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

REPLY BRIEF
OF
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COMES NOW, Charter Fiberlink-Missouri, LLC, and submits its reply to the CenturyTel's Proposed Findings of Fact and Conclusions of Law (hereinafter "*CTel P.F.*").

I. INTRODUCTION

In responding to each argument presented by CenturyTel, Charter follows the order of issues presented in Charter's Proposed Order, Findings of Fact, and Conclusions of Law ("*Chtr. P.F.*").

II. GENERAL TERMS AND CONDITIONS ISSUES

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

Although CenturyTel initially proposed language that qualified the definition of "tariff," it states that neither Party's qualifying language, including its own, is necessary to provide a complete definition for "tariff." *CTel P.F.* at 13. CenturyTel asserted that its proposed language is duplicative of the last sentence of Article I, § 3 of the Agreement. *Id.* Accordingly, CenturyTel asserts "tariff" should be defined using only the following undisputed language: "Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time." *Id.* (citing Agreement, Article II, § 2.140).

Charter disagrees that the inclusion of the undisputed language alone is sufficient to provide a complete definition of the term "tariff," as that approach does not provide certainty between the Parties as to what tariff provisions are incorporated into the Agreement. Charter's original approach will minimize potential disputes between the Parties. *Chtr. P.F.* at 4. The use of language from Article II, § 2.140, without further qualification or clarification, does not convey that the Parties may incorporate only those tariff provisions that are specifically and expressly identified in the Agreement. Because it is evident from the Parties' dispute on this issue that they disagree on which portion of tariffs will be incorporated into the Agreement, it is imperative the Agreement include clear language on the definition of "tariff." Thus, the Commission should adopt Charter's proposed language on Issue 3(a), which establishes that where the Parties intend to incorporate specific provisions from a tariff, the statement of incorporation must be clear and unequivocal.

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

CenturyTel raises several arguments in defense of its proposed language. None are persuasive. CenturyTel's first argues that a simple reference to a tariff in the Agreement should be construed as incorporating all of the tariff's terms, *CTel P.F.* at 12, This argument is without merit. CenturyTel's proposal to incorporate tariffs in their entirety will create a more ambiguous, less manageable, Agreement. Webber Rebuttal at 13, lines 16-18. CenturyTel's approach will inevitably lead to disputes that could be avoided by specifically identifying applicable tariff provisions. Webber Direct at 11, lines 16-19. It is unreasonable for a single, discrete reference to a tariff in the Agreement to be construed as incorporating literally hundreds of pages of additional terms into the Agreement. *Chtr. P.F.* at 6.

CenturyTel's witness, Mr. Miller, acknowledged that approximately half of the eleven tariff provisions the Parties intend to incorporate are simply references to a defined term in a CenturyTel tariff. Miller, Tr. 159, lines 3-5, 8-12. Yet, CenturyTel fails to explain why its expansive position is necessary when the sole intent is simply to incorporate a definition for a term like "local calling area." The only rational explanation is that CenturyTel wants to use the additional tariff provisions to its benefit by conjuring an argument that if the Agreement is silent as to a rate, term or condition, it may use the tariff provisions and rates to invoice Charter for something not allowed by the Agreement. That is exactly what happened for three years in Missouri, and that approach was recently rejected by this Commission in Case No. LC-2008-0049.[1]

Moreover, CenturyTel's position is at odds with the FCC's policy on tariff incorporation, specifically in relating to obligations arising from interconnection agreements. Addressing a dispute arising from an attempt to incorporate terms of a tariff and force a party to pay for a service not

[1] *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 11 (MO PSC 2008) (hereinafter "*Report and Order*").

specifically required by an interconnection agreement, the FCC explained that significant problems arise:

> If a party to an interconnection proceeding could ***alter the outcome*** of the negotiation/mediation/arbitration processes set forth in sections 251 and 252 ***simply by filing a federal tariff***, those processes could become significantly moot. Carriers and this Commission would be plunged into substantial uncertainty and an entirely new series of tariff disputes, as every carrier who lost on an arguably "interstate" issue before a state commission would simply file a federal tariff imposing a more favorable result, … Indeed, that is exactly what has occurred here. Such an outcome could not have been intended by Congress, given the central role played by the section 251-252 process in the Telecommunications Act of 1996. [2]

The FCC thus reaffirmed a prior ruling that "[u]sing the tariff process to circumvent the section 251 and 252 process cannot be allowed."[3] Charter's proposal to provide specific references to limited tariff language avoids the types of disputes identified by the FCC. Webber Direct at 10, lines 15-18.

CenturyTel also claims that Charter's proposal would improperly permit Charter to pick and choose tariff provisions. This argument is illogical and nonsensical. Even under CenturyTel's approach, if a Party relied on a tariff to satisfy an Agreement obligation, that Party still would need to identify applicable tariff provisions. The Parties can avoid that step by identifying upfront which tariff provisions apply. Thus, Charter's approach will minimize the Parties' time and expense in interpreting the Agreement, and reduce potential disputes. Webber Direct at 10, lines 15-18.

CenturyTel's second argument, that Article I, § 3 fully protects both Parties, is also unpersuasive. CenturyTel ignores the fact that it could still impose new obligations upon Charter through application of an entire tariff. Such improper use of a tariff is precisely what prompted the dispute between the Parties before this Commission related to LNP charges.[4] The Parties' current interconnection agreement says nothing about local number portability ("LNP") charges. Yet

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[2] *In The Matter Of Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Co.; And New England Telephone And Telegraph Co., Complainants, v. Global Naps, Inc.*, Defendant. File No. EB-00-MD-009, 15 FCC Rcd 20665 at¶. 16 (2000).
[3] *Id*.
[4] Report and Order at 11.

CenturyTel tried to use its tariff to assess LNP charges upon Charter. *Chtr. P.F.* at 7. Not surprisingly, the Commission rejected CenturyTel's attempts to use its tariff in such manner.[5] Without specific references to tariff provisions in the Agreement, as Charter proposes, CenturyTel will continue to have the ability to improperly claim that extraneous provisions apply. Indeed, this result would be contrary to this Commission's decision in TO-2005-0336 where it concluded that an ILEC "cannot use tariff modifications to alter the terms of the parties' ICA."[6]

Third, CenturyTel also argues its incorporation proposal would eliminate unintended consequences if and when tariffs are changed pursuant to federal or state law. This argument is also flawed. In the event tariffs change pursuant to federal or state law, the Parties are free to amend the Agreement. Webber Rebuttal at 9, lines 10-12. Any claimed administrative burden is equally shared and is more than offset by the benefits of clear contract terms.

Finally, CenturyTel claims its proposed language will eliminate ambiguity and potential disputes when a Party orders additional services from a tariff, or utilizes the tariff for purposes not originally covered by the Agreement. *CTel P.F.* at 14. The evidence shows, however, that any services that were not originally covered by the Agreement that Charter may want to purchase out of CenturyTel's tariffs would be separate from services CenturyTel provides under this Agreement. Webber Rebuttal at 7, lines 13-14. Thus, CenturyTel's concerns here are unfounded and should be ignored. *Id.* at 7, lines 14-15.

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?

CenturyTel first asserts that its unilateral termination language is common in commercial contracts. *CTel P.F.* at 15-16. However, this argument fails to account for the evidence here that the Agreement is *not* a "standard commercial" contract. The Agreement arises from and is founded on

[5] *Id.*

[6] *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*, Case No. TO-2005-0336, Final Arbitrator's Report at 14 (June 21, 2005) (explaining that the "ICA always trumps contrary tariff provisions").

federal law,[7] and is approved by this Commission under a legal standard set by federal law.[8] Charter witness Giaminetti testified that interconnection agreements are decidedly *different* from commercial contracts. Giaminetti Direct at 6, lines 13-19. CenturyTel did not refute Ms. Giaminetti's testimony. Unlike a normal "commercial" contract, significant service-affecting issues arise when a carrier refuses to interconnect or exchange traffic with another carrier. Indeed, an interconnection agreement must pass public policy thresholds not applicable to an ordinary commercial contract. *Id.* at 7, lines 8-23.

This is precisely why the FCC prohibits carriers from taking self-help actions analogous to unilateral termination.[9] Citing the "ubiquity and reliability" of the nation's telecommunications network as an issue of "paramount importance," the FCC has proscribed self-help actions that might affect the reliability and availability of communications services. FCC precedent "provides that no carriers, … may block, choke, reduce or restrict traffic in any way…"[10] because such actions may "degrade the reliability" of the nation's telecommunications network.[11] CenturyTel's unilateral termination proposal is not consistent with FCC policies prohibiting self-help actions that affect the reliability of the nation's communications networks and should be rejected.

CenturyTel's next argument – that it would be unreasonable and time-consuming to include language requiring the Commission make an affirmative finding that default exists as a condition precedent to a non-defaulting Party's right to terminate the Agreement – is not supported by the evidence. As Ms. Giaminetti explained, Charter's proposal would require either Party to escalate only the most significant disputes to the Commission, *i.e.*, disputes which could lead to termination. Giaminetti Direct at 10, lines 4-5. In those limited circumstances, the non-defaulting Party would

[7] 47 U.S.C. §§ 251(a) and (c) (imposing duties on all telecommunications carriers to interconnect with other carriers).
[8] *Id*. at § 252(c)(1).
[9] *See In the Matter of Call Blocking by Carrier*, Declaratory Ruling and Order, 22 FCC Rcd 11629 (2007) (hereinafter "Call Blocking Order").
[10] *Id*. at ¶ 6.
[11] *Id*. at ¶ 5.

seek an order from the Commission directing both: (i) a specific action by a certain time, and (ii) if the defaulting Party fails to comply, termination. As the FCC suggested, actions that degrade, disrupt, or impair the ubiquity and reliability of traffic on the communications network must face higher scrutiny.[12] For that reason, Charter's proposal is an appropriate, measured approach.

CenturyTel's third argument regarding incentives (or lack thereof) is in no way instructive in this proceeding. Ms. Giaminetti testified that Charter has many incentives to comply with the terms of the Agreement. Giaminetti Rebuttal at 2, lines 7-29; 3, lines 1-3. Moreover, Ms. Giaminetti stated, "There is no incentive, or competitive advantage, to the allegedly defaulting party in invoking the Commission option" because the defaulting party would also have its resources tied up at the Commission. *Id.* at 2, lines 16-17. In addition, if a Party fails to comply with the Agreement, there are potential damages, fines, and orders from this Commission, all of which carry consequences any reasonable carrier would seek to avoid. Thus, Charter has sufficient incentives to comply with the Agreement, despite CenturyTel's claims to the contrary, and there is no evidence that Charter has ever failed to perform its contractual duties under the Parties' existing interconnection agreement. *Id.* at 4, lines 4-10.

Finally, CenturyTel argues its proposed language is analogous to language adopted by the Texas Public Utility Commission ("PUCT") in Docket 28821. *CTel P.F.* at 17. CenturyTel's reliance on the PUCT's decision is misplaced. The PUCT's decision was based on considerations about UNE-based and resale CLECs new to the market. Charter is an established competitor in Missouri. It operates its own network infrastructure and facilities to serve customers. These facilities have been in place for years. Therefore Charter does not pose the same risks associated with a new entrant utilizing a resale or UNE-based CLEC business model. For all of these reasons, the Commission should adopt Charter's proposed language on Issue 4(a).

[12] *See Call Blocking Order* at ¶5.

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?

CenturyTel makes three assertions here. First, CenturyTel argues that the FCC's procedures, pursuant to 47 C.F.R. § 51.715, adequately safeguard Charter and its end users because telecommunications carriers without an existing interconnection agreement with an incumbent LEC can enter into an interim arrangement. *CTel P.F.* at 19. This argument completely misconstrues Charter's larger point. FCC rules do not assure that a third party will assume the *same* Agreement in its entirety. The "Agreement is lengthy, complex and negotiated in good faith by Charter." Giaminetti Rebuttal at 11, lines 15-16. Charter should receive the benefits from undertaking the time-consuming and costly process of negotiating and arbitrating an interconnection agreement for the duration of the Agreement's term regardless of what entity assumes the role of the incumbent LEC. *Id.* at 11, lines 16-19.

Mr. Miller acknowledged that under CenturyTel's approach, Charter would have to re-negotiate with the third party, Miller Direct at 35, lines 6-7; Miller Rebuttal at 26, lines 13-14, and possibly even be forced to participate in yet another Commission proceeding to assure that the same terms and conditions of the Agreement would continue after a sale or transfer. Such a result would be unreasonable, as Charter should not have to bear the burden of additional resource expenditure simply because CenturyTel decides to sell an operating area.

CenturyTel's second contention, that Charter's proposed language places an unreasonable restraint or veto on a Party's ability to sell or transfer an operating area, is flawed. Under Charter's approach, as Ms. Giaminetti explained, conditioning a sale or transfer of all or part of a Party's service territory upon the third party meeting the obligations of this Agreement, benefits the public interest because the Agreement's terms necessarily establish certain operational requirements that

any competent LEC must meet. The inclusion of reciprocal language that is not only beneficial to Parties, but also the public interest, is not unreasonable.

Finally, CenturyTel claims that Charter's proposed language would devalue CenturyTel's assets. This argument is without merit. As Ms. Giaminetti explained, the notion that including Charter's reciprocal contract language would somehow devalue CenturyTel's assets completely overlooks the fact that the value of CenturyTel's assets are dependent in part on the revenues and benefits it derives from interconnection. Giaminetti Rebuttal at 12, lines 2-5. CenturyTel has opted out of most Commission oversight.[13] CenturyTel has provided no evidence (as opposed to speculation) that the limited Commission oversight implicit in Charter's proposed language would materially impact the value of its Missouri assets. For all these reasons, the Commission should 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?

The Parties disagree whether either should be permitted to assign its rights to a third party without the other's consent in the event of a sale of all or substantially all assets. Although CenturyTel appears to agree the Parties should obtain consent when assignment is unrelated to a sale and would be made to an unaffiliated third party entity, *CTel P.F.* at 22, CenturyTel is opposed to obtaining consent for an assignment to an Affiliate or subsidiary under *any* circumstances, *Id.* CenturyTel argues that Charter's proposed language adds an "unnecessary" layer of restriction on the Parties' rights by requiring that assignments only be made to third parties (including Affiliates and subsidiaries) without consent in connection with a sale of all or substantially all of a Party's assets. *Id.*

Charter agrees its proposed language should *not* be applied, or construed, in a manner that would restrict the assignment of the Agreement to Affiliates or subsidiaries. Charter believes that

[13] 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).

either Party should be allowed, subject to the undisputed restrictions set forth in Article II, §5, to make an assignment of the Agreement to one of its subsidiaries or Affiliates without the other Party's consent. The intent of Charter's proposed language is to make clear that the Parties will not be required to obtain consent to assign the Agreement in connection with the sale of all, or substantially all, of a Party's assets. Charter's proposed language is intended to ensure that neither Party has the right to delay, or withhold, the other party's ability to contract with third parties for the sale of all, or substantially all, of its assets. *Chtr. P.F.* at 16.

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?

On this issue, CenturyTel asserts that its Section 251 obligations to Charter, as expressed in the Agreement, are "fundamentally predicated on Charter's status as a certificated local provider." *CTel P.F.* at 23. Further, CenturyTel asserts that if Charter ceases to be a "local provider of telecommunications services" it is not required to perform duties under the Agreement. *Id.* Finally, CenturyTel argues that if the certificate of authority ("COA") granted to Charter is revoked by the Commission, Charter's provision of service would be illegal, and CenturyTel would have no obligation under the Act to perform its obligations of the Agreement to Charter. *Id.* at 24.

CenturyTel's arguments do not address the question of why Charter should be required to give CenturyTel a guarantee[14] (*i.e.*, to warrant) that it will always be certificated in Missouri. The Parties have already agreed that CenturyTel has no obligation to perform under the Agreement until Charter has obtained FCC and Commission authorization(s). Agreement, Art. III, § 8.4. Moreover, Charter has agreed to provide proof of its COA upon request. *Id.* Therefore, under agreed upon provisions of the Agreement, the consequences of revocation of Charter's certificate is clear: CenturyTel will not have to perform under the Agreement.

[14] That CenturyTel's language would require Charter to provide a special guarantee is also not in dispute. CenturyTel itself admits that a warranty is a unique form of guarantee that is different from a mere representation of a fact. *CTel P.F.* at 24 (citing Black's Law Dictionary).

