

**BEFORE THE WASHINGTON STATE
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 (b)**

DOCKET NO. UT-083041

**REBUTTAL TESTIMONY
OF RENÉE ALBERSHEIM
QWEST CORPORATION**

(Disputed Issue Nos. 1, 2, 3, 4, 5, 6, 6b, 7 and 8)

NOVEMBER 17, 2008

TABLE OF CONTENTS

I.	IDENTIFICATION OF WITNESS	1
II.	PURPOSE OF TESTIMONY	1
III.	ISSUE 1 – DISCONNECTING SERVICE	2
IV.	ISSUE 2 – BACKBILLING	5
V.	ISSUE 3 - DEPOSITS	7
VI.	ISSUE 4 – INSURANCE	9
VII.	ISSUE 5 – LIMITATION OF LIABILITY	14
A.	Gross Negligence	14
B.	Damages	16
C.	Listings	18
VIII.	ISSUE 6 – INDEMNIFICATION	20
IX.	ISSUE 6b – INDEMNIFICATION AND SETTLEMENT	23
X.	ISSUE 7 – INDEMNIFICATION AND INTELLECTUAL PROPERTY	25
XI.	ISSUE 8 – WARRANTIES	26
XII.	CONCLUSION	28

1

I. IDENTIFICATION OF WITNESS

2

Q. PLEASE STATE YOUR NAME, OCCUPATION AND BUSINESS ADDRESS.

3

4

A. My name is Renée Albersheim. I am employed by Qwest Corporation ("Qwest"), as a Staff Advocate. I am testifying on behalf of Qwest. My business address is 1801 California Street, 24th floor, Denver, Colorado, 80202.

5

6

7

Q. ARE YOU THE SAME RENÉE ALBERSHEIM THAT SUBMITTED DIRECT TESTIMONY ON OCTOBER 8, 2008?

8

9

A. Yes, I am.

10

II. PURPOSE OF TESTIMONY

11

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

12

A. The purpose of my testimony is to respond to the direct testimony of Charter witnesses Cosway, Giaminetti and Starkey related to Disputed Issues Nos. 1, 2, 3, 4, 5, 6, 6b, 7 and 8.

13

14

15

Q. FIRST, CAN YOU MAKE A GENERAL OBSERVATION REGARDING THE TESTIMONY OF CHARTER'S WITNESSES ON THE ISSUES IN SECTION 5 OF THE INTERCONNECTION AGREEMENT?

16

17

18

A. Yes. Mr. Starkey stated several times in his testimony that he was not a lawyer, and he had to consult counsel regarding the issues he was covering. In Qwest's view these are issues that are both legal issues and issues that directly and immediately impact how the companies do business with each other. These issues all relate to how companies do business with each other, and whether or not they are more or

19

20

21

22

1 less likely to have to litigate disputes. Increased litigation means increasing the cost
2 of doing business. Not just in these difficult financial times, but at all times, Qwest
3 considers it prudent to find ways to reduce the cost of doing business, and one way
4 to do that is to establish contracts with its customers that reduce the likelihood of
5 litigation costs. All of the issues in Section 5 can be tied back to that core business
6 consideration.

7
8 **III. ISSUE 1 – DISCONNECTING SERVICE**

9 **Q. WHAT IS THE PRIMARY POINT OF DISAGREEMENT REGARDING**
10 **ISSUE 1?**

11 A. The primary issue here is whether or not Qwest can disconnect Charter services for
12 non-payment of undisputed bills without first obtaining permission of the
13 Commission. Charter would like to insert the Commission into this process, giving
14 Charter the opportunity to delay disconnections for non-payment.

15 **Q. HOW DOES MS. GIAMINETTI PRESENT CHARTER’S POSITION ON**
16 **THIS ISSUE?**

17 A. Ms. Giaminetti presents this as an issue about termination of the agreement.¹ That
18 is not an accurate presentation of the issue. Paragraphs 5.4.3 and 5.13.1 are about
19 the disconnection of service for non-payment. The agreement is not terminated by
20 these actions.

21

¹ Giaminetti Direct at page 4.

1 **Q. MS. GIAMINETTI CLAIMS THAT QWEST’S LANGUAGE PERMITS**
2 **“UNILATERAL DISCONNECTION OF SERVICE”.² IS THAT**
3 **ACCURATE?**

4 A. No. Qwest’s language permits disconnection of service only for non-payment of
5 undisputed amounts. If Charter disputes the charges it has received from Qwest,
6 Qwest cannot disconnect for non-payment. Qwest can only disconnect if Charter
7 has not paid its bills, and Charter has not disputed the bills.

8 **Q. MS. GIAMINETTI IS CONCERNED THAT SOME SUBSCRIBERS**
9 **“MIGHT LOSE SERVICE ALTOGETHER.”³ WHAT DOES THE**
10 **AGREEMENT ALLOW CHARTER TO DO IN ORDER TO PREVENT**
11 **SUBSCRIBERS FROM LOSING SERVICE?**

12 A. Charter can make timely payments for service to Qwest, or Charter can dispute the
13 charges it receives from Qwest. If Charter takes either action, Qwest cannot
14 disconnect for non-payment, and thus cannot cause Charter subscribers to lose
15 service altogether.

16 **Q. IN HER TESTIMONY, MS. GIAMINETTI DESCRIBES THE PURPOSE OF**
17 **INTERCONNECTION.⁴ DO THE PARTIES DISAGREE ABOUT THE**
18 **PURPOSE OF INTERCONNECTION?**

19 A. No. Ms. Giaminetti also describes the fundamental obligations of the parties.⁵

² Giaminetti Direct at page 6.

