

**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

**DIRECT TESTIMONY
OF RENÉE ALBERSHEIM
QWEST CORPORATION**

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

OCTOBER 8, 2008

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I. IDENTIFICATION OF WITNESS

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

A. My name is Renée Albersheim. I am employed by Qwest Services Corporation, parent company of 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.

Q. PLEASE GIVE A BRIEF DESCRIPTION OF YOUR EDUCATIONAL BACKGROUND AND TELEPHONE COMPANY EXPERIENCE.

A. I have been working in Qwest's Global Wholesale Markets organization since December 2003. Before December 2003, I had worked in Qwest's Information Technologies Wholesale Systems organization since joining Qwest in October 1999. As a Staff Witnessing Representative, I provide support for Qwest's responses to regulatory issues associated with the 1996 Telecommunications Act, FCC orders, state commission decisions, and other legal and regulatory matters.

Prior to becoming a Qwest employee, I worked for 15 years as a consultant on many systems development projects and in a variety of roles, including the following: programmer and systems developer, systems architect, project manager, information center manager and software training consultant. I worked on projects in a number of different industries, including: oil and gas; electric, water and

1 telephone utilities; insurance; fast food; computer hardware; and the military. I also
2 designed and developed a number of applications, including electronic interfaces.
3 During that time, I worked on several of Qwest's Operations Support Systems
4 ("OSS") as a consultant on Human Resources and Interactive Access Billing
5 Systems ("IABS") projects.

6

7 In addition to working full-time at Qwest, I also earned a Juris Doctor degree from
8 the University Of Denver College Of Law and passed the Colorado Bar
9 Examination in October 2001. Prior to attending law school, I received a Master of
10 Business Administration in Management Information Systems from the University
11 of Colorado College of Business and Administration in 1985 and a Bachelor of Arts
12 degree from the University of Colorado in 1983.

13

14 **Q. HAVE YOU TESTIFIED PREVIOUSLY IN WASHINGTON?**

15 A. Yes, I presented testimony to this Commission in the Eschelon Arbitration, Docket
16 No. UT-062061, and in the Covad Arbitration, Docket No. UT-043045. I also
17 presented testimony in the previous cost dockets.

18

19

20

1 **Q. HAVE YOU TESTIFIED BEFORE OTHER STATE REGULATORY**
2 **COMMISSIONS?**

3 A. As a witness for Qwest's Global Wholesale Markets organization, I have filed
4 written testimony and appeared before the commissions in Arizona, Colorado, New
5 Mexico, Minnesota, Oregon, Utah and Wyoming. In my job as a witness on
6 matters dealing with Qwest's interconnection agreements and operations support
7 systems, I have also submitted written testimony in Idaho, Iowa, North Dakota,
8 South Dakota, Montana, and Nebraska.

9

10 **II. PURPOSE OF TESTIMONY**

11 **Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?**

12 A. The purpose of my testimony is to explain Qwest's positions, and the policies
13 underlying those positions related to Disputed Issues Nos. 1, 2, 3, 4, 5, 6, 6b, 7 and
14 8. These disputed issues fall under the heading of General Terms and Conditions,
15 which are contained, with one exception, in Section 5 of the Interconnection
16 Agreement. Much of the language that Qwest uses in Section 5 was worked out
17 with Qwest in great detail by CLECs, Qwest's local state Commissions and their
18 staffs. As I will discuss below, the changes Charter proposes to these terms and
19 conditions are contrary to the standards established by these industry participants.
20 In addition Charter's proposals increase the potential for contract disputes between
21 Qwest and Charter by making the terms vague.

22

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

2 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
3 **INTERCONNECTION AGREEMENT REGARDING DISCONNECTION OF**
4 **SERVICE FOR NON-PAYMENT?**

5 A. Qwest has proposed the following language regarding disconnection of service for
6 non-payment:

7 5.4.3 The Billing Party may disconnect services for failure by the billed Party to
8 make full payment within sixty (60) Days following the payment due date,
9 less any good faith disputed amount as provided for in Section 5.4.4 of
10 this Agreement, for the services provided under this Agreement. The
11 billed Party will pay the applicable reconnect charge set forth in Exhibit A
12 required to reconnect each service disconnected pursuant to this
13 paragraph. The Billing Party will notify the billed Party in writing and the
14 Commission on a confidential basis at least ten (10) business days prior to
15 disconnection of the service(s). In case of such disconnection, all
16 applicable undisputed charges, including termination charges, shall
17 become due. If the Billing Party does not disconnect the billed Party's
18 service(s) on the date specified in the ten (10) business days' notice, and
19 the billed Party's noncompliance continues, nothing contained herein shall
20 preclude the Billing Party's right to disconnect services of the non-
21 complying Party without further notice. For reconnection of the services
22 to occur, the billed Party will be required to make full payment of all past
23 and current undisputed charges under this Agreement for the services.
24 Additionally, the Billing Party will request a deposit (or recalculate the
25 deposit) as specified in Section 5.4.5 and 5.4.7 from the billed Party,
26 pursuant to this Section. If the billed Party is a new CLEC customer of
27 Qwest, the application of this provision will be suspended for the initial
28 three (3) Billing cycles of this Agreement and will not apply to amounts
29 billed during those three (3) cycles. In addition to other remedies that may
30 be available at law or equity, each Party reserves the right to seek
31 equitable relief, including injunctive relief and specific performance.

32
33 5.13.1 If either Party defaults in the payment of any amount due hereunder, or if
34 either Party violates any other material provision of this Agreement, and
35 such default or violation shall continue for thirty (30) Days after written
36 notice thereof, the other Party may seek relief in accordance with the
37 Dispute Resolution provision of this Agreement. The failure of either
38 Party to enforce any of the provisions of this Agreement or the waiver
39 thereof in any instance shall not be construed as a general waiver or

1 relinquishment on its part of any such provision, but the same shall,
2 nevertheless, be and remain in full force and effect.¹
3

4 **Q. WHAT CHANGES TO QWEST’S LANGUAGE HAS CHARTER**
5 **PROPOSED REGARDING DISCONNECTION OF SERVICE FOR NON-**
6 **PAYMENT?**

7 A. Charter has proposed the following changes:²
8

9 5.4.3 **With the Commission’s authorization**, the Billing Party may disconnect
10 services for failure by the billed Party to make full payment within sixty
11 (60) Days following the payment due date, less any good faith disputed
12 amount as provided for in Section 5.4.4 of this Agreement, for ~~thesuch~~
13 services provided under this Agreement. The billed Party will pay the
14 applicable reconnect charge set forth in Exhibit A required to reconnect
15 each service disconnected pursuant to this paragraph. The Billing Party
16 will notify the billed Party in writing and the Commission on a
17 confidential basis at least ten (10) business days prior to disconnection of
18 the service(s). In case of such disconnection, all applicable undisputed
19 charges, including termination charges, shall become due. If the Billing
20 Party does not disconnect the billed Party's service(s) on the date specified
21 in the ten (10) business days' notice, and the billed Party's noncompliance
22 continues, nothing contained herein shall preclude the Billing Party's right
23 to disconnect services of the non-complying Party without further notice,
24 **subject to the Commission’s authorization**. For reconnection of the
25 services to occur, the billed Party will be required to make full payment of
26 all past and current undisputed charges under this Agreement for the
27 services. Additionally, the Billing Party will request a deposit (or

¹ The Qwest language that is presented in this testimony is excerpted from Exhibit B filed with Qwest’s answer to Charter’s petition. The issue matrix does not always accurately reflect the language Qwest proposes for this Interconnection Agreement. The most accurate source for Qwest’s language is Qwest’s Exhibit B.

