Exhibit ___-T (MS-1T)

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

DIRECT TESTIMONY

OF

MICHAEL STARKEY

ON BEHALF OF

CHARTER FIBERLINK WA-CCVII, LLC

October 8, 2008

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I. INTRODUCTION AND PURPOSE OF TESTIMONY

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

A. My name is Michael Starkey. My business address is QSI Consulting, Inc., 243 Dardenne Farms Drive, Cottleville, Missouri 63304.

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 the firm's President.

Q. PLEASE PROVIDE A SYNOPSIS OF YOUR EDUCATIONAL BACKGROUND AND RELEVANT WORK EXPERIENCE.

A. Included with this testimony as Exhibit __ (MS-2) is a thorough description of my educational background and relevant work experience. In brief, I have been a consultant to telecommunications providers, equipment manufacturers, government agencies and other private parties since 1996. Previous to my consulting experience I served as the Director of Telecommunications for the Maryland Public Service Commission ("PSC") and prior to that, as the Office of Policy and Planning's Senior Policy Analyst for the Illinois Commerce

Commission. I began my career as a Senior Economist at the Missouri PSC. Throughout my career I have spent a great deal of time studying telecommunications networks, including substantial time and effort aimed at developing rational, efficient means by which competing communications carriers can interconnect their respective facilities. I have likewise analyzed the underlying economic characteristics of communications networks and have on numerous occasions provided expert testimony in arbitration proceedings pursuant to Section 252 of the Telecommunications Act.

Q. HAVE YOU PREVIOUSLY TESTIFIED BEFORE THIS OR OTHER PUBLIC UTILITY COMMISSIONS?

A. Yes. I recently testified before the Washington Utilities and Transportation Commission in Docket No. UT-063061, related to an arbitration pursuant to Section 252 of the Telecommunications Act between Eschelon Telecom, Inc. and Qwest. I have also testified before this Commission in Docket Nos. UT-063013 and UT-003013 (Phase B). In addition, I have testified before dozens of other state utility commissions, the FCC and courts of various jurisdictions on a wide array of telecommunications matters.

Q. ON WHOSE BEHALF WAS THIS TESTIMONY PREPARED?

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

("Charter").

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to provide the factual and policy underpinnings supporting Charter's positions on the following disputed issues in this arbitration:

- Issue 5: How should the parties agree to limit liability, and damages, arising from either party's actions?
- 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?
- Issue 7: How should the parties' respective indemnity obligations, as they relate to intellectual property rights, be established?
- Issue 8: How should the parties state their respective disclaimer of warranties?
- Issue 17: Should Charter be liable for miscellaneous charges assessed by Qwest, even where Charter does not request that Qwest perform any work?
- Issue 19: Should Qwest be permitted to undertake marketing of its own activities based upon the identity of Charter's subscriber listings?
- Issue 20: Whether prior written authorization to release, sell, or make available, Charter listing information should be obtained by Qwest?
- 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?
- 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?

- 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?

- 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?

II. ISSUE BY ISSUE ANALYSIS

ISSUE 5: How should the parties agree to limit liability, and damages, arising from either party's actions?

Q. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN THE COMPANIES SURROUNDING ISSUE 5?

A. This issue presents two questions: first, how should the parties limit liability for losses arising out of the performance of their respective obligations under the interconnection agreement; and second, how should the agreement limit damages that arise from either party's failure to perform under the agreement? I will address that issue (limiting damages arising from failure to perform) first, and, following that, discuss how the parties should limit liability for losses arising out of the performance of their respective obligations under the interconnection agreement. Although I am not an attorney, I am testifying on this, and several

other issues, to provide the Commission with an explanation of how Charter expects its proposed language would be applied on the issues of liability, damages, indemnity, etc.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THE ISSUE OF HOW TO DEFINE LIMITS ON DAMAGES?

A. Charter's proposed language for Section 5.8 is as follows:

> **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 **actual, direct damages**. Each Party's liability to the other Party for any other losses shall be limited to **actual, direct** damages. Payments pursuant to the QPAP shall not be counted against the limit provided for in this Section.
>
> 5.8.2 **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.**

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THIS ISSUE?

A. Qwest's proposed language for Section 5.8 is as follows:

> **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.

Q. WHAT ARE THE PRIMARY DIFFERENCES BETWEEN THE PARTIES' PROPOSED LANGUAGE FOR SECTION 5.8.1?

A. The parties differ as to how to define the scope of their liability to *each other.*

Charter's position is that the parties should not limit their damages to each other in a way that would preclude one party from obtaining meaningful relief from the other party. It is important to note that this provision doesn't deal with either party's indemnification obligations to the other; it only deals with damages either party suffers as a result of the other party's performance or non-performance.

Q. PLEASE EXPLAIN.

A. Charter believes that damages should be limited to "actual, direct" damages. This contrasts with Qwest's proposal that damages be further limited, and narrowly defined, as the total amount that is or would have been charged to the other party for the service(s) or function(s) not performed, or improperly performed, under the agreement. This interconnection agreement, at its essence, contemplates the exchange of traffic, without significant liabilities from one party to another. Notably, Charter does not lease UNEs or resell Qwest's services. For that reason, the amount of monthly charges that the Parties are subject to each month is relatively small. Given that fact, Qwest's proposal to limit direct damages to no more than an amount equal to such monthly charges would have the effect of limiting Charter's ability to recover the total amount of actual damages that might arise from actions or omissions by Qwest.

Q. PLEASE PROVIDE AN EXAMPLE OF THE WAY IN WHICH QWEST'S PROPOSED LANGUAGE COULD LIMIT CHARTER'S ABILITY TO

SEEK DAMAGES FROM QWEST.

A. Consider the possibility that a Qwest technician, or employee, when working out in the field, negligently cuts a fiber optic line that Charter has deployed in its network that was clearly marked. If that occurred in conjunction with Qwest's efforts to comply with its obligation to interconnect with Charter at a single point of interconnection, then a claim arising under this agreement might be limited by Qwest's proposal in a way that would prevent Charter's recovery of its actual, direct costs.

Q. IN YOUR HYPOTHETICAL, WHY WOULD CHARTER NOT BE ABLE TO RECOVER FROM QWEST THE ACTUAL, DIRECT COSTS FOR DAMAGE TO ITS NETWORK?

A. Charter would likely not be able to recover the entire amount of its actual, direct costs damages to its network from Qwest because, under Qwest's proposal, Charter would only be able to recover an amount that is equal to the amount it charges Charter on a monthly basis. That amount may or may not be sufficient to cover Charter's actual, direct costs to repair the damage to its network. If the monthly charges assessed to Charter under the interconnection agreement were less than the actual, direct damages suffered by Charter, then it would have to pay the difference. That doesn't seem fair, and it seems to be contrary to the cost causation principles used by the FCC for years in furthering competition since

1996.

Q. HOW DOES CHARTER'S LANGUAGE RESULT IN A MORE EQUITABLE RESULT?

A. Charter's language ensures that actual damages can be recovered by using the term "actual, direct damages" in defining those damages available to each party for harm suffered by the acts or omissions of the other party under the agreement. This standard ensures that the recovery of its actual, direct costs to repair the damages will be commensurate with the level of harm that the party that is not at fault suffers.

Q. PLEASE DISCUSS THE SECOND QUESTION THAT ARISES UNDER THIS ISSUE: WHETHER THE PARTIES SHOULD LIMIT THEIR LIABILITY FOR TIMES WHEN THEIR ACTIONS RISE TO THE LEVEL OF GROSS NEGLIGENCE.

A. Yes, of course. Another subsection in Section 5.8, specifically subsection 5.8.4, establishes the standard for liability limitations. The question that arises under the parties' competing language for subsection 5.8.4 is whether the legal standard of "gross negligence" should be included or not. This subsection establishes when the parties' liability to the other party will not be limited, and it lists several different circumstances, including: willful or intentional misconduct, and damage to property that is caused solely by the other party's negligence.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THE ISSUE OF HOW TO DEFINE LIMITS ON DAMAGES?

A. Charter's proposed language for Section 5.8.4 is as follows:

> 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.**

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THE ISSUE OF HOW TO DEFINE LIMITS ON DAMAGES?

A. Qwest's proposed language for Section 5.8.4 is as follows:

> 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.

Q. WHAT ARE THE PRIMARY DIFFERENCES BETWEEN THE PARTIES' PROPOSED LANGUAGE FOR SECTION 5.8.4?

A. Charter proposes that the fault standard of "gross negligence" be added to the list of those acts which neither party can limit their liability. Qwest opposes the addition of that standard.

Q. WHY DOES CHARTER PROPOSE TO ADD GROSS NEGLIGENCE TO THE STANDARDS UNDER THIS PROVISION?

A. Charter proposes to add gross negligence because, as the company's attorneys have explained, it believes that the agreement should not limit either party's liability when one party acts in a manner that is deemed to be grossly negligent. Other words used to describe gross negligence are "wanton" or "reckless" misconduct. Also remember that the parties have agreed to limit liability for actions that are deemed to be merely negligent, also known as simple negligence. Charter proposes that if a party acts in a manner that is so reckless, or irresponsible, that a court finds that the actions are deemed to rise to the level of gross negligence, then a party's liability to the other should not be limited to actual, direct damages.

