BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of the Petition of Charter Fiberlink-	**)**	
Missouri, LLC for Arbitration of an Interconnection	**)**	**Case No. TO-2009-0037**
Agreement Between CenturyTel of Missouri, LLC	**)**	
And Charter Fiberlink-Missouri, LLC.	**)**	

COMMENTS OF CENTURYTEL OF MISSOURI, LLC ON THE ARBITRATOR'S DRAFT REPORT

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DATED: December 22, 2008

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APPENDIX

I. INTRODUCTION

These Comments on the Arbitrator's Draft Order are submitted on behalf of CenturyTel of Missouri, LLC ("CenturyTel") pursuant to Missouri Public Service Commission ("Commission") Rule 4 CSR 240-36.040(20) and in accordance with the Amended Order Setting Procedural Schedule entered herein on August 27, 2008.[1] As such, these Comments are directed to the factual, legal or technical errors made in the Arbitrator's Draft Report issued on December 15, 2008 (the "Report").

In these Comments, CenturyTel will address specific Issues presented to the Arbitrator for resolution; however, CenturyTel hereby reserves, and does not waive, (a) any and all rights to seek review by the full Commission of the Final Arbitrator's Report and (b) a determination by the appropriate Federal district court pursuant to 47 U.S.C. § 252(e)(6) as to whether the Arbitrator's and/or the Commission's disposition of any issue fails to meet the requirements of 47 U.S.C. §§ 251 and 252.

To that end, CenturyTel incorporates by reference its pre-filed testimonies and post-hearing submissions filed in this proceeding. CenturyTel respectfully submits that the record and legal positions set forth in its post-hearing submissions fully support the resolution of each of the issues in a manner consistent with CenturyTel's positions. As to certain of the issues, CenturyTel is concerned that the Report does not properly reflect the controlling law, applicable facts, and policy considerations with regard to those issues for which Charter's positions as set forth in Charter's Proposed Order have been adopted, which positions CenturyTel has already demonstrated in its December 4, 2008 Reply Brief (the "*CenturyTel Reply Brief*") to be factually

[1] On December 19, 2008, in response to the request of CenturyTel, the Arbitrator granted leave to revise the 20-page limitation provided in Rule 4 CSR 240-36.040(20) to 30 pages. Thus, these Comments are submitted based upon such leave granted by the Arbitrator.

inaccurate and legally suspect. Accordingly, in these Comments, CenturyTel specifically addresses the errors in the Report with respect to Issues 2, 24, 11, 18, 19, 20, 21 and 31.[2]

II. ISSUES 2 AND 24

A. The Findings of Fact in the Report are Either Irrelevant or Erroneous

Finding of Fact 1 that a Network Interface Device or "NID" is a piece of "passive equipment" is irrelevant. What is relevant is that the NID (1) is owned by CenturyTel in its entirety, (2) is a part of CenturyTel's network in its entirety [3] and (3) is an Unbundled Network Element ("UNE") that CenturyTel must offer to Charter for its use.[4] Accordingly, if Charter chooses to use the NID instead of installing its own NID or otherwise connecting to the customer, Charter must pay CenturyTel the applicable UNE charge.

Finding of Fact 2 is incorrect as CenturyTel's monthly service order charge rate is not $33.78, but rather is $33.38.[5]

Finding of Fact 3 is irrelevant because Charter agreed to CenturyTel's non-recurring and recurring service order charges, and such charges were not an issue presented to the Commission by Charter in the Petition or by CenturyTel in the Response Therefore, the charges are not within the Commission's delegated authority under 47 U.S.C. § 252(b)(4). CenturyTel has fully briefed the facts and arguments that support this conclusion, and maintains its position that the Commission lacks jurisdiction to make any determinations with respect to such charges.[6]

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[2] Although CenturyTel agrees with the Report's resolution of Issues 4(a), 5, 8, 13, 16, 17, 23, 27, 28, 32, 37 and 40, CenturyTel fully expects Charter to object to the resolution of those Issues in the Report. However, there is no basis for reversal or alteration of the resolution of any of these identified issues.

[3] Tr. 93:1-2 and 190:19-24.

[4] 47 C.F.R. § 51.319(c).

[5] *See* Petition, Exhibit B, Article XI, Section II and CenturyTel Reply Brief, 7, fn. 33, which identified the error in Charter's Proposed Order.

[6] *See* CenturyTel's Motion to Strike, 2-7, CenturyTel's Reply in Support of Motion to Strike, 2-9, Affidavit of Susan Smith in Support of Motion to Strike, *CenturyTel Proposed Order*, 6-11 and CenturyTel Reply Brief, 6-8.

B. The Conclusions of Law in the Report are Erroneous

1. The Arbitrator Erroneously Adopted Charter's Definition of NID

Contrary to the Arbitrator's finding that CenturyTel's proposed language for the NID definition seeks to "limit or condition CLEC access rights to the NID,"[7] CenturyTel's language provides essential clarification of the NID's relationship to the Point of Demarcation, and does so consistently with the *UNE Remand Order* on which the Arbitrator relies.[8]

CenturyTel proposes to add the following double underscored language to the second sentence of Article II, § 2.103: "The NID houses the protector, 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 CFR 68.105." This language adds clarity where Charter has introduced ambiguity by claiming that the Point of Demarcation between the ILEC's network and the customer's inside wire is the protector.

Charter's claim is contrary to 47 C.F.R. § 68.105, in which the FCC defines the demarcation point. There are three parts to the FCC's definition. First, the rule generally defines the demarcation point to "consist of wire or a jack conforming to the technical criteria published by the Administrative Council for Terminal Attachments."[9] The rule then further defines the demarcation point depending on the type of installation. According to the FCC, its "rules permit the demarcation point of the incumbent LEC's network at a customer's premises to vary depending on the type of premises, i.e., single unit or multiunit, and the date the premises was built."[10] For single unit installations, which are the type of installations that are the subject of the

[7] Report, 10-11.

[8] *Id.*, 11.

[9] 47 C.F.R. § 68.105(a).

[10] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98 and 98-147, 18 FCC Rcd 16978 (2003) ("*2003 Unbundling Order*") ¶ 343 and fn. 1012.

record in this proceeding, the FCC defines the demarcation point as follows:

> For single unit installations existing as of August 13, 1990, and installations installed after that date ***the demarcation point shall be a point within 30 cm (12 in) of the protector*** or, where there is no protector, within 30 cm (12 in) of where the telephone wire enters the customer's premises, or as close thereto as practicable.[11]

Thus, the demarcation point for single unit installations is ***outside of the NID***, at an unspecified point on the wire extending from the customer's premises. All of Charter's activities regarding CenturyTel's NIDs take place ***within the NID***, and therefore are on the ***ILEC network side*** of the demarcation point.[12]

Likewise, for multiunit installations, the FCC defines the Point of Demarcation as a point separate and apart from the NID. For multiunit premises constructed before August 13, 1990, the demarcation point is generally "determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices," but where there are multiple demarcation points within the premises, "a demarcation point for a customer shall not be further inside the customer's premises than a point ***twelve inches from where the wiring enters the customer's premises***, or as close thereto as possible."[13] For newer multiunit premises, the wireline provider may place the demarcation point at the "minimum point of entry" or "MPOE", which is "either the closest practicable point to where ***the wiring*** crosses the property line or the closest practicable point to where ***the wiring*** enters a multitenant building or buildings."[14]

CenturyTel's inclusion of a direct reference to 47 C.F.R. § 68.105 in the definition of a

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[11] 47 C.F.R. § 68.105(c) (emphasis added); *see also 2003 Unbundling Order*, at ¶ 343, fn. 1012.

[12] Tr., 184:18-185:24; Blair Direct Testimony, 11:12-13:12; *see also*, CenturyTel's Reply Brief, 3-6.

[13] 47 C.F.R. § 68.105(d)(1) (emphasis added).

[14] 47 C.F.R. § 68.105(b) and (d)(2) (emphasis added). The Arbitrator's finding that CenturyTel has introduced the concept of the MPOE in an attempt to "confuse the issue" (Report, 14) finds no basis in the record and as such constitutes an unsupported and unfair attack on CenturyTel's motives. CenturyTel agrees that the MPOE is not relevant to the demarcation point at single unit installations, which are the only installations at which Charter has claimed the need to use CenturyTel's NIDs. But a full understanding of the FCC's definition of the Point of Demarcation is needed to correctly address Issues 2 and 24, and the Arbitrator should base his decision on the FCC's full definition and not the snippet on which Charter so misleadingly relies.

