

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

**QWEST CORPORATION'S
OPENING BRIEF**

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I. INTRODUCTION

1 The Commission should adopt Qwest's proposed language for all of the disputed issues in this
case. Qwest's language is consistent with prior interconnection agreements ("ICAs") in the
state and with its obligations under the Telecom Act, is simpler than Charter's, provides
greater certainty, and appropriately limits the parties' obligations to each other. Qwest's
language provides Charter sufficient protections in the areas where Charter expressed
concerns, and additional options to enable Charter to obtain the results it desires.

II. DISCUSSION OF DISPUTED ISSUES

2 The parties will revise the disputed issues matrix and file it contemporaneously with the reply
briefs. The disputed issues are discussed in numerical order in the following section of the
brief. In addition, there are some issues which were settled after testimony was filed – those
issues are noted herein for clarity and organization, but are not argued.

3 **Issue 1 – Disconnection of service** – the parties settled this issue by agreeing to the language
in the Eschelon arbitration order

4 **Issue 2 – Backbilling** – the parties settled this issue with issue 3. Qwest agreed to the 12
month backbilling limitation proposed by Charter, and Charter agreed to Qwest's deposit
language.

5 **Issue 3 – Deposits** – the parties settled this issue as described in connection with issue 2.

6 **Issue 4 – Insurance** – the parties settled this issue by compromising on the standard that an
insurer must meet. The parties agreed that the minimum standard would be an A.M. Best
rating of B+XIII.

Issue 5 – Limitation on Liability

7 Issue 5 concerns the parties' disputes regarding the appropriate language in the "Limitation on Liability" section of the ICA. This issue encompasses several sub-issues: whether the exceptions to limitations on liability should be broadened; what the limitation on damages should be; and whether or not liability standards for listings should be changed for Charter.

8 Qwest has proposed the following language regarding limitation of liability:

5.8 Limitation of Liability

5.8.1 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to 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. Each Party's liability to the other Party for any other losses shall be limited to the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises. Payments pursuant to the QPAP shall not be counted against the limit provided for in this Section.

5.8.2 Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. If the Parties enter into a Performance Assurance Plan under this Agreement nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan or any penalties associated with Docket No. UT 991358.

5.8.3 Intentionally Left Blank.

5.8.4 Nothing contained in this Section 5.8 shall limit either Party's liability to the other for (i) willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors, or employees.

10.4.2.6.1 To the extent that state Tariff(s) limit Qwest's liability with regard to Listings, the applicable state Tariff(s) is incorporated herein and supersedes the Limitation of Liability section of this Agreement with respect to Listings only.

9 Charter has proposed the following changes:

5.8.5 Limitation of Liability

5.8.6 Each Party's liability to the other Party for any loss relating to or arising out of any act or omission in its performance under this Agreement, whether in contract, warranty, strict liability, or tort, including (without limitation) negligence of any kind, shall be limited to ~~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~~ actual, direct damages. Each Party's liability to the other Party for any other losses shall be limited to ~~the total amounts charged to CLEC under this Agreement during the contract year in which the cause accrues or arises~~ actual, direct damages. Payments pursuant to the QPAP shall not be counted against the limit provided for in this Section.

5.8.7 Except as provided in Section 5.8.4, Neither Party shall be liable to the other for indirect, incidental, consequential, or special damages, including (without limitation) damages for lost profits, lost revenues, lost savings suffered by the other Party regardless of the form of action, whether in contract, warranty, strict liability, tort, including (without limitation) negligence of any kind and regardless of whether the Parties know the possibility that such damages could result. If the Parties enter into a Performance Assurance Plan under this Agreement, nothing in this Section 5.8.2 shall limit amounts due and owing under any Performance Assurance Plan or any penalties associated with Docket No. UT 991358.

5.8.3 Intentionally Left Blank.

5.8.4 Nothing contained in this Section 5.8 shall limit either Party's liability to the other for (i) acts of gross negligence, willful or intentional misconduct or (ii) damage to tangible real or personal property proximately caused solely by such Party's negligent act or omission or that of their respective agents, subcontractors, or employees. For purposes of this Section 5.8, "solely," shall mean not contributed to by the negligent act or omission of the other Party, or its respective agents, subcontractors, or employees.

~~10.4.2.6.1 To the extent that state Tariff(s) limit Qwest's liability with regard to Listings, the applicable state Tariff(s) is incorporated herein and supersedes the Limitation of Liability section of this Agreement with respect to Listings only. Intentionally Left Blank.~~

10 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. In addition, they broaden Qwest's potential liability in a way that is inconsistent with other ICAs, with Qwest's tariffed limitation of liability that applies to all customers, and with how Charter limits its

liability to its own customers.

- 11 *Gross Negligence* - Qwest believes it is appropriate to exclude gross negligence from the exceptions to the limitations on liability. Qwest recognizes that this position is a departure from prior rulings.¹ However, Qwest believes that its position is consistent with the Commission's ruling in that same proceeding on the issue of indemnity, and Qwest hopes to persuade the Commission that its reasoning on that issue (which Charter has raised again as issue 6 in this proceeding) should apply to the exceptions on limitations to liability.
- 12 In the 271 case, the Commission found that indemnification should be limited to failure to perform under that agreement.² The Commission re-affirmed this position in its order on reconsideration.³ Qwest believes that if indemnification, which is the compensation for loss or damage, should not include "gross negligence", then the basic liability provisions should also not include "gross negligence." Otherwise, Qwest faces the prospect of litigating the issue of whether gross negligence has taken place under the liability terms of the contract, even though gross negligence does not apply under the indemnity terms of the contract.
- 13 *Amount of Damages – Section 5.8.4* - With regard to the issue of the amount of damages that might be due under the agreement, Qwest's language properly limits damages to the amount charged to either party over the course of a year. Qwest's standard has been in use with its CLEC customers for years, and is the standard in use in its current Commission-approved ICAs. One issue with Charter's language is that it opens the door to further litigation, as it would then be necessary to litigate the question of the scope and amount of damages, increasing costs to both parties since they must pay to litigate the question. However, Qwest is also concerned that Charter's language is an expansion of liability that exposes Qwest to the

¹ See WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, 28th Supplemental Order at ¶ 374.

² *Id.* at ¶ 396.

³ See WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, 31st Supplemental Order at ¶ 46.

risk of having to defend against higher claims.

- 14 Contrary to the example Charter provided, it is highly unlikely that Qwest will cut a Charter fiber in the process of interconnecting Charter to Qwest's network.⁴ The issue of damages must be considered in the context of actions taken by the parties within this interconnection agreement. If Qwest were to cut a Charter fiber, it is more likely to take place outside the context of activities associated with interconnection. Therefore the terms of the interconnection agreement will not apply to that situation, and would not limit the damages that could be recovered.
- 15 Nor does Charter ever specifically describe what it believes would be included in "actual direct damages." Qwest believes that Charter is trying to expand the measure of damages to include things such as lost revenue, employee overtime, or anything else that Charter might consider bringing to litigation over the measure of damages for a particular incident. No other CLEC is entitled to such a calculation of damages under any other ICA. Qwest believes that Charter's language puts Qwest's at risk out of proportion to any failure Charter could experience. In addition, it is not appropriate for carriers to essentially insure each other against all losses – indeed, that is why the parties to the ICA would also carry insurance against losses, so that they are adequately protected.
- 16 *Listings* - In Section 10.4.2.6, Charter seeks to change the liability standards with regard to listings. The limitations on liability that Qwest has incorporated into this agreement are intended to create certainty and avoid litigation. Charter proposes to expand liability and increase the potential for litigation over damages.
- 17 Qwest's tariffs govern the rates and terms for directory listings.⁵ Leaving out language

⁴ Exhibit PL-7RT pp. 2-3

⁵ See Exhibit RA-7T, WNU-40 Exchange and Network Services Tariff, Sections 2.4.4 and 5.7.1.

referencing the tariffs implies that the rates and terms for listings are governed by the interconnection agreement, though there is no language to that effect. It is not appropriate for Charter to receive terms for directory listings that are different from all other carriers. It is also not appropriate to impose obligations in an interconnection agreement on a service that is governed by a tariff. Qwest is willing to make reference to the Washington Exchange and Network Services Tariff, sections 2.4.4 and 5.7.1 (E and F) in this paragraph in order to address Charter's concerns about ambiguity. Charter wants to ensure that actual direct damages cover damages related to errors in the provisioning of directory listings.⁶ It is apparent that Charter wishes to expand its ability to collect damages beyond what is permitted by the tariff and beyond what can be collected by other CLECs or other end users. Thus Charter's language gives it preferential terms over all other Qwest customers.