² For clarity, I have chosen the following standard for the presentation of the language proposed by both parties. Qwest’s language is presented in normal typeface. Charter’s proposed changes to Qwest’s language are presented in bold typeface. Charter’s added language is underlined. Charter’s proposed deletions of Qwest’s language are presented with a strikethrough.

1 recalculate the deposit) as specified in Section 5.4.5 and 5.4.7 from the
2 billed Party, pursuant to this Section. In addition to other remedies that
3 may be available at law or equity, each Party reserves the right to seek
4 equitable relief, including injunctive relief and specific performance.
5

6 **5.13.1** If either Party defaults in the payment of any amount due hereunder, or if
7 either Party violates any other material provision of this Agreement, and
8 such default or violation shall continue for thirty (30) Days after written
9 notice thereof, the other Party may seek relief in accordance with the
10 Dispute Resolution provision of this Agreement. The failure of either
11 Party to enforce any of the provisions of this Agreement or the waiver
12 thereof in any instance shall not be construed as a general waiver or
13 relinquishment on its part of any such provision, but the same shall,
14 nevertheless, be and remain in full force and effect. **Neither Party shall**
15 **disconnect service to the other Party without first obtaining**
16 **Commission authorization.**
17

18 **Q. PLEASE DESCRIBE THIS ISSUE GENERALLY.**

19 A. This issue concerns the standard business practice of disconnecting service to a
20 customer that has not paid its undisputed bills for that service.
21

22 **Q. HAS CHARTER ACCURATELY DESCRIBED THIS ISSUE?**

23 A. No. In the issue matrix Charter filed with its petition, Charter described this issue
24 as concerning the termination of the contract. That is not what this paragraph in the
25 Interconnection Agreement describes. As I stated before, the language in this
26 section of the agreement concerns the disconnection of services for non-payment.
27
28

1 **Q. WHY IS QWEST OPPOSED TO CHARTER'S ADDED LANGUAGE?**

2 A. Charter's language would prevent Qwest from taking action to disconnect service
3 for non-payment unless and until Qwest obtains Commission approval. This places
4 the burden on Qwest to file for Commission action and allows Charter to continue
5 to incur debt while that action is pending. This is unreasonable in light of the fact
6 that it is Charter's obligation to pay its undisputed bills in a timely fashion. Qwest
7 does not believe that it is appropriate to involve the Commission in normal business
8 processes, particularly since Charter has recourse under the provisions of the ICA if
9 it believes that Qwest is treating Charter unfairly.

10

11 **Q. WAS THE LANGUAGE QWEST IS PROPOSING AGREED TO BY**
12 **QWEST AND THE CLECS DURING THE 271 WORKSHOPS?**

13 A. Yes. This same language was developed by consensus during the section 271
14 workshops and approved by the Commission.

15

16 **Q. WHY SHOULD LANGUAGE THAT RESULTED FROM THE 271**
17 **WORKSHOPS MATTER TO THE COMMISSION IN THIS**
18 **PROCEEDING?**

19 A. The 271 process was initiated by Qwest's applications to re-enter the Long Distance
20 business in Qwest's 14-state local service market as permitted by the
21 Telecommunications Act of 1996. The 271 process included a number of
22 workshops that included a detailed analysis of the language to be included in
23 Qwest's Interconnection Agreements. The state Commissions, commission staff

1 members, and several CLECs participated in these workshops. This language was
2 not dictated by Qwest. Rather, it was the result of numerous negotiations, hearings
3 and commission orders, including orders from this Commission. In other words,
4 the language that Qwest uses for its Interconnection Agreements is the result of an
5 industry consensus.

6

7 **Q. IS QWEST'S LANGUAGE REGARDING DISCONNECTS STANDARD IN**
8 **ITS INTERCONNECTION AGREEMENTS WITH OTHER CLECS IN**
9 **WASHINGTON?**

10 A. Yes.

11

12 **Q. DOES ANY STATE REQUIRE QWEST TO OBTAIN COMMISSION**
13 **APPROVAL TO DISCONNECT SERVICES?**

14 A. Yes. Minnesota is the only state in Qwest's 14-state local service region that
15 requires Commission approval to disconnect services for non-payment of
16 undisputed bills.

17

18 **Q. WHAT HAS BEEN THE PRACTICAL IMPACT OF THIS REQUIREMENT**
19 **IN MINNESOTA?**

20 A. Events in Minnesota have demonstrated the problems with this Commission
21 requirement. On May 19, 2006, CP Telecom filed an application with the

1 Commission to discontinue service to Minnesota Phone Company for failure to
2 make required payments. (*In the Matter of CP Telecom's Petition to Discontinue*
3 *Service to Minnesota Phone Company*, MPUC Docket No. P6333,6198/M-06-719).
4 On June 5, 2006, Minnesota Phone Company filed a letter indicating that it had
5 filed a Chapter 11 bankruptcy petition. On August 17th the Commission dismissed
6 the CP Telecom petition due to the bankruptcy proceeding. In the meantime,
7 Minnesota Phone Company was allowed to continue running up 3 additional
8 months of bills that will never be repaid. This provision did not benefit end-user
9 customers or the provider. It just benefited the company that had not paid its
10 undisputed bills.

11
12 Similarly, Charter's proposed language would prevent Qwest from protecting itself
13 from mounting unpaid debt and force it to continue to process orders pending the
14 outcome of a proceeding. This places Qwest at additional risk of providing service
15 to the CLEC without assurance of being compensated. Other provisions in the
16 contract such as late payment fees provide no protection when a carrier is ultimately
17 unable to make payments at all, and the delay of a formal proceeding significantly
18 increases the financial risk to Qwest. Qwest should not be required to continue to
19 provide service to a company that is not willing or able to pay its undisputed
20 charges for that service.

21

22

1 **Q. HAS THIS ISSUE BEEN RAISED IN PRIOR ARBITRATIONS?**

2 A. Yes. This issue was raised in the Eschelon Arbitration Case UT-063061. In that
3 case the ALJ agreed with Qwest's position.³ This case is pending a final
4 Commission Order.

5

6 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
7 **TO THE LANGUAGE PERTAINING TO DISCONNECTION OF**
8 **SERVICE?**

9 A. This Commission should agree that Commission intervention should not be
10 required if services are to be disconnected for non-payment of undisputed charges
11 for service, and should choose Qwest's language for the Interconnection
12 Agreement.

13

14 **IV. ISSUE 2 – BACKBILLING**

15 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
16 **INTERCONNECTION AGREEMENT REGARDING BACK-BILLING?**

17 A. Qwest has proposed the following language regarding back-billing:

18

³ See *In the Matter of the Petition for Arbitration of an Interconnection Agreement Between Qwest Corporation and Eschelon Telecom, Inc., Pursuant to 47 U.S.C. Section 252(b)*, Order 16 Arbitrator's Report and Decision at pp 42-42 and 47-58.