NID is entirely consistent with the FCC's rule, and is required to clearly set forth the relationship between the NID and the Point of Demarcation. This clarification is needed precisely because of Charter's position that the demarcation point is ***inside*** the NID. ***The NID is not the point of demarcation in single unit installations, but it contains the protector which the FCC utilizes in its Rule to determine the Point of Demarcation outside of the NID.***

Because the Parties' rights regarding use of the NID, and compensation for such use, are determined on the basis of the relationship between the NID and the Point of Demarcation, it is essential that the definition of NID include the language proposed by CenturyTel. The Arbitrator's failure to do so in the Report is in error; thus, the Report's contents regarding Issue 2 should be revised consistently with the foregoing, and CenturyTel's language for Article II, § 2.103 should be adopted.[15]

2. The Arbitrator Erroneously Determined that Charter is Entitled to Use CenturyTel's NIDs without Compensation

The Arbitrator's conclusion that "all of Charter's activities take place on the customer side of the 'demarcation' point'"[16] is contrary to controlling law, namely 47 C.F.R. § 68.105. The Arbitrator mistakenly relies on subsection (a) of the rule to conclude that the jack within the NID is the demarcation point. As discussed above, subsection (a) merely states that, in general, the demarcation point consists of wire or a jack, and the rule goes on to further define the demarcation point depending on the type of installation. For single unit installations, which are the only type of installations addressed in this record, the rule clearly places the demarcation point at a point "downstream" from the protector and does not utilize the jack within the NID to establish the demarcation point.

Therefore, the Arbitrator's finding that CenturyTel's network "end[s] at the point of its

[15] CenturyTel refers the Arbitrator to *CenturyTel's Proposed Order*, 9-11 for appropriate findings to resolve Issue 2.

[16] Report, 13.

RJ11 connector"[17] is, without question, in error. Rather, according to FCC Rule 68.105(c) the ***entire NID is a part of CenturyTel's network***, inasmuch that the demarcation point is a point on ***the telephone wire*** within 12 inches of the protector located within the NID. As shown by the photographs of NIDs in the record,[18] as well as the actual NID shown to the Arbitrator at the hearing, FCC Rule 68.105(c) places the demarcation point ***outside of the NID***.[19] Charter's activities within the NID, as described by its Vice President Technical Operations,[20] therefore occur on the ***ILEC network side*** of the demarcation point, and within a network facility that is undisputedly owned in its entirety by CenturyTel. For these reasons, the Arbitrator has erred in concluding that "such activities do not constitute access to the NID UNE."[21]

Further, the Arbitrator mistakenly concludes that "the Charter connection remains entirely within portions of the NID that are completely and at all time accessible to the premises owner."[22] Charter derives no rights to such use from its customer. Although a CenturyTel customer has the right to access the "customer access" side of the NID for certain defined purposes, any such rights terminate when such former customer ceases to be a CenturyTel customer.[23] Under Missouri law, "[t]he business relationship between a utility and its customers is rooted in contract."[24] Thus, upon termination of service and the contract, the customer loses any rights it had to access CenturyTel's property while he or she was a CenturyTel customer. As

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[17] *Id.*, 13-14.

[18] *See* Blair Direct Testimony, 7; Miller Direct Testimony, GEM-3.

[19] It should be noted that Charter's PSC MO No. 1 Tariff contains language consistent with FCC Rule 68.105(c) identifying the demarcation point. *See,* Miller Rebuttal Testimony, 6:3-17.

[20] Blair Direct Testimony, 12:1-13:12.

[21] Report, 14. Further, the Arbitrator erred in the finding that CenturyTel "attempts to confuse the issue" by introducing the concept of minimum point of entry. CenturyTel does not introduce MPOE. While MPOE is addressed in 47 C.F.R. sec. 68.105*(b),* this concept relates to multiunit buildings. Issue 24 does not related to multiunit buildings and CenturyTel has not introduced this concept into Issue 24.

[22] *Id.*, 13.

[23] Miller Rebuttal Testimony, 6:20-7:8.

[24] *A.C. Jacobs and Co., Inc. v. Union Elec. Co.,* 17 S.W.3d 579, 585 (Mo. App. W.D. 2000).

the former chairman of this Commission has determined, "When a customer leaves CenturyTel for Charter, the contract between CenturyTel and the customer terminates and the CenturyTel tariff no longer applies. The customer no longer has the right to access CenturyTel's NID."[25]

The FCC has recognized that a CLEC may choose either to install its own NIDs, or use the ILEC's NID and, thus, benefit by avoiding the cost of deploying NIDs.[26] Charter, and only Charter, voluntarily decides whether to use or not to use CenturyTel's NIDs to accomplish the connection between Charter's wiring and the customer inside wiring. The FCC has made it clear that to the extent a CLEC like Charter chooses to use CenturyTel's NIDs, the applicable UNE charge applies whenever the CLEC uses any of the NID's "features, functions and capabilities."[27] A conclusion otherwise – that Charter has the right under federal law to make use, passive or otherwise, of CenturyTel's property without compensation – would effect a taking *per se* without just compensation in violation of the federal and state constitutions.[28]

For these reasons, the Arbitrator's conclusions with respect to Charter's use of CenturyTel NIDs are in error and must be corrected in accordance with the law, the facts, the FCC's clear direction and sound public policy.

3. The Arbitrator Erroneously Found NID Rates to be an Open Issue

The Arbitrator's conclusions regarding CenturyTel's charges for Charter's use of CenturyTel's NIDs are equally flawed. As noted above, the monthly recurring and non-recurring rates for Charter's use of the NIDs were *not open issues* presented to the Commission for

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[25] Findings, Conclusions and Award of Arbitrator, at 8, *CenturyTel, Inc. v. Charter Fiberlink, LLC,* AAA Case No. 51 494 Y 00524-07 (Aug. 24, 2007).

[26] *In the Matter of 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,* CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499, at ¶ 396 (1996).

[27] 47 C.F.R. § 51.307(c). *See also* CenturyTel Reply Brief, 3-5; Miller Rebuttal Testimony, 8:23-10:4.

[28] *Loretto v. Teleprompter Manhattan, LLC,* 458 U.S. 419 (1982); *Ogg v. Mediacom, LLC,* 142 S.W.3d 801 (Mo. App., W.D. 2004).

resolution, and as such are not within the Commission's jurisdiction to resolve.[29] Since such rates are not at issue, neither are the costs that comprise such rates.

Without waiving its position that Charter did not dispute the NID rates set forth in Article XI (Pricing), and assuming *arguendo* that the Arbitrator, in his reconsideration of his disposition of Issue 24, were to find that CenturyTel's NID rates are an open issue for determination, CenturyTel must be provided an opportunity to establish its rates and charges for NID use by Charter. If the UNE rate is in dispute (which, of course, CenturyTel advocates is the ***not*** the case in this proceeding), FCC Rule 47 C.F.R. § 51.509(h) provides:

> An incumbent LEC must establish a price for the network interface device when that unbundled network element is purchased on a stand-alone basis pursuant to Sec. 51.319(c).

Even though it would be contrary to the record, if the Arbitrator nonetheless concludes that there was not mutual agreement on the NID rates and that such rates are an open issue for determination, the Arbitrator must also conclude that in fairness and equity CenturyTel should be provided an opportunity to establish such rates, to present such rates to Charter for consideration, and if no agreement is reached with regard to such rates, to submit the rates to the Arbitrator for determination. In such event, CenturyTel would assess the currently proposed rate on an interim basis subject to true-up based on any final rate determined by the Arbitrator. Such action is necessary to comply with cost causation principles and to ensure there is no inference that Charter may use CenturyTel's NID free of charge.

The reasoning and the disposition of Issues 2 and 24 set forth at paragraphs (12) through (27) of the *CenturyTel Proposed Order* is consistent with common sense, the law, the record, and sound public policy. As such, the Arbitrator must correct the errors in the Findings of Fact, Conclusions of Law and Decision set forth in the Report regarding Issues 2 and 24, and

[29] *See*, note 6 *supra.*

CenturyTel's language for the Agreement regarding such Issues should be approved by the Arbitrator.