The only question remaining is whether there is any reason to force Charter to provide CenturyTel a "representation and warranty" as to the status of its certification. There are no facts in evidence compelling such a result. As Charter noted in its Proposed Findings, this Commission or another competent authority could issue a ruling at some point in the future bringing Charter's status as a "certified local provider" into question or doubt, while at the same time not limiting Charter's ability to perform its obligations under the Agreement. *Chtr. P.F.* at 18-19. It is, therefore, unreasonable to require Charter to provide a warranty, or other form of guarantee, of a fact or circumstance over which it will not always control.[15] For these reasons the Commission should reject CenturyTel's proposal, and instead adopt Charter's proposed language on Issue 7.

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

The Parties' disagreement under Issue 8(a) concerns the application of interest to amounts that are billed, paid, later disputed and ultimately resolved in favor of the billed party. Charter has proposed language in Section 9.4.2 of the Agreement to provide for such interest:

> At the billed Party's request, the billing Party will refund the entire portion of any Disputed Paid Amounts *resolved in favor of the billed Party*, subject to a rate of interest equal to one and one half (1 ½%) per month or the highest rate of interest that may be charged under Applicable Law, compounded daily, for the number of days from the Bill Date until the date on which such payment is made.

DPL at 21 (emphasis added); Giaminetti Direct at 25, lines 16-19. As Section 9.4.2 makes clear, to receive a refund plus interest, a billed Party must (i) dispute the prior undisputed, paid bill, (ii) make such dispute within one (1) year of the date of the bill's invoice, and (iii) ultimately prevail on the dispute. Ms. Giaminetti summarized Charter's position at hearing:

> Once we've identified that an amount was incorrect and we send that dispute to CenturyTel and they agree, we feel that they should then reimburse us for that

[15] *See, e.g., 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 2006).

> amount back as a credit with the applicable interest that they would charge us if we had short-paid the amount.

Giaminetti, Tr. 266, lines 15-20.

Ms. Giaminetti also testified at hearing as to the reason why an interest charge should apply in this circumstance:

> [B]ecause there's such a . . . long process to review CenturyTel's bills and we, quite frankly, every month find an error in those bills, there could be something that slipped through that both CenturyTel and Charter would agree that was an incorrect charge.

Id. at 266, lines 8-12. In other words, Charter's position underlying Section 9.4.2 derives from Charter's direct, monthly, recurring experience with the inaccuracy of CenturyTel's bills, *id.* at 244, lines 14-16, and the frustrations of dealing with CenturyTel's inadequate bill dispute process, Giaminetti, *id.* at 263, lines 15-25; 264, lines 1-5.

CenturyTel's position regarding Issue 8(a) has evolved during the course of this arbitration. For example, in his direct testimony CenturyTel witness Watkins erroneously claimed that Charter sought to apply interest to amounts still in dispute. Watkins Direct at 11, lines 7-9. Mr. Watkins had to recant that assertion in his rebuttal testimony, admitting his original position was wrong and that Charter's proposed interest calculation would only apply to amounts *resolved* in favor of the billed party. Watkins Rebuttal at 9, line 21; Watkins Tr. 376, lines 21-23.[16] Next Mr. Watkins claimed that Charter's proposal created an incentive for Charter to delay review of the bills it receives. Watkins Rebuttal at 5, lines 22-23. But, Mr. Watkins conceded on the stand that if invoices are inaccurate and the billed party disputes them consistently, that is a reasonable pattern of conduct (Watkins, Tr. 378, lines 10-14) and that is the nub of the disagreement here.

Relying in part on its monthly experiences in reviewing CenturyTel's inaccurate bills, dealing with CenturyTel's unwieldy bill dispute portal and process, knowing first-hand CenturyTel's

[16] "we both agree. . . to the extent a refund is due, it's due at the end as part of the dispute resolution process, not as an interim matter."

propensity to dismiss legitimate disputes, and recalling this Commission's recent finding that CenturyTel *knowingly* assessed charges to Charter not supported by the Parties' current interconnection contract,[17] Charter believes the unrefuted evidence in the record shows it is possible that improper CenturyTel charges will escape the initial notice of both Parties. In that narrow circumstance, Charter proposes that if later the billed Party realizes the error and prevails upon its dispute, it is entitled to a refund plus interest. There is no record evidence (versus Mr. Watkin's unfounded speculation) that Charter would use this interest provision to delay timely review of bills or use CenturyTel as some sort of "investment bank."

These undisputed facts lead to CenturyTel's next evolution on Issue 8(a). In its Proposed Findings, CenturyTel tries out a new theory. CenturyTel now claims that because it did not propose an interest charge on "all" underpayments (just undisputed underpayments), Charter's interest proposal does not mirror CenturyTel's interest proposal and thus should be rejected. *CTel P.F.* at 27. The Carrollian logic here is stupefying. First, Charter is not responsible for matching CenturyTel's proposals. If CenturyTel overlooked the opportunity to propose an interest charge in certain circumstances, it is far too late to raise such a proposal now. Second, CenturyTel's explanation simply doesn't wash. Section 9.3, to which the Parties have agreed, applies interest charges to *undisputed underpayments*. Section 9.4.1, as drafted by Charter, applies interest charges to *undisputed overpayments*. CenturyTel's statement that " . . . Charter's proposal is to apply an explicit and specific interest rate whenever it recovers a refund of *disputed charges in the course of a bill dispute proceeding*" is simply false. *CTel P.F.* at 28. Charter's proposal is and always has been to apply interest charges to *undisputed* overpayments *after* a challenged bill is resolved, as proposed Section 9.4.1 clearly provides and as Mr. Watkins conceded in his rebuttal testimony and on the stand. Watkins Rebuttal at 9, line 21; Watkins Tr. 376, lines 21-23 ("we both agree . . . to the extent

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

a refund is due, it's due at the end as part of the dispute resolution process, not as an interim matter.").

Finally, CenturyTel's argument that it is "unreasonable" to charge interest back to the "bill date" versus when Charter first raises a dispute is nonsensical. *CTel P.F.* at 29. If there are erroneous charges, the entirety of those charges should be subject to refund and interest.[18]

Based on the foregoing, the Commission should reject CenturyTel's criticisms of Charter's proposed language for Section 9.4.1, and accept Charter's common sense, reciprocal and equitable language for 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 found by the Commission,[19] 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.

Charter incorporates by reference its arguments from Issue 8(a), including the facts of CenturyTel's inaccurate bills, CenturyTel's improper rejection of properly disputed bills, Charter's timely disputing of inaccurate bills, and the Commission's findings in its recent *Report and Order*. For all these reasons, and to protect end users from unwarranted service disruptions, Charter respectfully urges the Commission to accept its proposed language for Issue 8(b).

[18] Coincidentally, CenturyTel's odd reasoning contravenes this Commission's finding in the *Report and Order* that *all* charges misapplied by CenturyTel to Charter should be refunded.
[19] *Report and Order* at 11.

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 agree that a change of law should be given retroactive effect when specifically required by a competent authority. The Parties disagree what the Agreement should require when the authority is silent as to the retroactive effect of its change of law. Charter pointed out in its Proposed Findings that AT&T's 13 State-CLEC ICA, evidence of industry standards, gives parties 60 days from written notice of a non-specific change-in-law to negotiate conforming modifications. *Chtr. P.F.* at 24. If they cannot agree, the dispute resolution provisions of the 13-State agreement kick in. That is precisely the process Charter offers here.

CenturyTel offers no substantive rationale as to why a non-specific change-of-law should run back in time to one Party's written notice. *CTel P.F.* at 34. The date of that written notice suggested by CenturyTel is no more "readily identified" than a date the Parties mutually agree to implement a change of law provision. CenturyTel's second point, that written notice constitutes "a point in time when at least one of the Parties provides notice that it believes the change in law provisions are triggered," *id.*, ignores the essential point of Charter's proposed language: the Parties should *mutually agree* when the change of law provisions are triggered if the applicable authority does not specify when. CenturyTel's proposal merely repeats what would happen when the competent authority actually specifies the applicability of its change-of-law decision.

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. The Commission should 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?

CenturyTel asks the Commission to adopt its proposed language for three reasons: (i) it is imperative for all CLECs to abide by a common set of operational procedures to ensure parity; (ii)

incorporating the Service Guide ensures operational uniformity and greater efficiency for CenturyTel in its interactions with carriers; (iii) CenturyTel's proposed language in Article III, § 53 adequately addresses both Parties' concerns. *CTel P.F.* at 35-36.

With respect to point one, Charter is not opposed to a set of common operational procedures in the Service Guide for reference purposes only. Charter's willingness to work from a set of common business reference procedures underscores Charter's concern that the Service Guide not be binding, since it was created by and is capable of being modified only by CenturyTel. It is common in the industry to use a service guide to informally document certain business processes. Gates Direct at 21, lines 2-5. But such a document is used solely for reference purposes and is not contractually binding upon either party. Other state commissions have so ruled.[20] CenturyTel's "parity" argument therefore fails.

CenturyTel's second argument is also unavailing. CenturyTel's efficiency concerns notwithstanding, the whole purpose of entering into a contract is to bind the parties to the precise terms set forth in that contract, unless the parties have mutually agreed otherwise. Gates Direct at 17, lines 22-23. State commissions have acknowledged that there is a "need for individual CLECs to be able to enter into agreements that are specific to their particular competitive needs."[21] This fundamental premise is the basis for Charter's efforts to negotiate the Agreement. Charter should be entitled to receive the benefit of its bargain – a legally certain document that will only change upon mutual consent or by order of a relevant authority. CenturyTel's proposed language should be

[20] *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).

[21] *See, e.g., In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration with Qwest Corporation*, ARB 775, Arbitrator's Decision at 6-7.

rejected, as it would undermine this desire by binding Charter to a document that can be unilaterally altered on an ongoing basis. It would be patently unfair and contrary to well-established principles of contract formation for Charter to be forced to abide by the terms of a document that is subject to unilateral change, by CenturyTel, without any consent from Charter.

CenturyTel's third argument, that Article III, § 53 affords Charter adequate protections, is flawed. CenturyTel claims that Section 53 makes clear the Service Guide is intended to supplement the Agreement and should not be construed as contradicting or modifying the terms of the Agreement, and permits Charter to delay, for two months, the implementation of any change to the Service Guide that materially and adversely affects its business while the Parties negotiate in good faith to resolve the adverse impact. *CTel P.F.* at 37-38. This argument ignores the fact that CenturyTel could still improperly impose obligations on Charter by adding terms in the Service Guide that impose processes, or restrictions, not otherwise set forth in the Agreement if it was silent on a particular subject. Charter encountered this exact problem under its current interconnection agreement with CenturyTel, which led to a dispute before the Commission.[22] CenturyTel attempted to justify number porting charges it assessed upon Charter by citing to its Service Guide. Notably, the disputed charges were not covered under the Parties' current interconnection agreement, and the evidence revealed that CenturyTel unilaterally modified the Service Guide after the Parties executed the interconnection agreement in an effort to include language covering service order charges for porting requests.[23] Fortunately the Commission flatly rejected CenturyTel's blatant efforts to improperly use the Service Guide in this manner.[24] Nonetheless, that case is a classic example of the problems that could arise if CenturyTel were permitted to bind Charter to a document that is subject to change.

[22] *See, generally, Report and Order*.
[23] See Exh. 4, Shremp/Giaminetti Surrebuttal, Case No. LC-2008-0049, at 7, lines 20-27 (Mo. PSC 2008); TS Schedule 1 (CenturyTel Service Guide dated April 14, 2005), Case No. LC-2008-0049 (Mo. PSC 2008).
[24] *Report and Order* at 11.

Next, CenturyTel's "two month suspension" argument also misses the point. From a practical standpoint, disputes between the Parties are rarely, if ever, resolved in two months or less. And, even if Charter were to escalate the dispute to the Commission, at the end of the two month period, the change would go into effect regardless of the cost or additional operational burdens to Charter. Gates Rebuttal at 33, lines 5-7. Further, given that CenturyTel has made it unmistakably clear that it has no desire to provide "customized procedures," *CTel P.F.* at 37, it is unlikely that CenturyTel would ever agree with a CLEC that needs something different from what the Service Guide provides. Indeed, CenturyTel has admitted that it has never changed the terms of its Service Guide at the request of a CLEC. For these reasons, the Commission should disregard CenturyTel's assertion that its proposed language in Section 53 is an alleged source of protection against misuse of the Service Guide and adopt Charter's language for 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 circumstances where, CenturyTel claims, the Commission or the FCC or a court of competent jurisdiction refuse to entertain an unresolved dispute. In its Proposed Findings, CenturyTel references numerous decisions to support its contention that binding arbitration can be appropriate. None of these cases support CenturyTel's position.

For example, CenturyTel's reliance on *In re Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*[25] is completely misplaced, and the use of this case appears calculated to intentionally misinform the Commission about an FCC decision. *Qwest* concerned a complaint brought by Qwest against Farmers and Merchants for violation of Sections 201 and 203 of the Communications Act by aggregating terminating *access* traffic in concert with conference calling companies. *Qwest* had *nothing* to do with interpretation of payment obligations under Sections 251

[25] 22 FCC Rcd 17973 (2007) (hereinafter "*Qwest*").

or 252 of the Act, or indeed anything to do at all with interpretation of an interconnection agreement, nor does the case even mention these sections of the Act or state-approved interconnection agreements. Instead, *Qwest* explains that Farmers and Merchants earned an excessive rate of return by "dramatically" increasing the amount of *interstate access traffic* delivered to its exchange, and charging for that traffic pursuant to its *interstate access tariff*. The specific paragraph CenturyTel cites, paragraph 29, does not "rule that disputes concerning payments pursuant to an interconnection agreement will not be accepted by the FCC." Here is what paragraph 29 says in its entirety, including footnotes:

> 29. We decline to rule as Farmers requests. To begin, Farmers' request is tantamount to a "cross-complaint," which the Commission's formal complaint rules expressly prohibit. n102 Moreover, any complaint instituted by Farmers to recover fees allegedly owed by Qwest would constitute a "collection action," which the Commission repeatedly has declined to entertain. n103
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> - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -
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> n102 47 C.F.R. § 1.725 ("Cross-complaints seeking any relief within the jurisdiction of the Commission against any carrier that is a party (complainant or defendant) to that proceeding are expressly prohibited. Any claim that might otherwise meet the requirements of a cross-complaint may be filed as a separate complaint in accordance with §§ 1.720 through 1.736. For purposes of this subpart, the term 'cross-complaint' shall include counterclaims.").
>
> n103 *See U.S. Telepacific Corp. v. Tel-America of Salt Lake City, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 24552, 24555-56, P 8 (2004) (citing "long-standing Commission precedent" holding that the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts).

In sum, *Qwest* has absolutely nothing to do with payments pursuant to an interconnection agreement and the case simply does not stand for the proposition CenturyTel asserts.

Next, while Charter acknowledges the Arkansas Public Service Commission's dicta in the case *In the Matter of Petition for Arbitration by Sprint Commc'ns Co. L.P. v. CenturyTel of Mountain Home, Inc.*,[26] Charter respectfully disagrees that the Arkansas commission accurately represented the FCC's decision in *Starpower*.[27] The FCC did not address, let alone rule on, the issue

[26] Docket No. 08-03-U (Ark. Pub. Serv. Comm'n July 18, 2008).
[27] 15 FCC Rcd 11277 (2004).

of whether a state commission could "compel commercial arbitration as a part of an interconnection agreement." The word "compel" does not appear in the *Starpower* decision. The word "commercial" does not appear in *Starpower*. The word "arbitration" appears exactly six (6) times in *Starpower*, and none of those instances have anything to do with a state commission "compelling" commercial arbitration. The FCC in *Starpower* simply did not examine or rule on a state commission's authority to compel commercial arbitration. The Arkansas commission was simply wrong in its assertion, and this Commission should reject such an interpretation of *Starpower*.