Q. WHY SHOULD LIABILITY NOT BE LIMITED FOR ACTS THAT ARE DEEMED TO BE GROSSLY NEGLIGENT?

A. The reason that liability should not be limited for acts that are grossly negligent is because that approach provides an additional incentive for both parties to ensure that their acts, and the acts of their employees and agents, are reasonable and appropriate. In other words, if each company knows that they could be fully liable for any reckless or grossly negligent actions taken on their behalf, they will be more likely to guard against the possibility that such acts will occur. Therefore, Charter's proposal provides reasonable incentives for each party to guard against potential harms to the other party.

In addition, it is also reasonable and equitable for a company to be fully liable for damages that arise from the grossly negligent actions of its employees or agents. This approach applies the basic principle that the entity which acts improperly and causes the harm should be responsible, or liable, for the damages that arise from those actions.

Q. ARE THERE ANY OTHER PROVISIONS THAT RELATE TO THIS ISSUE?

A. Yes. Section 10.4.2.6 is also at issue here. That provision raises the question of when, and how, Qwest's liability for directory listing errors should be limited via tariffs.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THAT ISSUE?

A. Charter has not proposed any language for that provision, and instead believes that it should be left blank and simply read:

> [Intentionally left blank.]

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THAT ISSUE?

A. Qwest's proposed language for Section 10.4.2.6 is as follows:

> 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.

Q. WHAT ARE CHARTER'S CONCERNS WITH QWEST'S PROPOSED LANGUAGE FOR THAT ISSUE?

A. The concern is that Qwest has proposed an open-ended, and somewhat ambiguous, provision to limit its liability for directory listings (or "Listings") that may be included in the published directory in that particular service area. Charter opposes this language because it is ambiguous and will create uncertainty as to when, and under what circumstances, Qwest's liability is limited. Moreover, the language purports to incorporate any "state Tariffs" to the extent that they may limit liability. But it is not clear what state tariffs that Qwest refers to, and whether such tariffs have terms that would be applicable to the parties' obligations under this interconnection agreement. Further, Qwest's liability for errors with regard to directory listings should be limited in the same way that their liability for other acts or omissions would be limited (under Charter's proposal) –they should be responsible for actual, direct damages for negligence, or more if they are grossly negligent or the harm is caused by their willful misconduct. So for those reasons Charter opposes Qwest's proposed language for Section 10.4.2.6.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE 5?

A. I recommend that the Commission adopt Charter's proposed language for Section 5.9 and the other subsections referenced above.

ISSUE 6(a): How should the parties' respective indemnity obligations be established?

Q. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN

THE COMPANIES SURROUNDING ISSUE 6.

A. This issue presents the question of how the parties' respective indemnity obligations should be established. Charter proposes an approach that ties the indemnity obligations of each party to their respective liabilities under the agreement. In other words, to the extent that one party acts in a manner that is negligent, grossly negligent, or deemed to be "willful misconduct," then, to the same extent, that party should not be able to invoke the indemnity obligations of the agreement to force the other party to defend against third-party claims that arise because of the other party's negligent, grossly negligent, or other similar actions. In other words, if a party seeking indemnification is twenty-five percent liable for harm caused to a third party, it should not be able to seek reimbursement for the full amount of damages (i.e., one-hundred percent) to the third party. Again, this is consistent with the FCC's cost causation principles. The party causing the cost pays. In contrast, Qwest's proposed indemnity language generally ignores the concept of contributory fault that Charter proposes to incorporate.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THIS ISSUE?

A. Charter has proposed the following language to address the parties' respective indemnity obligations:

5.9.1 The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:

5.9.1.1 Each of the Parties agrees to indemnify, defend and hold harmless **("Indemnifying Party")** the other Party and each of its officers, directors, employees and agents **("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 **third party**, for invasion of privacy, bodily injury or death of any **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.**

5.9.1.2 In the case of **C**laims or **L**osses 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 **C**laims or **L**osses (the "Indemnifying Party") shall defend and indemnify the other Party and each of its officers, directors, employees and agents (Indemnified Party) against any and all such **C**laims or **L**osses 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** the **Claims or L**osses **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.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THIS ISSUE?

A. Charter has proposed the following language to address the parties' respective indemnity obligations:

> 5.9.1 The Parties agree that unless otherwise specifically set forth in this Agreement the following constitute the sole indemnification obligations between and among the Parties:
>
> 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. 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 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.

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.

Q. WHAT ARE CHARTER'S CONCERNS WITH QWEST'S PROPOSED LANGUAGE FOR THAT ISSUE?

A. Charter is concerned that Qwest's proposed language doesn't explicitly recognize a principle of proportionality – a party should be liable for the harm it causes, but not more than that.

Q. PLEASE EXPLAIN.

A. Although I am not an attorney, I generally understand that a party that is legally responsible for harm to a third party should be willing to indemnify the other party against that harm, but only in proportion to the harm it actually caused. In other words, if the indemnifying party (or party alleged to have caused the harm) is only seventy-five percent at fault, it should only be required to pay for seventy-five percent of the damages, including attorneys fees. The indemnified party should be liable for paying the other twenty-five percent of the damages and defense costs.

Of course, this assumes that the third party was not at fault in any way (i.e., no liability for the harm caused by the parties to this agreement).

Q. HOW DOES CHARTER'S PROPOSED LANGUAGE ACHIEVE THIS RESULT?

A. Charter's proposed language for Section 5.9, and related provisions, introduces a concept of contributory negligence into the indemnity obligations, so that indemnity obligations are limited where the indemnified party has contributed to the alleged harm. The Commission should affirmatively find that the reasonable limitation of contributory negligence proposed by Charter is appropriate, and order the parties to incorporate the principle in to the agreement.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE 6(a)?

A. I recommend that the Commission adopt Charter's proposed language for Section 5.9.1 and 10.4.2.6, as set forth above.

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. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN THE COMPANIES SURROUNDING ISSUE 6(b).

A. This issue presents a very specific question concerning each party's obligations when an indemnity situation has arisen. Specifically, where the indemnity

obligations of this agreement have arisen, and one party is actively defending a claim by a third party (and therefore indemnifying the other party to this agreement), when must the indemnified party assume the defense of the action directly? There is one specific situation that could very easily arise, which is at issue here. That is, when the indemnified party does not consent to a reasonable settlement offer made by the claimants. In other words, if the plaintiffs make a reasonable offer of settlement, and the indemnified party refuses to accept that offer, must the indemnifying party continue to incur additional costs defending the claim or should the indemnified party (who refused the settlement offer) assume the defense of the claim?

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THIS ISSUE?

A. Charter's proposed language for Section 5.8 is as follows:

> In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the Indemnified Party. In the event the Indemnified Party withholds consent, the Indemnified Party **must**, at its cost, take over such defense, provided that, in such event, the Indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant Indemnified Party against, any cost or liability in excess of such refused compromise or settlement.

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THIS ISSUE?

A. Qwest's proposed language for Section 5.8 is as follows:

> In no event shall the Indemnifying Party settle or consent to any judgment pertaining to any such action without the prior written consent of the

Indemnified Party. In the event the Indemnified Party withholds consent, the Indemnified Party may, at its cost, take over such defense, provided that, in such event, the Indemnifying Party shall not be responsible for, nor shall it be obligated to indemnify the relevant Indemnified Party against, any cost or liability in excess of such refused compromise or settlement.

Q. PLEASE EXPLAIN THE PARTIES' DIFFERENCES OVER THIS PROVISION.

A. The difference is over one word. As you can see from the language set forth above, Charter proposes language which establishes that if the indemnified party does not accept a reasonable settlement offer, then that party ***must*** take over the defense of the action. Qwest, on the other hand, proposes language which establishes that the party refusing the reasonable settlement offer ***may*** take over the defense of the action.

Q. WHY IS CHARTER'S LANGUAGE PREFERRED?

A. Charter's language is preferred because it aligns the interests of each party, and promotes the acceptance of reasonable settlement offers. The proposal aligns both parties' interests by requiring the indemnified party to assume defense of the action if it rejects a reasonable settlement offer. That approach builds an equitable incentive for that party (the indemnified party) to accept a reasonable settlement offer. This occurs because if the indemnified party refuses to accept a reasonable settlement offer, it will be required to take over the defense of the action, and assume the cost of the legal fees and other costs associated with defending the

claim. In that way, Charter's proposed language ensures that the indemnified party will act reasonably, in a manner that is aligned with the economic interests of all parties, when considering reasonable settlement offers. In other words, any other approach on this issue leaves the indemnified party without any "skin in the game" (i.e., or incentives to act rationally). I would also note that Charter's language would apply equally to both parties.

Q. WHAT IS CHARTER'S CONCERN WITH QWEST'S PROPOSED LANGUAGE?

A. Charter is concerned that if Qwest is the indemnified party, and it refuses to accept a reasonable settlement offer, it can literally force Charter to continue to act as the indemnifying party and incur the full costs of the defense of the action. Such a result could entail dramatically higher legal costs for the indemnifying party. For example, settling a case before it goes to trial could easily save tens of thousands of dollars, if not more. In addition, settling for a reasonable amount prior to trial, rather than running the risk of obtaining a jury verdict, could save untold amounts. Resources that the indemnifying party shouldn't be ***required*** to spend. In short, it isn't an economically rational result. Qwest could force the continued litigation of a claim that would otherwise have been settled if Qwest were not involved. That result should be avoided.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE ,6(b)?

A. I recommend that the Commission adopt Charter's proposed language for Section 5.9.2.3.

ISSUE 7: How should the parties' respective indemnity obligations, as they relate to intellectual property rights, be established?

Q. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN THE COMPANIES SURROUNDING ISSUE 7.