III. ISSUE 11

The Report fails to acknowledge the most important term related to Issue 11, namely, CenturyTel's proposed Article III, § 53. The Report states that "CenturyTel's proposal would effectively permit it to unilaterally modify the contractual obligations of either Party"[30] and that the terms of the Service Guide would "take precedence over the Agreement."[31] The Report is in error on both points. Charter advanced these very concerns in negotiations between the Parties, and CenturyTel's proposed Section 53 was drafted specifically to address such concerns. Yet, the Report completely ignores CenturyTel's proposed Section 53.[32]

As CenturyTel's proposed Section 53 provides, CenturyTel agrees to limit the Service Guide's applicability to only those subject matters that are specifically referenced in the Agreement. Section 53 also clarifies that the incorporated procedures set forth in the Service Guide are *intended to "supplement" the terms of the Agreement, and cannot be construed as contradicting or modifying the terms of the Agreement*.[33]

The Report's failure to acknowledge the specific language proposed in Article III, § 53 has apparently caused an improper resolution of Issue 11. For example, the Report quotes a determination by the Minnesota Public Utilities Commission which held that, in the event of a conflict between a change in an ILEC's change management process, which is analogized to CenturyTel's Service Guide, and the terms of the ILEC's interconnection agreement, the terms

[30] Report, 43.

[31] *Id.*, 44.

[32] *See, e.g.*, Miller Direct Testimony, 41:4-43:17.

[33] *See* Revised Statement, 30-31 (Article III, § 53.2).

of the interconnection agreement would prevail.[34] The Report goes on to state that CenturyTel's proposed language would permit the terms of the Service Guide to trump the terms of the Agreement. As set forth above, CenturyTel's proposed Section 53 already incorporates the very principle espoused by the Minnesota Commission – that the terms of the Agreement take precedence over any conflicting terms contained in the Service Guide. CenturyTel's proposed language offers Charter even greater protections than those found in the Minnesota language. Section 53 provides for the delayed implementation of a change in procedure that "materially and adversely impacts" Charter's business while the Parties work to resolve the issue, and should the Parties be unable to resolve such issue, either Party may use the dispute resolution procedure to seek ultimate resolution.[35] Given the concessions and clarifications embodied in Section 53, the Arbitrator should revise the Report and should adopt CenturyTel's proposed language for Issue 11.

CenturyTel requests that the Arbitrator also consider the negative consequences of his initial resolution of Issue 11 for the Parties' operational relationship. If the Service Guide is of no moment, Charter could decide if and when it was willing to follow a simple operational process or procedure. What happens if Charter decides not to follow a simple ordering procedure or an established maintenance escalation process? Must CenturyTel customize a procedure for Charter and treat it differently than other CLECs interconnected with CenturyTel? Must CenturyTel provide special training of its personnel on Charter-specific processes and procedures? The current resolution of Issue 11 will cause uncertainty and future disputes between the Parties which may require Commission intervention, thus consuming resources of

[34] Report, 44, citing *In the Matter of Eschelon Telecom of Oregon, Inc.'s Petition for Arbitration with Qwest Corporation*, MPUC No. P-5340, 421/IC-06-768, Arbitrator's Report (MN PUC 2006) at 7).

[35] *See CenturyTel Proposed Order*, 38.

the Commission and the Parties unnecessarily. Therefore, the Arbitrator's resolution of this Issue in the Report should be reversed and CenturyTel's position on Issue 11 should be adopted.

Finally, the record is replete with examples in which ILECs have incorporated the terms of service guide-type documents into their interconnection agreements[36] (albeit on terms more onerous than those proposed by CenturyTel under Section 53), including in Charter's current interconnection agreement with Verizon.[37] Thus, action consistent with CenturyTel's position is not novel nor is it something that should cause concern for the Commission.

For all of the reasons provided by CenturyTel, the Arbitrator should reverse the resolution of Issue 11 set forth in the Report and should adopt CenturyTel's proposed language for the Agreement regarding Issue 11.

IV. ISSUE 18

The factual findings in the Report relating to Issue 18 are erroneous and cannot support the conclusions that are reached regarding the establishment of Points of Interconnection ("POIs") within the CenturyTel network. Rather, CenturyTel requests that the Arbitrator limit the resolution of this issue to his ultimate conclusion: "Nonetheless, in instances where a POI already exists between CenturyTel and Charter, the Arbitrator will order the practice to continue."[38] This conclusion is supported by the record[39] and avoids any question with respect to whether the remaining discussion contained in the Report is either factually or legally erroneous. Consistent with the Arbitrator's ultimate conclusion, CenturyTel's language to resolve Issue 18 should be adopted.

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[36] *See* Miller Direct Testimony, 44:23-46:27; Miller Rebuttal Testimony, 32:1-33:2.

[37] Miller Rebuttal Testimony, 32:3-20.

[38] *Id*.,76.

[39] Tr., 419:9-420:11.

A. The Findings of Facts in the Report are Erroneous

Although the Arbitrator states five (5) Findings of Fact,[40] his discussion of the issue contains a number of additional assertions of fact regarding the establishment of POIs within CenturyTel's network. The following factual assertions have no basis in the record and must be reversed:

1. The Report declares "CenturyTel has not established that a single POI in the specific exchanges that Charter seeks to interconnect would be technically infeasible."[41] The Report also declares that "CenturyTel has an extensive network throughout many areas of Missouri."[42] As explained below, this declaration is at best inexact as it fails to reflect that the network is deployed in only limited parts of the State. In addition, the declaration fails to reflect the use made by CenturyTel of its network, in particular its use for exchange access traffic and *not* for the transport of local telephone calls.

2. The Report declares that "in those areas where Charter competes with CenturyTel (and would establish a single POI) CenturyTel maintains certain high capacity transmission facilities to connect its network facilities in that area," and that "[t]he facts revealed by CenturyTel's network diagram, however, establish that Charter's request would simply seek interconnection arrangements that are equal to what CenturyTel already provides itself, not a `superior' arrangement."[43] These statements are in error. The record demonstrates that the CenturyTel network connecting the exchanges that are also served by Charter are facilities used for exchange access and *not local service*.[44] The record also demonstrates that CenturyTel provides no tandem switching for local calls.[45] Thus, CenturyTel provides this transport to Interexchange Carriers for long distance calls and not to itself for local calls.

3. With respect to purported efficiencies, the Report declares that "requiring Charter to interconnect at multiple points (or POIs) within a LATA would simply create inefficient network arrangements, and impose greater costs upon Charter."[46] The

[40] Report, 66. Although the references to the first two (2) findings related to Issue 18 are not controversial, Finding 3 related to the costs to reach a POI references Charter witness Gates' direct testimony at page 32, lines 20-22. *See id*., n. 170; *see also* Gates Direct Testimony, 32:19-22. Mr. Gates suggests that there are "significant competitive cost and operational implications for Charter." *Id*. As explained *infra*, this reference is inaccurate since the existing POIs are sufficient and the costs to get to the *existing* POIs have been incurred. Thus, the reference to page 32, lines 20-22 of the Gates Direct Testimony should be deleted.

[41] Report, 66.

[42] *Id*.

[43] *Id*.,73.

[44] Tr., 337:10-15.

[45] Tr., 400:2-9.

[46] Report,74.

record reflects that multiple POIs have been voluntarily deployed by Charter and no other POIs are necessary. [47] Thus, the costs have already been incurred by Charter.

4. The Report declares that "by forcing CLECs to use multiple POIs of CenturyTel's choice and location, CenturyTel is prohibiting CLECs, like Charter, from enjoying the efficiencies CenturyTel built into the network for its owns use, and improperly shifting the costs of building out the CenturyTel network to its competitors."[48] No citation is provided for this assertion and there is no evidence that any local network efficiencies that CenturyTel may possess with respect to its *local network* are *not* being shared.[49] Moreover, CenturyTel's proposed contract language requires mutual discussion of the location of the POIs with Commission intervention if disagreement occurs; CenturyTel is not "forcing" any CLEC to adopt CenturyTel's "choice and location" of a POI.[50]

5. The Report declares that "Mr. Watkins statements on this issue evolved, and in his rebuttal testimony he clearly moved away from his prior statements suggesting that interconnection as a single POI would be infeasible."[51] Nothing of the sort occurred. In responding to allegations made by Charter, Mr. Watkins reiterated the prohibition against a "superior form of interconnection."[52] This is acknowledged in the Report: "Mr. Watkins testimony, suggesting that interconnection at a single POI *would constitute either* a technically infeasible interconnection arrangements, *or* an unreasonably costly arrangement. . . ." [53]

When corrected, the facts undermine all of the proposed legal conclusions regarding Issue 18 contained in the Report. At the same time, the corrected findings of fact will support the Arbitrator's ultimate conclusion that "in instances where a POI already exists between CenturyTel and Charter, the Arbitrator will order the practice to continue."[54]

B. The Conclusions of Law are Erroneous

The conclusions of law with respect to Issue 18 are equally erroneous. First, there is no

[47] Tr., 419:9-420:11.

[48] Report, 74-75.