³ Giaminetti Direct at page 7.

⁴ Giaminetti Direct at page 8.

⁵ Giaminetti Direct at page 8.

1 What Ms. Giaminetti leaves out of her discussion is Charter’s obligation to pay
2 Qwest for the services it receives from Qwest. Ms. Giaminetti frames her
3 arguments in a discussion about termination of the agreement. As I have said,
4 Qwest is not terminating the agreement. Qwest is terminating services because bills
5 have not been paid. That is the crux of the issue here. Charter wants Commission
6 intervention to prevent Qwest from taking appropriate actions when Charter does
7 not pay for services, and Charter does not dispute that the payments are owed.

8 **Q. MS. GIAMINETTI CLAIMS THAT CHARTER’S PROPOSAL WILL**
9 **“ENSURE THAT END USER CUSTOMERS OF EITHER PARTY ARE**
10 **NOT ADVERSELY AFFECTED BY A BILL DISPUTE.”⁶ IS THAT TRUE?**

11 A. No. The language at issue in paragraphs 5.4.3 and 5.13.1 deals with undisputed
12 bills. If Charter disputes the charges, then these paragraphs do not apply.

13 Paragraph 5.4.3 begins:

14 The Billing Party may disconnect services for failure by the billed Party to
15 make full payment with sixty (60) Days following the payment due date,
16 **less any good faith disputed amount** as provided....(Emphasis added)

17 Thus the paragraph only applies to undisputed bills. And paragraph 5.13.1 states:

18 If either Party defaults in the payment of any amount due hereunder, or if
19 either Party violates any other material provision of this Agreement, and
20 such default or violation shall continue for thirty (30) Days after written
21 notice thereof, the other Party **may seek relief in accordance with the**
22 **Dispute Resolution provision of this Agreement.** (Emphasis added)

23 The language on dispute resolution is contained in section 5.18. That language is
24 not at issue in this proceeding. Billing disputes are not the issue. The issue pertains
25 to non-payment of undisputed bills.

⁶ Giaminetti Direct at page 10.

1 **Q. MS. GIAMINETTI CLAIMS THAT CHARTER’S LANGUAGE IS**
2 **“CONSISTENT WITH THE PRACTICE IN THE INDUSTRY, AND THE**
3 **ACTUAL EXPERIENCE OF BOTH PARTIES.”⁷ IS CHARTER’S**
4 **LANGUAGE CONSISTENT WITH QWEST’S EXPERIENCE?**

5 A. No. Qwest has disconnected the service of carriers that have not paid their
6 undisputed bills. Therefore with regard to Qwest, Ms. Giaminetti’s claim is not
7 accurate. In fact, the practice of the industry in Washington is consistent with
8 Qwest’s experience.

9 **Q. SO WHAT CAN CHARTER DO TO ENSURE THAT “WASHINGTON**
10 **CONSUMERS WILL NOT BE HARMED.”⁸**

11 A. Charter can make timely payments to Qwest, or Charter can raise good faith
12 disputes if it believes Qwest’s bills are not correct.

13 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
14 **REGARDING THE LANGUAGE FOR DISCONNECTING SERVICE IN**
15 **SECTIONS 5.4.3 AND 5.13.1?**

16 A. It is my recommendation that this Commission approve Qwest’s language for
17 disconnecting service when undisputed bills are not paid on time.

18

19 **IV. ISSUE 2 – BACKBILLING**

20 **Q. WHAT IS THE DISAGREEMENT BETWEEN QWEST AND CHARTER**

⁷ Giaminetti Direct at page 12.

⁸ Giaminetti Direct at page 12.

1 **REGARDING BACKBILLING?**

2 A. Qwest and Charter disagree regarding the time period for which back-billing should
3 be permitted under the interconnection agreement. Qwest's language allows for a
4 two year back-billing period. Charter wishes to change the back-billing period to
5 one year.

6 **Q. MS. GIAMINETTI MENTIONS THE FCC'S TWO YEAR TIME PERIOD**
7 **FOR BACK-BILLING.⁹ DOES SHE PROVIDE ANY EVIDENCE OR**
8 **SUPPORT FOR THE NOTION THAT THE FCC'S TWO YEAR TIME**
9 **PERIOD IS NOT PERMISSIBLE?**

10 A. No. Ms. Giaminetti's argument concentrates on Charter's desire to resolve business
11 disputes quickly. This issue is not about business disputes. It is about billing.
12 Qwest might discover that it has failed to bill Charter for services that Charter has
13 received from Qwest. Charter's language would prevent Qwest from recovering
14 more than one year of billing for those services. The same limitation would exist if
15 Qwest were to discover that it had over-billed Charter. Charter has provided no
16 evidence why either party should not be properly compensated for services
17 rendered within the two year time period permitted by the FCC.

18 **Q. ARE THERE OTHER PROVISIONS IN THE CONTRACT DEALING**
19 **WITH BUSINESS DISPUTES BETWEEN THE PARTIES?**

20 A. Yes. Charter and Qwest have agreed to language in Section 5.18 that allows either
21 party to take a dispute to the FCC, to a state Commission, or to court. If Charter

⁹ Giaminetti Direct at page 16.

1 brings a dispute with Qwest to any one of these forums, provisions are available for
2 Charter to seek expedited consideration of the dispute. It is notable that this section
3 includes timetables that are intended to produce speedy resolution of these disputes
4 via negotiations of the parties. It provides for dispute resolution by another body if
5 these negotiations fail. The point is that Charter's concern for speedy resolution of
6 business disputes is directly addressed by the interconnection agreement.