Starpower stands for the proposition that the FCC will assume jurisdiction over an interconnection dispute when a state commission fails to act on such a dispute: "In this proceeding, we apply Section 252(e)(5) for the first time to matters outside the scope of mediation and arbitration."[28] The FCC reached this decision after noting that "inherent in state commissions' express authority to mediate, arbitrate and approve interconnection under Section 252 is the authority to interpret and enforce previously approved agreements."[29] Thus, a state commission's failure to "act to carry out its responsibility" under Section 252 "can in some circumstances include the failure to interpret and enforce existing interconnection agreements."[30]

CenturyTel's use of the order in ARB 830 from Oregon is of no value here. There the arbitrator decided that, *as a matter of Oregon state law*, a party can be compelled to agree to or undergo mandatory arbitration.[31] The same cannot be said of *Missouri* state law: "Under the [Uniform Arbitration Act],

> a Missouri court has the authority to compel arbitration 'on application of a party showing an agreement [to arbitrate] described in section 435.350, and the opposing

[28] *Starpower* at 11279.
[29] *Id.*
[30] *Id.* at 11280.
[31] *In the Matter of Sprint Commc'ns Co. L.P. Petition for Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc., Order*, ARB 830, Arbitrator's Decision (Order No. 08-486) at 5 (hereinafter *Sprint Oregon*).

party's refusal to arbitrate . . . .' Section 435.355.1."[32]

Thus, to compel arbitration in Missouri, a court must first determine that parties have agreed in writing to arbitrate.[33] For the MUAA to apply, a contract must include an agreement to arbitrate, and if the contract does not include an agreement to arbitrate, the provisions of the MUAA are not applicable.[34] Hence, *Sprint Oregon* is clearly inapposite for the simple reason that the Parties here have not agreed to arbitrate. The MUAA cannot be cited as authority for including mandatory arbitration in a contract; the law stands only for the proposition that if a contract already includes mandatory arbitration, either party can enforce that right.

Nor is the Michigan case cited by CenturyTel helpful. As the decision itself points out, citing Sprint's objections, "both parties seem willing to agree to commercial arbitration in certain circumstances."[35] In this case, the Parties are *not* in general agreement that commercial arbitration is appropriate. Here is Charter's position from the DPL:

> "Disputes arising out of this Agreement should be resolved and litigated before the Commission, the FCC, or a court of competent jurisdiction. *Only* where both Parties mutually agree, should the dispute be submitted to binding commercial arbitration."

DPL at 37-38 (emphasis in original). Thus, because the Parties are not in agreement, and for the same reasons that call into question CenturyTel's use of *Sprint Oregon*, the Commission should ignore the Michigan arbitration result.

In sum, CenturyTel has cited to no FCC or state commission decision finding or suggesting that a Missouri party can be compelled to include mandatory arbitration in an interconnection agreement. The cases to which CenturyTel cited do not support CenturyTel's arguments, and the Commission should take great care in not relying on CenturyTel's characterizations of those

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[32] *Teltech, Inc. v. Teltech Communs.*, 115 S.W.3d 441, 442 (2003), citing MO. REV. STAT. § 435.350 ("MUAA").
[33] *HitCom Corp. v. Flex Fin. Corp.*, 4 S.W.3d 618, 619-20 (1999).
[34] *Weil v. Kirn*, 952 S.W.2d 399, 402 (1997).
[35] *In the Matter of the Petition of Spring Communications Company, L.P. for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturyTel Midwest – Michigan, Inc.*, Case No. U-15534, 2008 Mich. PSC LEXIS 146, *5 (2008).

decisions, which are either superficial, misleading or outright wrong. Federal jurisprudence is unanimous that a state commission must interpret and enforce the terms of an approved interconnection agreement, as Charter demonstrated in its Proposed Findings. *Chtr. P.F.* at 29-30.[36] If a state commission does not or cannot entertain an interconnection dispute, the FCC has determined it will hear the dispute. Otherwise either Party here can proceed to state or federal court as is appropriate to resolve an interconnection dispute. The Commission should 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?

The Parties disagree whether there should be a reasonable time period by which either Party can bring a claim under the Agreement. In its Proposed Findings, CenturyTel asks the Commission to adopt its proposal for three reasons, including expedited resolution of billing disputes, preservation of each Party's right to recover properly due amounts, and shifting the burden of proof to the billed Party. *CTel P.F.* at 42-44.

First, under CenturyTel's approach, the alleged benefit of implementing an expedited dispute resolution process would come at the expense of binding Charter to language that (i) presumes CenturyTel's invoices to be accurate in all cases; (ii) assigns CenturyTel the sole right to accept or reject billing disputes; and (iii) forces Charter to bring actions before the Commission in cases where CenturyTel refuses to accept Charter's disputes as legitimate. Webber Rebuttal at 22, lines 22-25. And, as Charter's Proposed Findings demonstrate, CenturyTel's proposed language would deviate from federal statutory guidance which provides that actions by and against carriers generally must be initiated within two years from the time the cause of action accrues. *Chtr. P.F.* at 32–33 (citing 47

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

U.S.C. § 415). CenturyTel fails to point to any evidence in the record that explains why the Parties would be best served by departing from the federal statute. Charter's proposal simply adopts that concept, as well as the guidance set forth in federal law, and incorporates it into the Agreement. Webber Rebuttal at 25, lines 13-14.

Second, CenturyTel's assertion that Charter's proposed language would improperly cut off liability for unpaid charges is no more onerous than the applicable federal statute of limitations for unpaid charges between carriers.[37] In the event that invoices submitted to Charter remain unpaid, and undisputed, for a period exceeding 24 months, it is reasonable to assume that CenturyTel would have already taken action to recover those charges. Webber Rebuttal at 24, lines 1-3. Section 20 (Dispute Resolution) of the Agreement clearly sets forth dispute resolution provisions that permit CenturyTel to act in the event of such a dispute. *Id.* at 24, lines 3-5. In the unlikely circumstance where Charter has neither paid CenturyTel, nor disputed the charges, CenturyTel would have the right to avail itself of the dispute, provisions of the Agreement. *Id.* at 24, lines 5-7.[38]

Third, CenturyTel's attempt to impose the burden of persuasion and proof upon the billed Party, which in most cases is Charter, in bill disputes is wholly unjustified. CenturyTel's proposal relies on the premise that its invoices are presumptively accurate. They are not. *Chtr. P.F.* at 33. Past experience irrefutably shows that CenturyTel's invoices are very frequently *inaccurate*. Giaminetti Direct at 31-35. This Commission's decision in Docket No. LC-2008-0049 further confirms that CenturyTel's invoices are not always proper.[39] For these reasons, CenturyTel should bear the burden of process and proof to prove that its bills are accurate. Therefore, the Commission should adopt Charter's language on Issue 13.

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[37] *See* 47 U.S.C. § 415(a).

[38] It is disconcerting that CenturyTel urges the Commission to adopt language to preserve its ability to invoice Charter for services more than 24 months after the fact, *id.* at 24, lines 9-12, but with respect to billing disputes CenturyTel seeks to force Charter into initiating an action before the Commission within 12 months if disputes are not resolved, *id.* at 24, lines 12-13.

[39] *Report and Order* at 9-10, 14-15.

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?

CenturyTel argues that if Charter asks CenturyTel to perform a service that is not otherwise provided in the Agreement, Charter must pay an additional charge to cover any potential costs incurred by CenturyTel. *CTel P.F.* at 44-45. This approach is necessary, CenturyTel argues, because CenturyTel will otherwise be required to perform services for Charter without compensation, "which would constitute subsidization of Charter's business." *Id*. at 35. Further, CenturyTel asserts that its proposed language is necessary to avoid disputes between the Parties. *Id*.

Unfortunately, CenturyTel never explains why alleged problems cannot be addressed through the amendment process, and CenturyTel has never identified the "services" it expects it will be required to provide to Charter, that are not otherwise identified, anywhere in the Agreement. Despite repeated opportunities, CenturyTel has not been able (or willing) to identify any specific act that it contends would constitute a new, or additional, "service" that would be provided to Charter.

Charter has demonstrated that the contract amendment process set forth in Sections 4 and 12 provides a means by which the Parties can accommodate the charges for the service provided by CenturyTel and requested by Charter. Webber Rebuttal at 26, lines 27-29. Such an amendment could specifically detail new functions, their costs and expenses, and the basis for requiring Charter to compensate CenturyTel for performing such functions. *Id*. at 26, lines 30-32. Thus, existing, agreed upon, amendment processes appropriately address CenturyTel's concerns.

As to prospective services, the Commission must not accept the statement of CenturyTel's Mr. Miller, that anything "missing" from the Pricing Article is the result of an "oversight by both parties." Miller Direct at 27, lines 14-18. The parties spent more than six months negotiating before coming to the Commission. Webber Rebuttal at 27, lines 27-8; 28, lines 1-4. It strains credibility to say that after six months of attempting to develop contract terms the Parties may have left something out by a simple "oversight."

Similarly, the Commission should look skeptically at claims regarding "phantom" services CenturyTel suggests may be requested by Charter. For example, at hearing Mr. Miller was asked to describe additional services that CenturyTel may provide to Charter. The only example Mr. Miller offered was that Charter may request that CenturyTel construct facilities "to a trailer out in the middle of the field…" Miller, Tr. 573, line 16. Mr. Miller then explained that this was based upon an example of another service provider's request, and that the other service provider was a *reseller* of CenturyTel's services. *Id.* at 574, line 21. Mr. Miller's example is wholly unconvincing. Charter is a facilities-based provider that offers services over its existing wireline network, and it does not resell CenturyTel services. It is therefore highly unlikely that Charter would make the type of service request that Mr. Miller identified during the hearing.

Finally, CenturyTel has not explained how its proposed language for Section 22.1 can be reconciled with language that the Parties have already agreed upon for this issue. Specifically, in Article I, § 3, CenturyTel and Charter have agreed to language stating that:

> "[n]otwithstanding any other provision of this Agreement, neither Party will assess a charge, fee, rate or any other assessment (collectively, for purposes of this provision, 'charge') upon the other Party except where such charge is specifically authorized and identified in this Agreement, and is (i) specifically identified and set forth in the Pricing Article, or (ii) specifically identified in the Pricing Article as a "TBD" charge." DPL at 47.

The Parties have agreed that *only* charges set forth in the Agreement can be assessed upon the other Party (which is logical and consistent with elementary principles of contract construction). Where there is no specific rate in the price list authorizing the charge, the Parties do not have the right to charge the other Party. CenturyTel cannot agree to one principle in one section of the Agreement, and then repudiate that principle in another section of the Agreement. The Commission should, therefore, reject CenturyTel's proposal and adopt Charter's proposed language on 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?

As to the question of whether indemnity obligations should be apportioned where the indemnified Party acts in a manner that contributes to the harm, CenturyTel argues that Charter's proposal "creates an obstacle" to carrying out a prompt defense of any claim that is subject to indemnity obligations of either party. In that regard, CenturyTel asserts that Charter's reliance upon a comparative fault standard would necessarily force Charter and CenturyTel into litigation to determine each Party's respective liability. *CTel P.F.* at 50.

Charter anticipated and refuted these arguments at length in its initial brief. *See Chtr. P.F.* at 37-39. Charter explained the specific process that the Parties would utilize to defend a third party claim, including: (1) assumption of the defense by the indemnifying Party; (2) an impleading or joinder action to bring in the other Party; and, (3) a process (during the litigation) by which each Party's liability was determined. *Id.* at 38.

Therefore, CenturyTel's unsupported assertions that Charter's proposal is not workable, is simply false. Charter's process is precisely the process contemplated by the Missouri Supreme Court when questions of comparative fault (and indemnity obligations arising from such fault) arise. Courts routinely weigh the relative liability of each party to an action based upon the comparative fault of each party involved in the transaction. 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."[40] Common judicial practice of "joining all parties" also refutes CenturyTel's claim that joint representation of the Parties would "likely be precluded."

CenturyTel also argues its proposed exclusion of liability is appropriate because Charter's indemnification exclusions for Section 30.1 "are not imposed on Charter's under its own tariffs and customer agreements." *CTel P.F.* at 50. CenturyTel wrongly presumes the relationship between Charter and its end user customers is analogous to the relationship between Carriers that interconnect

[40] *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)).

their networks and exchange traffic as peers, pursuant to their federal and state legal duties and obligations. That relationship contrasts markedly from the carrier-customer situation, where the carrier is providing a service to an end user customer, and thus liabilities, risks and legal duties are governed by a far different consideration.[41] For all these reasons the Commission should adopt Charter's language for Issue 15(a).

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?

CenturyTel makes two arguments under Issue 15(b). First, "the provision of information and services that are at issue in this Agreement" give rise to certain implied warranties that should be disclaimed. *CTel P.F.* at 51. Unfortunately, CenturyTel fails to explain precisely what "information and services" are provided under this Agreement, and what implied warranties arise from these undefined "information and services." The Commission cannot reasonably order the Parties to disclaim certain warranties if there is no common understanding of the warranties that are being disclaimed, or the "information and services" from which they would allegedly arise.

Second, CenturyTel points to the Restatement of Torts for the proposition that "warranty-like liability exists for inaccurate information that is supplied for the guidance of others." *CTel P.F.* at 52. CenturyTel's position leaves unanswered the questions of how, or when, such a warranty would apply to the situation of two carriers interconnecting their networks for the exchange of traffic. Further, CenturyTel offers no explanation of precisely what "information supplied for the guidance of others" is at issue here. The same conclusion must be drawn as to CenturyTel's continued reliance upon UCITA. *CTel P.F.* at 52. UCITA, a draft code, addresses software licensing and related

[41] CenturyTel's opposition to Charter's proposed use of the defined term "Claims" in Section 30.1, is curious, given that CenturyTel's own language in the DPL includes the defined term "Claim," and defines that term in the same manner as Charter. *See* DPL at 48 (each Party's proposed, undisputed, language for Section 30.1 includes the defined term "Claim"). Precisely why CenturyTel agreed to the use of this term during negotiations, but now wishes to back away from its uses, is unclear. Nonetheless, because both Parties' DPL language reflects a prior agreement on the use of the term "Claim" the Commission should reaffirm its use in this provision.

transactions, completely unrelated to the network interconnection functions at issue here. For all these reasons, the Commission should 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?

With respect to Issue 15(c) CenturyTel raises two arguments. First, as to limitation on damages, CenturyTel asserts there is a "well-established" practice in the telecommunications industry, which is also established in Charter's tariffs. *CTel P.F.* at 53. Second, as to Charter's proposal that any liability limitations should exclude gross negligence, CenturyTel asserts that doing so is improper because Missouri law does not recognize gross negligence. *Id*.

CenturyTel offers no support for its claim that its proposal reflects a "well-established" approach in the industry. As noted above, moreover, the relationship between carriers *interconnecting* is very different from the relationship between carriers and customers. *See* discussion in Issue 15(a), *infra*.

On the issue of excluding gross negligence from limitation of liability terms, that Missouri courts may not recognize a formal "gross negligence" standard does not mean the Agreement should limit liability in instances akin to gross negligence (especially when one Party is not acting with "due care"). CenturyTel offers no rational reason to limit liability when a Party engages in "wanton or reckless," or "intentional or willful misconduct" (i.e. actions that go beyond mere negligence, for which that Party should be liable).[42] Further, both the Commission and CenturyTel, have relied upon the "gross negligence" concept. In its arbitration decision between SBC and various LECs, the

[42] *See Nichols v. Bresnahan*, 357 Mo. 1126, 212 S.W.2d 570 (Mo. 1948) (recognizing the tort of recklessness). The *Nichols* court explained: "Negligence is one kind of tort, an unintentional injury usually predicated upon failure to observe a prescribed standard of care (52 Am.Jur., Sec. 20) while a willful, wanton, reckless injury is another kind of tort, an intentional injury often based upon an act done in utter disregard of the consequences. 52 Am.Jur., Secs. 22, 23; 38 Am.Jur., Secs. 4, 5. Reckless conduct may be negligent in that it is unreasonable but it is and must be something more than unreasonable, 'it must contain a risk of harm to others in excess of that necessary to make the conduct unreasonable and therefore, negligent.' 2 Restatement, Torts, p. 1294." *See also, Alack v. Vic Tanny Intern. of Missouri, Inc***.** 923 S.W.2d 330 (Mo. 1996) ("Additionally, there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.").

Commission ruled that "it is contrary to public policy to cap liability for intentional, willful, or ***grossly negligent*** action."[43] And, CenturyTel already agreed to language in Section 9.4 of Article VII (concerning 911 obligations), 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) (emphasis added). Thus, use of a gross negligence standard has been recognized by the Commission and CenturyTel. For all these reasons, the Commission should adopt Charter's 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?