[49] *CenturyTel Reply Brief*, 43.

[50] *Id.*, 43 citing Joint Statement, 66-71 (CenturyTel Proposed Sections 2.2.2, 3.2.2 (in its entirety) and 2.3.2.4.4).

[51] Report, 71.

[52] Watkins Rebuttal Testimony, 26:22-27:7, 37:1-12; *see also CenturyTel Reply Brief*, 39, n.175. As noted by Mr. Watkins, "Mr. Gates (and thus Charter) fails to provide any specificity with respect to the location and form of interconnection that Charter will need arising from the Agreement to be entered into at the end of this proceeding." Watkins Rebuttal Testimony, 27:4-7.

[53] Report, 73.

[54] *Id.*, 76.

"rule"[55] or "right"[56] with respect to the "single POI per LATA." The only interconnection rules at issue here were adopted in August 1996 by the FCC in its *First Report and Order* and nowhere within the cited Section 51.305(a)(2)[57] is the phrase "single POI per LATA" referenced. The citations referenced by the Arbitrator[58] are to either *notices of proposed rulemakings* or a *Section 271 proceeding* or an FCC Bureau arbitration decision. All of these actions rely on an inapplicable citation to a provision contained in an FCC Section 271 decision that quotes a private contractual provision between Southwestern Bell and MCI Worldcom.[59] The Arbitrator fails to explain how a BOC contract term can be grafted onto a general Section 251(c) requirement applicable to BOCs and non-BOCs alike.[60]

Second, the Report suggests that the "*only* limitation to Charter's right to interconnect at a single POI" under Section 251(c)(2) is a technical feasibility.[61] The Arbitrator fails to note that Section 251(c)(2) also requires that the POI be located within the network[62] and that the interconnection must not be more than equal to that provided by the ILEC to itself, its affiliates or other carriers.[63] As to the latter "no more than equal to" requirement, the Eighth Circuit has

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[55] *See, e.g., id*., 69.

[56] *Id*., 70.

[57] *Id*.

[58] *Id*., 67-68, 70.

[59] *See CenturyTel Reply Brief*, 37-39. Because the derivation of the concept of "single POI per LATA" is integral to the erroneous legal conclusions reached on Issue 18 and because, like Charter, the Arbitrator has failed to note the various footnotes within the quotes he includes in the Report, attached hereto as Appendix A are the pages from the FCC actions upon which Charter and the Arbitrator rely for the concept of a "single POI per LATA" rule. CenturyTel also notes that the discussion within the Oregon *amicus brief* noted by the FCC in footnote 170 of the Texas 271 proceeding ultimately premised its conclusions regarding technical feasibility and POIs on the now rejected superior interconnection notion along with the cost recovery mandates by the FCC that were rejected by the 8th Circuit in *IUB I* and *IUB II*. *See also* Watkins Direct Testimony, 34:4-7.

[60] Report, 69. To the extent that there is some factual finding that the "single POI per LATA rule" derives from the obligations under Section 251(c)(2) which applies to all incumbent LEC" (*Id*.), the excerpts from the FCC actions in Appendix A refute that finding.

[61] *Id*., 70 (emphasis added); *see also id*., 71-72.

[62] 47 U.S.C. § 251(c)(2)(B).

[63] 47 U.S.C. § 251(c)(2)(C) (The duty to provide interconnection must also be one "that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party. . . .").

confirmed that the FCC's "superior interconnection" theory was unlawful.[64] As with other sections of the Report in which the Arbitrator suggests that the Eighth Circuit directives must be followed,[65] it would be unlawful (as well as arbitrary and capricious) to ignore aspects of the Section 251(c)(2) framework[66] as well as the Eighth Circuit's directives with respect to Issue 18. The costs of "cater[ing] to every desire of every requesting carrier,"[67] like Charter's "single POI per LATA" concept, are clearly relevant and demonstrate an unlawful "superior" form of interconnection.

Third, the Arbitrator erroneously concludes that a single POI can be required because Section 251(c)(2) uses the term interconnection point in the singular.[68] The use of the singular must be viewed in light of all of the criteria contained in Section 251(c)(2) and in light of the network that is being examined. As to the latter, the relevant network is the ILEC network as it exists, not a local network that "cater[s] to every desire of every requesting carrier."[69] Where facilities do not exist to connect exchanges for the *exchange of local exchange service traffic*,[70] a single POI is inappropriate because it would create a superior form of interconnection that cannot be imposed under *IUB I* and *IUB II*.[71] Thus, the use of the singular noun "point" within Section 251(c)(2) does not preclude the use of multiple POIs.

For these reasons, the underlying legal conclusions reached in the Report are erroneous.

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[64] *See Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997) ("*IUB I*"); and *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744, 758 (8th Cir. 2000) ("*IUB II*")

[65] *See* Report, 80.

[66] *See CenturyTel Reply Brief*, 39-40 and n. 178 through 180.

[67] *IUB I*, 120 F.3d at 813.

[68] Report, 67.

[69] *IUB I*, 120 F.3d 813.

[70] Tr., 337:10-15; 400:2-9.

[71] The Report contains the assertion that the "Arbitrator also rejects other assertions made by Mr. Watkins regarding the limitations of CenturyTel's interconnection obligations. In particular, Mr. Watkins suggests that the non-discrimination principles of Section 251(c)(2) limit Charter's right to request a single POI." Report, 73. No reference or rationale is provided for this statement. Accordingly, the Arbitrator's statement is legal error.

As with the findings of fact noted in Section III.A, the legal conclusions reached in the Report with respect to Issue 18 must be reversed and CenturyTel's position with regard to Issue 18 should be adopted by the Arbitrator.

V. ISSUE 19

The factual findings are incomplete and cannot form the basis for the proper resolution of Issue 19 regarding the level of traffic to trigger the Parties' migration from an indirect form of interconnection to direct connection. Consistent with CenturyTel's position regarding Issue 18, CenturyTel requests the Arbitrator to limit his decision to the ultimate conclusion that, "where direct interconnection is already established, the Arbitrator will order the parties to continue to utilize that direct interconnection."[72] Since the ***existing*** interconnection between the Parties and its appropriateness is described in the record,[73] the resolution of Issue 19 should be limited to the issue before the Commission – the traffic level to be used for the migration from transit arrangements to direct trunking. For the reasons provided by CenturyTel, the CenturyTel language should be adopted.

A. <u>The Findings of Facts in the Report are Erroneous</u>

The Arbitrator states the issue to be: "Should Charter's right to utilize indirect interconnection as a means of exchange traffic with CenturyTel be limited to only those instances where Charter is entering a new service area, or market?"[74] This is not a proper statement of the issue, but even if it was, the Arbitrator properly concludes that "where direct interconnection is already established, the Arbitrator will order the parties to continue to utilize that direct connection."[75] Because the *existing* interconnection and its appropriateness is

[72] *Id*., 78.

[73] Tr., 419:9-420:11.

[74] Report, 76.

[75] *Id*., 78.

established,[76] the answer to the question posed by the Arbitrator is "yes," since a traffic threshold would be required only in any new markets that Charter may enter.[77]

In addition, the Arbitrator's statement of facts regarding Issue 19[78] is incomplete and thus in error. As a consequence, the statement of facts should be expanded to include the following:

1. Multiple POIs have been deployed by Charter and no other POIs are necessary (Tr., 419:9-420:11);

2. The Parties agree that use of indirect interconnection will end when exchanged traffic meets a DS1 threshold (Tr., 80:10-19 (Staff Questioning of Charter witness Gates); Watkins Rebuttal Testimony, 45:12-20);

3. Transit arrangements are inferior because they raise network management, traffic measurement and proper compensation issues (Watkins Direct Testimony, 57:1-22);

4. Charter has no plans to abandon its existing arrangements with CenturyTel (Gates Direct Testimony, 55:2-4); and

5. CenturyTel's proposed 200,000 minute threshold is a workable standard based on CenturyTel's experience (Watkins Rebuttal Testimony, 47:6-8) and is the standard used from prior agreements that Charter has with CenturyTel (Watkins Direct Testimony, 66:6-8).[79]

These additional findings of fact are needed for a proper resolution of the issue.

B. The Conclusions of Law are Erroneous

The Arbitrator's legal conclusions are in error. First, he states that a "right under Section 251(a) to interconnect through either direct or *indirect means* has been expressly recognized by the Commission. . . ."[80] Such conclusion is in error, as this right only applies to SBC-Missouri and even Charter's witness, Mr. Gates, acknowledged that CenturyTel's network is not capable

[76] Tr., 419:9-420:11.

[77] *See CenturyTel Reply Brief*, 44-45.