A. The dispute here revolves around how the parties define their respective indemnity obligations, as they related to intellectual property rights. Charter proposes the addition of a condition under 5.10 that would serve to limit indemnity obligations (via the phrase "with knowledge"), while Qwest opposes the addition of such phrase. Also, the parties disagree as to whether agreements to use the patent, copyright, logo, trademark, trade name, trade secret or other intellectual property rights of the other party should be written or oral. Charter proposes that such agreements be written agreements, Qwest proposes the use of oral agreements.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THIS ISSUE?

A. Charter has proposed the following language in Section 5.10 of the General Terms and Conditions:

> 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 the Indemnified Party, 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 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.

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THIS ISSUE?

A. Qwest has proposed the following language in Section 5.10 of the General Terms and Conditions:

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 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 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.

Q. PLEASE DESCRIBE HOW THE PARTIES' POSITIONS ON THIS ISSUE DIFFER FROM ONE ANOTHER.

A. The dispute over section 5.10 is narrow, as the above quoted language demonstrates. Charter's position is that there should be no intellectual property indemnity obligations where facilities or services of the parties are combined without the ***knowledge***, and direction, of the indemnifying party. The reason for this proposed language is simple: where facilities or services are combined in a manner that may infringe upon intellectual property rights of a third party without the knowledge of the indemnifying party, then that party should not be required to indemnify such third party claims related to an alleged combination of facilities or

services. This approach is consistent with other proposals that Charter has offered with respect to liability issues. Generally speaking, I understand that where one party is at fault, that party should be liable, or be required to indemnify the other party (as the circumstances warrant). However, where one party is not at fault, or has no knowledge of alleged infringement, that party should not be liable. Nor should that party be required to indemnify the other party for claims based upon alleged infringement arising from the combination of facilities or services which the first party had no knowledge of.

Q. IS THERE ANOTHER PROVISION AT ISSUE HERE?

A. Yes, section 5.10.4. The parties competing proposed language here illustrates their different approaches. Charter proposes the following language:

> 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.

While Qwest proposes the following language:

> 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.

As you can see, the parties differ over a single word: inclusion of the word "written" before the term agreement.

Q. WHY DOES CHARTER PROPOSE TO INCLUDE THE TERM "WRITTEN" IN THIS PROVISION?

A. Including that term will make it clear that neither party is entitled to use any intellectual property of the other party without first obtaining a written agreement. If the parties simply use the term "agreement" alone, there remains the possibility that there could be some confusion in the future over what constitutes an agreement to use such intellectual property. That is why Charter proposed to modify this provision to make it explicit that the agreement must be a "written" agreement. Using a written agreement to memorialize each party's rights under this provision ensures that each party is aware of its respective rights and obligations, and ensures that an enforceable document to protect such rights is created. It is simply a good idea to memorialize such agreements in a written document, rather than simply leaving the arrangement to an oral agreement.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE 7?

A. I recommend that the Commission adopt Charter's proposed language for Sections 5.10 and 5.10.4.

ISSUE 8: How should the parties state their respective disclaimer of warranties?

Q. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN THE COMPANIES SURROUNDING ISSUE 8.

A. This issue raises the question of what language is appropriate for the parties to disclaim any express or implied warranties to one another. Both parties agree that there are no express or implied warranties offered under the agreement, except as expressly set forth in the agreement. Charter proposes direct, and unambiguous, language to achieve that result. Qwest, on the other hand, proposes to include superfluous language which is ambiguous.

In addition, the parties disagree as to whether the parties should recognize that their respective service quality obligations should not be limited by these warranty disclaimers. Charter has offered language which clarifies that the parties' service quality obligations are not limited by their respective warranty disclaimers. In its answer to the Charter arbitration petition, Qwest offered similar language, and therefore seems to concede that Charter's proposal has merit.

Q. WHAT LANGUAGE HAS CHARTER PROPOSED FOR THIS ISSUE?

A. Charter has proposed the following language in Section 5.11 of the General Terms and Conditions:

> 5.11.1 EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT THERE DOES NOT EXIST, ANY

> WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE. **THIS PROVISION SHALL NOT SERVE TO ELIMINATE, OR OTHERWISE LIMIT, THE PARTIES' QUALITY OF SERVICE OBLIGATIONS PURSUANT TO APPLICABLE WASHINGTON LAW, INCLUDING WUTC RULES AT W.A.C. 480-120, ET. SEQ.**

Q. WHAT LANGUAGE HAS QWEST PROPOSED FOR THIS ISSUE?

A. Qwest has proposed the following language in Section 5.11 of the General Terms and Conditions:

> EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT THERE DOES NOT EXIST, ANY WARRANTY, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE AND THAT ALL PRODUCTS AND SERVICES PROVIDED HEREUNDER ARE PROVIDED "AS IS," WITH ALL FAULTS. THIS PROVISION SHALL NOT SERVE TO ELIMINATE, OR OTHERWISE LIMIT, THE PARTIES' QUALITY OF SERVICE OBLIGATIONS PURSUANT TO APPLICABLE WASHINGTON LAW.

Q. PLEASE DESCRIBE HOW THE PARTIES' POSITIONS ON THIS ISSUE DIFFER FROM ONE ANOTHER.

A. The primary difference is that Qwest includes the phrase shown in double underlines above. As I understand the situation, that language is included because Qwest believes it is necessary, or at least useful, for the purpose of limiting any implied warranties. That language is referenced in a Washington statute, RCW 62A.2-316, which sets forth the rules for warranties under the Uniform Commercial Code.

Q. WHY DOES CHARTER OPPOSE THE INCLUSION OF THIS LANGUAGE?

A. For two reasons. First, I have been informed by Charter's attorneys that the language is unnecessary because the parties have already agreed upon language that expressly, and explicitly, establishes that there are no implied warranties provided by either party under this agreement. Second, the language has no particular relevance to the parties' obligations under this agreement because it is derived from the Uniform Commercial Code, or "UCC." Although I am not an attorney, I understand that the UCC governs contracts for the provision of "goods." Since this interconnection agreement is not a contract for the provision of goods, it would seem that the UCC would not apply to this contract.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE 8?

A. I recommend that the Commission adopt Charter's proposed language for Section 5.11.

<u>Issue 17</u>: Should Charter be liable for miscellaneous charges assessed by Qwest, even where Charter does not request that Qwest perform any work?

Q. PLEASE DESCRIBE THE DISAGREEMENT BETWEEN THE COMPANIES RELATED TO ISSUE 17?

A. The parties disagree over whether Charter should be liable for miscellaneous

charges that Qwest attempts to assess Charter when Charter has not specifically requested that the work be performed. Charter's position is that it should not be held liable in this instance, while Qwest argues that it should be able to unilaterally impose miscellaneous charges on Charter whether or not Charter requested the work to be performed. In addition, Qwest proposes language that would establish "market-based" prices that are "subject to change" for the miscellaneous services, while Charter's proposal bases the prices for these miscellaneous services on the rates found in Qwest's tariffs.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 17?

A. Charter's proposal for Section 9.1.12 of Section 9 (Unbundled Network Elements) is shown below:

> 9.1.12 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. Miscellaneous services are provided at CLEC's request, **and CLEC must affirmatively agree to the charges for such services in advance**. Miscellaneous Charges are in addition to recurring and nonrecurring charges that apply under this Agreement. When more than one miscellaneous service is requested for the same Unbundled Network Element(s), Miscellaneous Charges for each miscellaneous service apply. Basic rates apply for miscellaneous services provided during Qwest's regular business hours, 8 a.m. to 5 p.m., local time, Monday through Friday, excluding holidays; overtime Miscellaneous Charges apply for such services provided between 5 p.m. and 8 a.m., local time, Monday through Friday, or any time Saturday, excluding holidays; and premium Miscellaneous Charges apply for such services provided any time on Sundays or holidays. **Depending on the specific circumstances, the items below are Miscellaneous Charges that may apply if requested by CLEC:**

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f) Cancellation – cancellation of a pending order for the installation of services at any time prior to notification by Qwest that service is available for use. The cancellation date is the date Qwest receives notice from CLEC that the order is cancelled. If CLEC or CLEC's End User Customer is unable to accept service within thirty (30) Days after the original Due Date, the order will be cancelled by Qwest. Prices for this miscellaneous service are **set forth in section** 3.1.Q **of** Qwest's Interconnection Services **Tariff, WN U-42.** Additional information concerning the application of prices for cancellations can be found in Qwest's Tariff FCC No. 1, Section 5.

