BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Petition of Charter Fiberlink-Missouri, LLC for	)	
Arbitration of Interconnection Rates, Terms, Conditions,	)	**Case No. TO-2009-0037**
And Related Arrangements with the CenturyTel of	)	
Missouri, LLC Pursuant to 47 U.S.C. § 252(b)	)	

FINAL ARBITRATOR'S REPORT

Issue Date: January 6, 2009

Effective Date: January 6, 2009

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Petition of Charter Fiberlink-Missouri, LLC for Arbitration of Interconnection Rates, Terms, Conditions, And Related Arrangements with the CenturyTel of Missouri, LLC Pursuant to 47 U.S.C. § 252(b)	))))	 **Case No. TO-2005-0468**

APPEARANCES

For Charter Fiberlink-Missouri, LLC

MARK W. COMLEY, Attorney at Law, Newman, Comley & Ruth, P.C., 601 Monroe, Suite 301, P.O. Box 537, Jefferson City, Missouri, 65102-0537.

CARRIE L. COX, CLIFFORD K. WILLIAMS AND MICHAEL R. MOORE, Attorneys at Law, Charter Fiberlink-Missouri, LLC, 12405 Powerscourt Drive, Saint Louis, Missouri 63131

K.C. HALM, JOHN DODGE, JENNIFER TOLAND AND BRIAN A. NIXON, Attorneys at Law, Davis Wright Tremaine LLP, 1919 Pennsylvania Avenue NW, Suite 200, Washington, D.C., 20006

For CenturyTel of Missouri, LLC

LARRY W. DORITY , Attorney at Law, Fischer & Dority, P.C., 101 Madison Street, Suite 400, Jefferson City, Missouri 65101

BECKY OWENSON KILPATRICK, Attorney at Law, CenturyTel, 220 Madison Street, Jefferson City, Missouri 65101

THOMAS J. MOORMAN, Attorney at Law, Woods & Aitken LLP, 2154 Wisconsin Avenue, N.W., Suite 200, Washington, D.C. 20007

PAUL M. SCHUDEL AND JAMES A. OVERCASH, Attorneys at Law, Woods & Aitken, 310 South 13th Street, Suite 500, Lincoln, Nebraska 68508

ARBITRATOR: **Ronald D. Pridgin, Senior Regulatory Law Judge.**

Arbitration Advisory Staff:

Natelle Dietrich, Division Director, Utility Operations Division, Missouri Public Service Commission.

John Van Eschen, Utility Regulatory Manager, Utility Operations Division, Missouri Public Service Commission.

Myron Couch, Utility Operations Technical Specialist II, Missouri Public Service Commission.

ARBITRATION REPORT

PROCEDURAL HISTORY

Petition for Arbitration:

On July 31, 2008[1], Charter Fiberlink-Missouri, LLC (hereafter "Charter") filed a petition for arbitration with the Commission pursuant to Section 252 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified as various sections of Title 47, United States Code ("the Act"), and Commission Rule 4 CSR 240-36.040. The petition asks the Commission to arbitrate unresolved issues in the negotiation of an interconnection agreement between Charter and CenturyTel of Missouri, LLC (hereafter "CenturyTel").

Notice of Arbitration:

The arbitration was conducted according to Commission Rule 4 CSR 240-36.040, which governs arbitrations under Section 251 of the Act ("the Rule"). On August 8, the Arbitrator notified the parties of his appointment as Arbitrator, set August 15 as the date for CenturyTel to respond, and ordered parties to appear at an August 19 Initial Arbitration Meeting. On August 11, the Arbitrator appointed his advisory staff.

Initial Arbitration Meeting:

The Initial Arbitration Meeting was held on August 19 as scheduled. A principal topic of that meeting was the procedural schedule. Section (15) of the Rule authorizes the Arbitrator to vary the procedures and timelines set out in the Rule as necessary to complete the arbitration within the period specified in the Act:

---

[1] Unless otherwise noted, all calendar references are to 2008.

> Because of the short time frame mandated by the Act, the arbitrator shall have flexibility to set out procedures that may vary from those set out in this rule; however, the arbitrator's procedures must substantially comply with the procedures listed herein. The arbitrator may vary from the schedule in this rule as long as the arbitrator complies with the deadlines contained in the Act.

Responses to the Petition for Arbitration:

CenturyTel responded on August 25. CenturyTel disputed Petitioners' positions on other issues, and raised additional issues for the Arbitrator to resolve.

Procedural Schedule:

On August 26, after considering the parties' proposals, the Arbitrator issued an Order Adopting Procedural Schedule. The schedule departed from the timelines in Rule 4 CSR 240-36.040 and modified various procedures.

Motions to Strike:

Petitioner and Respondent filed motions to strike on October 24, which are hereby denied.

Limited Evidentiary Hearing:

According to the procedural schedule, the parties filed prepared direct and rebuttal testimony. The parties also prepared and filed joint Decision Point Lists ("DPLs"). The Arbitrator held the hearing on October 27-28.

Arbitration Style:

Rule 4 CSR 240-36.040(5), "Style of Arbitration," provides:[2]

> An arbitrator, acting pursuant to the commission's authority under section 252(e)(5) of the Act, shall use final offer arbitration, except as otherwise provided in this section:
>
> (A) Final offer arbitration shall take the form of issue-by-issue final offer arbitration, unless all of the parties agree to the use of entire package final offer arbitration. The arbitrator in the initial arbitration meeting shall set time limits for submission of final offers and time limits for subsequent final offers, which shall precede the date of a limited evidentiary hearing.
>
> * * *
>
> (E) If a final offer submitted by one (1) or more parties fails to comply with the requirements of this section or if the arbitrator determines in unique circumstances that another result would better implement the Act, the arbitrator has discretion to take steps designed to result in an arbitrated agreement that satisfies the requirements of section 252(c) of the Act, including requiring parties to submit new final offers within a time frame specified by the arbitrator, or adopting a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the commission and the Federal Communications Commission pursuant to that section.

Commission Rule 4 CSR 240-36.040(19), "Filing of Arbitrator's Draft Report," provides in pertinent part that, "[u]nless the result would be clearly unreasonable or contrary to the public interest, for each issue, the arbitrator shall select the position of one of the parties as the arbitrator's decision on that issue." Choosing the position of one of the parties also means that the Arbitrator orders that party's proposed language to be incorporated into the interconnection agreement. Commission Rule 4 CSR 240-36.040(21), "Filing of the Final Arbitrator's Report," provides in pertinent part that, "The final report shall

[2] This style of arbitration is also popularly known as "baseball arbitration," in which an arbitrator picks either the player's or the club's final offer and decides what a Major League Baseball player's salary will be when the parties cannot agree to a contract.

include a statement of findings and conclusions and the reasons or basis therefore, on all the material issues of fact, law or discretion presented on the record."

Arbitration Standards:

In conducting issue-by-issue final offer arbitration, Section 252(c) of the Act provides:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall --
>
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
>
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
>
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

In turn, Section 251 of the Act, in pertinent part, provides:

> (a) General duty of telecommunications carriers
>
> Each telecommunications carrier has the duty--
>
> (1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and
>
> (2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256 of this title.
>
> (b) Obligations of all local exchange carriers
>
> Each local exchange carrier has the following duties:
>
> (1) Resale
>
> The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability

The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity

The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way

The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

(5) Reciprocal compensation

The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers

In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate

The duty to negotiate in good faith in accordance with section 252 of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection

The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) 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 to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

With respect to the public interest in the regulation of telecommunications, the Missouri General Assembly has provided an express statement of public policy to guide the Commission:[3]

The provisions of this chapter shall be construed to:

(1) Promote universally available and widely affordable telecommunications services;

(2) Maintain and advance the efficiency and availability of telecommunications services;

(3) Promote diversity in the supply of telecommunications services and products throughout the state of Missouri;

(4) Ensure that customers pay only reasonable charges for telecommunications service;

(5) Permit flexible regulation of competitive telecommunications companies and competitive telecommunications services;

(6) Allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise consistent with the public interest;

(7) Promote parity of urban and rural telecommunications services;

(8) Promote economic, educational, health care and cultural enhancements; and

(9) Protect consumer privacy.

[3] Section 392.185, RSMo Supp. 2002.

Additional Proceedings:

Rule 4 CSR 240-36.040(24), "Commission's Decision," provides:

> The commission may conduct oral argument concerning comments on the arbitrator's final report and may conduct evidentiary hearings at its discretion. The commission shall make its decision resolving all of the unresolved issues no later than the two hundred seventieth day following the request for negotiation. The commission may adopt, modify or reject the arbitrator's final report, in whole or in part.

STATEMENT OF FINDINGS AND CONCLUSIONS

Charter’s petition identified thirty-nine open issues for resolution. CenturyTel disagreed with the phrasing of virtually every issue Charter listed, and suggested different verbiage for those issues, as well as breaking up some issues into subparts. Thus, the Arbitrator will resolve the following issues, with each issue articulated as the winning party for that issue has phrased it.[4] When making findings of fact based upon witness testimony, the Arbitrator will assign the appropriate weight to the testimony of each witness based upon his or her qualifications, expertise and credibility with regard to the attested to subject matter.

Attached in compliance with Commission Rule 4 CSR 240-36.040(21) is the Arbitrator's Statement of Findings and Conclusions, consisting of several topical sections in which each Decision Point identified by the parties is considered in the light of the parties' arguments and the evidence they adduced. The Arbitrator has rendered a decision on each such Decision Point or group of related Decision Points and stated the basis

[4] In the Parties’ proposed orders filed in lieu of briefs, they stated that they had resolved Issues 1, 6, 9, 25, 26, 30, 33, 34 and 39. As such, those issues will not be addressed in this order.

therefore. The Arbitrator certifies that each such decision meets the requirements of §§ 251 and 252 of the Act.

Respectfully submitted,

/s/ Ronald D. Pridgin

Ronald D. Pridgin,
Senior Regulatory Law Judge,
Arbitrator.

Dated this 6th day of January, 2009, in Jefferson City, Missouri.

Article II - Definitions

2. How should the Agreement define the term Network Interface Device or NID?

24. Should Charter have access to the customer side of the Network Interface Device (“NID”) without having to compensate CenturyTel for such access?

Because Issues 2 and 24 are related they will be considered together. Also decided are CenturyTel’s additional sub-issues.

Findings of Fact

1. A Network Interface Device (“NID”) is a piece of passive equipment.[5]

2. CenturyTel’s proposed service order charge rate is $33.38 and its proposed monthly recurring NID charge is $1.91.[6]

3. CenturyTel’s service order charge is based on a cost study conducted by CenturyTel but not sponsored by any witness to this proceeding.[7]

Conclusions of Law and Discussion

CenturyTel Objection

The essence of CenturyTel’s objection to Mr. Gates’ rebuttal testimony questioning CenturyTel’s proposed NID rate level is that “Charter already agreed to CenturyTel’s NID charges in negotiations and did not place the amount of such charges in dispute in its

---

[5] Ex. 7, p. 5. l. 7-12.

[6] Tr. 428, l. 22; 471, l. 4-8.

[7] Ex. 15, 17.

arbitration petition."[8] CenturyTel's statement is wrong as a matter of fact and conclusion of law.

CenturyTel's challenge to Mr. Gates' rebuttal testimony regarding the unreasonableness of CenturyTel's NID rate rests on a factual non sequitur: Since Charter opposed the imposition of any NID charge, Charter has accepted a particular NID rate level. CenturyTel's argument amounts to what one federal court called an unconvincing "subtle abstraction," as further discussed below. That is, if a party to interconnection negotiations raises a rate application issue, the party is not also raising a rate level issue. It is self-evident from the facts in this matter that, in opposing any NID rate level, Charter opposes a particular rate level, such as the $1.91 proposed by CenturyTel.

A cardinal rule of contract interpretation is to ascertain the parties' intent.[9] The DPL confirms that Charter and CenturyTel failed to agree on the entire concept of NID compensation. There simply was no meeting of the minds on any NID compensation issue. Given this divide, Charter's silence on a particular NID rate cannot be construed as any form of acceptance of that particular proposed NID rate.[10]

Charter's proposed language makes clear that it believes, under federal law, it is never obligated to compensate CenturyTel for the type of access Charter seeks. By contrast, CenturyTel's language makes clear that it expects to receive both an initial service order charge and recurring monthly revenue from Charter for "use" of the NID.[11] In this circumstance, the Parties obviously have failed to agree as to compensation, and thus

---

[8] CenturyTel Motion to Strike at 2.

[9] *CenturyTel of Missouri, LLC v. Socket Telecom, LLC*, 2008 WL 4286648 (Mo. P.S.C. 2008) (citing *Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. Banc 2006).

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

[11] DPL at 89-90, CenturyTel proposed Section 3.5.1.

Charter has not agreed to either the service order charge,[12] or the NID charge, or the NID rate, whatever its level. Thus, under the Telecommunications Act, it is the Commission's role to determine what rate level, if any, is appropriate for NID access.

Federal jurisprudence favors Charter's interpretation here. In *TCG v. PSC of Wisconsin*[13] the United State District Court for the Western District of Wisconsin rejected a similar argument to the one CenturyTel advances in its Motion to Strike. There, on appeal from a Wisconsin PSC arbitration award petitioner TCG argued that because respondent Ameritech failed to dispute the character of TCG's switch (end office versus tandem), and because TCG characterized its switch as a tandem, the Wisconsin PSC could not have established anything other than a tandem switching rate level for TCG. That is, TCG argued that Ameritech had raised only the rate application issue, not the rate level issue. The federal court upheld the Wisconsin PSC's determination that it could address both the rate application and rate level. The court concluded that TCG's argument depended on a "subtle abstraction" not supported by the Telecommunications Act:

> Although state commissions are limited to deciding issues set forth by the parties, competing provisions require them to resolve fundamental elements necessary to make an interconnection agreement a working document. For example, under the act's arbitration and pricing standards, state commissions "shall" establish rates for interconnection. 47 U.S.C. § 252(c). Thus, state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, even if these matters are not specifically identified by parties as open issues in their petitions for arbitration. An issue as broad and important to an interconnection agreement as what parties will charge one another necessarily will include sub-issues that must be addressed by the arbitration panel in order to decide the larger matter. This is a common sense notion. That state commissions possess wider discretion under the act to determine rates for interconnection-related

[12] Charter separately opposes imposition of the service order charge when the company accesses a CenturyTel NID, for the simple reason that there is no service order activity to justify such a charge. Charter's opposition is memorialized in its Proposed Order filed on November 20, 2008 at Issues 27 and 40.

[13] 980 F.Supp. 992 (1997).