18 In addition, Charter itself agrees with limiting liability for listings when it is dealing with its own end users. Charter's Washington service offering contains a limitation of liability similar to Qwest's.⁷ The Commission should affirm that limitations of liability of this nature for listing service are appropriate, and adopt Qwest's language.

Issue 6 – 6(a) Indemnity

19 Qwest has proposed the following language regarding indemnification:

5.9.1.1 Each of the Parties agrees to release, indemnify, defend and hold harmless the other Party and each of its officers, directors, employees and agents (each an Indemnitee) from and against and in respect of 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 attorneys' fees), whether suffered, made, instituted, or asserted by any Person or entity, for invasion of privacy, bodily injury or death of any Person or Persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, resulting from the Indemnifying Party's breach of or failure to perform under this Agreement, regardless of the form of action, whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind.

⁶ Exhibit JDW-1T, p. 13.

⁷ Exhibit JDW-4, page 7, last paragraph of Section 3.1.3, and page 8, Section 3.1.4.

- 5.9.1.2 In the case of claims or loss alleged or incurred by an End User Customer of either Party arising out of or in connection with services provided to the End User Customer by the Party, the Party whose End User Customer alleged or incurred such claims or loss (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such claims or loss by the Indemnifying Party's End User Customers regardless of whether the underlying service was provided or Unbundled Network Element was provisioned by the Indemnified Party, unless the loss was caused by the willful misconduct of the Indemnified Party. The obligation to indemnify with respect to claims of the Indemnifying Party's End User Customers shall not extend to any claims for physical bodily injury or death of any Person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified Party.
- 5.9.2.2 If the Indemnifying Party wishes to defend against such action, it shall give written notice to the Indemnified Party of acceptance of the defense of such action. In such event, the Indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, and the Indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the Indemnifying Party does not accept the defense of the action, the Indemnified Party shall have the right to employ counsel for such defense at the expense of the Indemnifying Party. Each Party agrees to cooperate with the other Party in the defense of any such action and the relevant records of each Party shall be available to the other Party with respect to any such defense.

20 Charter has proposed the following changes:

- 5.9.1.1 Each of the Parties agrees to ~~release~~ indemnify, defend and hold harmless (**“Indemnifying Party”**) the other Party and each of its officers, directors, employees and agents (~~each an Indemnitee~~) (**“Indemnified Party”**) from and against and in respect of 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 attorneys' fees) (**collectively, “Claims”**), whether suffered, made, instituted, or asserted by any ~~Person or entity~~ **third party**, for invasion of privacy, bodily injury or death of any ~~Person or Persons~~ **such third party**, or for loss, damage to, or destruction of tangible property, whether or not owned by others (**collectively, “Losses”**), resulting from the Indemnifying Party's **negligence, gross negligence or willful misconduct, or** breach of or failure to perform under this Agreement, regardless of the form of action, whether in contract, warranty, strict liability, or tort including (without limitation) negligence of any kind, **except to the extent that such Claims or Losses arise from the Indemnified Party's negligence, gross negligence, or willful misconduct.** ~~The obligation to indemnify with respect to claims of the Indemnifying Party's End User Customers shall not extend to any claims for physical bodily injury or death of any Person or persons, or for loss, damage to, or destruction of tangible property, whether or not owned by others, alleged to have resulted directly from the negligence or intentional conduct of the employees, contractors, agents, or other representatives of the Indemnified Party.~~

5.9.1.2 In the case of Celaims or Losses alleged or incurred by an End User Customer of either Party, arising out of or in connection with services provided to the End User Customer by the Party, the Party whose End User Customer alleged or incurred such Celaims or Losses (the Indemnifying Party) shall defend and indemnify the other Party and each of its officers, directors, employees and agents (collectively the Indemnified Party) against any and all such Celaims or Losses by the Indemnifying Party's End User Customers regardless of whether the underlying service was provided or Unbundled Network Element was provisioned by the Indemnified Party, **except to the extent that unless the Claims or Losses loss was were caused by the negligence, gross negligence or willful misconduct of the Indemnified Party-, including the employees, contractors, agents, or other representatives of the Indemnified Party.**

If the Indemnifying Party wishes to defend against such action, it shall give written notice to the Indemnified Party of acceptance of the defense of such action. In such event, the Indemnifying Party shall have sole authority to defend any such action, including the selection of legal counsel, **to the extent such action is based solely on the Indemnifying Party's network and/or services,** and the Indemnified Party may engage separate legal counsel only at its sole cost and expense. In the event that the Indemnifying Party does not accept the defense of the action, the Indemnified Party shall have the right to employ counsel for such defense at the expense of the Indemnifying Party. Each Party agrees to cooperate with the other Party in the defense of any such action and, **subject to Section 5.16 of this Agreement,** the relevant **non-privileged** records of each Party shall be available to the other Party with respect to any such defense.⁸

21 Qwest's language is preferable to Charter's because it provides a practical approach to address the possibility that one party may try to pass through excessive indemnification obligations to the other party. Sections 5.9.1.1, 5.9.1.2 and 5.9.2.2 ensure that there is a nexus to the agreement between the parties when contractual indemnification rights apply. Adding an exception based on "gross negligence" has the effect of voiding indemnification and eliminating the purpose of this provision of the contract.

22 As with other contested provisions of this Interconnection Agreement, the provisions regarding limitation of liability were worked out in the 271 process. In the 271 proceeding, the Commission adopted the language consistent with Qwest's proposal, and specifically prohibited an

⁸ Charter has included this paragraph directly under paragraph 5.9.1.2 in its proposal, and has not numbered the paragraph. The language in this paragraph is included in paragraph 5.9.2.2 in Qwest's contract proposal. Qwest does not know if Charter intended to duplicate paragraph 5.9.2 here, or if Charter simply intended to change paragraph 5.9.2. One reason Qwest does not know is that Charter presented the material for this issue to Qwest the day before Charter filed for arbitration. No substantive discussions between Charter and Qwest on this issue have occurred at this time.

exception for gross negligence.⁹ The Commission agreed with Qwest's position that concepts of negligence should not be introduced into a discussion of indemnification for breach of an interconnection agreement.¹⁰

- 23 In addition, Charter's language creates ambiguity in the contract because Charter proposes to create formal definitions for this section of the contract when these terms are used elsewhere and may have a different meaning. The words "claim" and "loss" appear in several sections of the contract. The word "claim" can be found in Sections 5.6.1.2, 5.9.1.1, 5.9.1.2, 5.9.2.1, 5.10.2, 5.18.1, 5.18.2, 5.20.1, 5.23.1, 9.3.5.4.1, 9.5.4.2.1, 10.3.6.3, 10.6.2.9.1. The word "loss" can be found in Sections 5.8.1, 5.9.1.1, 5.9.1.2, 5.10.2, 5.20.1, 10.6.2.9.1, 11.17.
- 24 The problem with creating definitions for terms in one section of the agreement when the same words are used elsewhere in the agreement is that it creates the potential for confusion. Even though all of the references cited above use the words in lower case, interpreters of the contract may well wonder if the definitions in the indemnity section should or should not be applied when the same word is used elsewhere. In addition, the parties previously agreed that definitions would reside in Section 4 of the contract. But more problematic is the fact that Charter proposes to create formal definitions for this section when these terms are used elsewhere and have a different meaning. The specificity of Qwest's language eliminates any uncertainty as to the meaning of the terms as they are used with regard to indemnification.
- 25 **Issue 6(b) – settlements** – the parties settled this issue by modifying Charter's language to include the adjective "reasonable" to describe a settlement or compromise that the indemnified party must accept.

⁹ See WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, 28th Order at ¶ 121 and 31st Order at ¶¶ 43-46.

¹⁰ See WA 271 proceeding, Docket Nos. UT-003022 and UT-003040, 28th Supplemental Order at ¶ 396 and 31st Supplemental Order at ¶ 46.

