BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC	Case No. TO-2009-0037

PROPOSED ORDER, FINDINGS OF FACT, AND CONCLUSIONS OF LAW OF CHARTER FIBERLINK-MISSOURI, LLC

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November 20, 2008

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COMES NOW, Charter Fiberlink-Missouri, LLC, and submits the following proposed order, with findings of fact, and conclusions of law.

I. PARTIES, PROCEDURAL HISTORY AND PRELIMINARY MATTERS

A. The Parties

Charter Fiberlink-Missouri, LLC ("Charter"), petitioner, operates as a facilities-based telephone service provider in Missouri. Utilizing existing network facilities of its cable company affiliate, Charter is in a unique position vis-à-vis other competitive carriers in Missouri. Charter's reliance on and use of the existing local distribution network of its affiliate means Charter does not need to lease unbundled network elements ("UNEs," such as switching, loops, transport, etc.) from incumbent local exchange carriers ("ILECs"), including CenturyTel of Missouri, LLC ("CenturyTel"). Thus, Charter is a co-carrier, with its own peer network, and does not require of ILECs anything more than efficient and fair traffic exchange under reasonable terms and conditions.

CenturyTel is an incumbent local exchange carrier offering telephone services in Missouri.

B. Resolved and Unresolved Issues

Given Charter's status as a facilities-based competitor, the disputed issues between Charter and CenturyTel (together, "Parties") are in many respects quite different from those between CenturyTel and other CLECs in Missouri, in that the parties aren't disputing UNE, Resale, and Collocation provisions. Fortunately, since this case began, Charter and CenturyTel have continued to negotiate, and resolve, a number of disputed issues. Specifically, the Parties have resolved the following disputed issues: Issue 1 (Definition of VoIP), Issue 6 (Deposits), Issue 9 (Forecasts), Issue 25 (Port requests requiring "project management") Issue 26 (Number

porting requests), Issue 30 (Directory close dates), Issue 33 (Rates for 911 facilities), Issue 34 (Traffic routing parameters) and Issue 39 (Pricing Article regarding 911 charges). Since the Commission does not have to decide these newly resolved issues, they are not addressed here.

C. Preliminary Matters

This Proposed Order is organized by both the major issue area and according to the Final Joint DPL filed by the Parties on September 2, 2008. Generally, the four major issue areas presented in this brief are: 1) General Terms and Conditions; 2) Network Interconnection; 3) 911 Issues; 4) Ancillary Issues

D. Legal Standard

The standard by which the disputed issues must be resolved is clear. This arbitration proceeding is governed by the substantive and procedural requirements set forth in Sections 251 and 252 of the federal Telecommunications Act.[1] Specifically, Section 252(c)(1) of the Act directs this Commission to resolve open issues in a manner that "meet the requirements of Section 251, including the regulations prescribed by the Federal Communications Commission ("FCC") pursuant to section 251."[2] Thus, the Commission must apply Section 251 and the FCC's regulations promulgating the Act to arrive at a decision consistent with Section 252(c)(1).

Notably, this standard does not allow for the consideration of many factors CenturyTel has suggested the Commission rely upon. Such factors include the potential that some other CLEC may "adopt" the final agreement pursuant to 47 U.S.C. § 252(i). Instead, the Commission must look only to federal law, and the rules and orders prescribed by the FCC in accordance with Section 251, and state law that comports with the Act.

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[1] 47 U.S.C. § 151, *et seq.* (hereinafter "Act").

[2] 47 U.S.C. § 252(c)(1).

II. GENERAL TERMS AND CONDITIONS ISSUES

Issue 3(a): How should the Agreement define the term "tariff?"

Issues 3 and 41 both deal with how the Parties should incorporate tariffs into the Agreement. With respect to Issue 3(a), Charter proposes that the Agreement should define the term "tariff" in a manner that makes clear that the Parties intend to incorporate only those tariff provisions that are specifically identified in the Agreement. CenturyTel proposes that the Agreement include a definition of the term "tariff" that could be used generally to incorporate an entire tariff(s), which could conceivably permit the Parties to indiscriminately incorporate any of the terms and conditions therein.

Findings of Fact

1. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.[3]

2. The Parties desire to incorporate portions of their tariffs into the Agreement. Webber Rebuttal at 6, lines 20-21, 23; 7, lines 1-4.

3. There are only eleven points in the Agreement that reference a tariff. Webber, Tr. 159, lines 3-5.

4. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes. Webber Direct at 13, lines 2-4.

Discussion

Charter's proposed language would include a definition of the term "tariff" which establishes that the Parties intend to incorporate only those provisions that are specifically and expressly identified in the Agreement. Unlike CenturyTel's proposal, which requires only a

[3] We take administrative notice of this fact pursuant to Mo. REV. STAT. § 536.070(6).

general reference to the complete tariff(s), Charter believes that the Agreement should not be construed as incorporating provisions that are not specifically identified by the Parties. We agree.

Charter's proposal creates certainty between the Parties as to what tariff provisions are incorporated into the Agreement. This approach also ensures that only those specific provisions that both Parties mutually intend to incorporate from either Party's tariffs will be made a part of the Agreement. As Mr. Webber explained, Charter's proposal will minimize potential disputes between the Parties concerning obligations arising under the Agreement. Webber Direct at 7, lines 3-6. Indeed, Charter's proposal clarifies that no material contractual obligations of either Party can be increased, or reduced, through the application of a tariff in an overbroad manner. Webber Direct at 7, lines 8-11.

Charter's proposal is consistent with applicable law. Specifically, Missouri courts have ruled that an extraneous document may constitute part of a contract "[s]o long as the contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt."[4] That result is consistent with Charter's language, which requires that any incorporated tariffs be "specifically and expressly identified in this Agreement ...." DPL at 5 (Charter proposed language Art. II, § 2.140)

Conclusion

We find that Charter's proposed language concerning Issue 3(a) is consistent with the Act and Missouri law. The language requires the incorporation of specific tariff terms, and therefore will ensure that any incorporated tariff is not applied in an overbroad manner. That, in turn,

[4] *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 196 (Mo.App.E.D. 2006) (citing RESTATEMENT (SECOND) OF CONTRACTS § 132 cmt. c. (1981)).

should help to limit disputes between the Parties concerning obligations arising under the Agreement. Accordingly, we adopt Charter's proposed language.

Issue 3(b) / Issue 41: How should specific tariffs be incorporated into the Agreement?

Issues 3 and 41 deal with how the Parties should incorporate tariffs into the ("Agreement"). Charter proposes that the Agreement should incorporate only those specific tariff provisions the Parties intend to be operative under the Agreement. CenturyTel proposes that referencing either Party's tariff in the Agreement is sufficient to incorporate all of the terms therein into the Agreement.

Findings of Fact

1. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.[5]

2. The Parties desire to incorporate portions of their tariffs into the Agreement. Webber Rebuttal at 6, lines 20-21, 23;, 7, lines 1-4.

3. There are only eleven points in the Agreement that reference a tariff. Webber, Tr. 159, lines 3-5.

4. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes. Webber Direct at 13, lines 2-4.

Discussion

CenturyTel proposes to incorporate portions of its existing tariffs into the Agreement as a basis for satisfying certain obligations it has under the Agreement. Webber Rebuttal at 6, lines 20-21. CenturyTel's position is that merely referencing either Party's tariff in the Agreement is sufficient to incorporate all tariff terms into the Agreement. Webber Direct at 10, lines 23-25.

[5] We take Administrative Notice of this fact pursuant to Mo. REV. STAT. § 536.070(6).

Under CenturyTel's approach, an entire referenced tariff would be incorporated and made part of the Agreement.

While Charter does not object in principle to the concept of incorporating external documents for certain contractual obligations, it insists the Parties incorporate external documents with precision. Webber Rebuttal at 6, line 23; 7, lines 1-4. Charter's position is that only the specific tariff provisions the Parties intend to be bound by should be incorporated into the Agreement. Under Charter's proposal, the Agreement would include language clarifying that tariffs are not applicable under the Agreement except, and only to the extent that, the Agreement incorporates specific rates or terms from either Party's tariff.

Charter argues it would be unreasonable for it to agree that hundreds of additional pages of CenturyTel's tariffs are automatically incorporated into the Parties' Agreement. Webber Rebuttal at 7, lines 5-7. We agree. CenturyTel's position appears to be at odds with Missouri law, which provides that an extraneous document may constitute part of a contract "[s]o long as the contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt."[6] CenturyTel's approach would not make "clear reference" in that mention of a single tariff provision could be leveraged into inclusion of other, superfluous tariff language not otherwise intended and/or mutually agreed upon by the Parties.

CenturyTel's proposal would make the Agreement less clear, more ambiguous, and more prone to future disputes that would need to be resolved by this Commission. Webber Rebuttal at 13, lines 9-10. As Mr. Webber testified, incorporating only the specific tariff provisions the Parties deem to be effective under the Agreement would ensure that the tariff is not applied in an overbroad manner. Webber Direct at 11, lines 14-16.

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[6] *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.*, 204 S.W.3d 183, 196 (Mo.App.E.D. 2006) (citing RESTATEMENT (SECOND) OF CONTRACTS § 132 cmt. c. (1981)).

We take note that the Commission rendered a decision to resolve an interconnection agreement dispute between Charter and CenturyTel.[7] That proceeding is particularly instructive because it involved the question of whether a CenturyTel tariff is incorporated into the current interconnection agreement between Charter and CenturyTel. The Commission found that CenturyTel had knowingly assessed Local Number Portability ("LNP" or porting) charges upon Charter that were not authorized by the interconnection agreement and more significantly, rejected CenturyTel's attempts to incorporate certain tariff charges as a basis for assessing charges upon Charter.[8] Thus, Charter's desire to clarify the application and incorporation of specific tariff provisions into the Agreement is well founded.

Further, we reject CenturyTel's claims that Charter's proposal creates unnecessary complexity or would cause CenturyTel to waste its time parsing through tariff terms and conditions. CenturyTel's argument overlooks that the company will be referencing its own tariff, with which it is presumably knowledgeable. We also agree with Mr. Webber there is nothing wasteful about specifically identifying which tariff provisions to incorporate into the Agreement to avoid confusion between the Parties, and overreaching by CenturyTel. Webber Direct at 12, lines 14-16. In addition, Mr. Webber explained that the Agreement is organized in a manner that would not make it unduly complicated for CenturyTel to specify which terms (including rates, terms and conditions) would be binding upon Charter. Webber Direct at 12, lines 20-22. Indeed, Charter has already identified the specific tariff provisions to be incorporated into the Agreement so there is no credible reason not to identify those terms specifically. Webber Direct at 13, lines 1-2.

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[7] *Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC, Case No. LC-2008-0049,* Report and Order at 5 (MO PSC 2008) (hereinafter *Report and Order*).

[8] *Id.* at 6, 10-11 (finding that "neither the Agreement, *nor the documents* to which the Agreement refers, provide for a charge for porting requests") (emphasis added).

We also reject CenturyTel's argument that the filed rate doctrine precludes Charter's proposal. Generally, the filed rate doctrine prohibits CenturyTel from offering services at rates, terms or conditions that vary from tariff.[9] CenturyTel therefore presupposes that Charter's proposal requires CenturyTel to provide services at rates, terms or conditions that vary from CenturyTel's tariff. We disagree. Charter does not seek to change the meaning of the tariff or exercise control over, nor is it seeking to obtain services at rates or terms that vary from those offered in the tariff. Webber Rebuttal at 10, lines 19-23. Thus, there is no evidence in the record to support CenturyTel's argument that the filed rate doctrine is implicated by Charter's proposed language.

Conclusion

We find that Charter's proposed language will incorporate only those specific tariff provisions the Parties intend to be operative under the Agreement. We reject CenturyTel's proposal to incorporate tariffs in their entirety, as such approach would lead to disputes between the Parties. We adopt Charter's language with respect to Issues 3(b) and 41.

Issue 4(a): Should the Agreement include terms that allow one party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?

The primary question here is whether the Agreement should include language that would allow one Party to initiate unilateral termination of the Agreement or whether the Agreement should include terms that allow for the Commission's oversight of any potential termination. Charter's proposed language would achieve the latter, a result that is in the public's interest, and consistent with both industry practice and Missouri law.

Findings of Fact

[9] *See*, e.g., *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998).

1. Interconnection involves the physical connection of networks and the establishment of call paths between the Parties' respective switches and related equipment. Giaminetti Direct at 7, lines 1-2.

2. Interconnection agreements establish the framework, and obligations, that provide both Parties' subscribers the ability to send calls to, and receive calls from, the public switched telephone network ("PSTN"). Giaminetti Direct at 8, lines 1-3.

3. Interconnection agreements are mandated by Section 251 of the Act, and are not formed based on typical arms-length negotiations. Giaminetti Direct at 6, lines 17-19.

4. Subscribers rely upon the physical connection, and call paths, to send calls to and from one another. Giaminetti Direct at 7, lines 9-10.

Discussion

Charter's proposed language will ensure that neither Party can unilaterally terminate the Agreement in a manner adversely impacting *either* Party's subscribers. Giaminetti Direct at 9, lines 12-14. Under Charter's proposal, any finding of a default by one Party would be predicated on the other Party's ability to invoke the dispute resolution processes of the Agreement. Charter Petition Exh. B, (Proposed Draft Agreement), § 2.6. That, in turn, would oblige the Parties to try to resolve disputes that could otherwise lead to service-affecting termination of the Agreement. Giaminetti Direct at 9, lines 16-18. Moreover, Charter's proposal also includes, in certain circumstances, the concept that termination of the Agreement will not occur unless, or until, the Commission specifically approves such action. *See* Charter Petition Exh. B, § 2.6.

The need for Commission intervention in service-affecting situations is self-evident. As Charter witness Giaminetti testified:

> if the Agreement were terminated while subscribers were still relying upon the physical connections used to send and receive calls between the Parties' networks,

> it would be possible that subscribers could lose service altogether, or that some calls would fail because of the termination.

Giaminetti Direct at 6, lines 7-10. CenturyTel did not contest Ms. Giaminetti's assertion that once the Parties' networks are interconnected, each Party's subscribers rely upon the physical connection to send calls to and from one another. This basic functionality is one of the most important aspects of physical interconnection mandated by Section 251 of the Act.

Charter's proposal is thus consistent with the procedures required under Sections 251 and 252 of the Act, as construed by several federal appellate courts. For example, as the Third Circuit recently explained:

> interpretation and enforcement actions that arise after a state commission has approved an interconnection agreement *must* be litigated in the first instance before the relevant state commission. A party may then proceed to federal court to seek review of the commission's decision or move on to the appropriate trial court to seek damages for a breach, if the commission finds one."[10]

Four other federal appellate courts agree that state commissions are best suited to interpret and enforce disputes arising out of interconnection agreements.[11] Their conclusion rests, in relevant part, on the fact that the state commissions have approved these agreements in the first instance.[12] Further, state commissions are also the expert state agency charged with interpreting and enforcing interconnection agreements Section 252.[13]

Moreover, it is clearly within the public interest and our rules that the Commission ensure that carrier disputes do not harm subscribers. Commission Rule 4 C.S.R. 240-33.110 contemplates Commission oversight, and adjudication, of disputes between companies like the

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[10] *Core Commc'ns, Inc. v. Verizon Pa., Inc.*, 493 F.3d 333, 344 (3d Cir. 2007) (emphasis added).

[11] *See Southwestern Bell Tel. Co. v. PUC*, 208 F.3d 475, 480 (5th Cir. 2000); *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1278 n.9 (11th Cir. 2003) (*en banc*); *BellSouth Telecomm. v. MCIMetro Access Trans. Serv.*, 317 F.3d 1270 (11th Cir. 2003); *Southwestern Bell Tel. Co. v PUC*, 208 F3d 475 (5th Cir. 2000); *Puerto Rico Telephone Co. v. Telecomm. Regulatory Board of Puerto Rico*, 189 F.3d 1 (1st Cir. 1999); and *MCI Telecomm. Corp. v. Ill. Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999).

[12] *Southwestern Bell Tel. Co.*, 208 F.3d at 479-80.

[13] *BellSouth Telecomms., Inc.*, 317 F.3d at 1277.

Parties and makes clear that "pending the resolution of a complaint filed with the commission, the subject matter of such complaint shall *not constitute a basis for discontinuance*."[14] This is precisely the same oversight Charter proposes to include in the Agreement. Accordingly, Charter's proposal is consistent with our rules.

Charter's proposal is also consistent with industry practice, which anticipates state commission approval of interconnection agreement termination actions that affect customers. Giaminetti Direct at 9, lines 18-21. Charter's proposal also ensures that any termination event is preceded by procedures that provide sufficient, orderly, and reasonable process. Given the significance of a potential termination of an interconnection agreement, it is appropriate to ensure that such events are preceded by adequate process to protect both Parties' respective rights, and uninterrupted service for each Party's end users.

In contrast, CenturyTel's proposed language offers few protections to Charter or end users. Most notably, CenturyTel seeks the power to terminate the agreement where one Party has "materially breached" any term or condition, CenturyTel Answer, Exh. B. (Draft Proposed Agreement) § 2.6(c); at the initiation of a "bankruptcy or receivership proceeding," *id.* at § 2.6(a); or upon the failure of a Party to pay undisputed amounts, *id.* at § 2.6(d). The problems with this approach are several. First, if CenturyTel's contract language is adopted, either Party would have the unfettered right to unilaterally terminate the Agreement in the event that a Party determines, in its sole discretion, that the other Party has "materially breached" a term or condition of the agreement. However, "material breach" is not defined in the Agreement. We will not grant either Party unilateral authority to terminate service and affect end users based on an undefined contract term.

[14] 4 C.S.R. 240-33.110(5) (emphasis added).

Second, with respect to bankruptcy proceedings, termination of a contract immediately following the initiation of such a proceeding would conflict with the federal statutory "automatic stay" that would bar any unilateral terminations of any agreements in place as of the date of such stay.[15] Bankruptcy protection is designed to maintain the status quo concerning the affected entity's contractual obligations and other assets until the Bankruptcy Court makes a determination as to the disposition of the debtor's assets. We will not approve a contract term that so obviously contravenes federal law.

Third, CenturyTel's proposal that termination occur where one Party fails to pay undisputed amounts, while facially appealing, is problematic. CenturyTel's proposed language does not acknowledge those circumstances where the very question of whether bills are properly disputed is at issue. As the Commission knows all too well, that situation has arisen between Charter and CenturyTel under their current contract[16] and continues in the Parties' relationship. As Ms. Giaminetti explained, "our charges are disputed, but in CenturyTel's mind, the charges are undisputed." Giaminetti, Tr. 253, lines 23-24. In such circumstances, under CenturyTel's proposed language, it would have the right to unilaterally terminate the Agreement – even if (as the Commission recently found) there was a good faith dispute submitted by Charter. That result is clearly unjust and unreasonable.

Fourth, CenturyTel's proposed 30-day notice and cure period is not realistic. For example, CenturyTel has not proffered any evidence to explain how a bankruptcy proceeding could be resolved in less than 30 days. Yet, under CenturyTel's proposal, it appears that

[15] *See* 11 U.S.C. § 362. Note that the automatic stay applies under any chapter of the bankruptcy code including both liquidation under Chapter 7 and reorganization under Chapter 11.

[16] *See Report and Order* at 5.

termination could happen on day 31. Miller, Tr. 594, lines 6-12.[17] In addition, as explained by Ms. Giaminetti, it takes Charter "twice the amount of time to dispute" billing matters with CenturyTel than with other ILECS. Giaminetti, Tr. 263, lines 15-17. This overly time consuming review process necessarily slows down the dispute resolution process. Thus, CenturyTel's proposed time period is inadequate.

Conclusion

Charter's proposed language ensures that the Agreement cannot be terminated unilaterally and that, in the unlikely event of a default, certain intermediary steps must be taken to protect subscribers from adverse effects. We adopt Charter's proposed language.

Issue 4(b) - Should the Agreement include terms that allow one Party to terminate the Agreement as to a "specific operating area" without any assurance to the other Party that the terms of the Agreement will continue uninterrupted with the new LEC that acquires the operating area?

The primary dispute between the Parties is whether either Party should be allowed to terminate the Agreement, as to a specific operating area or service area, without any assurances from the acquiring LEC that it will assume the terms of the Agreement. Charter's proposed language would establish that neither Party could terminate the interconnection agreement unless the buyer/transferee assumes the terms of the Agreement. Further, under Charter's approach, the Party that is not involved in the transaction would receive notice from the other Party. CenturyTel proposes unilateral authority to terminate the Agreement to effect sale to a third party of a specific operating area.

Findings of Fact

1. CenturyTel operates in multiple operating areas and service areas in Missouri. Giaminetti, Direct at 13, lines 18-20.

[17] Mr. Miller explained that "[i]f they have not cured the default at that point, then the party to whom the default has ... the non-defaulting party is allowed to take whatever action is specified according to the agreement."

Discussion

With respect to this issue, Charter seeks to ensure that if CenturyTel sells operations in a specific operating area to another entity, the terms of the Agreement would continue in effect once the buyer/transferee assumes operations in that area. Charter has exerted considerable time, and expense, to negotiate and arbitrate the terms of this Agreement. Thus, the benefits of Charter's efforts should last for the duration of the Agreement. CenturyTel should not be permitted to undermine those efforts by selling a specific operating area, or a portion thereof, to another buyer/transferee entity without requiring that entity to assume the Agreement in its entirety. Without these pre-conditions in place, the new buyer/transferee could simply refuse to interconnect with Charter, or could use leverage to force Charter to interconnect pursuant to unreasonable terms and conditions. Charter's proposal will ensure that this result is avoided.

We note that CenturyTel has opted into a waiver of Missouri Revised Statutes Section 392.300 so, unlike other carriers operating in Missouri, CenturyTel is not subject to the Commission's oversight as it pertains to receiving approval for transfers of its assets.[18] Miller, Tr. 595, lines 16-25; 596, lines 1-4. Thus, absent the language proposed by Charter, there are no protections to ensure that there is service continuity for end users served by Charter.

Conclusion

The proposed language offered by Charter ensures that neither Party is able to terminate the Agreement as to a specific area, or portion thereof, without the third party buyer/transferee assuming the terms of the Agreement. Specifically, neither Party will be permitted to use Section 2.7 to terminate the contract and discontinue interconnection arrangements in certain locations without meeting certain preconditions. Thus, both Parties will remain connected to the

[18] Notice of Election of CenturyTel of Missouri, LLC for Waiver of Commission Rules and Statues Pursuant to Section 392.420, RSMo., IE-2009-0079. (MO. PSC 2008).

public switched telephone network and each Party's respective subscribers' phone calls will continue to be delivered, and received, without interruption. We adopt Charter's language for Issue 4(b).

Issue 5: Should the Agreement allow either Party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other Party's consent?

This issue presents the question of whether the Agreement should include language that permits either Party to assign the Agreement to a third party in connection with a sale without being required to first obtain the prior consent of the other Party. Charter's position is that assignment should be subject to prior comment, which could not be unreasonably withheld, conditioned or delayed upon the sale of all or substantially all assets. CenturyTel's position is that the inclusion of Charter's proposed language would limit the ability of either Party to assign the Agreement to that Party's Affiliates or subsidiaries.

Findings of Fact

1. The Parties agreed in a joint agreement filed with the Commission on October 16, 2008 that Issue 5 was a "briefing only" issue, and therefore no Party submitted evidence with respect to Issue 5.

Discussion

Charter's position is that in the event of a sale of all or substantially all assets, either Party should be permitted to assign all of its rights, and delegate its obligations, liabilities and duties under this the Agreement to a third party without being required to seek the consent of the other Party. *See* DPL at 14. Charter asserts that it would be unreasonable for the Agreement to include language that would give either Party the right to withhold consent to assignment of the Agreement in a manner that would effectively undermine the other Party's ability to freely contract with third-parties in connection with the sale of all or substantially all assets. *Id.*

We agree. The inclusion of Charter's proposed language would ensure that any assignment to a third party of the Agreement (and the rights and obligations therein) in conjunction with the sale of all or substantially all assets could not be unreasonably withheld, conditioned, or delayed. We decline to grant either Party the right to delay, or withhold, the other Party's ability to freely contract with third parties including when one Party to the agreement sells all, or substantially all, of its assets. The sale of assets normally requires the assignment of contracts necessary to utilize the assets which companies like Charter and CenturyTel utilize in their operations. Thus, our decision ensures that both Parties will have the necessary flexibility to engage in these commercial transactions.

We also reject CenturyTel's argument that Charter's proposed language is confusing and otherwise unnecessary because it could effectively limit the ability of one Party to assign the Interconnection Agreement to its Affiliate or subsidiaries. *See* DPL at 14-15. Charter's proposal would permit either Party to assign the Agreement to third-parties (which includes either Party's Affiliates or subsidiaries) without prior consent from the other Party provided that such assignment occurs in connection with the sale of all or substantially all assets.

In the instances where a Party desires to assign its rights in the Agreement to an affiliate or subsidiary in an arrangement that does not involve a sale of assets, the assigning Party would simply need to obtain the other Party's written consent. Indeed, there is no dispute between the Parties with respect to the language that requires that "consent shall not be *unreasonably* withheld, conditioned, or delayed." In other words, neither Party would be permitted to unfairly withhold consent of assignment unless it was reasonable to do so. In practice, what this means is that if for some reason it is *reasonable* for a Party to refuse to permit assignment of the Interconnection Agreement by the other Party to its affiliates, subsidiaries, or any other third-

party, it may do so. Under Charter's language, CenturyTel would be required to negotiate with Charter in order to resolve whatever problems make it unreasonable for such an assignment to be made. This would be a business-to-business discussion that would likely be able to be handled quickly and efficiently.

Conclusion

For the forgoing reasons, we find that Charter's proposed language should be adopted on Issue 5.

Issue 7: Is Charter obligated to "represent and warrant" to CenturyTel the existence of its certification to operate in the State; or is it sufficient to simply state that such certification exists, with Charter providing proof upon CenturyTel's request?

This issue presents the question of whether the Commission should require Charter, as an express condition of the Agreement, to "represent and warrant" that it is a certified local provider of telephone exchange service. Charter argues such an obligation is unreasonable, in that it would require Charter to provide a *guarantee* of a status over which it may not always assert full control. Charter also argues this obligation is unnecessary given that it already has agreed to provide proof of certification to CenturyTel upon request. CenturyTel asserts that Charter must guarantee today and always that it will maintain a certificate to provide local telephone services in Missouri.