> services reflects an understanding that parties are least likely to resolve this issue without third-party assistance, that compulsory arbitration is reserved primarily for this purpose, and that the considerable public and private resources invested in arbitrating agreement provisions would be squandered if compensation-related issues were left unresolved.[14]

Similarly, in *BellSouth Telecomms., Inc. v. Cinergy Communs. Co.*,[15] the United States District Court for the Eastern District of Kentucky found no violation of Section 252(b) when the Kentucky PSC decided a matter "directly related" to an open issue, but not specifically identified in a petition for arbitration. In that case respondent BellSouth claimed that petitioner Cinergy had failed to raise BellSouth's obligation to continue to provide DSL service over UNE-P lines. Cinergy responded that the Telecommunications Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. The PSC determined that the DSL issue was "directly related" to a line-splitting issue that Cinergy raised in its original petition, and that both Parties had addressed this issue at later points in the proceeding. Therefore, the PSC determined that the issue of DSL over UNE-P was properly before the Commission. The federal court agreed and found no violation of Section 252(b).[16]

Finally, in *Universal Telecom, Inc. v. The Oregon Public Utility Commission*,[17] the federal court found that the Oregon PUC was entitled to reach the permissibility of offering the VNXX services that Universal was providing, even though neither Universal (a CLEC) nor Qwest (an ILEC) had raised that question in the arbitration petition or response thereto. (The parties had limited their pleadings to what intercarrier compensation rate, if any,

---

[14] *Id.* at 1000.

[15] 297 F. Supp. 2d 946 (2003).

[16] *Id.* at 953.

[17] Civ. No. 06-6222-HO (U.S. Dist. Ct. for the Dist. of Or.) (hereinafter *Universal*).

should apply to VNXX traffic directed to ISPs.) The court found that the Oregon PUC properly reached the issue of the legality of VNXX services in the course of considering two issues identified by Universal in its response to the petition for arbitration: whether Universal must pay for facilities on Qwest's side of the POI, and whether each party shall receive reciprocal compensation on all traffic.[18] The court reasoned that a state commission can always reach an issue in arbitration that relates to the lawfulness of a service.

The facts and these federal court decisions demonstrate that CenturyTel's "subtle abstraction" is incorrect as a matter of fact and conclusion law. Charter never accepted CenturyTel's proposed rate level. Further, if a party raises a rate application issue in interconnection negotiations, it is also raising a rate level issue. Finally, to the extent that a party raises rate application, rate level – because it is "directly related" – is also before the state commission as an open issue. For all these reasons, the Arbitrator must reject CenturyTel's Motion to Strike Mr. Gates' rebuttal testimony.

Further Conclusions and Discussion

The Parties disagree as to the definition of a NID. Charter's definition more closely follows the current FCC definition for a NID, and the FCC's underlying technical rationale for its NID definition. Although CenturyTel believes it is necessary to include in the NID definition the concepts of "Point of Demarcation" and "End User Customer's Inside Wire," along with a reference to FCC Rule 68.105, the Arbitrator concludes it is not.

[18] Order at 6 (Nov. 15, 2007).

In its *UNE Remand Order*, the FCC modified its definition of the loop network element to replace the phrase “network interface device” with “demarcation point.”[19] The FCC no longer considers the phrase “network interface device” appropriate for the purposes of describing the legal rights and responsibilities of interconnecting carriers at the point where the incumbent LEC and customer meet:

> We find the demarcation point preferable to the NID in defining the termination point of the loop because, in some cases, the NID does not mark the end of the incumbent's control of the loop facility.[20]

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

> Although competitors may choose to access the inside wire via the NID, in some circumstances they may choose to access the inside wire at another point, such as the minimum point of entry. By continuing to identify the NID as an independent unbundled network element, we underscore the need for the competitive LEC to have flexibility in choosing where best to access the loop.[21]

What CenturyTel asks the Arbitrator to do, in essence, is to ignore the FCC’s admonition regarding using a NID definition to limit or condition CLEC access rights to the NID. Were the Parties in disagreement about “demarcation point” or “minimum point of entry,” or the scope of FCC rules governing these concepts, CenturyTel’s proposed definition might prove beneficial. However, the Parties disagree only as to the definition of NID, which the FCC clearly has limited.

---

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

[20] *Id.* at ¶ 168.

[21] *Id.* at ¶ 235.

Decision

Consistent with the FCC's rules, the Arbitrator finds that a NID is any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.[22] Charter's proposed definition is consistent with this FCC definition, while CenturyTel's proposed definition introduces legal or regulatory concepts that might be used to limit or condition a CLEC's right to access that NID.

The Arbitrator finds this issue in favor of Charter.

NID Compensation

Conclusions of Law and Discussion

Charter argues it should be allowed to access the customer side of the NID for the purpose of connecting its own loop facilities to the customer's inside wire. According to Charter, such access does not constitute "use" of the NID as a UNE, and does not create any obligation for Charter to pay CenturyTel.[23] CenturyTel counters that where Charter elects to place its loop facilities in CenturyTel's NID, it must compensate CenturyTel for that "use." CenturyTel argues that Charter has no right to "use" CenturyTel's NIDs without compensation.[24]

The FCC does not define the term "use" with respect to NID access. It is unclear what "feature, function or capability" CenturyTel believes Charter "uses" when accessing the customer side of the NID. The evidence demonstrates that, to the extent Charter

[22] 47 C.F.R. § 51.319(b)(1).

[23] DPL at 88.

[24] Id. at 90.

accesses a CenturyTel NID for the purpose of connecting its facilities to the inside wiring of an end user customer (what Charter's witness Mr. Blair characterized as a "Star Wiring" scenario)[25], Charter typically opens the protective covering of the NID to reach the customer side. Then, after disconnecting CenturyTel's loop facility from the end user's inside wiring (often by disconnecting a cross-connect wire) either (i) attaches its own facilities to a clamp or terminal on the customer side of the NID, which clamp or terminal is connected to the inside wiring emanating from the end user customer's premise, or (ii) splices and encapsulates (known as "scotchlocking") its own facilities directly to the end user's inside wiring.[26]

In both cases, the Charter connection remains entirely within portions of the NID that are completely and at all times accessible to the premises owner. In no case would Charter formally request a NID UNE from CenturyTel, nor is CenturyTel required to engage in any back office activity or field activity.

It is important to note that all of Charter's activities take place on the customer side of the "demarcation point,"[27] which, according to FCC Rule 68.105(a) and in the context of a standard CenturyTel NID, means the jack into which CenturyTel's RJ11 connector (or cross-connect wire) is plugged.[28] "Carrier-installed facilities at, or *constituting, the demarcation point shall consist of wire* *<u>or a jack</u>*."[29] CenturyTel's "communications facilities" – that is, its network – end at the point of its RJ11 connector, *i.e.*, the end of its "local loop,"

---

[25] Ex. 7, p. 12, Diagram 3.

[26] Ex. 7, pp. 10-11; Tr. 528, l. 2-10.

[27] 47 C.F.R. § 68.3 ("the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises").

[28] Ex. 7, p. 7, Diagram 1.

[29] 47 C.F.R. § 68.105(a).

or the facilities capable of transmitting communications.[30] The customer's inside wiring begins at that same RJ11 jack which, while "carrier-installed," constitutes the demarcation point according to FCC Rule 68.105(a). Charter's activities all take place on the customer side of the demarcation point, and thus such activities do not constitute access to the NID UNE.

CenturyTel attempts to confuse the issue by introducing the concept of "minimum point of entry" ("MPOE"). CenturyTel's objective, evidently, is to suggest that even on premises where it installed an NID with a standard RJ11 connector, it might nonetheless still assert control over the wiring on the customer side of that connector and running to (in effect) the last 12 inches of wiring before the wiring actually enters the wall of the premises.[31] The MPOE is not relevant to this discussion, as the standard CenturyTel NID clearly serves to house the demarcation point. The significance of the fact that Charter's activities occur on the customer side of the demarcation point is that Charter is not actively or intentionally "using" any part of CenturyTel's "network" (any "network element") in the way it accesses the customer side of the NID.

The Arbitrator also finds that Charter is not obligated to pay CenturyTel a service order charge for accessing the customer side of the NID. There is simply no evidence of any back office or field activity performed by CenturyTel that would justify imposition of such a charge. When Charter accesses a CenturyTel NID, it is Charter, not CenturyTel,

---

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

[31] Tr. 591, l. 8-15.

which incurs costs.[32] CenturyTel performs no independent service function to warrant imposition of any charge.

Decision

Consequently, Charter does not "use" CenturyTel's NID as a UNE, and thus no compensation is required. Accordingly, Charter shall not be liable to CenturyTel for any NID-related charges, including any "service order" charges. Because Charter does not "use" CenturyTel's NID, CenturyTel may not assess that or any rate for providing access to its NIDs. The Arbitrator adopts Charter's language with respect to Issues 2 and 24.[33]

The Arbitrator finds this issue in favor of Charter.

3(a). How should the Agreement define, and incorporate, provisions from the tariffs used by both parties?[34]

Findings of Fact

4. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.[35]

5. The Parties desire to incorporate portions of their tariffs into the Agreement.[36]

---

[32] Tr. 530, l. 11-12.

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

[34] CenturyTel's phrasing of this issue is: "(a) How should the Agreement define the term 'tariff'? (b) How should the Tariffs be referenced and incorporated into the Agreement?"

[35] The Arbitrator takes administrative notice of this fact pursuant to 536.070(6) RSMo.

[36] Ex. 4, p. 6, l. 20-21, 23; p. 7, l. 1-4.

6. There are only eleven points in the Agreement that reference a tariff.[37]

7. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes.[38]

Conclusions of Law and Discussion

Charter's proposed language would include a definition of the term "tariff" that establishes that the Parties intend to incorporate only those provisions that are specifically and expressly identified in the Agreement. Unlike CenturyTel's proposal, which requires only a general reference to the complete tariff(s), Charter believes that the Agreement should not be construed as incorporating provisions that are not specifically identified by the Parties. The Arbitrator agrees.

Charter's proposal creates certainty between the Parties as to what tariff provisions are incorporated into the Agreement. This approach also ensures that only those specific provisions that both Parties mutually intend to incorporate from either Party's tariffs will be made a part of the Agreement. As Mr. Webber explained, Charter's proposal will minimize potential disputes between the Parties concerning obligations arising under the Agreement.[39] Indeed, Charter's proposal clarifies that no material contractual obligations of either Party can be increased, or reduced, through the application of a tariff in an overbroad manner.[40]

Charter's proposal is consistent with applicable law. Specifically, Missouri courts have ruled that an extraneous document may constitute part of a contract "[s]o long as the

[37] Tr. 159, l. 3-5.

[38] Ex. 3, p. 13, l. 2-4.

[39] Ex. 3, p. 7, l. 3-6.

[40] *Id.* at 7, l. 8-11.

contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt."[41] That result is consistent with Charter's language, which requires that any incorporated tariffs be "specifically and expressly identified in this Agreement …."[42]

Decision

Charter's proposed language concerning Issue 3(a) is consistent with the Act and Missouri law. The language requires the incorporation of specific tariff terms, and therefore will ensure that any incorporated tariff is not applied in an overbroad manner. That, in turn, should help to limit disputes between the Parties concerning obligations arising under the Agreement. Accordingly, Charter's proposed language will be adopted.

The Arbitrator finds this issue in favor of Charter.

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

Findings of Fact

8. The Parties maintain current intrastate and interstate tariffs which contain terms and conditions independent of the Agreement.[43]

9. The Parties desire to incorporate portions of their tariffs into the Agreement.[44]

---

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

[42] DPL at 5 (Charter proposed language, Art. II, § 2.140)

[43] The Arbitrator takes administrative notice of this fact pursuant to § 536.070(6) RSMo.

[44] Ex. 4, p. 6, l. 20-21; p. 7, l. 1-4.

10. There are only eleven points in the Agreement that reference a tariff.[45]

11. The majority of the terms the Parties seek to incorporate are for purposes of defining calling areas, or similar purposes.[46]

Conclusions of Law and Discussion

CenturyTel proposes to incorporate portions of its existing tariffs into the Agreement as a basis for satisfying certain obligations it has under the Agreement.[47] CenturyTel's position is that merely referencing either Party's tariff in the Agreement is sufficient to incorporate all tariff terms into the Agreement.[48] Under CenturyTel's approach, an entire referenced tariff would be incorporated and made part of the Agreement.

While Charter does not object in principle to the concept of incorporating external documents for certain contractual obligations, it insists the Parties incorporate external documents with precision.[49] Charter's position is that only the specific tariff provisions the Parties intend to be bound by should be incorporated into the Agreement. Under Charter's proposal, the Agreement would include language clarifying that tariffs are not applicable under the Agreement except, and only to the extent that, the Agreement incorporates specific rates or terms from either Party's tariff.

[45] Tr. 159, l. 3-5.

[46] Ex. 3, p. 13, l. 2-4.

[47] Ex. 4, p. 6, l. 20-21.

[48] Ex. 3, p. 10, l. 23-25.

[49] Ex. 4, p. 6, l. 23; p. 7, l. 1-4.

Charter argues it would be unreasonable for it to agree that hundreds of additional pages of CenturyTel's tariffs are automatically incorporated into the Parties' Agreement.[50] The Arbitrator agrees.

CenturyTel's position appears to be at odds with Missouri law, which provides that an extraneous document may constitute part of a contract "[s]o long as the contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt."[51] CenturyTel's approach would not make "clear reference". Mention of a single tariff provision could be leveraged into including other, superfluous tariff language not otherwise intended and/or mutually agreed upon by the Parties.

CenturyTel's proposal would make the Agreement less clear, more ambiguous, and more prone to future disputes that would need to be resolved by the Commission.[52] Incorporating only the specific tariff provisions the Parties deem to be effective under the Agreement would ensure that the tariff is not applied in an overbroad manner.[53]

The Commission recently rendered a decision to resolve an interconnection agreement dispute between Charter and CenturyTel.[54] That proceeding is particularly instructive because it involved the question of whether a CenturyTel tariff is incorporated into the current interconnection agreement between Charter and CenturyTel.

The Commission found that CenturyTel had knowingly assessed Local Number Portability ("LNP" or porting) charges upon Charter that were not authorized by the

---

[50] Tr. 7, l. 5-7.

[51] *See supra* note 30.

[52] Ex. 4, p. 13, l. 9-10.

[53] Ex. 3, p. 11, l. 14-16.

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

interconnection agreement and more significantly, rejected CenturyTel's attempts to incorporate certain tariff charges as a basis for assessing charges upon Charter.[55] Thus, Charter's desire to clarify the application and incorporation of specific tariff provisions into the Agreement is well-founded.