Issue 7 – Indemnification in Connection with Intellectual Property

26 The primary issue in dispute is Charter’s desire to add the phrase “or with knowledge” to the paragraph. Qwest opposes this addition because it adds a level of uncertainty to the indemnity obligation.¹¹ As with the language changes proposed elsewhere in this interconnection agreement, the determination of knowledge becomes a matter for litigation. It will be necessary to resolve ‘who knew what and when did they know it.’ This could add layers of complexity to the litigation. Furthermore, it could allow Charter to escape its indemnity obligation. For these reasons, the Commission should adopt Qwest’s proposed language.

27 Qwest has proposed the following language regarding indemnification and intellectual property:

5.10.2 Subject to Section 5.9.2, each Party (the Indemnifying Party) shall indemnify and hold the other Party (the Indemnified Party) harmless from and against any claim 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. In addition to being subject to the provisions of Section 5.9.2, the obligation for indemnification recited in this paragraph shall not extend to infringement which results from (a) any combination of the facilities or services of the Indemnifying Party with facilities or services of any other Person (including the Indemnified Party but excluding the Indemnifying Party and any of its Affiliates), which combination is not made by, or at the direction of the Indemnifying Party or (b) any modification made to the facilities or services of the Indemnifying Party by, on behalf of or at the request of the Indemnified Party and not required by the Indemnifying Party. In the event of any claim, the Indemnifying Party may, at its sole option (a) obtain the right for the Indemnified Party to continue to use the facility or service; or (b) replace or modify the facility or service to make such facility or service non-infringing. If the Indemnifying Party is not reasonably able to obtain the right for continued use or to replace or modify the facility or service as provided in the preceding sentence and either (a) the facility or service is held to be infringing by a court of competent jurisdiction or (b) the Indemnifying Party reasonably believes that the facility or service will be held to infringe, the Indemnifying Party shall notify the Indemnified Party and the Parties shall negotiate in good faith regarding reasonable modifications

¹¹ Charter’s witness confessed that he had not contemplated a circumstance where infringement took place without Charter’s knowledge, and he was therefore unable to provide additional detail regarding the meaning of Charter’s proposed language. Tr. 69-70.

to this Agreement necessary to (1) mitigate damage or comply with an injunction which may result from such infringement or (2) allow cessation of further infringement. The Indemnifying Party may request that the Indemnified Party take reasonable steps to mitigate damages resulting from the infringement or alleged infringement including, but not limited to, accepting modifications to the facilities or services, and such request shall not be unreasonably denied.

- 5.10.3 Except as expressly provided in this Intellectual Property Section, nothing in this Agreement shall be construed as the grant of a license, either express or implied, with respect to any patent, copyright, logo, trademark, trade name, trade secret or any other intellectual property right now or hereafter owned, controlled or licensable by either Party. Neither Party may use any patent, copyright, logo, trademark, trade name, trade secret or other intellectual property rights of the other Party or its Affiliates without execution of a separate agreement between the Parties.¹²

28 Charter has proposed the following changes:

- 5.10.4 Subject to Section 5.9.2, 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~~Claim 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. In addition to being subject to the provisions of Section 5.9.2, the obligation for indemnification recited in this paragraph shall not extend to infringement which results from (a) any combination of the facilities or services of the Indemnifying Party with facilities or services of ~~any other Person (including the Indemnified Party but excluding the Indemnifying Party and any of its Affiliates)~~, which combination is not made by, or at the direction, or with knowledge of the Indemnifying Party or (b) any modification made to the facilities or services of the Indemnifying Party by, on behalf of or at the request of the Indemnified Party and not required by the Indemnifying Party. In the event of any claim, the Indemnifying Party may, at its sole option (a) obtain the right for the Indemnified Party to continue to use the facility or service; or (b) replace or modify the facility or service to make such facility or service non-infringing. If the Indemnifying Party is not reasonably able to obtain the right for continued use or to replace or modify the facility or service as provided in the preceding sentence and either (a) the facility or service is held to be infringing by a court of competent jurisdiction or (b) the Indemnifying Party reasonably believes that the facility or service will be held to infringe, the Indemnifying Party shall notify the Indemnified Party and the Parties shall negotiate in good faith regarding reasonable modifications to this Agreement necessary to (1) mitigate damage or comply with an injunction

¹² Per Qwest's Answer to Charter's petition, Qwest has agreed to the grammatical change proposed by Charter in paragraph 5.10.5, so Qwest will not present the language for this paragraph here.

which may result from such infringement or (2) allow cessation of further infringement. The Indemnifying Party may request that the Indemnified Party take **reasonable** steps to mitigate damages resulting from the infringement or alleged infringement including, but not limited to, accepting modifications to the facilities or services, and such request shall not be unreasonably denied.

5.10.5 Except as expressly provided in this Intellectual Property Section, nothing in this Agreement shall be construed as the grant of a license, either express or implied, with respect to any patent, copyright, logo, trademark, trade name, trade secret or any other intellectual property right now or hereafter owned, controlled or licensable by either Party. Neither Party may use any patent, copyright, logo, trademark, trade name, trade secret or other intellectual property rights of the other Party or its Affiliates without execution of a separate **written** agreement between the Parties.

29 Charter’s proposed changes to this language have the effect of creating vagueness in the provision, shifting burdens to Qwest and increasing the likelihood of litigation. First, removing the “lost, cost, expense or liability” phrase may expand the potential claims for losses that could become the subject of litigation. One purpose of this ICA is to give Charter access to Qwest’s facilities. As such, Qwest is more vulnerable to claims of infringement, and the indemnity provisions regarding intellectual property must give Qwest the appropriate protection. Charter accesses, or has the right under the ICA to access, network technology that Qwest licenses from third party vendors, and Charter could violate the terms of those licenses.¹³

30 Under Qwest’s proposal, Qwest would have the obligation to indemnify Charter for actions that Qwest takes or that are taken under Qwest’s direction. Such an approach makes sense. Charter’s proposed “with knowledge” language extends that obligation to actions that Charter takes, simply because Qwest knows that Charter took the action. At the hearing, Charter clarified that this obligation would apply if Qwest simply knew about Charter’s actions, regardless of whether Qwest had any idea that Charter’s actions infringe on intellectual

¹³ See, Tr. 361:12-362:20, for an example of how the “with knowledge” language could allow Charter to escape its indemnification obligation.

property rights.¹⁴ There is no practical, legal, or policy rationale that justifies Charter's position.

31 **Issue 8 – Warranties** – the parties settled this issue when each party withdrew its proposal for additional language, and agreed to just use the undisputed terms for the disclaimer of warranties.

Issue 10 – Interconnection – Section 7.1.1 of the ICA

32 The Qwest proposed language in dispute for Section 7.1.1 was developed during the 271 workshops and reflects the consensus of the parties (Commission, Qwest and CLECs) that developed there.¹⁵ It is Commission approved language.

33 Charter describes its proposed changes to Section 7.1.1 as a question of when Qwest can deny interconnection at a particular point in Qwest's network. However, that is not the issue. The language that Charter proposes to modify concerns the circumstances in which Qwest can refuse to create or continue connections between Qwest tandem switches. There is no FCC rule that requires Qwest to make any showing before rejecting a request by a carrier such as Charter to create such a connection.

34 However, Charter's propose language would be improper even if the issue was whether interconnection at a particular point was technically feasible. FCC Rule 51.305(e) does not require Qwest to make a showing of technical infeasibility before it denies a request for such interconnection. The sequence of events in Rule 51.305(e) is clear. There is no duty to make any showing to a state commission until after the request for interconnection is denied. Rule 51.305(e) states that "an incumbent LEC *that denies* a request for interconnection at a particular point must prove to the state commission that interconnection at that point is not

¹⁴ See, Tr. 80:8-71:25 for a discussion by Mr. Webber of the application of the "with knowledge" language.

¹⁵ Exhibit WRE-1T, p. 6, lines 7-10.

technically feasible” (*emphasis added*). Plainly, the trigger that requires a showing to the state commission is a denial of a request for interconnection. Mr. Easton was absolutely correct in his description of the proper order of events.¹⁶ The Commission should reject Charter’s proposed changes to Section 7.1.1 of the ICA.