CenturyTel contends this issue centers on whether Charter can require CenturyTel to apply ILEC requirements for network modifications to Charter's CLEC operations. *CTel P.F.* at 56. CenturyTel alleges that Charter has "misconstrued the issue" because Charter is the Party seeking interconnection from CenturyTel, and therefore Charter's network modifications are "irrelevant" since CenturyTel is not seeking interconnection from Charter. *Id.* CenturyTel also asserts that "there is no need for reciprocal language because, due to CenturyTel's network, there is nothing that CenturyTel needs from Charter." *Id.* at 57. Finally, CenturyTel claims that there are "no governing standards" that would be applicable to Charter with regard to network upgrades because Charter is not the ILEC. *Id.*

As to CenturyTel's first argument, there is no evidence that Charter intended to "require CenturyTel to apply ILEC requirements for network modifications to Charter's CLEC operations." Charter's proposal is a reciprocal statement of its rights to upgrade its network and facilities, in the same way that CenturyTel can upgrade its network and facilities. Charter has

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

agreed to these principles for CenturyTel's upgrades, and there is no reason not to make this simple affirmative principle reciprocal, to the benefit of both Parties. CenturyTel's argument that there are "no governing standards" that apply to Charter is patently wrong. Section 251(a)(1) of the Act requires *all* telecommunications carriers, including CLECs, to interconnect with the facilities and equipment of other telecommunications carriers.[44] Consistent with the Act, each carrier is responsible for the costs on its side of the POI, and each carrier has a responsibility to keep up their portion of the network. Accordingly, the Commission should rule in Charter's favor and order the Parties to 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 whether a "slammed" carrier qualifies for compensation under FCC rules, and thus whether the Agreement should contain language regarding compensation for a slammed carrier. CenturyTel argues that FCC rules "focus on the protection of consumer interests as opposed to the interests of the carrier's recovery of its costs caused by the unauthorized port." *CTel P.F.* at 60. Thus "the Agreement should contain provisions that allow CenturyTel to recover costs incurred to correct any improper porting orders. . . ." *Id*.

As a matter of law, CenturyTel is flatly wrong that FCC regulations proscribe cost recovery by a slammed carrier. *Chtr. P.F.* at 46. FCC Rule 64.1140(a) establishes carrier liability for slamming:

> 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.[45]

[44] 47 U.S.C. § 251(a)(1).
[45] 47 C.F.R. § 64.1140(a) (emphasis added).

Mr. Miller testified that when CenturyTel ports a number to Charter, there are only two local exchange carriers involved. Miller, Tr. 550, lines 17-18. Thus, under FCC Rule 64.1140(a), if one assumed that Charter failed to comply with the slamming rules, CenturyTel is of necessity "the subscriber's properly authorized carrier" and is entitled to federal damages.

As is true for so many of CenturyTel's proposed findings, its slamming provisions are a solution in search of a problem. At most, CenturyTel claims, "Charter can not prevent occasional mistakes from happening." Miller Direct at 52, lines 20-21. Thus, there is simply no factual predicate, let alone record evidence, to justify imposing CenturyTel's proposed language from Article III, §§ 50.1 and 50.2 in a proceeding between Charter and CenturyTel.

For all of these reasons, Charter contends that the Commission should reject CenturyTel's proposed language from Article III, §§ 50.1 and 50.2, secure in the knowledge that FCC Rule 64.1140(a) adequately protects and compensates CenturyTel in the case of unauthorized changes or improper port requests. The Commission should accept Charter's language.

III. NETWORK INTERCONNECTION ISSUES

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?

As the evidence and arguments on Issues 2 and 24 have emerged, several reasons have become evident to justify why the Commission should reject CenturyTel's NID definition and its attempt to charge Charter for access to the customer-side of the NID. First, however, Charter discusses the NID definition, and its role in the NID compensation debate.

1. Charter's NID Definition Is Appropriate

Important to whether Charter "uses" the NID is the definition at issue between the Parties. Charter seeks a definition that adheres to FCC rule and policy. CenturyTel seeks a definition that expands its federal law rights, and thus its ability to charge for access to the customer side of the

NID. There can be no question that Charter's definition more closely follows the current FCC definition for a NID, and the FCC's underlying technical rationale for same. Here is Charter's proposed definition:

> A means of interconnection Inside Wiring to CenturyTel's distribution plant, such as a cross-connect device used for that purpose. The NID houses the protector.

Here is the FCC's NID definition:

> The network interface . . . is defined as 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.[46]

CenturyTel proposes to add the following phrase to Charter's definition:

> The point from which the Point of Demarcation is determined between the loop (inclusive of the NID) and the End User Customer's Inside Wire pursuant to 47 C.F.R. § 68.105.

CenturyTel's inclusion of the term "Point of Demarcation" contravenes FCC policy. 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."[47] Thus, the FCC no longer considers the phrase "network interface device" appropriate for the purposes of describing certain legal rights and responsibilities of interconnecting carriers at the point where the incumbent LEC and customer meet.[48] Indeed, the FCC specifically *declined* to limit CLECs' access rights at NIDs.[49] The Commission thus should reject CenturyTel's approach here.

2. Charter Does Not "Use" The NID

All of Charter's activities take place on the customer side of the federal demarcation point, which is defined by 47 C.F.R. § 68.105(a). Charter does not "use" the NID as a UNE. Rather, Charter attaches its facilities to a newly won customer's inside wiring on the side of the demarcation

[46] 47 C.F.R. § 51.319(c).
[47] *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").
[48] *Id.* at ¶ 168.
[49] *Id.* at ¶ 235.

point *already controlled by the customer*. Charter does not submit any sort of service request for a UNE from CenturyTel, nor does it need to. All activity is separate and apart from CenturyTel's network facilities. In this circumstance, CenturyTel is not entitled to any compensation because there is no use of the network facilities under its control.

Further, while the FCC does not define the term "use" with respect to NID access, CenturyTel's Mr. Miller identified four (4) main purposes the NID serves, including (i) connection between a LEC's drop to a premise and the customer's inside wiring, Miller, Tr. 522, line 25; 523, lines 1-2; (ii) grounding protection for lightning strikes, *id.* at 523, lines 2-3; (iii) weatherproof housing of the LEC-customer connection, *id.* at 523, lines 3-4); and (iv) as a test device for the end user, *id.* at 523, line 20. Charter does not willingly "use" the NID for any of these purposes.

It is *only* because CenturyTel's NID obstructs a customer's inside wiring that Charter, on the customer side of the NID, attaches its facilities to connection points or "scotch locks" in an empty compartment. Blair, Tr. 186, lines 4-66; 191, lines 7-11. But for the presence of CenturyTel's NID, Charter would attach directly to the end user's inside wiring, and Charter would position its house box at that point. Blair, Tr. 187, lines 13-25; 188, lines 7-25. Charter does not "use" the NID for grounding protection. That functionality is on the *network* side of the NID, which side Charter never accesses. Miller Direct at Exh. S-6; Blair Direct at 7, Diagram 1. Charter does not willingly "use" the NID for weatherproofing. Charter always deploys its own "house box" (aka "Service Box") that could be used for weatherproofing Charter's connection to the end user. Blair Direct at 12, Diagram 3. It is *only* because CenturyTel insists on leaving its NID that Charter must house its end user connection within the customer side of the NID rather than its own house box. Charter does not "use" the NID as a test device. Once CenturyTel's facilities are disconnected at the demarcation point, the NID no longer functions as a test device, for the reason that Charter's network facilities are differently configured than CenturyTel's. Blair Direct at 10, Diagram 2; 12, Diagram 3. For all of

these technical reasons, Charter does not "use" the NID as a UNE, and thus there is no basis under federal law for any NID charge in the Agreement.

3. CenturyTel's NID Intentionally Obstructs A Customer's Inside Wiring

The evidence in this case shows there are at least two reasons why CenturyTel leaves its NID at the premise of a former customer. First, CenturyTel does so in hopes of winning back that customer. Miller, Tr. 605, lines 4-9. Second, CenturyTel does so because the company has easements rights it has obtained from the property owners it served. Miller, Tr. 614, lines 14-18.[50] In both cases, it is axiomatic that CenturyTel *intends* to leave its NID at the premise. If CenturyTel does not remove its NID knowing that the device covers the connection, it stands to reason that CenturyTel intentionally obstructs the inside wiring. CenturyTel believes it can arbitrage FCC policy and leverage its own purported easements to charge a CLEC for "using" the NID – a charge that is neither warranted nor necessary if CenturyTel removed the NID when it loses a customer. In such circumstances, it would be highly inequitable to require Charter to pay for CenturyTel's obstructionist position. The Commission should not allow this inequitable result.

4. CenturyTel "Uses" the NID After Losing a Customer

Even after CenturyTel loses a customer, the facts show that CenturyTel continues to "use" the NID for its own purposes. For example, CenturyTel continues to use the NID to terminate its drop to the premise; CenturyTel does not dispatch a technician to disconnect that drop. Miller Rebuttal at 12, lines 1-2. Consequently, CenturyTel must also "use" the NID for grounding protection from lightning strikes, since its drop is still fully connected on the network side of the NID. Next, because its facilities remain attached to the NID, CenturyTel continues to "use" the NID for weatherproofing its connections. CenturyTel continues to "use" the NID for three of the four

[50] Mr. Miller's concession that the company has not calculated recurring NID costs, Miller, Tr. 604, lines 13-19, and that he, the company's NID witness, does not know recurring NID costs, *id.* at 527, lines 2-4, suggests a more subtle reason that CenturyTel leaves the NID in place: it costs CenturyTel nothing to do so.

purposes identified by Mr. Miller. In addition, CenturyTel "uses" the NID to support its opportunity to win back the customer, as Mr. Miller also testified.

Consequently, CenturyTel's reliance on *U S West Communications, Inc.*[51] is misplaced. In that arbitration Qwest, the ILEC, argued that only *one* LEC could use the NID at one time:

> Once a CLEC accesses Qwest's protector field, that NID access is no longer available for Qwest's or another CLEC's, use. Qwest is entitled to reimbursement for the use of its facilities.[52]

Here the unrefuted facts show that CenturyTel "uses" the NID after losing a customer, distinguishing this case from the Colorado arbitration.

In addition, the Colorado arbitrator noted a key fact in his decision that is not present here in Missouri:

> Whether a CLEC elects to connect its own protector to a Qwest protector under the circumstances described above is a business decision that resides solely with the CLEC.[53]

The facts here show that Charter's activity at the NID is *not* a "business decision that resides solely with the CLEC." Rather, the facts here are that Charter *must* access the customer side of the NID because CenturyTel chooses to leave the NID obstructing the customer's inside wire, based on win-back and easement considerations.

5. CenturyTel Failed To File A Required TELRIC Cost Study

FCC rules mandate that an ILEC that makes available any UNE in an interconnection agreement must price that UNE according to TELRIC principles, and submit a TELRIC cost study to the Commission to justify the proposed UNE rate.[54] CenturyTel conceded in discovery and at

[51] 2001 Colo. PUC LEXIS 983 (2001).
[52] *Id.* at *22.
[53] *Id.* at *23.
[54] 47 C.F.R. § 51.505(e) (emphases added).

hearing that it did not prepare any cost study to justify its NID rate.[55] For this reason alone, the Commission is legally required by FCC rules to reject any NID rate proposed by CenturyTel.

6. CenturyTel Incurs No Incremental Costs To Justify A NID Charge

The unrefuted facts show that CenturyTel incurs zero additional or incremental actual costs when Charter engages in activities at the NID. Miller, Tr. 530, lines 11-12. What costs CenturyTel has identified are speculative and not reflected in the company's books. *Id.* at 532, lines 10-12. These facts, combined with the unrefuted fact that the NID is a passive device with very low sunk costs and nominal recurring costs, mean that there is no sound basis on which to calculate any NID rate for CenturyTel.[56]

For all these reasons, the Commission should reject CenturyTel's NID definition and its attempt to charge Charter for accessing the customer side of the NID. The Commission should adopt Charter's language with respect to Issues 2 and 24.

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

To avoid its interconnection obligations under the Act CenturyTel raises specious arguments intended to distract this Commission. CenturyTel's arguments, though varied and wide-ranging, conspicuously omit any mention of Section 251, or FCC regulations. These omissions are fatal, because 47 U.S.C. 252(c)(1) requires the Commission to resolve the disputed issues by applying Section 251, and implementing FCC regulations.[57]

1. This Commission and CenturyTel's Own Contract Language Apply "LATA Concepts" to CenturyTel for Purposes of Defining Interconnection Obligations

First, CenturyTel relies on assertions that the "LATA designation is relevant only to the

[55] 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."); Gates, Tr. 538, lines 1-4.
[56] In addition, as Mr. Gates testified (Gates Rebuttal at 8, lines 25-27, 9, lines 1-7) and Mr. Miller conceded in his direct testimony (Miller Direct at 13, lines 20-22), CenturyTel is already recovering its NID costs through regulated rates. Unless CenturyTel adjusts its regulated rates – something CenturyTel has not proposed in this arbitration – CenturyTel will double recover its NID costs, with the extra recovery flowing directly to investors.
[57] 47 U.S.C. § 252(c)(1).

BOCs' line of business restrictions (such as InterLATA toll) … and not to non-BOC ILECs like CenturyTel" to argue that the FCC's single POI per LATA rule does not apply to incumbent LECs like CenturyTel. *CTel P.F.* at 68. CenturyTel fails to note that it invokes and expressly *relies upon* the "LATA designation" in its own proposed language. In Article V of the draft Agreement CenturyTel proposed (and Charter accepted) the use of a LATA designation to establish various obligations between the Parties:

> "CenturyTel's network includes, but is not limited to, End Office switches that serve Intra***LATA***, Inter***LATA***, Local, and EAS traffic. CenturyTel's network architecture in any given local exchange area and/or ***LATA*** can vary markedly from another local exchange area/***LATA***."[58]

Thus, CenturyTel itself uses the LATA designation to identify, and classify, types of traffic it will exchange (Intra, InterLATA traffic), and to identify the geographic areas in which its networks are located ("in any given … LATA").[59] Further, CenturyTel also uses the LATA designation to: (1) establish certain trunking obligations;[60] (2) define obligations associated with the exchange of "IntraLATA" toll traffic;[61] (3) clarify obligations when CenturyTel is designated as an "IntraLATA" toll provider;[62] and, (4) define (and limit) CenturyTel's obligations to unbundle dark fiber and dedicated transport.[63]

Notably, all of the contract references identified here are citations to language that

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[58] Charter Petition Exhibit B, Agreement, Art. V., § 2.2.1 (emphasis added).

[59] *See also* Art. V, § 4.2.1: "The Telecommunications traffic exchanged between **CLEC and CenturyTel will be classified as Local Traffic, ISP-Bound Traffic, …, ***intraLATA*** Toll Traffic, or ***interLATA*** Toll Traffic." (emphasis added); *and* § 4.2.5 ("All Exchange Access traffic and ***intraLATA*** Toll Traffic…") (emphasis added).

[60] Art. V, § 3.2.2 "The Parties agree that two-way trunk groups for local, ***IntraLATA*** and ***InterLATA*** traffic shall…" (emphasis added).

[61] Art. V, § 4.6.4.4.2 states: "Transit of IntraLATA Toll Traffic: A per-minute-of-use rate will be charged to the originating Party, as contained in CenturyTel's state access tariff." Indeed, Section 4.6.4.2 states that CenturyTel may be designated as an "IntraLATA Toll provider for existing LECs…."

[62] Art. V., § 4.6.4.2: "In the case of IntraLATA Toll Traffic where CenturyTel is the designated IntraLATA Toll provider for existing LECs, CenturyTel will be responsible for payment of appropriate usage rates to the existing LECs."

[63] Art. II (Definitions), § 2.39 (defining dark fiber as "unactivated optical interoffice transmission facilities, dedicated to **CLEC, that are within CenturyTel's network and connect CenturyTel switches or Wire Centers ***within the same LATA*** and State") (emphasis added); and § 2.40 (defining dedicated transport as "[a] transmission path between one of CenturyTel's Wire Centers or switches and another of CenturyTel's Wire Centers or switches ***within the same LATA*** and State."

CenturyTel proposed, and Charter accepted. Given CenturyTel's repeated reliance upon the LATA concept, its claims that the LATA designation does not apply to CenturyTel is contrary to the very terms it has incorporated into this Agreement.