[78] Report, 76.

[79] CenturyTel also notes that the FCC has also used the 200,000 minute of use threshold as the level of establishing a DS1. *In the Matter of Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket Nos. 00-218, 00-249, and 00-251, FCC 02-1731 (rel'd July 17, 2002) at para. 116 and n. 384.

[80] Report, 76; *see also id*. at 77-78.

of providing interconnection through transiting:

> In Missouri, the transiting carrier would be SBC. SBC, as the largest incumbent LEC, is the only carrier capable of providing transit service connecting all carriers, primarily because of the ubiquitous local network it has deployed.[81]

Since the transiting of *local traffic* by the Parties would be through SBC's network (which CenturyTel does not do for a call between its own end users), any requirement that would obligate CenturyTel to provide or utilize transit service above CenturyTel's agreed-to DS1 level would be a "superior form of interconnection" in violation of *IUB I* and *IUB II*.

Second, the Arbitrator relies upon *Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256, 1258 (10th Cir. 2005) ("*Atlas/Oklahoma Corporation Commission*") for the propositions that a "CLEC has the right to choose to avail itself of either direct interconnection under Section 251(c) or indirect interconnection under Section 251(a)"[82] and that "the use of direct interconnection in one instance does not preclude the use of indirect interconnection in other instances."[83] With all due respect, the above-quoted propositions from *Atlas/Oklahoma Corporation Commission* have been taken out of context. Specifically, the court stated that "[t]he physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligations under §251(a) to interconnect 'directly or indirectly.'"[84] This statement prefaces the court's ultimate holding: "In full accordance with our previous analysis, we hold that the RTCs' obligation to establish reciprocal compensation arrangements with the CMRS provider in the instant case is not impacted by the presence or absence of a direct connection."[85] There is no dispute in this proceeding with respect to reciprocal compensation. Thus, the court's decision in *Atlas/Oklahoma Corporation Commission* is not relevant to the

[81] Gates Direct Testimony, 50:7-10.

[82] Report, 77 (footnote omitted).

[83] *Id*. (footnote omitted).

[84] *Atlas/Oklahoma Corporation Commission*, 400 F.3d at 1268.

[85] *Id*.

issue at hand and the Arbitrator's conclusions derived from it are in error.

In addition, the Arbitrator has also failed to explain how a Section 251(a) duty can impose a more significant and onerous obligation upon CenturyTel than the most significant of the Act's interconnection obligations under Section 251(c).[86] As *IUB I* and *IUB II* direct, an ILEC cannot be required to provide a superior form of interconnection as a result of Section 251(c)(2)(C). Likewise, Section 251(a), the lowest of the escalating duties provided in Section 251, cannot be used indirectly to achieve what the courts in *IUB I* and *IUB II* say cannot be done directly – to require an ILEC to provide a superior form of interconnection.

Finally, the Arbitrator concludes that "CenturyTel's position . . . impedes competition by imposing impermissibly restrictive limitations on the use of indirect interconnection arrangements."[87] This conclusion cannot be reconciled with the Parties' agreement that a DS1 level of traffic is the trigger for when the Parties will migrate to a direct trunking form of interconnection. The only disagreement that exists is whether the DS1 level should be set at 200,000 minutes of use ("MOUs") of 240,000 MOUs. There is no explanation as to how a 40,000 MOU difference could be considered as impeding competition, particularly since Charter has previously agreed to that MOU threshold with CenturyTel in connection with the Parties' existing interconnection arrangement. Thus, since the Parties have agreed to end indirect transit arrangements at a DS1 level, there is no basis to conclude that CenturyTel's position impedes competition. Issue 19 addresses the minutes of use to determine a DS1 level, nothing more,

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[86] As the FCC has indicated,

> Section *251(a) imposes relatively limited obligations on all telecommunications carriers;* section 251(b) imposes moderate duties on local exchange carriers; and section 251(c) imposes more stringent obligations on incumbent LECs. Thus, *section 251 of the Act "create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved*

In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corporation, Memorandum Opinion and Order, File No. E-97-003, FCC 01-84, released March 13, 2001 ("*FCC Atlas Decision*") at para. 25 (emphasis added). Although substantively in error as to the Act and the FCC's requirements, the Arbitrator nonetheless acknowledged that he must follow FCC requirements. *See, e.g.,* Report, 72. Thus, the Arbitrator is *also* bound to follow the FCC's statements in the *FCC Atlas Decision.*

[87] Report, 78.

nothing less. For these reasons, this legal conclusion is clearly erroneous and must be reversed. For the reasons provided by CenturyTel, CenturyTel's proposed language adopted.

VI. ISSUE 20

The Report's factual findings and conclusions regarding this Issue are based on a misstatement of the issue.[88] The only issue that needs to be resolved is the amount of time that should be allocated for negotiation of entrance facility rates. This has been adequately addressed by CenturyTel[89] and CenturyTel's position fully justifies adoption of its language to resolve Issue 20.

A. The Findings of Facts in the Report are Erroneous

CenturyTel objects to the incomplete factual statement that "CenturyTel does not offer any language in the DPL which indicates it would accept a 'true-up' clause."[90] Although this is correct as far as it goes, CenturyTel witness Watkins indicated that the Revised Statement had an error and that CenturyTel's proposed language for Article V, § 2.3.1 does include a "true-up" clause.[91] CenturyTel requests that, for completeness, this fact be reflected in the Report by the Arbitrator. If this fact is recognized, then the need for shortening the negotiation period from 6 months (as proposed by CenturyTel) to 3 months as found by the Arbitrator[92] is without merit as any additional time permitted will have no ultimate financial consequence to Charter.

B. The Conclusions of Law are Erroneous

As a result of his misstatement of the issue, the Arbitrator has mistakenly "prejudged" the issue that CenturyTel has raised and has gone beyond the issue before the Commission for

[88] *Id.*

[89] *See, e.g., CenturyTel Reply Brief*, 47-48.

[90] Report, 81.

[91] Tr., 359:25-361:3; Watkins Rebuttal Testimony, 52:17-20. The omitted sentence provides: "Once such new rates are established, either by agreement or pursuant to a dispute resolution proceeding, such new rates shall apply retroactively to the Effective Date of this Agreement, and shall be trued-up accordingly." CenturyTel Response, Exhibit 2, Article V, p. 3 of 28.

[92] Report, 81.

resolution.[93] For this reason, all legal conclusions reached in the Report on Issue 20[94] should be reversed and the discussion narrowed to the timing issue which is in the dispute between the Parties.

VII. ISSUE 21

The Arbitrator's factual findings are incomplete and cannot form the basis for the proper resolution of Issue 21 regarding the use of one-way trunks by the Parties. As explained below, four (4) additional and critical facts are necessary to properly reflect the record on this issue as well as to properly resolve it. Moreover, the Report ignores the essence of the legal issue that must be resolved, and, therefore, the legal conclusions reached with respect to Issue 21 are erroneous. These errors can be corrected by the adoption of CenturyTel's proposed language based upon the reasons provided by CenturyTel.

A. The Findings of Facts in the Report are Erroneous

Even if the adopted statement of the issue from Charter was correct (which it is not and should be revised based on the submissions of CenturyTel),[95] the Arbitrator's factual findings are, at best incomplete. While the Report distinguishes a one-way trunk from a two-way trunk,[96] the Arbitrator fails to reflect four (4) critical facts that are at the heart of the Parties' dispute with respect to Issue 21:

1. Charter will routinely use two-way trunks and only wants the option of selecting one-way trunks if the need arises and then based solely on technical feasibility (Gates Direct Testimony, 62:34-63:3);

2. Charter's proposed language for Section 3.2.3 states in part: "[W]here one-way trunks are deployed then each Party is responsible for establishing any necessary interconnection facilities, over which such one-way trunks will be deployed *to the other Party's* switch." (Revised Statement, 80-81) (emphasis added);

[93] *See, e.g., CenturyTel Reply Brief*, 47-48.

[94] Report, 79-81, 82.

[95] Report, 82 and n. 225.

[96] *Id*., 82-83.