Issue 11 – Interconnection – Section 7.1.2

35 Issue 11 concerns a number of proposed modifications that Charter proposes to make to Section 7.1.2 of Qwest’s standard template and certain additional provisions that Charter proposes for Sections 7.1.2.4 of the parties’ agreement. Charter’s proposed changes should be rejected because they are incorrect. For example, in Charter’s first proposed change to Section 7.1.2, Charter modifies the language to provide that “CLEC shall have the right to establish” a single point of interconnection in a particular LATA. This statement is over-broad because the right exists only if the point of interconnection is technically feasible.

36 Charter next proposes a change that states that “[t]he Parties agree that this Section 7.1.2 shall not be construed as imposing any obligation upon Qwest to establish a physical point of interconnection with CLEC at a point that is outside of Qwest’s geographic area or territory.”¹⁷ The question that arises is whether other Charter proposed language requires Qwest to establish a physical point of interconnection at a point that is outside of Qwest’s geographic area or territory? As Mr. Linse testified, Charter’s proposed language for Section 7.2.2.1.2.2 could be interpreted to require Qwest to establish interconnection outside of its service territory.¹⁸ This is not a minor issue. Qwest has ILEC obligations only where it is an ILEC. Qwest is not an ILEC outside of its service territory and therefore does not have an obligation to establish a physical point of interconnection outside of its territory. While Charter agreed

¹⁶ Exhibit WRE-1T, p. 5, lines 15-24.

¹⁷ Exhibit WRE-1T, p. 8, lines 5-8.

¹⁸ Exhibit PL-7RT, p. 9, lines 1-11.

during the hearing that it did not intend to impose this obligation with its language, the language nevertheless creates an ambiguity about the obligation. However, Charter's proposed sentence would be appropriate if it were changed to read "[t]he Parties agree that **this Agreement** shall not be construed as imposing any obligation upon Qwest to establish a physical point of interconnection with CLEC at a point that is outside of Qwest's geographic area or territory."

37 Charter's proposed additions for Sections 7.1.2.4, 7.1.2.4(a) and 7.1.2.4(b) should be rejected because they are unnecessary. The interconnection options described in Qwest's proposed language were approved by the Commission in the 271 proceedings.¹⁹ The purpose of the ICA is to describe the interconnection provided by Qwest, not interconnection provided by third parties for Charter. Charter's use of third party facilities to interconnect with Qwest is not something that needs to be addressed in the Agreement because those facilities are by definition not facilities provided by Qwest. Qwest routinely allows CLECs such as Charter to use facilities provided by other parties to interconnect with Qwest.²⁰ For interconnection purposes, those third party facilities are considered to be Charter's facilities. Nothing in Qwest's proposed language prevents Charter from using third party facilities to interconnect with Qwest.

Issue 13 – Direct Trunked Transport

38 Issue 13 involves a dispute concerning what is referred to as Direct Trunked Transport. Charter proposes changes to Sections 7.2.2.1.2.2, 7.2.2.1.4, 7.3.2.1, 7.3.2.1.1, 7.3.2.1.3 and 7.3.2.3. Part of the dispute concerns whether direct trunked transport should be provided on a bill and keep basis. That will be discussed in connection with Issue Nos. 14 and 15. Part of the dispute concerns whether Charter's changes are appropriate. That will be discussed here.

¹⁹ Exhibit WRE-1T, p. 10, lines 3-4.

²⁰ Exhibit PL-7RT, p. 5 line 19 – p. 7 line 15.

39 Charter's proposed changes to Section 7.2.2.1.2.2 should be rejected because they are ambiguous and contradictory. Charter's first change purports to limit the transport Qwest provides such that it would be used only to "connect any POIs between the networks with CLEC's network." This change is ambiguous because a point of interconnection is by definition the point where Charter's network connects to Qwest's network. Charter's second change purports to change Section 7.2.2.1.2.2 into a provision prescribing reciprocal compensation terms and conditions. It contradicts Charter's bill and keep proposal and is not conditioned on whether the parties exchange traffic on a bill and keep basis.

40 Charter's proposed changes to Section 7.2.2.1.4 should also be rejected. The first change is conditioned by the clause "where the parties do not use the bill and keep arrangement set forth in Section 7.3" but does not specify when that will be the case. Charter's proposal that Charter's "applicable trunking and tandem switching rates apply" is not on its face consistent with the FCC's symmetry requirement which requires that the reciprocal compensation rates for telecommunications traffic charged by a CLEC be the same as those charged by the ILEC. 47 CFR §51.711. The exception to this rule requires the CLEC to present a cost study that shows that its transport and termination rates are higher. 47 CFR §51.711(b). Charter made no such showing in this case.²¹

41 Charter's proposed change to 7.3.2.1.1 should be rejected because it could be read to require Qwest to provide transport outside of Qwest's service territory. Qwest does not have an obligation as an ILEC to provide transport outside of its service territory. Changing the phrase "Serving wire center of the POI" to "Serving wire center for the POI" would allow Charter to argue that Qwest is required to provide transport to a Charter wire center in another state that Charter might connect to the Parties' point of interconnection.²² Such a wire center would be

²¹ Mr. Gates testified that it was Charter's intention that Charter's applicable rates be Qwest's rates. (Gates, Tr. 182:13 – 183:10). However, Charter's proposed language does not explicitly state that and should be rejected.

²² Exhibit PLT-1T, p. 12, lines 1-13.

“for” the POI, but not within the geographic area “of” the POI.

42 The changes Charter has made to Sections 7.3.2.1, 7.3.2.1.3 and 7.3.2.3 all concern charges for direct trunked transport. None of Charter’s changes are appropriate if Qwest’s bill and keep proposal is adopted.

43 The Commission should adopt Qwest’s proposed language for Sections 7.2.2.1.2.2, 7.2.2.1.4, 7.3.2.1, 7.3.2.1.1, 7.3.2.1.2, 7.3.2.1.3, 7.3.2.1.4, 7.3.2.2 and 7.3.2.2.1.

Issues 14 and 15 – Bill and Keep

44 Issues 14 and 15 concern the Parties’ respective bill and keep proposals. Qwest proposes bill and keep for everything except direct trunked transport. Charter proposes bill and keep for all transport and termination, including direct trunked transport.²³ Both Parties’ proposals are permissible under federal law. No FCC rule or order prohibits the Commission from adopting either proposal.²⁴

45 Although both proposals are permissible, the Commission should nonetheless adopt Qwest’s bill and keep proposal because it is more equitable. Charter has the ability to shift transport costs to Qwest by selecting a point of interconnection that is closer to Charter’s switch.²⁵ For example, in Washington, Charter presently interconnects in Yakima, approximately 71.4 miles from Charter’s switch. Qwest provides Charter with approximately 167 miles of direct trunked transport from Yakima to Qwest’s Spokane Tandem. However, Charter recently selected a new point of interconnection between its Kennewick Switch and Qwest’s Pasco end

²³ Issue No. 14 concerns non-recurring charges for trunking. Qwest proposes that the Parties be permitted to charge nonrecurring charges for establishing and rearranging direct trunked transport. Charter proposes that these costs be waived as part of its bill and keep proposal.

²⁴ Read by itself, FCC Rule 47 CFR 51.713 seems to contemplate that bill and keep would encompass termination of telecommunications traffic. However, when Rule 47 CFR 51.705 is read together with Rule 47 CFR 51.713, the rules seem to contemplate that bill and keep could encompass both transport and termination of telecommunications traffic. Mr. Easton’s testimony on this point was limited strictly to the language of the rules in 47 CFR 51.713 because the Parties were disputing modifications to Section 7.3.4.1.1.2 of the ICA which refers explicitly to that section. (Exhibit WRE-1T, pp. 21, 23).

²⁵ Exhibit WRE-2RT, p. 12.

office.²⁶ The transport that Charter will provide from that point of interconnection to its switch is less than five miles.²⁷ The transport that Qwest will provide from the new point of interconnection to the communities in which Charter has customers is much greater (45 miles to Qwest's end office in Waitsburg, 37.9 miles to the Qwest end office in Walla Walla, and over 70 miles to the Qwest tandem in Yakima).²⁸

46 By excluding direct trunked transport from bill and keep, the Commission will ensure that Charter takes into account Qwest's transport costs when it selects its points of interconnection. When Charter chooses a point of interconnection that is close to its own switch, it will do so with knowledge that it will have to pay for direct trunked transport on Qwest's side of the point of interconnection²⁹ based on Charter's relative use of that direct trunked transport (i.e., in proportion to the amount of traffic that Charter sends to Qwest).³⁰

47 Even if Charter did not select the point of interconnection to shift transport costs to Qwest, there would always be the possibility that other carriers could. Once the Qwest/Charter ICA is approved by the Commission, other carriers will have certain rights to opt into it in lieu of negotiating their own ICA. With Charter's proposed language, such carriers might shift an even greater portion of transport costs to Qwest through their selection of points of interconnection.