1 5.4.4.3 Failure by a Billed Party to dispute a rate, rate element, or charge within
2 the period applicable to an invoice on which such rate, rate element or
3 charge appears shall not constitute nor be construed as a waiver by the
4 Billed Party of its right to dispute the same or similar rates, rate elements,
5 or charges that may appear on subsequent invoices. If any portion of an
6 amount paid to a Party under this Agreement is subject to a bona fide
7 dispute between the Parties (“Disputed Paid Amount”), the Billed Party
8 may provide written notice to the Billing Party of the Disputed Paid
9 Amount, and seek a refund of such amount already paid, at any time prior
10 to the date that is two (2) years after the date of the invoice containing the
11 disputed amount that has been paid by the Billed Party (“Notice Period”).
12 If the Billed Party fails to provide written notice of a Disputed Paid
13 Amount within the Notice Period, the Billed Party waives.
14

15 5.4.10 The Parties shall bill each other for all services and arrangements under
16 this Agreement promptly and in any event shall use commercially
17 reasonable efforts to render such bills. In the event that prompt billing is
18 not possible, backbilling for unbilled charges shall be permitted for a
19 period of up to twenty-four (24) months following the provision of
20 service. Backbilling for services provided more than twenty-four (24)
21 months following the provision of service is not permitted, and each Party
22 hereby waives any right to collect any fees or charges otherwise due under
23 this Agreement (including charges for services under this Agreement that
24 are provided via its tariffs) that are not billed to the other Party within such
25 twenty-four (24) month period.
26

27 **Q. WHAT CHANGES TO QWEST’S LANGUAGE HAS CHARTER**
28 **PROPOSED REGARDING BACK-BILLING?**

29 A. Charter has proposed the following changes:

30

31 5.4.4.3 Failure by a Billed Party to dispute a rate, rate element, or charge within
32 the period applicable to an invoice on which such rate, rate element or
33 charge appears shall not constitute nor be construed as a waiver by the
34 Billed Party of its right to dispute the same or similar rates, rate elements,
35 or charges that may appear on subsequent invoices. If any portion of an
36 amount paid to a Party under this Agreement is subject to a bona fide
37 dispute between the Parties (“Disputed Paid Amount”), the Billed Party
38 may provide written notice to the Billing Party of the Disputed Paid
39 Amount, and seek a refund of such amount already paid, at any time prior

1 to the date that is ~~two (2)~~ one (1) years after the date of the invoice
2 containing the disputed amount that has been paid by the Billed Party
3 (“Notice Period”). If the Billed Party fails to provide written notice of a
4 Disputed Paid Amount within the Notice Period, the Billed Party waives
5 its rights to dispute its obligation to pay such amount, and to seek refund
6 of such amount.
7

8 5.4.10 The Parties shall bill each other for all services and arrangements under
9 this Agreement promptly and in any event shall use commercially
10 reasonable efforts to render such bills. In the event that prompt billing is
11 not possible, backbilling for unbilled charges shall be permitted for a
12 period of up to ~~twenty-four (24)~~ twelve (12) months following the
13 provision of service. Backbilling for services provided more than ~~twenty-~~
14 ~~four (24)~~ twelve (12) months following the provision of service is not
15 permitted, and each Party hereby waives any right to collect any fees or
16 charges otherwise due under this Agreement (including charges for
17 services under this Agreement that are provided via its tariffs) that are not
18 billed to the other Party within such ~~twenty-four (24)~~ twelve (12) month
19 period.
20

21 **Q. WHAT ARE QWEST’S OBJECTIONS TO CHARTER’S CHANGES TO**
22 **QWEST’S INTERCONNECTION AGREEMENT LANGUAGE?**

23 A. Charter’s language places a one-year limit on the time for which either party may
24 back-bill the other. Qwest’s language allows a period of two years for back-billing
25 by either party.
26

27 **Q. IS TWO YEARS THE STANDARD BACK-BILLING PERIOD THAT**
28 **QWEST HAS AGREED TO WITH OTHER CLECS?**

29 A. Yes. Two-years is the standard back-billing period, and this is the time period
30 contained in Qwest’s negotiation template.

1

2 **Q. WHAT IS YOUR UNDERSTANDING OF THE GENESIS OF THE TWO-**
3 **YEAR TIME-LIMIT FOR BACKBILLING?**

4 A. The two-year back billing period exists in section 415(a) of Communications Act.⁴

5

6 **Q. CHARTER CITES THREE FCC CASES IN THE ISSUE MATRIX FILED**
7 **WITH ITS PETITION TO SUPPORT ITS POSITION THAT THE BACK-**
8 **BILLING PERIOD SHOULD BE ONE YEAR.⁵ DO THESE CASES FULLY**
9 **SUPPORT CHARTER'S POSITION?**

10 A. No they do not. In all three cases, the FCC concludes that the reasonable time for
11 back-billing is situation specific.⁶ The FCC states that a delay of much less than 24
12 months between the rendering of service and receipt of an initial bill for such
13 service may not be just and reasonable, but the FCC acknowledges that a longer
14 time period may be reasonable under certain circumstances, and that each case must

⁴ 47 U.S.C. § 415, "All actions at law by carriers for recovery of their lawful charges, or any part thereof, shall be begun, within two years from the time the cause of action accrues, and not after."

⁵ *In the Matter of The People's Network Incorporated, v. American Telephone and Telegraph Company*, Memorandum Opinion and Order, 12 FCC recd 21081, k1997 FCC Lexis 1928 ("Peoples Network"); *In the Matter of Kenneth E. Brooten, Jr. v. AT&T Corp.*, 12 FCC Rcd 13343, 1997 FCC Lexis 4927, 9 Comm. Reg. (P&F) 786 ("Brooten"); *In the Matter of American Network, Inc. Petition for Declaratory Ruling Concerning Backbilling of Access Charges*, 4 FCC Rcd 550, 1989 FCC Lexis 52, 65 Rad. Reg. 2d (P&F) 1519 ("American Network").

⁶ See *Peoples Network* at ¶ 14; *Brooten* at ¶ 1; *American Network* at ¶ 19.

1 be judged by the specific circumstances it presents.⁷ The FCC⁸ and Charter's
2 petition acknowledge the two year time limit in the Act. Setting a 12-month limit in
3 the terms of this agreement eliminates Qwest's opportunity to prove that two years
4 may be reasonable under any circumstances and effectively modifies the applicable
5 statute of limitations, contrary to federal law.

6
7 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
8 **TO THE LANGUAGE PERTAINING TO BACKBILLING?**

9 A. This Commission should agree that two year standard limit for back-billing is
10 consistent with federal law, and should not be further limited in this contract. The
11 Commission should choose Qwest's language for the Interconnection Agreement.

12
13 **V. ISSUE 3 - DEPOSITS**

14 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE INTERCONNECTION**
15 **AGREEMENT REGARDING DEPOSITS?**

⁷ See for example *Brooten* at ¶ 13, "the reasonableness of the amount of time it takes a carrier to render a bill should be evaluated in accordance with the standards for what constitutes an unreasonable practice for purposes of Section 201(b) of the Act." In fact the FCC determined that AT&T's backbilling was reasonable in this case. See *Brooten* at ¶ 14. While the FCC found AT&T's practice in Peoples Network was not reasonable, the FCC stated, "We do not foreclose the possibility that backbilling delays of less than 120 days could be found to be unjust and unreasonable under the facts of a particular case. Likewise, backbilling delays exceeding 120 days may be reasonable in certain circumstances." *Peoples Network* at ¶ 18.

⁸ See *Peoples Network* at ¶ 14; *Brooten* at ¶ 13; *American Network* at ¶ 19.