g) Design change – information provided by CLEC or a request from CLEC that results in an engineering review and/or a design change to service on a pending service order, per order, per occurrence. Design changes include, but are not limited to: 1) changes to the address on a pending service order when the new address is in the same Qwest Wire Center as the original address; or 2) conversions from an Unbundled Network Element to a private line/Special Access circuit. In addition to a design change Miscellaneous Charge, an address change may result in the application of an expedite Miscellaneous Charge in order to retain the original Due Date. Prices for this miscellaneous service are **set forth in section 3.1.Q of** Qwest's Interconnection Services **Tariff, WN-U42.**

h) Dispatch – 1) information provided by CLEC, or a request from CLEC, in relation to installation of services, resulting in dispatch of a Qwest technician(s) when dispatch is not required for Qwest to complete its installation work; 2) information provided by CLEC resulting in dispatch, or a request from CLEC for dispatch, of a Qwest technician(s) in relation to a repair request where no trouble is found in Qwest's facilities; and 3) a Qwest technician(s) is dispatched and CLEC or CLEC's End User Customer is not available or ready. Prices for this miscellaneous service are **set forth in section 3.1.Q of** Qwest's Interconnection Services **Tariff, WN-U42.**

j) Maintenance of Service/Trouble Isolation – work performed by Qwest when CLEC reports trouble to Qwest and no trouble is found in Qwest's facilities. CLEC is responsible for payment of charges when the trouble is in equipment or systems provided by a party(ies) other than Qwest. Additionally, when CLEC reports trouble within

a quantity of services and circuits, but fails to identify the specific service and circuit experiencing trouble, charges apply for the time spent by Qwest to isolate the trouble. A call-out of Qwest technician at a time not consecutive with that technician's scheduled work period is subject to a minimum charge of four (4) hours. Failure of Qwest personnel to find trouble in Qwest facilities will result in no charge if the trouble is subsequently found in those facilities. Charges apply per Qwest technician, from the time of dispatch until the work is complete. Trouble Isolation Charges (TIC) apply for trouble isolation work on POTS and Maintenance of Service charges apply for trouble isolation work on other services. Dispatch Miscellaneous Charges may apply in addition to Maintenance of Service charges or TIC. Basic, overtime, or premium rates apply. Prices for this miscellaneous service are **set forth in sections 3.1.K.1-Trouble Isolation of** Qwest's Interconnection Services **Tariff, WN-U42 and in Section 3.1.Q-M**aintenance of Service of Qwest's Interconnection Services Tariff, WN U42.

Q. WHAT IS QWEST'S PROPOSAL FOR ISSUE 17?

A. Qwest proposes the following language for Section 9.1.12:

9.1.12 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. 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. Miscellaneous Charges are in addition to recurring and nonrecurring charges that apply under this Agreement. When more than one miscellaneous service is requested for the same Unbundled Network Element(s), Miscellaneous Charges for each miscellaneous service apply. Basic rates apply for miscellaneous services provided during Qwest's regular business hours, 8 a.m. to 5 p.m., local time, Monday through Friday, excluding holidays; overtime Miscellaneous Charges apply for such services provided between 5 p.m. and 8 a.m., local time, Monday through Friday, or any time Saturday, excluding holidays; and premium Miscellaneous Charges apply for such services provided any time on Sundays or holidays.

***

f) Cancellation – cancellation of a pending order for the installation of services at any time prior to notification by Qwest

that service is available for use. The cancellation date is the date Qwest receives notice from CLEC that the order is cancelled. If CLEC or CLEC's End User Customer is unable to accept service within thirty (30) Days after the original Due Date, the order will be cancelled by Qwest. Prices for this miscellaneous service are market-based, using Qwest's Tariffed, cataloged, price listed, or other similarly documented prices, and are subject to change. Additional information concerning the application of prices for cancellations can be found in Qwest's Tariff FCC No. 1, Section 5.

g) Design change – information provided by CLEC or a request from CLEC that results in an engineering review and/or a design change to service on a pending service order, per order, per occurrence. Design changes include, but are not limited to: 1) changes to the address on a pending service order when the new address is in the same Qwest Wire Center as the original address; or 2) conversions from an Unbundled Network Element to a private line/Special Access circuit. In addition to a design change Miscellaneous Charge, an address change may result in the application of an expedite Miscellaneous Charge in order to retain the original Due Date. Prices for this miscellaneous service are market-based, using Qwest's Tariffed, cataloged, price listed, or other similarly documented prices, and are subject to change.

h) Dispatch – 1) information provided by CLEC, or a request from CLEC, in relation to installation of services, resulting in dispatch of a Qwest technician(s) when dispatch is not required for Qwest to complete its installation work; 2) information provided by CLEC resulting in dispatch, or a request from CLEC for dispatch, of a Qwest technician(s) in relation to a repair request where no trouble is found in Qwest's facilities; and 3) a Qwest technician(s) is dispatched and CLEC or CLEC's End User Customer is not available or ready. Prices for this miscellaneous service are market-based, using Qwest's Tariffed, cataloged, price listed, or other similarly documented prices, and are subject to change.

j) Maintenance of Service/Trouble Isolation – work performed by Qwest when CLEC reports trouble to Qwest and no trouble is found in Qwest's facilities. CLEC is responsible for payment of charges when the trouble is in equipment or

> systems provided by a party(ies) other than Qwest. Additionally, when CLEC reports trouble within a quantity of services and circuits, but fails to identify the specific service and circuit experiencing trouble, charges apply for the time spent by Qwest to isolate the trouble. A call-out of Qwest technician at a time not consecutive with that technician's scheduled work period is subject to a minimum charge of four (4) hours. Failure of Qwest personnel to find trouble in Qwest facilities will result in no charge if the trouble is subsequently found in those facilities. Charges apply per Qwest technician, from the time of dispatch until the work is complete. Trouble Isolation Charges (TIC) apply for trouble isolation work on POTS and Maintenance of Service charges apply for trouble isolation work on other services. Dispatch Miscellaneous Charges may apply in addition to Maintenance of Service charges or TIC. Basic, overtime, or premium rates apply. Prices for this miscellaneous service are market-based, using Qwest's Tariffed, cataloged, price listed, or other similarly documented prices, and are subject to change.

Q. DOES CHARTER AGREE THAT EACH PARTY SHOULD BE ALLOWED TO RECOVER ITS COSTS WHEN PERFORMING MISCELLANEOUS SERVICES AT THE REQUEST OF THE OTHER PARTY?

A. Yes, generally. Charter can agree that where one party performs work at the request of the other party, then the party performing such work should be compensated in accordance with federal and state laws. In other words, a forward looking cost-based rate may be appropriate for some services and a just and reasonable, Commission-approved rate may be applicable in other circumstances. However, neither party should be liable for charges to the other party where the first party has not requested that the other party perform the work. This position

is fundamentally fair because each party is informed about the expectations of the other party related to the work being performed and the charges that will apply for that work *before* the work is performed. Further, Charter's proposal avoids potential disputes that could arise if one party unilaterally decides to perform miscellaneous services for the other, and the other party unexpectedly receives a bill for that work *after* the work has been performed.

Q. HOW DOES CHARTER'S PROPOSED LANGUAGE ENSURE A FAIR RESULT?

A. Charter's language states that miscellaneous services will only be performed at Charter's request, and that Charter must agree to the charges for such services in advance. In this way, both Charter and Qwest know what work will be performed and what charges will apply for that work before the work is performed by Qwest. If Charter does not request the work to be performed, it should not be held liable for the charges if Qwest unilaterally performs work. This concept is found in the agreed to language describing the miscellaneous charges.

Q. PLEASE ELABORATE.

A. Agreed to language in Section 9.1.12 states that "Miscellaneous services are provided at CLEC's request..." and agreed to language under the description of the miscellaneous services states that the miscellaneous services are to be

performed at the CLEC's request. For instance, the miscellaneous service identified as: "additional cooperative testing" is described as "performing specific tests requested by the CLEC," and the miscellaneous service identified as "design change" is described as "information provided by CLEC or a request from CLEC that results in an engineering review and/or a design change…" Similar language is also found in the description of other miscellaneous services. Hence, language that the parties have already agreed upon regarding miscellaneous services specifically uses the CLEC request as the triggering event for Qwest to perform the work.

Q. WHAT IS CHARTER'S CONCERN WITH QWEST'S PROPOSED LANGUAGE?

A. Qwest's proposed language would establish a process that gives Qwest the right to unilaterally determine when it would assess charges upon Charter. For instance, Qwest proposes language which states: "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."[1] As you can see, not only is this approach contradictory to the language describing miscellaneous service charges that base such work and charges on a request by the CLEC, but it relies on ambiguous language regarding "CLEC's actions" that Qwest does not define in

the ICA. Without knowing what "actions" Qwest may use as a basis for assessing charges, this proposal provides no certainty in this regard and could likely lead to future disputes. There is simply no reason for the parties' ICA to incorporate language that provides a unilateral right to assess charges upon the other party, particularly when that language conflicts with other agreed to language in the ICA.

Q. IS CHARTER ALSO CONCERNED ABOUT THE RATES THAT QWEST IS ATTEMPTING TO ASSESS FOR MISCELLANEOUS SERVICES?

A. Yes. Qwest's language would allow Qwest to assess "market-based" prices that are "subject to change" for certain miscellaneous services. Qwest uses the term "market based" as though the rates it proposes charging were established over time by a large number of sellers, none of which has monopoly or oligopoly power over the services. That is not the case. Instead, there is only one seller of these miscellaneous services, and that's Qwest. Charter's language, in contrast, would set these prices based on Qwest's tariffed rates for these services which, unlike Qwest's proposal, would not grant Qwest unilateral control over the prices it charges for miscellaneous services related to UNEs.

Q. PLEASE ELABORATE ON YOUR CONCERNS WITH QWEST'S

[1] Disputed language proposed by Qwest is represented by double underlined text.

PRICING PROPOSAL FOR MISCELLANEOUS SERVICES.

A. There are a number of problems with Qwest's proposal in this regard. First, these miscellaneous services apply to Unbundled Network Elements, which are noncompetitive, bottleneck facilities that Qwest must provide due to its position as an incumbent local exchange carrier. As I just noted, there is no "market" available to set a "market-based" rate for these services. For instance, Qwest proposes to set the price for "Dispatch" at a "market-based" rate even though this miscellaneous service relates to a dispatch of a "Qwest technician," and therefore, Charter must use Qwest for this service and could not look to a "market" provider for this service even if one existed (which it does not due to the very fact that Qwest is the only provider of UNEs in its incumbent territory). This is further supported by Qwest's own proposed language that would allow Qwest to set the "market-based" rate on its choice of *Qwest-related* pricing documentation. Further, Qwest points to no other providers in the "market" that Qwest's proposed language suggests exists. In sum, since Qwest is the only provider of these miscellaneous services for UNEs, there is no "market" for them, and in turn, a "market-based" rate, without any Commission oversight, is inappropriate.