Further, the Arbitrator rejects CenturyTel's claims that Charter's proposal creates unnecessary complexity or would cause CenturyTel to waste its time parsing through tariff terms and conditions. CenturyTel's argument overlooks that the company will be referencing its own tariff, with which it is presumably knowledgeable. The Arbitrator also agrees with Mr. Webber there is nothing wasteful about specifically identifying which tariff provisions to incorporate into the Agreement to avoid confusion between the Parties, and overreaching by CenturyTel.[56]

In addition, Mr. Webber explained that the Agreement is organized in a manner that would not make it unduly complicated for CenturyTel to specify which terms (including rates, terms and conditions) would be binding upon Charter.[57] Indeed, Charter has already identified the specific tariff provisions to be incorporated into the Agreement so there is no credible reason not to identify those terms specifically.[58]

In addition, the Arbitrator also rejects CenturyTel's argument that the filed rate doctrine precludes Charter's proposal. Generally, the filed rate doctrine prohibits a utility

---

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

[56] Ex. 3, p. 12, l. 14-16.

[57] *Id.* at 12, l. 20-22.

[58] *Id.* at 13, l. 1-2.

from offering services at rates, terms or conditions that vary from its tariff.[59] CenturyTel therefore presupposes that Charter's proposal requires CenturyTel to provide services at rates, terms or conditions that vary from CenturyTel's tariff.

The Arbitrator disagrees. Charter does not seek to change the meaning of the tariff or exercise control over it. Nor is it seeking to obtain services at rates or terms that vary from those offered in the tariff.[60] Thus, there is no evidence in the record to support CenturyTel's argument that the filed rate doctrine is implicated by Charter's proposed language.

Decision

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

The Arbitrator finds this issue in favor of Charter.

Article III – Terms and Conditions

Termination of Agreement

4(a). Should a Party be allowed to suspend performance under or terminate the Agreement when the other Party is in default, and the defaulting Party refuses to

---

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

[60] Ex. 4, p. 10, l. 19-23.

cure such default within thirty (30) days after receiving notice of such default? How should "default" be defined in the Agreement?

Findings of Fact

12. The language CenturyTel proposes for Article III, § 2.6, which includes the requirement of a default notice and a 30-day cure period, is consistent with similar provisions in other Section 251 interconnection agreements and commercial contracts.[61]

13. In contrast, Charter's competing language would require the non-defaulting party to the Agreement to commence dispute resolution and potential Commission involvement, even if the defaulting party's non-performance concerns undisputed charges.[62]

14. Requiring a Commission proceeding to establish a default would allow a party to violate the Agreement with inadequate risk of enforcement by the non-defaulting party.[63]

15. Such a requirement would also unfairly shift the burden of initiating a time-consuming and costly Commission proceeding to the non-defaulting party in order to obtain the right to terminate the Agreement. [64]

Conclusions of Law and Discussion

Default provisions and termination or suspension of performance provisions attendant to default by a Party are common to commercial contracts, and the Parties have chosen to include such provisions in the Agreement. Charter's proposed language would

---

[61] Ex. 21, p. 22, l. 9 – p. 28, l. 21

[62] *Id.* at 29, l. 12-19.

[63] *Id.* at 30, l. 18- p. 31, l. 2.

[64] *Id.*

require, in most instances, that the Commission find that a default exists as a condition precedent to the non-defaulting Party's right to terminate. In contrast, CenturyTel's proposed language requires notice and a 30-day cure period as a condition to the non-defaulting Party's right to terminate.

The Arbitrator concludes that it would be unreasonable for the Agreement to require that the Commission find that a default exists as a condition precedent to a Party's right to suspend performance or terminate the Agreement. Rather, the non-defaulting Party's giving written notice of the Default to the defaulting Party following which there is a 30-day cure period is sufficient.

Moreover, the record demonstrates that CenturyTel's policy is to provide a copy of any notice of default to the Commission.[65] Thus, the Commission will have actual notice of any potential default, and will be able to monitor the need for any action if and when such action is required.[66]

Further, Charter's own account of the billing disputes that arose with CenturyTel affiliates in 2007 shows that after it receives a notice of default, it may ask the Commission to issue a "standstill" order pending the Commission's review.[67] At that point, the Commission would have the discretion to involve itself before the Agreement is terminated.

---

[65] Ex. 20, p. 13, l. 1 – p. 14, l. 22; Rebuttal Schedule PH-1.

[66] However, it is questionable whether such action will be required since CenturyTel's witness has stated that CenturyTel would not disrupt any traffic exchange capability of Charter's subscribers under the termination provisions, absent involvement of the Commission.

[67] Ex. 12, p. 5, l. 12- p. 7, l. 5.

Decision

CenturyTel's proposed language creates the proper incentive for the Parties to perform their respective obligations under the Agreement. It also provides appropriate tools for a non-defaulting party to enforce the Agreement without unnecessary Commission intervention. Thus, the Arbitrator finds that CenturyTel's proposed language for the Agreement to resolve Issue 4(a) should be and hereby is approved.

The Arbitrator finds this issue in favor of CenturyTel.

4(b). Should the Agreement include terms that allow one Party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?"[68]

Findings of Fact

16. CenturyTel operates in multiple operating areas and service areas in Missouri.[69]

Conclusions of Law and Discussion

Charter seeks to ensure that if CenturyTel sells operations in a specific operating area to another entity, the terms of the Agreement would continue in effect once the buyer/transferee assumes operations in that area. Charter has exerted considerable time, and expense, to negotiate and arbitrate the terms of this Agreement. Thus, the benefits of Charter's efforts should last for the duration of the Agreement.

---

[68] CenturyTel's phrasing of this issue is: "What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?"

[69] Ex. 11, p. 13, l. 18-20.

CenturyTel should not be permitted to undermine those efforts by selling a specific operating area, or a portion thereof, to another buyer/transferee entity without requiring that entity to assume the Agreement in its entirety. Without these pre-conditions in place, the new buyer/transferee could simply refuse to interconnect with Charter, or could leverage Charter to interconnect pursuant to unreasonable terms and conditions. Charter's proposal will ensure that this result is avoided.

CenturyTel has opted into a waiver of Missouri Revised Statutes Section 392.300. So, unlike other carriers operating in Missouri, CenturyTel is not subject to the Commission's oversight as it pertains to receiving approval for transfers of its assets.[70] Thus, absent the language proposed by Charter, there are no protections to ensure that there is service continuity for Charter's end users.

<u>Decision</u>

Charter's proposed language ensures that neither Party is able to terminate the Agreement as to a specific area, or portion thereof, without the third party buyer/transferee assuming the terms of the Agreement. Specifically, neither Party will be permitted to use Section 2.7 to terminate the contract and discontinue interconnection arrangements in certain locations without meeting certain preconditions. Thus, both Parties will remain connected to the public switched telephone network and each Party's respective subscribers' phone calls will continue to be delivered, and received, without interruption. Charter's language for Issue 4(b) will be adopted.

The Arbitrator finds this issue in favor of Charter.

---

[70] Tr. 595, l. 16-25; Tr. 596, l. 1-4. See also Notice of Election of CenturyTel of Missouri, LLC for Waiver of Commission Rules and Statues Pursuant to Section 392.420, RSMo., Commission Case No. IE-2009-0079.

5. Should a Party's right to assign its rights and obligations under the Agreement, *without consent*, to a subsidiary or Affiliate be restricted to only those assignments made in conjunction with the sale of all or substantially all of the Party's assets?[71]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

The Arbitrator accepts CenturyTel's proposal that a Party be allowed to make a total or partial assignment of the Agreement to a subsidiary or affiliate without the other Party's consent upon (1) notice to the other Party; (2) the subsidiary's or affiliate's assuming the Agreement's obligations, rights, and duties in writing; and (3) the other Party's reasonable satisfaction that the subsidiary, affiliate, or assigning Party can fulfill the assigned obligations. In doing so, the Arbitrator rejects Charter's proposed restriction on a Party's ability to partially or totally assign duties and interests under the Agreement to situations involving the sale of all, or substantially all, of a Party's assets.

Under both CenturyTel's and Charter's proposed language relating to assignment, a Party's right to assign in whole or in part without the other Party's written consent is limited (1) to assignments made to a subsidiary or Affiliate of the assignor; (2) to situations where the assignee assumes the rights, obligations, and duties of the assignor; (3) to situations where the other Party is "reasonably satisfied" that the assignee is able to fulfill the

[71] Charter's phrasing of the issue is: "Should the Agreement allow either party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other party's consent?"

assignor's obligations; and (4) to situations where the other Party has first been given 90 days written notice. Charter provides no reason why a Party's right to assign rights, obligations, liabilities, and duties under this Agreement should be further limited to only the situation where a Party is closing its doors (*i.e.*, selling all or substantially all of its assets).

The general rule of law favors a party's right to assign duties and rights under a contract.[72] Absent an express and valid contract prohibition, the *Restatement (Second) Contracts* § 317 indicates that contractual rights can generally be assigned unless (1) substituting an assignee's right for the assignor's right would materially change the obligor's duty, materially increase the obligor's risk, materially impair the obligor's chance of obtaining return performance, or materially reduce the value of return performance to the obligor or (2) an assignment is forbidden by statute or public policy. None of those concerns are at issue here.

Rather, in this situation, CenturyTel reasonably proposes that either Party be allowed to make a total or partial assignment of the Agreement to one of its subsidiaries or Affiliates without the other Party's consent upon the conditions identified above. The written consent of the non-assigning Party would be required in other situations. This language protects the non-assigning Party's rights and is not forbidden by either statute or public policy.

In contrast, Charter's proposed language adds an unnecessary layer of restriction. Under CenturyTel's proposed language, either Party's ability to assign without consent is limited to situations where the assignment is made to an Affiliate or subsidiary. This is not a situation where obligations are being assigned to a "stranger" of either CenturyTel or

---

[72] RICHARD A. LORD, WILLISTON ON CONTRACTS § 74.22 (Westlaw database updated 2008).

Charter. In addition, Charter's proposed language unreasonably restricts CenturyTel's ability to utilize and advance its relationships with its Affiliates or subsidiaries. For these reasons, the Arbitrator rejects Charter's proposed language in Article II, § 5, which places an unnecessary restriction on the Parties' rights of assignment and adopts CenturyTel's language on this issue.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

7. Is Charter obligated to "represent and warrant" to CenturyTel the existence of its certification to operate in the State, or is it sufficient to simply state that such certification exists, with Charter providing proof upon CenturyTel's request?[73]

Findings of Fact

17. Charter is certified in Missouri to provide local exchange and other related services to residents of Missouri.[74]

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

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

---

[73] CenturyTel's phrasing of this issue is: "Should Charter be required to 'represent and warrant' to CenturyTel, or simply provide proof of certification, that it is a certified local provider of Telephone Exchange Service in the State?"

[74] The Arbitrator takes administrative notice of this fact pursuant to § 536.070(6) RSMo.

Conclusions of Law and Discussion

The dispute here concerns the extent to which a Party must provide guarantees to the other Party regarding a warranty as to its ongoing certification through the term of the Agreement. Although Charter did not file any testimony on this issue, its position is evident from the agreed-upon language in Article III, Section 8.4 of the draft Agreement.

Charter must obtain, and maintain, all necessary authorizations to obligate CenturyTel to perform under the Agreement. Charter agrees that CenturyTel has no obligation to perform under the Agreement until Charter has obtained FCC and Commission authorization(s).[75] Indeed, Charter has agreed to provide proof of certification to CenturyTel, in the form of a copy of its Certificate of Operating Authority, upon request.[76]

CenturyTel, however, wants Charter to not only represent but also "'warrant' that it is a certified local provider of Telephone Exchange Service in the State." In support of its proposal, CenturyTel testified that it seeks to require Charter to meet, and "continue to meet" federal and state requirements for certification as a local exchange carrier.[77] Further, CenturyTel believes it necessary that Charter not only "represent and warrant" its current status as a certified local provider, but that Charter promise to "remain certified" for the "entire term of the Interconnection Agreement."[78]

CenturyTel is asking Charter to promise something that is beyond its control. This Commission, and other competent authorities, has the power to define, expand, reduce, or revoke the licenses granted to CLECs. The Commission, the FCC, or a court could issue a

[75] Agreement, Art. III, § 8.4.

[76] *Id.*

[77] Ex. 21, p. 38, l. 8-9.

[78] *Id.* at l. 13.

ruling that could bring Charter's status as a "certified local provider" into question, but not affect Charter's ability to perform up to the Agreement. Thus, the Arbitrator declines to require a competitive provider of local service to "warrant" that it will always maintain all necessary certifications.[79]

Decision

Adopting the language proposed by Charter will not prejudice CenturyTel in any way. CenturyTel may request proof of Charter's certification at any time, and CenturyTel does not have to perform under the agreement if such certification does not exist. Charter's proposed language on this issue will be adopted.

The Arbitrator finds this issue in favor of Charter.

8(a). Should the *billed Party* be entitled to receive interest from the billing Party on amounts paid to the billing Party in error and which are later returned to the billed Party?[80]

Findings of Fact

20. The Agreement should not contractually specify any interest to any refunds of overpayments that are later returned to the billed Party through the disputed billing process.

---

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

[80] Charter's phrasing of this issue is: "(a) Should the bill payment terms related to interest on overpaid amounts be equitable? (b) Should the bill dispute provisions ensure that neither party can improperly terminate the agreement in a manner that could impair service to the public?

21. Charter's proposal to apply an "identical interest rate" to underpayment and overpayments conflates two very different circumstances. One pertains to the billed Party's failure to timely pay "undisputed" bills (to which the Parties already have agreed to the specific late payment charges that will apply). The other pertains to a Party's recovery of "disputed" amounts (either underpayments or overpayments) through the disputed bill resolution process.[81]

22. Charter's proposal would provide Charter with the incentive to not review its bills or submit billing disputes on a timely basis. [82]

23. Charter's proposal would provide Charter with the incentive to delay initiation of billing disputes for up to one year with the hope of recovering any overpayments with an inordinate amount of interest.[83]

24. Even if interest should be paid on overpayments refunded to the billed Party, no such interest should apply for the period of time prior to the billed Party providing written notice to the billing Party of the billed Party's intent to dispute the alleged overpayments.[84]

<u>Conclusions of Law and Discussion</u>

Like most issues in this arbitration, each Party claims that the other confused, misunderstood, or misstated its position on Issue 8(a).[85] In addition to reviewing the evidence filed by the Parties and their testimony at the hearing on the merits, the Arbitrator

---

[81] Ex. 14, p. 8, l. 6-18, p. 10, l. 1-16.

[82] *Id.* at 7, l. 5 – 8, l. 5.