48 For all of the above reasons, the Commission should adopt Qwest's proposed language for Sections 7.3.4.1.1.2, 7.3.4.1.2 and 7.3.4.1.3.

²⁶ Exhibit TJG-6C

²⁷ Linse, Tr. 266-67

²⁸ Linse, Tr. 267

²⁹ Linse, Tr. 308

³⁰ Charter's decision to use a single switch in Washington means that it has long loops from that switch to its customers. (Easton, Tr. 261). Loop costs are not recoverable in reciprocal compensation because they are not regarded by the FCC as additional costs of terminating calls. First Report and Order, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996. 11 FCC Rcd 15499, ¶1057 (Rel. Aug. 8, 1996)(*subsequent history relates to other parts of order and is omitted*).

Issue 16 – Indirect Interconnection

- 49 Issue 16 concerns language Charter proposed on the day Charter filed its petition for arbitration that purports to specify terms for indirect interconnection between Charter and Qwest.³¹ No negotiations concerning Charter’s proposal ever took place.³² Moreover, Qwest had no legal obligation to negotiate terms of indirect interconnection under Section 251(a) of the Act. 47.U.S.C. §251(a). Qwest’s obligation to negotiate is limited by statute to Section 251(b) and (c) obligations. *See* 47 U.S.C. §251(c)(1).
- 50 Charter’s last minute proposal should be rejected for several reasons. First, Charter’s proposal violates the agreement that Qwest and Charter had reached in the undisputed language for Section 7.2.11 of the ICA. Section 7.2.1.1 provides in the last sentence:

Unless otherwise agreed to by the Parties, via an amendment to this Agreement, the Parties will directly exchange EAS/Local traffic between their respective networks without the use of third party transit providers.

Easton, WRE-1T, p. 28, lines 16-27

- 51 Second, Charter’s proposed language for Sections 7.1.2.6 through 7.1.2.9 does not address significant issues that arise with indirect interconnection.³³ The language does not identify who Charter’s traffic will be routed through to get to Qwest. Furthermore, Charter’s language contains no provisions that address how traffic routed through the hypothetical and unidentified third party carrier will be segregated, identified or tracked so that the applicable intercarrier compensation, if any, will be applied to Charter’s traffic and not to other carriers’ traffic with which Charter’s traffic happens to be commingled. The issue here is not whether the traffic has the requisite signaling information. Rather, it is a question of being able to identify who the traffic came from and applying the correct intercarrier compensation terms.

³¹ Exhibit WRE-1T, p. 27, lines 1-5.

³² *Id.*

³³ Exhibit WRE-1T, p. 28, lines 1-14.

52 Third, Charter's proposed language presents problems if other carriers opt into the Qwest/Charter interconnection agreement. Charter's proposed language would allow Charter or a carrier that had opted into the Charter ICA to route traffic through an end office switch so as to disguise who the traffic came from.³⁴ Moreover, by forcing Qwest to use a transit provider up to Charter's proposed threshold, Charter's proposed language may leave Qwest in the position of having to pay unreasonable charges for the use of that transit carrier.³⁵

53 Finally, Charter's proposed language does not provide any means for Qwest to engineer the appropriate capacity for traffic Charter's routes through the unidentified third party transit provider.³⁶ As a result, Charter's proposed language may lead to circumstances that adversely affect service quality.³⁷ For all of these reasons, Charter's proposed Sections 7.1.2.6 through 7.1.2.9 should be rejected.

Issue 17 – Miscellaneous Charges

54 Miscellaneous charges apply to certain work that Qwest performs at the request of or on behalf of the CLEC. This contract language exists in all of the interconnection agreements that Qwest has entered into since these Miscellaneous Charges were approved in the cost docket in Washington.³⁸ Charter does not seem to have an opposition, in principle, to paying for work done by Qwest that was caused by or done at the request of or on behalf of Charter. Charter simply seems to be concerned that Qwest will, in an arbitrary and unsupported way, start assessing Miscellaneous Charges on Charter. Leaving aside the fact that there is no record evidence to support this contention, and that Charter was unable to come up with any examples of when this had ever been a problem, Qwest believes that Charter's concerns, even if they

³⁴ Exhibit PL-1T, p. 13 line 30 – p. 14 line 4.

³⁵ Linse, PL-1T, p. 15, lines 4-13; PL-7RT, p. 12, lines 4-22.

³⁶ Exhibit PL-7RT, p. 11, lines 7-22.

³⁷ *Id.*, p. 13 line 4 – p. 14 line 2.

³⁸ The miscellaneous charges were approved in Docket No. UT-023003. The dispute in this case is not about the amounts of these charges, but rather the circumstances under which Qwest may assess them.

were valid, do not support the adoption of Charter's proposed language.

55 There are two separate sub-issues in dispute for Section 9.1.12. The first is whether Qwest should be required to obtain Charter's approval before assessing a miscellaneous charge and the second is whether language should be inserted that makes the obligation to pay "depend[] on the specific circumstances." Qwest does not believe that there is a dispute over the rates, as Qwest is proposing the Commission approved rates for these services.

56 Charter should be required to pay miscellaneous charges for identified services that it causes Qwest to perform. Charter believes it should be entitled to review the appropriateness of such charges and agree to them before Qwest performs the services for which it may impose such charges. Although Qwest tries to obtain Charter's approval before providing these services, obtaining such approval is not always practical or reasonable. Thus, Qwest does not believe approval should be a contractual precondition to such charges. Charter further attempts to weaken its obligation to pay by making the obligation apply "depending on the specific circumstances." Qwest has proposed language in Section 9.1.12 that matches the definition of Miscellaneous Charges agreed upon by the parties in Section Four of the agreement – "Miscellaneous services are provided at CLEC's request or are provided based on CLEC's actions that result in miscellaneous services being provided by Qwest". Charter's proposal deletes this language.

57 Contrary to Charter's concerns, Qwest does not unilaterally decide to perform miscellaneous services for Charter. Qwest only performs these services after a CLEC has submitted either a service order or a trouble ticket. Qwest trains its technicians not to perform any work not authorized by a CLEC unless Qwest performs a service based on a CLEC action prior to knowing who has the cost responsibility for the service. It is Qwest's process to contact the CLEC, quote the charges and commence work once the customer accepts if possible. When Qwest completes the work, the close of the order or trouble ticket again advises the customer

of the charge and the CLEC's cost responsibility.

58 In the vast majority of circumstances, the CLEC will approve the services prior to Qwest starting any work related to a miscellaneous element.³⁹ However, there may be a situation where Qwest has performed work, based on information from Charter, which is not initially thought to be Charter's responsibility. An example of this situation would be a dispatch and isolation of trouble based on Charter's report of problems on Qwest's network that is determined not to be the fault of Qwest. Because the cost responsibility could not be determined until after Qwest had performed the service, this example would result in a charge to Charter that was not preapproved. This very situation is described in language agreed upon by the parties in Section 9.1.12 (j).

59 Even though Charter's concerns are unfounded, Charter's proposed language does nothing to resolve its concerns about these charges. Instead, the language creates vagueness regarding when and if Qwest gets paid. Charter's language refers to "*specific circumstances*" where Miscellaneous Charges "*may*" apply. Because these terms are undefined, Qwest would be unable to determine if it met the specific circumstances prior to performing the service. Requiring Qwest to perform services without knowing if it will get compensated is not appropriate. If Charter believes Qwest has improperly imposed such a charge, Charter has the ability to dispute the charge under dispute resolution provisions of the interconnection agreement.

60 **Issue 18 – 911 Trunks** – No. 18 concerns the provision by Qwest of LIS facilities that Charter can use for 911 interconnection. Subsequent to the hearing in Washington, the parties settled this issue and agreed to the following language: "In the event that CLEC doesn't self-provision 911/E911 facilities between Qwest's 911/E911 Selective Router location and

³⁹ Exhibit RHW-2RT, pp. 10-11.

Charter's switch location, 911/E911 DSO trunks may be provisioned on either multiplexed LIS T1 facilities or multiplexed private line T1 facilities at the CLEC's direction."