Findings of Fact

1. Charter is certified in Missouri to provide local exchange and other related services to residents of Missouri.[19]

2. There is no evidence in the record of this case that Charter's Missouri certification will be forfeited or withdrawn during the term of the Agreement.

3. Charter has agreed to provide proof of Missouri certification upon CenturyTel's request.

[19] We take administrative notice of this fact pursuant to MO. REV. STAT. § 536.070(6).

Discussion

The dispute here concerns the extent to which a Party must provide guarantees to the other Party regarding a warranty as to its ongoing certification through the term of the Agreement. Although Charter did not file any testimony on this issue, its position is evident from the agreed upon language in Article III, Section 8.4 of the draft Agreement. Charter agrees that CenturyTel has no obligation to perform under the Agreement until Charter has obtained FCC and Commission authorization(s). Agreement, Art. III, § 8.4. Charter's position is that it must obtain, and maintain, all necessary authorizations in order to obligate CenturyTel to perform under the Agreement. Indeed, Charter has agreed to provide proof of certification to CenturyTel, in the form of a copy of its Certificate of Operating Authority, upon request. Agreement, Art. III, § 8.4 (undisputed, agree upon, language).

CenturyTel, however, wants Charter to not only represent but also "'warrant' that it is a certified local provider of Telephone Exchange Service in the State." Agreement, Art. III, § 8.4 (CenturyTel proposed language). In support of its proposal CenturyTel testified that it seeks to require Charter to meet, and "continue to meet" federal and state requirements for certification as a local exchange carrier. Miller Direct at 38, lines 8-9. Further, CenturyTel believes it necessary that Charter not only "represent and warrant" as to its current status as a certified local provider, but that Charter promise to "remain certified" for the "entire term of the Interconnection Agreement." *Id.* at line 13.

We find that CenturyTel is asking Charter to promise something that is beyond Charter control. This Commission, and other competent authorities have the power to define, expand, reduce, or revoke the licenses granted to CLECs. We, the FCC or a court could issue a ruling at some point in the future bringing Charter's status as a "certified local provider" into question or

doubt but not impact Charter's ability to perform up to the Agreement. Thus, we decline to require a competitive provider of local service to "warrant" that it will always maintain all necessary certifications.[20]

Conclusion

We decline to subject either Party to a potential breach of warranty claim for matters that are beyond that Party's exclusive control and that may have nothing to do with a Party's ability to perform under the Agreement. Neither Party can reasonably be expected to *guarantee* that it will have always all necessary certifications. Finally, we note that adopting the language proposed by Charter will not prejudice CenturyTel in any way, in that it may request proof of Charter's certification at any time, and that CenturyTel does not have an obligation to perform under the agreement if such certification does not exist. We adopt Charter's proposed language on this issue.

Issue 8(a): Should the bill payment terms related to interest on overpaid amounts be equitable?

The Parties disagree whether the Agreement should permit interest to accrue on bills that either Party pays, later disputes and ultimately prevails upon. Charter's position is that such interest should accrue, at the rate of 1.5% per month, or the highest rate permitted by law. DPL at 21; Giaminetti Direct at 25, lines 16-19. CenturyTel opposes the interest provision, contending that disputed bills ultimately resolved in favor of the billed Party should be subject to negotiations by the Parties as to any retroactive corrective payments. DPL at 20-21; Watkins Direct at 13, lines 9-18.

Findings of Fact

[20] In this regard we take official notice of a similar decision from Texas. *In re Petition of Sprint Communications Company, L.P. for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidated Communications of Fort Bend Company and Consolidated Communications Company of Texas*, Arbitration Award, PUC Docket No. 31577 at 44-45 (Texas PUC Dec., 2006)

1. This Commission recently determined that CenturyTel knowingly billed charges to Charter which were not included in the Parties' current interconnection agreement.[21]

2. CenturyTel's monthly bills to Charter are substantially inaccurate on a monthly basis. Giaminetti, Tr. 244, lines 14-16.

3. CenturyTel's bill dispute process is not transparent and may not permit dispute resolution on a timely basis. Giaminetti, Tr. 263, lines 15-25; 264, lines 1-5.

4. Under Charter's proposal, interest accrual on paid, and later disputed, bills would apply reciprocally. Giaminetti Direct at 5, lines 16-19.

5. No record evidence exists to demonstrate that Charter would use the interest accrual process unfairly.

Discussion

Charter's proposal to apply interest to bills that are paid, later disputed and ultimately resolved in favor of the billing party is born of its frustration as to the inaccuracy of CenturyTel's monthly invoices, and the unwieldy nature of CenturyTel's automated bill dispute system. We have taken administrative notice of the *Report and Order* in Case No. LC-2008-0049, in which the Commission found that CenturyTel was aware for three years that local service order charges billed by CenturyTel and properly disputed by Charter were not supported by the Agreement.[22] Ms. Giaminetti testified that CenturyTel's monthly invoices contain, on average, 25% incorrectly billed charges. Giaminetti, Tr. 244, lines 14-16; 264, lines 14-15. CenturyTel did not refute Ms. Giaminetti's statement or cross examine her on it. Ms. Giaminetti also testified that Charter spends twice the amount of time or more each month reviewing and disputing bills rendered by

[21] *See Report and Order* at 5

[22] *See Report and Order* at 5, Finding of Fact 14.

CenturyTel than other ILECs. Giaminetti, Tr. 263, lines 15-17. Other than stating that CenturyTel does not purposefully render inaccurate bills, Miller Rebuttal at 35, lines [12-14], CenturyTel did not refute Ms. Giaminetti's statement in this regard.

Ms. Giaminetti also testified that CenturyTel's online billing portal process – unlike other ILEC portals – relies on hand-entered information, Giaminetti, Tr. 264, lines 1-5, which adds to processing time and often the portal times out during a dispute session, *Id.* Ms. Giaminetti testified that CenturyTel regularly attempts to assess Charter for charges from tariffs or for UNEs that are not in the Agreement (Giaminetti, Tr. 242, lines 16-22; for end user charges, Giaminetti, Tr. 250, lines 8-12); and that CenturyTel has given credits to Charter for hundreds of payments from CenturyTel's residential users, Giaminetti, Tr. 251, lines 1-5. Here again CenturyTel remained silent.

Conclusion

The record establishes that CenturyTel's bills to Charter are generally more than 75% accurate and that Charter must spend an inordinate amount of time reviewing and disputing CenturyTel's bills. Given the magnitude of billing problems (unrefuted by CenturyTel) and the resources Charter must expend to resolve them, we think it reasonable for Charter to request contract language imposing an interest charge on incorrect bills that are ultimately resolved in Charter's favor. We agree with Charter that interest payments should be reciprocal for both Parties. We further find that CenturyTel has provided no evidence that Charter will use CenturyTel as an "investment bank" as originally alleged. Further, CenturyTel has presented no evidence that Charter will not timely pay or dispute bills under Charter's preferred language, nor has CenturyTel offered evidence that Charter has done so in the past. Indeed the evidence is to the contrary, as this Commission recently determined. Thus, imposition of an interest charge on

CenturyTel, which would arise only to the extent the company renders an incorrect bill which is disputed and resolved in Charter's favor, is fair and should act as an incentive for CenturyTel to fix its billing deficiencies. We adopt Charter's proposed language to resolve Issue 8(a).

Issue 8(b): Should the bill dispute provisions ensure that neither Party can improperly terminate the Agreement in a manner that could impair service to the public?

The Parties disagree as to whether either Party can unilaterally terminate the Agreement for failure to pay an undisputed bill. Charter, largely pointing to the billing disputes described above, contends that if a Party fails to pay an undisputed bill, the billing Party must avail itself of the dispute resolution processes under the Agreement – potentially including a complaint to the Commission – prior to cessation of services or initiating disconnection. DPL at 21-22; Giaminetti Direct at 6-9. CenturyTel argues that if a bill is undisputed, it should be paid, and that if an undisputed bill is not paid, CenturyTel should be given the contractual power to discontinue processing Charter's orders and terminate interconnection services. DPL at 21-22.

Findings of Fact

1. CenturyTel's invoices to Charter are substantially incorrect on a monthly basis. Giaminetti, Tr. 244, lines 14-16.

2. The parties often have been in disagreement as to what constitutes "disputed" and "undisputed" invoices.[23]

3. The Commission recently ruled that three years' worth of invoices rendered by CenturyTel to Charter were properly disputed by Charter, despite CenturyTel's claims that such invoices had not been properly disputed.[24]

Discussion

[23] *See Report and Order* at 5.
[24] *Id.*

We incorporate by reference our discussion under Issue 8(a) regarding the inaccuracy of CenturyTel's invoices to Charter, and the Commission's finding in Case No. LC-2008-0049 that CenturyTel knowingly attempted to assess three years' worth of service order charges that were unsupported by the parties' interconnection agreement. We also note that the Commission found in that case Charter had properly and timely disputed relevant bills, despite CenturyTel's "rejection" of Charter's disputes. Ms. Giaminetti provided testimony showing that – given the errors each month – Charter *always* disputes its bills from CenturyTel, even when CenturyTel disagrees there is something to dispute. Giaminetti, Tr. 250, lines 3-5 ("We do formally dispute charges that are inaccurate routinely month over month."); Giaminetti, Tr. 249, lines 10-12 ("we have no undisputed charges with CenturyTel, although they would think we do."). We believe that Charter expresses a valid concern that CenturyTel has not always exercised prudence over accepting or rejecting disputes. Thus, CenturyTel is not entitled to a presumption that its bills are correct, and such presumption necessarily underlies its position on Issue 8(b). Granting CenturyTel unilateral control over service termination for a bill that it might characterize as "undisputed" but that later might in fact be determined to be disputed is unwise.

In addition, we agree with Charter that the interests of end users should be paramount in matters of service disruption. Because neither Party can predict with certainty, nor can the Commission know based on the record in this case, when there will be a "dispute about what constitutes a dispute," we think it safest for the interests of end users if the Parties resort to dispute resolution under the Agreement, including use of the Commission, prior to the disruption or disconnection of any service. Section 9.3 of the contract, to which both Parties have agreed, makes an underpaying Party liable for such underpayments plus interest. This should alleviate

CenturyTel's concerns that it will not be made whole, and discourage Charter from taking advantage of the dispute resolution process.

Conclusion

We adopt Charter's language for Issues 8(a) and 8(b).

Issue 10: Should the Agreement establish retroactive application of changes of law where the Parties do not specifically agree to such retroactive application, and where such changes only benefit one Party?

The Parties disagree as to the breadth of the Agreement's change of law provision. Charter contends that if a change of law is silent as to its retroactive effect, the Parties should negotiate any such effect. CenturyTel argues that, if the authority is silent as to when the change should take effect, it is the date that one of the Parties makes a request of the other to incorporate the change into the Agreement.

Findings of Fact

1. The Parties stipulated that Issue 10 is a legal issue, and neither Party submitted evidence on this matter.

Discussion

We believe Charter's position more closely reflects industry standards. For example, Section 23.1 of AT&T's 13 State-CLEC ICA provides that in the circumstance Intervening Law, to which CenturyTel is a party in Missouri:

> "the Parties shall have sixty (60) days from the Written Notice [of either Party] to attempt to reach agreement on appropriate conforming modifications".

While not dispositive of Issue 10, we believe the general AT&T approach is sound and indicative of industry practice.

CenturyTel's position directly contravenes its stance in Case No. LK-2006-0095.[25] There CenturyTel sought to opt into a prior approved agreement between SBC and Xspedius specifically to take advantage of its change-of-law provision, which provided for notice and negotiation of amendments:

> [Applicant CenturyTel] point[s] out that, under the terms of the SBC/Xspedius agreement, either party may seek on written notice to renegotiate and amend those provisions affected by any change of law resulting from SBC's appeal of the Commission's Arbitration Order. In the absence of this provision, the Applicants argue, they would be without recourse in the face of SBC's unilateral interpretation of the effects of any change of law -- the Applicants refer to "harsh, draconian and uneven results[.]"[26]

Where a change of law requires an amendment, or modification, to the Agreement, any retroactive effect, or true up of rates, should occur upon express direction by the authority whose actions precipitated the change of law event. However, if those decision-making bodies do not direct the Parties to give retroactive effect to the decision, the Parties should do so only where mutually agreed upon. The Agreement should not give one Party the unilateral right to establish a retroactive right or obligation where the other Party does not agree, and where the Commission, court or the FCC has not specifically directed.

Conclusion

We adopt Charter's language for Issue 10.

Issue 11: Should CenturyTel be allowed to incorporate its Service Guide as a means of imposing certain process requirements upon Charter, even though Charter has no role in developing the process and procedural terms in the Service Guide?

The Parties dispute whether the CenturyTel Service Guide ("Service Guide") should be incorporated into the Agreement such that the terms of the Service Guide will be binding on

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[25] *In the Matter of the Application of CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC, doing business as LightCore, a CenturyTel Company, for Adoption of an Approved Interconnection Agreement between Southwestern Bell Telephone, LP, doing business as SBC Missouri, and Xspedius Management Company of Kansas City, LLC, and Xspedius Management Company Switched Services, LLC,* 2005 Mo. PSC LEXIS 1449.

[26] *Id.* at *6.

Charter. Charter's proposed language would allow the Service Guide to be used as a reference, but not contractually binding. CenturyTel's proposed language would permit it to incorporate the terms of the Service Guide into the Interconnection Agreement, thereby making its terms contractually binding.

Findings of Fact

1. The Service Guide is an internal document developed by CenturyTel to describe and document certain processes and procedures unique to CenturyTel. Gates Direct at 16, lines 8-9.

2. The Service Guide operates as a handbook that contains CenturyTel's operating procedures for service ordering, provisioning, billing, maintenance, trouble reporting and repair for wholesale services. Gates Direct at 16, lines 10-13.

3. The Service Guide is subject to change without any oversight by the Commission or meaningful input from Charter. Gates Direct at 16, lines 15-17.

4. The Service Guide language changes frequently. Gates, Tr. 100, lines 5-7.

5. CenturyTel notices regarding Service Guide charges are high level summaries that include the name of the section that was affected and the page numbers where such change was made. Gates Direct at 19, lines 22-23; 20, line 1.

Discussion

The Service Guide is an internal document developed solely by CenturyTel to describe and document certain processes and procedures that are unique to CenturyTel. Gates Direct at 16, lines 8-9. As Mr. Gates explained, the terms of the Service Guide "might change day to day, month to month, year to year ..." Gates, Tr. 100, lines 6-7. In fact, CenturyTel admitted that it frequently makes changes to its Service Guide. Gates Rebuttal at 29, lines 14-16, (citing CenturyTel Response to Charter Data Request No. 8, (Attachment TJG-5)).

Although CenturyTel proposes to provide Charter with notice of all Service Guide changes, Gate Direct at 17, lines 2-3, CenturyTel notices do not offer sufficient detail to CLECs. Gates Direct at 19, lines 19-20. Indeed, Charter witness Gates testified that CenturyTel notices merely provide high level summaries that include the name of the section that was affected and the page numbers where such change was made. Gates Direct at 19, lines 22-23, 20, line 1. This format is not useful to CLECs that have no way of knowing what precise changes were made on the pages identified, since CenturyTel's changes do not appear in redline, nor are they otherwise marked. Gates Direct at 20, lines 2-5. Instead, CLECs must analyze and compare the new and old versions of the Service Guide line-by-line and word-by-word to identify the changes that were made. Gates Direct at 20, lines 5-7.

Moreover, CenturyTel has not demonstrated that changes to the Service Guide would be subject to meaningful input from Charter, or other CLECs, even though they would be contractually bound by these changes. Further, CenturyTel's changes would not be subject to oversight by the Commission. Gates Direct at 18, lines 20-21 (citing CenturyTel Response to Charter Data Request No. 13).

It is reasonable for a CLEC to seek certainty and reliability in order to plan and manage its business affairs. Giaminetti Direct at 36, lines 13-17. Charter's proposed language fulfills its need for certainty by effectively prohibiting CenturyTel from making unilateral changes to the Agreement by means of its Service Guide.

We reject CenturyTel's approach for several reasons. First, CenturyTel's proposal would effectively permit it to unilaterally modify the contractual obligations of either Party. Such a result would defeat the purpose of entering into the Agreement. Contracts are intended to bind parties to precise terms, but under CenturyTel's approach terms would remain unsettled.

Second, we believe it unfair and unreasonable to allow one Party to a contract to have the right to modify contractual obligations of a document that was unilaterally prepared by only one party. Third, CenturyTel's proposed language effectively circumvents the Commission approval process contemplated under Section 252 of the Act. Section 252 requires that all Interconnection Agreements, and amendments, be approved by a state commission.[27] CenturyTel's approach would effectively circumvent the formal amendment process designed to ensure that changes to the Agreements are subject to continued Commission oversight and approval. This we cannot countenance.

Fourth, and finally, contrary to CenturyTel's position and as Mr. Gates testified, it is not common for documents like CenturyTel's Service Guide to bind CLECs via the agreements. Several state commissions have determined that the terms of a document similar to the Service Guide (sometimes referred to as a Change Management Process document ("CMP")) cannot take precedence over the Agreement.[28] For example, the Minnesota PUC ruled that

> "[i]n cases of conflict between the changes implemented through the CMP and any CLEC interconnection agreement (whether based on the Qwest SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement."[29]

Conclusion

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[27] 47 U.S.C. § 252(e).

[28] *In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration with Qwest Corporation*, ARB 775, Arbitrator's Decision at 6-7 (Ore. PUC 2006) (finding that the terms and conditions of an interconnection agreement may differ from changes implemented through the CMP); *In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration with Qwest Corporation*, MPUC No. P-5340, 421/IC-06-768, Arbitrator's Report at 7 (MN PUC 2006) *(Eschelon Minnesota Arbitration)* (emphasizing that "Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection."); *Application of Eschelon Telecom of AZ, Inc. for approval of an ICA with Qwest Corp.*, T-01051B-06-0572, Opinion and Order (Ariz. Corp. Comm'n 2008) (finding that the Qwest CMP document could not be used to override the ICA).

[29] *Echelon Minnesota Arbitration* at 7.

Accordingly, we decline to allow CenturyTel to unilaterally modify the terms of the Agreement through the use of its Service Guide. We see no need to incorporate external terms into the Agreement, and the Service Guide should be used as a reference only. In the event that CenturyTel seeks to contractually bind Charter to certain terms therein, it may initiate the amendment process set forth in the Agreement, subject to the Commission approval. Our decision here is intended to ensure that both Parties have certainty as to their contractual obligations under the terms of the Agreement. We adopt Charter's language with respect to Issue 11.

Issue 12: Should the Agreement allow one Party to force the other Party into commercial arbitration under certain circumstances?

The crux of the Parties' disagreement is in those rare circumstances where, CenturyTel believes, the Commission or the FCC or a court of competent jurisdiction refuse to entertain an unresolved dispute. Then, CenturyTel argues, the Parties should be obligated to use binding arbitration. DPL at 38. Charter counters that, to the extent such circumstances arise, both Parties should agree to submit the dispute to binding arbitration. DPL at 37-39.

Findings of Fact

1. The Parties stipulated that Issue 12 was a "legal issue," and therefore no party submitted evidence regarding Issue 12.

Discussion

Our review of relevant case law leads us to conclude that, under the Act, the Commission is obliged to hear any legitimate unresolved dispute regarding interpretation or enforcement of the terms and conditions of an approved the Agreement. As the Court of Appeals for the Eleventh Circuit noted, the FCC "decided that interpretation and enforcement of the Agreements

were responsibilities of the states under section 252."[30] We disagree with CenturyTel's limited reading of the FCC's decision in *Starpower*. While the FCC indicated that parties are bound by any *existing* dispute resolution provisions of interconnection contracts, the key finding by the FCC relevant to Issue 12 is as follows:

> In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" under section 252. We conclude that it is.[31]

CenturyTel would have us ignore the FCC's clear discussion regarding the role of dispute resolution provisions:

> We note that, *in other circumstances*, parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, *the relevant interconnection agreements do not expressly specify how the disputes shall be resolved.*[32]

The FCC in *Starpower* thus acknowledged that where an interconnection agreement includes dispute resolution provisions (including binding arbitration requirements), a state commission might not become involved in resolving a dispute. But we are not asked to decide Issue 12 on the basis of an existing arbitration requirement. Rather, the Parties disagree as to whether a binding arbitration requirement should be included in the first instance.

Conclusion

Because case law instructs us that it is the responsibility of a state commission to interpret and enforce the terms of an approved interconnection agreement, we decline to mandate

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[30] *BellSouth Telecomms. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1275 (11th Cir. 2003), citing *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11279 (2000) (hereinafter *Starpower*).

[31] *Id.*

[32] *Id.* at 11281 (emphases added).

that either Party submit to binding arbitration at the whim of the other. If a Party is unhappy with our decision, or we decline to hear the dispute, that Party may proceed to the FCC or state or federal court as is appropriate. CenturyTel's position would undercut a Party's federal law right to a hearing before the Commission or FCC or a court of competent jurisdiction, and thus we reject that position. We adopt Charter's language with respect to Issue 12.

Issue 13: Should the Parties agree to a reasonable limitation as to the period of time by which claims arising under the Agreement can be brought?

This dispute requires us to determine what constitutes a reasonable time period by which either Party can bring a claim under the Agreement. Charter proposes language that would permit either Party to bring a claim for disputes arising under the agreement within two (2) years of the date of the occurrence giving rise to the dispute. CenturyTel does not propose language that directly addresses this question. Rather, CenturyTel proposes language that would require the billed Party, in the event of a billing dispute, to file a petition for formal dispute resolution within one (1) year of providing notice of such dispute or otherwise waive the billed Party's right to withhold the disputed amount.

Findings of Fact

1. Charter is normally the billed party under its interconnection arrangements with CenturyTel. Webber Direct at 15, lines 25-26.

2. CenturyTel's invoices are frequently inaccurate. Giaminetti Direct at 31, line 5.

3. Charter incurs significant costs associated with responding to CenturyTel's inaccurate invoices such as the time and expense associated with Charter employees reviewing and disputing all of the inaccurate CenturyTel invoices, communications related the disputes, and other resources spent in an effort to demonstrate that CenturyTel does not have the right to assess the charges. Giaminetti Direct at 35, lines 8-13.

Discussion

Charter proposes that the Agreement should include language limiting the time period during which either Party can bring a claim arising under the Agreement. Charter's language would set that period of time at two (2) years from the date of the occurrence of the action that gave rise to the dispute. On the other hand, if either Party failed to initiate an action within the two year period, it would have waived its opportunity to dispute. This approach applies equally to both Parties.

Charter's proposed language seeks to ensure that the Parties have greater certainty under the Agreement as it establishes a specific time frame by which either Party can make a claim against the other. Giaminetti Direct at 36, lines 9-11. Once a given time period expires, all potential claims that arose prior to that time would be waived. This would provide both Parties added certainty as to when, or if, claims may be brought. Giaminetti Direct at 36, lines 11-12. Further, Charter's proposed language would also create a more favorable environment for the business and operations units of each company to plan for operations, launch new service, and improve and differentiate their service offerings. Giaminetti Direct at 36, lines 13-17.

CenturyTel believes that the inclusion of Charter's language, or some variation thereof, is insufficient without also including CenturyTel's proposed language. DPL at 44. Under CenturyTel's proposed language, the *billed* party would be required to file a dispute resolution petition if the Parties cannot resolve a billing dispute within one hundred and eighty (180) days of the dispute notice. According to CenturyTel, if the billed Party fails to file such petition within one (1) year, it waives the dispute. Miller Direct at 49, lines 4-5.

We find several deficiencies in CenturyTel's proposal. First, Section 415 of the Communications Act provides that actions by and against carriers generally must be instituted

within two years from the time the cause of action accrues.[33] While the Parties are free to set their own time period in this case where they do not agree we give great weight to federal statutory guidance.

Second, CenturyTel's proposal is largely one-sided as Charter is almost always the "billed" Party under its interconnection arrangements with CenturyTel. Webber Direct at 15, lines 25-26. Thus, under CenturyTel's proposed language, it would generally be incumbent upon Charter to either accept CenturyTel's conclusions regarding its investigation of disputed amounts, or escalate the dispute to the Commission. Webber Direct at 15, lines 26-27; 16, line 1. It is not fair or reasonable to require that the billed Party always bear the burden of acceptance or escalation.

Third, and particularly troubling, is the fact that CenturyTel's proposed language places the burdens of persuasion and proof on Charter, the billed Party, in bill disputes that arise between the Parties. CenturyTel's approach here, as we have noted elsewhere in the context of billing disputes, is based on the improper premise that its invoices should be treated as presumptively accurate. They are not.

In contrast, Charter's position is that where an invoice is initially disputed by Charter and the dispute is not resolved through the dispute resolution procedures set forth in the agreement, CenturyTel should ultimately be responsible for proving that its invoice is accurate. Giaminetti Direct at 30, lines 21-24. We believe that approach strikes a fair, and equitable, balance between the obligations imposed upon the billing and billed Parties.

Thus, the presumption that CenturyTel always renders proper billing statements/invoices is simply not credible and certainly should not form the basis for language which imposes a

[33] 47 U.S.C. § 415 (2008).

burden upon Charter. Webber Direct at 16, lines 15-17. Because there is no basis to presume that CenturyTel's billing statements/invoices are generally accurate, CenturyTel should bear the ultimate burden of proof to show that the bills that it rendered to Charter are, in fact, accurate. As Mr. Webber explained "CenturyTel is in the best position to demonstrate that its billing statements are accurate."[34] Webber Direct at 17, lines 18-19.

Conclusion

We find that Charter's proposed language is preferable because federal statute specifies a 2-year period for carrier actions, and we give great weight to that statute. Charter's language also expressly limits provides certainty as to when, or if, claims may be brought. Such a result benefits the Parties for business and operational planning purposes, and would also allow the parties to compete more effectively, which would ultimately benefit end users in Missouri. Further, we reject CenturyTel's proposed language as it is clear from the evidence in the record that CenturyTel's billing statements/invoices are not generally inaccurate. Thus, we see no basis to place the burden of proof on Charter in bill disputes that arise between the Parties. Accordingly, we adopt Charter's proposed language on this issue.

