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12 Oral Argument
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14 February 5, 2009
15 Jefferson City, Missouri
16 Volume 5
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21 In the Matter of the Petition of)
22 Charter Fiberlink-Missouri, LLC,)
23 For Arbitration of an)
24 Interconnection Agreement Between) Case No. TO-2009-0037
25 CenturyTel of Missouri, LLC and)
Charter Fiberlink-Missouri, LLC)

RONALD D. PRIDGIN, Presiding,
SENIOR REGULATORY LAW JUDGE.

ROBERT M. CLAYTON III, Chairman,
TERRY JARRETT,
COMMISSIONERS.

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21 REPORTED BY:

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1 P R O C E E D I N G

2 JUDGE PRIDGIN: Good afternoon. We are on
3 the record. This is the oral argument in Case No.
4 TO-2009-0037, petition of Charter Fiberlink-Missouri, LLC
5 for arbitration of interconnection rates, terms,
6 conditions and related arrangements with CenturyTel of
7 Missouri, LLC pursuant to 47 USC Section 252(b). This
8 oral argument is being held on February 5th, 2009 at
9 1:30 p.m. We are in the Governor Office Building in
10 Jefferson City, Missouri.

11 If I could, I would like to get entries of
12 appearance from counsel, please, beginning with Charter.

13 MR. COMLEY: Thank you, Judge. Let the
14 record reflect the entry of appearance of Mark W. Comley,
15 Newman, Comley & Ruth, 601 Monroe, Suite 301, Jefferson
16 City, Missouri, and also Mr. K.C. Halm, Davis Wright
17 Tremaine, LLP, 1919 Pennsylvania Avenue Northwest,
18 Suite 200, Washington, D.C., on behalf of Charter
19 Fiberlink-Missouri, LLC.

20 And also I'd like to take the opportunity
21 to introduce today Mr. Michael R. Moore, who is director
22 of regulatory affairs and counsel for Charter
23 Communications. He is to my rear.

24 JUDGE PRIDGIN: Mr. Comley, thank you.
25 Mr. Halm, Mr. Moore, welcome.

1 Entries of appearance from CenturyTel,
2 please.

3 MR. DORITY: Thank you, Judge Pridgin.
4 Appearing on behalf of CenturyTel of Missouri, LLC,
5 Larry W. Dority with Fischer & Dority, PC and Becky
6 Owenson Kilpatrick with CenturyTel.

7 I would like to introduce to the
8 Commissioners that are present this afternoon our
9 co-counsel who will be presenting CenturyTel's position
10 this afternoon from the Woods & Aitken law firm. To my
11 left is Mr. Thomas Moorman from their Washington, D.C.
12 office, and to my right here is Mr. Paul Schudel from
13 their Lincoln, Nebraska office. Written entries of
14 appearance have been provided to the court reporter.
15 Thank you.

16 JUDGE PRIDGIN: Mr. Dority, thank you.
17 Ms. Kilpatrick, Mr. Moorman, Mr. Schudel, welcome.

18 And I understand from a previous order that
19 I issued, and I believe it reflects the parties'
20 agreement, that each side would have 45 minutes to present
21 oral argument, and I designated Charter to begin and give
22 their 45 minutes in its entirety, after which CenturyTel
23 would have its 45 minutes.

24 I do not have any kind of clock. This will
25 be treated largely as an appellate argument in which you

1 may be getting interrupted at any time for bench
2 questions, and I will do everything I can to not interrupt
3 your argument but to try to keep you apprised of how much
4 time you have left, and when your 45 minutes is up, I will
5 try to gently but firmly say, I'm sorry, time's up.

6 Is there anything from counsel before we
7 see if we have any Bench comments or before we begin oral
8 argument? I'm sorry. Mr. Chairman?

9 CHAIRMAN CLAYTON: Judge, of course, they
10 don't have to use all 45 minutes if they don't want to,
11 correct?

12 JUDGE PRIDGIN: That is entirely correct.

13 CHAIRMAN CLAYTON: Thank you. Just for
14 clarification.

15 JUDGE PRIDGIN: Just for clarification.
16 Anything from counsel before we begin? I think someone
17 had asked earlier from CenturyTel, we would normally
18 prefer that you come up and use the podium, but if it gets
19 to the point where you've broken down issues per counsel
20 and we have several different attorneys talking, I don't
21 necessarily expect running back and forth. We have
22 microphones at the table. So I would normally want to go
23 with speaking from the podium, but if we start bouncing
24 around from different lawyers, feel free to just use the
25 mics at the table.

1 Anything from the Bench? Anything further
2 from counsel?

3 (No response.)

4 JUDGE PRIDGIN: All right. Charter. And
5 I'll try to use -- give you the time at the back of the
6 clock there is 1:35, and I'm keeping track up here. So by
7 my math your time would be up at roughly 2:20.

8 MR. HALM: Thank you, Judge Pridgin. I'm
9 going to help you keep track of time as well. Hopefully
10 come in under that 45-minute limit.

11 Mr. Chairman, Commissioner Jarrett, Judge
12 Pridgin, thank you for the opportunity to present these
13 additional arguments on a limited set of issues in this
14 proceeding. And thank you for the flexibility in
15 accommodating travel schedules with myself and counsel for
16 CenturyTel coming out of town.

17 My name is K.C. Halm. I'm counsel for
18 Petitioner, Charter Fiberlink of Missouri, LLC. And
19 before I get into the specific issues, I would like to
20 express Charter's appreciation and gratitude for the hard
21 work and efforts put forth by Judge Pridgin and the Staff
22 in adjudicating this case. They did so in a fair and
23 efficient manner under a very short timeline, and their
24 efforts are to be commended.

25 Charter believes that the final

1 arbitrator's report is on the whole a good decision and
2 should be adopted by this Commission subject to the
3 handful of issues that we'll talk about today.