1 A. Qwest has proposed the following language regarding deposits:

2

3 5.4.5 In the event of a material adverse change in CLEC's financial condition
4 subsequent to the Effective Date of this Agreement, Qwest may request a
5 security deposit. A "material adverse change in financial condition"
6 means the Party is repeatedly delinquent in making its payments, or is
7 being reconnected after a disconnection of Service or discontinuance of
8 the processing of orders by Qwest due to a previous failure to pay
9 undisputed charges in a timely manner. Qwest may require a deposit to
10 be held as security for the payment of charges before the orders from
11 CLEC will be provisioned and completed or before reconnection of
12 Service. "Repeatedly delinquent" means any payment of a material
13 amount of total monthly Billing under the Agreement received after the
14 Payment Due Date, three (3) or more times during the last twelve (12)
15 month period. The initial deposit may not exceed the estimated total
16 monthly charges for a two (2) month period based upon recent Billing.
17 The deposit may be adjusted by CLEC's actual monthly average charges,
18 payment history under this Agreement, or other relevant factors. The
19 deposit may be an irrevocable bank letter of credit, a letter of credit with
20 terms and conditions acceptable to Qwest, or some other form of mutually
21 acceptable security such as a cash deposit. Required deposits are due and
22 payable within thirty (30) Days after demand and non-payment is subject
23 to Sections 5.4.2 and 5.4.3 of this Agreement.
24

25 5.4.6 Interest will be paid on cash deposits at the rate applying to deposits under
26 applicable Commission regulations. Cash deposits and accrued interest
27 will be credited to CLEC's account or refunded, as appropriate, upon the
28 earlier of the expiration of the term of the Agreement or the establishment
29 of satisfactory credit with Qwest, which will generally be one full year of
30 timely payments of undisputed amounts in full by CLEC. Upon a
31 material change in financial standing, including factors referenced in
32 Section 5.4.5 above, CLEC may request and the Qwest will consider a
33 recalculation of the deposit. The fact that a deposit has been made does
34 not relieve CLEC from any requirements of this Agreement.
35

36 5.4.7 Qwest may review CLEC's credit standing and modify the amount of
37 deposit required but in no event will the maximum amount exceed the
38 amount stated in 5.4.5 or another amount, if approved by the
39 Commission.
40

1 **Q. WHAT CHANGES TO QWEST'S LANGUAGE HAS CHARTER**
2 **PROPOSED REGARDING DEPOSITS?**

3 A. Charter has proposed the following changes:

4

5 5.4.5 In the event of a material adverse change in ~~CLEC's a party's~~ financial
6 condition subsequent to the Effective Date of this Agreement, ~~Qwest the~~
7 **other party** may request a security deposit. A "material adverse change
8 in financial condition" means the Party is repeatedly delinquent in making
9 its payments, or is being reconnected after a disconnection of Service or
10 discontinuance of the processing of orders by ~~Qwest a party due~~ to a
11 previous failure to pay undisputed charges in a timely manner. ~~Qwest A~~
12 **party** may require a deposit to be held as security for the payment of
13 charges before the orders from ~~CLEC the other party~~ will be provisioned
14 and completed or before reconnection of Service. "Repeatedly delinquent"
15 means any payment of a material, **undisputed** amount of total monthly
16 Billing under the Agreement received after the Payment Due Date, three
17 (3) or more times during the last twelve (12) month period. The initial
18 deposit may not exceed the estimated total **net** monthly charges **(that is,**
19 **the amounts the Party owes, less amounts owed to the other Party)** for
20 a two (2) month period based upon recent Billing. The deposit may be
21 adjusted by ~~CLEC's the other party's~~ actual monthly average charges,
22 payment history under this Agreement, or other relevant factors. The
23 deposit may be an irrevocable bank letter of credit, a letter of credit with
24 terms and conditions **reasonably** acceptable to ~~Qwest the other party~~, or
25 some other form of mutually acceptable security such as a cash deposit.
26 Required deposits are due and payable within thirty (30) Days after
27 demand and non-payment is subject to Sections 5.4.2 and 5.4.3 of this
28 Agreement.
29

30 5.4.6 Interest will be paid on cash deposits at the rate applying to deposits under
31 applicable Commission regulations. Cash deposits and accrued interest
32 will be credited to ~~CLEC's the depositing party's~~ account or refunded,
33 as appropriate, upon the earlier of the expiration of the term of the
34 Agreement or the establishment of satisfactory credit with ~~Qwest the~~
35 **other party**, which will generally be one full year of timely payments of
36 undisputed amounts in full by ~~CLEC the depositing party~~. Upon a
37 material change in financial standing, including factors referenced in
38 Section 5.4.5 above, ~~CLEC the depositing party~~ may request and ~~Qwest~~
39 **the other party** will consider a recalculation of the deposit. The fact that

1 a deposit has been made does not relieve ~~CLEC~~ **the depositing party**
2 from any requirements of this Agreement.
3

4 5.4.7 **Qwest A Party** may review ~~CLEC's~~ **the other party's** credit standing
5 and modify the amount of deposit required but in no event will the
6 maximum amount exceed the amount stated in 5.4.5 or another amount, if
7 approved by the Commission.
8

9 **Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S CHANGES TO**
10 **QWEST'S INTERCONNECTION AGREEMENT LANGUAGE?**

11 A. Charter's changes make the deposit requirements of the contract reciprocal, and
12 Charter changes the basis of the terms under which an additional deposit may be
13 required. Unilateral security deposit provisions are not only the norm in Qwest
14 interconnection agreements, but are also an industry standard. Qwest is the primary
15 entity whose facilities are being used to provide services under this contract. Thus
16 Qwest is entitled to require a deposit from carriers who pose a risk of nonpayment
17 for services. If there is another agreement under which Charter is providing service
18 to Qwest, the appropriate place to negotiate such deposits is within that agreement.

19

20 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
21 **TO THE LANGUAGE PERTAINING TO DEPOSITS?**

22 A. This Commission should agree that Qwest is the primary provider of service in this
23 Interconnection Agreement, and therefore should have the right to demand deposits
24 if there is concern that Charter will not be able to pay for service. The Commission
25 should choose Qwest's language for the Interconnection Agreement.

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VI. ISSUE 4 – INSURANCE

Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE INTERCONNECTION AGREEMENT REGARDING INSURANCE?

A. Qwest has proposed the following language regarding insurance:

5.6.1 Each Party shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers having a "Best's" rating of A-VII with respect to liability arising from that Party's operations for which that Party has assumed legal responsibility in this Agreement. If either Party or its parent company has assets equal to or exceeding ten billion dollars (\$10,000,000,000), that Party may utilize an Affiliate captive insurance company in lieu of a "Best's" rated insurer. To the extent that the parent company of a Party is relied upon to meet the ten billion dollar (\$10,000,000,000) asset threshold, such parent shall be responsible for the insurance obligations contained in this Section 5.6.1, to the extent its affiliated Party fails to meet such obligations.

Q. WHAT CHANGES TO QWEST’S LANGUAGE HAS CHARTER PROPOSED REGARDING DISCONNECTION OF SERVICE FOR NON-PAYMENT?

A. Charter has proposed the following changes:

5.6.1 Each Party shall at all times during the term of this Agreement, at its own cost and expense, carry and maintain the insurance coverage listed below with insurers ~~having a “Best’s” rating of A-VII~~ **in good standing** with respect to liability arising from that Party’s operations for which that Party has assumed legal responsibility in this Agreement. If either Party or its parent company has assets equal to or exceeding ten billion dollars (\$10,000,000,000), that Party may utilize an Affiliate captive insurance company in lieu of a “Best’s” rated insurer. To the extent that the parent company of a Party is relied upon to meet the ten billion dollar

1 (\$10,000,000,000) asset threshold, such parent shall be responsible for the
2 insurance obligations contained in this Section 5.6.1, to the extent its
3 affiliated Party fails to meet such obligations.
4

5 **Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S CHANGES TO**
6 **QWEST'S INTERCONNECTION AGREEMENT LANGUAGE?**

7 A. Charter seeks to reduce the standards governing the insurance it is required to carry
8 in order to have access to Qwest's facilities. The purpose of the Interconnection
9 Agreement under arbitration in this proceeding is to give Charter access to Qwest's
10 facilities. Qwest has the right as the owner of the facilities to which Charter seeks
11 access to require minimum levels of acceptable coverage. This includes setting
12 standards for the type of insurer. An insurance policy has little value if the insurer
13 is unable or unwilling to pay claims. By requiring a "Best's" rating of A-VII,
14 Qwest is assured that Charter's insurance carrier is managed well and has the
15 financial strength to pay claims.