7 **Q. IF CHARTER DISAGREES WITH A BACK-BILLED AMOUNT, IS**
8 **CHARTER REQUIRED TO PAY NO MATTER WHAT?**

9 A. No. As with any bill, Charter may dispute the bill. Charter may prove to Qwest
10 that Qwest's back billing is in error. If, through the dispute process, Qwest is able
11 to demonstrate that the back-billing is correct, Charter would then need to pay
12 Qwest. If Charter is still not satisfied, then Charter may invoke the dispute
13 provisions of the interconnection agreement as discussed above.

14 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
15 **REGARDING THE LANGUAGE FOR BACK-BILLING IN SECTIONS**
16 **5.4.4.3 AND 5.4.10?**

17 A. The Commission should approve Qwest's language permitting a two-year time
18 period for back-billing.

19 **V. ISSUE 3 - DEPOSITS**

20 **Q. WHAT IS IN DISPUTE BETWEEN QWEST AND CHARTER WITH**
21 **REGARD TO DEPOSITS?**

22 A. Qwest's language permits Qwest to seek additional deposits from Charter if there

1 are material changes to Charter's financial condition. Charter seeks to make the
2 deposit requirement reciprocal.

3 **Q. MS. GIAMINETTI PREDICATES HER POSITION ON THE POSSIBILITY**
4 **THAT "CHARTER WILL HAVE A BASIS TO BILL QWEST FOR**
5 **TERMINATING TRAFFIC OR FOR SOME OTHER FUNCTION THAT**
6 **CHARTER UNDERTAKES IN CONJUNCTION WITH THE EXCHANGE**
7 **OF TRAFFIC."¹⁰ HAS CHARTER BILLED QWEST FOR ANY SERVICES**
8 **TO DATE?**

9 A. No.

10 **Q. IS THERE ANY CERTAINTY THAT CHARTER WILL BILL QWEST FOR**
11 **TERMINATING TRAFFIC?**

12 A. No. There are issues in this arbitration that could have some impact on the services
13 for which Charter may bill Qwest. Qwest witness William Easton is responding to
14 Charter's proposals on these issues.

15 **Q. DOES MS. GIAMINETTI DEFINE THE "SOME OTHER FUNCTION"**
16 **THAT CHARTER MIGHT BILL QWEST FOR?**

17 A. No. It is not possible to respond to such a nebulous claim. I am not aware of
18 anything else that Charter could bill Qwest for.

19 **Q. ARE YOU AWARE OF ANY PLANS BY QWEST TO PURCHASE**
20 **SERVICES FROM CHARTER UNDER THIS CONTRACT?**

¹⁰ Giaminetti Direct at page 21.

1 A. No. At this time, Qwest does not purchase services from Charter, and I am not
2 aware of any plans to make any purchases in the future under this interconnection
3 agreement.

4 **Q. CHARTER ALSO PROPOSES LANGUAGE LIMITING DEPOSIT**
5 **AMOUNTS TO NET MONTHLY CHARGES. IS QWEST EVER LIKELY**
6 **TO OWE MORE TO CHARTER THAN CHARTER OWES TO QWEST,**
7 **GIVEN THE FACTS DISCUSSED ABOVE?**

8 A. No. Thus, Charter's proposal to limit deposits contradicts Charter's position that it
9 should be allowed to demand deposits from Qwest.

10 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
11 **REGARDING THE LANGUAGE FOR DEPOSITS IN SECTIONS 5.4.5, 5.4.6**
12 **AND 5.4.7?**

13 A. The Commission should approve Qwest's language permitting Qwest to seek
14 additional deposits from Charter.

15

16 **VI. ISSUE 4 – INSURANCE**

17 **Q. WHAT IS THE ISSUE BETWEEN THE PARTIES REGARDING**
18 **INSURANCE?**

19 A. Qwest's contract language requires the application of a minimum industry rating of
20 A-VII for financial viability for insurance carriers under this agreement. Charter
21 proposes that the phrase "in good standing" be used instead.

1 **Q. DOES MS. COSWAY DEFINE “IN GOOD STANDING”?**

2 A. No. Ms. Cosway does not define “in good standing.” She provides no qualitative
3 or quantitative measure that can give Qwest some indication of the financial viability
4 of an insurance carrier that is “in good standing.”

5 **Q. DOES MS. COSWAY PROVIDE AN INDUSTRY STANDARD BASIS FOR**
6 **“IN GOOD STANDING?”**

7 A. No. Qwest has no way to compare “in good standing” as a measure of an insurance
8 carrier’s financial viability as compared to other insurance carriers.

9 **Q. MS. COSWAY CLAIMS THAT THERE IS “NO NEED TO SPECIFY**
10 **INSURANCE REQUIREMENTS” AS QWEST PROPOSES.¹¹ DOES**
11 **QWEST AGREE?**

12 A. No. Qwest needs some assurance that Charter’s insurance carrier(s) will be able to
13 pay any claims that arise under this agreement. The Best’s rating gives Qwest
14 specific details regarding an insurance carrier’s financial viability, and thus its
15 ability to pay.¹² This provides a qualitative, industry-standard measure that gives
16 Qwest the assurance that any claims that must be paid by Charter’s carrier will be
17 paid.

18 **Q. MS. COSWAY STATES THAT “CHARTER HAS EVERY INCENTIVE TO**
19 **MAINTAIN ADEQUATE INSURANCE.”¹³ DOES MS. COSWAY**

¹¹ Cosway Direct at page 4.