Second, Qwest's language gives it unilateral power to charge whatever it wants for miscellaneous services for UNEs. Qwest's language would allow it to develop some unknown rate for these miscellaneous services by looking to essentially any

Qwest pricing-related document it chooses, and to make matters worse, would grant Qwest the authority to change those rates without any input from either Charter or this Commission. And because there is no "market" to constrain Qwest's proposed "market-based" rate, Qwest would have the unfettered ability to charge Charter whatever it chooses.

Third, the very fact that Qwest is attempting to insert language in the parties' ICA that would allow Qwest to set whatever rates it wants for miscellaneous services and then change those rates at its sole discretion, emphasizes the importance of including Charter's proposed language that would require affirmative agreement of Charter to the charges for such services in advance. If Qwest has its way, not only would Charter not know *when* it will be charged for miscellaneous services for UNEs by Qwest, but Charter will also not know *what* it will be charged by Qwest.

Q. HAS QWEST'S PROPOSAL TO ASSESS NON-COST BASED (OR MARKET BASED) RATES FOR MISCELLANEOUS SERVICES ALREADY BEEN ADDRESSED IN WASHINGTON?

A. Yes. For example, Section 9.1.12(g) refers to the miscellaneous service Design Change. As shown above, Qwest proposes to assess "market-based" rates for design changes. However, in a recent arbitration between Qwest and Eschelon,

the Arbitrator specifically found that Qwest must provide design changes as part of its obligations under Section 251(d)(2)(B) of the Act and must price them at TELRIC. The Arbitrator's Report and Decision states:

> First, Qwest asserts that it is not required to provide CFA and loop design changes under Section 252(c) of the Act. However, Qwest's testimony states that "[E]ngineering review of modifications to pending orders is . . . an essential activity in Qwest's provisioning process . . . " and that engineering review is required for both loop design changes and CFAs." Therefore, the evidence demonstrates that CFAs and design change functions appear to be necessary functions of the provisioning process which Qwest is obligated to provide under Section 251(d)(2)(B) of the Act. This section of the Act states that, in determining which network elements should be made available, consideration shall be given as to whether the failure to provide such access to the elements would impair the ability of the carrier seeking access to provide the service it seeks to offer. Qwest is the only entity that can provide these functions. If Eschelon does not have access to these functions, it cannot provide service to its customers without unanticipated delay. Therefore, CFA and design changes should be offered as functions equivalent to UNEs and thus be subject to the TELRIC cost standards.[2]

Qwest's proposal to assess so-called market-based rates for design changes is in direct conflict with the Arbitrator's determination that "Qwest is the only entity that can provide these functions" and the requirement for Qwest to offer design changes at TELRIC rates.

Q. WHAT IS YOUR RECOMMENDATION RELATED TO ISSUE 17?

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

[2] *In the Matter of the Petition for Arbitration of an Interconnection Agreement between Qwest Corp. and Eschelon Telecom, Inc. Pursuant to 47 USC Section 252(b).* Docket No. UT-063061, Arbitrator's Report

9.1.12 of Section 9 (UNEs).

Issue 19: Should Qwest be permitted to undertake marketing of its own activities based upon the identity of Charter's subscriber listings?

Q. PLEASE DESCRIBE THE DISAGREEMENT THAT EXISTS BETWEEN THE COMPANIES SURROUNDING ISSUE 19.

A. Issue 19 relates to whether the ICA should make clear that Qwest may not market to Charter's customers based on the directory listing information that Charter provides to Qwest, in conjunction with Qwest's obligation under Section 251(b)(3) to provide nondiscriminatory access to directory listing. Charter proposes a clear rule to ensure that Qwest does not impermissibly use subscriber information to engage in improper or illegal marketing activities. Qwest's proposal, on the other hand, leaves the door open for Qwest to be able use Charter's information to market to Charter customers in certain instances.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 19?

A. The disputed language is found in Section 10.4.2.4 in Section 10 (Ancillary Services):

> 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

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and Decision, Order No. 16, pp. 14-15.

Service as described in Section 10.6. **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. Should Qwest cease to be a Telecommunications Carrier, by virtue of a divestiture, merger or other transaction, this access grant automatically terminates.

Q. WHAT IS QWEST'S PROPOSED LANGUAGE FOR ISSUE 19?

A. Qwest's proposal for Section 10.4.2.4 is as follows:

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.

Q. WHAT IS CHARTER'S POSITION ON ISSUE 19?

A. Qwest should not be permitted to market to Charter subscribers by segregating, or otherwise identifying Charter's subscribers included in Qwest's database of

subscriber listings that is used for publishing white pages directories. Accordingly, Charter proposes language that appropriately prohibits Qwest from using Charter's listings for marketing purposes. At the same time, Charter's proposal only limits Qwest's ability to engage in marketing, and does not impose limits on third party directory assistance providers.

Q. YOU MENTION ABOVE QWEST'S OBLIGATION TO PROVIDE NONDISCRIMINATORY ACCESS TO DIRECTORY LISTING. PLEASE ELABORATE ON QWEST'S OBLIGATION.

A. Qwest's obligation is grounded in Section 251(b)(3) of the Telecommunications Act of 1996, which requires the following of local exchange carriers:

> (3) DIALING PARITY- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and ***the duty to permit all such providers to have nondiscriminatory access to*** telephone numbers, operator services, directory assistance, and ***directory listing,*** with no unreasonable dialing delays. (emphasis added)

The nondiscrimination requirements related to directory listing is further spelled out in the FCC's rules in 47 CFR § 51.217. Qwest's obligation to provide nondiscriminatory access to directory listing pursuant to the above federal rules and laws requires Qwest to accept a customer's listing information in a directory assistance database or in a directory compilation for external use, such as white

pages listings.[3] Where Qwest is obligated to provide such access pursuant to its obligations under federal law, it should not be allowed to use such information to engage in improper, or unlawful, retention or win-back marketing activities by identifying Charter's subscribers through the listing information submitted to Qwest.

Q. ARE YOU AWARE OF SITUATIONS IN WHICH INCUMBENTS HAVE USED CUSTOMER INFORMATION IN AN INAPPROPRIATE MANNER FOR MARKETING PURPOSES?

A. Yes. Just recently, the FCC issued an order finding that Verizon violated Section 222(b) of the Act by using, for customer retention marketing purposes, proprietary information of other carriers that it received as part of the local number porting process.[4] Just as it is inappropriate for Verizon to use information it receives from its competitors related to its local number portability obligations for marketing purposes, it is inappropriate for Qwest to use information it receives from its competitors related to its obligation obligations under Section 251(b)(3) for marketing purposes.

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[3] *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 Released, ¶160.

[4] *See, In the Matter of Bright House Networks, LLC et al, Complainants, v. Verizon California, Inc. et al,*

Q. WOULD QWEST'S PROPOSED LANGUAGE ALLOW IT TO USE CHARTER'S SUBSCRIBERS' INFORMATION FOR MARKETING PURPOSES?

A. Yes, in certain circumstances. Qwest's language states that Qwest will not use Charter's listings marked as nonpublished or nonlisted for marketing purposes and that Qwest will not market to Charter's end users based on segregation of Charter's listings. Qwest's proposal, therefore, would allow Qwest to use the subscriber information provided to Qwest by Charter for marketing purposes so long as those listings are not non-published or non-listed listings or segregated. Charter contends that such an outcome is inappropriate, because it provides Qwest an improper platform for marketing, and should therefore be rejected.

Q. QWEST HAS INDICATED THAT QWEST TREATS CHARTER'S LISTINGS THE SAME AS QWEST'S LISTINGS, AND AS SUCH, THERE IS NO ADVANTAGE TO QWEST FOR MARKETING PURPOSES.[5] IS THIS A USEFUL COMPARISON?

A. No. Since Qwest's listings belong to Qwest customers, there would be no reason for Qwest to market to these customers in an attempt to get them to switch their service to Qwest. For Charter's listings, however, Qwest has a real incentive to

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Defendants, File No. EB-08-MD-002, Memorandum Opinion and Order, 23 FCC Rcd 10704 (June 23, 2008).

[5] Exhibit A to Qwest's Arbitration Response, p. 39.

market to Charter's customers in an effort to encourage them to switch from Charter to Qwest. This provides an advantage to Qwest in that it allows Qwest an opportunity to market directly to its competitors' end user customers based on information Qwest receives in carrying out its federal obligations.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 19?

A. I recommend that the Commission adopt Charter's proposed Section 10.4.2.4 of Section 10 (Ancillary Services), and reject Qwest's proposed language.

Issue 20: Whether prior written authorization to release, sell, or make available, Charter listing information should be obtained by Qwest?

Q. WHAT IS THE DISAGREEMENT BETWEEN THE COMPANIES UNDER ISSUE 20?

A. Charter and Qwest disagree as to whether Qwest should seek Charter's authorization before Qwest provides Charter's listings to directory assistance providers. Charter's proposal would require such authorization, while Qwest's proposal would not.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 20?