[83] *Id.*

[84] *Id.,* at 8, l. 19 – 9, l. 18.

[85] *See, e.g.,* Ex. 14, p. 7, l. 7-8; Ex. 12, p. 22, l. 16-17.

has carefully reviewed and considered the Parties' respective proposals and the entirety of Article III, § 9 as contained in each of the Parties' proposed Agreements.

The structure of Section 9, and the Parties' disputed language proposals within the context of that structure, are important to understanding the Parties' positions and, thus, the resolution of Issue 8(a). Therefore, in order to place the resolution of Issue 8 in context, a brief overview of the section is necessary.

Article III, § 9 contains three separate provisions that relate to this disputed issue - §§ 9.3, 9.41 and 9.4.2. Section 9.3 applies a "late payment charge" for the failure to pay *undisputed* amounts billed.[86] In contrast, Sections 9.4.1 and 9.4.2 both apply to billed amounts *disputed* by the billed party.

Section 9.4.1 permits the billed party to dispute billed amounts prior to the bill due date and to *withhold* payment of such amounts.[87] Section 9.4.2 permits the billed party to pay a bill entirely and then to *dispute already-paid amounts* up to one year after the initial bill date.[88] It is to Section 9.4.2 that Charter proposes to add the disputed language applying interest (at a rate commensurate with the amount of the late payment charge set forth in Section 9.3) to refunds of already-paid amounts that are later disputed and recovered pursuant to Section 9.4.2 and the billing dispute process.

---

[86] Article III, § 9.3 of CenturyTel's proposed Agreement; Article III, § 9.3 of Charter's proposed Agreement.

[87] *Id.,* Article III, § 9.4.1.

[88] *Id.,* Article III, § 9.4.2. With respect to Article III, § 9.4.2, Ms. Giaminetti testified: "What we're talking about here are *undisputed* overpayments." Ex. 12, p. 28, l. 22. However, the Arbitrator notes that Charter proposed its language applying interest rates to refunds in Section 9.4.2. As discussed above, that provision does not pertain to undisputed overpayments, but rather to overpayments *that are disputed* by the billed Party after they have been paid to the billing Party. (*See* Article III, § 9.4.2; Ex. 14, p. 10, l. 4-16.) Elsewhere in her testimony, Ms. Giaminetti acknowledges that the "overpayments" to which Charter seeks to apply an interest rate are, indeed, amounts disputed in a billing dispute. (See Ex. 12 , p. 23, l. 5-7 ("It is clear from the language that Charter proposes for Section 9.4.2 that a billed party may request return of an overpayment, plus interest, *only after* a billing dispute has been 'resolved'.").

While Charter asserts that it "only seeks the same opportunity for refunds of *overpayments*, at the same interest rate, that CenturyTel seeks for *underpayments*,"[89] that assertion is not entirely accurate. CenturyTel does not seek to apply an interest rate to *all* underpayments, but rather only to *undisputed* underpayments – charges that the billed Party *has not disputed* and to which Section 9.3 applies. Indeed, CenturyTel has not proposed to apply a contractually-specific interest rate (or late payment charge) to any underpayments that are the subject of a bona fide billing dispute under either Sections 9.4.1 (withheld amounts) or 9.4.2 (disputed amounts already paid).[90]

Rather, CenturyTel would allow, pursuant to the Agreement's terms, the process of negotiating or arbitrating the resolution of a disputed bill to determine, in a just and reasonable manner, any net payments and interest between the Parties. In contrast, Charter proposes to apply an explicit and specific interest rate whenever it recovers a refund of *disputed* charges in the course of a bill dispute proceeding.[91] Thus, while the *amount* of the interest rate in Charter's proposal may "mirror" the amount of the late payment charge found in Section 9.3, regarding undisputed amounts, the *circumstances* in which Charter proposes to apply that rate do not "mirror" each other.

Discerning the true differences between the Parties' respective positions, however, does not address the issue as to whether the billed Party should be entitled to interest on

---

[89] Ex. 11, p. 22, l. 13-14 (emphasis added).

[90] Ms. Giaminetti testified: "If Charter overpays (including in the circumstance where Charter prevails in a billing dispute), Charter proposes to assess the identical interest rate to which CenturyTel is entitled for underpayment." Ex. 11, p. 25, l. 13-16. However, based on the Arbitrator's review and analysis of Article III, § 9 above, there is no evidence that CenturyTel is contractually entitled, under the already resolved terms of the Agreement, to interest on *all* underpayments or even any underpayments that are the subject of a bona fide billing dispute under Section 9.4. Nor has CenturyTel taken that position with respect to Issue 8(a). Thus, Ms. Giaminetti's premise appears flawed.

[91] *See* Joint Statement, 21.

refunds of disputed amounts already paid. For the reasons set forth below, the Arbitrator concludes that Charter's proposed language seeking to apply interest to refunds pursuant to Article III, § 9.4.2 is unnecessary and unreasonable.

First, Charter states that its position "is that terms for bill payment, and refunds, should be equitable."[92] However, Charter's proposal actually creates an inequitable result. As stated above, there is no language in the already-resolved terms of the Parties' proposed Agreement applying a commensurate interest rate to underpayments resolved in the billing Party's favor during a bill dispute process. Charter's proposal standing alone appears to apply interest only to refunds of overpayments to the billed Party, not to underpayments resolved in favor of the billing Party. Thus, Charter's assertion that its proposed language in Section 9.4.2 "is simply to make the [interest rate provision] *reciprocal* in nature" is unconvincing.[93]

Second, the interplay between Charter's proposed language and the already-resolved language in Section 9.4.2 creates the potential for an even more inequitable result. Section 9 effectively gives the billed Party the option of either disputing charges by the bill due date and *withholding payment* (Section 9.4.1) or *paying all billed charges* and disputing *already-paid amounts* for up to one year from the date of the invoice (Section 9.4.2).

Combining the option afforded under Section 9.4.2 (which is not in dispute) with Charter's proposed interest language (which is in dispute) could result in: (1) Charter failing to timely review and dispute a bill; (2) Charter instead relying on Section 9.4.2 to dispute the charges paid under that bill up to one year later; and (3) Charter recovering a refund of

[92] Ex. 11, p. 22, l. 12.

[93] *See* Ex. 12, p. 22, l. 10-11.

the disputed charges over a year later with interest accruing as of the date of the original bill. Such a result would be inequitable to CenturyTel. Further, such a result would be inefficient for both Parties and would not promote the public policy favoring the timely notification and resolution of billing disputes.

Charter testified that it is not its business practice to intentionally delay resolving billing disputes in the hopes of recovering large interest payments on refunded charges.[94] But the Arbitrator agrees with CenturyTel that the interest language proposed by Charter, when combined with Section 9.4.2, certainly provides for that possibility, as well as an incentive (in the form of a large interest payment) for Charter to delay disputing bills promptly.[95] Further, the Arbitrator also determines that Charter's proposed interest language in Section 9.4.2 is unreasonable because it seeks the recovery of interest back to the "bill date" and not to the date on which it puts CenturyTel on notice of the dispute.

For the foregoing reasons, the Arbitrator concludes that Charter's proposed language in Issue 8(a) (Article III, § 9.4.2) should be rejected on the grounds that it is commercially unreasonable, particularly read in conjunction with those portions of Article III, §§ 9.4.1 and 9.4.2 to which the Parties have already agreed.

Decision

The Arbitrator finds this issue in CenturyTel's favor.

[94] Ex. 11, p. 24, l. 29 - p. 27, l. 22.

[95] Ex. 14, p. 7, l. 14 – p. 8, l. 5.

8(b). Should the billing Party be permitted to suspend or discontinue accepting orders from the billed Party under certain conditions when the billed Party fails or refused to pay "undisputed" charges?

<u>Findings of Fact</u>

25. It is commercially reasonable for the billing Party to be contractually permitted to suspend processing of orders and/or to discontinue service to the billed Party when the billed Party refuses or fails to pay *undisputed* charges.[96]

26. In such cases, the billing Party has already provided the service, the billed Party has used the service, the billing Party has rendered a bill for the service expecting payment, and the bill is presumptively accurate since the billed Party did not dispute the bill.[97]

27. Contractual remedies provide an appropriate incentive for the billed Party to pay undisputed charges.[98]

28. Charter's proposed language, which would require the billing Party to initiate a dispute resolution proceeding in order to recover undisputed charges, is unreasonable because it places unnecessary and unwarranted additional burden and expense on the billing Party to recover undisputed payments for services already rendered.[99]

---

[96] Ex. 19, p. 17, l. 3-14.

[97] *Id.* at 17, l. 15-23.

[98] *Id.* at 19, l. 8-20.

[99] *Id.* at 18, l. 10-15.

29. CenturyTel's proposed language contains similar remedies that this Commission has approved in other interconnection agreements, including an agreement to which Charter is a party.[100]

Conclusions of Law and Discussion

The Arbitrator concludes that CenturyTel's proposed language in Article III, §§ 9.5.1 and 9.5.2 should be adopted, and Charter's proposed language for Section 9.5.1 should be rejected. The remedies contained in CenturyTel's proposed Sections 9.5.1 and 9.5.2 – the rights to discontinue processing orders and to terminate services – triggered by the billed Party's refusal or failure to pay undisputed charges are commercially reasonable. Indeed, this Commission has approved similar language containing such remedies in other interconnection arbitrations.

In the M2A proceeding, the Commission addressed the following issue: "What should the ICA provide with respect to non-payment and procedures for disconnection?"[101] SBC's proposed language would permit it to "suspend order acceptance" for a CLEC's nonpayment of undisputed charges, and to "disconnect the CLEC's services" if the non-paying CLEC did not remedy after proper notice.[102] The Commission stated: "SBC's language is reasonable and should be adopted. The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection."[103] Notably, this language was

---

[100] *Id.* at 19, l. 21 – p. 21, l. 19.

[101] Final Arbitrator's Report, Docket No. TO-2005-0336, Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 49.

[102] *Id.* at 49-50.

[103] *Id.* at 52 (emphasis added).

incorporated into the interconnection agreement entered into by Charter and SBC in Missouri.[104]

Likewise, the Commission rejected language similar to Charter's proposal that CenturyTel not be permitted to suspend order processing or discontinue service "without the Commission's knowledge and permission."[105] Specifically, the Commission held that "SBC need not seek specific permission from the Commission before terminating service to a non-paying CLEC."[106]

The Arbitrator sees no reason to decide this issue differently in this proceeding. Given that the language at issue pertains to the non-payment of *undisputed* charges, CenturyTel should have the right to suspend a CLEC's orders and/or terminate the CLEC's services if that CLEC fails or refuses to pay such charges. CenturyTel's proposed language in Issue 8(b) is consistent with this Commission's decisions in M2A, and, the principles underpinning SBC's language align with CenturyTel's language.

The Commission has stated that a CLEC should have "ample warning . . . before disconnection occurs."[107] CenturyTel's proposed language in Sections 9.5.1 and 9.5.2 provides the billed party with sufficiently advanced warning before discontinuing order processing or discontinuing service.

For instance, in Section 9.5.1, CenturyTel's language provides that the billing Party can only discontinue order processing if the billed Party has not paid undisputed charges

---

[104] Interconnection and/or Resale Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 between SBC Missouri and Charter Fiberlink-Missouri, LLC, Docket No. TK-2006-0047, General Terms and Conditions, § 9.2.

[105] Ex. 12, p. 22, l. 24-26.

[106] Final Arbitrator's Report, Docket No. TO-2005-0336 , Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 52.

[107] *Id.*

ten (10) days after the bill due date, and then only after the billing Party has provided five (5) days' written notice. Similarly, in Section 9.5.2, CenturyTel's language provides that the billing Party can only discontinue service for such unpaid, undisputed charges upon seven (7) business days' written notice to the billed Party. Thus, under CenturyTel's proposed language, the billed Party has ample warning to cure unpaid, undisputed charges and to avoid any discontinuance of order processing or services due to such non-payment.

For all these reasons, the Arbitrator adopts and approves CenturyTel's proposed language to resolve Issue 8(b).

Decision

The Arbitrator finds this issue in CenturyTel's favor.

10. When should certain changes in law be given retroactive effect?

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

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

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

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

CenturyTel's position directly contravenes its stance in Case No. LK-2006-0095.[108] There, CenturyTel sought to opt into a prior approved agreement between SBC and Xspedius specifically to take advantage of its change-of-law provision, which provided for notice and negotiation of amendments:

> [Applicant CenturyTel] point[s] out that, under the terms of the SBC/Xspedius agreement, either party may seek on written notice to renegotiate and amend those provisions affected by any change of law resulting from SBC's appeal of the Commission's Arbitration Order. In the absence of this provision, the Applicants argue, they would be without recourse in the face of SBC's unilateral interpretation of the effects of any change of law -- the Applicants refer to "harsh, draconian and uneven results[.]"[109]

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

Decision

The Arbitrator finds this issue in favor of Charter.

---

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

[109] *Id.* at *6.

11. Should CenturyTel be allowed to incorporate its Service Guide as a means of imposing certain process requirements upon Charter, even though Charter has no role in developing the process and procedural terms in the Service Guide?[110]

Findings of Fact

30. The Service Guide is CenturyTel's internal document, and it describes and documents certain processes and procedures unique to CenturyTel.[111]

31. The Service Guide operates as a handbook that contains CenturyTel's operating procedures for service ordering, provisioning, billing, maintenance, trouble reporting and repair for wholesale services.[112]

32. The Service Guide is subject to change without any oversight by the Commission or meaningful input from Charter.[113]

33. The Service Guide language changes frequently.[114]

34. CenturyTel notices regarding Service Guide charges are high level summaries that include the name of the section that was affected and the page numbers where such change was made.[115]

---

[110] CenturyTel's phrasing of this issue is: "Should certain businesses and operational processes and procedures set forth in CenturyTel's 'Service Guide' be incorporated by reference into the Agreement?"

[111] Ex. 1, p. 16, l. 8-9.

[112] *Id.*, l. 10-13.

[113] *Id.*, l. 15-17.

[114] Tr. 100, l. 5-7.

[115] Ex. 1, p. 19, l. 22-23; p. 20, l. 1.