4 Specifically those issues are, Issue 13A,
5 which addresses the limitations period on claims that can
6 be brought by Charter for overcharges or billing disputes;
7 Issue 17, which raises the question of penalty charges
8 that may be assessed by CenturyTel against Charter for
9 so-called slamming events; Issue 31, which goes to both
10 parties' liability in the instance in which directories
11 are published and some harm arises from the publication of
12 that directory; Issue 32, which goes to each party's
13 respective obligations to provide nondiscriminatory access
14 to directory assistance; and finally Issues 27 and 40,
15 which go to the assessment of charges for number port
16 requests submitted by Charter to CenturyTel.

17 Review of these specific issues is
18 necessary for one of two reasons. Either the final
19 arbitrator's report does not comply with federal law,
20 specifically Section 251 of the regulations promulgating
21 that statute, or the decision does not implement terms
22 that are fair and equitable and which do not provide a
23 level playing field for the parties.

24 Let me turn right to the first issue,
25 Issue 13A. Again, this issue goes to the question of

1 whether or not there should be a limitation on the period
2 of time by which one party or another can initiate a claim
3 for bill disputes. The final arbitrator's report adopts
4 CenturyTel's language which requires the billed party --
5 99 percent of the time that will be Charter -- to initiate
6 a claim for any dispute of charges within one year from
7 the dispute notice or charter must waive its rights to
8 continue to dispute those charges, it must waive its
9 rights to continue to withhold payment.

10 We ask this Commission to reverse the
11 arbitrator's ruling as to the time period to bring a
12 claim. Reversal is necessary to ensure that the issue is
13 resolved in a manner that is consistent with the
14 Communications Act, which expressly provides for a
15 two-year limitations period for any claims arising between
16 carriers.

17 As I stated, the arbitrator's decision
18 adopts CenturyTel's language which requires Charter to
19 waive its right to dispute charges and withhold payments
20 for improper billings if Charter does not initiate a claim
21 within one year after its first notice of dispute of the
22 CenturyTel charges.

23 Let me take a moment to explain the
24 process. Recall that after the parties are
25 interconnected, there will be certain charges assessed by

1 CenturyTel to Charter for miscellaneous items. Each month
2 those bills will be submitted to Charter, and Charter then
3 has roughly 25 days to review the bills and either pay
4 them or dispute them consistent with the terms of the
5 contract.

6 When it disputes such charges, the language
7 adopted by the arbitrator establishes a period of time by
8 which Charter must initiate a dispute to the Commission.
9 If it doesn't do so within that period of time, one year,
10 it's effectively waived its rights to bring a claim.

11 That decision conflicts directly with
12 Section 415 of the Federal Communications Act, which
13 provides a two-year limitation period for all claims
14 between carriers. That federal law, that statute
15 specifically guarantees a period of no less than two years
16 to pursue a claim of overcharges. The arbitrator's report
17 therefore conflicts with that federal statute
18 impermissibly.

19 In contrast, Charter's proposed language
20 reflects this two-year limitations period provided under
21 federal law and allows Charter to initiate a claim within
22 that period of time. For these reasons, the Commission
23 should reverse the final arbitrator's report on this
24 particular issue and adopt Charter's language, which is
25 consistent with the federal statutory two-year limitation

1 period and does not shift the burden from CenturyTel to
2 Charter to escalate every bill dispute.

3 The next issue I'd like to discuss is
4 Issue 17A. As noted in my introduction, this issue
5 concerns CenturyTel's ability to assess a penalty charge
6 when Charter engages in a slamming event. The arbitrator
7 held that CenturyTel may impose a \$50 charge upon Charter
8 for every unauthorized subscriber change request submitted
9 by Charter, i.e., a slamming event.

10 We are asking the Commission today to
11 modify the final arbitrator's report to ensure a more
12 equitable approach by affirming that this \$50 penalty
13 charge may be applied reciprocally. In other words, the
14 Commission should affirm the decision but modify it to
15 allow Charter to assess a penalty charge upon CenturyTel
16 if and when CenturyTel were to engage in a slamming event.

17 Now, Charter has consistently made the
18 point that the FCC's regulations already include penalty
19 provisions, so we're not convinced that these charges are
20 necessary in the first instance.

21 Further, there is no evidence in the record
22 that shows that the \$50 charge proposed by CenturyTel
23 actually reflects any cost that CenturyTel may incur in
24 bringing back the subscriber to its network after the
25 slamming event has occurred.

1 Nevertheless, if the Commission affirms the
2 arbitrator's ruling, the Commission should make this
3 provision reciprocal, for the same rationale that the
4 arbitrator relied upon in adopting CenturyTel's language
5 also applies for Charter here. Specifically, Charter
6 cannot stop any improper slamming that CenturyTel may
7 engage in.

8 And further, if CenturyTel does engage in
9 those practices, it is reasonable to assume that Charter
10 will incur some costs in remedying that situation, i.e.,
11 in getting that subscriber back on its network. Equity
12 requires this approach. There is no reason to adopt a
13 one-sided proposal that benefits only one party to this
14 contract.

15 Now, admittedly slamming events happen
16 relatively rarely between these two parties. Therefore,
17 the impact of this particular proposal may not be
18 significant in real dollar terms, but it is significant in
19 that the Commission must consider the level playing field
20 that it should establish as between the parties and as
21 reflected in the contract terms it will approve in this
22 proceeding.

23 Therefore, we ask the Commission to modify
24 the arbitrator's decision by specifically ordering the
25 reciprocal application of this \$50 penalty charge should

1 one party or the other engage in a slamming event.

2 The third issue we'd like to raise today is
3 Issue 31. Issue 31 goes to the question of whether or not
4 CenturyTel should be permitted to limit its liability for
5 any errors or omissions that arise in the publication of
6 CenturyTel's directories.

7 In the final arbitrator's report,
8 CenturyTel's language was adopted, and it was determined
9 that CenturyTel through this language will have no
10 liability except when grossly negligent to Charter or
11 Charter's subscribers for any errors or omissions that
12 arise during publication of a CenturyTel directory. In
13 other words, CenturyTel will never be liable to Charter or
14 Charter's subscribers for any harm arising from the
15 publication of the CenturyTel directory, even when such
16 harm is the result of CenturyTel's own negligence.