16

17 **Q. IS CHARTER'S LANGUAGE BASED ON AN INDUSTRY STANDARD?**

18 A. No. Charter's language is vague and is not based on an industry standard.
19 Charter's language makes this provision of the agreement more likely to be subject
20 to dispute. Charter's language is not reasonable in that it is not defined. Charter
21 claims that Qwest's standard is arbitrary, but in truth Charter's language is arbitrary
22 in that it is not quantifiable whereas "Best's" ratings are precisely quantifiable.

23

1 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
2 **TO THE LANGUAGE PERTAINING INSURANCE?**

3 A. This Commission should agree that industry standard insurance ratings provide
4 greater certainty and protection of Qwest's facilities, and should choose Qwest's
5 language for the Interconnection Agreement.

6

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

8 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
9 **INTERCONNECTION AGREEMENT REGARDING LIMITATION OF**
10 **LIABILITY?**

11 A. Qwest has proposed the following language regarding limitation of liability:

12

13 5.8 Limitation of Liability
14

15 5.8.1 Each Party's liability to the other Party for any loss relating to or arising
16 out of any act or omission in its performance under this Agreement,
17 whether in contract, warranty, strict liability, or tort, including (without
18 limitation) negligence of any kind, shall be limited to the total amount that
19 is or would have been charged to the other Party by such breaching Party
20 for the service(s) or function(s) not performed or improperly performed.
21 Each Party's liability to the other Party for any other losses shall be limited
22 to the total amounts charged to CLEC under this Agreement during the
23 contract year in which the cause accrues or arises. Payments pursuant to
24 the QPAP shall not be counted against the limit provided for in this
25 Section.
26

27 5.8.2 Neither Party shall be liable to the other for indirect, incidental,
28 consequential, or special damages, including (without limitation) damages
29 for lost profits, lost revenues, lost savings suffered by the other Party
30 regardless of the form of action, whether in contract, warranty, strict

1 liability, tort, including (without limitation) negligence of any kind and
2 regardless of whether the Parties know the possibility that such damages
3 could result. If the Parties enter into a Performance Assurance Plan under
4 this Agreement nothing in this Section 5.8.2 shall limit amounts due and
5 owing under any Performance Assurance Plan or any penalties associated
6 with Docket No. UT 991358.
7

8 5.8.3 Intentionally Left Blank.
9

10 5.8.4 Nothing contained in this Section 5.8 shall limit either Party's liability to
11 the other for (i) willful or intentional misconduct or (ii) damage to tangible
12 real or personal property proximately caused solely by such Party's
13 negligent act or omission or that of their respective agents, subcontractors,
14 or employees.
15

16 10.4.2.6.1 To the extent that state Tariff(s) limit Qwest's liability with regard
17 to Listings, the applicable state Tariff(s) is incorporated herein
18 and supersedes the Limitation of Liability section of this
19 Agreement with respect to Listings only.
20

21 **Q. WHAT CHANGES TO QWEST'S LANGUAGE HAS CHARTER**
22 **PROPOSED REGARDING LIMITATION OF LIABILITY?**

23 A. Charter has proposed the following changes:
24

25 5.8 Limitation of Liability
26

27 5.8.1 Each Party's liability to the other Party for any loss relating to or arising
28 out of any act or omission in its performance under this Agreement,
29 whether in contract, warranty, strict liability, or tort, including (without
30 limitation) negligence of any kind, shall be limited to ~~the total amount~~
31 ~~that is or would have been charged to the other Party by such~~
32 ~~breaching Party for the service(s) or function(s) not performed or~~
33 ~~improperly performed~~ **actual, direct damages**. Each Party's liability to
34 the other Party for any other losses shall be limited to ~~the total amounts~~
35 ~~charged to CLEC under this Agreement during the contract year in~~
36 ~~which the cause accrues or arises~~ **actual, direct damages**. Payments

1 pursuant to the QPAP shall not be counted against the limit provided for in
2 this Section.
3

4 5.8.2 **Except as provided in Section 5.8.4, N**neither Party shall be liable to the
5 other for indirect, incidental, consequential, or special damages, including
6 (without limitation) damages for lost profits, lost revenues, lost savings
7 suffered by the other Party regardless of the form of action, whether in
8 contract, warranty, strict liability, tort, including (without limitation)
9 negligence of any kind and regardless of whether the Parties know the
10 possibility that such damages could result. If the Parties enter into a
11 Performance Assurance Plan under this Agreement, nothing in this Section
12 5.8.2 shall limit amounts due and owing under any Performance
13 Assurance Plan or any penalties associated with Docket No. UT 991358.
14

15

16 5.8.3 Intentionally Left Blank.
17

18 5.8.4 Nothing contained in this Section 5.8 shall limit either Party's liability to
19 the other for (i) **acts of gross negligence,** willful or intentional misconduct
20 or (ii) damage to tangible real or personal property proximately caused
21 solely by such Party's negligent act or omission or that of their respective
22 agents, subcontractors, or employees. **For purposes of this Section 5.8,**
23 **"solely," shall mean not contributed to by the negligent act or**
24 **omission of the other Party, or its respective agents, subcontractors,**
25 **or employees.**
26

27 ~~**10.4.2.6.1 To the extent that state Tariff(s) limit Qwest's liability with regard**~~
28 ~~**to Listings, the applicable state Tariff(s) is incorporated herein and**~~
29 ~~**supersedes the Limitation of Liability section of this Agreement with respect**~~
30 ~~**to Listings only. Intentionally Left Blank.**~~
31

32 **Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S CHANGES TO**
33 **QWEST'S INTERCONNECTION AGREEMENT LANGUAGE?**

34 A. All of the proposals that Charter has made with regard to liability and indemnity in
35 section 5 and section 10 create ambiguity in the contract and increase the likelihood

1 that the parties will have to litigate any circumstance in which liability or damages
2 are at issue. Qwest's limitation of liability language reflects that Qwest is the entity
3 which provides the facilities to the CLEC, and as the provider, faces the much
4 greater risk of damage to its facilities. Qwest's language already limits damages to
5 the amount charged to either party over the course of a year.

6

7 **Q. DOES QWEST HAVE ANY OTHER OBJECTIONS?**

8 A. Yes. The parties disagree on the standard that should apply for liability in Section
9 5.8.4. Qwest's standard has been in use with its CLEC customers for years, and is
10 the standard in use in its current Commission-Approved Interconnection
11 Agreements.