Issue 14: Should CenturyTel be allowed to assess charges upon Charter for as yet unidentified and undefined, potential "expenses" that CenturyTel may incur at some point in the future?

This issue asks whether one Party should be entitled to charge the other Party for certain costs, expenses, or operational expenditures that may arise in the future. Charter's position is that neither Party should be permitted to recover costs or "expenses" from the other Party unless specifically and expressly authorized to do so under the terms of the Agreement. Conversely, CenturyTel believes it is necessary to include language in the draft Agreement which would

[34] Indeed, Missouri law "places the burden of charging the correct rate" upon the utilty. *Overman v. Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo. Ct. App. 1984).

provide CenturyTel a basis to seek "reimbursement" from Charter all "reasonable and necessary" costs.

Findings of Fact

1. The Parties spent more than six months negotiating the terms of these agreements. Webber Rebuttal at 27, lines 27-28.

2. The Parties have had ample time to identify those terms in the draft Agreement which they believe would require some form of compensation from the other Party. CenturyTel has been on notice that Charter expected all necessary pricing terms to be included in the agreement (and the Pricing Article specifically). Webber Rebuttal at 28, lines 1-4.

3. The Commission recently determined that CenturyTel has improperly assessed charges upon Charter for functions required by the Parties interconnection agreement, but for which no charges apply.[35]

Discussion

In arbitrating the disputed issues here we are seeking to clarify each Party's respective obligations now, and for the term of the contract. We endeavor to resolve issues in a manner which will ensure that the Agreement approved by this proceeding is clear with respect to each Party's respective obligations. For that reason, we are hesitant to grant CenturyTel the discretion to impose charges upon Charter which are not specifically enumerated in the Agreement.

CenturyTel asks us to approve its right to seek reimbursement from Charter for all "reasonable" costs. Miller, Direct at 20, lines 3-4. But CenturyTel cannot, or will not, identify such costs at this time. Instead, CenturyTel seeks the right to recover these unidentified, or ill-defined, "expenses" by assessing non-recurring charges upon Charter. DPL at 45 (CenturyTel

[35] *See Report and Order* at 11.

proposed § 22.1). CenturyTel's proposal is problematic for several reasons, not the least of which is that it creates uncertainty as to Charter's obligations on a going-forward basis. That type of ambiguity has already lead these two Parties into prior disputes, one of which this Commission recently decided.

CenturyTel's proposed language increases the potential for future disputes. Most significantly, CenturyTel's proposal would allow it to assess charges upon Charter to perform functions that are not currently provided for in the Agreement for potential expenditures or costs which CenturyTel has not identified. That is not to say that CenturyTel may not be entitled to compensation for performing certain functions that are not currently set forth in the Agreement, and Charter does not dispute that notion. Webber Direct at 22, lines 27-32. In the event that CenturyTel performs such functions, Charter acknowledges that the contract amendment process set forth in Sections 4 and 12 of the Agreement would provide a means by which CenturyTel can propose an amendment to the Agreement that specifically details the costs and expenses it seeks to recover, and the basis for requiring Charter to compensate CenturyTel. Webber Rebuttal at 26, lines 15-18; 27, lines 12-17.

We agree. Under Charter's proposal CenturyTel will have sufficient opportunity to propose an amendment to ensure that Charter compensates CenturyTel for performing any functions not currently contemplated by the Parties, or set forth in the Agreement. Webber Direct at 23, lines 8-9. If the terms of that amendment are reasonable, we expect the Parties would reach an agreement on such terms. Indeed, the Commission routinely approves interconnection agreement amendments. Furthermore, to the extent that any dispute did arise between the parties, CenturyTel would have the right to use the dispute resolution process to resolve any disputed terms.

Conclusion

We adopt Charter's language for Issue 14.

Issue 15(a): Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to be negligent, grossly negligent, or constituting intentional or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?

This issues requires us to determine whether one Party should be forced to indemnify another Party when the indemnified Party has acted in a manner that is deemed to be negligent, grossly negligent, or which constitutes intentional or willful misconduct. Charter argues that indemnity obligations should be limited in that situation; CenturyTel disagrees.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

The dispute centers around the scope of the indemnity provisions of the Agreement. Generally, both Parties have agreed to indemnify one another against third-party claims. However, Charter proposes language which would limit either Party's indemnity obligations *to the extent that* the indemnified Party engages in certain acts that give rise to the potential third-party claims. Specifically, Charter asserts that if the indemnified Party has engaged in acts that are deemed negligent, grossly negligent or which constitute intentional or willful misconduct, then that Party (the indemnified party) may not demand indemnification to the extent that it was at fault. DPL at 48.

If we were to adopt Charter's proposed language, we would expect any third party claims to be defended in the following manner. First, after the plaintiff filed its claims, CenturyTel might invoke the indemnity provisions and require Charter to defend the claims. Second,

Charter would assume the defense of the claims, and (likely) implead CenturyTel into the dispute. Then, each Party's respective liabilities to the third party would be addressed in the litigation. In this way, Charter would, technically, continue to indemnify CenturyTel against the claims, but CenturyTel would be liable for the proportion of damages, in a manner commensurate with the level of harm caused by its acts or omissions. In other words, Charter would be required to indemnify CenturyTel, but only *to the extent that* the indemnified party is not at fault.

This approach is, of course, consistent with the concept of contributory or "comparative fault," which our Supreme Court adopted as the liability standard for tort claims.[36] Under this fault standard, courts weigh the relative liability of each party to an action based upon the comparative fault of each party involved in the transaction. In practice, as the Court has explained, "joining all parties to a transaction in a single lawsuit" allows "for the comparison of the fault of all concerned."[37] Thus, Charter's proposal is consistent with the governing fault standard in Missouri. It therefore ensures that indemnity obligations are limited where the indemnified Party has contributed to the alleged harm.

CenturyTel opposes Charter's proposal and argues that Charter's approach would be unworkable in terms of designating potential liability between the two Parties, for purposes of defending the claim. But CenturyTel offers no reasoned explanation as to why Charter should in fact assume indemnity obligations (in their entirety) when CenturyTel acts in a manner that gives substantial rise to the harms. Further, we find that the Missouri courts' repeated affirmation of this principle of comparative fault, and the mechanism by which liability is established when there is more than one defendant, sufficiently answers any CenturyTel claim that Charter's

[36] *See Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 439 (Mo. 2002) (citing *Gustafson v. Benda*, 661 S.W.2d 11, 13 (Mo. banc 1983)).
[37] *Id.* (citing Prosser).

proposal is unworkable. That claim simply does not reflect the fact that the Missouri courts have expressly adopted these very principles.

In addition, we note that CenturyTel has already agreed, in Section 9.4 of Article VII, that Charter's indemnity obligations should be limited when claims arising from the provision of 911 service are caused by CenturyTel "acts of negligence, gross negligence or wanton or willful misconduct..." DPL at 115 (CenturyTel proposed language Art. VII, § 9.4). In other words, CenturyTel has agreed, in the 911 indemnity provisions, to the very concept that Charter proposes for the general indemnity provisions of the Agreement. CenturyTel can not oppose these principles in the context of the general indemnity provisions of the Agreement, but at the same time accept the same limiting principles elsewhere. That internal inconsistency fundamentally undermines its position on this issue. We therefore discount CenturyTel's assertions concerning potential problems with administering this standard.

Finally, this Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[38] CenturyTel's language is inequitable because it fails to recognize the principle of contributory fault. In other words, if the indemnified party is partly liable for the harm to a third party, CenturyTel's proposal would require the indemnifying party to pay for the entire claim. Charter's language properly recognizes the principle of contributory fault by only requiring the indemnifying party to reimburse the indemnified party up to the extent that the indemnified party is not at fault.

Conclusion

For the foregoing reasons we adopt Charter's language for Issue 15(a).

[38] *SBC Arbitration-Commission Decision,* at 56.

Issue 15(b): Should the Agreement include language whereby CenturyTel purports to disclaim warranties that have no application, either potential or actual, to the exchange of traffic under this interconnection agreement?

Issue 15(b) presents an altogether different question. The question here is whether implied warranties under the Agreement should be limited by utilizing a disclaimer of warranties standard that is drawn from a "uniform" code which does not apply to the Parties in this case. CenturyTel argues that the "uniform" code at issue here, UCITA (the Uniform Computer Information Transactions Act ("UCITA")), standard should apply. Charter argues that because the UCITA does not have any apparent application to the Parties in this case, any disclaimer of implied warranties under UCITA are inappropriate.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

There is no need for the additional disclaimer of warranties language that CenturyTel seeks here. Specifically, CenturyTel asserts that it must be permitted to limit any implied warranties of "reasonable care, workmanlike effort, results, lack of negligence, accuracy or completeness of responses." DPL at 53 (CenturyTel proposed language for Art. III, Section 30.2). CenturyTel bears the burden of demonstrating that this language is either necessary, or appropriate. We conclude that CenturyTel has not met its burden. Although CenturyTel stated that the source of its additional language is the disclaimer of implied warranties created by UCITA, UCITA is a *draft*, proposed "uniform" code which has been adopted by only two states: Maryland and Virginia. It is intended to provide a set of rules and contract principles governing software licensing and online contracting.

Neither of those activities is contemplated under this draft Agreement. Moreover, UCITA is not applicable to network interconnection under Section 251 of the Act.[39] Further, there is no evidence that this language has ever been explicitly, or expressly, applied to interconnection agreements.

We note that this language is in addition to other standard warranties language to which the Parties have agreed. Specifically, the Parties have agreed to disclaim any implied warranties "as to the services, products and any other information or materials exchanged by the Parties, including but not limited to any implied warranties, duties, or conditions of merchantability, [and] fitness for a particular purposes." DPL at 53 (Charter proposed language at Art. III, § 30.2) Thus, it is clear that the Parties agree as to the standard disclaimer, or limitations, of implied warranties that we see in most interconnection agreements. This language sufficiently protects both Parties.

Conclusion

For the foregoing reasons we adopt Charter's language for Issue 15(b).

Issue 15 (c): Should the Agreement limit direct damages to an amount equal to "monthly charges" assessed between the Parties; and otherwise limit liability in an equitable manner?

The question arising under this issue is whether CenturyTel may limit its damages to Charter to no more than the total amount that CenturyTel has charged to Charter in any given month (or year), even in those situations where CenturyTel acts in a manner that is deemed to be grossly negligent. Charter asserts that such limitations on damages are improper. CenturyTel supports such limitations.

Findings of Fact

[39] 47 U.S.C. § 251.

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

We begin by noting that this provision deals with liability for damages when the parties harm each other. This provision does not limit the parties' indemnification obligation to a third party. Under CenturyTel's proposal, any damages that it may be liable to Charter for will be strictly limited by a formula that is equivalent to the amount of charges assessed by CenturyTel under the Agreement for any particular month, or where liability is for a full year, total charges for such year. DPL at 54 (CenturyTel proposed language for Art. III, § 30.3). We note that the Parties' competing proposed language for Section 30.3.3.7 differs in two significant ways.

First, the Parties disagree as to whether damages should be capped at a pre-determined and arbitrary level. CenturyTel argues that damages should be capped at monthly charges. Charter responds that damages should be limited to actual, direct damages.

Second, the Parties also dispute the question of whether damages arising from the gross negligence of the other party should be specifically excluded from any limitation on damages. Charter proposes to include gross negligence in this provision, so that damages between the Parties would not be limited where damages arise as a result of grossly negligent behavior by the party at fault. DPL at 57 (Charter proposed language, Art. III, § 30.3.3.7). CenturyTel, on the other hand, declines to include gross negligence in this provision.

As to the first question, we decline to adopt CenturyTel's arbitrary cap upon the total amount of damages that may be available to Charter. We do not believe that it is appropriate, either practically or as a matter of public policy, for the Parties to set an artificial cap on potential liability to each other. Practically speaking, it is inappropriate to cap potential damages because

that would likely prohibit the innocent party from being fully compensated for its actual damages. For example, if CenturyTel acted in a grossly negligent manner such that Charter's network facilities were damaged, and its service was impaired, its potential actual damages (i.e., repair costs) could be significant. In that circumstance, we see no valid reason to limit CenturyTel's damages liability to the arbitrary amounts that CenturyTel proposes (essentially total monthly charges). From a public policy standpoint, we also believe that setting an artificial cap on damages reduces incentives for the Parties to ensure that their actions do not result in harm to the other Party. In other words, by not limiting damages, we ensure that both Parties have appropriate incentives to take due care with respect to the network and facilities of the other Party.

As to the second question, we find that the effect of CenturyTel's language is that it would artificially cap the amount of damages available to Charter, even in the context of damages that arose from CenturyTel's *grossly negligent* actions. *Id.* at 57 (CenturyTel language for Art. III, § 30.3.3.7). Because the Commission has already decided this very question, we reject CenturyTel's proposal. In the 2005 arbitration proceeding between SBC and various LECs the Commission affirmed the Arbitrator's ruling that "it is contrary to public policy to cap liability for intentional, willful, or grossly negligent action."[40] Thus, we reject CenturyTel's proposed damage limitations in this arbitration proceeding.

Conclusion

Accordingly, we adopt Charter's proposed language for Issue 15(c).

Issue 16: Should both Parties be allowed to modify, and upgrade, their networks; and should the other Party be responsible for assuming the costs of such network upgrades or modifications?

[40] *SBC Missouri Arbitration*, Commission Order at 56 (affirming Arbitrator's Final Report, Sec. 1(a) at p. 71).

The dispute here concerns whether one Party can require the other Party to accommodate – through additional activities, expenses or investment – network changes of the other Party. CenturyTel has proposed language stating that "CLEC shall be solely responsible for the cost and activities associated with accommodating [CenturyTel's] changes in its own network." (CenturyTel proposed language, Art. III, § 47.) Charter asserts that both Parties should be allowed to modify and upgrade their networks, and that each Party should be responsible for accommodating changes to its network that are due to the other Party's modification to its network.

Findings of Fact

1. Providers routinely upgrade, groom and/or improve their networks consistent with their business plans and available capital. Gates Direct at 23, lines 7-8.

2. Sufficient capacity is required on both sides of a POI so that blocking or other technical problems do not occur. Gates Rebuttal at 35, lines 27-28.

3. It is in both Parties' interests to ensure traffic is exchanged in an efficient manner. Gates Rebuttal at 36, lines 1-2.

Discussion

Both Parties have an obligation to exchange traffic. In order to exchange traffic, some joint planning of the interconnection facilities is required. Without joint planning, there may be insufficient capacity on either or both sides of the POI, thereby resulting in blocking or other technical problems. It is in both Parties' interests to ensure that traffic is exchanged in an efficient manner. However, as the Act and FCC rules point out, each Party is responsible for costs on its side of the ("POI"). FCC Rule 51.703(b) specifically states that "a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that

originates on the LEC's network."[41] Regardless of the type of network facilities that CenturyTel deploys on its side of the POI, those costs are the responsibility of CenturyTel. Similarly, Charter is responsible for the technology, and the cost of that technology, on its side of the POI.

The Agreement should not contain language that would directly or indirectly prohibit one Party from undertaking any plan or program to implement modifications to its network. While this may not have been the intent of CenturyTel's language, it is important to clarify the impact of the language. There should be no opportunity for one carrier to force expenses, costs and upgrades on the other carrier.

Conclusion

Each Party should be solely responsible for any costs associated with any technology upgrade or other network modifications required on their own network. Charter should not be required to compensate CenturyTel for costs associated with upgrades to CenturyTel's network. Charter's proposed language provides the required equity between the Parties and allows both companies to update their networks. Charter's proposed language is also consistent with the Act. For these reasons we adopt Charter's proposed language.

Issue 17: Should Charter be contractually bound by terms concerning liability for carrier change requests that exceed its obligations under existing law?

The Parties disagree as to the need for language addressing cost recovery in "slamming" circumstances. Charter contends that FCC rules protect CenturyTel (and vice versa) while CenturyTel believes not.

Findings of Fact

1. "Slamming" refers to the unauthorized change in local exchange carriers serving an end user.[42]

[41] 47 C.F.R. § 51.703(b).

2. Neither party submitted evidence as to the extent of slamming between them or their costs of rectifying slamming.

Discussion

Mr. Miller claims in his direct testimony that, as an "executing carrier" under FCC rules, CenturyTel is not entitled to any compensation for rectifying an unauthorized change in local exchange carriers, and "[s]ince CenturyTel's costs are not addressed under the FCC's rules, the Agreement should provide for recovery of costs incurred due to Charter slamming activities." Miller Direct at 52, lines 16-18. We find that Mr. Miller misread the FCC's rules.

FCC Rule 64.1100(c) defines "authorized carrier" as

> "generally any telecommunications carrier that submits a change, on behalf of a subscriber, in the subscriber's selection of a provider of telecommunications service with the subscriber's authorization verified in accordance with the procedures specified in this part."[43]

Thus, a submitting carrier that does not have a subscriber's authorization when submitting a change (*i.e.*, a slamming carrier) cannot be an "authorized carrier." The slammed carrier remains the properly authorized carrier. This means that FCC Rule 64.1140(a), which establishes carrier liability for slamming, offers the cost protection CenturyTel seeks:

> Any submitting telecommunications carrier that fails to comply with the procedures prescribed in this part shall be liable *to the subscriber's properly authorized carrier* in an amount equal to 150% of all charges paid to the submitting telecommunications carrier by such subscriber after such violation, as well as for additional amounts as prescribed in Sec. 64.1170. The remedies provided in this part are in addition to any other remedies available by law.[44]

Mr. Miller testified at hearing that, "under normal circumstances," when CenturyTel ports a number to Charter, there are only two local exchange carriers are involved. Miller, Tr. 550, lines

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[42] *See* 47 C.F.R. § 64.1100, et seq.

[43] 47 C.F.R. § 64.1100(c).

[44] 47 C.F.R. § 64.1140(a).

17-18. Thus, under FCC Rule 64.1140(a), if one assumed that Charter failed to comply with the slamming rules, CenturyTel must be "the subscriber's properly authorized carrier" and is entitled to damages as specified under this rule.

Conclusion

FCC rules provide that a properly authorized carrier is entitled to damages from a submitting carrier. As such, we find that CenturyTel is adequately protected under applicable FCC rules and should not be able to assess an additional penalty upon Charter, if this over occurs. Given the lack of record evidence as to the frequency of such unauthorized changes between the Parties, or their costs to rectify same, we find that Charter's language referencing FCC Rule 64.1100, *et seq.* is sufficient to protect both Parties' interests. We adopt Charter's language.

III. NETWORK INTERCONNECTION ISSUES

Issues 2 and 24:

Issue 2: How should the Agreement define the term Network Interface Device or "NID"?

Issue 24: Should Charter have access to the customer side of the Network Interface Device ("NID") without having to compensate CenturyTel for such access?[45]

Because Issues 2 and 24 are related we consider them together. We also decide CenturyTel's additional sub-issues, also related to Issues 2 and 24. First, however, we address CenturyTel's pending motion to strike portions of the testimony of Charter witness Mr. Gates regarding CenturyTel's proposed rate for NID access.

CenturyTel's Motion to Strike

[45] CenturyTel believes that there are two issues presented in this issue: (a) Should Article IX, Section 3.4 clarify that the End User controls Inside Wire except in those multi-tenant properties where CenturyTel owns and maintains such Inside Wire? and (b) Is Charter required to submit an order to and pay CenturyTel for accessing CenturyTel's NID when Charter connects its loop to the End User's Inside Wiring through the customer access side of the CenturyTel NID?

On October 24, 2008 CenturyTel moved to strike certain portions of Mr. Gates' prefiled rebuttal testimony, claiming it is beyond the scope of the issues being arbitrated in this proceeding and beyond the scope of rebuttal testimony.[46] CenturyTel contends that Mr. Gates cannot testify as to CenturyTel's proposed NID rate because Charter agreed to that rate in negotiations. Pursuant to joint stipulation, Charter filed its response on November 20, 2008. We deny CenturyTel's motion to strike Mr. Gates' rebuttal testimony.

Section 252(b)(2)(A)(i) of the Act requires a party that petitions a state commission to arbitrate an interconnection agreement provide its petition, relevant documentation concerning any unresolved issues, the position of each party with respect to those issues, and any other issue discussed and resolved by the parties. Section 252(b)(1) limits the state commission's consideration to any "open issue." In this case the Parties never agreed as to the level of compensation for CenturyTel when Charter accesses the NID. Charter's proposed language makes clear that it believes, under federal law, it has no obligation to pay CenturyTel. By contrast, CenturyTel makes clear it expects to receive both an initial service order charge and recurring monthly revenue from Charter for what CenturyTel considers "use" of the NID. DPL at 89-90; (CenturyTel proposed language for Art. III, § 3.5.1.) Because the Parties failed to agree as to compensation, we find that Charter never assented to either the service order charge, or the NID rate, whatever its level. Thus, under the Act, it is the Commission's role to determine both whether any charge may be assessed for these activities and, if so, at what rate *level* is appropriate.[47] Our decision is supported by the few cases to speak to when an issue is "open" or "unresolved."

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[46] Although CenturyTel's motion alleges that Mr. Gates' rebuttal testimony also is "beyond the scope of scope of rebuttal" CenturyTel provides no argument in support of that allegation. Consequently, we do not reach that allegation here.

[47] We address the level of the service order charge below.

In *TCG v. PSC of Wisconsin*,[48] a federal court rejected an argument similar to the one CenturyTel advances here. There TCG argued that because Ameritech failed to dispute the character of TCG's switch (end office versus tandem), and because TCG characterized its switch as a tandem, the Wisconsin PSC could not have established anything other than a tandem switching rate *level* for TCG. That is, TCG argued that Ameritech had raised only the rate *application* issue, not the rate *level* issue. The federal court upheld the Wisconsin PSC's determination that it could address both the rate *application* and rate *level*. The court concluded that TCG's argument depended on a "subtle abstraction" not supported by the Act:

> Although state commissions are limited to deciding issues set forth by the parties, *competing provisions* require them to resolve fundamental elements necessary to make an interconnection agreement a working document. For example, under the act's arbitration and pricing standards, state commissions "shall" establish rates for interconnection. 47 U.S.C. § 252(c). Thus, state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, ***even if these matters are not specifically identified by parties as open issues in their petitions for arbitration***. An issue as broad and important to an interconnection agreement as what parties will charge one another necessarily will include sub-issues that must be addressed by the arbitration panel in order to decide the larger matter. This is a common sense notion. That state commissions possess wider discretion under the act to determine rates for interconnection-related services reflects an understanding that parties are least likely to resolve this issue without third-party assistance, that compulsory arbitration is reserved primarily for this purpose, and that the considerable public and private resources invested in arbitrating agreement provisions would be squandered if compensation-related issues were left unresolved.[49]

Similarly, in *BellSouth Telecomms., Inc. v. Cinergy Communs. Co.*,[50] a federal court found no violation of Section 252(b) when the Kentucky PSC decided a matter "directly related" to an open issue, but not specifically identified in a petition for arbitration. In that case, BellSouth claimed Cinergy had failed to raise in its petition BellSouth's obligation to continue to

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[48] 980 F.Supp. 992 (1997) hereinafter ("*TCG*").

[49] *Id.* at 1000 (emphasis added).

[50] 297 F. Supp. 2d 946 (2003) hereinafter ("*BellSouth*").

provide DSL service over UNE-Platform ("UNE-P") lines. Cinergy responded that the Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. The PSC determined the DSL issue was "directly related" to a line-splitting issue that Cinergy raised in its petition, which both parties later addressed. Therefore, the PSC determined that the issue of DSL over UNE-P was properly before the Commission. The federal court agreed and found no violation of Section 252(b).[51]

Finally, in *Universal Telecom, Inc. v. The Oregon Public Utility Commission*,[52] a federal court found the Oregon PUC was entitled to reach the permissibility of offering Virtual NXX ("VNXX") services that Universal was providing, even though neither Universal nor Qwest had raised that question in the arbitration petition or response thereto. (The parties had limited their pleadings to what intercarrier compensation rate, if any, should apply to VNXX traffic directed to ISPs.) The court found the Oregon PUC properly reached the issue of VNXX legality in the course of considering two issues identified by Universal in its response to the petition for arbitration: whether Universal must pay for facilities on Qwest's side of the POI, and whether each party shall receive reciprocal compensation on all traffic.[53] The court reasoned a state commission can always reach an issue in arbitration that relates to lawfulness of a service.

A cardinal rule of contract interpretation is to ascertain the intent of the parties.[54] We find that during their negotiations Charter and CenturyTel failed to agree on the entire concept of NID compensation. There simply was no meeting of the minds on any NID compensation issue – neither the issue of whether CenturyTel can charge Charter at all for the type of NID access Charter seeks, nor the issue of the level of any such charge. Given this divide, Charter's silence

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[51] *Id.*

[52] Civ. No. 06-6222-HO, 2007 WL 4118908 (D. Or. Nov. 115, 2007) hereinafter ("*Universal*").

[53] *Universal* at 6.

[54] *CenturyTel of Missouri, LLC v. Socket Telecom, LLC*, 2008 WL 4286648 (Mo. P.S.C. 2008).

on a particular NID rate cannot be construed as any form of acceptance of a particular proposed NID rate.[55] Further, as guided by the federal court rulings cited above, Charter was not required to object specifically to CenturyTel's NID rate level because it is obvious that Charter objected to *all* NID rate levels, including the $1.91 proposed by CenturyTel. In the context of those rulings, Charter's objection to any NID rate *application* (*i.e.*, its lawfulness) necessarily includes objection to any NID rate *level*. In the DPL the Parties might have said something like, "We don't agree about whether CenturyTel can charge for NID access, but if it can, we agree that CenturyTel's proposed rate is acceptable." That is the result CenturyTel is seeking, but it is obvious that the actual state of the Parties' discussions bears no relation to that hypothetical statement. Thus, under the Act, we must not only decide whether any charge for the NID access at issue here is appropriate, if we do conclude some charge is appropriate, we must establish the appropriate rate level. Charter is entitled to comment on what NID rate level, if any, is appropriate under federal law as such commentary directly relates to its opposition to any compensation, and Mr. Gates' rebuttal testimony therefore is within the scope of the issues being arbitrated in this proceeding.