¹² Exhibit RA-3T is a Guide to Best’s financial strength guidelines. See also Exhibit RA-4T, which provides further information regarding Best’s financial rating system.

¹³ Cosway Direct at page 4.

1 **PROVIDE ANY SPECIFICS REGARDING WHAT “ADEQUATE**
2 **INSURANCE” IS?**

3 A. No. Ms. Cosway does not define adequate insurance. She does not relate adequate
4 insurance to the financial viability of Charter’s chosen carrier(s). She provides no
5 specifics that Qwest can measure against any industry standard that gives Qwest
6 any assurance that Cosway’s carrier will be able to pay claims. In fact when given
7 the opportunity in discovery to provide clarity, Charter did not do so.¹⁴ In essence,
8 Ms. Cosway expects Qwest to trust Charter’s judgment in its choice of carrier(s).

9 **Q. MS. COSWAY STATES THAT CHARTER’S “FREEDOM TO CHOOSE**
10 **AMONG DIFFERENT PROVIDERS SHOULD NOT BE UNREASONABLY**
11 **CONSTRAINED BY QWEST.”¹⁵ IS QWEST UNREASONABLY**
12 **CONSTRAINING CHARTER’S ABILITY TO CHOOSE ITS INSURANCE**
13 **CARRIER(S)?**

14 A. Not at all. Qwest’s A-VII standard is a minimum standard. Best’s A ratings range
15 from A-I to A-XV. There are also ratings above A, including A+ and A++. A
16 search of carriers on Best’s website with ratings of A and above produces 102 pages
17 of carriers, with 20 carriers on each page. Thus Charter has numerous carriers to
18 choose from, and can hardly be considered unreasonably constrained. This wide
19 range of carriers and the fact that the rating Qwest has chosen is not the highest
20 rating negates Ms. Cosway’s contention that Qwest requires Charter only do

¹⁴ See Exhibit RA-5T – Charter Response to Qwest Data Request No. 12.

¹⁵ Cosway Direct at page 4.

1 business with the “best of the best”.¹⁶

2 **Q. MS. COSWAY CLAIMS THAT BECAUSE CHARTER IS A FACILITIES**
3 **BASED CLEC, “THERE WILL BE NO LEASING OF UNBUNDLED**
4 **NETWORK ELEMENTS.”¹⁷ DOES THIS HAVE ANY BEARING ON AN**
5 **INSURANCE CARRIER’S ABILITY TO PAY CLAIMS?**

6 A. No. What facilities are insured has no bearing regarding whether claims for
7 damage to those facilities can or will be paid. Ms. Cosway’s implication is that
8 because Charter is not leasing all possible facilities from Qwest, that Qwest’s risk is
9 somehow reduced. This reasoning is faulty on two levels. First it assumes that the
10 facilities in question are somehow less valuable, but it also assumes that this has
11 some relationship to whether or not claims will be paid. The fact is, Charter is
12 leasing facilities from Qwest, and those facilities must be covered for damage
13 caused by Charter. The Section at issue in this contract pertains to whether
14 Charter’s chosen insurance carrier will be able to cover such claims.

15 **Q. MS. COSWAY CLAIMS THAT CHARTER IS NOT LIKELY TO**
16 **COLLOCATE IN A QWEST OFFICE.¹⁸ DOES THIS HAVE ANY**
17 **RELEVANCE TO THE ABILITY OF CHARTER’S INSURANCE**
18 **CARRIER(S) TO PAY CLAIMS TO QWEST?**

19 A. Again, no. Whether or not Charter chooses to collocate is irrelevant to Charter’s

¹⁶ Cosway Direct at page 5.

¹⁷ Cosway Direct at page 5.

¹⁸ Cosway Direct at page 5.

1 insurer's ability to pay claims. Once again, Ms. Cosway's implication is that there
2 is less risk to Qwest if Charter is not collocated in Qwest's central offices. The
3 salient point is whether any claims will be paid, not where the damage causing
4 those claims occurs. It should be noted that Ms. Cosway states in the same breathe
5 that, "there could be a limited situation where Charter collocates in a Qwest
6 office."¹⁹ Given that possibility, Ms. Cosway's argument is thus negated.

7 **Q. IS A BEST'S RATING OF A-VII THE ONLY MINIMUM STANDARD**
8 **THAT QWEST IS WILLING TO USE TO MEASURE AN INSURER'S**
9 **FINANCIAL VIABILITY?**

10 A. No. Qwest offered Charter several alternatives, none of which were accepted.

11 These alternatives included:

- 12 • Self insurance – Qwest will allow a carrier to self-insure as long as the carrier
13 maintains a minimum net worth of \$50 Million.
- 14 • Captive Insurance – Charter may use a captive insurance company as long as
15 the company maintains \$10 Million in assets.
- 16 • Qwest is willing to accept an insurer with a Standard & Poor's rating of BBB.

17 These minimum standards are not plucked out of thin air. These standards are
18 based on guidelines provided by Marsh, which is an independent company that
19 provides financial analysis of insurers.²⁰

20 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**

¹⁹ Cosway Direct at page 5.

²⁰ Exhibit RA-6T is a copy of Marsh's Guidelines.

1 **REGARDING THE LANGUAGE FOR INSURANCE IN SECTION 5.6.1?**

2 A. The Commission should agree that a minimum standard Best’s rating of A-VII is
3 reasonable, and this Commission should approve Qwest’s language regarding
4 insurance.