12

13 **Q. ARE THERE ANY OTHER PROBLEMS WITH CHARTER'S PROPOSALS**
14 **ON LIABILITY?**

15 A. Yes. In Section 10.4.2.6, Charter seeks to change the liability standards with regard
16 to listings. The limitations on liability that Qwest has incorporated into this
17 agreement are intended to create certainty and avoid litigation. Charter proposes to
18 expand liability and increase the potential for litigation over damages. In addition,
19 as listings are governed by Tariff, Qwest wants to ensure that there is consistency
20 between this agreement, all other CLEC interconnection agreements, and the
21 applicable state tariff.

1 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
2 **TO THE LANGUAGE PERTAINING TO LIMITATION OF LIABILITY?**

3 A. This Commission should agree that certainty of the language created in the 271
4 process is preferable to the vagueness created by Charter's changes, and should
5 choose Qwest's language for the Interconnection Agreement.

6

7 **VIII. ISSUE 6 - INDEMNIFICATION**

8 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
9 **INTERCONNECTION AGREEMENT REGARDING INDEMNIFICATION?**

10 A. Qwest has proposed the following language regarding indemnification:

11

12 5.9.1.1 Each of the Parties agrees to release, indemnify, defend and hold harmless
13 the other Party and each of its officers, directors, employees and agents
14 (each an Indemnitee) from and against and in respect of any loss, debt,
15 liability, damage, obligation, claim, demand, judgment or settlement of
16 any nature or kind, known or unknown, liquidated or unliquidated
17 including, but not limited to, reasonable costs and expenses (including
18 attorneys' fees), whether suffered, made, instituted, or asserted by any
19 Person or entity, for invasion of privacy, bodily injury or death of any
20 Person or Persons, or for loss, damage to, or destruction of tangible
21 property, whether or not owned by others, resulting from the Indemnifying
22 Party's breach of or failure to perform under this Agreement, regardless of
23 the form of action, whether in contract, warranty, strict liability, or tort
24 including (without limitation) negligence of any kind.
25

26 5.9.1.2 In the case of claims or loss alleged or incurred by an End User Customer
27 of either Party arising out of or in connection with services provided to the
28 End User Customer by the Party, the Party whose End User Customer
29 alleged or incurred such claims or loss (the Indemnifying Party) shall
30 defend and indemnify the other Party and each of its officers, directors,
31 employees and agents (collectively the Indemnified Party) against any and
32 all such claims or loss by the Indemnifying Party's End User Customers

1 regardless of whether the underlying service was provided or Unbundled
2 Network Element was provisioned by the Indemnified Party, unless the
3 loss was caused by the willful misconduct of the Indemnified Party. The
4 obligation to indemnify with respect to claims of the Indemnifying Party's
5 End User Customers shall not extend to any claims for physical bodily
6 injury or death of any Person or persons, or for loss, damage to, or
7 destruction of tangible property, whether or not owned by others, alleged
8 to have resulted directly from the negligence or intentional conduct of the
9 employees, contractors, agents, or other representatives of the Indemnified
10 Party.
11

12 5.9.2.2 If the Indemnifying Party wishes to defend against such action, it shall
13 give written notice to the Indemnified Party of acceptance of the defense
14 of such action. In such event, the Indemnifying Party shall have sole
15 authority to defend any such action, including the selection of legal
16 counsel, and the Indemnified Party may engage separate legal counsel
17 only at its sole cost and expense. In the event that the Indemnifying Party
18 does not accept the defense of the action, the Indemnified Party shall have
19 the right to employ counsel for such defense at the expense of the
20 Indemnifying Party. Each Party agrees to cooperate with the other Party
21 in the defense of any such action and the relevant records of each Party
22 shall be available to the other Party with respect to any such defense.
23

24 **Q. WHAT CHANGES TO QWEST'S LANGUAGE HAS CHARTER**
25 **PROPOSED REGARDING INDEMNIFICATION?**

26 A. Charter has proposed the following changes:
27

28 5.9.1.1 Each of the Parties agrees to ~~release~~ indemnify, defend and hold harmless
29 **("Indemnifying Party")** the other Party and each of its officers, directors,
30 employees and agents ~~(each an Indemnitee)~~ **("Indemnified Party")**
31 from and against and in respect of any loss, debt, liability, damage,
32 obligation, claim, demand, judgment or settlement of any nature or kind,
33 known or unknown, liquidated or unliquidated including, but not limited
34 to, reasonable costs and expenses (including attorneys' fees) **(collectively,**
35 **"Claims")**, whether suffered, made, instituted, or asserted by any ~~Person~~
36 ~~or entity~~ **third party**, for invasion of privacy, bodily injury or death of
37 any ~~Person or Persons~~ **such third party**, or for loss, damage to, or
38 destruction of tangible property, whether or not owned by others
39 **(collectively, "Losses")**, resulting from the Indemnifying Party's

1 **negligence, gross negligence or willful misconduct, or** breach of or
2 failure to perform under this Agreement, regardless of the form of action,
3 whether in contract, warranty, strict liability, or tort including (without
4 limitation) negligence of any kind, **except to the extent that such Claims**
5 **or Losses arise from the Indemnified Party's negligence, gross**
6 **negligence, or willful misconduct.** ~~The obligation to indemnify with~~
7 ~~respect to claims of the Indemnifying Party's End User Customers~~
8 ~~shall not extend to any claims for physical bodily injury or death of~~
9 ~~any Person or persons, or for loss, damage to, or destruction of~~
10 ~~tangible property, whether or not owned by others, alleged to have~~
11 ~~resulted directly from the negligence or intentional conduct of the~~
12 ~~employees, contractors, agents, or other representatives of the~~
13 ~~Indemnified Party.~~
14

15 5.9.1.2 In the case of Claims or Losses alleged or incurred by an End User
16 Customer of either Party, arising out of or in connection with services
17 provided to the End User Customer by the Party, the Party whose End
18 User Customer alleged or incurred such Claims or Losses (the
19 Indemnifying Party) shall defend and indemnify the other Party and each
20 of its officers, directors, employees and agents (collectively the
21 Indemnified Party) against any and all such Claims or Losses by the
22 Indemnifying Party's End User Customers regardless of whether the
23 underlying service was provided or Unbundled Network Element was
24 provisioned by the Indemnified Party, **except to the extent that unless the**
25 **Claims or Losses loss was were** caused by the **negligence, gross**
26 **negligence or** willful misconduct of the Indemnified Party-, **including**
27 **the employees, contractors, agents, or other representatives of the**
28 **Indemnified Party.**
29

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

1 each Party shall be available to the other Party with respect to any such
2 defense.⁹
3

4 **Q. WHAT MAKES QWEST’S LANGUAGE PREFERABLE TO CHARTER’S**
5 **CHANGES TO THE INTERCONNECTION AGREEMENT LANGUAGE**
6 **ON INDEMNIFICATION?**

7 A. Qwest’s language provides a market-based approach to address the possibility that
8 one party may try to pass through excessive indemnification obligations to the other
9 party. Sections 5.9.1.1, 5.9.1.2 and 5.9.2.2 ensure that there is a nexus to the
10 agreement between the parties when contractual indemnification rights apply.
11 There is no basis for extending the exclusion to negligence. Adding an exception
12 based on “gross negligence” has the effect of voiding indemnification and
13 eliminating the purpose of this provision of the contract.

14

15 **Q. WHAT IS THE SOURCE OF THE LANGUAGE ON INDEMNIFICATION?**

16 A. As with other contested provisions of this Interconnection Agreement, the
17 provisions regarding limitation of liability were worked out in the 271 process.