We also note that some forms of NID access constitute access to a UNE under federal law.[56] Therefore, as discussed more fully below, under FCC rules, CenturyTel must *prove* to the Commission that its proposed rate for NID access does not exceed the forward-looking economic cost per unit of providing the element, using a TELRIC cost study.[57] Charter did not waive its opportunity after the submission of its petition and CenturyTel's response (as well as CenturyTel's evidence) to challenge or test CenturyTel's assertion that the NID rate comports

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[55] *See, generally, Pride v. Lewis*, 179 S.W. 375 (Mo.App. W.D. 2005).

[56] 47 C.F.R. § 51.319(c). As we discuss below, because Charter's activities all take place on the customer side of the demarcation point, Charter's access does not constitute "use" of the NID within the meaning of federal law.

[57] 47 C.F.R. § 51.505(e).

with TELRIC, and to examine and challenge the required cost study demonstrating TELRIC compliance. Charter does not forfeit that right because it did not specifically oppose the NID rate in the petition or materials associated therewith. The most logical time for a CLEC to oppose a proffered UNE rate is after discovery, testimony and cross examination *of the cost study*; until that time, the CLEC (and the Commission) will not have full knowledge of the ILEC's claimed costs. Since CenturyTel must offer only lawful NID rates, we believe *Universal* supports our examination of the company's proposed NID rates, and Charter's right to challenge them.

For all these reasons we deny CenturyTel's motion to strike Mr. Gates' testimony.

Issue Nos. 2 and 24

Findings of Fact

1. A Network Interface Device ("NID") is a piece of passive equipment. Blair Direct at 5, lines 7-12.

2. CenturyTel's proposed service order charge rate is $33.78 and its proposed monthly recurring NID charge is $1.91. Reynolds, Tr. 428, line 22; Schultheis, Tr. 471, lines 4-8.

3. CenturyTel's service order charge is based on a cost study conducted by CenturyTel but not sponsored by any witness to this proceeding. Reynolds Direct; Schultheis Rebuttal.

4. Under Issues 27 and 40, we rule that CenturyTel's service order charge cost study constitutes impermissible hearsay and denied CenturyTel's request to admit the cost study into the record of this matter.

Discussion

The Parties disagree as to the definition of a NID. We believe Charter's definition more closely follows the current FCC definition for a NID, and the FCC's underlying technical

rationale for its NID definition. Although CenturyTel believes it necessary to include in the NID definition the concepts of "Point of Demarcation" and "End User Customer's Inside Wire," along with a reference to FCC Rule 68.105, we do not. In its *UNE Remand Order*, the FCC modified its definition of the loop network element to replace the phrase "network interface device" with "demarcation point."[58] The FCC no longer considers the phrase "network interface device" appropriate for the purposes of describing the legal rights and responsibilities of interconnecting carriers at the point where the incumbent LEC and customer meet:

> We find the demarcation point preferable to the NID in defining the termination point of the loop because, in some cases, the NID does not mark the end of the incumbent's control of the loop facility. [59]

Indeed, the FCC specifically *declined* to include "inside wiring" in its definition of NID, noting that to do so limited CLECs' access rights:

> Although competitors may choose to access the inside wire via the NID, in some circumstances they may choose to access the inside wire at another point, such as the minimum point of entry. By continuing to identify the NID as an independent unbundled network element, we underscore the need for the competitive LEC to have flexibility in choosing where best to access the loop.[60]

What CenturyTel asks us to do, in essence, is to ignore the FCC's admonition regarding using a NID definition to limit or condition CLEC access rights to the NID.

Were the Parties in disagreement about "demarcation point" or "minimum point of entry," or the scope of FCC rules governing these concepts, CenturyTel's proposed definition might prove beneficial. However, the Parties disagree only as to the definition of NID, which definition the FCC clearly has limited.

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[58] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report & Order and Fourth Notice of Proposed Rulemaking,15 FCC Rcd 3696 ¶ 168, n. 304 (1999) (hereinafter "UNE Remand Order").

[59] *Id.* at ¶ 168.

[60] *Id.* at ¶ 235.

Conclusion

Consistent with the FCC's rules, we find that a NID is any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.[61] Charter's proposed definition is consistent with this FCC definition, while CenturyTel's proposed definition introduces legal or regulatory concepts that might be used to limit or condition a CLEC's right to access that NID. We adopt Charter's definition.

NID Compensation

We now turn to the issue of NID compensation. Charter argues it should be allowed to access the customer side of the NID for the purpose of connecting its own loop facilities to the customer's inside wire. According to Charter, such access does not constitute "use" of the NID as a UNE, and does not create any obligation for Charter to pay CenturyTel. DPL at 88. CenturyTel counters that where Charter elects to place its loop facilities in CenturyTel's NID, it must compensate CenturyTel for that "use." CenturyTel argues that Charter has no right to "use" CenturyTel's NIDs without compensation. *Id.* at 90.

The FCC does not define the term "use" with respect to NID access, and it is unclear what "feature, function or capability" CenturyTel believes Charter "uses" when accessing the customer side of the NID. The evidence in this case demonstrates that, to the extent Charter accesses a CenturyTel NID for the purpose of connecting its facilities to the inside wiring of an end user customer (what Charter's witness Mr. Blair characterized as a "Star Wiring" scenario, Blair Direct at 12, Diagram 3), Charter typically opens the protective covering of the NID to reach the customer side and, after disconnecting CenturyTel's loop facility from the end user's

[61] 47 C.F.R. § 51.319(b)(1).

inside wiring (often by disconnecting a cross-connect wire) either (i) attaches its own facilities to a clamp or terminal on the customer side of the NID, which clamp or terminal is connected to the inside wiring emanating from the end user customer's premise, or (ii) splices and encapsulates (known as "scotchlocking") its own facilities directly to the end user's inside wiring. Blair Direct at 10-11; Miller, Tr. 528, lines 2-10. In both cases the Charter connection remains entirely within portions of the NID that are completely and at all times accessible to the premises owner. In no case would Charter formally request a NID UNE from CenturyTel, nor is CenturyTel required to engage in any back office activity or field activity.

It is important to our consideration of NID access that all of Charter's activities take place on the customer side of the "demarcation point,"[62] which, according to FCC Rule 68.105(a) and in the context of a standard CenturyTel NID, means the jack into which CenturyTel's RJ11 connector (or cross-connect wire) is plugged. Blair Direct at 7, Diagram 1. "Carrier-installed facilities at, or *constituting, the demarcation point shall consist of wire or a jack*."[63] CenturyTel's "communications facilities" – that is, its network – end at the point of its RJ11 connector, *i.e.*, the end of its "local loop," or the facilities capable of transmitting communications.[64] The customer's inside wiring begins at that same RJ11 jack which, while "carrier-installed," constitutes the demarcation point according to FCC Rule 68.105(a). Charter's activities all take place on the customer side of the demarcation point, and thus such activities do not constitute access to the NID UNE.

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[62] 47 C.F.R. § 68.3 ("the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises").

[63] 47 C.F.R. § 68.105(a).

[64] We note here that, of all the NID "functions" identified by Mr. Miller, none include the transmission of communications. Miller, Tr. 522, lines 23-25; 523, lines 1-17 (wherein Mr. Miller identifies a NID's purpose as (i) a connection device between the LEC's drop and the customer's inside wiring; (ii) protection from lightning strikes; (iii) a weatherproof housing; and (iv) a test device).

CenturyTel attempts to confuse the issue by introducing the concept of "minimum point of entry" ("MPOE"). CenturyTel's objective, evidently, is to suggest that even on premises where it installed a NID with a standard RJ11 connector, it might nonetheless still assert control over the wiring on the customer side of that connector and running to (in effect) the last 12 inches of wiring before the wiring actually enters the wall of the premises. Miller, Tr. 591, lines 8-15. We do not believe MPOE is relevant to this discussion, as the standard CenturyTel NID clearly serves to house the demarcation point.

The significance of the fact that Charter's activities occur on the customer side of the demarcation point is that Charter is not actively or intentionally "using" any part of CenturyTel's "network" (any "network element") in the way it accesses the customer side of the NID. Specifically, Charter is not using the NID for any of the purposes identified by Mr. Miller at hearing. Miller, Tr. 522, lines 23-25; 523, lines 1-17. Charter is not "using" the NID as a connection between its drop and the customer's inside wiring, or for protection from lightning strikes, or as a test device. Charter supplies its own connection from its own outside plant to the premises (a "drop"). Charter makes its own connection to the inside wiring, and only touches CenturyTel's NID clamp or post when the inside wiring is too short (and is thereby obscured by CenturyTel's facilities) to accommodate an independent splice. Blair, Tr. 75, lines 15-20. Charter does not ground its connection on the network side of the NID; Charter always provides its own ground wire. Blair Direct at 12, Diagram 3. Charter does not use the test facilities on the customer side of the NID in any way. Charter simply disconnects CenturyTel's local loop and attaches its own facilities to the customer's premises wire that terminates at the NID.

The only NID function identified by Mr. Miller that Charter might conceivably "use" is weatherproof housing, but such "use" clearly is owing to the inadequate length of inside wiring

from the premise and the fact that CenturyTel's NID is in the way – the latter perhaps owing to a claim of perpetual easement, Miller, Tr. 614, line 10 – denying Charter use of its own house box to weatherproof its connection. Such incidental "use" of the NID is insufficient to give rise to a compensation obligation.

Another key fact in determining Charter's purported "use" of CenturyTel's NID is whether Charter voluntarily avails itself of any NID functions available to it. The focus here is Charter's access and occupation of a very limited portion of the customer side of the NID, either a passive terminal or clamp that is on the customer side of the demarcation point, or an empty compartment. We do not believe that the record supports a finding that Charter *chooses* to "use" the CenturyTel's NID in most cases. Instead, it appears that Charter *must* access and attach to the interior clamp on the customer side of the demarcation point or interior empty space within the NID the majority of the time because the NID obstructs the customer's inside wiring, which is generally too short to allow for interconnection with Charter's facilities outside the NID. In such circumstance we cannot say that Charter is "using" the NID of its own volition. Charter must be permitted to connect to its customers in a technically reasonable and cost efficient manner; that is the very heart of the FCC's decision to qualify the NID as a UNE.[65] But no CLEC should be forced to pay for a phantom functionality that it does not need simply because ILEC facilities otherwise obstruct direct connection to an end user. Here we recall the testimony offered by each of the company's witnesses on NID access.

Mr. Blair is the Vice President, Technical Operations, at Charter, and is responsible, *inter alia*, for technical operations standards, processes and procedures for installation, field customer service and hybrid fiber/cable plant maintenance. Blair Direct at 1, lines 12-25. Prior to joining

[65] *UNE Remand Order* at ¶¶ 238-240.

Charter, Mr. Blair held a number of technical positions in the telecommunications and cable industries. *Id.* at 3, lines 7-25. Mr. Blair testified that, in creating a policy for Charter's access to ILEC NIDs, his specific concern was "that house wiring comes typically through the side of the house or right into the back of the NID. And in order to get access to that, we said we would just go ahead and make our connection with the house wiring right there." Blair, Tr. 184, lines 24-25; 185, lines 1-3. Mr. Blair continued, "*our biggest issue* was that the wir[es] coming into the NID are not long enough to really pull anywhere. . . ." Blair, Tr. 186, lines 4-6 (emphasis added).

Mr. Miller, who testified for CenturyTel on NID issues, is not an engineer and has not served as a technician or field personnel during his career in the telephony industry. Miller, Tr. 520, line 25; 521, lines 1-5, 12-15. He has served as a manager, not a field technician. His observations are based on personal experiences in homes he has owned or visited. Miller, Tr. 585, lines 20-25; 586, line 1. While we do not question the accuracy of Mr. Miller's personal anecdotes, they remain just that, and do not match Mr. Blair's considerable professional experiences that underpin the Charter NID access policy Mr. Blair created, or that underlie his testimony as to the typical length of inside wiring into NIDs. Consequently, we believe the record demonstrates that, in the majority of cases, the end user's inside wiring feeds directly into the back of the NID and that wiring is too short to accommodate a splice outside of the NID.

We also recall Mr. Blair's unrefuted testimony that Charter installs its own "house box" at each end user customer's home. Blair Direct at 10, Diagram 2; 12, Diagram 3; Blair, Tr. at 75, line 17. Clearly Charter has an economic incentive (to make full use of its own deployed assets) to move the connection with the end user customer from CenturyTel's NID to the Charter house box, and no reason except for the physical limitation of the inside wiring not to move the

connection. Blair, Tr. 186, lines 4-6. The fact that Charter deploys its own house box, coupled with Mr. Blair's testimony that Charter prefers the "Serial Wiring" scenario "as its first option" so as not to interact with CenturyTel, Blair, Tr. 188, lines 24-25; 189, lines 1-3, leads us to conclude that Charter does not willingly "use" CenturyTel's NID and thus should not be forced to compensate CenturyTel.

Finally, Mr. Miller testified that CenturyTel might exert an ownership claim on inside wiring in some circumstances (Miller, Tr. 543, lines 12-14; 591, lines 8-15), i.e., claim to own or control wiring outside the NID toward the customer's premise, or exert a perpetual easement to keep its NID in place at a former customer's premise. Miller, Tr. 614, line 10.[66] In these circumstances, too, it appears that Charter might be forced to utilize the CenturyTel NID to make a connection to its new end user customer. Under an easement, Charter cannot remove the NID absent CenturyTel's permission, which is unlikely given CenturyTel's hopes of reclaiming the customer. Here again we cannot conclude that Charter voluntarily "uses" CenturyTel's NID, and thus no compensation should result.

We also find that Charter is not obligated to pay CenturyTel a service order charge for accessing the customer side of the NID. There is simply no evidence of any back office or field activity performed by CenturyTel that would justify imposition of such a charge. When Charter accesses a CenturyTel NID, it is Charter, not CenturyTel, which incurs costs. Miller, Tr. 530, lines 11-12. CenturyTel performs no independent service function to warrant imposition of any charge, let alone a $33.78 service order charge.[67]

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[66] This statement contradicts Mr. Miller's earlier testimony that CenturyTel would remove its NID at the request of a former customer. Miller, Tr. 546, lines 14-17.

[67] In effect, CenturyTel is asking us to decide (a) that Charter must submit a service order form, in effect merely to notify CenturyTel that Charter is "using" CenturyTel's NID rather than to actually have CenturyTel perform any services, and then (b) that Charter must pay CenturyTel $33.78 for a mere notification, with no actual "service"

CenturyTel's NID Rate

Although we have decided that Charter does not "use" CenturyTel's NID for purposes of justifying compensation, we also find that CenturyTel has not complied with FCC rules which require CenturyTel to price NID access (or, in this case, access to the customer side of the NID) at TELRIC rates based on a TELRIC cost study filed with the Commission. "An incumbent LEC must establish a price for the network interface device when that unbundled network element is purchased on a stand-alone basis pursuant to Sec. 51.319(c)."[68]

> The total element long- run incremental cost of an element is the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements.[69]

> The actual TELRIC rate charged to an entrant leasing the element would be a fraction of the TELRIC figure, based on a reasonable projection of the entrant's use of the element (whether on a flat or per usage basis) as divided by aggregate total use of the element by the entrant, the incumbent, and any other competitor that leases it.[70]

CenturyTel's counsel stated at hearing the company has not conducted a cost study to support the NID rate,[71] Tr. 538, lines 1-4, which by necessity means that the proposed rate is not based on a TELRIC cost study. Instead, Mr. Miller characterized the rate as an "interconnection agreement rate." Miller, Tr. 584, line 17. Mr. Miller further testified that, while CenturyTel's recurring NID costs "may have been studied," he has no knowledge of the specifics of such an examination. Miller, Tr. 527, lines 9-10. Indeed, Mr. Miller-CenturyTel's only witness

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being provided by CenturyTel. We decline to require the generation of revenues for phantom services in this manner.

[68] 47 C.F.R. § 51.509(h).

[69] 47 C.F.R. § 51.505(b).

[70] *Verizon v. FCC*, 535 U.S. 467, n. 16 (2002), citing 47 C.F.R. §51.511 (1997).

[71] *See also* Gates Rebuttal at Schedule TJG-4, Charter's Request 12 ("No cost study or other support information was provided because the parties have agreed on the amount of the NID use charges.")

regarding NIDs-does not know the company's recurring NID cost. Miller, Tr. 527, line 4. Federal law clearly obligates an ILEC to price NID access according to UNE and TELRIC principles:

> An incumbent LEC *must prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, *using a cost study that complies with the methodology set forth in this section and Sec. 51.511.*[72]

If CenturyTel's NID rate is not based on TELRIC, we are legally required to reject it, irrespective of whether Charter opposes the rate (which we find above Charter has done in any event). This is not the case of the ILEC proposing a rate for a service or facility other than a UNE, which the CLEC or a commission might accept independent of UNE costing and pricing principles. To the extent some forms of NID access constitute access to a federally mandated UNE or a portion thereof, the price of such access must be calculated according to TELRIC principles pursuant to a cost study filed with the Commission. CenturyTel's NID rate is self-admittedly not in compliance with FCC rules and must be rejected.

We are also concerned that CenturyTel's monthly recurring NID rate vastly overstates the company's forward-looking (and even embedded) NID costs. Mr. Miller testified that the NID is a static device, with no moving or mechanical parts. Miller, Tr. 525, lines 13-16. He did not disagree with Mr. Gates' assertion that a typical NID costs approximately $70.00.[73] Miller, Tr. 525, line 25. Using $70.00 as a proxy for CenturyTel's sunk cost, CenturyTel's $1.91 rate either was calculated presuming a 3.5-year useful life for NIDs (which is not reasonable for a passive device), or CenturyTel imputed extraordinary and likely unacceptably high ROI and maintenance

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[72] 47 C.F.R. § 51.505(e) (emphases added).

[73] We take note, too, that the FCC entertained evidence that NIDs typically cost between $25.00 and $40.00. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, 15 FCC Rcd 3696, ¶ 239 (1999).

expenses. We would expect to see a monthly recurring charge for NID access along the lines of Mr. Gates' calculations, or even lower given the strictures of 47 C.F.R. § 51.511.

Nor are we convinced that Charter's particular form of access to the CenturyTel NID gives rise to *any* incremental or additional costs for CenturyTel that would justify the $1.91 charge. In response to cross examination, Mr. Miller conceded that Charter's physical access to the NID causes no additional or incremental costs to CenturyTel. Miller, Tr. 530, lines 11-12. Instead, Mr. Miller suggested that CenturyTel "might" have future maintenance or repairs costs, Miller, Tr. 532, lines 10-12, or that Charter would derive "unjust enrichment" from uncompensated access to the NID, which he equated to a competitive cost to CenturyTel, Miller, Tr. 532, lines 10-12. Mr. Miller's first claims (maintenance and repair costs) overlook his later testimony that CenturyTel keeps the NID in place in the hopes of serving the premise in the future. Miller, Tr. 532, lines 10-12. Since CenturyTel would experience maintenance and repair costs even if Charter did not access the customer side of the NID, and since CenturyTel is willing to incur such costs to sustain its competitive standing vis-à-vis the end user, a proper cost analysis would apportion a greater percentage of such costs to CenturyTel than NID access. In any event, CenturyTel has failed to quantify the costs and thus they are too speculative for consideration here.

Mr. Miller's second claim (unjust enrichment) is both speculative and the type of "opportunity cost" that FCC rules expressly disallow in a TELRIC study. Mr. Miller claims that to the extent Charter "co-opts" the NID, such action "translates to an immediate cost to CenturyTel as Charter's competitor." Miller, Tr. 532, lines 10-12. To the extent Mr. Miller means to convey that CenturyTel can no longer derive NID revenues from an end user customer,

those lost revenues are opportunity costs not permitted in a TELRIC study.[74] To the extent Mr. Miller means to convey that Charter is avoiding a cost it otherwise would incur, we note the measure of Charter's "avoided cost" is a fraction of the very TELRIC rate that CenturyTel has failed to calculate or provide, and which TELRIC rate appears to be measured in a few pennies per month at most, not the unsupported $1.91 that CenturyTel proposes.[75]

Conclusion

Consequently, we find that Charter does not "use" CenturyTel's NID as a UNE, and thus no compensation is required. We find that CenturyTel has not met its burden, clearly established in applicable FCC regulations, to show that its proposed NID rate (of which a CLEC might expect to pay a fraction) comports with TELRIC principles, and further that CenturyTel's NID rate does not comport with TELRIC principles. Additionally, we find that, as CenturyTel concedes, Charter's physical access causes no additional or incremental costs to CenturyTel that could serve as inputs to a TELRIC study of NID access costs. Accordingly, Charter shall not be liable to CenturyTel for any NID-related charges, including any "service order" charges. Because Charter does not "use" CenturyTel's NID, and absent the required TELRIC justification for its proposed $1.91 rate, we find that CenturyTel may not assess that or any rate for providing access to its NIDs.[76] We adopt Charter's language with respect to Issues 2 and 24.[77]

Charter Motion to Strike

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[74] 47 C.F.R. § 51.505(d)(3).

[75] Here again we take note of Mr. Blair's testimony that Charter deploys its own house box at each new subscriber's premise. CenturyTel's claim that Charter is avoiding costs by "using" the NID fails to recognize Charter's investment. Obviously, too, CenturyTel is free to remove its NID at any time should it desire to deprive Charter of "unjust enrichment" or force Charter not to "avoid costs."

[76] While we agree with Mr. Gates' reply testimony that, presuming a monthly recurring charge, CenturyTel would double recover its NID costs absent a mechanism to credit ratepayers, since we do not permit CenturyTel to assess any charge, we need not guard against this double recovery.

[77] CenturyTel raised in the DPL potential Issue 24(a), "(a) Should Article IX, Section 3.4 clarify that the End User controls Inside Wire except in those multi-tenant properties where CenturyTel owns and maintains such Inside Wire?" We find that CenturyTel's proposed language for Section 3.4 is unnecessary given the language of 47 C.F.R. § 51.319(b)(2).

On October 24, 2008 Charter filed a motion to strike Rebuttal Schedule GEM-1 accompanying the rebuttal testimony of CenturyTel witness Miller, along with certain passages from Mr. Miller's rebuttal testimony. Charter claims that photographs included in GEM-1 constitute inadmissible hearsay, as are statements relying on the photographs. At hearing Mr. Miller confirmed that he did not take the photographs or witness the damage purportedly shown in the photographs. Miller, Tr. 549, line 23; Miller Tr. 550, line 1. Under Missouri law the declaration of an out-of-court declarant is generally inadmissible. The photographs appended to Mr. Miller's rebuttal testimony are clearly hearsay and we will exclude them from the record. We grant Charter's motion to strike Schedule GEM-1, Page 13, lines 3-7, and Page 14 lines 4-7 of Mr. Miller's rebuttal testimony.

Issue 18: Should Charter be entitled to interconnect with CenturyTel at a single Point of Interconnection (POI) within a LATA?

This issue presents the question of whether Charter is entitled to a single POI at which it will exchange all traffic with CenturyTel. Charter asserts it has a right under federal law to establish such a single POI arrangement, and that such arrangement is the most efficient and cost effective manner for the Parties to exchange traffic. CenturyTel, asserts that Charter is not entitled to a single POI, but instead must establish multiple POIs and CenturyTel, including at each CenturyTel exchange where certain traffic thresholds are met.

Findings of Fact

1. CenturyTel is an incumbent local exchange carrier, ("incumbent LEC"), as that term is defined under 47 U.S.C. § 251(h)(1).[78]

2. In order for Charter and CenturyTel to exchange traffic between their respective customers, they must interconnect their networks, which takes place at a physical location called

[78] We take administrative notice of this fact pursuant to MO. REV. STAT. § 536.070(6).

the "Point of Interconnection" or "POI." Gates Direct p. 30, at 8-10.

3. Charter must construct (or lease or acquire) new facilities for access to each POI, Gates Direct p. 32, at 20-22.

4. CenturyTel, has an extensive network throughout many areas of Missouri. Gates Direct p. 32, at 15-16.

5. CenturyTel has not established that a single POI in the specific exchanges that Charter seeks to interconnect would be technically infeasible.

Discussion

In resolving this issue we reiterate that under the governing standard for this arbitration, we must ensure we "meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to section 251."[79] Thus, our decision here must, by necessity, turn upon the application of Section 251 of the Act and FCC regulations.

Section 251(c)(2)(B) imposes upon CenturyTel a "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network;...at any technically feasible point within the carrier's network...." [80] Thus, CenturyTel (the ILEC) has a duty to provide to Charter (the requesting carrier) interconnection with CenturyTel's network at "any technically feasible point" within CenturyTel's network. Section 251(c)(2) references a technically feasible *point*, in the singular, as the place at where the ILEC must provide interconnection. Thus, the Act on its face reveals that a requesting carrier can choose to interconnect with the incumbent LEC at a *single* point on the incumbent's network, as long as that point is technically feasible.

Our interpretation of the statute is consistent with the construction by the expert agency

[79] 47 U.S.C. § 251(c)(1).
[80] 47 U.S.C. § 251(c)(2)(b).

responsible for implementing the Act. Specifically, the FCC has considered this issue and repeatedly found that the Act grants requesting carriers the right to establish a single POI on the incumbent LEC's network. In June 2000, the FCC stated:

> Section 251, and our implementing rules, requires an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. *This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA.*[81]

In April 2001, in discussing its rules in the course of initiating a proceeding regarding intercarrier compensation, the FCC stated:

> As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, *including the option to interconnect at a single POI per LATA.*[82]

In July 2002, in resolving an arbitration between Verizon and WorldCom, the FCC stated:

> Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. *This includes the right to request a single point of interconnection in a LATA.*[83]

Finally, as recently as March 2005, the FCC explained:

> Under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.[84] The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect *at a single point of interconnection* (POI) per

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[81] *In the Matter of Application by SBC Communs. Inc., Southwestern Bell Telephone Co., and Southwestern Bell Communs. Services, Inc. d/b/a Southwestern Bell Long Distance; Pursuant to Section 271 of the Telecommuns. Act of 1996 to Provide In-Region, InterLATA Services in Texas*; CC Docket No. 00-65; Released June 30, 2000; at ¶ 78 (emphasis added).