17 Now, again, this provision does exclude
18 gross negligence, but the concern is that there may be
19 some actions which are deemed to be negligent which create
20 the harm and for which Charter is not responsible. In
21 those circumstances, CenturyTel should not be able to
22 limit its liability.

23 We ask that the Commission modify the final
24 arbitrator's report to ensure the proper apportionment of
25 liability as between the parties. To do so, the

1 Commission should adopt Charter's language which fairly
2 apportions liability, and it makes clear that CenturyTel
3 will not be liable if Charter does not fulfill its
4 obligations to convey the information in the proper
5 format.

6 Let me take a moment to provide a little
7 bit of background on this issue. Both CenturyTel and
8 Charter have an interest in ensuring that their
9 subscribers' telephone number, name and address are
10 included in the directories that are published in those
11 areas in which their subscribers live.

12 Oftentimes there are some subscribers who
13 request that that information not be published for a
14 variety of reasons, simply because they want to maintain
15 their privacy, they don't want to be subjected to direct
16 marketing, or there may be more serious reasons. For
17 example, an undercover policeman may not wish to have his
18 name, address and phone number published in a publicly
19 available directory for obvious reasons. We refer to
20 those subscribers as nonpub, nonpublication subscribers.

21 The process for getting a Charter
22 subscriber listing into a CenturyTel directory occurs this
23 way. Charter gathers its subscribers' listing
24 information, compiles it in the appropriate database, and
25 for those subscribers that request nonpublication status

1 marks and identifies those subscribers. Therefore, when
2 it conveys this information to CenturyTel or CenturyTel's
3 publishers, it has fulfilled its obligations to designate
4 the nonpub subscribers.

5 If in the event after CenturyTel -- after
6 Charter provides that information to CenturyTel something
7 occurs where those subscribers are published in the
8 directory, it is reasonable to assume that that occurred
9 because of some error or omission by either CenturyTel or
10 its publishers. Only in that limited circumstance where
11 Charter fulfills its duties but something bad happens in
12 the end do we believe that CenturyTel should bear some
13 liability for the harms that would arise.

14 This result we believe is necessary because
15 the final arbitrator's report is based upon the
16 fundamental flaw that Charter is solely responsible for
17 conveying this information and submission into the
18 directories. As I just explained, Charter is initially
19 responsible for properly marking and identifying the
20 subscribers, but the overall process does require that
21 CenturyTel or its publishers take some action.

22 It is therefore clear that Charter's not
23 attempting to shift liability from itself to CenturyTel.
24 Charter acknowledges that it has some obligations under
25 this process. Again, it's only in the limited

1 circumstance where Charter fulfills its obligations but
2 some harm does arise where liability should accrue to
3 CenturyTel. Charter's obligations are clearly
4 memorialized in its proposed language under Section 7,
5 Article 12.

6 In addition to the question of limiting
7 CenturyTel's liability, we also ask the Commission to
8 clarify that the arbitrator's decision on Issue 15C, which
9 rejected CenturyTel's proposal to cap damages on potential
10 claims, would be applied consistently throughout the
11 agreement.

12 Judge Pridgin with respect to Issue 15C at
13 page 63 of the final arbitrator's report decided that it
14 was improper to arbitrarily impose a cap on potential
15 damages. CenturyTel had proposed that those damages be
16 limited to an amount that is paid under the agreement.
17 Judge Pridgin and the Staff properly rejected that
18 proposal.

19 You did so because you found that no
20 artificial cap on damages is appropriate, and that
21 artificially capping damages would reduce the incentives
22 for each party to ensure that their actions did not cause
23 harm to the other party, and of course, having damages may
24 not allow the injured party to fully recover any damages
25 they may incur.

1 To be clear, what we're asking is the
2 ruling on that issue be applied consistently throughout
3 the agreement and be applied specifically with respect to
4 this Issue No. 31 concerning directory liability
5 limitations and proposed caps on damages as proposed by
6 CenturyTel.

7 Notably, if CenturyTel's language were
8 adopted in this instance such that damages would be
9 limited to any amounts paid between the parties, Charter's
10 damages would be set at zero because it pays no monies to
11 CenturyTel for the directory listing functions that occur
12 today. That's why it's imperative that Judge Pridgin's
13 ruling on Issue 15C be applied consistently throughout
14 this agreement.

15 For these reasons, Charter requests the
16 Commission reverse the final arbitrator's report and adopt
17 Charter's proposed language which apportions liability
18 properly, and we also ask that you affirm his decision
19 with respect to Issue 15C rejecting any cap on damages.

20 Another directory issue in this case is
21 Issue 32. Issue 32 deals primarily with directory
22 assistance obligations, and this is distinguished from the
23 directory listing and publication issues that we just
24 talked about in Issue 31. On this issue, the final
25 arbitrator's report adopts CenturyTel's language based

1 upon a finding that CenturyTel is currently satisfying its
2 obligations under Section 251(b)(3) of the Act.

3 The issue raises two important questions.
4 First, whether the contract language should include terms
5 that ensure that each party queries the appropriate
6 databases to make -- to make -- excuse me, to ensure that
7 subscribers requesting listing information of another
8 party is provided to the requesting party.

9 The second question goes to whether or not
10 CenturyTel is obligated to accept Charter's subscriber
11 listings for inclusion in a database that is used to
12 provide directory assistance services.

13 We ask that the Commission reverse the
14 arbitrator's ruling on both counts and adopt Charter's
15 language. That language ensures that both parties will
16 satisfy their statutory duties under Section 251(b)(3) in
17 part by accepting the contractual obligation to accept
18 listings for placement in the appropriate directory system
19 database, and Charter's language also ensures compliance
20 with the statute in that it requires specifically that
21 both parties make available listing information of the
22 other party's subscribers.