3. Charter's confirmed position is that each Party should bear the financial responsibility to its side of the POI (Gates Direct Testimony, 30:11-12; 31:5-8, 45:15-18); and

4. CenturyTel does not transport its local calls beyond its network (Watkins Direct Testimony, 74:13-75:16).

The Arbitrator's additional two findings of fact contained within his Discussion of Issue 21 are in error and should be revised and/or rejected. First, the Arbitrator finds that the selection of one-way trunks versus two-way trunks is subject only to consideration of technical feasibility.[97] *As a matter of law*, the Arbitrator cannot write out of the Act the requirements of Section 251(c)(2), including the prohibition against imposing superior forms interconnection. [98]

Second, the Arbitrator incorrectly concludes that "CenturyTel's proposed language restricts [Charter's] ability to deploy one-way trunks because it requires both Parties to negotiate the appropriate trunk configuration," thus creating a "veto power."[99] CenturyTel's language does nothing of the sort, as the Arbitrator elsewhere acknowledges: "If the Parties cannot agree on the deployment of a one-way trunk, the matter would proceed through the dispute resolution process."[100] The dispute resolution would involve the Commission where necessary. Therefore, the Commission, if requested and based on a fact-specific record, would determine whether one-way trunks should be deployed by Charter.

B. <u>The Conclusions of Law are Erroneous</u>

The Arbitrator's legal conclusion is also erroneous. He "adopts Charter's proposed language as consistent with federal law in that it provides a CLEC the ability to choose either one-way or two-way trunks depending upon the particular circumstances of the traffic the CLEC

[97] Report, 83.

[98] *See CenturyTel Reply Brief*, 39-40 and n. 178-180.

[99] Report, 83. CenturyTel assumes the second reference to "CenturyTel" was intended to be "Charter." If not, CenturyTel is willing to agree to negotiate the appropriate one-way trunk arrangement subject to the full requirements of Section 251(c)(2) of the Act. *See* 47 U.S.C. § 251(c)(2).

[100] Report, 83.

will exchange with the ILEC."[101] The Arbitrator overlooks the fact that Charter's proposed language regarding one-way trunks in Section 3.2.3 would require CenturyTel to be responsible for the delivery of local traffic beyond a POI within its network and beyond points which CenturyTel transmits *its own* local exchange service traffic today. This is a superior form of interconnection outlawed by *IUB I* and *IUB II*.[102]

Further, the Arbitrator concludes that CenturyTel's proposed language would allow CenturyTel to "essentially have a 'veto' power over Charter in regard to the types of trunks it chooses to deploy."[103] For the reasons stated in Section VII.A, above, this conclusion has no basis. To the contrary, the dispute resolution process anticipates Commission involvement regarding unresolved issues. Thus, the conclusion is erroneous and must be reversed.

VIII. ISSUE 31

The conclusion in the Report that "CenturyTel has the obligation to ensure that end user customer listings are not published in the directories when those customers specifically request that such information not be published" should be reversed.[104] ***This determination is unsupported by any evidence in the record to the effect that CenturyTel even has the ability to review the information submitted by Charter***. Thus, any "expectation" that there are CenturyTel "operational protections in place"[105] to ensure the information is not published should be rejected.

In contrast, the Agreement's language specifically states that Charter's listing information may be sent to *either* CenturyTel or a third party publisher and specifically prohibits

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[101] Report, 84.

[102] *See* Section IV.B, *supra*, for discussion of the directives that must be followed arising from *IUB I* and *IUB II*; *see also CenturyTel Reply Brief*, 49-50.

[103] Report, 83.

[104] Report, 99.

[105] *Id.*

Charter from providing the listing information of any customers who do not wish to have published listings.[106] If that information is sent to the third party publisher rather than CenturyTel, and if Charter has the obligation to ensure that the information is never provided in the first place, the assumption currently in the Report is clearly out of place.

Moreover, the conclusion that "CenturyTel should indemnify Charter against *any* third party claims concerning the publication of non-publish information" significantly goes beyond the principle of comparative fault espoused in the proposed decision (*i.e.*, CenturyTel should indemnify Charter for CenturyTel's "negligence, gross negligence, or intentional or willful misconduct"). This additional language adds unnecessary confusion and may potentially be taken out of context in the future.

Therefore, for all of the reasons presented by CenturyTel on its briefing of this issue, ***including the legal analysis that Missouri law does not recognize the concept of gross negligence***,[107] CenturyTel's proposed language for Issue 31 should be adopted.

IX. CONCLUSION

For the reasons set forth herein, in the *CenturyTel Proposed Order,* in CenturyTel's Reply Brief and in CenturyTel's additional filings in this proceeding regarding each of the foregoing issues, CenturyTel respectfully requests that the Arbitrator:

(a) Issue a Final Arbitrator's Report that (i) corrects the errors in the Draft Report relating to Issues 2, 24, 11, 18, 19, 20, 21 and 31 in accordance with CenturyTel's positions set forth hereinabove, and (ii) adopts and approves the language that CenturyTel proposes to resolve all remaining issues that the Arbitrator has decided in favor of Charter in the Draft Order;

[106] Agreement, Article XII, § 2.1.2; Joint Statement 102-05.

[107] This concern is also presented with the conclusions in the Report regarding Issue 15.

(b) Retain jurisdiction of this arbitration until the Parties have submitted a conforming agreement for approval pursuant to Section 252(e) of the Act; and

(c) Retain jurisdiction of this arbitration and the Parties hereto as necessary to enforce the arbitrated Agreement.

DATED: December 22, 2008

Respectfully submitted,

/s/ Larry W. Dority

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing Comments were served by facsimile, hand-delivery, or electronic mail, on the 22nd day of December, 2008, on the following:

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APPENDIX A:
Excerpts from Various FCC Actions Regarding the "Single POI per LATA" Issue

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by SBC Communications Inc.,	)	
Southwestern Bell Telephone Company,	)	CC Docket No. 00-65
And Southwestern Bell Communications	)	
Services, Inc. d/b/a Southwestern Bell Long	)	
Distance	)	
	)	
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996	)	
To Provide In-Region, InterLATA Services	)	
In Texas	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 2000 **Released:** June 30, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

at a minimum of one mutually agreeable point of interconnection."[167] This portion of the interconnection agreement between SWBT and AT&T, however, was negotiated and, therefore, does not have to comply with section 251.[168] Consequently, AT&T's experience does not constitute evidence of a failure by SWBT to provide interconnection at all technically feasible points for purposes of section 271 review.[169]

78. 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.[170] The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it proves to the state public utility commission that interconnection at that point is technically infeasible.[171] Thus, new entrants may select the "most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' costs of, among other things, transport and termination."[172] Indeed, "section 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC's network at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points."[173] We note that in SWBT's interconnection agreement with MCI (WorldCom), WorldCom may designate "a single interconnection point within a LATA."[174]

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[167] *See* SWBT Deere Texas II Reply Aff., App. A-4 at 5-7; AT&T Texas II Reply Comments, DeYoung/Fettig Decl., at 5 n.7.

[168] SWBT Texas II Reply Comments at 53. SWBT notes that the issues raised by AT&T will be debated before the Texas Commission in a pending arbitration between SWBT and AT&T. SWBT Deere Texas II Reply Aff. App. A-4 at 7. We believe that AT&T's issue is appropriately resolved through the Texas Commission's arbitration process. *See AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications, Inc's Response to Southwestern Bell Telephone Company's Petition for Arbitration*, Tex. PUC Docket 22315 at 13-17 (filed April 17, 2000).

[169] In addition, we find that SWBT satisfactorily addresses AT&T's concern that SWBT does not allow virtual collocation if space for physical collocation is available. AT&T's DeYoung Texas I Aff. at para. 332; *see also* AT&T's March 8, 2000 *ex parte* at 2-3. SWBT confirms that sections 25 and 26 of SWBT's Virtual Collocation Tariff make virtual collocation available to competitive LECs regardless of the availability of physical collocation; the restriction to which AT&T refers involves a maintenance and repair option for virtually collocated equipment, and such language does not deny virtual collocation as alleged by AT&T. SWBT Texas I Reply Comments at 51; Auinbauh Texas I Reply Aff. at paras. 34-35.

[170] *See* 47 U.S.C § 251(c)(2),(3); *see also* 47 C.F.R. §51.305(a)(2); *see, e.g., 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.

[171] 47 C.F.R Section 51.305(e); *see also Local Competition First Report and Order,* 11 FCC Rcd at 15602, 15605-06, paras. 198, 203, 205.

[172] *See Local Competition First Report and Order,* 11 FCC Rcd at 15588, para. 172.

[173] *Local Competition First Report and Order,* 11 FCC Rcd at 15608, para. 209.

[174] *See* SWBT Texas II Application , App. 5, Tab 45, MCI(WorldCom) Agreement Attach. 4, § 1.2.2. Section 1.2.2 of the WorldCom Agreement states: "MCI(WorldCom) and SWBT agree that MCI(WorldCom) may (continued....)