Conclusions of Law and Discussion

The Service Guide is an internal document developed solely by CenturyTel to describe and document certain processes and procedures that are unique to CenturyTel.[116] As Mr. Gates explained, the terms of the Service Guide "might change day to day, month to month, year to year . . .".[117] In fact, CenturyTel admitted that it frequently makes changes to its Service Guide.[118]

Although CenturyTel proposes to give Charter notice of all Service Guide changes,[119] those notices do not offer sufficient detail to CLECs.[120] Indeed, Charter witness Gates testified that CenturyTel notices merely provide high level summaries that include the name of the section that was affected and the page numbers where such change was made.[121]

This format is not useful to CLECs that have no way of knowing what precise changes were made on the pages identified, since CenturyTel's changes do not appear in redline, nor are they otherwise marked.[122] Instead, CLECs must analyze and compare the new and old versions of the Service Guide line-by-line and word-by-word to identify the changes that were made.[123]

---

[116] *Id.* at 16, l. 8-9.

[117] Tr. 100, l. 6-7.

[118] Ex. 2, p. 29, l. 14-16 (citing CenturyTel Response to Charter Data Request No. 8, Attachment TJG-5).

[119] Ex. 1, p. 17, l. 2-3.

[120] *Id.* at 19, l. 19-20.

[121] *Id.* at 19, l. 22-23; 20, l. 1.

[122] *Id.* at 20, l. 2-5.

[123] *Id.* at 20, l. 5-7.

Moreover, CenturyTel has not demonstrated that changes to the Service Guide would be subject to meaningful input from Charter, or other CLECs, even though they would be contractually bound by these changes. Further, CenturyTel's changes would not be subject to oversight by the Commission.[124]

It is reasonable for a CLEC to seek certainty and reliability in order to plan and manage its business affairs.[125] Charter's proposed language fulfills its need for certainty by effectively prohibiting CenturyTel from making unilateral changes to the Agreement by means of its Service Guide.

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

CenturyTel's argument, that Article III, § 53 affords Charter adequate protections, is flawed. CenturyTel claims that Section 53 makes clear the Service Guide is intended to supplement the Agreement and should not be construed as contradicting or modifying the terms of the Agreement, and permits Charter to delay, for two months, the implementation of any change to the Service Guide that materially and adversely affects its business while the Parties negotiate in good faith to resolve the adverse impact. This argument ignores the fact that CenturyTel could still improperly impose obligations on Charter by adding terms in the Service Guide that impose processes, or restrictions, not otherwise set forth in the Agreement if it was silent on a particular subject. Charter encountered this exact

---

[124] *Id.* at 18, l. 20-21 (citing CenturyTel Response to Charter Data Request No. 13).

[125] Ex. 11, p. 36, l. 13-17.

problem under its current interconnection agreement with CenturyTel, which led to a dispute before the Commission.[126]

Second, it is unfair and unreasonable to allow one Party to a contract to have the right to modify contractual obligations of a document that was unilaterally prepared by only one party. Third, CenturyTel's proposed language effectively circumvents the Commission approval process contemplated under Section 252 of the Act. Section 252 requires that all Interconnection Agreements, and amendments, be approved by a state commission.[127] CenturyTel's approach would effectively circumvent the formal amendment process designed to ensure that changes to the Agreements are subject to continued Commission oversight and approval.

Fourth, and finally, contrary to CenturyTel's position and as Mr. Gates testified, it is not common for documents like CenturyTel's Service Guide to bind CLECs via the agreements. Several state commissions have determined that the terms of a document similar to the Service Guide (sometimes referred to as a Change Management Process document ("CMP")) cannot take precedence over the Agreement.[128]

For example, the Minnesota PUC ruled that

> "[i]n cases of conflict between the changes implemented through the CMP and any CLEC interconnection agreement (whether based on the Qwest

---

[126] *See, generally*, *Report and Order*.

[127] 47 U.S.C. § 252(e).

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

> SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement."[129]

Decision

Accordingly, the Arbitrator declines to allow CenturyTel to unilaterally modify the terms of the Agreement through the use of its Service Guide. There is no need to incorporate external terms into the Agreement, and the Service Guide should be used as a reference only.

In the event that CenturyTel seeks to contractually bind Charter to certain terms therein, it may initiate the amendment process set forth in the Agreement, subject to Commission approval. This decision is intended to ensure that both Parties have certainty as to their contractual obligations under the terms of the Agreement. Charter's language with respect to Issue 11 will be adopted.

The Arbitrator finds this issue in favor of Charter.

12. Should the Agreement allow one party to force the other Party into commercial arbitration under certain circumstances?[130]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

---

[129] *Echelon Minnesota Arbitration* at 7.

[130] CenturyTel's phrasing of this issue is: "If neither the FCC nor the Commission accepts jurisdiction over a dispute between the Parties arising out of the Agreement, should the Agreement permit a Party to submit such dispute to binding commercial arbitration before a mutually agreed upon arbitrator?"

Conclusions of Law and Discussion

A review of relevant case law leads to the conclusion that, under the Act, the Commission is obliged to hear any legitimate unresolved dispute regarding interpretation or enforcement of the terms and conditions of an approved the Agreement. As the Court of Appeals for the Eleventh Circuit noted, the FCC "decided that interpretation and enforcement of the Agreements were responsibilities of the states under section 252."[131]

The Arbitrator disagrees with CenturyTel's limited reading of the FCC's decision in *Starpower*. While the FCC indicated that parties are bound by any *existing* dispute resolution provisions of interconnection contracts, the key finding by the FCC relevant to Issue 12 is as follows:

> In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" under section 252. We conclude that it is.[132]

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

> We note that, *in other circumstances*, parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, *the relevant interconnection agreements do not expressly specify how the disputes shall be resolved*.[133]

The FCC in *Starpower* thus acknowledged that where an interconnection agreement includes dispute resolution provisions (including binding arbitration requirements), a state

---

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

[132] *Id*.

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

commission might not become involved in resolving a dispute. But the Arbitrator is not asked to decide Issue 12 on the basis of an existing arbitration requirement. Rather, the Parties disagree as to whether a binding arbitration requirement should be included in the first instance.

Decision

Because case law instructs that it is the responsibility of a state commission to interpret and enforce the terms of an approved interconnection agreement, the Arbitrator declines to mandate that either Party submit to binding arbitration at the whim of the other. If a Party is unhappy with the decision, or if the Commission declines to hear the dispute, that Party may proceed to the FCC or state or federal court as is appropriate. CenturyTel's position would undercut a Party's federal law right to a hearing before the Commission or FCC or a court of competent jurisdiction, and thus that position is rejected.

The Arbitrator finds this issue in favor of Charter.

13(a). If the Parties are unable to resolve a "billing dispute" through established billing dispute procedures, should the billed Party be required to file a petition for formal dispute resolution within one (1) year of proving written notice of such dispute, or otherwise waive the dispute? (b) To the extent a "Claim" arises under the Agreement, should a Party be precluded from bringing such "Claim"

against the other Party more than twenty-four (24) months from the date of the occurrence giving rise to the "Claim"?[134]

Findings of Fact

35. The language CenturyTel proposes for Article III, §§ 9.4 and 20.4 is intended to address issues relating to past and ongoing billing disputes with Charter.[135]

36. After CenturyTel has received the notice of dispute from Charter, CenturyTel would be obligated to investigate such disputes in good faith and report its findings to Charter. Charter may then either accept such findings or to escalate the dispute to the Commission for resolution.[136]

37. If the billing dispute cannot be resolved within 180 days after Charter's notice of dispute, Charter could petition for formal dispute resolution pursuant to Article III, § 20.3. If Charter did not initiate formal dispute resolution within twelve (12) months following the notice of dispute, Charter would waive its right to withhold payment of the disputed amount.[137]

38. When CenturyTel receives Charter's reasons for the dispute, CenturyTel evaluates such reasons and either accepts or rejects such disputes. Only Charter knows whether it has a reasonable basis for disputing the billing. Thus, consistent with common

---

[134] Charter's phrasing of this issue is: "Should the parties agree to a reasonable limitation as to the period of time by which claims arising under the agreement can be brought?"

[135] Ex. 21, p. 47, l. 16 – p. 48, l. 5.

[136] *Id.*

[137] *Id.* at 49, l. 1-7.

commercial practices, Charter should make the decision whether to escalate the dispute to the Commission.[138]

Conclusions of Law and Discussion

The Parties have devoted a considerable amount of time and effort to billing and payment issues that have arisen in the past. These past experiences have caused the Parties to advocate distinctly different approaches to the process for resolving disputed billing amounts that will be provided in the Agreement.

The Parties agree to the provisions of Article III, § 9.4 which specify that if a Party disputes, in good faith, any amount billed under the Agreement, the Parties will expeditiously investigate the disputed amount, will exchange documentation reasonably requested, and will "work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution."[139] Where informal efforts do not resolve a pending dispute, the Parties propose contrasting approaches to the initiation and waiver of formal dispute rights.

Charter's formulation of Article III, § 20.4 would establish a contractual limitation of action period of 24 months from the date of the occurrence which gives rise to the dispute. In contrast, CenturyTel's proposed additional language for Article III, § 9.4, would require Charter to petition for formal dispute resolution pursuant to Section 20.3 "within 180 days of the billed Party providing written notice of the Disputed Amounts to the billing Party." Further, if the billed Party did not seek formal dispute resolution within one year of such

[138] *Id.* at 35, l. 5-20.

[139] Joint Statement at 42.

written notice, the billed Party would waive its right to withhold payment of the Disputed Amount.

The Arbitrator concludes that it is commercially reasonable to require the Parties to expeditiously resolve billing disputes that may arise. CenturyTel's proposed language better accomplishes this goal by requiring the billed Party to decide whether to initiate formal dispute resolution within 180 days following the date of the billed Party's notice that it is disputing a billed amount. Further, adopting CenturyTel's procedures places the obligation to proceed with formal dispute resolution on the Party in possession of the facts supporting non-payment of the Disputed Amount – the billed Party.

Decision

The Arbitrator concludes that CenturyTel's proposed language for Article III, §§ 9.4 and 20.4 is fair and reasonable, and finds that such language should be and hereby is approved.

The Arbitrator finds this issue in favor of CenturyTel.

14. Should CenturyTel be allowed to assess charges upon Charter for as yet unidentified, and undefined, potential "expenses" that CenturyTel may incur at some point in the future?[140]

[140] CenturyTel's phrasing of this issue is: "(a) If Charter requests that CenturyTel provide a service or perform an act not otherwise provided for under the Agreement, and Charter preapproves the quoted costs of CenturyTel's performance, should the Agreement include a provision requiring Charter to pay such costs as preapproved by Charter? (b) If a service or facility is offered under the Agreement but does not have a corresponding charge set forth in the Pricing Article, should such service or facility be subject to "TBD" pricing pursuant to Article III, Section 46?

Findings of Fact

39. The Parties spent more than six months negotiating the terms of this agreement.[141]

40. The Parties have had ample time to identify those terms in the draft Agreement which they believe would require some form of compensation from the other Party. CenturyTel has been on notice that Charter expected all necessary pricing terms to be included in the agreement (and the Pricing Article specifically).[142]

41. The Commission recently determined that CenturyTel has improperly assessed charges upon Charter for functions required by the Parties interconnection agreement, but for which no charges apply.[143]

Conclusions of Law and Discussion

In arbitrating the disputed issues here, the Arbitrator is seeking to clarify each Party's respective obligations now, and for the term of the contract. For that reason, the Arbitrator is hesitant to grant CenturyTel the discretion to impose charges upon Charter which are not specifically enumerated in the Agreement.

CenturyTel asks to approve its right to seek reimbursement from Charter for all "reasonable" costs.[144] But CenturyTel cannot, or will not, identify such costs at this time.

---

[141] Ex. 14, p. 27, l. 27-28.

[142] *Id.* at 28, l. 1-4.

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

[144] Ex. 21, p. 20, l. 3-4.

Instead, CenturyTel seeks the right to recover these unidentified, or ill-defined, "expenses" by assessing non-recurring charges upon Charter.[145]

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

CenturyTel's proposed language increases the potential for future disputes. Most significantly, CenturyTel's proposal would allow it to charge Charter to perform functions that are not currently provided for in the Agreement.

That is not to say that CenturyTel may not be entitled to compensation for performing those functions. Charter does not dispute that notion.[146] If CenturyTel performs such functions, the contract amendment process set forth in Sections 4 and 12 of the Agreement would provide a means by which CenturyTel can propose an amendment to the Agreement. That amendment can specifically detail the costs and expenses CenturyTel seeks to recover, as well as the basis for requiring Charter to compensate CenturyTel.[147]

<u>Decision</u>

Under Charter's proposal, CenturyTel will have sufficient opportunity to propose an amendment to ensure that Charter compensates CenturyTel for performing any functions not currently contemplated by the Parties, or set forth in the Agreement.[148] If the terms of that amendment are reasonable, the Arbitrator would expect the Parties to agree on such

---

[145] DPL at 45 (CenturyTel proposed § 22.1).

[146] Ex. 3, p. 22, l. 27-32.

[147] Ex. 4, p. 26, l. 15-18; p. 27, l. 12-17.

[148] Ex. 3, p. 23, l. 8-9.

terms. Indeed, the Commission routinely approves interconnection agreement amendments. Furthermore, to the extent that any dispute did arise between the parties, CenturyTel would have the right to use the dispute resolution process to resolve any disputed terms.

The Arbitrator finds this issue in favor of Charter.

Indemnity, Warranties and Limitation of Liability Issues

15(a). Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to constitute negligence, gross negligence, intentional or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?[149]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

The dispute centers on the scope of the indemnity provisions of the Agreement. Generally, both Parties have agreed to indemnify one another against third-party claims. However, Charter proposes language which would limit either Party's indemnity obligations *to the extent that* the indemnified Party engages in certain acts that give rise to the potential third-party claims. Specifically, Charter asserts that if the indemnified Party has engaged in

---

[149] CenturyTel's phrasing of this issue is: (1) – Should indemnification obligations be triggered by agreed-upon threshold issues or instead become the basis for protracted disputes between the Parties? (2) – Should the items of damage and cost for which the Indemnifying Party is responsible be identified where the claimant is that Party's customer?

acts that are deemed negligent, grossly negligent or which constitute intentional or willful misconduct, then that Party (the indemnified party) may not demand indemnification to the extent that it was at fault.[150]

If Charter's proposed language were adopted, the Arbitrator would expect any third-party claims to be defended in the following manner. First, after the plaintiff filed its claims, CenturyTel might invoke the indemnity provisions and require Charter to defend the claims. Second, Charter would assume the defense of the claims, and (likely) implead CenturyTel into the dispute. Then, each Party's respective liabilities to the third party would be addressed in the litigation. In this way, Charter would, technically, continue to indemnify CenturyTel against the claims, but CenturyTel would be liable for the proportion of damages, in a manner commensurate with the level of harm caused by its acts or omissions. In other words, Charter would be required to indemnify CenturyTel, but only *to the extent that* the indemnified party is not at fault.