A. Charter proposes the following language in Section 10.4.2.5 of Section 10 (Ancillary Services):

10.4.2.5 CLEC's 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.** 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.

Q. WHAT IS QWEST'S PROPOSED LANGUAGE FOR ISSUE 20?

A. Qwest proposes the following for Section 10.4.2.5:

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.

Q. PLEASE DESCRIBE THE RESULT OF EACH PARTY'S PROPOSED LANGUAGE?

A. A side-by-side reading of the disputed language set forth above shows that the parties' respective proposals for this issue are similiar with respect to the primary issue of whether Qwest can release Charter's listings to third parties without prior written authorization. Both parties propose language that would require Qwest to receive prior written authorization from Charter before releasing Charter's end users listings to third parties, and both parties include an exception to this requirement for releasing listings to directory assistance providers.

Q. IF THE PARTIES' PROPOSALS ARE SIMILAR ON THESE POINTS, WHY IS CHARTER'S PROPOSAL FOR SECTION 10.4.2.5 PREFERABLE TO QWEST'S?

A. Charter's language in Section 10.4.2.5 creates a general rule that Qwest will not release Charter's customer listings without prior written consent from Charter. However, Charter's language then provides for an exception to this rule for directory assistance providers whereby Qwest would be allowed to sell, make available, or release Charter's listings to directory assistance providers without prior authorization. Qwest's proposed language, on the other hand, includes unnecessary and duplicative language. Instead of creating a general rule with the sole exception relating to directory assistance providers, Qwest's proposal includes unnecessary language that attempts to distinguish between various parties based on whether or not prior written authorization would be required from

Charter before releasing Charter's listings to those parties ("....to directory publishers, or other third parties other than Directory Assistance providers.") Charter's proposal of a rule and an exception results in clearer, more definitive contract language. Further, immediately following the sentence where Qwest carves out directory assistance providers as a party to which Qwest can release Charter's directory listings without prior written authorization, there is agreed to language that states just that: i.e., no prior authorization from Charter is required for Qwest to sell, make available, or release Charter's listings to directory assistance providers. Accordingly, Qwest's proposed language is redundant and duplicative of language already agreed to by the parties, and is therefore unnecessary.

Q. ARE THERE OTHER REASONS WHY CHARTER'S PROPOSAL SHOULD BE ADOPTED INSTEAD OF QWEST'S PROPOSAL?

A. Yes. Charter's proposed language specifically requires that if Qwest releases Charter's end user customer listings to third parties – whether they are released to third parties with prior written consent from Charter or released to directory assistance providers without prior written consent – Qwest's release of that information will be done in accordance with and only to the extent required by applicable law. Qwest should not object to complying with applicable law as it relates to releasing Charter's customers' listings, and therefore, should not object

to including this language in the ICA.

Finally, Charter proposes language that would prohibit Qwest from providing Charter's listings to third parties for marketing purposes. I have explained above under Issue 19 why Qwest should not be allowed to use Charter's listings for Qwest's marketing purposes and the same holds true for Qwest selling Charter's listings to third parties who may also use that information for marketing purposes. To the extent that Qwest would seek Charter's prior written authorization to release Charter's listings to any other third party, this language puts Qwest on notice that it may not release this information without Charter's consent. In other words, Charter's proposed language would put Charter in charge of deciding whether subscriber information it has provided to Qwest may be used for marketing purposes, not Qwest.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 20?

A. I recommend that the Commission adopt Charter's proposal for Section 10.4.2.5 of the ICA.

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 THE DISAGREEMENT RELATED TO ISSUE 21?

A. Qwest objects to Charter's proposed language which recognizes that there should be no charges assessed by Qwest on Charter for primary directory listings. Notably, the parties agreed during negotiations that there is no charge for primary listings, and agreed to include the term "no charge" in the price list for primary listing (Exhibit A to the ICA, Section 10.3.1). However, Qwest apparently believes that it should be able to change the "no charge" in the price list to a non-zero rate sometime in the future without negotiating an ICA amendment with Charter. Therefore, Charter's proposal, which includes specific language in the ICA stating that no charge applies for primary listings, is crucial so that Qwest is not able to unilaterally begin charging Charter for primary listings in the future. An ICA amendment should be required for Qwest to make such a change, and Charter's proposal is designed to make sure that if Qwest wants to begin charging for primary listings in the future, it negotiates an amendment with Charter.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 21?

A. Charter proposes the following language for Sections 10.4.2.1.1 and 10.4.3.3:

> 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.
>
> 10.4.3.3 **There shall be no charge (recurring or non-recurring) to CLEC for the inclusion of a Primary Listing for CLEC's End Users.**

Q. WHAT IS QWEST'S PROPOSED LANGUAGE FOR ISSUE 21?

A. Qwest's proposal for Sections 10.4.2.1.1 and 10.4.3.3 are as follows:

> 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 monthly recurring charge. Additional terms regarding application of rates is provided in Section 10.4.3.
>
> 10.4.3.3 INTENTIONALLY LEFT BLANK

Q. DOES QWEST CONTEND THAT IT SHOULD BE ABLE TO ASSESS A CHARGE ON CHARTER FOR PRIMARY LISTINGS UNDER THE ICA THAT IS BEING ARBITRATED IN THIS PROCEEDING?

A. No, and this makes Qwest's opposition to Charter's proposal for Issue 21 particularly puzzling. Qwest acknowledges in its position statement that it does not currently assess a rate for a primary listing[6] and has provided nothing to support the notion that it should be allowed to assess a charge during the term of the ICA.

Q. WHAT IS QWEST'S PROPOSAL ON THIS ISSUE?

A. Qwest proposes to omit Charter's proposed language from Section 10.4.3.3 and proposes language in Section 10.4.2.1.1 suggesting that a non-recurring charge may apply or could apply in the future.

[6] Exhibit A to Qwest Arbitration Response, p. 40.

Q. WHY DOES CHARTER DISAGREE WITH QWEST'S PROPOSAL?

A. Qwest's approach does not account for the parties' mutual understanding and agreement not to assess charges for primary listings. Qwest's proposal to strike the reference precluding non-recurring charges in section 10.4.2.1.1 simply does not square with that agreement. Further, Qwest's proposed 10.4.2.1.1 implies that there may be charges for a primary listing that Qwest will assess in the future. The parties' ICA should reflect the current requirements as agreed to between the parties, which in this instance is that no charges apply for primary listings.

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 21?

A. I recommend that the Commission adopt Charter's proposed language in Section 10.4.3.3 and reject Qwest's proposed modification to 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. PLEASE SUMMARIZE THE DISAGREEMENT UNDER ISSUE 22.

A. Charter and Qwest disagree as to whether Qwest should be allowed to charge Charter for nonlisted and nonpublished listings when a Charter customer chooses not to include their listing information in directories. It is Charter's position that Qwest should not be allowed to charge Charter in these instances, and Qwest contends that it should be allowed to charge Charter. In addition, the companies

disagree as to whether Qwest should be allowed to assess a "market-based" rate for premium and privacy listings.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 22?

A. The disputed language under Issue 22 is in Sections 10.4.2.1.2 and 10.4.3. Charter's proposals for these sections are provided below:

> 10.4.2.1.2 CLEC will be charged for its facilities-based premium Listings (e.g., additional, foreign, cross-reference) at 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.
>
> ***
>
> 10.4.3.2 Premium Listings.
>
> ***
>
> 10.4.3.4 **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.**

Q. WHAT IS QWEST'S PROPOSAL FOR ISSUE 22?

A. Qwest's proposal for issue 22 is as follows:

> 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.

***

10.4.3.2 Premium and Privacy Listings.

***

10.4.3.4 [Intentionally left blank.]

Q. WHY SHOULD QWEST NOT CHARGE CHARTER FOR NONLISTED AND NONPUBLISHED LISTINGS, AS CHARTER PROPOSES?

A. The answer is straightforward: in the case of nonlisted or nonpublished listings (what is referred to as privacy listings), Qwest should not have to undertake any activities for which it should assess a charge. As such, it seems clear Qwest will incur no additional costs related to non-published listings and as such, should be entitled to no additional charges. Where Charter subscribers choose not to include their listing information in the directories (in which case there is no activities for Qwest to undertake to include these subscribers in the directory,[7] there should be no charge assessed upon Charter for *not* publishing the listing information. As I explained under Issue 17, when one party performs work at the request of the

other, the party performing the work should be compensated at cost-based, Commission approved, rates where the parties agree that such compensation is proper. And the converse holds true: when one party does *not* perform work for the other (as in the case of Qwest not having to undertake work related to getting information into directories related to nonlisted/nonpublished listings), the party *not* performing the work should *not* be compensated. This approach to compensation is fair and equitable to both parties.

Q. QWEST'S PROPOSED LANGUAGE WOULD ALLOW IT TO ASSESS A MARKET-BASED RATE FOR PREMIUM AND PRIVACY LISTINGS. PUTTING ASIDE FOR THE MOMENT WHETHER QWEST SHOULD BE ALLOWED TO CHARGE CHARTER FOR NONLISTED/NONPUBLISHED LISTINGS, IS A MARKET-BASED RATE FOR THESE LISTINGS APPROPRIATE?

A. No. I explained above under Issue 17 regarding miscellaneous services why it is inappropriate for Qwest to assess a "market-based" rate. The primary reason is that for there to be a "market-based" rate wherein competing market participants constrain the pricing flexibility of any individual provider, there must first be a "market" – or competing providers – for the service in question. As in the case of

[7] Agreed to language in Section 10.6.2.1.3.2 of the ICA states: "Nonlisted Listings and nonpublished Listings shall not be included in any directory produced in any format or medium."

the miscellaneous services discussed in Issue 17, there is no directory listings "market."