Issue 19 – Limitation on Qwest's Use of Charter Listing Information – Section 10.4

- 61 Issue 19 concerns Charter's proposal to limit Qwest's use of Charter listing information. Charter's proposal is unlawful, and is inconsistent with other agreed-to language in the ICA.
- 62 The two components of the Telecommunications Act involved with the Directory Listings issues are Section 222(e) which requires carriers that provide telephone exchange service to provide subscriber list information to requesting directory publishers "on a timely and unbundled basis, under nondiscriminatory and reasonable rates, terms, and conditions,"⁴⁰ and Section 251(b)(3) of that Act, which requires, among other things, that local exchange carriers (LECs) permit competing providers of telephone exchange service "nondiscriminatory access to ... directory assistance, and directory listing."⁴¹ Section 222(e) governs the provision of listing information that will be used in publishing directories.⁴²
- 63 The obligations under 251(b) (3) and 222(e) regarding provision of directory listings to other parties are distinct. In the *Second Order on Reconsideration* the FCC addressed issues regarding nondiscriminatory access obligations and found that nondiscriminatory access to directory assistance and directory listing pursuant to 251(b)(3) requires Qwest to accept a CLEC end user customer's listing information for use in a directory assistance database available to other DA providers or in directory assistance that Qwest provides itself to callers:

⁴⁰ 47 U.S.C. § 222(e).

⁴¹ 47 U.S.C. § 251(b)(3).

⁴² *In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket No. 96-115; CC Docket No. 96-98; CC Docket No. 99-273, September 9, 1999, ¶124 (SLI/DA Order and Notice) The SLI/DA Order and Notice is comprised of three parts - the *Third Report and Order* in CC Docket No. 96-11, the *Second Order on Reconsideration* in CC Docket No. 96-98 and a *Notice of Proposed Rulemaking* in CC Docket No. 99-273.

As stated in paragraph 149, *supra*, section 251(b) (3) requires that every LEC's customers be able to access each LEC's directory assistance service and obtain a directory listing. We agree with U S WEST and MCI that non-discriminatory access thus imposes a reciprocal obligation on all LECs to accept the listings of competing providers' customers for inclusion in their directory assistance and operator services databases. This requirement also ensures that a competing LEC that does not wish to provide its own directory assistance service, but rather wishes to use the incumbent LEC's service, will have its customers listed.⁴³

64 However, in the *Third Report and Order*, the FCC ruled that Qwest's obligations under Section 222(e) were different:

“We conclude that section 222(e) obligates all telecommunications carriers, including competitive LECs, to provide subscriber list information regarding their telephone exchange service customers to requesting directory publishers. We also conclude that section 222(e) does not obligate a carrier to provide subscriber list information of customers of other LECs. An incumbent LEC therefore need not act as a clearinghouse for providing subscriber list information to directory publishers, except to the extent a State commission so requires.”⁴⁴

65 Qwest provides several products and services to meet its directory obligations. The Qwest White Pages Directory Listings Service is described in Section 10.4 of the ICA. CLEC listings are put into Qwest's listing database along with other CLEC's listings, as well as Qwest end user listings. Qwest uses this service to meet its obligations in several ways - by providing non private listings to DA providers upon request; by providing a product called the Directory Assistance List (DAL); by the listings being placed in Qwest's Directory Assistance (DA) service so it will be available when a customer calls 411 or “information”; and, if allowed by the CLEC, Qwest will include the CLEC provided listings in lists furnished to directory publishers for the purpose of publishing the listings in printed directories which is a product called "Directory Publisher Lists" (DPL).

66 Qwest does not segregate Charter's or any CLEC's customer listings for marketing purposes. Qwest's listings products and services do not separate or identify Charter customers. White

⁴³ Id. at ¶154, footnote omitted.

⁴⁴ Id. at ¶8.

pages directory listings for Charter end users are integrated with other CLEC listings and Qwest retail end user listings into the Qwest system and all are treated in the same manner. Qwest's language eliminates the only potential advantage (segregation) Qwest could have. Listings are generally publicly available today in a number of forms, including on the internet.

67 Charter's proposal would place unreasonable restrictions on Qwest's use of listing information. Section 10.4.2.4 describes the uses of the directory listings provided to Qwest by a CLEC in providing the White Pages Directory Services. The dispute for Section 10.4.2.4 is over Charter's proposed language that improperly limits the lawful uses of the directory listings.

68 Once the directory listings are received from a CLEC and put into Qwest's Listing Database, the listings are not grouped by carrier. Qwest's directory listings process prevents Qwest from grouping the listings in its database by carrier. Qwest cannot market to a specific carrier's customers using lists from this database. Qwest does not currently use the listing database for any of its internal or external marketing. Charter's directory assistance listings are treated the same as Qwest's customer listings, providing no advantages to Qwest for marketing purposes. Qwest does not use the Directory Listings in its marketing programs.

69 Qwest is proposing the following language:

10.4.2.4 If CLEC provides its End User Customer's Listings to Qwest, CLEC grants Qwest access to CLEC's End User Customer Listings information for use in its Directory Assistance Service as described in Section 10.5, and in its Directory Assistance List Service as described in Section 10.6. , and for other lawful purposes, except that CLEC's Listings supplied to Qwest by CLEC and marked as nonpublished or nonlisted Listings shall not be used for marketing purposes subject to the terms and conditions of this Agreement. Qwest will incorporate CLEC End User Customer Listings in the Directory Assistance Database. Qwest will incorporate CLEC's End User Customer Listings information in all existing and future Directory Assistance applications developed by Qwest. Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings. Should Qwest cease to be a Telecommunications Carrier, by virtue of a divestiture, merger or other transaction, this access grant automatically terminates.

70 Charter proposes to modify the Qwest language with the following highlighted changes:

10.4.2.4 If CLEC provides its End User Customer's Listings to Qwest, CLEC grants Qwest access to CLEC's End User Customer Listings information for use in its Directory Assistance Service as described in Section 10.5, and in its Directory Assistance List Service as described in Section 10.6. ~~and for other lawful purposes, except that CLEC's Listings supplied to Qwest by CLEC and marked as nonpublished or nonlisted Listings shall not be used for marketing purposes subject to the terms and conditions of this Agreement.~~ CLEC's Listings supplied to Qwest by CLEC shall not be used by Qwest for marketing purposes. Qwest will incorporate CLEC End User Customer Listings in the Directory Assistance Database. Qwest will incorporate CLEC's End User Customer Listings information in all existing and future Directory Assistance applications developed by Qwest. ~~Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings.~~ Should Qwest cease to be a Telecommunications Carrier, by virtue of a divestiture, merger or other transaction, this access grant automatically terminates.

71 Charter proposes to delete Qwest language that "Qwest will not market to CLEC's End User Customer's Listings based on segregation of CLEC's Listings." This is in conflict with Charter's stated position.⁴⁵ Furthermore, Charter's additional changes do not comply with FCC rulings because the changes attempt to place limits on the lawful uses of the DA listing information and should be rejected by the Commission.

72 Section 251(b)(3) of the Telecommunications Act of 1996 (Act) requires local exchange carriers (LECs) to provide nondiscriminatory access of their local directory assistance (DA) databases to competing DA providers that are certified as competitive LECs, are agents of competitive LECs, or offer call completion services.⁴⁶ For Qwest, this means providing its end user directory listings along with the end user listings of the CLECs that choose to provide them to Qwest. Qwest's language allows the use of the listings for "lawful purposes." Charter seeks to limit the right to use the listings for lawful purposes.

⁴⁵ When asked about this during the hearing, Charter explained that it made that edit because Qwest's language says it will not market based on segregation of listings, but it does not say that Qwest will not market. Tr. 103:10-19. However, Charter then immediately conceded that Qwest is permitted to market to Charter subscribers. Tr. 103:23-25.

⁴⁶ See *Provision of Directory Listing Information under the Telecommunications Act of 1934, as Amended*, CC Docket No. 99-273, *First Report and Order*, 16 FCC Rcd 2736 at 2744-50, paras. 15-29, (2001) (SLI/DA First Report and Order).