23 As to the first question, the FCC defined
24 nondiscriminatory access to directory assistance in the
25 following way: A LEC shall permit competing providers to

1 have access to its directory assistance services so that
2 any customer of a competing provider can obtain directory
3 listings notwithstanding the identity of the customer's
4 local service provider.

5 Now, those are a lot of words and a
6 complicated way of saying when your end user calls 411 and
7 wants to get information about another carrier's end user,
8 you have to -- you the carrier need to make sure that
9 information is provided to your subscriber.

10 The utility of these databases is that all
11 subscribers are listed regardless of whether or not they
12 take service from the incumbent telephone company or a
13 competitive telephone company. That has not always
14 happened in the past between these parties, and that is
15 why it is necessary to include contract language here
16 which ensures that it will always happen in the future.

17 The second question goes to the process for
18 including all party subscriber listing information in the
19 appropriate directory assistance database. As its name
20 suggests, the directory assistance database is a database
21 of telephone subscriber listings that LECs and their
22 vendors, collectively DA providers, use to provide
23 directory assistance or 411 services.

24 Competitors like Charter must ensure that
25 their subscribers are included in this database because

1 those subscribers obviously want to be, want their listing
2 information to be available to requesting parties. That,
3 of course, excludes the few people that request
4 nonpublication status that we talked about in the prior
5 issue. LECs or their vendors then populate these
6 databases and use those databases to provide 411 or
7 directory assistance services.

8 The current process between CenturyTel and
9 Charter is somewhat different than what normally occurs.
10 Today, rather than submitting this information to
11 CenturyTel like it does to other major incumbent LECs,
12 Charter is required to submit the information directly to
13 CenturyTel's DA vendor. It is required to do so because
14 CenturyTel has refused to play the role that is required
15 under Section 251(b)(3) to accept those listings and
16 ensure that they are included in the appropriate
17 databases.

18 This arrangement which CenturyTel has
19 dictated and which will continue if the final arbitrator's
20 report is affirmed by this Commission has led to
21 significant problems in the past. And those problems have
22 arisen in part because the DA vendor whom CenturyTel has
23 contracted with has not always performed their obligations
24 under the law.

25 Charter's proposed language addresses the

1 potential that those problems could arise again in the
2 future. Charter's proposed language ensures that
3 CenturyTel as the incumbent LEC bears the responsibility
4 under Section 251(b)(3) of the Act to ensure that its --
5 to ensure that Charter's subscriber listings are included
6 in the appropriate DA databases.

7 Federal law requires this result. The FCC
8 has defined the statutory principle of nondiscriminatory
9 access to directory listing as the act of placing a
10 customer's listing information in a directory assistance
11 database or in a directory compilation for external use
12 such as White Pages. That is the nondiscrimination
13 obligation that is required under the statutory language
14 of Section 251(b)(3), and that is precisely what Charter
15 has asked this Commission to approve.

16 Charter's language is consistent with this
17 standard in that it requires -- it obligates CenturyTel to
18 accept, include and maintain in the same manner that
19 CenturyTel treats its own listings Charter subscriber
20 listings in the appropriate directory assistance database.

21 CenturyTel's language in contrast is not
22 consistent with the federal standard. CenturyTel's
23 language simply says there's a process in place today.
24 Charter must go directly to the vendors to address these
25 concerns and we won't be the middleman.

1 CenturyTel's position reflects its
2 position -- CenturyTel's language, I'm sorry, reflects its
3 position that it wants to avoid liability for any problems
4 and it wants to avoid the administrative obligations
5 associated with providing nondiscriminatory access to
6 directory assistance.

7 We would ask that the Commission reverse
8 the final arbitrator's report and adopt Charter's proposed
9 language on these two critical issues.

10 Finally, the last issue I'd like to discuss
11 today goes to Issues 27 and 40, which together raise the
12 question of whether or not CenturyTel may assess charges
13 for number porting requests submitted by Charter. The
14 arbitrator adopted CenturyTel's language which permits
15 CenturyTel to assess a charge on Charter each time that a
16 telephone number is ported from CenturyTel's network to
17 Charter's network, and this occurs after Charter wins a
18 new subscriber from CenturyTel.

19 We would ask that you reverse the final
20 arbitrator's report and apply federal law which
21 specifically prohibits interconnection charges associated
22 with number porting between two competing LECs.

23 At issue here is a question of whether
24 CenturyTel may be permitted to charge Charter for each
25 time a subscriber moves from CenturyTel's network to

1 Charter's network. The record is clear that CenturyTel
2 would assess these charges on every number port request
3 submitted by Charter. CenturyTel's own witnesses have
4 admitted that the charges are intended to recover their
5 costs associated with responding to porting orders
6 transmitted by Charter, and that these charges are
7 assessed upon every port request submitted by Charter
8 which, of course, are submitted on behalf of the end user
9 who wishes to take their telephone number with them when
10 they move from Charter to CenturyTel's network.

11 It is therefore clear that these charges
12 would not arise but for the fact that number porting is
13 occurring here. These charges are for all intents and
14 purposes a charge on number porting. In addition, they
15 amount to a surcharge or a tax on competition in that they
16 require Charter to pay a fee for every new subscriber it
17 obtains from CenturyTel.

18 The decision is wrong as a matter of law
19 because the FCC has clearly ruled that number porting
20 charges are prohibited under Sections 251 and 252.
21 Specifically in its 2002 cost reconsideration order, at
22 paragraph 62, the FCC said the following: Incumbent LECs
23 may not recover any number portability costs through
24 interconnection charges or add-ons to interconnection
25 charges to their carrier, quote, customers, end quote.

1 Nor may they recover carrier specific costs through
2 interconnection charges to other carriers where no number
3 portability functionality is provided.

4 That statement set forth at 17 FCC record
5 2578 paragraph 62 clearly establishes that the FCC has
6 prohibited the types of charges at issue here. And to the
7 extent that the Commission were to accept CenturyTel's
8 assertion that its charges are unrelated to porting, the
9 FCC's statement in that order clearly applies even where,
10 quote, no number portability functionality is provided.