5

6 **VII. ISSUE 5 – LIMITATION OF LIABILITY**

7 **Q. WHAT ARE THE ISSUES WITH REGARD TO LIMITATION OF**
8 **LIABILITY?**

9 A. There are several issues: whether the exceptions to limitations on liability should be
10 broadened; whether or not there should be limitations on damages; and whether or
11 not liability standards for listings should be changed for Charter.

12 **A. GROSS NEGLIGENCE**

13 **Q. MR. STARKEY CLAIMS THAT ALLOWING GROSS NEGLIGENCE TO**
14 **BE INCLUDED IN DETERMINATION OF LIABILITY CREATES**
15 **“ADDITIONAL INCENTIVE FOR BOTH PARTIES TO ENSURE THAT**
16 **THEIR ACTS...ARE REASONABLE AND APPROPRIATE.”²¹ DO YOU**
17 **AGREE?**

18 A. No. “Gross Negligence” is a legal term of art.²² Of course Qwest trains its
19 employees to behave according to standards of corporate conduct, and Qwest trains

²¹ Starkey Direct at page 11.

²² “Gross Negligence” is defined by *Black’s Law Dictionary* as “a conscious, voluntary act or omission in reckless disregard of a legal duty and of the consequences to another party, who may typically recover exemplary damages.”

1 employees to perform their respective job functions. Beyond asking employees to
2 exercise common sense, it is not possible to provide training on how to avoid gross
3 negligence. There are no hard and fast rules regarding whether or not a person has
4 acted in a grossly negligent matter. That determination can only be made in a legal
5 proceeding. Adding gross negligence to a determination of liability increases the
6 likelihood of litigation, because it will be necessary to determine whether or not
7 gross negligence has occurred.

8 **Q. HAS THIS COMMISSION RULED ON THE ISSUE OF GROSS**
9 **NEGLIGENCE PREVIOUSLY?**

10 A. Yes. The Commission agreed to add “gross negligence” to the exceptions for
11 limitations on liability.²³

12 **Q. IF THE COMMISSION HAS ALREADY RULED IN FAVOR OF ADDING**
13 **GROSS NEGLIGENCE TO THE EXCEPTIONS TO LIMITATIONS ON**
14 **LIABILITY WHY IS QWEST COMING BACK TO THE COMMISSION**
15 **TO ASK FOR A DIFFERENT RESULT NOW?**

16 A. Qwest believes this finding is inconsistent with the position the Commission took
17 on the issue of indemnity, and Qwest hopes to persuade the Commission that its
18 reasoning on that issue (which Charter has raised again as issue 6 in this
19 proceeding) should apply to the exceptions on limitations to liability. In the 271
20 case, the Commission found that indemnification should be limited to failure to

²³ See WA 271 28th Supplemental Order at ¶ 374.

1 perform under that agreement.²⁴ The Commission re-affirmed this position in its
2 order on reconsideration.²⁵ Qwest believes that if indemnification, which is the
3 compensation for loss or damage, should not include “gross negligence”, then
4 liability should also not include “gross negligence.” Otherwise, Qwest faces the
5 prospect of litigating the issue of whether gross negligence has taken place under
6 the liability terms of the contract, even though gross negligence does not apply
7 under the indemnity terms of the contract.

8 **Q. WHAT DOES QWEST ASK OF THE COMMISSION REGARDING THE**
9 **LANGUAGE FOR SECTION 5.8.4?**

10 A. Qwest asks the Commission to accept Qwest’s proposed language for Section 5.8.4,
11 and exclude “gross negligence” from the exceptions to limitations on liability.

12 **B. DAMAGES**

13 **Q. MR. STARKEY ARGUES THAT DAMAGES SHOULD BE EXPANDED**
14 **TO INCLUDE “ACTUAL, DIRECT DAMAGES.”²⁶ DO YOU BELIEVE**
15 **THAT IS APPROPRIATE?**

16 A. No. Again, this opens the door to further litigation, as it would then be necessary to
17 litigate the question of the scope and amount of damages, increasing costs to both
18 parties since they must pay to litigate the question. There is no practical business
19 need to incur such litigation costs. Qwest is also concerned that Charter’s language

²⁴ See WA 271 28th Supplemental Order at ¶ 396.

²⁵ See WA 271 31st Supplemental Order at ¶ 46.

²⁶ Starkey Direct at page 7.

1 is an expansion of liability that exposes Qwest to the risk of having to defend
2 against higher claims.

3 **Q. MR. STARKEY CLAIMS THAT WITHOUT THIS PROVISION,**
4 **CHARTER FACES THE POSSIBILITY OF NOT COLLECTING FULL**
5 **COMPENSATION FOR DAMAGES IT MAY SUFFER.²⁷ DO YOU**
6 **AGREE?**

7 A. No. Mr. Starkey's argument presumes that Charter has equal or greater facilities at
8 risk compared to Qwest, because Charter does not lease UNEs or resell Qwest
9 services.²⁸ That assumption is flawed. No matter where it takes place, Charter is
10 entering Qwest facilities in order to connect to Qwest's network, not the other way
11 around. And as I noted in the discussion of insurance above, Charter admits that it
12 may collocate in Qwest's central offices. Qwest has no plans to collocate in similar
13 Charter facilities.

14 **Q. MR. STARKEY PRESENTS A HYPOTHETICAL FIBER CUT TO**
15 **ILLUSTRATE HIS THEORY THAT CHARTER MAY NOT RECOVER**
16 **FULL DAMAGES FROM QWEST.²⁹ IS MR. STARKEY'S**
17 **HYPOTHETICAL PLAUSIBLE?**

18 A. No. It is not likely that Qwest will cut a Charter fiber in the process of
19 interconnecting Charter to Qwest's network. Qwest witness Phillip Linse will

²⁷ Starkey Direct at page 7.