[82] *In the Matter of Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) ("*Unified Intercarrier Compensation NPRM*") at ¶ 112 (footnote omitted, emphasis added).

[83] *Petition of WorldCom, Inc., et al., Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Comm'n,* Memorandum Opinion and Order, 17 FCC Rcd 27039 at ¶ 52 (2002) (hereinafter "*FCC Worldcom*") (emphasis added). The Fourth Circuit affirmed that the Bureau's decision is entitled to the same deference that would normally be granted to a decision of the full Commission. *MCI Metro Access Transmission Servs. v. BellSouth Telecomms., Inc.* 352 F.3d 872, n. 8 (4th Cir. 2003).

[84] 47 U.S.C. § 251(c)(2)(B).

LATA.[85]

It is settled law that competitive providers, like Charter, have the right to interconnect with incumbent providers, like CenturyTel, at a single POI within a LATA. This right is supported by a plain reading of the Section 251(c)(2), and the FCC regulations implementing that statute.[86]

We expressly reject CenturyTel's assertion that this established rule only applies to ILECs that are also former Bell Operating Companies ("BOCs").[87] We do so for several reasons. First, and most importantly, the Act itself (and Section 251(c) in particular) does not except non-BOCs from the rule. Had Congress intended to apply the single POI rule only to ILECs that also were BOCs it clearly could have done so expressly. Indeed, in enacting the Act Congress did carve out the former BOCs for the purpose of imposing specific, additional obligations on such companies.[88] Congress set forth these provisions in a separate section of the Act, Part III, entitled "Special Provisions Concerning Bell Operating Companies." In contrast, the statutory provision which gives rise to the single POI obligation, Section 251(c), clearly applies to *all* incumbent local exchange carriers (regardless of whether they are, or are not, a former BOC).

Accordingly, under accepted rules of statutory construction, it is clear that Congress intended all incumbent LECs (including both non-BOCs and BOCs) to be subject to those duties set forth under Section 251(c). Because the single POI per LATA rule derives from the

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[85] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 15 at ¶ 87 (2005) (emphasis added).

[86] 47 C.F.R. §51.321(a) ("...an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.")

[87] *See* Watkins Direct at 27, lines 12-18.

[88] *See*, e.g., 47 U.S.C. §§ 271-276. These provisions clearly only apply to BOCs, for example, Section 271 governs "Bell Operating Company" entry into InterLATA services. And Section 273 governs manufacturing by "Bell Operating Companies."

obligations under Section 251(c)(2) which applies to all incumbent LECs, we conclude that the rule applies to CenturyTel.

Next, we note the FCC has implemented the single POI per LATA requirement as a component of its interconnection rules, including 47 C.F.R. § 51.305(a)(2) – which applies to all ILECs, not just BOCs. Also, the FCC orders which establish the single POI obligation upon ILECs, like CenturyTel, do not explicitly (or even implicitly) carve out non-BOC ILECs. There is no distinction made by the FCC in its orders affirming this rule.

As previously noted, we must ensure that the resolution of issues in this proceeding meets the requirements of Section 251, and the FCC regulations implementing that statute. Given the express language of the Act, and the FCC's repeated statements interpreting the Act, we conclude Charter has the right to interconnect with CenturyTel at a single POI on CenturyTel's network. We further conclude that Charter's proposed language, which provides a right to establish a single POI per LATA, with CenturyTel's network, is consistent with Section 251 and FCC regulations.

Under Section 251(c)(2) and applicable FCC regulations, the only limitation to Charter's right to interconnect at a single POI is where such an arrangement would be "technically infeasible." As the FCC has explained,

> Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA. The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it *proves* to the state public utility commission that interconnection at that point is technically infeasible.[89]

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[89] *In the Matter of Application of SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, FCC 00-238, CC Docket No. 00-65, Released June 30, 2000, ¶ 78 ("Texas 271 Order") (footnotes omitted, emphasis added).

Thus, our inquiry turns to the question of whether CenturyTel has proven that Charter's request for interconnection at a single point would be technically infeasible. We find that CenturyTel has not made that showing. Instead, CenturyTel offers a variety of ill-defined excuses why it believes the Commission should not adopt a single POI concept for this Agreement. At the outset, CenturyTel's witness Mr. Watkins makes several statements in his direct testimony which suggest it would be technically infeasible to interconnect with CenturyTel at a single POI on their network.[90] However, Mr. Watkins' statements on this issue evolved, and in his rebuttal testimony he clearly moved away from his prior statements suggesting that interconnection at a single POI would be infeasible.[91] Instead, Mr. Watkins asserted on rebuttal an alternative argument: granting Charter the right to interconnect at a single POI would create additional costs for CenturyTel to transport traffic on its network.[92] We address each potential objection in turn.

As to the question of technical infeasibility, we note that CenturyTel bears the burden of proof on this question. FCC rule 47 C.F.R. § 51.305 requires that "an incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that the interconnection at that point is not technically feasible."[93] The FCC has defined technical infeasibility narrowly, requiring significant technical or operational concerns to overcome the presumption against technical feasibility:[94]

> [a] determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its

[90] Watkins Direct at 28, lines 5-22.

[91] Watkins Rebuttal at 26, lines 22-26.

[92] *Id.* at 36, lines 10-15.

[93] 47 C.F.R. § 51.305(e).

[94] 47 C.F.R. §51.5.

> facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.[95]

Accordingly, based on these standards, any suggestion by CenturyTel that it must modify the facilities on its side of the POI has no bearing on whether Charter should be allowed to choose a single POI per LATA. This standard also informs us that CenturyTel's proposed POI limitations, including the requirement that Charter "negotiate" a POI, or establish a "Local POI,"[96] are inconsistent with the presumption under federal law that a single POI is the competitor's right, absent a showing of technical infeasibility. Further, we are convinced that CenturyTel's other proposed limitations on Charter's ability to request a single POI per LATA (including considerations related to CenturyTel's network architecture, potential costs, future capacity needs, etc.) are not consistent with FCC regulations implementing Section 251, and must therefore be rejected.

Further, CenturyTel's statement concerning the potential economic impact of allowing Charter to establish a single POI are not relevant to our analysis. FCC rule 51.305 clearly, and expressly, states that "technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns." As such, we can not deny Charter's right to a single POI simply because of any alleged additional costs that CenturyTel asserts may arise.[97]

With respect to the specific evidence in the record concerning the potential technical

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[95] *Id.*

[96] CenturyTel's proposed term "Local POI" is not well defined, but suggests that Charter would be obligated to establish multiple POIs in each local exchange area in which it provides service. This clearly conflicts with the FCC's single POI per LATA requirement.

[97] Note that we do not necessarily accept CenturyTel's assertions that a single POI would necessarily impose greater costs upon CenturyTel. Charter witness Mr. Gates testified that a "single POI should actually reduce costs for CenturyTel and for Charter due to lower fiber transport costs." Gates Direct at 45, lines 12-13.

ramifications of adopting the single POI concept, we are convinced that existing network arrangements on CenturyTel's networks will mitigate potential concerns regarding CenturyTel's ability to receive traffic at a single POI on its network. Specifically, in those areas where Charter's competes with CenturyTel (and would establish a single POI), CenturyTel maintains certain [redacted] to connect its network facilities in that area. In particular, evidence introduced at the hearing, CenturyTel network diagram (identified as CTL-DM-49-001 "PROPRIETARY") ("P") indicates that there are [redacted] This diagram, demonstrates that CenturyTel has deployed [redacted] These are the same service territories where Charter currently provides service. Moreover, the network diagram also shows that CenturyTel has already deployed [redacted] between several of these end offices, as well as other end offices.

These facts demonstrate CenturyTel already has the capacity to send traffic between, and among, CenturyTel end offices in the areas served by Charter. Therefore, if required to establish a single POI with Charter, CenturyTel is technically capable of sending all its traffic in these five service areas to, and from, that single POI arrangement with Charter. For example, if Charter chose to establish a single POI with CenturyTel at the Wentzville tandem, and deliver all of its traffic to that point, CenturyTel would be able to accept traffic at that point, and transport it to the appropriate end office for delivery to the called party. Accordingly, we are not convinced by Mr. Watkins' testimony, suggesting that interconnection at a single POI would constitute either a technically infeasible interconnection arrangement, or an unreasonably costly arrangement.

Further, we also reject other assertions made by Mr. Watkins, regarding the limitations of CenturyTel's interconnection obligations. In particular, Mr. Watkins suggests that the non-discrimination principles of Section 251(c)(2) limit Charter's right to request a single POI. For example, Mr. Watkins states that an ILEC is "not required to provision interconnection arrangements for the benefit of its competitors that are more than what the incumbent does for itself..." Watkins Direct at 30, lines 24-27; and "under Section 251(c)(2) of the Act, [ILECs] are not required to provision superior arrangements at the request of the competing carriers." Watkins Direct at 31, lines 15-16. The facts revealed by CenturyTel's network diagram, however, establish that Charter's request would simply seek interconnection arrangements that are equal to what CenturyTel already provides itself, not a "superior" arrangement.

Nor is Mr. Watkins correct to suggest that Charter's proposal would require CenturyTel to build new facilities. For example, he states that "competitive carriers requesting interconnection should have access 'only to an incumbent LEC's *existing* network –not to a yet unbuilt superior one'" Watkins Direct at 32, lines 6-7; and "incumbents are not required 'to alter substantially their networks in order to provide superior quality interconnection...'" Watkins Direct at 32, lines 20-21. Even accepting Mr. Watkins' characterization of the cited decisions, we are persuaded that the CenturyTel network diagram proves CenturyTel already has an existing which means that Charter's request would not require CenturyTel to "alter substantially" its network in order to accommodate Charter's single POI request.

Taken as a whole, we are convinced that these facts demonstrate that Charter's single POI request: (1) is technically feasible; (2) does not present a "superior" form of interconnection;

and, (3) should not require CenturyTel to incur any appreciable additional costs.[98] We reiterate that factors such as "super" interconnection or additional costs cannot be considered by this Commission in determining whether a POI is technically feasible. Given the facts we now have concerning CenturyTel's existing network facilities, requiring Charter to interconnect at multiple points (or POIs) within a LATA would simply create inefficient network arrangements, and impose greater costs upon Charter. That result is impermissible under federal law, and clearly unnecessary given CenturyTel's existing network arrangements in the areas served by Charter.

Furthermore, we find that allowing CenturyTel to dictate the location of a single POI or multiple POIs for originating traffic would be problematic. That result could allow CenturyTel to force Charter to build out a ubiquitous network based on the same geographic reach as the CenturyTel network. Additionally, by forcing CLECs to use multiple POIs of CenturyTel's choice and location, CenturyTel is prohibiting CLECs, like Charter, from enjoying the efficiencies CenturyTel built into the network for its own use, and improperly shifting the costs of building out the CenturyTel network to its competitors. Nothing about this approach represents an appropriate balance of costs between the ILEC's existing network dominance and a CLEC's investment to compete in the market. In short, allowing CenturyTel to determine the number and location of POIs would allow CenturyTel to have control over Charter's investment decisions and could force Charter to invest in facilities that are not justified from a market or engineering standpoint. Gates Direct at 38, lines 10-19. Further, from an economic standpoint, a single POI allows CLECs to have a minimal, yet efficient, presence until its customer base and traffic patterns warrant the further expansion of its own network. Gates Direct at 42, lines 4-6.

Conclusion

[98] Here we take particular note that CenturyTel has presented no cost evidence regarding the ramification of Charter's single POI language despite having express notice of Charter's proposal no later than when the DPL was filed.

Charter is entitled, under federal law, to establish a single POI per LATA with CenturyTel as the point at which it will exchange all traffic with CenturyTel in that LATA. The FCC's language could not be more clear: "an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."[99] For these reasons we adopt Charter's proposed language on this issue.

Issue 19: Should Charter's right to utilize indirect interconnection as a means of exchanging traffic with CenturyTel be limited to only those instances where Charter is entering a new service area or market?

This dispute concerns the circumstances under which Charter may use indirect interconnection as a means of exchanging traffic with CenturyTel. The Parties disagree on the terms and conditions under which the Parties may exchange local competitive traffic via a third party tandem switch. CenturyTel proposes a low threshold that would require the Parties to establish dedicated trunking between their networks once the traffic volume reaches 200,000 minutes per month. Charter proposes a trigger for direct connection when the total volume of traffic exchanged between the Parties' network exceeds 240,000 minutes per month for three consecutive months.

Findings of Fact

1. Direct interconnection is a form of interconnection where there is an actual physical connection of networks for the purpose of exchanging traffic originating on two service provider's networks. Gates Direct at 49, lines 11-12.
2. "Transiting" connotes indirect interconnection through an intermediary carrier's network. Gates Direct at. 49, lines 23-25.

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[99] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92 (rel. Apr. 27, 2001), at ¶ 112; *see also In the Matter of Application by SBC Communications Inc. et al. to Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, CC Docket No. 00-65, FCC 00-238 at ¶ 78, n. 174 (rel. June 30, 2000) ("a competitive LEC has the option to interconnect at only one technically feasible point in each LATA").

Discussion

Section 251 of the Act requires telecommunications carriers to interconnect "directly *or indirectly* with the facilities and equipment of other telecommunications carriers."[100] The right under Section 251(a) to interconnect through either direct *or indirect means* has been expressly recognized by the Commission:

> "[a] CLEC may choose to indirectly interconnect with SBC Missouri by using the facilities of another carrier. Such indirect interconnection does not release the CLEC from any of the obligations to which it is held under the agreement."[101]

In that case the Commission rejected CenturyTel's attempt to adopt language that would limit a carrier's right to indirect interconnection, explaining that such limitations are not consistent with Section 251(a)(1) and the Commission's previous interpretation of the Act.[102] Federal courts have also affirmed that a CLEC has the right to choose to avail itself of either direct interconnection under 251(c), or indirect interconnection under Section 251(a).[103] Further, the use of direct interconnection in one instance does not preclude the use of indirect interconnection in another instance.[104]

Charter seeks to maintain its federally-established right to choose indirect interconnection when it is the most appropriate means of exchanging traffic. Contrary to CenturyTel's assertion, Charter is not attempting to "use indirect interconnection indefinitely," Watkins Direct at 44, line 15, but rather to establish a more reasonable threshold of traffic volume before the Parties move

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[100] 47 U.S.C. § 251(a)(1) (emphasis added).

[101] *Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the Telecommunications Act of 1996*, Final Commission Decision, Case No. TO-2006-0299, 2006 Mo. PSC LEXIS 1380, at *32-33 (2006) (hereinafter Socket Arbitration-Commission Decision); *see also Southwestern Bell Telephone d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement*, Final Arbitrator's Report, Case No. TO-2005-0336 ("...pursuant to 47 USC 251(a)(1), an ILEC has a duty to indirectly interconnect with a CLEC that chooses such method of interconnection") (hereinafter SBC Arbitration-Arbitrator's *Final Report*).

[102] *Socket Arbitration-Commission Decision, at *32-33.*

[103] *See Atlas Tel v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1268 (10th Cir. 2005).

[104] *Id.*

away from indirect interconnection arrangements. Charter has a statutory right under Section 251(a) to utilize indirect interconnection as a means of exchanging traffic with CenturyTel. There are no statutory or regulatory limitations on the use of indirect interconnection. Charter can able to utilize indirect interconnection as a means of exchanging local, extended area service ("EAS") and other traffic with CenturyTel's network, where appropriate.

Conclusion

We adopt Charter's proposed language as consistent with the Commission's prior decisions and federal law. Charter has a right under the Act to interconnect with CenturyTel through direct or indirect means. Furthermore, the Act contains no limitations on this right, and Charter is entitled to use indirect interconnection as a means of exchanging EAS and other traffic. CenturyTel's position is inconsistent with the Commission's prior decisions on this issue, and impedes competition by imposing impermissibly restrictive limitations on the use of indirect interconnection arrangements.

Issue 20: Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?

This issue raises a series of related questions. First, whether CenturyTel obligated to lease "interconnection facilities" to Charter at cost-based rates pursuant to Section 251(c)(2)? The Parties appear to agree that the answer to this question is yes. Second, therefore, whether cost-based rates set forth pursuant to Section 251(c)(2) must be calculated using the TELRIC pricing standard? Charter says yes; CenturyTel says no. The remaining dispute concerns the mechanics of how the Parties will adopt cost-based rates. In particular, the Parties dispute whether to allow "true-up" of interim rates once a final rate is negotiated, and the time period that they should use to negotiate a final rate before the issue is escalated to the Commission.

Findings of Fact

1. Charter seeks access to CenturyTel's network to interconnect and exchange local voice traffic with CenturyTel. Gates Direct at 60, lines 5-6.

2. An interconnection (or "entrance") facility is a transmission facility used to interconnect two networks, for the mutual exchange of traffic on such networks. Gates Direct at 56, lines 5-8.

3. When carriers exchange traffic, they sometimes use a "relative use factor." Gates, Tr. 82, lines 13-18.

4. Under a relative use factor, costs are proportioned based on the amount of a carrier's originated traffic. *Id.*

Discussion

Charter and CenturyTel do not dispute that Section 252(c)(2) requires CenturyTel to lease interconnection facilities to Charter at cost-based rates. Watkins Direct at 67, lines 7-9. As the Commission has determined, the FCC ruled that CLECs have the right to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service, and that CLECs are entitled to access to interconnection facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[105] The Commission and the federal courts, have both ruled that incumbent LECs like CenturyTel must make available interconnection (or "entrance") facilities to CLECs like Charter, at TELRIC rates pursuant to Section 251(c)(2). That is settled law. Accordingly, we affirm that pursuant to Section 251(c)(2), Charter is entitled to lease facilities that are used to interconnect to CenturyTel for the exchange of traffic at cost-based rates.[106]

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[105] *See* SBC Arbitration–Arbtrator's Final Report, Section V, at p. 16, Case No. TO-2005-0336 (Mo. PSC 2005).

[106] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report & Order and Order on Remand and Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 at ¶ 366 (2003) ("Triennial Review Order").

Moreover, cost-based rates are determined using the TELRIC pricing standard.[107] With respect to the question of whether interconnection facilities must be made available at TELRIC rates, the Eighth Circuit ruled that "CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network."[108]

Next, we consider which Party's proposed interim rate methodology should be adopted. Under CenturyTel's proposal the cost-based standard would not apply to the interim lease rates. Pursuant to CenturyTel's proposed language, these "interim rates" would be governed solely by CenturyTel's tariff—not according to cost-based principles. DPL at p. 77. Charter proposes the use of CenturyTel's tariffed rate, subject to the originated local traffic factor (sometimes referred to as a relative use factor, or "RUF") of fifty percent (50%). Gates Direct at 83, lines 23-25. According to Charter, applying an RUF percentage to this arrangement, according to Charter it would result in a rate that is closer to the rates Charter pays in other TELRIC-based states. Gates, Tr. 83, lines 10-15.

We find that Charter's proposed interim rate methodology is more likely to approximate the final 251(c)(2) cost-based TELRIC rates that we order the Parties to adopt. Charter identifies an appropriate surrogate (the RUF factor) as a means of ensuring that any interim rate to which it may be subject reasonably approximates the TELRIC rate that CenturyTel must develop. CenturyTel's proposal to use tariffed rates, without any consideration of a RUF, would translate into rates that are significantly higher than what we would expect to see for a 251(c)(2) rate. Charter's proposed language presents a more reasonable approach, consistent with both federal law and by the Commission's decisions in other arbitration proceedings.[109]

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[107] *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*, 461 F.Supp.2d 1055 (D. Mo. 2006).

[108] *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*, 530 F.3d 676, 684 (8th Cir. 2008).

[109] *See* SBC Final Arbitrator's Report, Section V, at p. 16, Case No. TO-2005-0336 (Mo. PSC 2005) ("To the extent CLECs desire to obtain interconnection facilities described above, they may do so at cost-based (TELRIC) rates"),

Now we turn to the Parties' competing "true-up" proposals. CenturyTel's proposed language for establishing an interim rate does not account for recovery of any above-cost amounts paid by pending adoption of a final rate. Notably, CenturyTel does not offer any language in the DPL which indicates it would accept a "true-up" clause. DPL at 77-78 Nevertheless, Mr. Watkins testified that "any interim rate will be adjusted (i.e. "trued-up") once the final rates are determined." Watkins Direct at 67, lines 18-19.

Regardless of this apparent inconsistency, we believe that Charter's proposed interim rate methodology including true-up, better embodies the intent of 251(c)(2) and a CLEC's right to interconnection at a cost-based TELRIC rate. Charter's approach also is more reasonable, by virtue of its "true-up" clause that ensures payments made prior to the establishment of the final rate can be trued-up back tot the effective date of the Agreement.

Finally, CenturyTel proposes a significantly longer negotiations period for establishing the cost-based rate. Under CenturyTel's proposal, the Parties would have to wait six (6) months before an unresolved dispute may be escalated to the Commission. Charter's language shortens this period, requiring the Parties to negotiate instead for three (3) months prior to seeking Commission intervention. We believe that a three (3) month timeframe is a reasonable amount of time for the Parties to negotiate.

Conclusion

Charter's proposed language is consistent with applicable law, and provides a reasonable process for CenturyTel to determine an appropriate cost-based rate for interconnection facilities that it must make available to competitors like Charter. Charter has proposed a specific, and

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see also Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n, 461 F.Supp.2d 1055 (D. Mo. 2006) ("...the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities").

precise, formula for establishing interim rates that will apply during the negotiations period. This formula fairly compensates CenturyTel for the facilities it provides. By the same token, the formula does not require Charter to pay more than is reasonably required, in the interim and is consistent with a TELRIC standard for such facilities than interim tariffed rates. For these reasons we adopt Charter's proposed language on this issue.

Issue 21: Should Charter be allowed to deploy one-way trunks at is discretion, and without having to assume the entire cost of interconnection facilities used to carry traffic between the Parties' respective networks?

This issue focuses on the Parties' dispute over whether Charter should be entitled to deploy its own one-way trunks under certain circumstances. Charter maintains it has a right under federal law to deploy one-way trunks. CenturyTel asserts that two-way trunking is the most efficient method of trunking, and therefore is the appropriate architecture. CenturyTel further asserts that Charter should only be able to deploy one-way trunks where both Parties mutually agree to use a one way trunk, and that Charter should be responsible for the cost of the facilities that CenturyTel would need to deploy to get CenturyTel's traffic to Charter.

Findings of Fact

1. A one-way trunk is a trunk between two switching centers over which traffic may be originated from only one of the two switching centers. Gates Direct p. 61, lines 16-19.

2. The one-way trunk may be deployed from either carrier's network. Gates Direct p. 61, lines 16-19.

3. A two-way trunk allows calls to originate from both ends of the trunk. Gates Direct p. 61, lines 23-24.

4. Both one-way and two-way trunks can carry the traffic that is exchanged between Charter and CenturyTel. Gates Direct at 62, lines 1-2.

Discussion

FCC rules place the selection of one-way versus two-way trunks in the hands of the connecting CLEC, subject to issues of technical feasibility.[110] Consistent with federal jurisdiction,[111] and the precedent of this Commission,[112] Charter proposes language that would allow Charter to choose the circumstances when it would employ two-way or one-way trunks. As Charter witness Gates testified, Charter expects that it will routinely order two-way trunks. Gates, Tr. 115, lines 1-4. However, two-way trunks may not always be necessary. Under some circumstances, such as where the traffic is clearly one-way, a one-way trunk may be more efficient.

CenturyTel's proposed language restricts CenturyTel's ability to deploy one-way trunks because it requires both Parties to negotiate the appropriate trunk configuration. If the Parties cannot agree on the deployment of a one-way trunk, the matter would proceed through the dispute resolution process. As such, CenturyTel would essentially have a "veto" power over Charter in regard to the types of trunks it chooses to deploy.

Conclusion

We adopt Charter's proposed language as consistent with federal law in that it provides a CLEC the ability to choose either one-way or two-way trunks, depending upon the particular circumstances of the traffic the CLEC will exchange with the ILEC.

Issue 22: What threshold test should be used to determine when the Parties will establish Direct End Office Trunks?

The Parties agree that the appropriate threshold for establishing a direct end office trunk ("DEOT") is 24 or more trunks. Accordingly, the specific threshold to be used for establishing DEOTs is not dispute. Instead, the issue in dispute concerns how to determine how the threshold

[110] 47 C.F.R. § 51.305(f) ("If technically feasible, an incumbent LEC *shall* provide two-way trunking upon request")(emphasis added).

[111] *FCC WorldCom Arbitration Order, at ¶ 147*

[112] *Socket Arbitration-Commission Decision*, at *49

is met. Charter's proposal calls for a DEOT to be established when actual traffic volumes meet a DS1 level for three consecutive months. CenturyTel proposed to require a DEOT when actual, or *projected*, traffic volumes meet the DS1 level for either three consecutive months or three months of any five consecutive month period.

Findings of Fact

1. A DEOT is an interconnection trunk group between a POI and an end office. It rides the facilities of each party on its side of the POI.[113]

2. A DEOT's capacity is 24 trunks, or DS1 level. Gates Direct at 65, lines 6-8.

Discussion

Commission precedent establishes that where traffic is reciprocal, DEOTs may be established upon mutual agreement of the carriers.[114] Charter's proposal would ensure that the threshold test for determining when Parties will establish DEOTs will be based on actual traffic volumes. This standard ensures that DEOTs are not established based on speculative levels of anticipated traffic volumes between the Parties' networks, or volumes of traffic that may only arise at some undefined point in the future. Specificity benefits both Parties, while still ensuring that necessary traffic and trunk engineering arrangements are established when appropriate.

We find CenturyTel's language is problematic in that it would require that the Parties establish DEOTs based, at least in part, on "projected" traffic volumes. CenturyTel's language therefore could require DEOTs to be established when traffic does not actually meet the agreed-upon DS1 threshold. If the projection is incorrect and traffic volumes do not reach the threshold level, DEOTs would be unnecessary.

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[113] We take administrative notice of this fact purusant to our authority under Mo. Rev. Stat. § 536.070.

[114] *SBC Arbitration-Arbitrator's Final*, Section V p. 11 (June 21, 2005) (noting further that "neither carrier may require separate trunk groups").