11 It's clear that the FCC intended that
12 incumbent LECs recover their costs through other means but
13 not by assessing charges on co-carriers and competitors
14 like Charter. Unfortunately, the final arbitrator's
15 report does not address this legal authority and never
16 explains how these charges are permissible given the FCC's
17 expressed prohibition.

18 Further, the final arbitrator's report
19 mistakenly relies upon the 2004 L -- 2004 BellSouth LNP
20 clarification order. That ruling is not informative to
21 this Commission because the FCC specifically declined to
22 rule on the question of whether BellSouth's charges on
23 other carriers were permissible under the law, and they
24 said so specifically at Footnote 49 of that Order where
25 again I'd like read the language. Because this order only

1 concerns end user charges, this is not the appropriate
2 proceeding to evaluate charges assessed against other
3 carriers. It is therefore clear that the Order does not
4 say anything about the types of charges at issue in this
5 case, a charge from one carrier to another.

6 By the FCC's own words, we know that its
7 decision in the LNP clarification order does not apply to
8 the charges assessed against other carriers as -- as that
9 which CenturyTel has proposed here. For that reason, the
10 final arbitrator's report relying upon that order is in
11 error.

12 Because the final arbitrator's report on
13 this issue conflicts directly with federal law, the FCC's
14 2002 order prohibiting such charges specifically, the
15 Commission must reverse the arbitrator and adopt Charter's
16 proposed language which prohibits any charges associated
17 with number porting requests.

18 That concludes our oral arguments. Thank
19 you, your Honor.

20 JUDGE PRIDGIN: Mr. Halm, thank you. Do we
21 have any Bench questions? Anything further from Charter?
22 You still have roughly 15 minutes left. All right.
23 Waiving the remainder of your time then?

24 MR. HALM: Well, are there rebuttal
25 opportunities?

1 JUDGE PRIDGIN: I had not anticipated that,
2 and I wanted to try to make that order as clear as I could
3 that every side would have 45 minutes just in one block.

4 MR. HALM: We're happy to forego on our
5 time.

6 JUDGE PRIDGIN: Thank you very much.

7 MR. HALM: Thank you.

8 JUDGE PRIDGIN: CenturyTel.

9 MR. SCHUDEL: Could I ask a three to
10 five-minute break?

11 JUDGE PRIDGIN: That's certainly fine.
12 Let's go off the record and we'll resume -- let's give it
13 to about 2:15. That will give you about five or ten
14 minutes.

15 MR. SCHUDEL: Thank you.

16 JUDGE PRIDGIN: We're off the record.

17 (A BREAK WAS TAKEN.)

18 JUDGE PRIDGIN: We're back on the record.

19 It's now 2:15. We're back after a brief recess. I
20 understand that CenturyTel is now ready for its 45
21 minutes. I show 2:15 according to the clock at the back
22 of the room. So CenturyTel, you will have until
23 3 o'clock. Mr. Moorman, when you're ready, sir.

24 MR. MOORMAN: Thank you, Judge.

25 Commissioner Jarrett, Judge Pridgin, my name is Tom

1 Moorman. I'm here on behalf of CenturyTel of Missouri,
2 LLC. Please let me introduce my partner as I -- as we
3 were introduced earlier, Paul Schudel, who will also be
4 presenting certain of the issues today before you.

5 I will be presenting Issues 18, 19 and 21,
6 which we will refer to as the interconnection issues.
7 Mr. Schudel will be presenting Issues 2 and 24, the NID
8 issues.

9 Although we will present comments and
10 argument on the issues noted in the January 20th
11 submission, motion for oral argument, CenturyTel expressly
12 reserves and does not waive any right of appeal or any
13 other right that it possesses with respect to those issues
14 that the arbitrator in the final report had resolved in a
15 manner contrary to that taken by CenturyTel.

16 We all understand that in resolving issues,
17 such as in this case, we need to engage in reasonable
18 decision-making through the review of the law, the
19 applicable facts, and when deciding the issues, ensure
20 that those results are consistent with sound rational
21 public policy.

22 The Communications Act of 1934 as amended
23 and in particular Section 252 provides additional
24 governance that must be adhered to. Section 252 of the
25 Act requires the Commission -- requires that the

1 Commission ensure that its decisions are consistent with
2 the FCC's directives under Section 251. Further, the
3 Commission's actions are also limited to those issues that
4 have been raised in the arbitration petition and the
5 response thereto.

6 CenturyTel does not believe that these
7 standards or objectives have been met with respect to the
8 final report, and as such, we believe that the final
9 report must be and should be significantly revised by you,
10 the Commission, in its action in this proceeding.

11 On the interconnection issues, Issues 18,
12 19 and 21, CenturyTel requests that you keep four primary
13 points in mind as you look at the record, look at the
14 report and look at the arguments that have been raised by
15 CenturyTel on those issues.

16 First, the facts demonstrate that the
17 trunking facilities that are in place between the
18 exchanges within which Charter competes with CenturyTel
19 have been deployed by CenturyTel solely for the exchange
20 for -- solely for the provision of exchange access.
21 Exchange access is defined as the origination and/or
22 termination of telephone toll service, long distance
23 service. Those facilities are used for exchange access
24 purposes. In other cases there may not even be any
25 CenturyTel facilities connecting potential exchanges

1 within which Charter may compete.

2 Further, the facts in the record
3 demonstrate that the parties have existing POIs in place,
4 they have multiple POIs in place, and those POIs and the
5 facility arrangements work. They allow for the exchange
6 of traffic. The parties individually met -- or
7 individually concluded that those existing facility
8 arrangements and POIs are necessary for the proper
9 competition within the various exchanges that CenturyTel
10 operates and within which Charter competes.

11 Finally, there is the fact that CenturyTel
12 has no transport obligation or facility obligation beyond
13 its existing incumbent network.

14 The second point that we would like you to
15 keep in mind is that one of the primary reasons for the
16 Act was to facilitate the development of facility-based
17 competition, and we believe that there are readings of the
18 final report that could undermine that objective.