²⁸ Starkey Direct at page 7.

²⁹ Starkey Direct at page 8.

1 discuss the technical reasons why this is not likely. Taking a broader view,
2 damages are to be considered in the context of actions taken by the parties within
3 this interconnection agreement. If Qwest were to cut a Charter fiber, it is more
4 likely to take place outside the context of activities associated with interconnection.
5 For example, Qwest might cut a fiber while digging to place its own fiber. That is
6 not an activity associated with interconnection, therefore the terms of the
7 interconnection agreement will not apply to that situation.

8 **Q. DOES CHARTER EVER SPECIFICALLY DESCRIBE WHAT IT**
9 **BELIEVES WOULD BE INCLUDED IN “ACTUAL DIRECT DAMAGES”?**

10 A. No, not clearly, and that is one of the problems with their proposal. Qwest believes
11 that Charter is trying to expand the measure of damages to include things such as
12 lost revenue, employee overtime, or anything else that Charter might consider
13 bringing to litigation over the measure of damages for a particular incident. No
14 other CLEC is entitled to such a calculation of damages under any other ICA.
15 Qwest believes that Charter’s language puts Qwest’s at risk out of proportion to any
16 failure Charter could experience.

17 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
18 **REGARDING THE LANGUAGE FOR DAMAGES IN SECTION 5.8.1?**

19 A. The Commission should adopt Qwest’s language regarding the calculation of
20 damages.

21 **C. LISTINGS**

22 **Q. WHAT IS THE ISSUE REGARDING LIABILITY AND LISTINGS?**

1 A. Qwest includes language in its interconnection agreement that states explicitly that
2 liability for listings is found in the tariff(s) that govern listings. Charter proposes to
3 delete that language.

4 **Q. MR. STARKEY CLAIMS THAT QWEST'S PROPOSAL IS OPEN-ENDED**
5 **AND AMBIGUOUS.³⁰ DO YOU AGREE?**

6 A. No. In fact the opposite is true. Qwest's tariffs govern the rates and terms for
7 directory listings.³¹ Leaving out language referencing the tariffs implies that the
8 rates and terms for listings are governed by the interconnection agreement, though
9 there is no language to that effect. It is not appropriate for Charter to receive terms
10 for directory listings that are different from all other carriers. It is also not
11 appropriate to impose obligations in an interconnection agreement on a service that
12 is governed by a tariff. Qwest is willing to make reference to the Washington
13 Exchange and Network Services Tariff, sections 2.4.4 and 5.7.1 (E and F) in this
14 paragraph in order to address Charter's concerns about ambiguity.

15 **Q. IS AMBIGUITY CHARTER'S ONLY CONCERN?**

16 A. No. Mr. Starkey admits that Charter wants to ensure that actual direct damages
17 cover damages related to errors in the provisioning of directory listings.³² It is
18 apparent that Charter wishes to expand its ability to collect damages beyond what is
19 permitted by the tariff and beyond what can be collected by other CLECs or other

³⁰ Starkey Direct at page 13.

³¹ See Exhibit RA-7T WNU-40 Exchange and Network Services Tariff, Sections 2.4.4 and 5.7.1.

³² Starkey Direct at page 13.

1 end users. Thus Charter's language gives it preferential terms over all other Qwest
2 customers.

3 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
4 **REGARDING THE LANGUAGE REFERENCING A TARIFF IN SECTION**
5 **10.4.2.6?**

6 A. The Commission should adopt Qwest's language regarding the reference to the
7 tariff governing directory listings.

8 **VIII. ISSUE 6 – INDEMNIFICATION**

9 **Q. THE CRUX OF THIS ISSUE IS INDEMNIFICATION. WHAT DOES IT**
10 **MEAN TO INDEMNIFY?**

11 A. To "indemnify" means to compensate a victim for loss.³³

12 **Q. MR. STARKEY CLAIMS THAT THE CHANGES CHARTER HAS MADE**
13 **TO THE LANGUAGE ON INDEMNIFICATION IN ORDER TO**
14 **INTRODUCE THE CONCEPT OF CONTRIBUTORY NEGLIGENCE TO**
15 **THE CONTRACT?³⁴ IS THAT REALLY THE RESULT OF CHARTER'S**
16 **CHANGES?**

17 A. No. While a finding of contributory negligence may result from litigation on
18 indemnification, the real result of Charter's changes is to expand the scope of
19 indemnification. Charter introduces the concepts of negligence, gross negligence
20 and willful misconduct as acts requiring indemnification. Qwest's language limits

³³ *Black's Law Dictionary*.

³⁴ Starkey Direct at page 18.

1 indemnification to acts to breach or failure to perform under the interconnection
2 agreement.

3 **Q. SO WHAT ARE THE REAL IMPACTS OF CHARTER'S PROPOSED**
4 **CHANGES?**

5 A. Once again, Charter's language changes increase the likelihood that there will be
6 litigation. It will be necessary to determine if negligence, gross negligence or
7 willful misconduct has taken place.

8 **Q. HAS THIS COMMISSION RULED ON THIS ISSUE PREVIOUSLY?**

9 A. Yes. As I noted in my direct testimony, and in the discussion of liability above, this
10 Commission agreed with Qwest's position that concepts of negligence should not
11 be introduced into a discussion of indemnification for breach of an interconnection
12 agreement.³⁵

13 **Q. DID CHARTER'S DIRECT TESTIMONY ADDRESS QWEST'S**
14 **CONCERNS REGARDING CREATION OF DEFINITIONS IN THIS**
15 **SECTION OF THE CONTRACT?**

16 A. No. Charter did not. In my direct testimony I raised Qwest's concern that Charter
17 proposes to create formal definitions for this section of the contract when these
18 terms are used elsewhere and may have a different meaning.