73 Charter’s broad limitation that listings “shall not be used by Qwest for marketing purposes” does not comply with the FCC rulings. Charter’s proposed language imposes a “veto” of a lawful use of the listings and violates the FCC rulings. The FCC has consistently ruled that the providing carrier (in this case Charter) could not dictate how the listing information was to be used:

In addition, as the Commission has previously noted, “[s]ection 251(b)(3) does not, by its terms, limit the use of directory assistance data solely to the provision of directory assistance.”⁴⁷

Furthermore, we conclude that section 251(b)(3)’s requirement of nondiscriminatory access to a LEC’s DA database does not contemplate continuing veto power by the providing LEC over the uses to which DA information is put.⁴⁸

74 In the *SLI/DA First Report and Order*, the Commission specifically considered and rejected arguments that a competing DA provider should be restricted from reselling DA information to third parties, finding that commenters “offered no basis in the Act or our rules for imposing [a DA only use] restriction on competing DA providers.” The Commission also found that restrictions on the use of DA data would substantially increase the costs of providing competitive DA services, thereby reducing the benefits to consumers arising from the presence in the market of competitive DA providers.⁴⁹

75 Charter would have the Commission approve elimination of language that provides for the lawful use of directory listings. Charter has provided no reason to vary from the FCC rulings. Further, although Charter claims that Qwest’s language regarding “other lawful uses” is too broad and open-ended, Charter has agreed to include a reference to “other lawful uses” in two other provisions of the ICA – Section 10.5.2.11 and Section 10.6.2.1. In these sections, it is Charter who is permitted the “other lawful uses”. This agreed-to language is appropriate in

⁴⁷ In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Order on Reconsideration and Notice, 14 FCC Rcd 15550, 15646, para. 186.

⁴⁸ *SLI/DA First Report and Order*. at 2748-49, paras. 28-29.

⁴⁹ *Id.*

those sections, and should also be approved in Section 10.4.2.4 – the Commission should reject Charter’s language and accept Qwest’s proposed language.

Issue 20 – Prior Written Authorization to Release, Sell or Make Available Charter Listing Information

76 Section 10.4.2.5 provides the terms and conditions for Qwest to release directory listings to other parties. As discussed above, directory publishers may seek Qwest’s directory listings (including the CLEC provided listings). In addition, other third parties may also want to purchase the listings. Qwest must provide nondiscriminatory access to its directory listings to directory publishers.⁵⁰ However, Qwest is not required to provide CLEC listings to the directory publishers but will if the CLEC grants permission to do so.⁵¹ Section 10.4.2.5 lists the conditions by which Qwest will release the information.

77 When first doing business with Qwest, a CLEC will complete Qwest’s “New Customer Questionnaire” that covers among other things, the CLEC’s choice on whether to release directory listings to “directory publishers or other third parties.” Section G.7 of the questionnaire gives the CLEC two options on how directory listings will be provided to directory publishers and third parties:

Option 1 - Permission to provide listings to directory publishers or other third parties to which Qwest supplies its own listings.

Option 2 – Restrictions on providing listings to directory publishers and other third parties unless Qwest receives your letter of authorization from a directory publisher or third party.

78 Charter has the choice to allow Qwest to provide the listings to all publishers and third parties or Charter can choose to select those specific publishers or third parties to receive their end

⁵⁰ *In the Matters of Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Third Report and Order*, Docket No. 96-115 14 FCC RCD 15550 (1999), ¶ 53.

⁵¹ *Id.* at ¶ 54.

user listings. Charter has currently selected Option 1, but may change its selection at any time. If Charter were to select Option 2, its directory listings will be removed from the listings provided to directory publishers and third parties, and the Charter listings would only be included in lists provided to those parties that provide a letter of authorization from Charter.

79 Qwest is proposing the following language:

10.4.2.5 CLEC End User Customer Listings will be treated the same as Qwest's End User Customer Listings. Prior written authorization from CLEC, which authorization may be withheld, shall be required for Qwest to sell, make available, or release CLEC's End User Customer Listings to directory publishers, or other third parties other than Directory Assistance providers. No prior authorization from CLEC shall be required for Qwest to sell, make available, or release CLEC's End User Customer Directory Assistance Listings to Directory Assistance providers. Listings shall not be provided or sold in such a manner as to segregate End User Customers by Carrier. Qwest will not charge CLEC for updating and maintaining Qwest's Listings databases. CLEC will not receive compensation from Qwest for any sale of Listings by Qwest as provided for under this Agreement.

80 Charter proposes to modify the Qwest language with the following highlighted changes:

10.4.2.5 CLEC End User Customer Listings will be treated the same as Qwest's End User Customer Listings. **Qwest will not release CLEC's End User Customer Listings without CLEC's prior written consent and only to the extent required by Applicable Law. Prior written authorization from CLEC, which authorization may be withheld, shall be required for Qwest to sell, make available, or release CLEC's End User Customer Listings to directory publishers, or other third parties other than Directory Assistance providers.** No prior authorization from CLEC shall be required for 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.** 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.** Qwest will not charge CLEC for updating and maintaining Qwest's Listings databases. CLEC will not receive compensation from Qwest for any sale of Listings by Qwest as provided for under this Agreement.

81 Charter's language does not acknowledge Qwest's 251(b)(3) obligation to provide directory listings to DA providers. Qwest's language carves out the DA provider exception that, as described above in Issue 19, Charter cannot legally limit the lawful uses of the directory listings provided to DA providers. Charter's proposal however, requires "prior written consent" and bans marketing uses for all entities provided with listings, including DA

providers – this violates the FCC rulings discussed in Issue 19.

82 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.

83 Except for DA providers, Charter can limit who receives their end user listings. Charter is provided with a choice on which, if any, directory publishers or third parties can receive the directory listings. Charter’s choice of Option 1 or Option 2 constitutes the “prior written approval” for release to directory publishers or third parties.

84 Charter puts forth the same blanket limitation on the uses of the directory listings as before. Charter again fails to acknowledge that a limitation on the lawful use of directory listings by DA providers is improper. Even if the failure to exclude DA providers from the limits is ignored, the language still is inappropriate since Charter *already* has the ability to keep the directory listings away from third parties, whatever purpose they may have in mind. Charter’s proposed language is really just a complicated choice of “Option 2.” Instead of putting improper language in the contract, Charter should and easily could, change its current choice of Options so it can properly limit which, if any, third parties received the directory listings from Qwest. Accordingly, the Commission should approve Qwest’s language.

85 **Issue 21: Charges for Directory Listings** – the parties settled this issue.

Issue 22 – Charges for Privacy Listings

86 The dispute on this issue stems from the fact that Charter wants to obtain, at no charge, certain Privacy Listing options such as non-listed and non-published numbers, options that every CLEC and every Qwest retail subscriber pays for, and that Charter charges its own end-users to obtain. Qwest disagrees with Charter’s position on this issue.

87 Privacy Listing is an option that includes non-published and non-listed listings. Privacy Listing is available to CLECs for use by their customers, at the same Commission approved rate listed in Exhibit A to the ICA that Qwest end users pay, except that CLEC receive a wholesale discount on that rate.

88 Charter has the option to submit its end user customer listings to Qwest for use in directory assistance and directory publishing products. If Charter does not submit a listing to Qwest, Qwest obviously will not charge Charter for these listings as it has not performed any activity.

- a. If Charter provides a standard listing to Qwest, the standard rate in Exhibit A applies. The current rate listed in Exhibit A is “No Charge”
- b. If Charter provides a listing to Qwest and wants the listing to be nonpublished or nonlisted, standard rates, if any, apply and the privacy listing charge applies. The current Commission approved rate listed in Exhibit A for privacy listings is “General Exchange Tariff Rate, Less Wholesale Discount.”

89 Privacy Listings are the exception, not the norm. The large majority of end user listings are published. The public policy of the state encourages end users to be listed, thereby enabling other end users to find telephone numbers and use the telephone network. As such, a small charge is imposed by Qwest for the privilege of not having that information disclosed. Charter also charges its end users for privacy listings at rates higher than Qwest’s rates.⁵²

90 To obtain a Privacy Listing, the CLEC must submit the listing with specific indicators marked representing what options it seeks for that listing.

91 Qwest is proposing the following language:

10.4.2.1.2 CLEC will be charged for its facilities-based premium Listings (e.g., additional, foreign, cross-reference) and Privacy Listings (i.e., nonlisted and nonpublished) at market-based prices contained in Exhibit A. Primary Listings and other types of Listings are defined in the Qwest General Exchange Tariffs.