19 Third, we ask that you keep in mind that
20 four other states have addressed similar issues, similar
21 contentions and, quite frankly, similar facts to those
22 associated with the establishment or proper establishment
23 of the point of interconnection or POI and that those
24 state commission decisions stand for the -- can be read to
25 stand for the proposition that all aspects of 251(c)(2),

1 which is the provision regarding interconnection and the
2 establishment of points of interconnection, all aspects of
3 251(c)(2) must be reviewed and acknowledged and considered
4 when establishing proper POIs.

5 And fourth, we'd like you to keep in mind
6 that on Issue 19 dealing with the establishment of a DS1
7 level of traffic, the issue is very, very narrow. The
8 issue has nothing to do with indirect interconnection
9 obligations under 251(a) of the Act. The parties agree
10 that they will use indirect interconnection transiting
11 arrangements up to a DS1 level of traffic that is
12 exchanged between them.

13 The only issue that you have before you for
14 resolution that is ripe for resolution is what minute of
15 use would -- should be established for purposes of
16 determining what constitutes a DS1. That's it. That's
17 the limited scope of Issue 19.

18 In reviewing Issue 18, the focus of
19 Issue 18, and to some extent Issue 21, is the proper
20 application of the requirements under 251(c)(2) of the Act
21 and, for that matter, the proper interpretation and
22 application of Section 51.305 of the FCC's rules.

23 The final report concludes that there is a
24 requirement, a rule that establishes the right to a single
25 point of interconnection per LATA or in a LATA, the single

1 POI per LATA assertion or legal theory that has been
2 brought forth and argued by Charter.

3 The rules do nothing of the sort. In fact,
4 the rules don't at all include any reference at all to a
5 single POI. If I could, I'll show you 51.305 of the FCC
6 rules, and I ask you to read those and find a reference to
7 a single POI per LATA. There isn't any. What there is is
8 a regulatory gloss based on certain assertions made in
9 Notice of Proposed Rulemakings by the FCC, references to
10 an arbitration decision, Verizon Arbitration Order in
11 Virginia, and ultimately to its 271 interLATA relief
12 decision issued by the FCC dealing with Southwestern Bell
13 and MCI, or actually Southwestern Bell.

14 And ultimately the single POI per LATA
15 devolves into a cross reference to a footnote within the
16 271 Order, the Texas 271 Order that cross references a
17 private contract provision between Southwestern Bell and
18 MCI. Common sense demands that one understand and
19 recognize that a private contract provision can't possibly
20 establish a rule, it can't possibly be applied to parties
21 not subject or not party to the underlying agreement. And
22 CenturyTel clearly is not subject or a party to the
23 Southwestern Bell/MCI agreement.

24 Moreover, with respect to Issue 18, the
25 final report says that the only consideration that is

1 necessary is to look at whether or not the interconnection
2 request is technically feasible. We respectfully
3 disagree. We learned in law school that in order to
4 properly construct -- or to construe a statute, you need
5 to look at it holistically. We've demonstrated that in
6 our filings and our Briefs here.

7 In so doing, you need to look at all
8 aspects of 251(c)(2), which I believe includes technically
9 feasibility, but also includes the concept that the POI
10 might be within the network, and most importantly for
11 application here, Section 251 -- I'm sorry, 252, 251(c)(2)
12 requires that the resulting interconnection cannot impose
13 a superior form of interconnection upon the ILEC, that the
14 form of interconnection cannot be greater than or more
15 than equal to that which the ILEC provides to itself, its
16 affiliates and other carriers.

17 And, in fact, that's why I referenced the
18 facts that are before you. There is a gloss in the final
19 report with respect to the network. The network as I
20 explained and the record supports is only used for the
21 provision of exchange access, not for local traffic, not
22 for the exchange of local traffic or the transport of
23 local traffic, except potentially in limited instances of
24 EAS.

25 In addition, in so doing, the final report

1 did not address those facts and in one fell swoop
2 eliminated without any explanation the discussion of the
3 network arrangements that CenturyTel has deployed
4 unexplainedly, no explanation within the report. But if
5 you compare the report to the draft report, you'll see the
6 discussion, although we pointed out in our papers that
7 discussion was inexact.

8 In addition, the final report failed to
9 acknowledge these four state commission decisions from
10 sister jurisdictions looking at resolving, in my view
11 properly so, and in CenturyTel's view properly so, the
12 proper legal construct for establishing points of
13 interconnection within the ILEC's network.

14 Those four decisions were issued in
15 Michigan, Oregon, Arkansas and Colorado. They reached
16 diametrically opposite conclusions based on the law and
17 applying the law to the facts. If you look at the law,
18 though, they got it right. It's consistent with the
19 holistic view of 251(c)(2) and the application of that to
20 a given set of facts, and those facts again are that the
21 network in place that CenturyTel has for purposes of this
22 issue is used for exchange access.

23 As I mentioned also, there is a reading of
24 the -- of the final report which could suggest that there
25 is a public policy in the state of Missouri associated

1 with the dismantling of facility-based competition. In
2 the draft report there were certain -- there was language
3 included that specifically directed on Issues 18 and 19
4 that the existing arrangements between the parties would
5 continue. Unexplainedly, that language was deleted in the
6 final report. We have no reason -- we have no idea why.

7 And so, too, with the state commission
8 decisions, those weren't even referenced in the final
9 report, nor any effort to suggest or identify why those
10 decisions and the application of the law contained therein
11 and the discussion of the law contained therein was not
12 appropriate.

13 Accordingly, with a stroke of a pen it
14 seemed to us that, based upon the draft report versus the
15 final report, that we're not fully appreciating the
16 factual record before the Commission, nor are we
17 appreciating a proper application of the governing law,
18 251(c)(2) and the FCC regulations as required of you under
19 252 in resolving arbitration issues.