Q. HAVE ANY STATE COMMISSIONS REJECTED "MARKET-BASED" RATES FOR DIRECTORY LISTINGS?

A. Yes. Comcast is engaged in arbitration proceedings with Embarq before a number of state commissions including the Commissions of Washington, Texas, Pennsylvania, Minnesota, and New Jersey. These arbitrations raise a single issue: Embarq's attempt to assess a "market-based"[8] or non-cost based monthly recurring charge on Comcast for storage and maintenance of Comcast's directory listings (what has been referred to in those cases as the Directory Listings Storage and Maintenance charge or "DLSM" charge). Though the Washington Commission has yet to issue its decision in this arbitration, the state commissions that have issued decisions in the Comcast/Embarq arbitrations have rejected Embarq's market-based directory listings charge. For instance, the Texas Public Utility Commission found as follows:

> Embarq argues that the definition of "non-discriminatory access" for the purposes of §251(b)(3) does not prohibit non-cost based [a term Embarq used in the Comcast/Embarq arbitration cases synonymously with market-based] rates...The Arbitrators find that Embarq's interpretation of non-discriminatory access to be at odds

[8] *See, e.g.,* Direct Testimony of Alan Lubeck on behalf of United Telephone Company of the Northwest, d/b/a Embarq, Washington UTC Docket No. UT- 083025, July 2, 2008, page 2 of 25, lines 9-12.

with the FCC's definition of "non-discriminatory access."[9]

Not only did the Texas Commission, which adopted the Texas Arbitrator's recommendations, find that market-based rates for listings to be discriminatory, it concluded that "In fact, the standard industry practice appears to be for ILECs to maintain the complete directory listing information database for all telephone subscribers in a given service territory." This means that there is no competitive "market" for directory listings – rather the ILEC maintains the complete directory listing information database for all carriers that is purchased by directory publishers to public telephone directories, and as such, a competitor has no real option other than to get its subscribers' listing information into the ILEC's database. The arbitrator in the Pennsylvania proceeding has also rejected Embarq's proposed market-based rate in the arbitrator's proposed decision[10] (the Pennsylvania Commission's final decision is pending). Further, Comcast and Embarq settled this issue before the Minnesota Public Utilities Commission after Embarq agreed to Comcast's proposal that excluded Embarq's proposed market-based rate.[11]

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[9] Arbitration Award, Texas Public Utility Commission Docket No. 35402, dated September 22, 2008.
[10] Recommended Decision, Pennsylvania Public Utilities Commission Case A-310190, dated September 10, 2008.
[11] The Minnesota Public Utilities Commission has previously rejected Embarq's proposed market-based DLSM charge in an arbitration between Embarq and MCImetro. *See, In the Matter of the Petition of MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services for Arbitration of an Interconnection Agreement with Embarq Minnesota, Inc. Pursuant to 47 U.S.C. § 252(b)*. Minnesota PUC

Q. WHAT IS YOUR RECOMMENDATION FOR ISSUE 22?

A. The Commission should adopt Charter's proposed language for Section 10.4.3.4 and reject Qwest's proposed additions for Sections 10.4.2.1.2 and 10.4.3.2.

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. PLEASE DESCRIBE THE DISAGREEMENT RELATED TO ISSUE 23?

A. The parties disagree as to whether Qwest should be required to provide the same provisions for Charter's listings in relation to yellow page classified directories as it does for white pages directories. Charter's proposal would require the same treatment, while Qwest's proposal would not.

Q. WHAT IS CHARTER'S PROPOSED CONTRACT LANGUAGE FOR ISSUE 23?

A. Charter proposes the following language for Section 10.4.5 of Section 10 (Ancillary Services) and Section 15 (Qwest's Official Directory Publisher):

> 10.4.5 **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**

Docket No. P-430, 5321M-07-611, *Order Adopting Interconnection Agreement with Modifications and Establishing Effective Date*, dated February 6, 2008, pp. 8-9.

listings, multiple listings, and advertisements, shall be arranged between any affected End User and Qwest's contractor.

15. 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** yellow pages advertising **arrangements will be established directly between Qwest's Official Directory Publisher and any End Users seeking to place such advertising.**

Q. WHAT IS QWEST'S PROPOSED CONTRACT LANGUAGE FOR SECTIONS 10.4.5 AND 15?

A. Qwest's proposed language is as follows:

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.

Q. WHAT IS THE PURPOSE OF CHARTER'S PROPOSED LANGUAGE FOR ISSUE 23?

A. Charter's proposed Section 10.4.5 requires Qwest to provide the same treatment for CLEC listings in relation to classified (Yellow Pages) directories published by Qwest or on Qwest's behalf as it does for CLEC listings in relation to white pages directories. Charter's proposed Section 15 requires Qwest to include Charter's customers' listings in white and Yellow Pages directories to the same extent it provides to its own customers. In both sections, Charter makes clear that arrangements for listings in the Yellow Pages other than primary listings (such as bold-faced listings, multiple listings, and advertisements) will be arranged between the end user and Qwest's directory contractor.

Q. WHY SHOULD QWEST BE REQUIRED TO PROVIDE THE SAME PROVISIONS FOR CHARTER'S LISTINGS IN RELATION TO YELLOW PAGES DIRECTORIES AS THEY DO WHITE PAGES DIRECTORIES?

A. As discussed above under Issue 19, Qwest is obligated to provide nondiscriminatory access to directory listing pursuant to Section 251(b)(3) of the Act, which includes the act of listing a customer in a directory. The FCC's rules define "directory listings" broadly as follows:

> *Directory listings. Directory listings* are any information:

> (1) Identifying the listed names of subscribers of a telecommunications carrier and such subscriber's telephone numbers, addresses, or primary advertising classifications (as such classifications are assigned at the time of the establishment of such service), or any combination of such listed names, numbers, addresses or classifications; and
>
> (2) That the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.[12]

Thus, the duty to publish competitors' business customers in a Yellow Pages directory on a nondiscriminatory basis extends to incumbent carriers, like Qwest, who have caused their own customer listings to be published in the classified (Yellow Pages) book published by Qwest's directory publisher. Further, reference to "primary advertising classifications" in the language quoted above is a reference to classifications in the Yellow Pages.

Q. HAS IT BEEN PREVIOUSLY DETERMINED THAT AN ILEC SHOULD PROVIDE NONDISCRIMINATORY ACCESS TO YELLOW PAGES PUBLICATION TO A CLEC'S CUSTOMERS?

A. Yes. In *MCI v Michigan Bell*,[13] MCI appealed a decision of the Michigan Public Service Commission that did not require Ameritech Michigan to provide MCI

[12] 47 C.F.R. § 51.5.

[13] *MCI Telecommunications Corp. and MCImetro Access Transmission Services, Inc., Plaintiffs, v. Michigan Bell Telephone Company d/b/a Ameritech Michigan, Inc., et al.*, Defendants. Case No. 97-74362,United States District Court for the Eastern District of Michigan, Southern Division, 79 F. Supp. 2d 768; 1999 U.S. Dist. LEXIS 21674, December 22, 1999.

with access to (i.e., list MCI's customers in) Ameritech's Yellow Pages. The federal court granted MCI's appeal and ordered Ameritech to list MCI's customers in its Yellow Pages on a nondiscriminatory basis. In that appeal, Ameritech argued that it could not be required to publish MCI's customers in its Yellow Pages because Yellow Pages are published by Ameritech Publishing, Inc. and Ameritech Michigan does not publish a Yellow Pages directory. The court stated that "this argument is specious" and concluded that "the FCC did not indicate that 'the act of placing a customer's listing' must be performed directly by the incumbent carrier itself. To the contrary, the regulations define 'directory listings' more broadly as any information 'that the telecommunications carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format.' 47 C.F.R. § 51.5. Thus, the duty to publish competitors' business customers in a Yellow Pages directory on a nondiscriminatory basis extends to incumbent carriers who have caused their own customers listings to be published in a Yellow Pages directory." The court further found that the "issue of whether Ameritech Publishing is an affiliate of Ameritech is not relevant because the regulation is drafted more broadly. 'Directory listings' also include those that an incumbent carrier has 'caused to be published.' 47 C.F.R. § 51.5. Ameritech causes its own customers to be published in the Ameritech PagesPlus Yellow Pages. Therefore, Ameritech has the duty to provide nondiscriminatory access to

such Yellow Pages publication to MCI's customers."

Similarly, in *US WEST v Hix*,[14] the court concluded that placing CLEC listings in Yellow Pages directories was part and parcel of the obligation to provide nondiscriminatory access to directory listings under the Act. The court found:

> 13. In sum, this Court finds that an interpretation of nondiscriminatory access to directory listings that would allow USWC to perpetuate this aspect of its former monopoly by refusing to publish directory listings of CLEC customers on equal terms and conditions as USWC provides its own customers would discriminate against new entrants to the telecommunications market and therefore violate the Act. Nondiscriminatory access to directory listings under the Act extends to the actual act of placing a CLEC customer's listing information in the yellow pages, the white pages, and directories published in any other format on equal terms, rates and conditions as USWC provides to its customers.
>
> 14. The Court also rejects USWC's argument that the CPUC did not have the authority to bind Dex since Dex is a separate corporate entity apart from USWC and is the one that actually publishes the directories. USWC does not dispute the CLEC's assertion that Dex is an affiliate of USWC. FCC regulations mandate that nondiscriminatory access to directory listings must be provided by USWC with respect to directory listings that USWC or "an affiliate has published, caused to be published, or accepted for publication in any format." 47 C.F.R. § 51.5. The CPUC was entitled to rely on the FCC's interpretation of the Act in holding that USWC's obligations to ensure that listings for new entrants' customers are published in its directories extends to ensuring that listings for those customers are included in directories published by Dex.