Furthermore, setting the threshold on projected demand, as CenturyTel proposes, could lead to disputes between the Parties as to which Party's projected traffic volumes are accurate and should be used to determine whether the threshold has been met. In effect, CenturyTel's language would provide incentives for CenturyTel to argue that traffic volumes "will be" a DS1 level in the future so that Charter must establish DEOTs. That potential result, in turn, could increase Charter's costs. We find that potential result unacceptable, and unnecessary.

Conclusion

The threshold test for determining when Parties will establish DEOTs must be based on actual traffic volumes to ensure that DEOTs are not established based on speculative volumes or volumes that may or may not exist in the future. CenturyTel's language is vague and subject to traffic projections that may not materialize. Charter's proposed language bases the threshold on actual traffic volumes, which would avoid potential disputes between the Parties by using data that is objective and verifiable. For these reasons, we adopt Charter's proposed language.

Issue 23: Should Charter pay CenturyTel a tariffed access charge for transiting traffic where CenturyTel end office switches perform a transit functionality for unqueried calls that have been ported to another carrier?

The issue in dispute here is narrow. The disputed issue involves a situation that does not arise very often – when Charter sends an "unqueried call" to CenturyTel's network, what are the parties' respective obligations concerning the routing of that call to the third-party service provider? Charter proposes language that would simply ensure that in those circumstances when CenturyTel performs an "N-1 query" on CenturyTel's behalf, CenturyTel will then route the call to the called party's service provider. CenturyTel's position is not altogether clear, although it does appear that CenturyTel seeks compensation for routing the call to the third-party service provider.

Findings of Fact

1. When calls are routed to telephone numbers that have been ported from one carrier to another, special routing protocols are used. These protocols include the designation of an "N-1" carrier, that is required to perform certain number query functions.

2. The FCC has defined the "N-1" carrier as that carrier situated just before the terminating carrier. In practical terms, for local calls, the N-1 carrier is the carrier that has the retail carrier/customer relationship with the end user that is making the call. Watkins Direct at 79, lines 18-19.

3. The FCC requires the N-1 carrier to query a database in order to determine the identity of the terminating carrier that now serves the end user that has ported a telephone number from one carrier's network to another carrier's network. *Id.* at 20-21.

4. This query is necessary because of the possibility that the telephone number to which the call is directed has been ported to another carrier. *Id.* at 22-23.

Discussion

At issue here is a dispute that is comparatively narrow – when Charter sends an "unqueried" call to CenturyTel's network, what are the parties' respective obligations concerning routing the call? Gates Direct at 68, lines 7-14. Charter simply wants to ensure that in those circumstances CenturyTel does *in fact* route the call to the called party's service provider. *Id.*

Despite the relatively limited proposal put forward by Charter, CenturyTel appears to go far beyond the basic proposal put forward by Charter. Instead, CenturyTel filed many pages of testimony in which it seems to ask this Commission to affirm that it will be compensated for the functionality associated with routing that call, and transporting it across its network. Watkins Direct at 81, lines 21-23. In so doing, CenturyTel seems to assert that Charter has not, or is not,

meeting its number porting obligations when it fails to properly query a call that is routed to a subscriber with a ported number.

We do not believe that the resolution of this issue requires this Commission to make such a finding. Instead, we agree with the testimony of Charter witness Mr. Gates, who explained that:

> Mr. Watkins addresses many things in his testimony and goes far afield from the actual dispute. The dispute revolves around a situation that does not arise very often: when Charter sends an "unqueried" call to CenturyTel's network, what are the parties' respective obligations concerning routing the call? Charter simply wants to ensure that in those circumstances CenturyTel does ***in fact*** route the call to the called party's service provider.

Charter does not dispute the fact that it is obligated to perform these queries, and it also does not object to the notion that it must compensate CenturyTel when CenturyTel performs such queries, and then routes the call to the appropriate third party service provider. Gates Rebuttal at 79, lines 21-23. Indeed, CenturyTel wants to be compensated for the functionality associated with routing that call, and transporting it across its network, and we believe that is a reasonable request. Charter's witness Mr. Gates has acknowledged that Charter is willing to compensate CenturyTel at the rate elements proposed by CenturyTel, i.e., the combined tandem switching and tandem transport and termination rates. Gates Rebuttal at 79, lines 22-24. We therefore affirm that Charter must compensate CenturyTel when it performs these queries.

Since we have affirmed that CenturyTel is entitled to payment for its actions in performing the so-called N-1 query, we believe it is also reasonable to incorporate Charter's proposed contract language (which simply confirms that CenturyTel will perform these query functions on the relatively few occasions when Charter does not perform its own query). That result is reasonable, and equitable. We therefore adopt it as our own here.

Conclusion

We therefore adopt Charter's proposed language for Issue 23, along with the proposed rates offered by CenturyTel for this issue.

IV. 911 ISSUES

Issue 35: Should both Parties' liability for errors associated with the provision of 911 services be limited by contract, in a manner that is consistent with applicable law?

With this issue we address whether both Parties should be able to limit their liability for civil damages to the other Party related to the provision of 911 services, when one Party has acted in a manner that is deemed to be negligent, grossly negligent, or which constitutes intentional or willful misconduct. Charter argues that liability should not be limited in those situations. CenturyTel argues that liability should be limited in those situations. Further, the Parties disagree as to whether this language should apply reciprocally.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

During our discussion of Issue 15, concerning liability limitations, above, we noted that this Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[115] We are therefore bound by that precedent, and decide this issue accordingly. This question arises in the context of the 911 sections of the draft Agreement. The provision of 911 services in Missouri is generally a matter of great significance, and one which

[115] *SBC Arbitration*-Commission Decision, at 56.

we must carefully review to ensure that service providers obligated to provide these important services are held accountable for their actions.

With that in mind, we take this opportunity to review the Parties' competing language. In so doing, the differences between their respective proposals are evident. First, Charter proposes that the limitation of liability language apply reciprocally, to both Parties' benefit.[116] CenturyTel, in contrast, proposes language that would only benefit CenturyTel, and which Charter would not benefit from. Regardless of the scope of liability we adopt herein, there is no reason that these provisions should not apply to the benefit of both Parties. We note that both Parties provide 911 services to their respective end user customers, and therefore fail to see why only one Party should benefit from the protections of this language.

Although we recognize that CenturyTel, as an incumbent provider, has greater obligations with respect to certain 911 network facilities, we believe that Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel. Accordingly, we adopt Charter's proposal to make this language reciprocal, to apply to both Parties' benefit.

With respect to the question of what liability standard should apply, as noted above, we have already decided that it is against public policy for a party to escape, or limit, liability when that Party's fault rises to the level of gross negligence, or intentional or willful misconduct. This principle is especially true in light of the significant public policy concerns surrounding the provision of 911 services.

Any Party that proposes to limit its liability for harm caused by gross negligence or intentional misconduct bears the burden of demonstrating that such liability limitations are

[116] DPL at 113-115 (Charter proposed language Art. VII, 9.3 and 9.6).

appropriate. CenturyTel, the Party proposing this limitation, has not offered any evidence to support its proposed language. Further, the only support that CenturyTel offers for this language is the single sentence in its position statement in the Parties' Joint DPL, at page 113, where it alludes to language that is found in a CenturyTel tariff. Apart from that single sentence, however, CenturyTel fails to explain why it should be allowed to limit its liability in this manner to a co-carrier such as Charter.

Nor does CenturyTel explain why this Commission should depart from the concept it has used in prior proceedings. For example, in the 2005 SBC arbitration proceeding, Case No. TO-2005-0336, the Commission approved SBC's proposed contract language, which specifically carved out liability arising from gross negligence, recklessness or intentional misconduct from the 911 liability limitations provisions of the final agreement.[117]

More significantly, however, the courts of Missouri have construed our statutes in a manner that is not consistent with CenturyTel's attempts to limit its liability. Specifically, in *Overman v. Southwestern Bell*, the Missouri Court of Appeals construed language in Section 392.350 of the Missouri Revised Statutes. That statute provides that any telecommunications company that causes some act or omission which results in loss or damages "shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom."[118] In construing this language, and in consideration of the common law rights to recover punitive damages, the Missouri Court of Appeals concluded that telephone companies can not escape liability (and damages) when the "acts complained of were done wrongfully, intentionally, or without just cause or excuse."[119]

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[117] Final Arbitrator's Report, Appendix IXA Detailed Language Decision Matrix (Issue number CC-E911 – 9).

[118] Mo. Rev. Stat. § 392.350.

[119] *Overman v. Southwestern Bell Tel. Co.*, 675 S.W.2d 419, 424 (Mo. Ct. App. 1984).

Further, the *Overman* court noted that cases in Missouri recognize the propriety of imposing punitive damages against a telephone company "in a proper case." To this point the *Overman* court cited, with approval, the decision in *Warner v. Southwestern Bell Telephone Company,*[120] in which the Missouri Supreme Court stated that a tariff limiting the amount of damages for errors and omission (in directories) are generally valid and enforceable, but they "do not exempt a defendant when its conduct has been wanton and willful,..."[121] Indeed, the *Overman* court concluded that in none of the Missouri cases on the books did the courts ever rule "that a telephone company is not liable for intentional torts, and those for resultant punitive damages."[122] As a result, the court concluded, that "[t]he only conclusion is that the Missouri General Assembly has chosen not to act in specifying or limiting the types of damages recoverable for violations of § 392.200, or of the common law."[123] Thus, in accordance with these decisions we will not allow either party to limit its liability when it has acted in an intentional, willful or grossly negligent manner.

Finally, we also reject CenturyTel's attempts to limit the total amount of damages that it may be liable for if it engages in grossly negligent behavior, or intentional/willful misconduct. Consistent with its position on issue 15(c), above, Charter argues that the Parties should not limit their damages in a way that would preclude one Party from obtaining meaningful relief from the other, when the party at fault is grossly negligent or engages in intentional misconduct. We agree, and note that this issue has already been decided. As noted during our discussion of issue 15(c), in the 2005 arbitration proceeding between SBC and various competitive LECs, the Commission affirmed the Arbitrator's ruling that "it is contrary to public policy to cap liability

[120] 428 S.W.2d 596, 603 (Mo. 1968).
[121] *Id.* at 424 (citing *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596, 603 (Mo. 1968)).
[122] *Id.* at 424.
[123] *Id.*

for intentional, willful, or grossly negligent action."[124] Because the Commission has already decided this very question, we have no choice but to reject CenturyTel's proposal here.[125]

Conclusion

For all of the foregoing reasons we adopt Charter's language for Issue 35.

Issue 36: Should each party be required to indemnify and hold harmless the other party except where the indemnified party has engaged in acts that constitute negligence, gross negligence, intentional or willful misconduct in connection with E911 service?

Here we answer the question of whether provisions concerning the indemnity protections related to 911 liability should be reciprocal. Charter argues that such provision should be reciprocal. CenturyTel argues that such provisions should only apply to the benefit of CenturyTel. In other words, according to CenturyTel, Charter should be required to indemnify CenturyTel for any 911-related claims, but CenturyTel should not be required to indemnify Charter of the same.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

In our discussion of the previous question, Issue 35, we concluded that the 911 liability provisions should benefit both Parties reciprocally. We noted that both Parties provide 911 services to their respective end user customers, and therefore both Parties have potential liability concerns arising from their provision of 911 service to their respective end users.

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[124] SBC Arbitration - Commission Order at 56 (affirming Arbitrator's Final Report, Sec. 1(a) at p. 71).

[125] We also agree with Charter's that CenturyTel's proposal presents another problem. Because this Agreement contemplates primarily the exchange of traffic, without significant liabilities for leasing, resale or other services, the amount of monthly charges that the Parties are subject to is relatively small. For that reason, CenturyTel's proposal to limit direct damages to no more than an amount equal to such monthly charges could effectively preclude recovery of the amount of direct damages that arise from a significant harm or error that occurred to one Party's network, employees, or other assets. Therefore, it would also be improper to limit damages in this way if such limitations preclude the injured Party from recovering its actual damages.

CenturyTel claims that this provision should only apply for CenturyTel's benefit, because only CenturyTel "is responsible for managing the Database Management System and relaying subscriber information to the counties." DPL at 115 (CenturyTel Position Statement). That may be true (though there is no evidence in the record to make that finding). However, it does not address the basic premise of this indemnity language, which applies to "any damages, claims, [or] causes of action..." The specific contract language at issue here is quite broad, in that it would impose indemnity obligations for "any damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise which may be assessed by any person, business, governmental agency, or other entity... as a result of any act or omission [of the other Party]..." DPL at 115 (CenturyTel proposed language for Art. VII, § 9.4). Thus, it does not apply only to the specific claims that may arise as a result of CenturyTel's unique obligations in administering the 911 system. Instead, it applies to potentially all claims arising from any 911 service. As we have previously noted, Charter also provides 911 service to its end users as required by state law, and therefore may be faced with "potential damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise." Charter therefore may also face certain 911 liability, and should therefore be afforded the same indemnity protections which CenturyTel seeks for itself.

Given these facts, we decline to adopt contract language that would allow only one Party to benefit from the protections of this language. This conclusion stands, even though we recognize that CenturyTel, as an incumbent provider, has greater obligations with respect to certain 911 network facilities. Nevertheless, as discussed above, we believe that Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel. Accordingly, we adopt Charter's proposal to make this language reciprocal, to apply to both Parties' benefit.

Conclusion

For all of the foregoing reasons we adopt Charter's language for Issue 36.

Issue 37: Should the Agreement limit both Parties' liability related to the release of information, including non-published and non-listed information, in response to a 911 call?

We are again asked to decide whether certain liability related provisions should apply unilaterally, or reciprocally. In this instance, specific language limits liability related to the release of nonpublished or nonlisted subscriber information.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

In our discussion of the previous issues we have concluded that there is no reason that the 911 liability provisions should not apply for the benefit of both Parties. We see no reason to depart from our rationale there to reach our conclusion here.

Conclusion

For all of the foregoing reasons we adopt Charter's language for Issue 37.

Issue 38: Should CenturyTel be permitted to limit its liability for so-called "non-regulated" telephone services in connection with 911 services –even where that term is not defined under the Agreement?

This issue requires the Arbitration Panel to determine whether the Agreement should include language that permits CenturyTel to limit its liability with respect to 911 services in connection with so-called "nonregulated" telephone services, an undefined term. CenturyTel's DPL statement suggests that it could be referring, among other things, to "shared tenant services." Charter's position is that CenturyTel's proposed language should not be included in the Agreement as it creates unnecessary uncertainty and is one-sided. CenturyTel asserts that its

proposed language should be included in the Agreement because it should not be held liable for certain 911 routing situations.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

We incorporate by reference our discussion under Issue 35 and Issue 36 regarding 911 liability; thus our decision with respect to 911 liability on those issues will apply here. Specifically, we have found that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[126] Generally, in arbitrating the disputed issues, the Arbitration Panel is charged with the task of ensuring that each Party's respective obligations under the Agreement are unambiguous. For that reason, we are reluctant to accept CenturyTel's proposal because it has failed to carry its burden of proof with respect to the purpose, or intent, of its language. Specifically, we are troubled by the meaning of the term "nonregulated" telephone services. We note that CenturyTel has not defined that term in its proposed language, nor has CenturyTel offered any meaningful explanation of how any liability with respect to the provision of these so-called "nonregulated" telephone services would arise in the first place. Put simply, we do not see the need, or wisdom in adopting this language.

This approach is consistent with the basic purpose of an interconnection agreement, which, pursuant to Sections 251 and 252 of the Telecommunications Act, is intended to definitively establish the rights and obligations of the Parties. In other words, the Agreement must be clear and unambiguous to accomplish the purposes of those Sections 251 and 252. In

[126] *SBC Missouri Arbitration*, Commission Order at 56.

contrast, if we were to adopt CenturyTel's proposed language, the Agreement would include ambiguous terminology that would create uncertainty as to Charter's obligations on a going-forward basis. Ambiguity with respect to Charter's obligations to CenturyTel, especially as it pertains to a limitation on CenturyTel's liability in connection with certain vital 911 services, should be avoided. Doing so will likely lead to fewer disputes between the parties.

Conclusions of Law

For the foregoing reasons, we adopt Charter's proposed language for Issue 38.

V. ANCILLARY ISSUES

A. Number Portability Issues

Issue 27: Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter's network?

Issue 40: Should the Pricing Article include Service Order rates and terms?

These issues present the question of whether CenturyTel may assess charges upon Charter for the administrative costs of responding to number porting requests from Charter. Charter asserts that charges associated with number porting are prohibited by the FCC's order implementing the number porting cost recovery mechanisms mandated by Section 251(e)(2).[127] CenturyTel acknowledges that number porting charges are prohibited by federal law, but argues that the charges it seeks to impose upon Charter are not covered by the FCC's rule.

Findings of Fact

In analyzing the charges proposed by CenturyTel, the Commission must consider the larger context of how, and when, such charges are assessed. Specifically, we recognize that the activities which precipitate CenturyTel's proposed charges arise in the context of Charter's acquisition of new end user customers, i.e., former CenturyTel telephone service subscribers.

[127] 47 U.S.C. § 251(e)(2).

1. Many telephone subscribers in Missouri are choosing to acquire service from competitive entities like Charter, and in so doing may often move from CenturyTel to Charter because of the competitive rates and terms offered by Charter's competing voice services. Gates Direct at 74, lines 1-3

2. When subscribers move from CenturyTel to Charter, they often wish to port their telephone number from one provider to another. Watkins, Tr. 362, lines 22-25, 363, line 1. *See also* Gates Direct at 73, lines 11-19.

3. To ensure that the end user's request is satisfied, Charter initiates certain inter-carrier communications with CenturyTel to convey the end user's request to port their numbers. That communication is presented in a form known in the industry as an LSR (an acronym for Local Service Request). Reynolds Direct at 5, lines 4-6.

4. Upon receipt of this request, CenturyTel undertakes certain actions that are necessary to ensure that the number is ported to Charter's network, Watkins Direct at 93, lines 5-23; 94, lines 1-9; and Reynolds Direct at 5, lines 4-23; 6, lines 1-21; 7, lines 1-7.

5. CenturyTel's proposed charges arise when Charter conveys the *customer's* request to port their telephone number from one provider to another.[128]

6. CenturyTel's proposed charges would be assessed whenever that activity occurs, i.e., when a number is ported from its network to Charter's network.[129]

7. CenturyTel's costs associated with responding to number porting request (via LSRs) from Charter are specific to CenturyTel (carrier-specific costs), unrelated to general network

[128] CenturyTel has admitted, in a series of discovery responses, that these charges would not arise "but for" the fact that Charter is competing with CenturyTel, and actively porting numbers (and more importantly, subscribers) away from CenturyTel's network. *See* CenturyTel Response to Charter RFI Nos. 19-21, and 24-27. Gates Rebuttal at 86, lines 4-8, and Gates Rebuttal Testimony exhibit "Attachment TJG-6."

[129] Watkins, Tr. 363, lines 5-10; 362, lines 16-21 (CenturyTel witness Watkins explaining that "each time a number is ported there is a local service request that must be processed" and that "a charge would apply."); *and* Gates Rebuttal at 86, lines 2-4 ("Whatever the name [of the charge], it's coincident with Charter having won a customer and that customer porting its number to Charter.").

upgrade costs. Watkins, Tr. 364, lines 22-25; 365, lines 1-4

Discussion

With these facts in hand, we now address the following fundamental question: can CenturyTel impose charges on Charter for actions it takes in order to fulfill an *end user customer's* request to port a telephone number to Charter? To answer this question we need not make new law, or interpret an untested legal argument, because the FCC has *already* answered this question. Specifically, in its 2002 Number Portability Cost Reconsideration Order the FCC ruled that:

> [I]ncumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier "customers," nor may they recover carrier-specific costs through interconnection charges to other carriers where no number portability functionality is provided.[130]

CenturyTel readily admits that its proposed charges represent an explicit "term and condition of interconnection" with Charter, and other CLECs.[131] It is therefore clear that CenturyTel seeks to propose an "interconnection charge" upon Charter for certain functions associated with CenturyTel's fulfillment of its federal statutory duty to engage in number portability with other carriers. We need not determine whether the costs which this charge seeks to recover are directly, or indirectly, related to number porting because the FCC's 2002 ruling applies to both situations. The FCC's statement at paragraph 62 of its 2002 Cost Reconsideration Order expressly prohibits interconnection charges associated with both "number portability costs" and those carrier-specific costs "where no number portability functionality is provided."[132]

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[130] *In the Matter of Telephone Number Portability*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578, at ¶ 62 (2002) ("2002 Number Portability Cost Reconsideration Order") (emphasis added).
[131] Watkins Direct at 93, lines 12-14.
[132] 2002 Number Portability Cost Reconsideration Order at ¶ 62.

The FCC's statement prohibiting charges for porting leaves no doubt that the FCC does not permit ILECs to assess charges upon other carriers for number porting. This decision is valid law to this day. There is no contrary legal authority, and CenturyTel has failed to offer any authority that purports to negate the FCC's statement on the issue.

Rather, in an attempt to ignore the application of the FCC's prohibition of interconnection charges for porting activities, CenturyTel argues that the charges at issue here have nothing to do with number portability, that they are simply administrative order processing or service costs that fall outside of the scope of the FCC's prohibition. Watkins Direct at 94, lines 10-16. The FCC has ruled that the carrier-specific costs of implementing number portability include the very costs at identified by Charter. Specifically, they include costs associated with "transferring" telephone numbers to other carriers, and the costs associated with "the exchange of porting orders" between carriers – the very same functions for which CenturyTel claims to incur costs when responding to Charter's port requests.

The cost recovery rule was promulgated in the FCC's 1998 Third Report and Order on Telephone Number Portability,[133] which established a regime for LECs to recover their costs of implementing long term number portability. The FCC allowed ILECs to recover these costs through: (i) a monthly number portability end-user charge;[134] and, (ii) a number portability query-service charge that applies to carriers on whose behalf the incumbent LEC performs LNP queries.[135]

In that order the FCC identified three separate categories of costs associated with implementing number portability: (1) shared costs; (2) carrier-specific costs directly related to

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[133] *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 (1998) ("*Third Report and Order*").
[134] *Id.* at 11776, para. 142. *See* 47 C.F.R. §§ 52.33(a), (a)(1).
[135] *Third Report and Order*, 13 FCC Rcd at 11778, para. 147. *See* 47 C.F.R. §§ 52.33(a), (a)(2).

providing number portability; and (3) carrier-specific costs not directly related to providing number portability.[136] The cost recovery rule applies to the second category, i.e., carrier-specific costs directly related to providing number portability.

CenturyTel argues its charges are for number porting, *per se,* but are simply charges associated with the administrative costs of responding to "service requests" from Charter. CenturyTel claims its charges recover costs of administrative services that it performs in processing LSRs, Watkins Direct at 94, lines 10-16; and Reynolds Direct at 7, lines 10-12, and that such costs are not directly related to the provision of number porting. CenturyTel argues, therefore, its charges are not prohibited by the cost recovery rule because they recoup costs outside of the category of costs covered by that rule. Watkins Direct at 91, lines 2-5.

CenturyTel's arguments fail because the FCC specifically defined the activities at issue in this case, *i.e.*, porting telephone numbers from CenturyTel's network to Charter's, and transmitting porting orders between the two companies, *as* activities that are directly related to providing number portability, and therefore covered by the cost recovery rule. Specifically, in the *Third Report and Order*, the FCC defined carrier specific costs directly related to providing number portability (and thus covered by the cost recovery rule) as

> "costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the *porting of telephone numbers from one carrier to another.*"[137]

And the FCC declined to define such costs as one-time costs, explaining that the "*ongoing costs*" of establishing number portability are covered under the rule.[138]

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[136] *Id.* at ¶¶ 68-77.
[137] *Third Report and Order*, at ¶ 72 (emphasis added).
[138] *Id.* at ¶ 38 (emphasis added).

In a later reconsideration order, the FCC concluded that the only eligible LNP costs are "costs carriers incur specifically in the provision of number portability services, such as ... porting of telephone numbers from one carrier to another."[139]

> In this order the FCC adopted a two part test for defining those costs that are directly related to number portability, and therefore covered by the cost recovery rule. Under that test such costs: (1) would not have been incurred by the carrier "but for" the implementation of number portability; *and* (2) were incurred "for the provision of" number portability service.

As the FCC also explained, the phrase "porting telephone numbers from one carrier to another" refers to systems for uploading and downloading local routing number information and to the process of "*transmitting porting orders* between carriers."[140]

Considered as a whole, these rulings mean the FCC defines a carrier-specific cost directly related to providing number porting as the "porting of telephone numbers from one carrier to another," which specifically includes "*transmitting porting orders* between carriers." These are the very functions at issue here, and for which CenturyTel erroneously claims a right of compensation.[141] For example, CenturyTel witness Mr. Watkins testified that CenturyTel's proposed charges apply when porting orders, or "LSRs", are exchanged between Charter and CenturyTel. Watkins, Tr. 363, lines 5-10. And Mr. Watkins acknowledged that the work undertaken by CenturyTel is a necessary predicate to responding to Charter's request to port a telephone number from CenturyTel to Charter. Watkins, Tr. 362, lines 16-25; 363, line 1. Thus, the functions at the core of CenturyTel's service order charges, i.e. responding to porting orders

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[139] *In the Matter of Telephone Number Portability Cost Classification Proceeding*, Memorandum Opinion and Order, 13 FCC Rcd 24495 at ¶ 12 (1998) (emphasis added). *Id.* at ¶ 10.

[140] *Id.* at ¶ 14 (emphasis added).

[141] Moreover, these costs also meet the two part test established by the FCC because CenturyTel would not have incurred these costs "but for" its porting obligations, and they were incurred because CenturyTel is obligated to provide number porting to its subscribers.

transmitted from Charter, are covered by the cost recovery rule.[142] CenturyTel may not seek to recover them through LSR charge.