19 **Q. CAN YOU PROVIDE EXAMPLES OF SECTIONS IN THE CONTRACT**
20 **THAT CONTAIN THE SAME TERMS THAT CHARTER PROPOSES TO**

³⁵ See WA 271 28th Supplemental Order at ¶ 396. See also WA 271 31st Supplemental Order at ¶ 46.

1 **DEFINE WITHIN THE INDEMNIFICATION SECTION?**

2 A. Yes. The words “claim” and “loss” appear in several sections of the contract. The
3 word "claim" can be found in Sections 5.6.1.2, 5.9.1.1, 5.9.1.2, 5.9.2.1, 5.10.2,
4 5.18.1, 5.18.2, 5.20.1, 5.23.1, 9.3.5.4.1, 9.5.4.2.1, 10.3.6.3, 10.6.2.9.1. The word
5 "loss" can be found in Sections 5.8.1, 5.9.1.1, 5.9.1.2, 5.10.2, 5.20.1, 10.6.2.9.1,
6 11.17.

7 **Q. WHAT IS THE PROBLEM WITH CREATING DEFINITIONS FOR**
8 **TERMS IN ONE SECTION OF THE AGREEMENT WHEN THE SAME**
9 **WORDS ARE USED ELSEWHERE IN THE AGREEMENT?**

10 A. The problem is this creates the potential for confusion. Even though all of the
11 references I cited above use the words in lower case, interpreters of the contract
12 may well wonder if the definitions in the indemnity section should or should not be
13 applied when the same word is used elsewhere. There is no reason to create this
14 kind of confusion, and there is no need to create definitions for words in the
15 indemnity section of the contract that have the potential to impact other sections of
16 the contract.

17 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION**
18 **REGARDING THE LANGUAGE ON INDEMNIFICATION IN SECTIONS**
19 **5.9.1, 5.9.1.1 AND 5.9.1.2?**

20 A. The Commission should adopt Qwest’s language for indemnification.

21

1 **IX. ISSUE 6B – INDEMNIFICATION AND SETTLEMENT**

2 **Q. WHAT IS THE ISSUE BETWEEN QWEST AND CHARTER REGARDING**
3 **INDEMNIFICATION AND SETTLEMENT?**

4 A. The issue is whether Charter may use the language of the contract to force Qwest to
5 make an unreasonable choice – accept a bad settlement offer or pay for ongoing
6 legal proceedings.

7 **Q. MR. STARKEY CLAIMS THAT “CHARTER’S LANGUAGE IS**
8 **PREFERRED BECAUSE IT ALIGNS THE INTERESTS OF EACH PARTY,**
9 **AND PROMOTES THE ACCEPTANCE OF REASONABLE**
10 **SETTLEMENT OFFERS.”³⁶ DO YOU AGREE?**

11 A. No. What may be a reasonable settlement to one party may not be reasonable to the
12 other. Charter’s language provides no room for this potential difference.

13 **Q. CAN YOU PROVIDE EXAMPLES OF THE KIND OF PROBLEMS THAT**
14 **CHARTER’S LANGUAGE CAN CAUSE?**

15 A. Yes. One problem is that the issue of whether a party is in fact indemnified may
16 not be resolved until the conclusion of the litigation. So, for example, Charter and
17 Qwest are sued by a Charter end-user. Charter could dispute its duty to indemnify
18 because it claims the injury was caused by a Qwest employee’s negligence. Under
19 Charter’s proposed language, Charter is required to defend the case even if it
20 disputes the duty to indemnify. If the end user makes a settlement offer for say
21 \$1,000,000.00, Charter could sign off on this offer and then Charter’s language puts

³⁶ Starkey Direct at page 20.

1 the onus on Qwest to accept the offer. If Qwest feels the offer is unreasonable, then
2 Qwest must handle the defense at its own cost. This would be so even if the issue
3 of indemnity is a separate claim that will not be resolved until the end of the
4 litigation. This puts Qwest in an untenable position.

5 **Q. ARE THERE OTHER POTENTIAL DRAWBACKS TO CHARTER'S**
6 **LANGUAGE?**

7 A. Yes. As another example, there could be a non-monetary attribute of the settlement
8 that Qwest does not agree with, such as attributing the blame to Qwest for the loss
9 being indemnified. Qwest is left with a Catch-22 decision, either accepting blame
10 or paying to defend. Charter's language provides no requirement for Charter to
11 negotiate a settlement that is reasonable to Qwest.

12 **Q. WHAT MAKES QWEST'S LANGUAGE MORE REASONABLE**
13 **REGARDING INDEMNIFICATION AND SETTLEMENT?**

14 A. Qwest's language more accurately reflects the allocation of risk between the
15 indemnified and indemnifying parties. Charter's language in the examples
16 provided above denies Qwest input on the settlement except for the decision to
17 approve or disapprove. If Qwest disapproves, then Qwest is forced to pay the costs
18 of litigation. The law already addresses the issue of whether rejection of a
19 settlement is reasonable, as Charter could sue Qwest for bad faith and, if successful,
20 could recoup its litigation costs and any extra exposure it faces. Charter's language
21 switches the risk to the indemnified party, forcing this party to choose between
22 accepting an unreasonable settlement or paying the costs of litigation.