[14] *U S WEST Communications, Inc., a Colorado corporation, Plaintiff, v. Robert J. Hix, et al., Defendants; Civil Action No. 97-D-152* (Consolidated with Nos. 97-D-387, 97-D-934, 97-D-1667, 97-D-2047, 97-D-2096 and 98-D-934), United States District Court for the District of Colorado, 93 F. Supp. 2d 1115; 2000 U.S. Dist. LEXIS 5088, April 13, 2000.

Q. WHY DOES CHARTER OPPOSE QWEST'S PROPOSED LANGUAGE IN SECTION 15?

A. As explained above, Qwest is required to treat CLEC listings in the same fashion in relation to Yellow Pages directories as they do white pages directories. Qwest's language says just the opposite – i.e., "Qwest and CLEC agree that certain issues outside the provision of basic white page Directory Listings, such as yellow pages advertising, yellow pages Listings, ...will be the subject of negotiations between CLEC and directory publishers, including Qwest's Official Directory Publisher." Further, Qwest's reason for objecting to Charter's language does not address the real issue. Qwest's position statement for Issue 23 in Exhibit A to Qwest's Arbitration Response states:

> The additional language is not necessary because Qwest provides its directory listings database that includes Qwest and CLEC customers, to directory publishers in the industry standard OBF approved format that does not contain font or print formats, "type of business" classifications, page placements and does not specify white or yellow pages. This type of individual requests and specific requirements are negotiated between the publisher and the end-user.

Despite Qwest's discussion of individual request such as print format being addressed between the publisher and the end user in response to Charter's proposal, Charter's proposed language specifically states that arrangements for listings in a classified directory other than primary listings, such as print formats "shall be arranged between any affected End User and Qwest's contractor."

Hence, Charter's language already addresses the concern discussed by Qwest, so it is a non-issue. The issue is the extent to which Charter's customers will receive a primary listing in both white and Yellow Pages just as Qwest's customers do – an issues Qwest's response impermissibly ignores.

Q. WHAT IS YOUR RECOMMENDATION ON ISSUE 23?

A. The Commission should 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. PLEASE SUMMARIZE THE DIFFERENCES BETWEEN THE COMPANIES' PROPOSALS ON ISSUE 24.

A. The companies agree that when one party initiates an audit, that party assumes responsibility to pay for the audit unless the auditor discovers a significant difference between the amount billed and the amount owed, in which case, the non-requesting party shall pay the requesting party's commercially reasonable expenses associated with the audit. The companies, however, disagree as to the reasonable threshold for determining whether a significant difference exists. Charter proposes for that threshold to be 10%, and Qwest proposes 5%. A second disagreement revolves around whether the non-requesting party must share the

cost of the auditor if the non-requesting party requests an independent auditor mutually agreed to by the parties. Charter's proposal is that if the audited (or non-requesting) party requests an independent auditor, the same cost obligations would apply as described above – i.e., the requesting party is responsible for the cost of the auditor unless a significant discrepancy is discovered by the auditor. Qwest, on the other hand, attempts to shift half of the cost of the auditor to the audited party if that party requests a mutually agreeable independent auditor whether or not the auditor discovers a significant discrepancy. Charter believes the two issues should be separate, i.e., the parties should be able to choose a mutually agreeable auditor without the audited party being required to halve the bill even when the auditor finds no significant problems.

Q. WHAT IS CHARTER'S PROPOSED LANGUAGE FOR ISSUE 24?

A. Charter proposes the following language for Issue 24, found in Sections 18.2.8.2, 18.2.9, and 18.2.10:

> 18.2.8.2 Notwithstanding the foregoing, the non-requesting Party shall pay all of the requesting Party's commercially reasonable expenses in the event an Audit or Examination identifies a difference between the amount billed and the amount determined by the Audit **to be owed** that exceeds **ten** percent **(10%)** of the amount billed and results in a refund and reduction **of at least ten percent (10%)** in the Billing to the requesting Party.
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> 18.2.9 The **Audited** Party **may require** that an Audit be conducted by a mutually agreed-to independent auditor, which agreement will not be unreasonably withheld or delayed by **either**

Party. Under this circumstance, the costs of the independent auditor shall be paid for by the Party requesting the Audit subject to Section 18.2.8.2.

18.2.10 In the event that the non-requesting Party requests that the Audit be performed by an independent auditor, the Parties shall mutually agree to the selection of the independent auditor. Under this circumstance, the costs of the independent auditor shall be **established pursuant to the terms set forth in Section 18.2.9, above. However, t**he portion of this expense borne by the requesting Party shall be borne by the non-requesting Party if the terms of Section 18.2.8.2 are satisfied.

Q. WHAT IS QWEST'S PROPOSED LANGUAGE FOR ISSUE 24?

A. Qwest's proposed language for Sections 18.2.8.2, 18.2.9 and 18.2.10 is shown below:

18.2.8.2 Notwithstanding the foregoing, the non-requesting Party shall pay all of the requesting Party's commercially reasonable expenses in the event an Audit or Examination identifies a difference between the amount billed and the amount determined by the Audit that exceeds five percent (5%) of the amount billed and results in a refund and/or reduction in the Billing to the requesting Party.

18.2.9 The Party requesting the Audit may request that an Audit be conducted by a mutually agreed-to independent auditor, which agreement will not be unreasonably withheld or delayed by the non-requesting Party. Under this circumstance, the costs of the independent auditor shall be paid for by the Party requesting the Audit subject to Section 18.2.8.2.

18.2.10 In the event that the non-requesting Party requests that the Audit be performed by an independent auditor, the Parties shall mutually agree to the selection of the independent auditor. Under this circumstance, the costs of the independent auditor shall be shared equally by the Parties. The portion of this expense borne by

the requesting Party shall be borne by the non-requesting Party if the terms of Section 18.2.8.2 are satisfied.

Q. WHAT IS THE BASIS FOR CHARTER'S PROPOSAL FOR ISSUE 24?

A. The party requesting the audit of the other party must assume some responsibility for the costs of the audit, unless the audit reveals significant differences in the amounts owed and the amounts billed (or should have been billed), in which case it makes sense for the audited party to pay the costs associated with the audit. This is a fair outcome because if the audited party is shown to have materially underpaid the Billing Party or overbilled the Billed Party, it would show that the actions of the audited party warranted such an audit, and therefore, the audited party should be financially responsible for the audit. However, if the auditor does not find any material underpayment/overbilling, then the audit requested by the requesting party was not warranted, and therefore, the audited party should not be financially responsible for the audit. However, in the case of Charter, the threshold for determining whether a difference exists that would have warranted the audit should be set at 10% of the difference between the billed amounts and the amounts owned determined by the audit, as requested by Charter – not the 5% threshold proposed by Qwest.

Q. WHY IS THE 10% THRESHOLD PROPOSED BY CHARTER SUPERIOR TO THE QWEST-PROPOSED 5% THRESHOLD?

A. The higher 10% threshold is an appropriate differential level due to the fact that the amounts billed to Charter will generally be relatively small as compared to other CLECs that rely upon Qwest-provided UNEs or resale of Qwest's retail services. Where the amounts billed are relatively small, the 5% threshold proposed by Qwest would be more easily triggered even though the total dollar amounts in question may be relatively minor. In other words, it is an issue of materiality. While the disputed 5% difference might or might not be material for most CLECs who buy UNEs and other products from Qwest, it very likely won't be for Charter. By imposing a 5% threshold on Charter when it purchases relatively fewer services from Qwest, in effect, holds Charter to a higher standard than UNE-based or resale based CLEC, because a significant difference for a UNE-based/resale-based in dollar terms would be higher than a significant difference for Charter. As a result, Charter could be forced to pay for an audit requested by Qwest even when relatively little money is at stake.

Q. WHY SHOULD THE REQUESTING PARTY STILL BE RESPONSIBLE FOR THE COSTS OF THE AUDITOR EVEN IF THE AUDITED PARTY REQUESTS A MUTUALLY AGREEABLE INDPENDENT AUDITOR (AS PROPOSED BY CHARTER)?

A. As described above, it is Charter's position that the relative discrepancy

discovered by the auditor (i.e., 10%) should be the only trigger as to who pays for the audit. The idea of which auditor is chosen is a separate issue and choosing a mutually agreed upon auditor just makes sense between commercial partners like Qwest and Charter (and is likely to limit dispute as to the auditors' findings). Requiring the parties to share the cost of an independent, mutually agreeable auditor, as proposed by Qwest, would shift more costs to the audited party, whether or not it is ultimately determined to be at fault. Simply put, 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 necessary based upon findings of material misreporting or overbilling. At that point, the audited party becomes the cost-causer. Whether the parties chose a mutually agreed upon auditor or not does not change either of those facts.

Q. WHAT IS YOUR RECOMMENDATION ON ISSUE 24?

A. The Commission should adopt Charter's proposed language for Sections 18.2.8.2, 18.2.9, and 18.2.10.

III. CONCLUSION

Q. DOES THAT CONCLUDE YOUR TESTIMONY?

A. Yes, it does.