Furthermore, the Commission has established certain CenturyTel interconnection obligations (or obligations of a competitor with whom CenturyTel is interconnected) by express reference to LATA boundaries and limitations. For example, recently the Commission ruled that "if the CLEC interconnects on terms and conditions like Socket does with CenturyTel (at least one POI ***per LATA*** and the CLEC bearing responsibility for facilities on its side of the POI),…"[64] Also, the Commission, in ruling on point of interconnection issues, specifically developed "criteria for establishing an additional POI ***within a LATA*** …", and adopted a specific "methodology to determine the necessity for another POI ***within a LATA***."[65] Thus, Commission precedent, like CenturyTel's own contract language here, refutes the notion that CenturyTel is not subject to LATA restrictions.

2. The Single POI Rule Stems from Section 251(c) of the Act Which Establishes Interconnection Obligations of All Incumbent LECs, Not Just Former BOCs

CenturyTel raises three points as to why the SPOI rule does not apply here: first that the only basis for the SPOI rule is an FCC notice of proposed rulemaking; *CTel P.F.* at 68; second, that the rule is derived from the FCC's *Texas 271 Order*, which relied upon contract language between MCI and SWTB, and is therefore only applicable to former BOCs. *Id*. at 68-69; third, that the rule only applies to former BOCs, but not to all incumbent LECs. *Id*. at 69.

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[64] *Socket Telecom, LLC v. CenturyTel of Missouri, LLC, d/b/a CenturyTel, and Spectra Communications Group, LLC, d/b/a CenturyTel*, Report and Order, Case No. TC-2007-0341, 2008 Mo. PSC LEXIS 314, *26 (Mo. PSC Mar. 26, 2008) (emphasis added).

[65] *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, *26 (Mo. PSC June 27, 2006) (emphasis added). In that decision the Commission also applied LATA designations to resolve disputed issues involving LATA designations, to define IntraLATA toll traffic (traffic that is exchanged "within LATA boundaries"), and to established obligations concerning the indirect interconnection (adopting Socket language that the third party must have a POI with the originating and terminating carrier in the same LATA as the originating and terminating Parties' Local Routing Numbers ("LRN")). *Id*. at 32.

CenturyTel is incorrect to suggest that the only authority for the SPOI rule is a notice of proposed rulemaking, and a decision implementing Section 271 of the Act. The SPOI rule arises from the express statutory language of Section 251(c)(2) which states that all ILECs have "[t]he duty to provide, … interconnection with the local exchange carrier's network . . . at any technically feasible ***point*** within the carrier's network."[66] There is no dispute that CenturyTel is an ILEC within the meaning of Section 251.[67] Thus, the statute applies to CenturyTel.

To answer what is required of CenturyTel under the Act, the Commission need only look to the expert agency, the FCC, and its repeated decisions implementing the statute. In its first decision implementing Section 251, the FCC explained:

> Section 251(c)(2) [of the Act] gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at ***any technically feasible point*** on that network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points.[68]

This confirms that interconnection may occur at any technically feasible "point" (note the FCC's use of the singular). In other words, at a ***single*** point on the incumbent LEC's network. The FCC's conclusion has been restated in many subsequent decisions, including where the FCC arbitrated interconnection obligations of an ILECs. In July 2002 the FCC's Wireline Competition Bureau ruled in an arbitration between Verizon and WorldCom, that: "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.*"[69] The FCC's own words, therefore, undermine

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[66] 47 U.S.C. § 251(c)(2) (emphasis added).
[67] *See* Agreement, Preamble section (fourth "Whereas" clause).
[68] *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 at ¶ 209 (1996).
[69] *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).

CenturyTel's repeated attempts to limit the application of the SPOI rule.[70]

CenturyTel asserts that "any reliance by Charter on the FCC's Unified Intercarrier Compensation proceeding is misplaced as it is only a notice of proposed rulemaking." *CTel P.F.* at 64, 68. Although the FCC restated the SPOI rule in its intercarrier compensation NPRMs (issued in 2005 and 2001), it did so in the context of asking whether the *existing* rule should be altered, or modified.[71] That the SPOI rule was mentioned in an NPRM does not negate its application to CenturyTel. And while "no decision has been released" in these NPRMs, the FCC's lack of action confirms that the existing rule remains in effect.

CenturyTel is also incorrect when it asserts that the source of the ruling in the Texas 271 Order is the contract language between SWBT and MCI in footnote 174. *CTel P.F.* at 68-69. In fact, the FCC specifically cited the Act not an ICA:

> "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."[72]

Later in this decision, at footnote 174, the FCC reviewed ICA language *only* to determine whether SWBT was complying with its federal law obligations (but not as a basis for affirming the SPOI rule). In contrast, the FCC's authority for the SPOI rule is set forth in footnote 170, wherein the FCC specifically cited Section 251(c) and the FCC's rule 47 C.F.R. § 51.305(e).

The Act sets forth obligations of all ILECs under Section 251 (and elsewhere), and separately

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[70] Several federal courts, including the U.S. Court of Appeals for the Fifth Circuit have concluded that a CLEC, like Charter, is entitled to interconnect with an incumbent LEC, like CenturyTel, at a single POI on the incumbent's network.

[71] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685 at ¶ 92 (2005) ("soliciting additional comment on changes to our network interconnection rules").

[72] *See 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 (citing 47 U.S.C. § 251(c)(2),(3); 47 C.F.R. §51.305(a)(2); and *Memorandum of the Federal Communications Commission as Amicus Curiae, US West Communications, Inc., vs. AT&T Communications of the Pacific Northwest, Inc. et. al*, No. CV 97-1575 JE).

sets forth the unique obligations of the former BOCs under Section 271. Because the SPOI rule *stems from Section 251*, which applies to all ILECs, it clearly applies to CenturyTel. Under accepted rules of statutory construction it is clear that Congress intended to subject all ILECs (both non-BOCs and BOCs) to those duties set forth under Section 251(c).[73] In sum, the SPOI rule: (1) stems from Section 251; (2) is applicable to all ILECs, including CenturyTel; (3) is unrelated to the obligations of former BOCs that arise from a separate section of the Act, Section 271; and (4) has been reaffirmed by the FCC on at least four separate occasions since first being implemented in 1996.

3. Providing Charter Interconnection at a Single POI Does Not Represent a "Superior Form" of Interconnection; Nor Does It Present A Question of Technically Infeasibility

CenturyTel is relieved of its obligation to provide interconnection at a particular point in its network *only* if it proves that interconnection at that point is technically infeasible.[74] Given that the SPOI rule applies to CenturyTel, as a matter of law, the only remaining question is whether interconnection via an SPOI arrangement would be technically infeasible. In resolving questions of technical infeasibility, the FCC has established the following criteria:

> 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 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 … would result in specific and significant adverse network reliability impacts***.[75]

What this standard tells us is that a SPOI can be deemed as technically infeasible only upon evidence of "specific" and "significant adverse network reliability." Further, the burden of proof is

[73] This construction is supported by the fact that the FCC has implemented the SPOI 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. Further, it is instructive that the FCC orders which establish the single POI rule never excluded, or carve, out the non-BOC ILECs from its application. There is no distinction made by the FCC in its orders affirming this rule.
[74] 47 C.F.R. § 51.305(e); *see also Local Competition First Report and Order,* 11 FCC Rcd at 15602, 15605-06, ¶¶ 198, 203, 205.
[75] 47 C.F.R. § 51.5.

on the ILEC (here, CenturyTel), not the competitor. Thus, CenturyTel must prove that an SPOI would impair the reliability of CenturyTel's network to a significant, or substantial, degree. Further, economic concerns (i.e., additional costs), or the need to modify facilities or equipment are *not* permissible criteria under the FCC's rule.

CenturyTel has not offered any evidence that a SPOI arrangement would impair the reliability of its network. CenturyTel has suggested that a SPOI may require it to "modify" portions of its network, or possibly incur incremental costs to accommodate the request. But it has offered *no evidence* of "adverse network reliability impacts" as required by the FCC's criteria. Therefore, the Commission cannot find that Charter's SPOI proposal is technically infeasible because CenturyTel has offered no evidence that such an arrangement would adversely impact the reliability of CenturyTel's network.[76]

Although Charter does not accept CenturyTel's assertions that its request for a SPOI would require a "superior" interconnection arrangement, CenturyTel misleads the Commission by suggesting that the Eighth Circuit's decisions in *Iowa Utilities Board v. FCC*,[77] forbids "superior" network interconnection requests. What the Eighth Circuit held, was that Section 251(c)(3) requires access to an "existing network –not to a yet unbuilt superior one."[78] The Eighth Circuit explained that ILECs can be required to modify their facilities "to the extent necessary to accommodate

[76] Apparently recognizing the limits of its position, CenturyTel asserts that the standard of proof is something very different from that required by FCC rule. Specifically, CenturyTel asserts "the record is clear" (without citing to the record) that interconnection should not be examined in the abstract, and CenturyTel "only needs to demonstrate that Charter's proposal could require trunking and network arrangements that do not exist within CenturyTel's network" (without citing to any legal authority). *CTel P.F.* at 67. Thereafter, without any citation at all, CenturyTel asserts that this "showing has been made." *Id.* Presumably the "showing" to which CenturyTel refers are its assertions regarding the limitations of its existing network. These claims, collectively, underlie CenturyTel's claim that interconnection via a single POI represents a "form of superior interconnection" that is contrary to 47 U.S.C. § 251(c)(2). *CTel P.F.* at 70.

[77] *Iowa Utils. Bd. v. FCC*, 120 F.3d 573, 813 (8th Cir. 1997).

[78] *Id.*

interconnection…" but cannot be required "to alter *substantially* their networks to provide superior quality interconnection.".[79]

Charter's SPOI proposal does not violate these principles. The record reflects that CenturyTel has already built a high-capacity network in the areas where Charter competes. Therefore Charter's single POI proposal will not require CenturyTel to provide access to an as yet "unbuilt superior network." Moreover, the only modification to CenturyTel's high capacity network that may be necessary would be to establish specific circuits (known as "trunks") over the high-capacity facilities to carry local traffic. The establishment of local trunks over high-capacity facilities is routine and cannot constitute a substantial network alteration of the kind that the Eighth Circuit identified.

To CenturyTel's other allegations, first CenturyTel argues that interconnection via a SPOI would require it to "construct or create network trunking arrangements" solely for the benefit of Charter. *CTel P.F.* at 64. While it may be true that CenturyTel would have to create a trunk over an existing transmission facility to carry local traffic, there is no evidence that doing so would impair the reliability of CenturyTel's network. Charter would be doing the same for CenturyTel on Charter's side of the POI. Gates Direct at 24, lines 1-2; 36, lines 9-11. CenturyTel's witness Watkins acknowledged that establishment of trunks necessary for the exchange of local traffic is a relatively simple process: "[i]t is technically possible to carry multiple kinds of traffic in the same trunk group, yes." Watkins, Tr. 340, lines 22-23. Modification of network trunking arrangements does not constitute *technical* infeasibility.[80]

CenturyTel also asserts that "there is no single point in a LATA within which CenturyTel operates where CenturyTel has facilities linking all of the CenturyTel end offices in the LATA, …"

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[79] *Id.*

[80] Rule 51.5 excludes consideration of facilities modifications: "[t]he fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible."

CTel P.F. at 70. CenturyTel offers no record citation for this claim. Even if true, the claim is irrelevant because Charter's request for an SPOI is limited to the CenturyTel end office in the LATA where ***Charter provides*** competing service, not the entire LATA. The record reflects (through CenturyTel's own evidence) that there is single point in a LATA within which CenturyTel operates where CenturyTel has facilities linking all of the CenturyTel end offices in the LATA, where Charter competes with CenturyTel.[81] Gates Rebuttal at 44-45 (PROPRIETARY version).

CenturyTel conceded that it already has an existing network connecting each of the CenturyTel end offices, and tandem, located in the several exchanges where Charter operates. Thus, CenturyTel already has high-capacity network facilities between each of the locations where Charter operates today.[82] Those facilities have the capacity to handle significant volumes of voice traffic. Thus, CenturyTel's existing network infrastructure is sufficient to exchange traffic with Charter via an SPOI, and there is no need to construct new facilities as CenturyTel alleges.

CenturyTel's assertion that its high-capacity network facilities are "not used for traffic other than exchange access traffic," does not present a significant technical barrier. *CTel P.F.* at 70. Mr. Watkins conceded that the process to establish trunks over CenturyTel's existing high-capacity facilities, to allow for the transmission of local traffic ("grooming"), is not a technically difficult process. Watkins, Tr. 340, lines 12-15.

4. Federal Law, Rather Than Other State Commission Decisions, Is Binding Upon This Commission In Resolving This Issue

CenturyTel also identifies state commission decisions concerning POI obligations. *CTel P.F.* at 71-72. CenturyTel acknowledges that these cases "are not binding," *id*. at 72, but urges the Commission to rely upon them to reject Charter's "narrow construction" of Section 251(c)(2).

Reliance upon these cases is inappropriate for two reasons. First, the Commission must

[81] These are the communities of Wentzville (served by a CenturyTel tandem) and O'Fallon, St. Peters, Bourbon, and Cuba (served by CenturyTel end offices). *See Chtr P.F.* at 71-72.
[82] *Id.*

resolve disputed issues by applying Section 251, and the FCC regulations implementing that statute. The legal standard matches the very statute and FCC decisions Charter identified in support of its position.

Second, these cases rely upon specific facts concerning the lack of CenturyTel "transport" facilities, which is not the case in Missouri. For example, the Michigan decision specifically states that "[a]s CenturyTel states, it does not own transport networks between all of its exchanges." *CTel P.F.* at 72.[83] Further, in the Arkansas decision cited by CenturyTel, that commission also stated "CenturyTel does not own transport networks between all of its exchanges…" *CTel P.F.* at 72.[84] Thus, in these cases the state commissions found that CenturyTel's network facilities were not interconnected, for transport purposes.

That is not the case in Missouri. In the five specific areas where Charter competes with CenturyTel, CenturyTel maintains a high-capacity transport network between its end offices and tandem office. This fact, and the specific nature of the high-capacity facilities that connect each of the five CenturyTel offices, was established by Charter witness Gates, Gates Rebuttal at 47-49 (PROPRIETARY Version), as well as in Charter's Proposed Findings, *Chtr. P.F.* at 71-72 (PROPRIETARY Version).

These facts also demonstrate that Charter is not seeking so-called "superior" interconnection with CenturyTel, nor is Charter seeking the right to interconnect with an as yet "unbuilt" network. To the contrary, Charter simply seeks to affirm its statutory right to interconnection with the existing, established, high-capacity transport network that CenturyTel has already built in the area where Charter competes with CenturyTel. Thus, Charter is seeking interconnection on terms that are equal to, or no greater than, those to which CenturyTel uses itself. For all these reasons, the Commission should adopt Charter's language on Issue 18.

[83] *Michigan Commission Decision II* at 7-8.
[84] *Arkansas Commission Decision* at 4.

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?

CenturyTel's affirmative arguments on this issue cover a broad range of questions, many of which are not before the Commission today. For example, limitations on the use of transit arrangements, or whether indirect interconnection constitutes a "superior" form of interconnection, are simply not before the Commission in this case. Instead, the issue is whether Charter has a statutory right to use indirect interconnection arrangements, and, if so, what (if any) limitations should apply to those arrangements. Charter has demonstrated in its initial brief, *Chtr. P.F.* at 75-76, that the right of indirect interconnection is a statutory right which this Commission has repeatedly affirmed. Thus, Charter has a right to use indirect interconnection arrangements, as a matter of law.

With respect to CenturyTel's arguments concerning the potential conditions that may be placed upon Charter's right to use indirect interconnection arrangements, those arguments are misleading and suggest that the dispute here is broader than the Parties' actual position. First, as to CenturyTel's assertion that the "issue concerns the migration from a transit arrangement" to a form of direct connection, *CTel P.F.* at 75, that is simply not accurate. Charter witness Mr. Gates testified that Charter is proposing the use of transit to establish indirect interconnection in "limited circumstances." Gates Rebuttal at 61, lines 4-5. Further, Mr. Gates' testimony also established that there is no reason that Charter and CenturyTel cannot be interconnected, directly, under the standards of Section 251(c)(2), for the exchange of traffic in one area and, at the same time, interconnect indirectly pursuant to Section 251(a) for the exchange of relatively small amounts of traffic in another area.