This approach is, of course, consistent with the concept of contributory or "comparative fault," which the Missouri Supreme Court adopted as the liability standard for tort claims.[151] Under this fault standard, courts weigh the relative liability of each party to an action based upon the comparative fault of each party involved in the transaction.

In practice, as the Court has explained, "joining all parties to a transaction in a single lawsuit" allows "for the comparison of the fault of all concerned."[152] Thus, Charter's proposal is consistent with the governing fault standard in Missouri. It therefore ensures

[150] DPL at 48.

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

[152] *Id*. (citing Prosser).

that indemnity obligations are limited where the indemnified Party has contributed to the alleged harm.

CenturyTel opposes Charter's proposal and argues that Charter's approach would be unworkable in terms of designating potential liability between the two Parties, for purposes of defending the claim. But CenturyTel offers no reasoned explanation as to why Charter should in fact assume indemnity obligations (in their entirety) when CenturyTel acts in a manner that gives substantial rise to the harms.

Further, Missouri courts' repeated affirmation of comparative fault, and the mechanism by which liability is established when there is more than one defendant, sufficiently answers any CenturyTel claim that Charter's proposal is unworkable. That claim simply does not reflect the fact that the Missouri courts have expressly adopted these very principles.

In addition, CenturyTel has already agreed, in Section 9.4 of Article VII, that Charter's indemnity obligations should be limited when claims arising from the provision of 911 service are caused by CenturyTel "acts of negligence, gross negligence or wanton or willful misconduct . . ."[153] In other words, CenturyTel has agreed, in the 911 indemnity provisions, to the very concept that Charter proposes for the general indemnity provisions of the Agreement.

CenturyTel can not oppose these principles in the context of the general indemnity provisions of the Agreement, but at the same time accept the same limiting principles elsewhere. That internal inconsistency fundamentally undermines its position on this issue.

---

[153] DPL at 115.

The Arbitrator therefore discounts CenturyTel's assertions concerning potential problems with administering this standard.

Finally, the Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[154] CenturyTel's language is inequitable because it fails to recognize the principle of contributory fault. In other words, if the indemnified party is partly liable for the harm to a third party, CenturyTel's proposal would require the indemnifying party to pay for the entire claim. Charter's language properly recognizes the principle of contributory fault by only requiring the indemnifying party to reimburse the indemnified party up to the extent that the indemnified party is not at fault.

Decision

The Arbitrator finds this issue in favor of Charter.

15(b). Should the Agreement include language whereby CenturyTel purports to disclaim warranties that have no application, either potential or actual, to the exchange of traffic under this interconnection agreement?[155]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

---

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

[155] CenturyTel's phrasing of this issue is: Should the disclaimer of warranties be limited to product-based language or extend to the information and services that are the subject of the Parties' Agreement?

Conclusions of Law and Discussion

There is no need for the additional disclaimer of warranties language that CenturyTel seeks here. Specifically, CenturyTel asserts that it must be permitted to limit any implied warranties of "reasonable care, workmanlike effort, results, lack of negligence, accuracy or completeness of responses."[156]

Although CenturyTel stated that the source of its additional language is the disclaimer of implied warranties created by UCITA, UCITA is a *draft*, proposed "uniform" code which has been adopted by only two states: Maryland and Virginia. It is intended to provide a set of rules and contract principles governing software licensing and online contracting.

Neither of those activities is contemplated under this draft Agreement. Moreover, UCITA is not applicable to network interconnection under Section 251 of the Act.[157] Further, there is no evidence that this language has ever been explicitly, or expressly, applied to interconnection agreements.

This language is in addition to other standard warranties language to which the Parties have agreed. Specifically, the Parties have agreed to disclaim any implied warranties "as to the services, products and any other information or materials exchanged by the Parties, including but not limited to any implied warranties, duties, or conditions of merchantability, [and] fitness for a particular purposes."[158] Thus, it is clear that the Parties agree as to the standard disclaimer, or limitations, of implied warranties that are in most interconnection agreements. This language sufficiently protects both Parties.

---

156 DPL at 53 (CenturyTel proposed language for Art. III, § 30.2).

157 47 U.S.C. § 251.

158 DPL at 53 (Charter proposed language at Art. III, § 30.2).

Decision

The Arbitrator finds this issue in favor of Charter.

15(c). Should the Agreement limit direct damages to an amount equal to "monthly charges" assessed between the Parties; and otherwise limit liability in an equitable manner?[159]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

This provision deals with liability for damages when the parties harm each other. This provision does not limit the parties' indemnification obligation to a third party.

Under CenturyTel's proposal, any damages that it may be liable to Charter for will be strictly limited by a formula that is equivalent to the amount of charges assessed by CenturyTel under the Agreement for any particular month, or where liability is for a full year, total charges for such year.[160] The Parties' competing proposed language for Section 30.3.3.7 differs in two significant ways.

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

---

[159] CenturyTel's phrasing of this issue is: Should the Agreement limit damages in a manner that is consistent with telecommunications industry practice and Charter's own customer agreements and tariffs?

[160] DPL at 54 (CenturyTel proposed language for Art III, § 30.3).

Second, the Parties also dispute the question of whether damages arising from the gross negligence of the other party should be specifically excluded from any limitation on damages. Charter proposes to include gross negligence in this provision, so that damages between the Parties would not be limited where damages arise as a result of grossly negligent behavior by the party at fault.[161] CenturyTel, on the other hand, declines to include gross negligence in this provision.

As to the first question, the Arbitrator declines to adopt CenturyTel's cap upon the total amount of damages that may be available to Charter. It is inappropriate, either practically or as a matter of public policy, for the Parties to set an artificial cap on potential liability to each other. Practically speaking, it is inappropriate to cap potential damages because that would likely prohibit the innocent party from being fully compensated for its actual damages.

From a public policy standpoint, setting an artificial cap on damages reduces incentives for the Parties to ensure that their actions do not result in harm to the other Party. In other words, by not limiting damages, both Parties have appropriate incentives to take due care with respect to the network and facilities of the other Party.

As to the second question, the effect of CenturyTel's language is that it would artificially cap the amount of damages available to Charter, even in the context of damages that arose from CenturyTel's *grossly negligent* actions.[162] Because the Commission has already decided this very question, CenturyTel's proposal is rejected.

In the 2005 arbitration proceeding between SBC and various LECs, the Commission affirmed the Arbitrator's ruling that "it is contrary to public policy to cap liability for

[161] DPL at 57 (Charter proposed language, Art. III, § 30.3.3.7).

[162] *Id.*

intentional, willful, or grossly negligent action."[163] Thus, the Arbitrator rejects CenturyTel's proposed damage limitations in this arbitration proceeding.

Decision

The Arbitrator finds this issue in favor of Charter.

16. Should the Agreement contain a provision providing that CenturyTel is solely responsible for the costs and activities associated with accommodating changes to its network that are required due to Charter's modifications to its network?[164]

Findings of Fact

42. The Parties' dispute relates to "whether Charter can be permitted to require CenturyTel to apply what are *incumbent* LEC requirements regarding network changes to Charter's *CLEC* operations."[165]

43. Charter has misconstrued the issue since Charter is seeking interconnection from CenturyTel; thus, any changes that Charter makes to its network are irrelevant since CenturyTel is not seeking, and cannot seek, interconnection from Charter.[166]

---

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

[164] Charter's phrasing of this issue is: "Should both Parties be allowed to modify, and upgrade, their networks, and should the other Party be responsible for assuming the costs of such network upgrades or modifications?"

[165] Ex. 13, p. 19, l. 15-17 (emphasis in original).

[166] *Id.* at 19, l. 17 – 20, l. 22.

44. Nothing in CenturyTel's language affects Charter's ability to upgrade its network.[167]

45. Nothing in CenturyTel's language would make Charter responsible for the costs CenturyTel incurs for CenturyTel's network upgrades.[168]

46. CenturyTel opposes the efforts of Charter to make the provision reciprocal in order to avoid any inferences that CenturyTel may be responsible for Charter's network upgrade costs.[169]

47. There are no governing standards applicable to Charter such as those that are applicable to CenturyTel.[170]

48. Charter witness Gates' reference to an FCC decision in Issue 9 is also consistent with CenturyTel's position since the FCC has recognized that interconnection under the Act is distinct from bilateral commercial negotiations, and that, in any event, there is no need for reciprocal language because, due to CenturyTel's network, there is nothing that CenturyTel needs from Charter.[171]

49. Charter witness Gates' reference to never seeing any provision similar to the one being addressed indicates that Mr. Gates has not reviewed the current Agreement between the Parties which includes a provision that is essentially identical to that being proposed by CenturyTel here.[172]

---

[167] *Id.* at 25, l. 11-18; Ex. 14, pp. 17-21.

[168] Ex. 13, p. 21, l. 21 – p. 22, l. 1; p. 22, l. 14-19.

[169] *Id.* at 24, l. 9-15; 25, l. 1-9.

[170] *Id.* at 21, l. 1 – 22, l. 11; 22, l. 14-22; 23, l. 1-3, l. 6-8, l. 10; 24, l. 2; Ex. 14, p. 22, l. 1-6.

[171] Ex. 14, p. 25, l. 3-12.

[172] *Id.* at 23, l. 5-25.

50. Charter has very similar language in place in its interconnection agreement with AT&T in Missouri.[173] Thus, Mr. Watkins's testimony of these facts undermines Mr. Gates' testimony regarding never having seen such a provision.[174]

51. Making the provision "mutual" would not negatively impact CenturyTel for all of the reasons he has provided.[175]

Conclusions of Law and Discussion

CenturyTel is correct that Charter sought interconnection from CenturyTel and CenturyTel cannot seek the same from Charter. Thus, the very structure of the Act is not reciprocal and that overarching fact must guide the resolution of this issue. CenturyTel's language should be adopted as it is consistent with Section 251(c)(5) of the Act. That section states as follows:

> (c) Additional obligations of incumbent local exchange carriers
>
> In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:
> . . .
> (5) Notice of changes
>
> The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.
>
> 47 U.S.C. § 251(c)(5).

Moreover, CenturyTel has agreed to comply with 47 C.F.R. §§ 51.325 through 51.335 as noted by its witness. Those FCC Rules are applicable to ILECs.

---

[173] *Id.* at 23, l. 25 – 24, l. 16.

[174] *Id.* at 24, l. 16-17.

[175] *Id.* at 26, l. 1-8.

For example, Section 51.325(a) states that "An incumbent local exchange carrier ("LEC") must provide public notice regarding any network change. . . ." Similar references are made to the ILEC's requirements in the other relevant sections as well. As a result, the Arbitrator agrees with CenturyTel that the explicit network change requirements applicable to it are not applicable to Charter, but do provide Charter with rights when and if such requirements are triggered.

Charter has duties under Section 251(a)(2) and other general nondiscriminatory requirements under other applicable law. But Charter has provided no reference to any specific or explicit implementation rules or requirements under that provision. Without specific requirements governing Charter's CLEC network upgrades such as those that only apply to ILECs under the Act and FCC rules, there would be no explicit governing standards applicable to Charter. Accordingly, Charter's contention that the provision should be reciprocal is simply mistaken when viewed in light of applicable law.

Likewise, Charter's suggestion that there would be no adverse affect on CenturyTel if the provision were made reciprocal cannot withstand scrutiny based on the lack of any explicit rules or requirements applicable to Charter with respect to network changes. The fundamental incongruence of Charter's CLEC reciprocal language with applicable law renders its contract language subject to unnecessary questions as to its meaning, and Charter's approach should be avoided.

Simple logic suggests that the lack of any such explicit rules or requirements applicable to Charter concerning which CenturyTel can enforce Charter's compliance creates an essentially unlimited exposure for CenturyTel. Thus, Charter's contention that making Section 47 reciprocal would present no adverse impact upon CenturyTel is rejected.

The additional reasons that Charter provides for its position are equally unavailing. First, Charter expresses concerns that the CenturyTel language could impose CenturyTel's upgrade costs upon Charter. While the Arbitrator does not find that the language proposed by CenturyTel could be construed in that manner, CenturyTel further has made clear that the concern expressed by Charter is not what the language entails. Therefore, this Charter concern has been addressed.

Second, Charter appears to be concerned that the language could be interpreted in a manner to preclude Charter from upgrading its network. That has also been rebutted on the record and nothing further regarding that apparent concern is necessary.

Third, the Charter witness' suggestion that the CenturyTel language is somehow novel has no merit. Charter has agreed to substantially similar language in its current agreement with CenturyTel and another agreement with another ILEC here in Missouri.

<u>Decision</u>

For the foregoing reasons, CenturyTel's proposed language regarding Section 47 shall be included in the Agreement. **The Arbitrator finds this issue in favor of CenturyTel.**

17. Should the Agreement contain terms setting forth the process to be followed if Charter submits an "unauthorized" request to CenturyTel to port an End

User's telephone number, and should Charter be required to compensate CenturyTel for switching the unauthorized port back to the authorized carrier?[176]

Findings of Fact

52. FCC "anti-slamming" regulations cited by Charter focus on protection of consumer interests as opposed to the interests of the carrier executing an unauthorized port, particularly as they relate to such carrier's recovery of its costs caused by the unauthorized port.[177]

53. CenturyTel cannot stop improper porting orders from occurring; thus, the Agreement should contain provisions that allow CenturyTel to recover costs incurred to correct any improper porting orders which is why CenturyTel has proposed Article III, §§ 50.1 and 50.2.[178]

Conclusions of Law and Discussion

CenturyTel's proposed language for Article III, §§ 50.1 and 50.2 establishes procedures that would apply if Charter submits an order for number portability or for UNEs in order to provide service to an end user. It also establishes the rate of $50.00 per affected line that would be charged by CenturyTel to Charter to switch an end user back to the LEC originally serving the end user.

While the FCC's "anti-slamming" regulations generally address this subject, the Arbitrator does not find any inconsistencies or conflicts between CenturyTel's proposed

---

[176] Charter's phrasing of this issue is: "Should Charter be contractually bound by terms concerning liability for carrier change requests that exceed its obligations under existing law?"

[177] Ex. 21, p. 52, l. 9-18.

[178] *Id.* at 53, l. 8-18.

language and such regulations, and Charter has not identified any. The Arbitrator concludes that CenturyTel's proposed language for Article III, §§ 50.1 and 50.2 is fair and reasonable and finds that such language should be and is approved.

<u>Decision</u>

The Arbitrator finds this issue in favor of CenturyTel.