1 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION WITH**
2 **REGARD TO THE LANGUAGE PERTAINING TO INDEMNIFICATION**
3 **AND SETTLEMENT IN SECTION 5.9.2.3?**

4 A. This Commission should agree that Charter's language places an unfair burden
5 upon Qwest with regard to settlements, and should choose Qwest's language for the
6 Interconnection Agreement.

7 **X. ISSUE 7 – INDEMNIFICATION AND INTELLECTUAL PROPERTY**

8 **Q. WHAT IS THE PRIMARY ISSUE BETWEEN THE PARTIES ON**
9 **SECTION 5.10?**

10 A. The primary issue is Charter's desire to add the phrase "or with knowledge" to the
11 paragraph.

12 **Q. MR. STARKEY CLAIMS THAT THERE SHOULD BE NO**
13 **INDEMNIFICATION FOR INTELLECTUAL PROPERTY**
14 **INFRINGEMENT WITHOUT KNOWLEDGE.³⁷ DO YOU AGREE?**

15 A. No. While that argument may seem logical on its face, what it does is add a level of
16 uncertainty to indemnification. As with the language changes proposed elsewhere
17 in this interconnection agreement, the determination of knowledge becomes a
18 matter for litigation. It will be necessary to resolve 'who knew what and when did
19 they know it.' And it will be necessary to determine if that knowledge can be
20 attached to the alleged infringement.

³⁷ Starkey Direct at page 24.

1 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION WITH**
2 **REGARD TO THE LANGUAGE PERTAINING TO INDEMNIFICATION**
3 **AND INTELLECTUAL PROPERTY IN SECTION 5.10?**

4 A. This Commission should agree that Charter's language creates ambiguity with
5 regard to proving knowledge, and should choose Qwest's language for the
6 Interconnection Agreement.

7

8 **XI. ISSUE 8 – WARRANTIES**

9 **Q. MR. STARKEY CLAIMS THAT THE ISSUE HERE IS QWEST PROPOSES**
10 **VAGUE AMBIGUOUS LANGUAGE ON WARRANTIES WHILE**
11 **CHARTER'S PROPOSAL IS DIRECT AND UNAMBIGUOUS?³⁸ DO YOU**
12 **AGREE?**

13 A. No. In fact the opposite is true. Charter proposes to reference Washington rules
14 within the language on warranties. The problem is that some of the rules Charter
15 includes apply to retail transactions and not wholesale. Including them in this ICA
16 creates ambiguity for everyone. Which rules will apply to this contract? Is it
17 appropriate to apply retail rules to a wholesale contract? Qwest believes that this
18 addition creates unnecessary complications to very specific language that makes it
19 clear the parties agree to "disclaim any express or implied warranties to one
20 another."³⁹

³⁸ Starkey Direct at page 27.

³⁹ Starkey Direct at page 27.

1 **Q. DO YOU AGREE WITH MR. STARKEY’S CONTENTION THAT**
2 **REMOVAL OF QWEST LANGUAGE THAT ALL PRODUCTS ARE**
3 **PROVIDED “AS IS” DOES NO HARM TO QWEST BECAUSE THE**
4 **PARTIES HAVE ALREADY AGREED THERE ARE NO IMPLIED**
5 **WARRANTIES?⁴⁰**

6 **A.** No. First, Mr. Starkey defends his position by stating that this protection already
7 exists in a WA statute. That is contradictory to the notion that Mr. Starkey feels it
8 is necessary to include a reference to rules in the same paragraph in order to clarify
9 Qwest’s obligations to Charter. Second, Qwest’s language adds clarification to the
10 statement in the sentence above. Mr. Starkey claims that Qwest’s proposal is
11 ambiguous. It is contradictory to claim that adding the statement that products are
12 provided “as is” is somehow ambiguous, especially if the parties agree that there are
13 no implied warranties.

14 **Q. MR. STARKEY CLAIMS THAT QWEST’S STATEMENT THAT ALL**
15 **PRODUCTS ARE PROVIDED “AS IS” IS DERIVED FROM THE**
16 **UNIFORM COMMERCIAL CODE “UCC” AND IS THEREFORE NOT**
17 **APPROPRIATE FOR THIS CONTRACT.⁴¹ DO YOU AGREE?**

18 **A.** No. The derivation of the sentence is irrelevant. Whether or not this language
19 resides in the UCC is irrelevant. The parties are not concerned about whether or not
20 the UCC governs this contract. The issue here is that there be explicit language
21 ensuring that there are no warranties, express or implied, in this particular

⁴⁰ Starkey Direct at page 28.

⁴¹ Starkey Direct at page 29.

1 interconnection agreement.

2 **Q. WHAT IS YOUR RECOMMENDATION TO THE COMMISSION WITH**
3 **REGARD TO THE LANGUAGE WARRANTIES IN SECTION 5.11?**

4 A. This Commission should agree that Qwest's language more clearly and properly
5 states that there are no express or implied warranties in this agreement.

6

7

XII. CONCLUSION

8 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

9 A. Charter's proposed changes to Section 5 of the interconnection agreement create
10 ambiguity in the contract. This increases the potential for disputes regarding each
11 party's execution of the terms of the contract. This in turn increases the likelihood
12 that Qwest and Charter will have to come to this Commission to resolve those
13 disputes. Qwest believes it is good business to execute a contract with concrete
14 terms that are not likely to result in disputes. Qwest believes it is in everyone's
15 interest that this Commission approve Qwest's proposals for Section 5 of the
16 interconnection agreement between Qwest and Charter.

17 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

18 A. Yes.