This principle was affirmed in *Atlas Telephone v. Oklahoma Corporation Commission*,[85] where the court ruled that the use of direct interconnection in one instance does not preclude the use of indirect interconnection in another instance. The court stated: "…the affirmative duty established

[85] *Atlas Tel. Co., et al. v. Okla. Corp. Comm'n, et al.*, 400 F.3d 1256 (10th Cir. 2005).

in § 251(c) runs solely to the ILEC, and is only triggered on request for direct connection. The physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligation under § 251(a) to interconnect "'directly or *indirectly*.'"[86] Accordingly, CenturyTel's assertion that this issue presents the question of the need to migrate from one arrangement to another is simply not correct.

Further, the record shows that utilizing the DS1 trigger proposed by Charter (and which CenturyTel seems to accept as well), *see CTel P.F.* at 77, will eliminate any concern that this form of traffic exchange will strain the Parties' networks. Gates Rebuttal at 62, lines 5-8. And CenturyTel's concerns regarding the potential that a large number of carriers may use this method is tempered by the fact that there will be less than a full DS1's worth of traffic for each carrier. *Id*. Furthermore, Charter's experience with other carriers demonstrates that the proper standard for the DS-1 trigger, is the standard of 240,000 minutes per month, for three (3) consecutive months. Gates Direct at 54, lines 1-10. Because CenturyTel has not offered any persuasive evidence that this threshold is impractical, or unworkable, the Commission should adopt it here.

Finally, CenturyTel's arguments regarding the need for a PLU factor demonstrate that it already provides this form of indirect interconnection to other service providers (why else would CenturyTel have concerns about not being able to obtain necessary billing information if the problem were not arising with other carriers?). Therefore, under the nondiscrimination principles of Section 251, and the Act, Charter is entitled to the same basic interconnection rights as that which CenturyTel offers to other service providers. Accordingly, for the foregoing reasons the Commission should adopt Charter's proposed language for Issue 19, and rule in Charter's favor on these disputed issues.

[86] *Id*. at 1268.

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?

CenturyTel asserts that this issue centers on the period of time following this arbitration that the Parties should be given to negotiate the rate for the lease of interconnection facilities, and, if no agreement is reached, whether the Parties should utilize the dispute resolution procedures contained in Article 20 of the Agreement. *CTel P.F.* at 80. CenturyTel contends that the negotiation period should be six months, in contrast with Charter's proposal for a 90 day negotiation period. *Id.* CenturyTel claims that the six month period will provide the time necessary for the Parties to exchange proposals and engage in good faith negotiations. *Id.*

CenturyTel asserts that Charter's discussion concerning pricing standards is not presently before the Commission, and that Charter's proposed RUF is inconsistent with the provision agreed to by the Parties that each Party shall be responsible for the facilities on its side of the POI. *Id.* CenturyTel also contends that the Parties have already agreed to true-up rates, and already agreed to dispute resolution procedures that address all possible scenarios that could arise. *Id.* at 81.

Charter believes that CenturyTel's proposed six month period is unreasonable and simply too long. A six month negotiation period merely drags out the resolution process and prevents the Parties from moving forward and solving the dispute. Gates Rebuttal at 68, line 22. Charter's proposed three month period is more than sufficient for the Parties to exchange proposals and to engage in good faith negotiations.

CenturyTel's assertion that Charter's discussion concerning pricing standards is not properly before the Commission is clearly wrong. Pricing standards are central to the negotiation of the rate for lease of interconnection facilities.[87] Moreover, the issue of pricing standards is indeed before the Commission. Charter specifically requested that the Commission address the pricing standard issue

[87] *Southwestern Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n,* 461 F.Supp.2d 1055 (D. Mo. 2006).

in the Parties' Revised Statement of Unresolved Issues. DPL at 79. Charter also has reiterated this request in its witness' testimony. Gates Rebuttal at 66, lines 18-25; 67, lines 1-4.

Finally, CenturyTel's proposed language is vague and (contrary to CenturyTel's claim) does not reflect any agreement that the Parties will "true-up" rates. DPL at 77-78. CenturyTel's mere assertion that the Parties have already agreed to true up rates is insufficient. *CTel P.F.* at 81. An explicitly stated true up clause is necessary to ensure that payments made prior to the establishment of the final rate are indeed trued up back to the effective date of the Agreement.

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?

CenturyTel asserts that there are two aspects to this issue: 1) the terms and conditions under which one-way trunks may be deployed; and 2) the location of the POI and the responsibilities of each of the Parties on their respective sides regardless of whether one-way trunks or two-way trunks are used. *CTel P.F.* at 83. According to CenturyTel, two-way trunks are likely to be more efficient for both Parties since they exchange traffic with each other, and use of one-way trunks should be limited to those circumstances where "technical considerations require the Parties to properly identify, measure and bill the traffic." *Id.* Nevertheless, CenturyTel claims that its proposed language allows for the deployment of one-way trunks. *Id.*

CenturyTel further contends that Section 51.305(f) is inapplicable in this instance because it was intended to protect new entrants by requiring the provision of two-way trunking. According to CenturyTel, the rule does not apply because the Parties "agree to use two-way trunking and there are no cost imposition issues…" *Id.* Moreover, CenturyTel argues that Charter's proposed language is an attempt to shift costs onto CenturyTel for facilities on Charter's side of the POI. *Id.* at 84

Contrary to CenturyTel's assertion, the language does not provide for deployment of one-way trunks "to distant locations beyond points that CenturyTel transports local traffic today…" *Id.* at 85. The record already reflects that Charter currently operates in five separate communities within

the CenturyTel service area. *See* Issue 18. Moreover, there is nothing in the record that supports CenturyTel's speculative statement that Charter's switch may be located at some "distant location." The Commission cannot deny Charter's statutory right to establish one-way trunks based upon speculation by one of CenturyTel's witnesses.

Section 51.305(f) clearly obligates the provision of two-way trunks "upon request," and thus, by implication provides for the competitive LEC to elect to use one-way trunks. As Charter discussed in its brief, deployment of one-way trunks under certain circumstances may be more efficient, and CenturyTel cannot deny that right. *Chtr. P.F.* at 81. Even though Charter intends to use two-way trunking under most circumstances, there is no specific agreement between the Parties to do so.

Granting Charter the right to use one-way trunks, at its discretion, would not constitute an effort to improperly shift costs, or to create a "superior" form of interconnection. Instead, permitting the use of one-way trunks, in certain limited situations were economically feasible, is consistent with federal law and a competitor's statutory right to interconnect with an incumbent LEC's network at any technically feasible point, using either one-way or two-way trunks.

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

CenturyTel claims that the Parties should use the "best available information" to establish direct end office trunks when "actual volumes and reasonable projections of traffic…" dictate that such trunks should be used. *CTel P.F.* at 87. CenturyTel claims that this standard would avoid overburdening trunk groups and other network facilities and ensure quality service to end users from both companies. *Id.* CenturyTel further contends that its proposed standard is "dynamic and reflective" of the level of traffic exchanged between the Parties. *Id.*

With respect to CenturyTel's latter contentions, that Charter's proposal could lead to the "overburdening" of trunk groups and network degradation issues, this is yet another problem in

search of a solution. There is no evidence in the record that without a direct end office trunk ("DEOT") there is any quantifiable risk of network harm.

CenturyTel's assertion that Charter "should want to ensure that the necessary facilities are in place to anticipate the traffic increase and to ensure quality service" is a poorly veiled attempt by CenturyTel to place Charter in the position of potentially having to deploy additional equipment that may never be used. Charter witness Mr. Gates testified that the problem with CenturyTel's language is that, by relying upon the concept of "projected" or forecasted traffic, it could require the Parties to establish these direct trunks even in those situations where traffic does not actually rise to the agreed-upon DS1 threshold. Gates Rebuttal at 76, lines 17-23.

Agreed upon language in the Agreement reflects that, even though forecasts are made in good faith, they are not binding. *See* Agreement, Art. III, § 11. Accordingly, the possibility remains that forecasted traffic volumes may not, in fact, reach the threshold levels requiring a direct trunk. That, in turn, would mean that the Parties would have to spend the time and resources deploying these facilities even where such facilities are technically unnecessary. There is no reason for the Commission to force the Parties into a situation that could lead to the deployment of inefficient trunking arrangements. Furthermore, the record reflects that reliance upon forecasts could in fact lead to additional disputes as to which party's forecasts are accurate, and should be used to determine whether the threshold has been met. Gates Rebuttal at 77, lines 7-12. 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, which would increase Charter's costs unnecessarily. For these reasons, the Commission should adopt Charter's proposed language, which requires the establishment of these facilities only where actual traffic volumes exist.

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?

CenturyTel argues that this issue presents two sub-issues for the Commission to resolve. The first is whether Charter, where it is an N-1 carrier, should be required to perform data queries. The second issue, according to CenturyTel, is whether Charter should pay CenturyTel for completing calls to third parties when calls are routed to a CenturyTel end office. CenturyTel claims that the crux of the dispute involves Charter calls delivered to a CenturyTel end office or tandem when Charter has not performed the N-1 query. *CTel P.F.* at 89. According to CenturyTel, where Charter is the N-1 carrier, Charter must perform the N-1 query. *Id*. With regard to routing unqueried calls, CenturyTel contends that rate elements should apply, and that the charges should not be capped at the $0.005 rate suggested by Charter. *Id.* at 90. CenturyTel further asserts that TELRIC pricing is inappropriate under the circumstances. *Id.*

CenturyTel's statements of the issues are overbroad, and do not reflect Charter's position (as stated in the testimony of its witnesses). Notably, Charter does *not* dispute the fact that it has an obligation to perform the N-1 query where it is the N-1 carrier. Charter has never disputed that obligation, and there is no disputed contract language (or testimony) that supports CenturyTel's contention that this obligation is in dispute. It simply is not, and is therefore not an issue that the Commission must decide.

The scope of the second disputed issue is quite narrow: whether Charter is required to compensate CenturyTel for routing unqueried calls. The answer, as Charter witness Mr. Gates has explained is that Charter has already agreed to pay CenturyTel for routing unqueried calls. Gates Rebuttal at 79, lines 21-26. However, when Charter pays CenturyTel for routing these unqueried calls, CenturyTel must accept the specific responsibility to route such calls to the called party's service provider. Any other conclusion would allow CenturyTel to collect payment for calls that it may decide not to route at some point in the future. Accordingly, Charter's proposal to accept the obligation to pay for such routing, on the condition that CenturyTel affirmatively accept the obligation to route such calls, is reasonable and practical.

Moreover, because the routing functionality is, by CenturyTel's own admission, a transiting function, it must be subject to the TELRIC pricing standard applicable to such standards. Although the specific rate is not in dispute here, it is important for the Commission to affirm that interconnection functions provided by incumbent LECs, like CenturyTel (pursuant to their obligations under Section 251), must be provided at a TELRIC-based rate. The Commission can easily affirm this principle in ruling on this issue, and should take the opportunity to do so here in order to avoid any questions in the future.

For these reasons the Commission should adopt Charter's proposed language and rule that on the rare occasions when Charter does not perform an N-1 query, then CenturyTel will perform the query and route the call to the appropriate location. In so doing, Charter will be obligated to compensate CenturyTel for such functions, at a rate that is consistent with TELRIC. For these purposes, the rate to be used is the rate proposed by CenturyTel.

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?

CenturyTel argues that its proposed language on this issue "essentially mirror[s]" some of the language already contained in its Missouri General and Local Exchange Tariff and its Wholesale 911 tariff. *CTL P.F.* at 110-111. Further, CenturyTel argues that liability limitations for 911 are necessary to "ensure that services are provided at reasonable rates" and to address any "unknown ramifications" of a CenturyTel 911 error. *Id.* CenturyTel also incorporates arguments presented in Issue 15(c), concerning limits on damage awards, and cites as instructive several cases from 1917 and 1924, involving Western Union Telegraph company. *Id.*

As to the first argument, the existence of language in a CenturyTel end user tariff does not provide a basis to affirm the use of such language in a bilateral contract like that being arbitrated in this proceeding. As previously noted, the relative positions of co-carriers is different from the

carrier-customer relationship that is addressed in CenturyTel end user tariffs.[88] Therefore, language in these tariffs is not binding, or instructive, in this proceeding.

CenturyTel's reliance upon the Western Union Telegraph cases from nearly one hundred years ago is similarly misplaced. Those decisions do not address the specific issues in dispute here, including the question of whether liability (and damages) should be capped when one Party acts in an intentional, willful, or wanton and reckless manner. That specific question was addressed by this Commission in the 2005 SBC Arbitration, TO-2005-0336, where this Commission affirmed that "it is contrary to public policy to cap liability for intentional, willful, or grossly negligent action."[89] That decision is binding precedent and is instructive, contrary to the cases cited by CenturyTel. Accordingly, CenturyTel should not be allowed to limit its liability where its actions constitute negligence, wanton, reckless or willful misconduct.

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?

CenturyTel argues that its proposed language on this issue is reasonable because it is CenturyTel's responsibility to manage the Database Management System ("DBMS") and to relay subscriber information to the various counties including the subscriber information provided to it by Charter. *CTel. P.F* at 113. CenturyTel contends that it could be held liable if Charter transmits to CenturyTel inaccurate information concerning Charter's subscribers. *Id*. Finally, CenturyTel argues that because Charter has not identified any situation in which it may require indemnification, that the indemnity provisions should therefore not be reciprocal.

[88] Although CenturyTel points to its Wholesale 911 tariff as including similar language, it offers no citations to that tariff. There is no reason to give credence to CenturyTel's unsupported assertions regarding language that may, or may not be, included in a tariff that is not at issue in this proceeding, nor are the tariff provisions applicable to the parties' arbitrated Agreement.

[89] *SBC Missouri Arbitration*, Commission Order at 56 (affirming Arbitrator's Final Report, Sec. 1(a) at p. 71). *See also, Alack v. Vic Tanny Intern. of Missouri, Inc***.** 923 S.W.2d 330 Mo.,1996 ("Additionally, there is no question that one may never exonerate oneself from future liability for intentional torts or for gross negligence, or for activities involving the public interest.").

In response to the last assertion, in its Proposed Order, Charter identified circumstances where indemnity provisions would be appropriate. Specifically, at page 91 Charter explained that Charter provides 911 service to its own end users, and performs certain other functions associated with the provision of 911 service in Missouri. *Chtr. P.F.* at 91. Moreover, Charter's various obligations with respect to the delivery of 911 service are clearly set forth in the draft Agreement. Specifically, Charter must: "transport 911 calls from its switch to the applicable CenturyTel Selective Router;" "forward the ANI information of the party calling 911;" "provide sufficient facilities and trunks at each CenturyTel 911 Selective Router;" and, "promptly test all 911 trunks and facilities between **CLEC's network and the CenturyTel 911 Selective Router(s)." Agreement, Art. VII, §§ 4.2, 4.3. Accordingly, these obligations reflect Charter's 911 actions, and provide a basis for establishing reciprocal indemnity provisions.

Moreover, in the 2005 SBC arbitration proceeding this Commission ruled "that liability and indemnity provision should be reciprocal and symmetrical."[90] Accordingly, the facts and the law support Charter's proposal to make these 911 indemnity provisions mutual.

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?

CenturyTel argues that its proposed language on this issue is appropriate because CenturyTel is responsible for managing the DMBS and is potentially liable to customers for the 911 services that it provides, and that Missouri law does not provide immunity from liability for E911 services. *CTel. P.F.* at 114. But CenturyTel's primary objection to Charter's proposal is simply that the liability limitations of this provision would apply reciprocally, to both CenturyTel and Charter, rather than simply for CenturyTel's benefit. *Id.* at 115.

Charter has demonstrated that it has obligations under both state law and the Agreement (Art. VII, § 4.2 and 4.3) to engage in certain activities related to the provision of 911 services. Further,

[90] *SBC Missouri Arbitration*, Arbitrator's Final Report at Sec. 1(a), p. 71.

Charter also pointed out that this Commission has previously ruled that liability and indemnity provisions in interconnection agreements between incumbent LECs and competitive LECs should be "reciprocal and symmetrical."[91] No exception was made for liability and indemnity provisions related to the provision of 911 services. Therefore, precedent requires that these terms be made reciprocal and symmetrical. Moreover, CenturyTel's suggestion that this provision only applies to the release of information "to an *emergency response agency responding to a 911 call*" CTel. PF. at 115 (emphasis in original), is not correct. The language at issue here, § 9.7 of Art. VII, limits liability for "the good faith release of information not in the public record." Agreement, Art. VII, § 9.4. Thus, this provision limits liability for any release of information that is not public, and is not limited the release of information to emergency responders, as CenturyTel contends. Accordingly, reciprocal application of this liability limitation language is appropriate.