Interconnection

18. Should Charter be entitled to interconnect with CenturyTel at a single point of interconnection (POI) within a LATA?[179]

<u>Findings of Fact</u>

54. CenturyTel is an incumbent local exchange carrier ("incumbent LEC"), as that term is defined under 47 U.S.C. § 251(h)(1).[180]

55. In order for Charter and CenturyTel to exchange traffic between their respective customers, they must interconnect their networks at a physical location called the "Point of Interconnection" or "POI."[181]

56. Charter must construct (or lease or acquire) new facilities for access to each POI.[182]

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

---

[179] CenturyTel's phrasing of this issue is: "What terms and conditions that govern the Point of Interconnection (POI) and trunking arrangements should be included in the Interconnection agreement?"

[180] The Arbitrator takes administrative notice of this fact pursuant to § 536.070(6) RSMo.

[181] Ex. 1, p. 30, l. 8-10.

[182] *Id.* at 32, l. 20-22.

Conclusions of Law and Discussion

In resolving this issue, the Arbitrator must "meet the requirements of Section 251, including the regulations prescribed by the Commission pursuant to section 251."[183] Thus, the decision here must, by necessity, turn upon the application of Section 251 of the Act and FCC regulations.

Section 251(c)(2)(B) imposes upon CenturyTel a "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network; . . . at any technically feasible point within the carrier's network. . . ."[184] Thus, CenturyTel (the ILEC) has a duty to provide to Charter (the requesting carrier) interconnection with CenturyTel's network at "any technically feasible point" within CenturyTel's network.

Section 251(c)(2) references a technically feasible *point*, in the singular, as the place at where the ILEC must provide interconnection. Thus, the Act on its face reveals that a requesting carrier can choose to interconnect with the incumbent LEC at a *single* point on the incumbent's network, as long as that point is technically feasible.

This interpretation of the statute is consistent with the construction by the expert agency responsible for implementing the Act. Specifically, the FCC has considered this issue and repeatedly found that the Act grants requesting carriers the right to establish a single POI on the incumbent LEC's network.

In June 2000, the FCC stated:

> Section 251, and our implementing rules, requires an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. *This*

---

[183] 47 U.S.C. § 251(c)(1).

[184] 47 U.S.C. § 251(c)(2)(b).

> *means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA*.[185]

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

> As previously mentioned, an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, *including the option to interconnect at a single POI per LATA*.[186]

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

> Under the Commission's rules, competitive LECs may request interconnection at any technically feasible point. *This includes the right to request a single point of interconnection in a LATA*.[187]

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

> Under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.[188] 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.[189]

---

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

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

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

[188] 47 U.S.C. § 251(c)(2)(B).

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

It is settled law that competitive providers, like Charter, have the right to interconnect with incumbent providers, like CenturyTel, at a single POI within a LATA. This right is supported by a plain reading of the Section 251(c)(2), and the FCC regulations implementing that statute.[190]

The Arbitrator expressly rejects CenturyTel's assertion that this established rule only applies to ILECs that are also former Bell Operating Companies ("BOCs").[191] This is decided for several reasons.

First, and most importantly, the Act itself (and Section 251(c) in particular) does not except non-BOCs from the rule. Had Congress intended to apply the single POI rule only to ILECs that also were BOCs it clearly could have done so expressly.

Indeed, Congress carved out the former BOCs for the purpose of imposing specific, additional obligations on such companies.[192] Congress set forth these provisions in a separate section of the Act, Part III, entitled "Special Provisions Concerning Bell Operating Companies." In contrast, the statutory provision which gives rise to the single POI obligation, Section 251(c), clearly applies to *all* incumbent local exchange carriers (regardless of whether they are, or are not, a former BOC).

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

---

[190] 47 C.F.R. §51.321(a) ("…an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.")

[191] *See* Ex. 13, p. 27, l. 12-18.

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

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

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

Given the express language of the Act, and the FCC's repeated statements interpreting the Act, Charter has the right to interconnect with CenturyTel at a single POI on CenturyTel's network. Further, Charter's proposed language, which provides a right to establish a single POI per LATA, with CenturyTel's network, is consistent with Section 251 and FCC regulations.

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

> Section 251, and our implementing rules, require an incumbent LEC to allow a competitive LEC to interconnect at any technically feasible point. This means that a competitive LEC has the option to interconnect at only one technically feasible point in each LATA. The incumbent LEC is relieved of its obligation to provide interconnection at a particular point in its network only if it *proves* to the state public utility commission that interconnection at that point is technically infeasible.[193]

---

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

Thus, the inquiry turns to the question of whether CenturyTel has proven that Charter's request for interconnection at a single point would be technically infeasible. CenturyTel has not made that showing.

At the outset, CenturyTel's witness Mr. Watkins makes several statements in his direct testimony that suggest it would be technically infeasible to interconnect with CenturyTel at a single POI on their network.[194] However, Mr. Watkins' statements on this issue evolved, and in his rebuttal testimony he clearly moved away from his prior statements suggesting that interconnection at a single POI would be infeasible.[195] Instead, Mr. Watkins asserted on rebuttal an alternative argument: granting Charter the right to interconnect at a single POI would create additional costs for CenturyTel to transport traffic on its network.[196] Each potential objection will be addressed in turn.

As to the question of technical infeasibility, CenturyTel bears the burden of proof on this question. FCC rule 47 C.F.R. § 51.305 requires that "an incumbent LEC that denies a request for interconnection at a particular point must prove to the state commission that the interconnection at that point is not technically feasible."[197] The FCC has defined technical infeasibility narrowly, requiring significant technical or operational concerns to overcome the presumption against technical feasibility:[198]

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

---

[194] Ex. 13, p. 28, l. 5-22.

[195] Ex. 14, p. 26, l. 22-26.

[196] *Id.* at 36, l. 10-15.

[197] 47 C.F.R. § 51.305(e).

[198] 47 C.F.R. §51.5.

> must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.[199]

Accordingly, based on these standards, any suggestion by CenturyTel that it must modify the facilities on its side of the POI has no bearing on whether Charter should be allowed to choose a single POI per LATA. This standard also means that CenturyTel's proposed POI limitations, including the requirement that Charter "negotiate" a POI, or establish a "Local POI,"[200] are inconsistent with the presumption under federal law that a single POI is the competitor's right, absent a showing of technical infeasibility. CenturyTel's other proposed limitations on Charter's ability to request a single POI per LATA (including considerations related to CenturyTel's network architecture, potential costs, future capacity needs, etc.) are not consistent with FCC regulations implementing Section 251, and must therefore be rejected.

Further, CenturyTel's statement concerning the potential economic impact of allowing Charter to establish a single POI is not relevant to the analysis. FCC rule 51.305 states that "technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns." As such, the Arbitrator cannot deny Charter's right to a

[199] *Id.*

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

single POI simply because of any alleged additional costs that CenturyTel asserts may arise.[201]

Mr. Watkins' testimony, suggesting that interconnection at a single POI would constitute either a technically infeasible interconnection arrangement, or an unreasonably costly arrangement, is unpersuasive. Further, 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.

For example, Mr. Watkins states that an ILEC is "not required to provision interconnection arrangements for the benefit of its competitors that are more than what the incumbent does for itself . . . ,"[202] and "under Section 251(c)(2) of the Act, [ILECs] are not required to provision superior arrangements at the request of the competing carriers."[203] The facts revealed by CenturyTel's network diagram, however, establish that Charter's request would simply seek interconnection arrangements that are equal to what CenturyTel already provides itself, not a "superior" arrangement.

Nor is Mr. Watkins correct to suggest that Charter's proposal would require CenturyTel to build new facilities. For example, he states that "competitive carriers requesting interconnection should have access 'only to an incumbent LEC's *existing*

---

[201] The Arbitrator does not necessarily accept CenturyTel's assertions that a single POI would necessarily impose greater costs upon CenturyTel. Charter witness Mr. Gates testified that a "single POI should actually reduce costs for CenturyTel and for Charter due to lower fiber transport costs." Ex. 1, p. 45, lines 12-13.

[202] Ex. 13, p. 30, l. 24-27.

[203] *Id.* at 31, l. 15-16.

network –not to a yet unbuilt superior one'"[204], and "incumbents are not required 'to alter substantially their networks in order to provide superior quality interconnection . . ."[205]

Taken as a whole, these facts demonstrate that Charter's single POI request: (1) is technically feasible; (2) does not present a "superior" form of interconnection; and, (3) should not require CenturyTel to incur any appreciable additional costs.[206] Factors such as "super" interconnection or additional costs cannot be considered in determining whether a POI is technically feasible.

Furthermore, allowing CenturyTel to dictate the location of a single POI or multiple POIs for originating traffic would be problematic. That result could allow CenturyTel to force Charter to build out a ubiquitous network based on the same geographic reach as the CenturyTel network. Additionally, by forcing CLECs to use multiple POIs of CenturyTel's choice and location, CenturyTel is prohibiting CLECs, like Charter, from enjoying the efficiencies CenturyTel built into the network for its own use, and improperly shifting the costs of building out the CenturyTel network to its competitors. Nothing about this approach represents an appropriate balance of costs between the ILEC's existing network dominance and a CLEC's investment to compete in the market.

In short, allowing CenturyTel to determine the number and location of POIs would allow CenturyTel to have control over Charter's investment decisions and could force Charter to invest in facilities that are not justified from a market or engineering

---

[204] *Id.* at 32, l. 6-7.

[205] *Id*. at 32, l. 20-21.

[206] CenturyTel has presented no cost evidence regarding the ramification of Charter's single POI language despite having express notice of Charter's proposal no later than when the DPL was filed.

standpoint.[207] Further, from an economic standpoint, a single POI allows CLECs to have a minimal, yet efficient, presence until its customer base and traffic patterns warrant the further expansion of its own network.[208]

Decision

Charter is entitled, under federal law, to establish a single POI per LATA with CenturyTel as the point at which it will exchange all traffic with CenturyTel in that LATA. The FCC's language could not be clearer: "an ILEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point, including the option to interconnect at a single POI per LATA."[209]

For these reasons, Charter's proposed language on this issue shall be adopted.

The Arbitrator finds this issue in favor of Charter.

19. 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?[210]

[207] Ex. 1, p. 38, l. 10-19.

[208] *Id.* at 42, l. 4-6.

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

[210] CenturyTel's phrasing of this issue is: "Should the Agreement between the Parties limit the voluntary utilization of third party transit arrangements to a DS1 level of traffic?"

Findings of Fact

58. Direct interconnection is a form of interconnection where there is an actual physical connection of networks for the purpose of exchanging traffic originating on two service provider's networks.[211]

59. Transiting connotes indirect interconnection through an intermediary carrier's network.[212]

60. Indirect interconnection will end when exchanged traffic meets a 240,000 MOU threshold for three consecutive months.[213]

Conclusions of Law and Discussion

Section 251 of the Act requires telecommunications carriers to interconnect "directly *or indirectly* with the facilities and equipment of other telecommunications carriers."[214] The right under Section 251(a) to interconnect through either direct *or indirect means* has been expressly recognized by the Commission:

> "[a] CLEC may choose to indirectly interconnect with SBC Missouri by using the facilities of another carrier. Such indirect interconnection does not release the CLEC from any of the obligations to which it is held under the agreement."[215]

---

[211] Ex. 1, p. 49, l. 11-12.

[212] *Id.* at 49, l. 23-25.

[213] Tr. p. 80; l. 10-19; Tr. 106, l. 15-25; Tr. 107, l. 1-3.

[214] 47 U.S.C. § 251(a)(1) (emphasis added).

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

In that case the Commission rejected CenturyTel's attempt to adopt language that would limit a carrier's right to indirect interconnection, explaining that such limitations are not consistent with Section 251(a)(1) and the Commission's previous interpretation of the Act.[216] Charter seeks to maintain its federally-established right to choose indirect interconnection when it is the most appropriate means of exchanging traffic. Contrary to CenturyTel's assertion, Charter is not attempting to "use indirect interconnection indefinitely."[217] Rather, Charter wants to establish a more reasonable threshold of traffic volume before the Parties move away from indirect interconnection arrangements.

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

<u>Decision</u>

The Arbitrator adopts Charter's proposed language as consistent with the Commission's prior decisions and federal law. Charter has a right under the Act to interconnect with CenturyTel through direct or indirect means. Furthermore, the Act contains no limitations on this right, and Charter is entitled to use indirect interconnection as a means of exchanging EAS and other traffic. CenturyTel's position is inconsistent with

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

[217] Ex. 13, p. 44, l. 15.

the Commission's prior decisions on this issue, and impedes competition by imposing impermissibly restrictive limitations on the use of indirect interconnection arrangements.

The Arbitrator finds this issue in favor of Charter.

20. Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?[218]

<u>Findings of Fact</u>

61. Charter seeks access to CenturyTel's network to interconnect and exchange local voice traffic with CenturyTel.[219]

62. An interconnection (or "entrance") facility is a transmission facility used to interconnect two networks for the mutual exchange of traffic on such networks.[220]

63. When carriers exchange traffic, they sometimes use a "relative use factor."[221]

64. Under a relative use factor, costs are proportioned based on the amount of a carrier's originated traffic.[222]

<u>Conclusions of Law and Discussion</u>

Charter and CenturyTel do not dispute that Section 252(c)(2) requires CenturyTel to lease interconnection facilities to Charter at cost-based rates.[223] As the Commission has

---

[218] CenturyTel's phrasing of this issue is: "How long should the Agreement provide the Parties to negotiate cost-based rates for such facilities before they may seek Commission intervention?"

[219] Ex. 1, p. 60, l. 5-6.

[220] *Id.* at 56, l. 5-8.

[221] Tr. 82, l. 13-18.

[222] *Id.*

[223] Ex. 13, p. 67, l. 7-9.

determined, the FCC ruled that CLECs have the right to obtain interconnection facilities pursuant to Section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service.[224] Further, CLECs are entitled to access to interconnection facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[225]

The Commission and the federal courts have both ruled that incumbent LECs like CenturyTel must make available interconnection (or "entrance") facilities to CLECs like Charter, at TELRIC rates pursuant to Section 251(c)(2). That is settled law. Accordingly, the Arbitrator affirms that pursuant to Section 251(c)(2), Charter is entitled to lease facilities that are used to interconnect to CenturyTel for the exchange of traffic at cost-based rates.[226]

Moreover, cost-based rates are determined using the TELRIC pricing standard.[227] With respect to the question of whether interconnection facilities must be made available at TELRIC rates, the Eighth Circuit ruled that "CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network."[228]

Next, which Party's proposed interim rate methodology should be adopted? Under CenturyTel's proposal the cost-based standard would not apply to the interim lease rates. Pursuant to CenturyTel's proposed language, these "interim rates" would be governed

---

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

[225] *Id.*

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

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

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

solely by CenturyTel's tariff—not according to cost-based principles.[229] Charter proposes the use of CenturyTel's tariffed rate, subject to the originated local traffic factor (sometimes referred to as a relative use factor, or "RUF") of fifty percent (50%).[230] According to Charter, applying an RUF percentage to this arrangement would result in a rate that is closer to the rates Charter pays in other TELRIC-based states.[231]

CenturyTel's proposal to use tariffed rates would probably translate into rates that are significantly higher than would be expected for a 251(c)(2) rate. Charter's proposed language presents a more reasonable approach, consistent with both federal law and by the Commission's decisions in other arbitration proceedings.[232]

Next, the Arbitrator must choose between the Parties' competing "true-up" proposals. CenturyTel's proposed language for establishing an interim rate does not account for recovery of any above-cost amounts paid by pending adoption of a final rate. Notably, CenturyTel does not offer any language in the DPL which indicates it would accept a "true-up" clause.[233] Nevertheless, Mr. Watkins testified that "any interim rate will be adjusted (i.e., "trued-up") once the final rates are determined."[234] Charter's language clearly includes a "true-up" clause that ensures payments made prior to the establishment of the final rate can be trued-up back to the effective date of the Agreement.