20 At the same time, there seems to be, if
21 this single POI per LATA is somehow affirmed, the net
22 result is a transfer or a shifting of transport and
23 switching costs from Charter to CenturyTel and its end
24 users even though the existing point of interconnection --
25 interconnection facilities were deployed by Charter and

1 determined to be necessary and the cost associated with
2 them to be determined to be necessary for proper
3 competition.

4 With respect to Issue 21, this has to do
5 with one-way trunks. Likewise with respect to Issue 21,
6 we have the same concerns with respect to the proper
7 application of the requirements under Section 251(c)(2),
8 but it goes beyond that.

9 There seems to be a distancing between the
10 discussion in the final report with what Charter actually
11 had requested the Commission to adopt as its language.
12 That language provided that where one-way trunks are
13 deployed, then each party is responsible for establishing
14 any inter-- any necessary interconnection facilities over
15 which one-way trunks will be deployed to the other party's
16 switch -- that's Charter's language -- or, as a practical
17 matter, that if Charter determines to deploy one-way
18 trunks, that CenturyTel would be responsible for
19 facilities beyond the POI.

20 That is diametrically opposed to Charter's
21 position on Issue 18 where Charter says each party is
22 responsible for its side of the POI. Moreover, Charter or
23 CenturyTel has no such obligation today to deploy
24 facilities beyond its network, and the record reflects
25 that the Charter switches are beyond the CenturyTel

1 network.

2 That result creates a superior form of
3 interconnection, just as a single POI per LATA creates a
4 superior form of interconnection which is outlawed under
5 251(c)(2) as determined and interpreted and reasoned by
6 the Eighth Circuit in the Iowa Utility Board decisions 1
7 and 2.

8 With respect to Issue 21, I also would note
9 that the record reflects that the parties agree that they
10 will routinely use two-way trunks. So the need to really
11 to -- not to apply the full structure of the Act seems in
12 the -- seems to be, one, inappropriate, but two, one-way
13 trunks would likely not come up very often.

14 Finally, I would like to say that there's
15 some confusion in the record as reflected in the report
16 that CenturyTel -- CenturyTel's position and language
17 would create a veto over Charter's use of one-way trunks.
18 That cannot be reconciled with what CenturyTel has
19 proposed in its language or the application of the
20 language to any one-way trunk issue.

21 If there is a dispute for the deployment of
22 one-way trunks, that dispute under CenturyTel's language
23 would be brought before you the Commission for resolution.
24 That is not a veto.

25 With respect to the use of indirect

1 interconnection transiting arrangements, Issue 19, as I
2 mentioned when I started my discussion with you here
3 today, I noted that that issue was very, very limited.
4 It's very limited because it only relates to what minute
5 of use threshold should be used to establish a DS1.
6 CenturyTel says it should be 200,000 minutes. Charter
7 says it should be 240,000 minutes.

8 There's really no support in the record at
9 all for the 240,000 minutes proposed by Charter.
10 CenturyTel has demonstrated, however, that that 200,000
11 minute of use threshold is consistent with its experience,
12 with FCC actions, the Verizon arbitration decision and
13 other agreements that it has in place with Charter.

14 The issue, though, is that in the
15 discussion within the final report on Issue 19, there is a
16 considerable amount of dicta associated with some sort of
17 unfettered right to use indirect interconnection under
18 251(a) indefinitely. That is not before you. That
19 language causes confusion. That language should be
20 eliminated, and the Commission when it takes action on the
21 final report eliminate that language and address the DS1
22 issue, which is solely the only issue that is ripe for
23 Commission decision here.

24 As we've demonstrated in our papers and our
25 filings in this proceeding, we significantly question the

1 underlying premise that 251(a) can in any way impose a
2 greater obligation upon any carrier, an ILEC in
3 particular, beyond that which the most onerous of
4 provisions, Section 251(c), imposes.

5 I refer you to our paper in the discussion
6 by the FCC in the Atlas Telephone Company, Inc.
7 v. AT&T Corporation case where they acknowledged, where
8 the FCC acknowledged that 251 creates an escalating set of
9 obligations with 251(a) imposing, quote, relatively
10 limited obligations on all telecommunications carriers.

11 But yet 251(a) under the dicta associated
12 with Issue 19 somehow is bootstrapped into a greater
13 obligation to indefinitely transport traffic by CenturyTel
14 beyond its network in the event that that dicta is
15 retained and some third party attempts to use it, because,
16 again, the parties' sole issue with respect to Issue 19 is
17 what the level of traffic should be for DS1.

18 Finally, I just would like to note, if I
19 could, with respect to Issues 27 and 40, Charter's counsel
20 indicated that the FCC had specifically prohibited
21 interconnection charges and related those interconnection
22 charges to the LSR service charges that are at issue here.

23 MR. COMLEY: Your Honor, we understood that
24 rebuttal was not permitted in the arguments today.

25 MR. MOORMAN: I'm responding.

1 JUDGE PRIDGIN: Well, that's what I should
2 have -- if we're going to -- I'm afraid we're going to end
3 up going back and forth, and I've already -- with the
4 understanding there would be no rebuttal, I've already
5 waived their time. So if you could just stick to the
6 issues that CenturyTel raised in its joint list.

7 MR. MOORMAN: That would be fine, and I
8 would rest on the papers on the other issues.

9 JUDGE PRIDGIN: All right. Thank you.

10 MR. MOORMAN: I now turn the podium over to
11 Mr. Schudel.

12 JUDGE PRIDGIN: Mr. Moorman, thank you.
13 Mr. Schudel, you have about 20 minutes left, between 20
14 and 25 minutes.

15 MR. SCHUDEL: Let me just start by asking
16 for a clarification. I'm not intending to be
17 argumentative. As I understood, Charter's counsel made a
18 decision to use only a portion of its time. I understood
19 your order to say that we could similarly make that
20 decision inclusive of whether we chose to address comments
21 that Mr. Halm might make today. That's an erroneous
22 conclusion I'm understanding from you?