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?

On this issue, CenturyTel argues in its Proposed Findings that Charter's proposed language creates ambiguity, even more so than using the undefined term "nonregulated telephone service," because it only details a limited portion of Charter's obligations under the Agreement. *CTel P.F.* at 116. In support of this assertion, CenturyTel claims that "nonregulated telephone services" includes all services that are not regulated, so a precise definition is unnecessary.

CenturyTel's argument strains reason. Although CenturyTel freely admits that it has not defined the term "nonregulated telephone service," it nevertheless urges this Commission to accept the notion that adopting language that includes undefined, and vague, terms is somehow more likely to avoid ambiguity than adopting language with clearly defined terms. As Charter has explained, the purpose of entering into an interconnection agreement is to clearly establish, and memorialize, the parties' rights and obligations pursuant to the terms therein. CenturyTel's proposed language is

[91] *Id.*

devoid of this certainty. Such a result would likely lead to future disputes between the Parties and should be avoided.

CenturyTel also raises the argument that Charter's proposed language does not address certain situations such as when Charter sells service to nomadic VoIP providers, shared tenant service providers or when certain EAS traffic does not route correctly to the PSAP. *Id.* This argument also fails. Charter's proposed language clearly states that Charter has the obligation to answer and transmit to CenturyTel all E911 telephone calls that originate from Charter's end user customers; that is, to fulfill its existing obligations under applicable law. Because Charter accepts this obligation to properly route 911 calls, the notion that what Charter would not process all inbound 911 calls, no matter their original protocol, is not based on any evidence. CenturyTel is simply speculating. Further, there is no evidence in the record that Charter sells, or intends to sell, its services to nomadic VoIP providers or shared tenant providers.

The problem with CenturyTel's proposed language, besides the fact that it is vague, is that it attempts to improperly foist its responsibilities as the 911 selective router provider onto Charter. CenturyTel's language states, in cases of unregulated service: "It is the obligation of [Charter] to answer, respond to, transfer, terminate, dispatch, or arrange to dispatch emergency services or otherwise handle all E911 telephone calls that originate from telephones within [Charter's] service area." DPL at 117. Charter's proposal appropriately only requires Charter to transmit such calls to the selective router.[92] Charter is not responsible for answering, responding to, terminating, dispatching or arranging to dispatch emergency services or otherwise handling E911 calls unless the End User calls Charter's operator services, instead of "911." These are tasks that are provided either by CenturyTel or the appropriate PSAP.

V. ANCILLARY ISSUES

[92] Charter's proposed language would be more clear if it were to substitute "switch" instead of "answer" since when Charter's End Users call "911," the call is switched by Charter and transmitted to the appropriate CenturyTel selective router.

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?

The question presented here is whether the Commission can, consistent, with federal law approve a charge that CenturyTel attempts to impose upon Charter for every telephone number porting request, or order, that is submitted by Charter to CenturyTel. Charter asserts, and has demonstrated in its Proposed Order, that these charges are expressly prohibited under federal law, and that shifting these costs from CenturyTel to Charter presents a barrier to competition.

CenturyTel raises several arguments in defense of its proposed charges. First, CenturyTel asserts that the costs at issue are separate and apart from the actual porting process. *CTel P.F.* at 93. Second, CenturyTel asserts that the imposition of a number porting administrative service charge is a "routine term and condition for interconnection between CenturyTel and CLECs." *Id*. Third, in the only federal law cited in support of its charges, CenturyTel claims that a 2004 FCC "Clarification Order" held that these costs cannot be recovered through end user charges (and, by implication, they may be recovered through carrier charges). *Id*. at 94. Fourth, and finally, CenturyTel points to other state commission decisions which it suggests are relevant, or instructive, to the resolution of this issue. *Id*. at 95.

As to CenturyTel's first argument, that the costs at issue here are "separate and apart" from the costs arising from porting a telephone number, the record evidence does not support this assertion. To this point, the record reflects that Charter does not dispute CenturyTel likely incurs some costs in responding to these porting orders from Charter. But the question is not whether CenturyTel incurs any costs, but instead whether those costs would not arise *but for* the submission of the porting orders from Charter. Evidence in the record shows that these cost would not arise but

for the submission of porting orders from Charter, and CenturyTel's ongoing obligations to port telephone numbers under federal law. Watkins, Tr. 364, lines 4-9.

Further, CenturyTel acknowledges that these charges are assessed upon Charter whenever a subscriber "wins" a subscriber away from CenturyTel, and that subscriber requests that his/her telephone number be ported from CenturyTel to Charter. *Id.* at 362, lines 19-20 ("If each time a number is ported there is a local service request [order] that must be processed, then yes, each time a local service processing charge would apply."). Thus, these charges arise *only because* the Parties must engage in the number porting process in order to satisfy the end user customer's request. *Id.* at 362, lines 19-20.

Under this standard, it is clear that these costs are properly characterized as "ongoing costs" of transferring telephone numbers. Indeed, CenturyTel itself cites one of the key provisions of the FCC's *Third Report and Order*, at paragraph 72, where the FCC described the costs covered by the FCC's cost recovery rule as those costs that carriers incur "in the provision of number portability services" including the "porting of telephone numbers from one carrier to another."[93] A review of the history of the FCC's orders addressing the cost recovery principles of number porting reveal that the ongoing costs, including the administrative or "service" delivery costs, were included in those costs the FCC classified as the costs of providing long term number porting.

First, CenturyTel does not deny that the actions it takes in response to a port request from Charter are necessary to facilitate, and fulfill, the port request itself. Watkins, Tr. 365, lines 5-7 (Watkins acknowledging that it is not possible to port a telephone number without submitting a local service request order). Thus, in responding to a porting order from Charter, CenturyTel must initiate certain actions, and incur certain costs, to ensure that the request is completed. Furthermore, there is no dispute that these costs are properly characterized as "ongoing" costs, in that CenturyTel incurs

[93] *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 at ¶ 72 (1998) ("*Third Report and Order*").

these costs on a recurring basis, or each time that Charter submits a port request. Watkins, Tr. 362, lines 19-20.

Second, the record demonstrates that CenturyTel's proposed charges arise each time that Charter submits a porting order to CenturyTel,[94] and that these charges would be assessed whenever CenturyTel responds to a number port order transmitted by Charter. Indeed, CenturyTel witness Mr. Watkins testified that "each time a number is ported there is a local service request [order] that must be processed" and that "a charge would apply." Watkins, Tr. 363, lines 5-10; 362, lines 16-21. *See also* 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.").

These types of ongoing costs (responding to, and transmitting, port orders) were clearly contemplated by the FCC when they described carrier-specific costs which may not be recovered via interconnection charges on other carriers. In describing those ongoing costs that are directly related to number porting the FCC explained that the "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***."[95] Declining to define such costs as one-time costs, the FCC acknowledged that the costs would be "***ongoing*** costs" associated with providing number porting.[96]

In explaining its meaning with respect to the scope of the phrase "porting of telephone numbers from one carrier to another," the FCC explained that this term refers to certain porting systems and to the process of "transmitting ***porting orders between carriers***."[97] Thus, the FCC has already determined that the costs of transmitting "porting orders" between carriers is clearly the kind of cost that is directly related to providing number portability, and therefore not recoverable against

[94] 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."
[95] *Third Report and Order* at ¶ 72 (emphasis added).
[96] *Id*. at ¶ 38 (emphasis added).
[97] *Id.* at ¶ 14 (emphasis added).

other carriers. For these reasons, the FCC's cost recovery rule, 47 C.F.R. 52.33, and the FCC orders implementing this regulation, apply to the costs and charges at issue here. Under those precedents, including the FCC's pronouncements in the 2002 Cost Reconsideration Order that "incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier 'customers,'" CenturyTel is prohibited from recovering these costs through interconnection charges to co-carriers like Charter. [98]

Finally, CenturyTel's asserted distinction between administrative or service delivery costs and those costs associated with the process of porting a telephone number has specifically been rejected by the FCC. In an early number portability cost recovery order, the FCC ruled that certain "service delivery costs" identified by Qwest Corporation (then US West Communications) were included in those categories of costs that must be recovered through end user charges, rather than through charges upon co-carriers.[99] Accordingly, because the distinction that CenturyTel relies upon so heavily here is not one that the FCC has recognized, this Commission should not rely upon it in this case.

CenturyTel's second defense of these charges is simply that the imposition of a number porting administrative service charge is a "routine term and condition for interconnection between CenturyTel and CLECs." *CTel P.F.* at 93. This assertion, unsupported by record evidence, is nonetheless irrelevant to the resolution of this issue. As previously noted, the Commission *must* resolve this issue in a manner that is consistent with Section 251, and FCC regulations implementing the statute. Section 251(e)(2) requires that the costs of number portability be implemented in a "competitively neutral" manner, which is one reason why the FCC has prohibited charges against co-carriers, like Charter. Thus, resolution of this issue must be consistent with that statute (and the

[98] *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).

[99] *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).

competitive neutrality principle), and the FCC orders implementing the statute (which Charter identified in its Proposed Order).[100]

As to federal law, CenturyTel suggests that the FCC has already addressed the very issue in dispute here. Specifically, CenturyTel cites to what it calls the "FCC's LNP Clarification Order," *CTel P.F.* at 94, for support that these service order charges may be assessed against co-carriers like Charter. But these claims miss the mark, and ask this Commission to rely upon an FCC decision which, by its own words, specifically did ***not*** rule on the issue in dispute here.

When questioned about this assertion at the hearing, CenturyTel witness Mr. Watkins conceded that the FCC's 2004 LNP Clarification Order did not address the same question at issue here. During cross examination Mr. Watkins was asked to respond to footnote 49 of that order. In response to a question from Charter counsel concerning the scope of the LNP Clarification Order, Mr. Watkins then read the FCC's own discussion of that question (as found in footnote 49 of the Order) into the record: "Because this order [LNP Clarification Order] only concerns end user charges, this is not the appropriate proceeding to evaluate charges assessed against other carriers." Watkins, Tr. 370, lines 13-15. This language, taken from footnote 49 of the LNP Clarification Order, demonstrates that CenturyTel's reliance on the order is misplaced. The order only addressed end

[100] Furthermore, if the existence of such charges were a relevant consideration Charter would present counter evidence to demonstrate these charges are not routine terms in most incumbent LEC interconnection agreements. Indeed, although Charter adopted an interconnection agreement in Wisconsin which included a number porting charge, as Charter's witness Ms. Giaminetti noted, that agreement only covered three CenturyTel companies operating in Wisconsin. Giaminetti, Tr. 239, lines 14-20. The other interconnection agreement between Charter and CenturyTel in Wisconsin, which covers most of the CenturyTel companies operating in Wisconsin, does <u>not</u> include a provision authorizing number porting charges. Notably, the agreement without any charges was a negotiated agreement, rather than an adopted agreement. *See, e.g.*, Miller Direct, Exhibit GEM-1 at 2 (describing Wisconsin interconnection agreement between Charter and CenturyTel rural companies which does not include number porting charges). Furthermore, were the Commission to consider the terms of other interconnection agreements, in evaluating CenturyTel's claim that number porting charges are a "routine term and condition" then it would find no such provision in the *current Missouri* interconnection agreement between the Parties. Indeed, this Commission recently considered that very question, and unequivocally found that: "[t]he Interconnection Agreement does not provide for charges for porting numbers."[100] Thus, CenturyTel's claim that these are "routine terms" is simply not accurate. Notwithstanding the inaccuracy of CenturyTel's claims, this issue must be resolved under federal law rather than unsupported and inaccurate assertions by CenturyTel.

user charges; and the FCC explicitly declined to consider the propriety of "charges assessed against other carriers,"[101] like the charges at issue in this case.

Nevertheless, even if the Commission accepted CenturyTel's reliance upon this order, it would not change the fact that the FCC had, only two years prior to releasing the LNP Clarification Order, very clearly stated in its 2002 Cost Reconsideration Order that "interconnection charges assessed against other carriers" are strictly *forbidden*.[102] Thus, whatever the meaning of the 2004 LNP Clarification Order, it clearly does not reverse, or otherwise modify, the Commission's statement in its 2002 Cost Reconsideration Order. Indeed, CenturyTel does not make such a claim.

Interestingly, CenturyTel does not even attempt to address the 2002 Cost Reconsideration Order at all – it simply ignores the FCC's express statements that these charges are unlawful. As Charter's initial brief demonstrates, *Chtr. P.F.* at 94-95, the costs at issue in this case are created by end users who desire to port their telephone numbers from CenturyTel's network to Charter's network (to take advantage of the competitive services offered by Charter). That is precisely why the FCC ordered carriers to recover their costs through charges on the end users, rather than other carriers. That, in turn, explains why the FCC affirmatively prohibited charges on other carriers, when it ruled that: incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier "customers."[103]

CenturyTel's fourth, and final, argument in defense of its charges is that other state commissions have ruled that number porting charges were not precluded by the Act. None of those decisions address the application of the FCC's decision in the 2002 Cost Reconsideration Order. Moreover, it appears that each of those states rejected the specific rates offered by CenturyTel after

[101] *In the Matter of Tel. Number Portability, Bell South Corp. Petition for Declaratory Ruling*, Order, 19 FCC Rcd 6800 at n. 49 (2004).
[102] *2002 Number Portability Cost Reconsideration Order* at ¶ 62.
[103] *2002 Reconsideration Order* at ¶ 62.

finding that CenturyTel's rates did not have sufficient cost justification. Thus, those decisions do not appear to support CenturyTel's position here.

Furthermore, several state commissions have recently taken a skeptical view of other carriers' attempts to impose number porting, or service transfer, charges on competitive carriers entering the markets. For example, recently a Wisconsin Public Service Commission ruled that a service order charge for number porting (proposed by another incumbent LEC) is an impermissible interconnection charge which is expressly prohibited by paragraph 62 of the 2002 Cost Reconsideration Order.[104]

In addition, the Indiana Utility Regulatory Commission recently rejected the imposition of LNP service order charges in a recent arbitration proceeding.[105] In that case, the Indiana commission reasoned that imposing service charges served as an impediment to number porting, and was likely to impede competition.[106]

Further, state commissions in New York, Minnesota, and Massachusetts have rejected a CLEC's attempt to impose upon the ILEC a "service transfer charge" whenever a customer disconnects local exchange service from the CLEC and switches to the requesting ILEC.[107] The charges at issue in those cases are analogous to CenturyTel's service order charges for number porting. Generally, the state commissions in New York, Minnesota, and Massachusetts concluded that service transfer charges are not permitted because the charges: (1) served as an unfair impediment to competition; (2) were not supported by a cost study; and (3) were not being assessed

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[104] *Petition for Arbitration of Rates, Terms and Conditions Between Charter Fiberlink, LLC and Wood County Telephone Company d/b/a Solarus*, Arbitration Award, Docket 5-MA-147 at 17 (rel. Wis. PSC Oct. 23, 2008).
[105] *In re Sprint Communications Company, L.P.*, Case No. 43052-INT-01, 2006 WL 2663730, *40 (Ind. U.R.C. 2006).
[106] *Id.*
[107] *In re Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts Concerning Customer Transfer Charges Imposed by Broadview Networks, Inc.*, D.T.E. 05-4 (Mass. DTE 2006); *In re Complaint and Petition of Verizon New York Inc. Concerning Service Transfer Charges Imposed by Broadview Networks, Inc.*, Case 05-C-0066, Order Granting, In Part, Complaint and Petition at 7 (N.Y. PSC 2005); *In the Matter of McLeodUSA's Tariff Filing Introducing Wholesale Order Processing Charges that Apply When McLeodUSA's Customers Shift to Other Telecommunications Carriers*, M-04-395 (Minn. PUC 2004).

by the other LEC, who was performing the same service-transfer related tasks at no charge to the CLEC.

Thus, the clear weight of authority in other state commissions is contra to these types of charges, precisely because they contradict federal law and undermine competition. Nonetheless, as previously noted, this issue must be resolved by this Commission through the application of federal law, not the decisions of other state commissions. And, as has been demonstrated in Charter's Proposed Order, and herein, federal law clearly prohibits the type of interconnection charges that CenturyTel proposes here. For the foregoing reasons the Commission should adopt Charter's proposed language for issues 27 and 40.