Further, even assuming, *arguendo* that CenturyTel was correct that its costs do not fall within those covered by the FCC cost recovery rule, the FCC's 2002 prohibition of carrier charges still bars CenturyTel from assessing these charges on Charter. We find support for this conclusion in the FCC's own words:

> "[I]ncumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier 'customers,' *nor may they* recover carrier-specific costs through interconnection charges to other carriers where *no* number portability functionality is provided."[143]

The latter clause clearly applies to CenturyTel, because CenturyTel claims to have incurred carrier-specific costs in responding to port requests from Charter, and it also claims that these costs are incurred in the provision of administrative tasks unrelated to porting, and where no number portability functionality is provided. Thus, if the statements of CenturyTel's own witnesses are accurate, then the FCC's additional prohibition also applies here because the FCC specifically prohibited such charges even where no number portability functionality is provided. Thus, this statement bars CenturyTel from imposing its proposed LSR charges, regardless of whether they are directly related to providing number porting.[144] Costs caused by end users who desire to port their telephone numbers from CenturyTel's network cannot be recovered from

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[142] Furthermore, CenturyTel's argument that these costs are carrier-specific costs that are not directly related to providing number portability is not consistent with the FCC's characterization of such costs. The FCC found that carrier-specific costs not directly related to providing number porting are "the costs of network upgrades necessary to implement a database method." Examples of such costs include "the costs of upgrading SS7 capabilities or adding intelligent network (IN) or advanced intelligent network (AIN) capabilities." *Third Report and Order*, at ¶¶ 62, 68.

[143] 2002 Number Portability Cost Reconsideration Order at ¶ 62 (2002) (emphasis added).

[144] *See also In the Matter of Long-Term Number Portability Tariff Filings; U S WEST Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 11983 at ¶¶ 21-22 (1999) (finding that service delivery costs are included in those categories of costs that must be recovered through end user charges, not charges upon co-carriers).

Charter. That is precisely why the FCC ordered carriers to recover their costs through charges on end users, rather than other carriers.[145]

CenturyTel views its charges as the natural consequence of Charter's request for the "services" it provides to Charter. However, what CenturyTel calls a "service" are in fact the same actions that it must undertake to fulfill its federal statutory duties under Section 251(b)(2) of the Act. Section 251(b)(2) of the Act requires all LECs to provide number portability.[146] The reason for imposing this duty upon all LECs is clear-- it benefits consumers and promotes competition:

> The ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase. Number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers. The resulting competition will benefit all users of telecommunications.[147]

There is no dispute that actions CenturyTel takes to respond to port requests conveyed by Charter are undertaken to fulfill CenturyTel statutory duty to provide number portability. Mr. Watkins, specifically acknowledged that CenturyTel, like all LECs, does so because the company is "required to do so by federal law." Watkins, Tr. 364, line 9. CenturyTel, therefore, must ensure that numbers are ported from its network to requesting carrier networks, and vice versa, when a *subscriber* so requests.[148]

Mr. Watkins' testimony on this issue demonstrates that CenturyTel, when responding to porting requests from Charter, is providing number portability, as it is *required to do* under

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[145] *See* 47 C.F.R. § 52.33 (authorizing carriers to assess tariffed end user charges to recover costs of number porting).
[146] 47 U.S.C. § 251(b)(2).
[147] *In re Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352, at 8368, ¶ 30 (1996).
[148] This fact also reminds us the subscriber is, ultimately, the cost causer in these situations. That is why the FCC directed incumbents, like CenturyTel, to recover their costs from subscribers, not other carriers.

federal law. As a result, those actions do not constitute the provision of a service to Charter, but instead represent the actions that CenturyTel must undertake to comply with its federal statutory duties. Although CenturyTel may argue that this conclusion is somehow "unfair", the conclusion rests upon the simple principle that when Congress enacted Section 251 of the Act, it undoubtedly understood that creating new obligations and duties upon incumbent LECs, like CenturyTel, would impose cost and operational burdens on those companies. As the FCC itself explained:

> "[a]lthough telecommunications carriers, both incumbents and new entrants, *must incur costs* to implement number portability, the long term benefits that will follow as number portability gives consumers more competitive options outweigh these costs."[149]

Such burdens are the price of developing competition in the local exchange market, and may not be shifted back onto competitors.

Section 251(e)(2) requires that the costs of establishing number portability be "borne by all telecommunications carriers on a competitively neutral basis."[150] This principle of competitive neutrality was also an important component of the FCC's cost recovery orders (discussed above). Allowing CenturyTel to assess charges on Charter (which does not assess charges on CenturyTel[151]) would undermine, rather than enhance, competition and the competitive neutrality the FCC sought to establish.[152] As the FCC explained, "[i]f the [FCC] ensured the competitive neutrality of only the distribution of costs, carriers could effectively undo this competitively neutral distribution by recovering from other carriers."[153] Thus, the FCC was clearly concerned that the very types of charges at issue in this proceeding could undermine

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[149] *See In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 at ¶ 4 (1998) (emphasis added).
[150] 47 U.S.C. § 251(e)(2).
[151] Gates Direct at 81, lines 20-22.
[152] As Ms. Giaminetti testified, on the stand, a ruling in favor of CenturyTel would increase Charter's costs. Tr. 71, lines 18-21.
[153] *Third Report and Order*, at ¶ 39.

competitive neutrality and possibly create barriers to competition (by increasing competitor's costs).

Charter Motion to Strike

We now turn to the inadmissibility of CenturyTel's cost studies. On October24, 2008 Charter filed a motion to strike one schedule which accompanies the direct testimony of CenturyTel witness Jeffrey W. Reynolds and two schedules which accompany the rebuttal testimony of CenturyTel witness M. Scott Schultheis along with certain passages in each witnesses' testimony. Both Mr. Reynolds and Mr. Schultheis are outside consultants to CenturyTel. The challenged schedules include data that CenturyTel claims provides justification for its LSR rate level. Charter alleges that the cost studies constitute inadmissible hearsay, as they are offered by an out-of-court declarant, *i.e.*, neither Mr. Reynolds nor Mr. Schultheis performed or sponsored the studies, and no other CenturyTel witness sponsored them either. We agree with Charter that CenturyTel's cost studies constitute inadmissible hearsay, and thus we exclude them from the record and our consideration.

Charter stipulated that Messrs. Reynolds and Schultheis are expert witnesses.[154] Missouri rules of evidence provide that an expert may rely upon facts or data not developed by the expert himself if the facts or data are of a type reasonably relied upon by experts in the field.[155] However, Missouri jurisprudence makes clear that such facts or data can only serve as background for the expert's opinion and cannot be offered as "independent substantive evidence."[156] Consequently, while Messrs. Reynolds and Schultheis are free to render their expert opinions as to the reasonableness of CenturyTel's LSR rate level, they may not be used as vehicles to introduce otherwise inadmissible evidence like the unsponsored cost studies.

[154] Charter Motion to Strike at 4.
[155] Section 490.065(3) RSMo.
[156] *Peterson v. National Carriers*, 972 S.W.2d 349 (1998) (emphasis added).

We therefore grant Charter's motion to strike the passages from Mr. Reynolds' direct testimony and Mr. Schultheis rebuttal testimony as set forth in appendix B.

The ultimate consequence of our decision to grant Charter's motion to strike is that we find that CenturyTel has failed to provide adequate cost justification for its LSR rate level. We give appropriate weight to the expert opinions of Messrs. Reynolds and Schultheis, but their mere assertions of reasonableness, bereft as they must be of any supporting documentation, are simply insufficient to justify the LSR rate level, or this Commission's reliance on same. For these reasons and consistent with our discussion in the preceding section, we decline to accept any rate level for the LSR charge.

Although we have found that CenturyTel is not permitted to assess an LSR charge in the number porting circumstance and that CenturyTel has failed to justify its proposed LSR rate level, we take this opportunity to examine, briefly, CenturyTel's LSR cost studies. It appears that CenturyTel performed an *embedded* cost analysis, not a forward-looking cost study. In addition, CenturyTel's study did not use least cost principles required by TELRIC methodology. Instead CenturyTel merely measured its current inefficient, labor-intensive process to derive a revenue requirement, not a TELRIC or TELRIC-like rate.

Mr. Schultheis testified that he believes that TELRIC is the appropriate standard for establishing interconnection rates in this proceeding. Schultheis, Tr. 475, lines 21-25.We agree. TELRIC methodology leads to the selection of the long-run, least-cost, most-efficient, forward-looking outcome. [MO cite] CenturyTel's cost studies exhibit none of these attributes. For example, CenturyTel examined its *current* labor practices to derive *current* purported "time-motion" costs. Such an approach is not TELRIC, and not "TELRIC-compliant." CenturyTel its own admission did not consider the least-cost, most efficient manner in which it might process

porting LSRs for porting. Fatal to CenturyTel's presumption here is Mr. Schultheis' testimony that other mid-size ILECs for whom he consults routinely automate number porting processes:

> I believe most of the ILECs that I consult with have automated processes with the exception of the small rural companies that I also consult with, which are manual. But even in the -- let's just say midsize companies, and I'll put CenturyTel in a midsize company, even with some of the midsize companies I've consulted with, the process is automated. Schultheis, Tr. 501, lines 20-25, 502, line 1.

Thus, CenturyTel's study does not seek the least cost, most efficient result. A proper examination would have presumed (or at least acknowledged) an automated process such as other, similarly situated ILECs employ.

Further, Mr. Schultheis admitted at hearing that had he performed the study, he would have used different inputs than did CenturyTel. His testimony calls into question the reasonableness of CenturyTel's inputs. For example Mr. Schultheis would have forecasted labor rates through the term of the interconnection contract and adjusted them for inflation using Bureau of Labor Standards statistics; Schultheis, Tr. 495, lines 8-10. sampled more customer representatives' time; Schultheis, Tr. 495, lines 19-20 issued guidelines about initiating the study over time and measuring task times; Schultheis, Tr. 497, lines 6-11 and he might have forecast greater than a zero percent increase in demand (i.e., a growth in Charter's porting requests). Schultheis, Tr. 501, lines 1-5. Any one of these corrections would impact the study results. Taken together these corrections may have had a profound impact on the results.

We also agree with Charter's Mr. Gates, who testified that CenturyTel time estimates associated with each function are not well documented, and the methodology used to determine those times has neither been described in any meaningful way nor has it been tested and approved by the Commission. Gates Rebuttal at 95 In addition, as Mr. Gates noted, in the

CenturyTel study, supervision and support, department overhead, and, indirect overheads equate to approximately 50% of the total "cost" associated with an LNP request. We do not believe it reasonable for CenturyTel to attempt to load in such a high percentage of indirect costs into an LSR rate. [MO cite]

Conclusion

For all these reasons, we are highly skeptical of CenturyTel's LSR cost studies, and even had we not determined that CenturyTel is precluded by federal law from assessing a service order charge for LNP or that its cost studies are inadmissible, we would not feel comfortable in relying on an analysis so rife with admitted flaws. Thus, a decision to allow CenturyTel's charges would be contrary to the FCC's decisions prohibiting such charges. Moreover, approval of such charges would effectively impair the competitive neutrality that the FCC sought to achieve in implementing its number porting cost recovery rules. For those reasons we reject CenturyTel's proposed service order porting charges, and adopt Charter's proposed language on that issue.

B. OSS Systems Issues

Issue 28: Should CenturyTel be entitled to monitor, and audit Charter's use of OSS Systems which Charter may use to make a service request, or similar request of CenturyTel?

The principal question for the Commission here is whether the Agreement should include language providing CenturyTel with unfettered, undefined, rights to monitor and audit Charter's use of the CenturyTel Operational Support Systems ("OSS"). Charter asserts CenturyTel should accept reasonable and explicit parameters as to how CenturyTel may monitor and audit Charter's use of OSS. CenturyTel seeks unilateral authority to "audit" and "monitor" Charter's use of OSS, which terms CenturyTel does not define.

Findings of Fact

1. Charter uses CenturyTel's OSS to engage in activities (e.g. customer record search requests, number port requests) necessary to compete with CenturyTel. Lewis Direct at 7, lines 8-16.

2. Charter has entered into interconnection agreements with other carriers that provide descriptive language about of the process of auditing and monitoring Charter's use of OSS. Lewis, Tr. 204, lines 3-12.

3. Charter's interconnection agreement with AT&T limits AT&T's right to audit Charter's use of OSS to instances where there is a suspicion of misuse. Lewis, Tr. 213, lines 24-25, 215, lines 1-2.

Discussion

Charter contends CenturyTel should not be permitted to engage in opened-ended "auditing" and "monitoring" activities related to Charter's use of CenturyTel's OSS. Charter's proposal would require CenturyTel to obtain Charter's consent prior to CenturyTel initiating monitoring or auditing Charter's use of OSS. Lewis Direct at 4, lines 13-15; Lewis Tr. 202, lines 13-14. Charter has acknowledged that the OSS is CenturyTel's and already has agreed to Sections 7 and 8 of Article X of the Agreement. Lewis Direct at 6, lines 17-20. Charter does not dispute CenturyTel's concern with ensuring that the system is used properly. Rather, as Ms. Lewis explained "[i]f the wording was more exacting ... then it would be all right for [CenturyTel] to monitor." Lewis, Tr. 202, lines 24-25, 203, line 1.

CenturyTel's proposal would grant it unrestricted rights to monitor and audit Charter's use of the OSS. Lewis Direct at 6, lines 4-7. CenturyTel's proposal does not explain what actions CenturyTel would take to monitor and audit Charter's use. Lewis Direct at 4, lines 15-16; Lewis, Tr. 202, lines 16-18. When asked what a CenturyTel audit entails, CenturyTel's Mr.

Miller, testified "I can only say that that's kind of an individual case basis question." Miller, Tr. 609, lines 16-17. Mr. Miller explained that CenturyTel may want to audit Charter's use to see what records Charter accessed, and what information Charter pulled, to ensure Charter's compliance with Section 222. Miller, Tr. 609, lines 19-25; Miller, Tr. 610, lines 7-10.

CenturyTel's refusal to include any limits in its proposal regarding how it plans to audit and monitor Charter's use of the OSS is problematic. CenturyTel would have the potential to use such information in an anti-competitive manner to initiate marketing retention programs to retain customers. Lewis Direct at 8. lines 2-5. To that point, the FCC recently determined that Verizon violated Section 222 of the Act by using highly sensitive and proprietary information of other carriers for customer retention marketing when Verizon was notified of the customer's desire to cancel service and signup with a competitor.[157] Lewis, Tr. at 214, lines 10-14.

CenturyTel's proposed OSS language contrasts starkly with language in interconnection agreements Charter has with other carriers. Lewis, Tr. 204, lines 3-12. For example, the OSS language in Charter's agreement with AT&T explicitly states that AT&T's audit rights are limited to instances where AT&T believes Charter is misusing the OSS. Lewis, Tr. 213, lines 24-25; 215, lines 1-2. Further, the process AT&T follows to audit use of OSS is clearly spelled out. Lewis, Tr. 214, lines 2-3. To Charter's point about competitive misuse use of audit data, the OSS language in the AT&T agreement explains that information gathered during AT&T audits is kept confidential and is not disclosed to any AT&T personnel who perform marketing and/or subscriber retention-type activities. *See* Lewis, Tr. at 214, lines 5-11.

Conclusion

[157] In the Matter of Bright House Networks, LLC, et al., v. Verizon California, Inc., et al., 23 FCC Rcd 10704(2008).

CenturyTel's proposed language is insufficient because it does provide reasonable limits on how CenturyTel intends to audit and monitor Charter's use of OSS. CenturyTel's proposal would give CenturyTel unconditional rights to monitor and audit Charter's use that could be improperly used by CenturyTel to gather information to gain a competitive advantage. Charter's proposed language, by requiring Charter's prior consent before CenturyTel initiates any actions to monitor or audit Charter's use, would avoid, or at least mitigate, some of the opportunities for such misuse by CenturyTel. Therefore, we adopt Charter's language.

CenturyTel's Motion to Strike

On October 24, 2008 CenturyTel filed a motion to strike portions of Ms. Lewis' testimony on OSS, accusing Ms. Lewis of attempting to "abandon" Charter's proposed language regarding limitations on CenturyTel's opportunity to audit and monitor Charter's use of OSS. Absent definitions of the terms "audit" and "monitor," Charter still opposes CenturyTel's unilateral and unlimited right to audit and monitor Charter's use of OSS, and Ms. Lewis' rebuttal testimony does not state or imply otherwise.

To CenturyTel's criticism of Ms. Lewis' inclusion of non-Missouri contract language, it is obvious Ms. Lewis did so for illustrative purposes, not to change Charter's position. Her rebuttal testimony responds specifically to Mr. Miller's assertion that a Charter/AT&T contract constitutes "existing precedent" for OSS auditing issues. Lewis Rebuttal at 5, lines 15-19. Following directly on that testimony, Ms. Lewis supplied other examples of non-Missouri contracts to which Charter is a party and which address limitations on OSS monitoring. *Id.* at 6, lines 29-31. Ms. Lewis specifically qualified the use of such language in this case. *Id.*, lines 31-34.

Ms. Lewis' rebuttal testimony on OSS is well within the scope of the disputed Issue 28 and the scope of rebuttal. Ms. Lewis did not abandon or otherwise change Charter's position. Accordingly, we deny CenturyTel's motion to strike Ms. Lewis' testimony.

The principal question for the Commission here is whether the Agreement should include language providing CenturyTel with unfettered, undefined, rights to monitor and audit Charter's use of the CenturyTel Operational Support Systems ("OSS"). Charter asserts CenturyTel should accept reasonable and explicit parameters as to how CenturyTel may monitor and audit Charter's use of OSS. CenturyTel seeks unilateral authority to "audit" and "monitor" Charter's use of OSS, which terms CenturyTel does not define.

Issue 29: Should the Agreement preserve CenturyTel's rights to recover from Charter certain unspecified costs of providing access to "new, upgraded, or enhanced" OSS?

The primary dispute between the Parties is whether the Agreement should include language that permits CenturyTel to preserve its right to recover unspecified costs with respect to upgrades and enhancements to its OSS, should such upgrades and enhancements occur during the term of the agreement. Charter's position is that neither Party should be permitted to recover costs or expenses from the other Party unless expressly authorized to do so under the terms of the agreement. CenturyTel's proposed language would allow it to preserve its rights to recover costs with respect to upgrades and enhancements to its OSS.

Findings of Fact

1. CenturyTel has not provided any evidence on the nature of the costs it seeks to "recover" through its proposed contract language. Webber Direct at 25, lines 18-21.

Discussion

We believe that CenturyTel should not have the right to assess any charges upon Charter for the recovery of any OSS costs or "expenses" that CenturyTel may incur, except as

specifically authorized under the terms of the Agreement. Indeed, as Mr. Webber testified, the Parties should only be permitted to recover their respective costs or "expenses" in accordance with the corresponding rates expressly identified in the Pricing Article of the Agreement. Webber Direct at 24, lines 17-19. Webber Direct at 24, lines 19-22. In contrast, CenturyTel's proposed language would allow CenturyTel to assess charges upon Charter for alleged costs that CenturyTel has not identified, or quantified. Webber Direct at 26, lines 8-10.

There is no evidence in the record that indicates when, or whether, CenturyTel proposes to upgrade or enhance its OSS during the term of the Agreement. Webber Direct at 25, lines 16-18. Significantly, CenturyTel has yet to make clear what its unspecified costs may entail, how such costs would be recovered, or the extent to which the proposed recovery of such costs would require an examination of, and potential changes to, the existing rate elements. Webber Direct at 25, lines 18-21. CenturyTel's proposal would require Charter to agree to an open-ended provision that gives CenturyTel the discretion to impose charges upon Charter for performing functions not otherwise provided for in the Agreement. Webber Direct at 25, lines 21-23. Such a result creates uncertainty as to Charter's contractual and financial obligations. Webber Direct at 25, lines 22-23. We are convinced that this uncertainty could lead to disputes between the Parties over whether a charge is properly authorized under the terms of the Agreement.

CenturyTel may address new, upgraded, or enhanced OSS, and the recovery of any associated costs, through the contract amendment processes set forth in Section 4 (Amendments) and/or Section 12 (Changes in Law) of the agreement. Those sections provide a means by which CenturyTel could propose an amendment that specifically, and expressly, identifies the enhancements or upgrades, and the associated costs it seeks to recover or that it is required to implement as a result of a change of law. Webber Direct at 26, lines 21-23. If the terms of

CenturyTel's proposed amendment are reasonable, and consistent with applicable laws and regulations, the Parties should reach an agreement subject to the Commission's prior approval. Webber Direct at 27, lines 7-10.

Conclusion

We find that Charter's proposed language is reasonable. The Agreement should not include language that would allow CenturyTel to assess charges upon Charter for alleged costs that CenturyTel has not identified, or quantified. CenturyTel has failed to explain exactly what its costs would entail. The ambiguous nature of CenturyTel's proposed language would create uncertainty between the parties and could lead to future disputes that would likely be escalated to the Commission for review. We agree with Charter that CenturyTel could simply use the contract amendment and/or change of law process to seek to recover any future costs it believes it is entitled to recover. Accordingly, we accept Charter's proposed language.

C. Directory Issues

Issue 31: How should each Party's liability be limited with respect to information included, or not included, in Directories?

We are again asked to decide whether damages for liability related to certain actions, this time concerning directory listing functions, should be artificially capped. CenturyTel proposes that any damages stemming from "errors or omissions" in CenturyTel's directories should be limited to the amounts paid by CenturyTel under the Directory Article of the Agreement. Charter opposes such a limitation, and proposes that damages be limited to "actual damages" consistent with its position on Issue 15.

Findings of Fact

1. The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party.

Discussion

There are several questions to resolve in this issue. First, whether the Parties can arbitrarily limit damages arising from errors or omissions associated with the publishing of directories. Second, whether CenturyTel should indemnify Charter against third party claims when CenturyTel publishes the name of subscribers who have specifically requested that their information **not** be published.

As to the first question, we have already resolved that same issue in our discussion of Issue 15. Specifically, in our discussion of liability and damages limitations issues there, we concluded that public policy prohibits attempts to cap liability for intentional, willful, or grossly negligent action. We see no reason to depart from that conclusion on the same question with respect to damages limitations as they relate to liability for directories.

Specifically, we find that the effect of CenturyTel's language for Sections 7 of Article XII, is that it would artificially cap the amount of damages available to Charter, even in the context of damages that arose from CenturyTel's *grossly negligent* actions. DPL at 102 (CenturyTel language for Art. XII, § 7.1). Because the Commission has already decided that "it is contrary to public policy to cap liability for intentional, willful, or grossly negligent action,"[158] we reject CenturyTel's proposed damage limitations concerning directory liability functions.

As to the second question, we believe that CenturyTel has the obligation to ensure that end user customer listings are not published in the directories, when those customers specifically request that such information not be published. This is a common sense conclusion, and one which we expect both Parties fully appreciate. Therefore, we must ensure that the Agreement includes proper incentives to ensure that this information is not published, when the end user customer so requests. We expect that CenturyTel has sufficient operational protections in place

[158] *SBC Arbitration*-Commission Decision at 56 (affirming Arbitrator's Final Report, Sec. 1(a) at 71).

to ensure that result. Further, CenturyTel must know that the potential ramifications of publishing that information can be quite significant.

Consistent with the principle of comparative fault, which we have previously relied upon, we find that if CenturyTel causes to be published the name of a Charter end user customer that has specifically requested that such information **not** be published in a directory, CenturyTel must assume the defense of any action. In other words, CenturyTel should indemnify Charter against any third party claims concerning the publication of non-publish information. As we have previously decided, the Agreement should allocate risk fairly, and in a manner that is proportionate to each Party's respective obligations and responsibilities. Specifically, where one Party acts in a manner that is deemed to be grossly negligent, or which constitutes intentional misconduct, then that Party should not be allowed to contract away its liability to end user subscribers, or to the other Party. Instead, that Party should be required to defend any potential claims, subject to the principles of comparative fault that govern tort claims in Missouri (which we have already discussed). Furthermore, where the Parties agree to limit liability for special damages, including incidental, indirect, or consequential damages, then that limitation should not include a carve-out for claims which require Charter to indemnify CenturyTel. The liability limitations provisions should apply equitably, without imposing greater obligations on one Party in favor of the other Party (as CenturyTel proposes).

Conclusion

For the foregoing reasons, we adopt Charter's language for Issue 31.

Issue 32: How should the Agreement define each Party's respective directory assistance obligations under Section 251(b)(3)?

This issue presents the question of whether the Agreement should include language that sets forth each Party's responsibilities for ensuring that each Party has non-discriminatory access

to "directory listing and directory assistance databases" (as used in Section 251(b)(3) of the Act). Charter's position is that the Agreement should include language which ensures that when CenturyTel subscribers dial directory assistance and request the phone number of a Charter subscriber, that phone number along with other relevant information (such as name and address), will be available. CenturyTel acknowledges that it has an obligation to provide Charter with non-discriminatory access to directory assistance, but takes the position that it is not a directory assistance provider, and thus it should not be obligated to act as an intermediary on behalf of Charter, or to otherwise ensure work performed by its directory assistance provider.

Findings of Fact

1. A directory listing consists of the customer's name, phone number, and address that are published in a directory, such as a telephone book, or included in a directory database, such as that used when a caller dials "411." Gates Direct at 85, lines 4-6.

2. While some people specifically request that their directory listing information not be published, most persons expect that their listing information will be published, and made readily available through directory assistance services. Lewis Direct at 13, lines 9-11.

3. It is standard industry practice for the ILEC to maintain all listing information for subscribers in its serving territory. Gates Rebuttal at 100, lines 11-12.

4. Under a prior arrangement, CenturyTel's subscribers were not able to obtain directory listing information, i.e., name, address, and phone number, for Charter's subscribers. Lewis Direct at 12, lines 27-28.

5. It is industry practice for third party vendors (i.e. directory assistance providers) to query both a local, and a national, directory assistance database to obtain subscriber listing information. Lewis Direct at 13, lines 23-25; 14, lines 1-2.

6. CenturyTel's current vendor queries both databases which enable Charter subscriber listing information to be available to CenturyTel's subscribers. Lewis Direct at 14, lines 17-19.

Discussion

Resolution of this issue requires that we address two separate, but related, questions: first, whether CenturyTel is obligated to accept Charter subscriber "directory listing" information and place such information in the CenturyTel database (or one maintained by CenturyTel's vendor); and, second, once the subscriber's directory listing information is included in the appropriate database, whether both Parties' query those databases when a customer calls 411 and requests information about the other Party's subscribers?