18

⁹ Charter has included this paragraph directly under paragraph 5.9.1.2 in its proposal, and has not numbered the paragraph. The language in this paragraph is included in paragraph 5.9.2.2 in Qwest’s contract proposal. Qwest does not know if Charter intended to duplicate paragraph 5.9.9.2 here, or if Charter simply intended to change paragraph 5.9.9.2. One reason Qwest does not know is that Charter presented the material for this issue to Qwest the day before Charter filed for arbitration. No substantive discussions between Charter and Qwest on this issue have occurred at this time.

1 **Q. HAS THIS COMMISSION RULED ON PROVISIONS SIMILAR TO**
2 **THOSE PROPOSED BY CHARTER FOR THIS SECTION OF THE**
3 **AGREEMENT?**

4 A. Yes. In the 271 proceeding, the Commission adopted the language consistent with
5 Qwest's proposal, and specifically prohibited an exception for gross negligence.¹⁰

6

7 **Q. DOES QWEST HAVE ANY OTHER ISSUES WITH CHARTER'S**
8 **PROPOSED LANGUAGE CHANGES?**

9 A. Yes. Charter proposes to create definitions in Section 5.9.1.1 of the contract and
10 then use those definitions in subsequent sections of the contract. First, the standard
11 for the contract is to place definitions in Section 4 of the contract. But more
12 problematic is the fact that Charter proposes to create formal definitions for this
13 section when these terms are used elsewhere and have a different meaning. The
14 specificity of Qwest's language eliminates any uncertainty as to the meaning of the
15 terms as they are used with regard to indemnification.

16

17 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
18 **TO THE LANGUAGE PERTAINING TO INDEMNIFICATION?**

¹⁰ See *WA 271 28th Order* at ¶ 121; See also *WA 271 31st Order* at ¶¶ 43-46.

1 A. This Commission should agree that certainty of Qwest's language is preferable to
2 the vagueness created by Charter's changes, and should choose Qwest's language
3 for the Interconnection Agreement.

4

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

6 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
7 **INTERCONNECTION AGREEMENT REGARDING INDEMNIFICATION**
8 **AND SETTLEMENT?**

9 A. Qwest has proposed the following language regarding indemnification and
10 settlement:

11

12 5.9.2.3 In no event shall the Indemnifying Party settle or consent to any judgment
13 pertaining to any such action without the prior written consent of the
14 Indemnified Party. In the event the Indemnified Party withholds consent,
15 the Indemnified Party may, at its cost, take over such defense, provided
16 that, in such event, the Indemnifying Party shall not be responsible for, nor
17 shall it be obligated to indemnify the relevant Indemnified Party against,
18 any cost or liability in excess of such refused compromise or settlement.
19

20 **Q. WHAT CHANGES TO QWEST'S LANGUAGE HAS CHARTER**
21 **PROPOSED REGARDING INDEMNIFICATION AND SETTLEMENT?**

22 A. Charter has proposed the following changes:

23

24 5.9.2.3 In no event shall the Indemnifying Party settle or consent to any judgment
25 pertaining to any such action without the prior written consent of the
26 Indemnified Party. In the event the Indemnified Party withholds consent,
27 the Indemnified Party ~~may~~ **must**, at its cost, take over such defense,
28 provided that, in such event, the Indemnifying Party shall not be

1 responsible for, nor shall it be obligated to indemnify the relevant
2 Indemnified Party against, any cost or liability in excess of such refused
3 compromise or settlement.
4

5 **Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S CHANGES TO**
6 **QWEST'S INTERCONNECTION AGREEMENT LANGUAGE?**

7 A. The law and this agreement sufficiently address Charter's recourse rights if Qwest
8 unreasonably refuses to settle a dispute. If Qwest acted in bad faith, then fee
9 shifting may be ordered by the court as a remedy. Charter's language is overbroad
10 and puts on unreasonable burden upon Qwest even if Qwest's rejection of a
11 settlement is reasonable. Qwest's language allows for reasonable rejection of a
12 settlement offer, as frequently occurs during settlement negotiations.

13

14 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
15 **TO THE LANGUAGE PERTAINING TO INDEMNIFICATION AND**
16 **SETTLEMENT?**

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

20

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

22

1 **Q. WHAT LANGUAGE HAS QWEST PROPOSED IN THE**
2 **INTERCONNECTION AGREEMENT REGARDING INDEMNIFICATION**
3 **AND INTELLECTUAL PROPERTY?**

4 A. Qwest has proposed the following language regarding indemnification and
5 intellectual property:

6
7 5.10.2 Subject to Section 5.9.2, each Party (the Indemnifying Party) shall
8 indemnify and hold the other Party (the Indemnified Party) harmless from
9 and against any claim that the use of facilities of the Indemnifying Party or
10 services provided by the Indemnifying Party provided or used pursuant to
11 the terms of this Agreement misappropriates or otherwise violates the
12 intellectual property rights of any third party. In addition to being subject
13 to the provisions of Section 5.9.2, the obligation for indemnification
14 recited in this paragraph shall not extend to infringement which results
15 from (a) any combination of the facilities or services of the Indemnifying
16 Party with facilities or services of any other Person (including the
17 Indemnified Party but excluding the Indemnifying Party and any of its
18 Affiliates), which combination is not made by, or at the direction of the
19 Indemnifying Party or (b) any modification made to the facilities or
20 services of the Indemnifying Party by, on behalf of or at the request of the
21 Indemnified Party and not required by the Indemnifying Party. In the
22 event of any claim, the Indemnifying Party may, at its sole option (a)
23 obtain the right for the Indemnified Party to continue to use the facility or
24 service; or (b) replace or modify the facility or service to make such
25 facility or service non-infringing. If the Indemnifying Party is not
26 reasonably able to obtain the right for continued use or to replace or
27 modify the facility or service as provided in the preceding sentence and
28 either (a) the facility or service is held to be infringing by a court of
29 competent jurisdiction or (b) the Indemnifying Party reasonably believes
30 that the facility or service will be held to infringe, the Indemnifying Party
31 shall notify the Indemnified Party and the Parties shall negotiate in good
32 faith regarding reasonable modifications to this Agreement necessary to
33 (1) mitigate damage or comply with an injunction which may result from
34 such infringement or (2) allow cessation of further infringement. The
35 Indemnifying Party may request that the Indemnified Party take
36 reasonable steps to mitigate damages resulting from the infringement or
37 alleged infringement including, but not limited to, accepting modifications
38 to the facilities or services, and such request shall not be unreasonably
39 denied.

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5.10.4 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.¹¹

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12 **Q. WHAT CHANGES TO QWEST'S LANGUAGE HAS CHARTER**

13 **PROPOSED REGARDING INDEMNIFICATION AND INTELLECTUAL**

14 **PROPERTY?**

15 A. Charter has proposed the following changes:

16

17

5.10.2 Subject to Section 5.9.2, each Party (the Indemnifying Party) shall indemnify and hold the other Party (the Indemnified Party) harmless from and against any ~~loss, cost, expense or liability arising out of a c~~Claim that the use of facilities of the Indemnifying Party or services provided by the Indemnifying Party provided or used pursuant to the terms of this Agreement misappropriates or otherwise violates the intellectual property rights of any third party. In addition to being subject to the provisions of Section 5.9.2, the obligation for indemnification recited in this paragraph shall not extend to infringement which results from (a) any combination of the facilities or services of the Indemnifying Party with facilities or services of ~~any other Person (including the Indemnified Party but excluding the Indemnifying Party and any of its Affiliates)~~, which combination is not made by, or at the direction, or with knowledge of the Indemnifying Party or (b) any modification made to the facilities or services of the Indemnifying Party by, on behalf of or at the request of the Indemnified Party and not required by the Indemnifying Party. In the

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¹¹ Per Qwest's Answer to Charter's petition, Qwest has agreed to the grammatical change proposed by Charter in paragraph 5.10.5, so Qwest will not present the language for this paragraph here.