10.4.3 The following rate elements apply to white pages directory Listings and are

⁵² Exhibit JDW-4, page 15.

contained in Exhibit A of this Agreement.

10.4.3.1 Primary Listings; and

10.4.3.2 Premium and Privacy Listings.

10.4.3.4 [INTENTIONALLY LEFT BLANK]

92 Charter proposes to modify the Qwest language with the following highlighted changes:

10.4.2.1.2 CLEC will be charged for its facilities-based premium Listings (e.g., additional, foreign, cross-reference) ~~and privacy Listings (i.e., nonlisted and nonpublished)~~ at ~~market-based~~ prices contained in Exhibit A. Primary Listings and other types of Listings are defined in the Qwest General Exchange Tariffs.

10.4.3 The following rate elements apply to white pages directory Listings and are contained in Exhibit A of this Agreement.

10.4.3.1 Primary Listings; and

10.4.3.2 Premium ~~and Privacy~~ Listings.

~~10.4.3.4 [INTENTIONALLY LEFT BLANK]~~ **CLEC shall have no obligation to provide Qwest directory listing information related to CLEC End User Customers that have requested non-list or non-publish status within the directory. 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.**

93 Qwest objects to Charter's proposal. Charter can achieve the result its proposed language seeks by merely not submitting a specific listing to Qwest instead of attempting to obtain this service without paying for it. Charter does not have to provide its listings to Qwest. White Pages Directory Listings Service only involves listings provided to Qwest by the CLEC voluntarily.

94 Qwest only places those listings provided by Charter into the listings database. These listings are provided so a CLEC's end users are included in directory assistance databases, available for directory assistance services and included in published directories. If Charter does not

want its end users listed in Qwest's directory listings database, it simply does not have to submit them to Qwest.

95 Qwest's Commission approved rates allow Qwest to charge for privacy listings, and this makes Charter's second sentence proposed for Section 10.4.3.4 more problematic. Charter's language proposes that Qwest not be able to charge for any act connected to its end users who request Privacy Listings.

96 Simply put, Charter just wants to erase Privacy Listings from the ICA and thus not pay for Privacy Listings. Charter fails to acknowledge that the Commission has approved Privacy Listings as a rate element and approved a rate for such listings. The approved rate currently in Exhibit A to the ICA is "General Exchange Tariff Rate, Less Wholesale Discount." The Qwest Washington Exchange and Network Services Tariff defines Privacy Listings and sets the rate in Sections 5.7.1 (G) (6) and (7) for non-listed and non-published listings. Charter gets this rate less the wholesale discount. This pricing structure was approved in the 271 process and has been in place since that time.⁵³ Notwithstanding, Charter proposes to just remove "Privacy Listings" from Sections 10.4.2.1.2 and 10.4.3.2. Charter offers no basis for obtaining this type of special treatment. However, if the listing is supplied and the listing is marked with a privacy indicator, Qwest will charge Charter for this optional service at the Commission-approved rate.

Issue 23 – Classified (Yellow Pages) Listings

97 Qwest provides its directory listings product to both yellow and whites pages directory publishers. The listings of Charter and other CLEC's are commingled with Qwest's listings and provided in a manner that does not distinguish between whose carrier the end user uses.

⁵³ Docket No. UT-003022, ALJ's August 31, 2000 Order, paragraph 108; no changes made in subsequent final orders of the Commission.

This fulfills Qwest's responsibility with regard to yellow pages publishers. Charter wants terms and conditions in the ICA requiring Qwest to negotiate on its behalf for yellow pages publishing. Charter's proposal would require Qwest to attempt to renegotiate existing contracts with third parties, even though the Commission does not have authority to require those third parties to modify their agreements, and even though there has been no showing whatsoever that Charter or other CLECs have been unable to negotiate acceptable arrangements with yellow pages publishers on their own.

98 Qwest provides directory listings to the publisher that it chooses to publish the white pages directory, which is currently Dex. Qwest provides directory listings to requesting directory publisher on nondiscriminatory terms. Charter has agreed to have its end user listings commingled with others in the listings provided by Qwest.

99 Qwest is proposing the following language:

10.4.5 Intentionally Left Blank

15. Qwest and CLEC agree that certain issues outside the provision of basic white page Directory Listings, such as yellow pages advertising, yellow pages Listings, directory coverage, access to call guide pages (phone service pages), applicable Listings criteria, white page enhancements and publication schedules will be the subject of negotiations between CLEC and directory publishers, including Qwest's Official Directory Publisher. Qwest acknowledges that CLEC may request Qwest to facilitate discussions between CLEC and Qwest's Official Directory Publisher.

100 Charter proposes to modify the Qwest language with the following highlighted changes:

10.4.5 ~~Intentionally Left Blank~~ Classified (yellow pages) Primary Listings

The same provisions and requirements that apply to white pages directory treatment of CLEC Listings also apply to the provision of a classified listing in any classified (Yellow Pages) directory published by or on behalf of, or under contract to, Qwest. Arrangements for listings in a classified directory other than primary listings, including bold-faced listings, multiple listings, and advertisements, shall be arranged between any affected End User and Qwest's contractor.

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. Qwest shall promptly cause any contracts or 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. Notwithstanding the foregoing, CLEC acknowledges that ~~Qwest and CLEC agree that certain issues outside the provision of basic white page Directory Listings, such as yellow pages advertising, yellow pages Listings, directory coverage, access to call guide pages (phone service pages), applicable Listings criteria, white page enhancements and publication schedules will be the subject of negotiations between CLEC and directory publishers, including Qwest's Official Directory Publisher. Qwest acknowledges that CLEC may request Qwest to facilitate discussions between CLEC and Qwest's Official Directory Publisher,~~ arrangements will be established directly between Qwest's Official Directory Publisher and any End Users seeking to place such advertising.

101 Charter's proposed language imposes a "yellow pages" obligation on Qwest that is improper and unnecessary. Qwest's proposed language for Section 15 correctly defines the scope of Qwest's yellow page directory role.

102 Qwest does not contract to publish yellow pages. Qwest has negotiated with Dex to provide a complementary yellow page listing for those business listings Qwest provides in its directory listings. Qwest does not publish or have published a yellow pages directory. Qwest provides its directory list information to requesting directory publishers at the same rates, terms, and conditions that it provides the information to its contracted directory publisher. Charter has provided Qwest with written permission to include its end user customers in these listings, and Qwest does so and will continue to do so.

103 Charter's language would require Qwest to negotiate with the directory publisher 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." Indeed, yellow pages publishers are not public service companies and are not subject to the Commission's

jurisdiction. Charter was unable to explain what would happen if the publisher refused to negotiate with Qwest under Charter's proposed language.⁵⁴ And Charter was further unable to provide even one example of a directory publisher refusing to negotiate with Charter directly, or refusing to provide Charter's end users with the same terms and conditions offered to Qwest's end users.⁵⁵ If Charter wants to provide its listings to a publisher, Charter can do so without Qwest's approval and certainly without Qwest's involvement. Other directory issues, such as those listed in Qwest's proposed language for Section 15.0 above are strictly between the publisher and Charter.

104 **Issue 24: Cost Responsibility for Audits** – the parties settled this issue by agreeing that the threshold would be 10%, as proposed by Charter, but that the requesting party would share the cost of an independent auditor 50/50 as proposed by Qwest.

III. CONCLUSION

105 For the reasons set forth herein, the Commission should adopt Qwest's proposed language for all of the disputed issues. For the issues associated with the general terms and conditions of the agreement, including Issues 5, 6, and 7, Qwest's language is consistent with prior ICAs in the state, is simpler than Charter's, provides greater certainty, and appropriately limits the parties' obligations to each other in terms of liability and indemnity. For the interconnection issues, including Issues 10, 12, 13, 14, 15, 16, and 18, Qwest language is consistent with its obligations under the Act, is more balanced than Charter's proposal, and provides greater certainty. For the other issues, including the miscellaneous charges in Issue 17, and the directory issues in Issues 19, 20, 22, and 23, Qwest's language is consistent with other agreed-to language in the ICA, correctly memorializes Qwest's obligations with regard to listings, and provides Charter both sufficient protections and additional options to enable Charter to obtain

⁵⁴ Tr. 143.

⁵⁵ Tr. 144.

the results it desires.

DATED this 29th day of January, 2009.

QWEST



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