The answer to both questions, we conclude, is yes. Pursuant to Section 251(b)(3), all local exchange carriers have the duty to permit all competing providers with "nondiscriminatory access to telephone numbers, . . . directory assistance, and directory listing."[159] Of particular relevance to this dispute, is the statute's mandate that CenturyTel provide CLECs, like Charter, "nondiscriminatory access to . . . directory assistance, and directory listing."[160]

In construing the obligations arising under this section of the statute, the FCC has clearly identified the specific actions that ILECs (indeed, all LECs) must undertake to comply with their duty under Section 251(b)(3) to provide non-discriminatory access to directory listing. To that end, the FCC has explained: "the section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion . . . that directory listing be defined as a verb that refers to *the act of placing a customer's listing information in a directory*

[159] 47 U.S.C. § 251(b)(3).
[160] *Id.*

assistance database or in a directory compilation for external use (such as white pages)."[161] This means competitors have the right to have their customers' listing information "placed" into the local directory assistance databases that other LECs (mainly incumbents) maintain, or cause to be maintained, on "nondiscriminatory rates, terms and conditions."[162]

We note that this action of "placing a customer's listing information in a directory assistance database" is the very functionality that Charter seeks in its proposed language under this issue. Specifically, Charter proposes that CenturyTel "will accept, include, and maintain, in the same manner that CenturyTel treats listings of its own End Users, CLEC subscriber listings in the directory assistance databases maintained by CenturyTel or its third-party vendors." DPL at 106 (Charter proposed language for Art. III, Sec. 8). That language essentially mirrors the FCC's own explanation of the scope of the obligations under Section 251(b)(3).

In contrast, CenturyTel's proposed language does not contemplate, or even allude to, its federal duty to accept Charter customer listing information for inclusion in the CenturyTel directory assistance database (or one maintained by CenturyTel's vendor). Quite to the contrary, CenturyTel's proposed language expressly rejects that concept, and requires Charter to contract with third party entities to include the Charter subscriber listing information in appropriate databases. To wit, CenturyTel proposes that "[e]ach Party will be responsible for contracting with or otherwise making its own arrangements for services with any such third-party DA-provider, including but not limited to arrangements to provide its own End User Customers' DA

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[161] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934 [sic], As Amended*, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd. 15550, ¶ 160 (1999) ("*SLI/DA Order*").

[162] 47 C.F.R. § 51.217(a)(2)(i) (FCC rule defining "nondiscriminatory access" requirement of Section 251(b)(3).

listings to such third-party DA-provider for inclusion in a national database accessible to the other Party." DPL at 106 (CenturyTel proposed language for Art. III, Sec. 8).

We find that CenturyTel's language is contrary to the express statements of the FCC in construing the nondiscrimination obligation under Section 251(b)(3), as it relates to placing a customer's listing information in a directory assistance database. On the other hand, Charter's language actually mirrors the FCC's language on this issue. Accordingly, we adopt Charter's language because it is consistent with Section 251, and FCC regulations implementing that statute.

As to the second question, we are again guided by the FCC's decisions implementing Section 251(b)(3). In defining the nondiscrimination standard under Section 251(b)(3) the FCC has explained that:

> "Nondiscriminatory access" refers to access to telephone numbers, operator services, directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives. Nondiscriminatory access includes, but is not limited to:
>
> (i) Nondiscrimination between and among carriers in the rates, terms, and conditions of the access provided; and
>
> (ii) The ability of the competing provider to obtain access that is *at least equal in quality to that of the providing LEC.*[163]

Thus, under Section 251(b)(3), CenturyTel's own actions related to the provision of directory assistance to its own customers listings in the directory, instructs our decision concerning whether CenturyTel has an obligation to query the appropriate databases.

First, as an aside, CenturyTel seems to acknowledge that it does have the obligation to query the appropriate databases. Miller Rebuttal at 42-43. CenturyTel witness Mr. Miller acknowledges that CenturyTel can, and should, query these databases to ensure that when a

[163] 47 C.F.R. § 51.217(a)(2) (emphasis added).

CenturyTel subscriber dials 411 it is able to obtain the directory listing information of a Charter subscriber.

More significantly, we find that CenturyTel performs that same query function for itself when it provides its own end user customers the directory assistance services they expect, and as required by this Commission. Missouri requires the provision of DA as part of basic local telecommunications service. *See* 4 CSR 240.32.050(4)(E)-(G). As Charter witness Ms. Lewis testified, most telephone subscribers expect that their listing information will be publicly available and believe that their family, friends, or business associates will be able to obtain their listing information through directory assistance services. Lewis Direct at 13, lines 12-14. We believe this is true of CenturyTel subscribers, and have no reason to doubt that CenturyTel provides its subscribers this basic functionality. As a result, when someone dials 411 in an effort to obtain the directory listing information of a CenturyTel subscriber, that information is normally available. That information is available because CenturyTel "queries" the appropriate database (where this listing is maintained) and provides the responsive data to its vendor.

The FCC's explanation of the scope of the nondiscrimination obligations of Section 251 is instructive here. The FCC has explained that, "[t]he term 'nondiscriminatory,' as used throughout section 251, applies to the terms and conditions an incumbent LEC imposes on third Parties *as well as on itself*."[164] The text of the rule conforms with this FCC guidance because the conjunction at the end of 47 C.F.R. § 217(a)(2)(i) makes it clear that *both* the prohibition against "[]discrimination between and among carriers in the rates, terms, and conditions of the access provided,"[165] *and* the "the ability of the competing provider to obtain access that is at least equal

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[164] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd 15499, ¶ 218 (1996) (emphasis added).

[165] 47 CFR § 51.217(a)(2)(i).

in quality to that of the providing LEC,"[166] are to be considered in evaluating whether a "providing LEC" provides a "requesting LEC" with nondiscriminatory access to directory listings.

The leading case in the directory publication context is *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*[167] The *MCI* case involved an ILEC that argued it "c[ould] not be required to publish" a CLECs' D[irectory] L[isting] information because it had divested its directory publishing business to a third-party.[168] The court rejected the argument as "specious."[169] First, the court observed that the FCC's regulations define the term, "directory listings ... broadly as any information 'that the telecommunications carrier or an affiliate has published, *caused to be published*, or accepted for publication in any directory format.'"[170] Thus, the court found that the obligations imposed by Section 251(b)(3), "extend[] to incumbent carriers who have caused their own customers listings to be published ...."[171] Because the ILEC "caused" its listings to be published in the third-party's directory, the court found that the ILEC owed the CLEC "the duty to provide nondiscriminatory access to" the same directories, as required by Section 251(b)(3).[172]

A subsequent case, *U.S. West Comm., Inc. v. Hix*,[173] is identical. In *Hix*, the court rejected as "irrelevant" the claim made by the ILEC, U.S. West, (now known as Qwest) that Section 251(b)(3) did not apply because it did not "own or control" the directory publisher.[174]

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[166] 47 CFR § 51.217(a)(2)(ii).
[167] 79 F. Supp. 2d 768 (E.D. Mich. 1999).
[168] *Id.* at 801.
[169] *Id.*
[170] *Id.* at 802 (quoting 47 C.F.R. § 51.5) (emphasis added).
[171] *Id.*
[172] *Id.*
[173] 93 F. Supp. 2d 1115 (D. Colo. 2000).
[174] *Id.* at 1133.

Instead, the court found that U.S. West was obligated under Section 251(b)(3) to "actually place a customer's listing information in" the directories it causes to be published "on terms and conditions that are equal to those provided to [its] own customers."[175]

These cases are instructive because, among other things, they affirm the proposition that a LEC cannot abdicate its responsibilities under 251(b)(3) by outsourcing its directory assistance obligations to a third-party. In addition, the FCC affirmed that:

> Section 251(b)(3) requires that each LEC, to the extent it provides telephone numbers, operator services, directory assistance, and/or directory listings for its customers, must permit competing providers nondiscriminatory access to these services. Any standard that would allow a LEC to permit access that is inferior to the quality of access enjoyed by the LEC itself is not consistent with Congress' goal to establish a pro-competitive policy framework.[176]

Given that CenturyTel provides this functionality to its own end users, it is obligated under Section 251(b)(3) to provide the same functionality to Charter. Thus, we hereby conclude that CenturyTel is obligated under Section 251(b)(3) to ensure that it, or its vendor, always queries the appropriate directory assistance databases to ensure that Charter's end user subscriber directory listing information is made available to the requesting party.

We believe Charter's proposed language is more consistent with the FCC's interpretation of Section 251(b)(3) obligations relating to directory assistance. Further, we also reject CenturyTel's language because it does not reflect these basic obligations, and because it attempts to shift responsibility for any, and all, directory assistance obligations from CenturyTel to its (or another) third party vendor. We find that approach to be inconsistent with the FCC's previous rulings on this issue.

Conclusion

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[175] *Id.* at 1132.

[176] *U.S. West Communs., Inc. v. Hix*, 93 F. Supp. 2d 1115 (2000), citing Second Report & Order, 11 FCC Rcd 19392 at p. 102.

For all of the foregoing reasons we adopt Charter's language for Issue 32.

VI. CONCLUSION

For each issue discussed in this Order, the Arbitration Panel awards the contract language specified for that issue. Where the Arbitration Panel has adopted specific contract language, the Parties shall incorporate that language into the Agreement. In those instances where the Arbitration Panel adopted a position on an issue and provided drafting instructions for the Parties, the Parties shall compose contract language to implement the Arbitration Panel's award.

Respectfully submitted,

/s/ Mark W. Comley

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Dated: November 20, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Proposed Order, Findings of Fact, and Conclusions of Law of Charter Fiberlink-Missouri, LLC was served by hand-delivery or electronic mail, on the 20th day of November, 2008, on the following:

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APPENDIX A

Resolved Issue Number	Parties' Resolved Language
Issue 1	**Art. II, Sec. 2.80 and related provisions DEFINITIONS** 2.80 **Interconnected VoIP Service Traffic** Interconnected VoIP Service Traffic is traffic that is provisioned via a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network. 2.89 **Local Traffic** For purposes of Article V of this Agreement, Local Traffic is traffic (excluding CMRS traffic) that is originated and terminated within the CenturyTel Local Calling Area, or mandatory Extended Area Service (EAS) area, as defined in **Section 1 of** the CenturyTel of Lake Dallas Inc. General Exchange Tariff on file with the Public Utility Commission of Texas. Local Traffic does not include optional local calling (i.e., optional rate packages that permit the end-user to choose a Local Calling Area beyond the basic exchange serving area for an additional fee), referred to hereafter as "optional EAS". Local Traffic includes Information Access Traffic to the extent that the end user and the ISP are physically located in the same CenturyTel Local Calling Area. Local Traffic includes Interconnected VoIP Service Traffic to the extent that the originating end user and the terminating end user are physically located in the same CenturyTel Local Calling Area. **Art. V** 4.2.1 The Telecommunications traffic exchanged between **CLEC and CenturyTel will be classified as Local Traffic, ISP-Bound Traffic, Interconnected VoIP Service Traffic, intraLATA Toll Traffic, or interLATA Toll Traffic. . . . . 4.2.1.2 "ISP-Bound Traffic" means traffic that originates from or is directed, either directly or indirectly, to or through an information service provider or Internet service

provider (ISP) who is physically located in an exchange within the local calling area of the originating End User. Traffic originated from, directed to or through an ISP physically located outside the originating End User's local calling area will be considered toll traffic and subject to access charges.

4.2.1.3 Interconnected VoIP Service Traffic originated by an End User Customer of one Party in an exchange on that Party's network and terminated to a End User Customer of the other Party on that other Party's network located within the same exchange or other non-optional extended local calling area associated with the originating customer's exchange, as defined by CenturyTel's applicable local exchange tariff, shall be included in Local Traffic. Interconnected VoIP Service Traffic directed to a terminating End User physically located outside the originating End User's local calling area will be considered toll traffic and subject to access charges.

Charter represents that, with the exception of ISP-Bound Traffic (which shall continue to be governed by separate provisions of this Agreement addressing ISP-Bound Traffic), the only traffic that Charter currently exchanges with CenturyTel meets the definition of "Interconnected VoIP Service Traffic." The Parties agree that no other forms of IP-enabled traffic (excluding ISP-Bound Traffic) may be exchanged between the Parties without an amendment to the Agreement. In the event that Charter desires to begin sending traffic to CenturyTel that does not meet the definition of Interconnected VoIP Service Traffic (as defined in Article II, Section 2.80), Charter shall provide written notice to CenturyTel prior to doing so. Upon receipt of such notice, the Parties shall, unless otherwise mutually agreed, amend this Agreement in accordance with Article III, Section 4 to reflect terms appropriate for the exchange of such additional type(s) of IP-enabled traffic.

. . . .

4.2.6 As set forth in Section 4.2.1.3 of this Article, Interconnected VoIP Service Traffic shall be assigned to the corresponding jurisdiction for compensation

	purposes, if all the signaling parameters are included with the traffic exchange. Calling Party Number ("CPN") and Jurisdictional Indicator Parameter ("JIP") of the originating Interconnected VoIP Service Traffic shall indicate the geographical location of the actual IP caller location, not the location where the call enters the PSTN.
Issue 6	**Art. II, Sec. 6. ASSURANCE OF PAYMENT** 6.1 <u>When a Deposit/Assurance of Payment Is Required.</u> Charter shall be required, upon CenturyTel's request, to provide CenturyTel with a deposit for, or an adequate assurance of payment of, amounts due (or to become due) to CenturyTel hereunder, upon the occurrence of one or more of the following conditions: 6.1.1 Charter has received at least two (2) delinquent notices[1] in the prior twelve months; 6.1.2 Charter is a new entrant to the market or an affiliate to an existing CLEC ("New Entrant") and has not been in service long enough to have already established satisfactory credit by having made at least twelve (12) consecutive months of timely payments to CenturyTel for charges incurred as a CLEC; 6.1.3 there is deemed by CenturyTel to be an "impairment of credit" of the "New Entrant," as defined in Section 6.1.2, at the initial establishment of credit. For purposes of this Section 6.1.3, an "impairment of credit" will be determined from information available from financial sources, that the New Entrant has not maintained a BBB or better long term debt rating or an A-2 or better short term debt rating by Standard and Poor's for the prior six months; 6.1.4 Charter (a) fails to timely pay a bill rendered to it (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which the Billed Party has complied with the billing dispute requirements set forth in this Agreement), and (b) the amount of such undisputed delinquency exceeds five percent (5%) of the aggregate amount billed by CenturyTel to Charter under this Agreement for the month in question; or

[1] Delinquent notices as used in this Section 6, refer to notices issued to Charter by CenturyTel for unpaid, undisputed amounts.

6.1.5 Charter (a) admits its inability to pay its debts as such debts become due, (b) has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law relating insolvency, reorganization, winding-up, composition or adjustment of debts or the like, (c) has made an assignment for the benefit of creditors, or (d) is subject to a receivership or similar proceeding.

6.2 If a deposit is required under Section 6.1 above, Charter shall remit the deposit amount to CenturyTel within thirty (30) calendar days of receipt of written notification requiring such deposit. If Charter fails to furnish the required deposit, CenturyTel may, at its sole discretion, suspend processing Charter's orders until the deposit is remitted.

6.3 Calculating the Amount of Deposit/Assurance of Payment. Unless otherwise agreed by the Parties, a deposit required under Section 6.1 will be calculated based on the greater of (1) CenturyTel's anticipated two (2)-month charges to Charter (including, but not limited to, both recurring and non-recurring charges) as reasonably determined by CenturyTel, for interconnection facilities and any other facilities or services to be furnished by CenturyTel under this Agreement, or (2) $5,000.

6.4 Modifying the Amount of Deposit/Assurance of Payment. Throughout the Term of this Agreement, CenturyTel reserves the right to request an additional amount of the deposit or assurance of payment required of Charter if Charter is repeatedly delinquent in making its payments, or Charter is being reconnected after a disconnection of service. "Repeatedly delinquent" means any undisputed payment received thirty (30) calendar days or more after the bill due date, three (3) or more times during a twelve (12) month period. In such a case, the deposit amount shall be re-evaluated based upon actual billing totals and shall be increased if Charter's actual billing average for the most recent three (3)-month period exceeds the deposit amount held. However, in no event will the total amount of deposit required under this Section 6 exceed the total of Charter's actual billing average for the most recent three (3)-month period.

6.5 Return of Deposit. If, during the course of this Agreement, Charter provides a deposit pursuant to this Section 6, and subsequently establishes a minimum of eighteen (18) consecutive months good payment history with CenturyTel when doing business as a local service provider, CenturyTel shall return the initial deposits, with interest; provided, however, that the terms and conditions set forth herein shall continue to apply for the remainder of the Term. In

	determining whether Charter has established a minimum of eighteen (18) consecutive month's good payment history, Charter's payment record for the most recent eighteen (18) monthly billings shall be determinative. 6.6 Form of Deposit/Assurance of Payment. Unless otherwise agreed by the Parties, the deposit or assurance of payment shall consist of (a) a cash security deposit in U.S. dollars held by CenturyTel, (b) an irrevocable standby letter of credit naming CenturyTel as the beneficiary thereof, (c) a surety bond in a form acceptable to CenturyTel, or (d) some other form of security as the Parties may mutually agree. 6.7 Interest on Cash Deposit. CenturyTel shall pay interest on any such cash deposit in accordance with state requirements for End User deposits if such exist. 6.8 Drawing on Deposit/Assurance of Payment. Where a deposit is required under this Section 6, CenturyTel may (but is not obligated to) draw on the letter of credit or cash deposit, as applicable, upon notice to Charter in respect of any undisputed amounts to be paid by Charter for services or facilities rendered under this Agreement that are not paid within thirty (30) calendar days of the date that payment of such amounts is required by this Agreement. 6.9 Charter's Replenishment of Deposit/Assurance of Payment. If CenturyTel draws on the letter of credit or cash deposit, in accordance with the terms of this Agreement, upon request by CenturyTel, Charter shall provide a replacement or supplemental letter of credit or cash deposit conforming to the requirements of Section 6.3 or 6.4, whichever is applicable. 6.10 Effect on Other Obligations. The fact that a deposit or other assurance of payment is requested by CenturyTel hereunder shall in no way relieve Charter from compliance with the requirements of this Agreement (including, but not limited to, any applicable Tariffs) as to advance payments and timely payment for facilities or services, nor constitute a waiver or modification of the terms herein pertaining to the discontinuance of services for nonpayment of any undisputed amounts, payment of which is required by this Agreement.
Issue 9	**Art. II, Sec. 11. CAPACITY PLANNING AND FORECASTS** Within twenty (20) Business Days from the Effective Date of this Agreement, or as soon after the Effective Date as practicable, to the extent the Parties have not been interconnected pursuant to a prior interconnection agreement,

	the Parties agree to meet and develop joint planning and forecasting responsibilities which are applicable to interconnection arrangements. Such responsibilities for new interconnection arrangements, and for interconnection trunks or facilities ordered pursuant to a prior interconnection agreement, shall include but are not limited to the following: . . . . 11.5 Capacity forecasts are not binding on either Party. Charter will not be liable to CenturyTel for any situation in which facilities that Charter actually orders do not match Charter's capacity forecast for such facilities or for any facilities forecasted by Charter but not actually ordered or deployed by Charter. 11.6 CenturyTel reserves the right to assess **CLEC a TBD charge for stranded interconnection plant/facility capacity forecast by **CLEC but not used by **CLEC within six (6) months after a forecast period to the extent that CenturyTel built the plant/facility based on **CLEC's order. **Article XI (Pricing), § I(E):** I(E). Stranded Interconnection plant/facility per Article III, Section 11.6: "TBD"
Issue 25	**Art. IX, Sec. 1.2.2.3 NUMBER PORTABILITY** For purposes of this Article, the Donor Party may request to use a project management approach for the implementation of LSRs for large quantities of numbers ported from a single End User location, within a given state. For purposes of this provision, "large quantities" shall mean seventy-five (75) or more numbers. The Donor Party also may request to use a project management approach for the implementation of LSRs for complex ports, which shall be defined as those ports that include complex switch translations (*e.g.*, Centrex, ISDN, AIN services, remote call forwarding, or multiple services on the loop). Under such managed projects ("projects"), the Parties may negotiate implementation details including, but not limited to: due dates, cutover intervals and times, coordination of technical resources, and completion notice.
Issue 26	**Art. IX, Sec. 1.0 NUMBER PORTABILITY** 1.2.2.1 The LSR will have a requested due date that is not less than the standard interval of four (4) Business Days.

	1.2.2.2 Both Parties agree to provide a Firm Order Confirmation (FOC) to the Recipient Party within 24 hours from the time a LSR is received.
Issue 30	**Art. XII Sec. 2.0 DIRECTORY SERVICES PROVIDED** 2.1.2.3. Directory Close Date. **CLEC must submit all listing information intended for publication by the applicable Directory close date. CenturyTel shall provide **CLEC with publication schedules, including Directory close dates for the Directories associated with the areas where Charter is providing local service, as well as a list of Directories for which Directory close dates have changed since the last publication schedule was provided. CenturyTel, or its Publisher, shall also provide **CLEC with a list of exchanges for each Directory to enable **CLEC to submit the appropriate listing information for each Directory. All information provided under this provision will be posted on the CenturyTel.com web site, and notification will be provided to **CLEC via CenturyTel's email notification process when the data is updated.
Issue 33	**Art. VII, Sec. 3.3.1** CenturyTel shall provide and maintain sufficient dedicated E911 circuits/trunks from each applicable Selective Router to the PSAP(s) of the E911 PSAP Operator, according to provisions of the applicable State authority, applicable NENA standards and documented specifications of the E911 PSAP Operator. CenturyTel will permit **CLEC to lease 911 facilities from **CLEC's network to CenturyTel's Selective Router(s) at the rates set forth in Article XI (Pricing). **CLEC has the option to secure alternative 911 facilities from another provider to provide its own facilities
Issue 34	**Art. VII, Sec. 4.6.1** If **CLEC uses a third-party database provider, and provides Nomadic VoIP Service, as defined in Section 4.3.2 (above), **CLEC shall obtain its own routable but non-dialable ESQKs for each PSAP to which CenturyTel provides or shall provide coverage, and shall supply these ESQKs to CenturyTel for the Selective Routers servicing each such PSAP. If warranted by traffic volume growth, or if upon request by a PSAP or other governmental or quasi-governmental entity, **CLEC shall promptly obtain the appropriate number of additional ESQKs to be allocated to each PSAP as may be appropriate under the circumstances. The term "ESQK" as used herein, shall be defined as an Emergency Services Query Key, which is used by the National Emergency

	Numbering Association ("NENA") as a key to identify a call instance at a VoIP Positioning Center, and which is associated with a particular selective router/emergency services number combination.
Issue 39	**Art. XI, § IV, (Pricing) 911** A. 911 Facilities from the Charter POI to CenturyTel's SR. 911 Facilities from Charter POI to CenturyTel SR — Monthly Recurring — Nonrecurring DS1 Termination — $51.00/mo. — $ 174.43 DS1 Transport (if applicable) — $0.61 per mile — $ 0.00 Trunk charges will be paid to CenturyTel for each E911 PSAP to which Charter connects, in addition to the 911 Facilities charges set forth in A. 911 Trunk Charge (per channel) — $85.00 — $170.00 The E911 Gateway charge set forth in Section IV(C)(i) below only applies to the extent the **CLEC is establishing the gateway connection for the first time. All other services identified under this Section IV(C) are provided only upon **CLEC's request: Automatic Location Identification (ALI) Database — Monthly Recurring — Nonrecurring i. Per Article VII 3.4.5 – If **CLEC uses CenturyTel's E911 gateway — No Charge — $ 380.00[2] ii. If **CLEC does not utilize CenturyTel's E911 Gateway a. Database Administration, per database — $ 380.00 — $ 0.00 b. Database, per non-CENTURYTEL subscriber record for which CENTURYTEL will verify via the MSAG — $ 0.04 — $0.35

[2] A one-time charge that applies to new CLECs when establishing gateway connection.

	iii. Third Party FRAD Connectivity Third Party Frame Relay Access Device (FRAD) Connectivity provides for retrieval of ALI Database Information for wireless and competitive Local Providers using a non-CenturyTel Third Party Database Provider over a Non-Call Associated Signaling (NCAS) solution. 1) FRAD Access $63.44 $ 0.00 2) Steerable ALI Software $ 71.42 $1000.00 D. When requested by **CLEC, additional file copy of the MSAG $ 0.00 $250.00

Appendix B

Portions of Mr. Reynolds' direct testimony stricken from the record:

- Page 3, lines 11-12, the sentence: "I will also provide support for the NRC rates that CenturyTel has included in the Agreement.";
- Page 12, lines 11-15 in their entirety;
- Page 13, lines 2-3, the sentence: "The charges are based on the costs associated with the function at issue and event-specific.";
- Page 13, lines 4-7 in their entirety; and
- Schedule JWR-1 Proprietary.

Portions of Mr. Schultheis' rebuttal testimony stricken from the record:

- Page 4, lines 10-11, the sentence: "A true and correct copy of this document is attached to this testimony as Schedule MSS-3 - Proprietary.";
- Page 4, lines 15-16, that portion of the question: "AND CONTAINED IN THE NRC STUDY PROVIDED TO CHARTER";
- Page 4, line 17, the phrase: "and contained in the NRC Study";
- Page 5, lines 1-2, the sentence: "The charges are based on the non-recurring costs associated with the function at issue.";
- Page 5, lines 18-25 in their entirety;
- Pages 6 and 7, lines 1-24 in their entirety;
- Page 8, lines 1-25 in their entirety;
- Page 9, lines 1-15 in their entirety;
- Page 10, lines 12-13, that portion of the question: "ALONG WITH THE COST STUDY AND WORK PAPERS YOU MENTIONED?";
- Page 10, lines 15-27 in their entirety;
- Page 11, lines 1-6 in their entirety;
- Page 11, lines 10-14 in their entirety;
- Page 11, lines 20-24, including the following passage: "With that said, the Commission should not have concern with the pricing proposed based on the costing methodology that was used. The methodology is sound and the result of applying the methodology to the costs and demand amply supports the rates at issue in this proceeding. Therefore, the Commission should not hesitate to affirm CenturyTel's NRC rates in this proceeding that I have identified above.";
- Page 12, lines 2-3 in their entirety;
- PROPRIETARY Schedule MSS-2; and
- PROPRIETARY Schedule MSS-3.