1 event of any claim, the Indemnifying Party may, at its sole option (a)
2 obtain the right for the Indemnified Party to continue to use the facility or
3 service; or (b) replace or modify the facility or service to make such
4 facility or service non-infringing. If the Indemnifying Party is not
5 reasonably able to obtain the right for continued use or to replace or
6 modify the facility or service as provided in the preceding sentence and
7 either (a) the facility or service is held to be infringing by a court of
8 competent jurisdiction or (b) the Indemnifying Party reasonably believes
9 that the facility or service will be held to infringe, the Indemnifying Party
10 shall notify the Indemnified Party and the Parties shall negotiate in good
11 faith regarding reasonable modifications to this Agreement necessary to
12 (1) mitigate damage or comply with an injunction which may result from
13 such infringement or (2) allow cessation of further infringement. The
14 Indemnifying Party may request that the Indemnified Party take
15 **reasonable** steps to mitigate damages resulting from the infringement or
16 alleged infringement including, but not limited to, accepting modifications
17 to the facilities or services, and such request shall not be unreasonably
18 denied.
19

20 5.10.4 Except as expressly provided in this Intellectual Property Section, nothing
21 in this Agreement shall be construed as the grant of a license, either
22 express or implied, with respect to any patent, copyright, logo, trademark,
23 trade name, trade secret or any other intellectual property right now or
24 hereafter owned, controlled or licensable by either Party. Neither Party
25 may use any patent, copyright, logo, trademark, trade name, trade secret or
26 other intellectual property rights of the other Party or its Affiliates without
27 execution of a separate **written** agreement between the Parties.
28

29 **Q. WHAT ARE QWEST'S OBJECTIONS TO CHARTER'S CHANGES TO**
30 **QWEST'S INTERCONNECTION AGREEMENT LANGUAGE IN**
31 **SECTION 5.10.2?**

32 A. Charter's proposed changes to this language have the effect of creating vagueness
33 in the provision, shifting burdens to Qwest and increasing the likelihood of
34 litigation. First, removing the "lost, cost, expense or liability" phrase, dramatically
35 expands the potential claims for losses that could become the subject of litigation.
36 Qwest's language specifically identifies what persons would be subject to this

1 paragraph. Removing Qwest's language and adding the phrase "or with
2 knowledge" creates ambiguity, and could expand litigation to include the question
3 of how to define what "knowledge" is and who has/had such "knowledge".

4

5 **Q. WHICH PARTY BEARS THE GREATER RISK WITH REGARD TO THE**
6 **USE OF INTELLECTUAL PROPERTY?**

7 A. Qwest. Remember that the purpose of this Interconnection Agreement is primarily
8 to give Charter access to Qwest's facilities. This includes access to Qwest's
9 Operations Support Systems ("OSS"), for the purposes of pre-ordering, ordering,
10 billing, maintenance and repair. Qwest's OSS incorporate numerous software
11 systems that Qwest has licensed from other vendors.

12

13 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
14 **TO THE LANGUAGE PERTAINING TO INDEMNIFICATION AND**
15 **INTELLECTUAL PROPERTY?**

16 A. This Commission should agree that this places an unprecedented and undue burden
17 upon Qwest, and should choose Qwest's language for the Interconnection
18 Agreement.

19

1 **APPLICABLE WASHINGTON LAW, INCLUDING WUTC RULES**
2 **AT W.A.C. 480-120, ET. SEQ.**
3

4 **Q. HAS QWEST MADE ANY OTHER PROPOSALS TO CHARTER**
5 **REGARDING WARRANTIES?**

6 A. Yes. In an effort to settle this issue, Qwest proposed the following language to
7 Charter:

8
9 5.11.1 EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, THE
10 PARTIES AGREE THAT NEITHER PARTY HAS MADE, AND THAT
11 THERE DOES NOT EXIST, ANY WARRANTY, EXPRESS OR
12 IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF
13 MERCHANTABILITY AND FITNESS FOR A PARTICULAR
14 PURPOSE AND THAT ALL PRODUCTS AND SERVICES
15 PROVIDED HEREUNDER ARE PROVIDED “AS IS,” WITH ALL
16 FAULTS. **THIS PROVISION SHALL NOT SERVE TO**
17 **ELIMINATE, OR OTHERWISE LIMIT, THE PARTIES’**
18 **QUALITY OF SERVICE OBLIGATIONS PURSUANT TO**
19 **APPLICABLE WASHINGTON LAW.**
20

21 **Q. HAS CHARTER REPLIED TO QWEST’S SETTLEMENT OFFER?**

22 A. No.

23

24 **Q. WHAT ARE QWEST’S OBJECTIONS TO CHARTER’S CHANGES TO**
25 **QWEST’S INTERCONNECTION AGREEMENT LANGUAGE ON**
26 **WARRANTIES?**

27 A. Qwest’s language is consistent with the industry standard language for warranties
28 as specified in Article 2 of the Uniform Commercial Code. This language is also

1 the standard for Qwest's contracts with other CLECs. Qwest has attempted to
2 accommodate Charter by including the reference to service quality, but Qwest
3 cannot agree to remove the "as is" language. Charter has other protections within
4 this document that allow it to test the services provided by Qwest and to determine
5 whether the services are acceptable before accepting them from Qwest. Charter
6 also has the service quality protections that Qwest has agreed to add to the warranty
7 language. Removing the "as is" provision creates a level of vagueness to the
8 warranty language that gives Charter another avenue to use the contract for the
9 purposes of litigation, which also creates greater financial risk for Qwest.

10

11 **Q. WHY DOES QWEST'S SETTLEMENT PROPOSAL REMOVE THE**
12 **SPECIFIC REFERENCE TO WASHINGTON RULES?**

13 A. The rules cited in Charter's language include service quality rules for retail
14 services. This contract pertains to wholesale services. Qwest is concerned that the
15 reference is too broad and creates a potential for conflict as to which service quality
16 rules will apply to this contract.

17

18 **Q. WHAT SHOULD THIS COMMISSION'S DECISION BE WITH REGARD**
19 **TO THE LANGUAGE PERTAINING TO WARRANTIES?**

1 A. This Commission should agree that Qwest's language follows an accepted industry
2 standard for warranties, and should choose Qwest's language for the
3 Interconnection Agreement.

4

5 **XII. CONCLUSION**

6 **Q. PLEASE SUMMARIZE YOUR TESTIMONY.**

7 A. Section 5 of Qwest's Interconnection Agreements is intended to clarify the rights
8 and responsibilities of the parties to each agreement. It is also intended to reduce
9 the likelihood of litigation by specifically defining the things such as liability and
10 indemnification. The changes that Charter has proposed for Section 5 reduce its
11 effectiveness. Charter's changes add vagueness to the terms and increase the
12 likelihood of litigation. Charter's language veers away from standard industry
13 practice, and nullifies much of the work that was done by industry participants in
14 the 271 process to create a workable contract for interconnection. This adds costs
15 for both parties, increases the likelihood that this Commission will need to
16 intervene in disputes between the parties, and on the whole increase the financial
17 risk that must be borne by Qwest. For these reasons, Charter's contract changes
18 should be rejected, and Qwest's language should be used for Section 5 of the
19 Interconnection Agreement between Qwest and Charter.

20

21

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

2 A. Yes.