Thus, SWBT provides WorldCom interconnection at any technically feasible point, and section 252(i) entitles AT&T, or any requesting carrier, to seek the same terms and conditions as those contained in WorldCom's agreement, a matter any carrier is free to take up with the Texas Commission.[175]

2. Pricing of Interconnection

a. Background

79. As discussed above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[176] Section 251(c)(2) requires incumbent LECs to provide interconnection "at any technically feasible point within the carrier's network ... on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[177] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[178]

80. Interconnection trunking, physical and virtual collocation, and meet-point arrangements are among the technically feasible methods of interconnection.[179] Shared cage and cageless collocation arrangements must be part of an incumbent LEC's physical collocation offerings.[180] To comply with its collocation obligations, an incumbent LEC must make collocation arrangements available on "rates, terms, and conditions that are just, reasonable, and

(Continued from previous page)
designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities." SWBT Texas II Application , App. 5, Tab 45, WorldCom Agreement Attach. 4, § 1.2.2

[175] *See* 47 U.S.C. § 252(i). Section 252(i) makes these terms and conditions available to all requesting carriers despite SWBT's statement that it requires competitive LECs to interconnect in every local exchange area. *See* SWBT Texas II Reply at 50.

[176] 47 U.S.C. § 271(c)(2)(B)(i).

[177] 47 U.S.C. § 251(c)(2).

[178] 47 U.S.C. § 252(d)(1).

[179] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-81, paras. 549-53. In a physical collocation arrangement, an interconnecting carrier has physical access to space in the LEC central office to connect to the incumbent LEC network. *Id.* at 15784, para. 559, and n.1361. In a virtual collocation arrangement, interconnectors designate central office transmission equipment dedicated to their use, but have no right to enter the central office and do not pay for incumbent LEC floor space. *Id.* In a meet-point arrangement, the parties negotiate a point at which one carrier's responsibility for service ends and the other carrier's begins. *See id.* at 15778, n.1332.

[180] *Advanced Services First Report and Order*, 14 FCC Rcd at 4783-85, paras. 40-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

NOTICE OF PROPOSED RULEMAKING

Adopted: April 19, 2001 **Released:** April 27, 2001

Comment Date: 90 days after publication in the Federal Register
Reply Comment Date: 135 days after publication in the Federal Register

By the Commission: Chairman Powell and Commissioner Ness issuing separate statements; Commissioner Furchtgott-Roth concurring and issuing a statement

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6. Bill and Keep for Traffic Subject to Section 251(b)(5)

69. In light of the current imbalances in traffic exchanged among interconnected networks, and the potential for inefficient incentives under the existing per-minute reciprocal compensation rates, we generally seek comment on the relative benefits of bill and keep for all traffic subject to section 251(b)(5),[88] versus the current per-minute reciprocal compensation rates imposed by most states. We seek comment from state commissions, in particular, regarding the benefits of either approach. We ask that parties discuss the incentives provided by each approach to intercarrier compensation. We also seek comment on the benefits of each approach in promoting competition and negating the effects of market power. We ask that commenters discuss the relative benefits of bill-and-keep and per-minute reciprocal compensation with respect to the pricing signals provided, and the relation between actual costs and prices determined under each approach. We seek comment on how the Commission should weigh the benefits of implementing bill and keep against any disadvantages that commenters may identify. We also seek comment on the disadvantages of applying a bill-and-keep arrangement to any particular type of traffic currently exchanged among interconnected carriers.

70. We seek comment on the best method for allocating transport responsibilities and costs among interconnected carriers under a mandatory bill-and-keep approach to reciprocal compensation. Under our current rules, the originating telecommunications carrier bears the costs of transporting traffic to its point of interconnection with the terminating carrier. If carriers must recover their transport costs from their end users, does this rule still make sense? What incentives does this rule create regarding location and number of points of interconnection (POIs)? Is there a more appropriate way to allocate transport costs?

71. Qwest argues, for example, that a bill-and-keep arrangement does not work when three carriers are involved in the transport and termination of traffic, because the middle carrier that transports the traffic from one LEC to the other does not really have a "customer" involved in the call from which it can recover costs.[89] Qwest therefore argues that the Commission should allow LECs to continue charging each other for delivering transiting traffic that originates on the networks of other carriers.[90] We ask commenters to address this and other issues related to the transport obligations of interconnected LECs under a bill-and-keep regime. CMRS carriers also originate and terminate three-carrier calls, some of which are governed by reciprocal compensation. We seek comment on the issues or problems that the current intercarrier compensation rules present for three-carrier calls. We seek comment on how bill and keep might affect such calls.

72. Under our current rules, interconnecting CLECs are obligated to provide one POI per LATA.[91] Under a bill-and-keep regime, should this rule still apply? How should carriers

[88] *See supra* note 7 and accompanying text.

[89] Qwest *ex parte* in CC Docket No. 99-68, Appendix B, at ii (filed Nov. 22, 2000).

[90] *Id.*

[91] 47 C.F.R. § 51.321; *see also* In the Matter of Application by SBC Communications Inc. *et al.* to Provide In-Region, InterLATA Services in Texas, CC Docket No. 00-65, *Memorandum Opinion and Order*, FCC 00-238 at ¶ 78, n.174 (rel. June 30, 2000).

of various implementation problems,[175] however, the Commission has never ordered a peak-load pricing rate structure, though it has permitted such rate structures. In implementing the reciprocal compensation provisions of the 1996 Act, for example, the Commission permitted states to adopt alternative rate structures, including: (1) a higher rate for peak periods; (2) a uniform per-minute rate; (3) a capacity-based rate; or (4) a bill-and-keep arrangement, provided that traffic is relatively balanced.[176] States, however, in applying the Commission's rules governing reciprocal compensation, have generally adopted average per-minute rates. Similarly, with respect to interstate access charges, the Commission has permitted ILECs to charge either a uniform per-minute rate to recover the costs of switching, or a two-part tariff consisting of a call setup charge and a per-minute charge.[177] The Commission has also sought comment on whether it should adopt capacity-based charges to recover switching costs.[178]

110. Our recent experience with ISP reciprocal compensation issues suggests certain questions about the use of uniform per-minute charges to recover the traffic-sensitive costs of termination. In particular, it appears that the Commission may have underestimated the inefficiencies associated with the use of uniform per-minute prices. Accordingly, we seek comment first on whether an average per-minute rate structure can efficiently recover the traffic sensitive costs of interconnection, whether for reciprocal compensation or for access charges. If parties believe that such a rate structure is inherently inefficient, then we ask them to propose alternative, more efficient rate structures. We also seek comment on whether the Commission overestimated the practical difficulties associated with peak-load pricing arrangements. In particular, we seek comment on: (1) how to deal with the practical, implementation problems associated with peak-load pricing; and (2) whether a peak-load pricing structure can eliminate the regulatory arbitrage opportunities of the existing interconnection pricing regimes.

111. We also invite comment on whether alternative rate structures would be more efficient, and whether they would eliminate some of the problems we are currently experiencing. For example, we ask parties to comment on the advantages and disadvantages of using a capacity-based rate structure, and a multi-part rate structure that includes both a call set-up charge and a per-minute charge. Finally, we invite parties to propose alternative rate structures that they believe would be more efficient, and to explain the basis for their belief.

c. Single Point of Interconnection Issues

112. As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a

[175] The practical difficulties associated with peak-load pricing schemes include: (1) that peak traffic volumes may occur at different times in different areas (*e.g.*, between a downtown business area and a residential suburb); (2) that peak periods may change over time (*e.g.*, in response to increasing Internet use); and (3) that implementing a peak-load pricing scheme may cause a shift in the peak.

[176] *See* 47 C.F.R. §§ 51.507(c), 51.713; *Local Competition Order*, 11 FCC Rcd. at 15878-79 ¶¶ 755-757, 16028-29 ¶¶ 1063-64.

[177] *See* 47 C.F.R. § 69.106.