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?

CenturyTel offers three basic arguments in support of its proposed language for monitoring and auditing Charter's use of its OSS system. First, CenturyTel argues that its proposed language is not too open-ended, as Charter suggests, because Sections 8.3.2. and 8.3.3 adequately address the permissible scope of the audit. *CTel P.F.* at 97. Second, CenturyTel asserts that there are multiple assurances in the Agreement that any information obtained in connection with CenturyTel's monitoring or auditing of its OSS system will be for proper purposes. *Id.* at 98. And, finally, CenturyTel asserts that it would be unreasonable and unnecessary to condition CenturyTel's monitoring and auditing of Charter's use of its OSS system upon Charter's prior consent. *Id.* at 99. Each of these claims is unavailing.

CenturyTel's first assertion, that its proposed language should be adopted because Section 8.3.2. and 8.3.3 adequately establish the scope of the audit, fails to account for the fact that this language is completely silent on what it means to monitor or audit Charter's use of CenturyTel's OSS system. In fact, these provisions simply establish that: CenturyTel has a right to monitor

Charter's use of the OSS; CenturyTel has the right to monitor or audit electronically; and that any information collected by CenturyTel shall be treated as confidential information of Charter pursuant to Article III, § 14.0 (Confidential Information). As Ms. Lewis explained, "[t]his language does not answer the question of what information is being monitored; the frequency of the monitoring; nor does it indicate whether certain Charter-specific data, files, statistics, or network addresses are being monitored." Lewis Rebuttal at 2, lines 23-26. CenturyTel should not have unfettered, and undefined, rights to audit and monitor Charter's use of the OSS. Because CenturyTel has refused to define what these terms mean, it would be unreasonable for Charter to be required to adhere to CenturyTel's proposed language unconditionally.

CenturyTel also asserts there is no reason for CenturyTel to provide further details to Charter concerning when and how CenturyTel plans to conduct its monitoring of use of the OSS system because the Agreement contains language that adequately protects any information obtained by CenturyTel from misuse. *CTel P.F.* at 97. This argument ignores the fact that CenturyTel's proposed language would give it unfettered, and undefined, rights to monitor Charter's use of the OSS; and that the language in the Agreement does not expressly, or explicitly, address Charter's concerns that CenturyTel may use its unrestricted rights to monitor and audit Charter's use for its own competitive advantage. Lewis Direct at 7, lines 24-27; Lewis, Tr. 202, lines 13-15; 215, lines 1-7. The language that CenturyTel identifies in the Agreement does not in any way narrow the scope of the numerous ways that CenturyTel's proposed language could be applied if left undefined. As such, CenturyTel should not be permitted to have such unrestricted rights to monitor Charter's use of the OSS.

Further, CenturyTel's assertion that the Agreement contains adequate safeguards to ensure that CenturyTel does not improperly use information obtained from Charter through its OSS monitoring activities is flawed. Specifically, CenturyTel relies upon Article X, § 8.3.3, which requires that information obtained by CenturyTel be treated as confidential information pursuant to

Article III, § 14.0; and CenturyTel's "Company Policy" regarding the use of a competitor's proprietary information. With respect to Article X, § 8.3.3, this provision incorporates the obligations set forth in Article III, § 14.0 which provides a general overview of how confidential information should be treated. Because the language in Section 14.0 is general in nature and is not tailored to circumstances surrounding CenturyTel's right to monitor or audit OSS use, it does not place explicit restrictions on who may access the confidential information pertaining to OSS audits. Simply put, CenturyTel could keep the data "confidential" within CenturyTel, but still share it with inappropriate persons (such as marketing retention personnel). Lewis, Tr. 214, lines 5-10. In contrast, the OSS audit language in the interconnection agreement between AT&T and Charter in Missouri (cited for illustrative purposes by Ms. Lewis) expressly states that "SBC-13STATE agrees that it shall only use employees or outside parties to conduct the audit who do not have marketing, strategic analysis, competitive assessment or similar responsibilities within SBC-13STATE." Lewis Rebuttal at 6, lines 13-17. The Agreement clearly lacks these explicit restrictions.

Moreover, CenturyTel suggests that Charter should take comfort in knowing that CenturyTel's Company Policy ensures that CenturyTel will not misuse what it deems to be "proprietary information." Aside from the fact that the assurances set forth in the CenturyTel Company Policy may not necessarily apply because certain OSS information obtained by CenturyTel may not fall squarely within the meaning of the term "proprietary information," even more problematic is the fact that CenturyTel's Company Policy is a unilaterally created document that is not binding upon the parties and it could change at any given moment, in CenturyTel's sole discretion. As such, CenturyTel's Company Policy offers little to dispel Charter's concerns with entering into an Agreement that gives CenturyTel unfettered, and undefined, rights to audit and monitor Charter's use of the OSS.

Finally, CenturyTel's argument that Charter's purposed language is unreasonable and unnecessary is wrong. Contrary to CenturyTel's claims that Charter seeks to exercise "unfettered

authority" to deny CenturyTel's rights to monitor and audit use of OSS, Charter's proposed language merely requires that CenturyTel obtain Charter's consent before it initiates any actions to monitor or audit Charter's use of the OSS. DPL at 96-98. Charter's consent would be granted or withheld on a reasonable basis – a typical industry standard – and there is no evidence in the record to suggest Charter would have an unbridled right to deny CenturyTel's rights. And Ms. Lewis explained the intent behind this language is not to guarantee that CenturyTel will never abuse its rights to monitor or audit OSS use, but to at least make Charter aware of those instances when CenturyTel is taking such actions. Lewis Direct at 8, lines 21-23. Ms. Lewis also explained that in lieu of adopting Charter's proposed language, CenturyTel could simply provide a more detailed explanation of what actions it takes to monitor and audit another provider's use of the CenturyTel OSS. *Id.* at 8, lines 23-27. Thus, it is clear that Charter's primary interest is to have clarity on what "audit" and "monitor" mean. Absent that reasonable request, the Commission should adopt Charter's language for Issue 28.

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?

CenturyTel raises several arguments to support its position that the Commission should adopt its proposed language concerning costs related to new, upgraded or enhanced OSS. First, it argues its proposed language is narrow in scope and only preserves CenturyTel's right to recover its costs with respect to upgrades and enhancements to its OSS during the term of the Agreement. *CTel P.F.* at 99. Second, CenturyTel contends its proposed language sets forth a process that would sufficiently protect Charter's interests because the process would require Commission approval to establish new rates that Charter would pay for new, upgraded or enhanced OSS. *Id.* Finally, CenturyTel claims its proposed language does not allow unilateral pricing modification. *Id.* at 100. Each of these claims is unavailing, and should be rejected by the Commission.

CenturyTel's first assertion that its proposal is "limited" to addressing only costs related to OSS ignores the fact that the proposal is ambiguous and open-ended, except to give CenturyTel sole

discretion to impose charges upon Charter for performing functions not expressly set forth in the Agreement. Such a result is not "narrow." As Mr. Webber testified, CenturyTel's language would have Charter agree, in advance, that any costs related to new, upgraded or enhanced OSS would be recovered regardless of the circumstances surrounding such changes and regardless of the costs. Webber Rebuttal at 32, lines 27-28; 33, line 1. The record is devoid of any evidence that explains with any level of specificity why CenturyTel would incur these costs; whether Charter would benefit from the costs having been incurred; the extent to which other costs would be offset; how CenturyTel would propose to determine such costs; under what standard its costs would be reviewed; and whether the costs would be recovered only from Charter. *Id.* at 33, lines 1-5. CenturyTel's argument that its proposed Commission approval process for any pricing modification still shifts the burden to Charter to rebut the reasonableness of OSS investment.

Finally, CenturyTel's argument that its proposed language would not permit unilateral changes is not persuasive. CenturyTel's proposed language fails to clearly establish what CenturyTel costs could be recovered under its proposal. As Mr. Webber explained, CenturyTel's proposal is "utterly ambiguous," and could be interpreted to give CenturyTel the discretion to impose any number of charges upon Charter that are not otherwise identified, or agreed-upon in the Agreement. Webber Rebuttal at 33, line 7. In other words, language that would effectively require Charter to accept charges that it does not otherwise agree to would be tantamount to a unilateral change in the Agreement. For that reason, CenturyTel's proposal is inappropriate and unreasonable.

In contrast, Charter's proposed language provides that CenturyTel would use existing, agreed-upon processes to propose an amendment that expressly identifies new, upgraded or enhanced OSS; the basis for such upgrades or enhancements; the costs it seeks to recover; and the rates and/or rate elements that it intends to use to recover such costs. Thus, the Commission should adopt Charter's proposed language on Issue 29.

C. Directory Issues

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

CenturyTel presents several arguments in support of its proposal on this issue. First, CenturyTel argues that submitting it to potentially unlimited liability on the part of its (or its publisher's) mere negligence is unreasonable. *CTel P.F.* at 101. Second, CenturyTel also objects to assuming an obligation to indemnify Charter "if CenturyTel's or its publisher's error or omission caused an error in publication of an end user customer's data or listings." *Id*. Third, CenturyTel asserts that Charter's actions in submitting directory listing information should not be the basis for CenturyTel, or its publisher, to assume any liability for errors caused by Charter's errors or omissions. *Id*. at 104. CenturyTel repeatedly notes that Charter is "solely responsible" for ensuring that its subscriber's directory listing information is submitted to the directory publisher.

Addressing this last point first, CenturyTel either misunderstands, or intentionally misconstrues the scope of Charter's proposal on this issue. There is no dispute that Charter is responsible for submitting its subscriber's listing information. For that reason, Charter's proposal is specifically tied to Charter's actions, and establishes a specific standard of care that Charter must meet.

A brief review of Charter's proposed language demonstrates that CenturyTel's liability may be limited in any instance when Charter's own actions cause the problem. Notably, Charter's proposed language in Section 7.1 of Article XII, allows CenturyTel to limit its liability, generally. Then, in the clause beginning "However, …" Charter language states that "CenturyTel's liability shall not be limited in any instance in which **CLEC [Charter] accurately conveys to CenturyTel or its Publisher that its End User Customers desire not to be published in a directory and CenturyTel or its Publisher causes the publication of such End User Customer data or listings." DPL at 103-104. (Charter proposed language for Art. XII, § 7.1). Thus, Charter's proposal addresses a very specific situation: that is, where it is clear that Charter "accurately conveys" to CenturyTel, or CenturyTel's

publisher, the fact that a Charter customer does not want to be published, and the customer's information is then later published, then it is clear that the harm arises from the acts of CenturyTel, or its publisher. In that case, CenturyTel should not be permitted to limit its liability.

Furthermore, this language specifically addresses the alleged harm raised by CenturyTel, that it or its publisher, could be liable for errors or omissions caused by Charter. But that would not be possible because Charter's language clearly sets a liability threshold, and only shifts liability where it is clear that Charter has accurately conveyed information (and therefore not engaged in an error omission). In other words, if a problem occurs because a customer's information is published, and it is clear that Charter has met the standard of care required of this section, then it would be clear that the error or omission that resulted in the publication of the information was the result of the actions of CenturyTel or its publisher. In that situation CenturyTel should not be allowed to limit liability.

CenturyTel's second argument, that it objects to assuming an obligation to indemnify Charter "if CenturyTel's or its publisher's error or omission caused an error in publication of an end user customer's data or listings," *CTel P.F.* at 101, is curious and inconsistent with general principles of liability and indemnity. Notably, when CenturyTel or its publisher is responsible for an error or omission that causes harm to a Charter customer, and that customer then sues Charter (who had no hand in the error or omission), the negligent Party (CenturyTel or its publisher) should assume the defense of the action and indemnify Charter. Any other result is patently unjust, and would leave Charter facing potential liability for acts or omissions of a third party (i.e. CenturyTel).

Furthermore, CenturyTel's proposal to disclaim any indemnity obligation for its own errors or omission is exacerbated by the fact that it proposes to limit its damages to the amounts paid under these provisions of the Agreement. A brief review of the Price List reveals that potential charges for directory listing functions provided by CenturyTel would likely not amount to a significant sum of money. But the potential damages for a directory error or omission could be very significant, and would surely not bear any relationship to the relatively small amounts of money that Charter would

pay to CenturyTel under these provisions of the Agreement. Therefore, Charter's proposal to limit damages not to amounts paid by Charter, but instead to the "actual damages" incurred is more equitable, and rational.

Finally, to the extent that the Commission agrees with CenturyTel's assertions regarding the gross negligence standard under Missouri law, *CTel P.F.* at 106-07, Charter agrees that utilizing the analogous concepts of "wanton or reckless" would be a suitable substitute for the gross negligence standard proposed by both Parties.[108]

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

On this issue, the Parties' dispute centers around the question of whether the Agreement should include language that clearly establishes each party's directory assistance obligations. CenturyTel claims that it satisfies its obligations to provide Charter with non-discriminatory access to directory assistance and directory listing, and that explicit language in the Agreement is unnecessary. *CTel P.F.* at 108. CenturyTel offers two arguments. First, it asserts that there is no need for Charter's proposed language because Charter's witnesses acknowledged that directory assistance problems experienced in the past have been eliminated. *CTel P.F.* at 109. Second, CenturyTel asserts that it satisfies the requirements of Section 251(b)(3) because it provides Charter non-discriminatory access to directory assistance that is equivalent in type and quality to that which CenturyTel provides to itself. *Id.*

CenturyTel's first argument, that Charter's proposed language is unnecessary, is incorrect for several reasons. First, the fact that these problems have arisen in the past is evidence that the potential exists for problems in the future. Although CenturyTel may have cured past problems, its

[108] *See, e.g., Nichols v. Bresnahan*, 357 Mo. 1126, 212 S.W.2d 570 (Mo. 1948) (recognizing the tort of recklessness). Nevertheless, Charter believes the concept of intentional misconduct should continue to be used in the Agreement.

language does not ensure the problem will not arise again in the future. That result can be avoided, on a going forward basis, if Charter's proposed language is adopted.

As to CenturyTel's second argument, it is not true that CenturyTel currently satisfies all of its obligations under Section 251(b)(3), nor does its language reflect all of its obligations under the statute. As Charter demonstrates in its Proposed Findings, *Chtr. P.F.* at 116, under Section 251(b)(3) CenturyTel must perform ***two*** essential functions: (1) accept Charter's directory listing information for inclusion in the CenturyTel database (or one maintained by CenturyTel's vendor); and (2) ensure that CenturyTel subscribers have access to Charter's subscriber directory listing information in the CenturyTel database, and vice versa, by querying the applicable database when a subscriber requests such information.

With respect to the first action, providing nondiscriminatory access to directory listing, CenturyTel does ***not*** accept Charter subscriber listing information for inclusion in the relevant databases at this time. Notably, CenturyTel does perform this function for ***itself*** when it submits directory listing information to its own end user customers in a directory assistance database. Lewis, Tr. 208, lines 1-4. As such, it is clear that Charter is *not* being provided with non-discriminatory access to directory listing, as is required by Section 251(b)(3). Charter's proposed language would ensure that CenturyTel fulfills both of these obligations under Section 251(b)(3); CenturyTel's language would not. Thus, Charter's proposed language is necessary to ensure compliance with Section 251(b)(3).

Finally, the fact that CenturyTel sub-contracts out specific directory assistance functions, does not relieve it of the obligation to fulfill its responsibilities under Section 251(b)(3). Several courts have affirmed that the use of a subcontractor to perform these functions does not shift the

statutory obligations to the third party vendor.[109] Thus, the Agreement should reflect this federal obligation to ensure that CenturyTel does not attempt to abandon its statutory obligations related to directory assistance and directory listing.

VI. CONCLUSION

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

[109] *See MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768 (E.D. Mich. 1999) (finding that because an ILEC caused its listings to be published in a third party's directory, it owed the CLEC a duty to provide non-discriminatory access to the same directories); *U.S. West Comm., Inc. v. Hix*, 93 F. Supp. 2d 1115 (D. Colo. 2000) (rejecting an ILEC's attempt to relinquish its Section 251(b)(3) responsibilities because it had subcontracted its directory assistance functions to a third party).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Reply Brief of Charter Fiberlink-Missouri, LLC was served by hand-delivery or electronic mail, on the 4th day of December, 2008, on the following:

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