23 JUDGE PRIDGIN: Yes. I mean, I fear that
24 if -- somebody had to start, and I gave both sides 45
25 minutes in one block, and I'm afraid it's an unfair

1 advantage for one side to start and not get time for
2 rebuttal. Otherwise we'll end up going back and forth and
3 back and forth. I ruled that it would -- everybody would
4 get a 45-minute block to address the issues that they
5 brought up.

6 MR. SCHUDEL: All right. Thank you.

7 JUDGE PRIDGIN: You're welcome.

8 MR. SCHUDEL: Mr. Chairman, Commissioner
9 Jarrett, Judge Pridgin, as I've been introduced, my name
10 is Paul Schudel. I also represent CenturyTel Missouri in
11 this proceeding, and I will address Issues 2 and 24 which
12 relate to network interface devices, otherwise known as
13 NIDs.

14 It is CenturyTel's position that the final
15 report finds that Charter does not use the CenturyTel NIDs
16 when it connects its facilities to the customer's inside
17 wiring within the NIDs, but that this finding is
18 inconsistent with applicable FCC rules and the facts in
19 the record.

20 The FCC defines a NID as an unbundled
21 network element, or UNE, to which an ILEC must provide a
22 CLEC nondiscriminatory access. In addition, the ILEC is
23 required to provide all of the NID's features, functions
24 and capabilities if requested. This CLEC access to the
25 NID is to be provided at, quote, a price when the UNE is

1 purchased on a standalone basis, end of quote, according
2 to FCC rule found in 47 CFR Section 51.509(h).

3 In a nutshell, the ILEC, here CenturyTel,
4 must provide the NID to the CLEC, here Charter, as a UNE,
5 and the CLEC must pay the ILEC for the NID as a UNE.
6 Here the final report will require CenturyTel to provide
7 the NID UNE, which is clearly owned by CenturyTel, to
8 Charter without compensation.

9 The record establishes that Charter places
10 its wiring within the NID to connect with the customer
11 wiring. Charter chooses to do so because the NID provides
12 a weatherproof secure location for this connection.

13 As former Missouri Commission Chairman
14 James Mosay found in a Wisconsin AAA arbitration between
15 the affiliates of CenturyTel and Charter regarding a
16 dispute over NID usage and compensation, quote, Charter's
17 technicians have routinely used the CenturyTel owned NIDs
18 as a convenient weather-protected box within which to
19 connect a Charter wire to customer's wire. In doing so,
20 Charter avoids the need and expense of installing its own
21 NIDs, end of quote.

22 Any right of Charter to use a CenturyTel
23 NID as a weatherproof connection point exists only if
24 Charter orders and pays for the NID as a UNE. The
25 contrary conclusion in the final report is regrettably in

1 error.

2 The final report also mistakenly concludes
3 that, quote, the Charter connection remains entirely
4 within portions of the NID that are completely and at all
5 times accessible to the premise owner, end of quote.
6 That's at page 17 of the report.

7 Under Missouri law, the business
8 relationship between a utility and its customers is rooted
9 in contract. Consistent with the former Commission
10 Chairman Mosay's determination in the Wisconsin
11 arbitration, he found, quote, when a customer leaves
12 CenturyTel for Charter, the contract between CenturyTel
13 and the customer terminates and the CenturyTel tariff no
14 longer applies. The customer no longer has the right to
15 access the CenturyTel NID.

16 Further, the final report mistakenly
17 concludes that the rates for using CenturyTel's NIDs are a
18 disputed issue in this proceeding. However, Charter did
19 not raise this issue in its petition. The NID sections of
20 the parties' agreement set forth undisputed language that
21 cross references the pricing article and confirmed that
22 the NID rates were and are undisputed.

23 Section 252(b)(1) of the Act authorizes the
24 Commission to arbitrate any open issues between the
25 parties to an interconnection agreement negotiation.

1 Section 252(b)(4) requires the Commission to limit its
2 consideration, quote, to issues set forth in the petition
3 and in the response, if any, end of quote.

4 Charter neither identified NID rates as an
5 open issue nor provided any documentation concerning NID
6 rates with the filing of its petition.

7 If notwithstanding CenturyTel's arguments
8 to the contrary, which we made in our motion to strike as
9 well as in our other briefing documents, the Commission
10 concludes that the NID rates are an open issue, CenturyTel
11 must be provided an opportunity to establish its rates and
12 charges for Charter's use of the NID as required by 47 CFR
13 Section 51.509(h). We presume that would be a proceeding
14 that would follow this proceeding.

15 CenturyTel respectfully requests that the
16 Commission not accept the resolution of Issues 2 and 24 as
17 set forth in the final report, but rather that it adopt
18 CenturyTel's proposed language for the interconnection
19 agreement concerning these two issues, and the undisputed
20 NID rates set forth in the parties' agreement should also
21 be accepted.

22 Thank you for your time and attention.

23 JUDGE PRIDGIN: Mr. Schudel, thank you.

24 Anything further from CenturyTel?

25 (No response.)

1 JUDGE PRIDGIN: Anything from the Bench?

2 (No response.)

3 JUDGE PRIDGIN: Anything further from

4 counsel?

5 (No response.)

6 JUDGE PRIDGIN: All right. If there's
7 nothing further, that will conclude the oral argument in
8 Case TO-2009-0037. Thank you very much. We're off the
9 record.

10 WHEREUPON, the oral argument in this case
11 was concluded.

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3) ss.
4 COUNTY OF COLE)

5 I, Kellene K. Feddersen, Certified
6 Shorthand Reporter with the firm of Midwest Litigation
7 Services, and Notary Public within and for the State of
8 Missouri, do hereby certify that I was personally present
9 at the proceedings had in the above-entitled cause at the
10 time and place set forth in the caption sheet thereof;
11 that I then and there took down in Stenotype the
12 proceedings had; and that the foregoing is a full, true
13 and correct transcript of such Stenotype notes so made at
14 such time and place.

15 Given at my office in the City of
16 Jefferson, County of Cole, State of Missouri.

17 _____
18 Kellene K. Feddersen, RPR, CSR, CCR
19 Notary Public (County of Cole)
20 My commission expires March 28, 2009.
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