[178] *Pricing Flexibility Order and NPRM*, 14 FCC Rcd. at 14328-30 ¶¶ 211-16.

single POI per LATA.[179] Our current reciprocal compensation rules preclude an ILEC from charging carriers for local traffic that originates on the ILEC's network.[180] These rules also require that an ILEC compensate the other carrier for transport[181] and termination[182] for local traffic that originates on the network facilities of such other carrier.[183] Application of these rules has led to questions concerning which carrier should bear the cost of transport to the POI, and under what circumstances an interconnecting carrier should be able to recover from the other carrier the costs of transport from the POI to the switch serving its end user. In particular, carriers have raised the question whether a CLEC, establishing a single POI within a LATA, should pay the ILEC transport costs to compensate the ILEC for the greater transport burden it bears in carrying the traffic outside a particular local calling area to the distant single POI.[184] Some ILECs will interconnect at any POI within a local calling area; however, if a CLEC wishes to interconnect outside the local calling area, some LECs take the position that the CLEC must bear all costs for transport outside the local calling area.[185] CLECs hold the contrary view, that our rules simply require LECs to interconnect at any technically feasible point within a LATA, and that each carrier must bear its own transport costs on its side of the POI.[186]

113. If a carrier establishes a single POI in a LATA, should the ILEC be obligated to interconnect there and thus bear its own transport costs up to the single POI when the single POI is located outside the local calling area? Alternatively, should a carrier be required either to interconnect in every local calling area, or to pay the ILEC transport and/or access charges if the location of the single POI requires the ILEC to transport a call outside the local calling area? Further, if we should determine that a carrier establishing a single POI outside a local calling area must bear some portion of the ILEC's transport costs, do our regulations permit the imposition of access charges for calls that originate and terminate within one local calling area but cross local calling area boundaries due to the placement of the POI?[187]

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[179] *See supra* note 91 and accompanying text.

[180] *See* In the Matter of Joint Application by SBC Communications, Inc. *et al.* for Provision of In-Region, InterLATA Services in Kansas and Oklahoma, CC Docket No. 00-217, *Memorandum Opinion and Order*, FCC 01-29 at ¶ 235 (rel. Jan. 22, 2001) ("*Kansas/Oklahoma 271 Order*") (citing 47 C.F.R. § 51.703(b); In the Matters of TSR Wireless, LLC *et al.* v. U.S. West, 15 FCC Rcd. 11166 (2000), *pet. for review docketed sub nom., Qwest v. FCC*, No. 00-1376 (D.C. Cir. Aug. 17, 2000)).

[181] 47 C.F.R. § 51.701(c).

[182] 47 C.F.R. § 51.701(d).

[183] 47 C.F.R. § 51.701(e).

[184] *See Kansas/Oklahoma 271 Order, supra* note 180, at ¶¶ 232-34.

[185] SBC Reply in CC Docket No. 00-217, at 83-84.

[186] AT&T Comments in CC Docket No. 00-217, Attachment 2, Fettig Declaration, at 26-27.

[187] *See ISP Intercarrier Compensation Order* at ¶¶ 24-30 (discussing relationship between reciprocal compensation and access charges).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration	)	CC Docket No. 00-218
	)	
In the Matter of Petition of Cox Virginia Telcom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon-Virginia, Inc. and for Arbitration	)	CC Docket No. 00-249
	)	
In the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.	)	CC Docket No. 00-251

MEMORANDUM OPINION AND ORDER

Adopted: July 17, 2002 **Released: July 17, 2002**

By the Chief, Wireline Competition Bureau:

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(ii) Discussion

51. We adopt the petitioners' proposed interconnection language, rather than Verizon's proposed language implementing its "GRIPS" and "VGRIPS" proposals.[116] We find that petitioners' language more closely conforms to the Commission's current rules governing points of interconnection and reciprocal compensation than do Verizon's proposals. Because we adopt the petitioners' proposals, rather than Verizon's, we also determine that WorldCom's motion and Cox's objection are moot with respect to Issue I-1.

52. Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point.[117] This includes the right to request a single point of interconnection in a LATA.[118] The Commission's rules implementing the reciprocal compensation provisions in section 252(d)(2)(A) prevent any LEC from assessing charges on another telecommunications carrier for telecommunications traffic subject to reciprocal compensation that originates on the LEC's network.[119] Furthermore, under these rules, to the extent an incumbent LEC delivers to the point of interconnection its own originating traffic that is subject to reciprocal compensation, the incumbent LEC is required to bear financial responsibility for that traffic. The interplay of these rules has raised questions about whether they lead to the deployment of inefficient or duplicative networks.[120] The Commission is currently examining the interplay of these rules in a pending rulemaking proceeding.[121] As the Commission recognized in that proceeding, incumbent LECs and competitive LECs have taken opposing views regarding application of the rules governing interconnection and reciprocal compensation.[122]

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[116] With respect to AT&T, we adopt AT&T's November Proposed Agreement, §§ 4.1 *et seq.* and 4.2 *et seq.*, and Schedule 4 (except for certain provisions modified or rejected elsewhere in this Order, such as in Issue III-3/III-3-a and Issue V-1/V-8); and reject Verizon's November Proposed Agreement, §§ 1.45(a), 1.63, 4.1 *et seq.*, 4.2 *et seq.*, 5.7.3 and 5.7.6 *et seq.* With respect to Cox, we adopt Cox's November Proposed Agreement, § 4.2 *et seq.*; and reject Verizon's November Proposed Agreement, § 4.2.2 *et seq.* With respect to WorldCom, we adopt WorldCom's November Proposed Attachment IV, §§ 1.1 through 1.1.3.3, and 1.3 through 1.3.2; and reject Verizon's November Proposed Agreement, Part B, §§ 2.49 and 2.71, and Interconnection Attachment, §§ 2.1 *et seq.*, 2.5, 7.1 *et seq.* and 7.5 *et seq.*

[117] *See* 47 U.S.C. § 251(c)(2); 47 C.F.R. § 51.305(a)(2).

[118] *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9634, 9650, paras. 72, 112 (2001) (*Intercarrier Compensation NPRM*); *SWBT Texas 271 Order*, 16 FCC Rcd at 18390, para. 78 n.174.

[119] *See* 47 C.F.R. § 51.703(b).

[120] *See Intercarrier Compensation NPRM*, 16 FCC Rcd at 9617, para. 14.

[121] *See id.*, 16 FCC Rcd at 9650-52, paras. 112-14.

[122] *See id.*, 16 FCC Rcd at 9650, para. 112.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	

FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: February 10, 2005 **Released: March 3, 2005**

Comment Date: 60 days after publication in the Federal Register
Reply Comment Date: 90 days after publication in the Federal Register

By the Commission: Chairman Powell, Commissioners Abernathy, Copps, and Adelstein issuing separate statements.

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a portion of the high costs of interstate local switching and transport as universal service? Parties are asked to comment on the legality of such an interpretation and the desirability of taking such an approach.

E. Network Interconnection Issues

1. Background

87. Under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.[275] The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA.[276] In addition, our rules preclude a LEC from charging carriers for traffic that originates on the LEC's network.[277] For traffic subject to section 251(b)(5) of the Act, our rules permit a terminating carrier to recover from the originating carrier the cost of certain facilities from an "interconnection point" to the called party.[278] In the *Intercarrier Compensation NPRM*, the Commission solicited comment on whether an incumbent LEC should be obligated to bear its own costs of delivering traffic to a single POI when that POI is located outside the calling party's local calling area.[279] Alternatively, the Commission asked whether a carrier should be required to interconnect in every local calling area or pay the incumbent transport and/or access charges if the location of the single POI requires transport beyond the local calling area.[280] The Commission also sought comment on whether current rules result in inefficient network design by forcing the originating LEC to bear the cost of transport outside the local calling area, or whether requiring competitors to establish multiple POIs or pay for transport beyond the local calling area forces competitive carriers to replicate the incumbent LEC

[275] 47 U.S.C. § 251(c)(2)(B).

[276] *Application by SBC Communications Inc., Southwestern Bell Tel. Co. and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, para. 78 n.174 (2000).

[277] 47 C.F.R. § 51.703(b). At least two courts have held that this rule applies even in cases where an incumbent LEC delivers calls to a POI located outside its customer's local calling area. *See Southwestern Bell Tel. Co. v. Public Utils. Comm'n of Texas*, 348 F.3d 482, 486-87 (5th Cir. 2003); *MCImetro Access Transmission Services, Inc. v. BellSouth Telecommunications, Inc.*, 352 F.3d 872, 881 (4th Cir. 2003). Local calling areas are established or approved by state commissions. *Local Competition First Report and Order*, 11 FCC Rcd at 16013-14, para. 1035.

[278] Specifically, our rules permit recovery of the costs of transport and termination of telecommunications traffic between LECs and other telecommunications carriers. 47 C.F.R. § 51.701. The rules define "transport" as the "transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC." *Id.* § 51.701(c). The rules define "termination" as the "switching of telecommunications traffic at the terminating carrier's end office switch, or equivalent facility, and delivery of such traffic to the called party's premises." *Id.* § 51.701(d).

[279] *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9651, para. 113.

[280] *Id.* The Commission also asked whether its regulations permit the imposition of access charges for calls that originate and terminate within one local calling area but cross local area boundaries due to the placement of the POI. *Id.*