---

[229] DPL at. p. 77.

[230] Ex. 1, p. 83, l. 23-25.

[231] *Id.* at 83, l. 10-15.

[232] *See* SBC Final Arbitrator's Report, Section V, at p. 16, Case No. TO-2005-0336 (Mo. PSC 2005) ("To the extent CLECs desire to obtain interconnection facilities described above, they may do so at cost-based (TELRIC) rates"), *see also Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*, 461 F.Supp.2d 1055 (D. Mo. 2006) ("…the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities").

[233] DPL at. pp. 77-78.

[234] Ex. 1, p. 67, l. 18-19.

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

Decision

Charter's proposed language is consistent with applicable law, and provides a reasonable process for CenturyTel to determine an appropriate cost-based rate for interconnection facilities that it must make available to competitors like Charter. Charter has proposed a specific, and precise, formula for establishing interim rates that will apply during the negotiations period. This formula fairly compensates CenturyTel for the facilities it provides. By the same token, the formula does not require Charter to pay more than is reasonably required.

For these reasons, Charter's proposed language is adopted. **The Arbitrator finds this issue in favor of Charter.**

21. Should Charter be allowed to deploy one-way trunks at its discretion, and without having to assume the entire cost of interconnection facilities used to carry traffic between the Parties' respective networks?[235]

[235] CenturyTel's phrasing of this issue is: "a) Under what terms and conditions should one-way trunks be used for the exchange of traffic within the scope of this Agreement? b) Regardless of whether one-way or two-way trunks are deployed, where should Points of Interconnection (POIs) be located and what are each Party's responsibilities with respect to facilities to reach the POI?"

Findings of Fact

65. A one-way trunk is a trunk between two switching centers over which traffic may be originated from only one of the two switching centers.[236]

66. The one-way trunk may be deployed from either carrier's network.[237]

67. A two-way trunk allows calls to originate from both ends of the trunk.[238]

68. Both one-way and two-way trunks can carry the traffic that is exchanged between Charter and CenturyTel.[239]

69. 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."[240]

70. Charter does not dispute that each Party should bear the financial responsibility on its side of the POI.[241]

Conclusions of Law and Discussion

FCC rules place the selection of one-way versus two-way trunks in the hands of the connecting CLEC, subject to issues of technical feasibility.[242] Consistent with federal

---

[236] Ex. 1, p. 61, l. 16-19.

[237] *Id.*

[238] *Id.* at 61, l. 23-24.

[239] *Id.* at 62, l. 1-2.

[240] Revised Statement, pp. 80-81.

[241] Ex. 1, p. 30, l. 11-12; p. 31, l. 5-8; p. 45, l. 15-18.

[242] 47 C.F.R. § 51.305(f) ("If technically feasible, an incumbent LEC *shall* provide two-way trunking upon request")(emphasis added).

jurisdiction,[243] and the decisions of this Commission,[244] Charter proposes language that would allow Charter to choose the circumstances when it would employ two-way or one-way trunks. As Charter witness Gates testified, Charter expects that it will routinely order two-way trunks.[245] However, two-way trunks may not always be necessary. Under some circumstances, such as where the traffic is clearly one-way, a one-way trunk may be more efficient.

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

Decision

The Arbitrator 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 will exchange with the ILEC.

The Arbitrator finds this issue in favor of Charter.

---

[243] *FCC WorldCom Arbitration Order, at ¶ 147.*

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

[245] Tr. 155, l. 1-4.

22. What threshold test should be used to determine when the Parties will establish direct end office trunks?[246]

Findings of Fact

71. A Direct End Office Trunk ("DEOT") is an interconnection trunk group between a POI and an end office. It rides the facilities of each party on its side of the POI.[247]

72. A DEOT's capacity is 24 trunks, or DS1 level.[248]

Conclusions of Law and Discussion

Commission decisions have stated that where traffic is reciprocal, DEOTs may be established upon mutual agreement of the carriers.[249] Charter's proposal would ensure that the threshold test for determining when Parties will establish DEOTs will be based on actual traffic volumes. This standard ensures that DEOTs are not established based on speculative levels of anticipated traffic volumes between the Parties' networks, or volumes of traffic that may only arise at some undefined point in the future. Specificity benefits both Parties, while still ensuring that necessary traffic and trunk engineering arrangements are established when appropriate.

---

[246] CenturyTel's phrasing of this issue is: "Should the Parties utilize reasonable projections of traffic volumes in addition to actual traffic measurement in their determination of whether the threshold has been reached for purposes of establishing dedicated end office trunks versus after-the-fact traffic measurement solely for such determination?

[247] The Arbitrator takes administrative notice of this fact pursuant to § 536.070 RSMo.

[248] Ex. 1, p. 65, l. 6-8.

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

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

Furthermore, setting the threshold on projected demand, as CenturyTel proposes, could lead to disputes between the Parties as to which Party's projected traffic volumes are accurate and should be used to determine whether the threshold has been met.

Decision

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

The Arbitrator finds this issue in favor of Charter.

23(a). Where Charter is the N-1 carrier for calls to ported numbers of third party carriers, should Charter be responsible for data base queries and the proper routing of its calls to third party carriers? (b) For calls that Charter fails to fulfill its N-1 carrier obligations and are routed improperly to a CenturyTel end office, what

should charter be required to pay to CenturyTel for the completion of such calls to third parties?[250]

Findings of Fact

73. The area of disagreement relates to Section 4.6.5 where the call is delivered to a CenturyTel *end office or tandem* and the N-1 query has not been done by Charter.[251]

74. CenturyTel explains the N-1 query function and the need for it to ensure proper routing of a call. Where Charter is the N-1 carrier, Charter agrees that it must do the N-1 query. [252]

75. With respect to the second aspect of Issue 23 – the routing of unqueried of calls – CenturyTel witness Watkins outlines the steps that CenturyTel would be required to undertake if an unqueried Charter call were to be delivered to a CenturyTel end office or tandem for termination.[253]

76. Calling these efforts "extraordinary measures"[254], CenturyTel witness Watkins explains that, even though it is not required to, CenturyTel will attempt to complete the call for Charter so long as Charter pays for the routing functions.[255]

77. The access rate elements that should apply in this situation – "the NP query charge; (b) Tandem Switching; (c) Tandem Switching Facility, and (d) Transport Switched

[250] Charter's phrasing of this issue is: "Should Charter pay CenturyTel a tariffed access charge for transiting traffic where CenturyTel end office switches perform a transit functionality for unqueried calls that have been ported to another carrier?"

[251] Ex. 13, p. 79, l. 10-14.

[252] *Id.* at 80, l. 19 – 81, l. 5; Ex. 14, p. 58, l. 28-29.

[253] *Id.* at 82, l. 16 – 83, l. 6.

[254] *Id.* at 83, l. 1.

[255] *Id.* at 83, l. 9-14; Ex. 14, p. 59, l. 20-21; p. 60, l. 1-3; p. 61, l. 7-10.

Termination" – should be paid and are the elements that CenturyTel has included within the Agreement.[256]

78. If Charter is not willing to pay these charges, Charter should undertake the routing and querying itself.[257]

79. Charter's position on the rate issue is inconsistent with its agreement to the rates that apply to properly delivered queried calls and provides no justification for this not-to-exceed rate of $0.005.[258]

<u>Conclusions of Law and Discussion</u>

Initially, there is no issue with respect to Charter's responsibility to conduct the necessary query when it is the "N-1" carrier in a call; Charter acknowledges the same. As a result, the explicit confirmation of this Charter obligation sought by CenturyTel under Issue 23(a) is granted.

There are two aspects of Issue 23(b) that need to be addressed with respect to when Charter does not undertake its N-1 obligations. First, Charter does not object to the application of the intrastate access rate elements that CenturyTel has proposed, and it appears that the rates are not actually in dispute. Therefore, those rate elements and the rates that are included in the CenturyTel intrastate access tariff apply.

The Arbitrator agrees with CenturyTel that there is no basis to assume that a cap of $0.005 should be imposed, particularly since the underlying rates proposed by CenturyTel have not been placed in issue by Charter. Also, this rate is for the transiting function alone.

---

[256] *Id.* at 84, l. 5-10; p. 85, l. 17-22.

[257] *Id.* at 84, l. 12-21.

[258] Ex. 14, p. 60, l. 10-22.

The query required by CenturyTel to undertake is an additional charge that CenturyTel may assess against Charter.

Second, there appears to be some concern on Charter's behalf with respect to CenturyTel's willingness to engage in the necessary functions in an effort to attempt to route a Charter unqueried call. Because Charter must compensate CenturyTel for unqueried Charter calls, CenturyTel indicates that it will undertake reasonable efforts to properly route the call where such routing is technically feasible with the scope of existing network hierarchy and existing relationships with third party carriers. This standard is appropriate since the call is being improperly routed to the end office or tandem for termination and the ability to ensure call completion is not a reasonable requirement to impose on CenturyTel. Therefore, like with Charter, the Arbitrator makes an explicit confirmation of this CenturyTel obligation.

Accordingly, Charter's language is rejected and CenturyTel's language regarding Issue 23 is adopted. Because the Parties agree that the intrastate access rates proposed by CenturyTel are appropriate, there is no need to address Charter's claims regarding TELRIC pricing.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article VI – Unbundled Network Elements

24. Should Charter have access to the customer side of the Network Interface Device ("NID") without having to compensate CenturyTel for such access?[259]

For the reasons discussed under Issue 2, the Arbitrator finds this issue in Charter's favor.

Article IX – Additional Services

27. When Charter submits an LSR requesting a number port, should Charter be contractually required to pay the service order charge(s) applicable to such LSR?[260]

Findings of Fact

80. CenturyTel requests that language be included within the Agreement that allows either Party to charge the other for the costs of processing local service requests, including service requests related to number porting.[261]

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

[260] Charter's phrasing of this issue is: "Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter's network?"

[261] Joint Statement, pp. 94-95.

81. CenturyTel incurs costs for the processing of local service requests.[262]

82. The service order rates represent the administrative costs of processing the local service request and the recovery of those costs.[263]

83. These costs are not part of the actual porting process.[264]

Conclusions of Law and Discussion

Although the Parties both recognize that costs are incurred by a Party when a local service request is processed, they disagree on who should be responsible for these costs. The testimony of Charter witness Giaminetti[265] and Exhibit 26 reflect the fact that an affiliate of Charter and an affiliate of CenturyTel have agreed to assess such service charges related to porting in Wisconsin.

The Arbitrator concludes that CenturyTel's position is allowed under the FCC rules and orders, which do not prohibit such charges. Moreover, CenturyTel's position allows both Parties to recover their costs for processing local service requests regarding number portability.

[262] Ex. 15, p. 4, l. 13 – p. 7, l. 12.

[263] Ex. 13, p. 89, l. 14-15.

[264] *Id.* at 93, l. 15 – 94, l. 16; Ex. 15, p. 2, l. 4-19.

[265] Tr. 239, l. 14-20.

The Arbitrator carefully reviewed and considered the significant FCC decisions cited by Charter and CenturyTel.[266] A review of these decisions reveals that the *Third Report and Order* established a cost recovery mechanism for LNP costs. The costs considered under the *Third Report and Order* were primarily for database and systems upgrades to allow for LNP to be implemented. In the *Third Report and Order*, the FCC concluded

> that carrier-specific costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the porting of telephone numbers from one carrier to another. Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability.[267]

The costs underlying the CenturyTel local service request charge are separate and apart from the costs recovered under the FCC's LNP cost recovery mechanism. As CenturyTel noted, the service order type costs associated with porting a number between two competing local service providers were not contemplated by the *Third Report and Order* to be included in the FCC's LNP cost recovery mechanism. This was confirmed in the FCC's *LNP Clarification Order*.

The FCC stated, in the context of the BellSouth petition for declaratory ruling on LNP cost recovery, that local service request costs do not constitute costs directly related to

---

[266] These orders primarily consisted of the following:

1. *In the Matter of Telephone Number Portability, Third Report and Order*, CC Docket No. 95-116, FCC 98-82, 13 FCC Rcd 11,701 (Rel. May 12, 1998) (*Third Report and Order).*
2. *In the Matter of Telephone Number Portability*, BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, Order, CC Docket No. 95-116, FCC 04-91, 19 FCC Rcd 6800 (Rel. Apr 13, 2004) *("LNP Clarification Order")* at Footnote 49.
3. *In the Matter of Telephone Number Portability, Memorandum Opinion and Order on Reconsideration and Order on Application for Review*, CC Docket No. 95-116, FCC 02-16, 17 FCC Rcd 2578 (Rel. Feb. 15, 2002) ("*2002 LNP Order*").
4. *Telephone Number Portability Cost Classification Proceeding,* Docket 95-116, RM 8535, DA-98-2534, 13 FCC Rcd 24495 (Rel. Dec. 14, 1998) *("LNP Cost Classification Order")* at para. 14.

[267] *Third Report and Order* at para. 72.

providing number portability and are therefore not recoverable through the federally tariffed end-user LNP charge. In fact, the FCC stated that "[w]ere BellSouth to seek recovery of such costs through its [federal end user] tariff, they would be rejected."[268]

The Arbitrator also notes that the foregoing conclusion is not without support from other state commissions. Although these other state commission decisions are not binding upon the Arbitrator or the Commission, the Michigan, Arkansas, Oregon, Colorado and Texas commissions have each reviewed contentions similar to those made by Charter, and each of these five (5) state commissions have concluded, as has the Arbitrator, that service order charges related to requests for porting are not precluded by the Act.[269]

The FCC has not mandated or prohibited the recovery of the costs for processing a local service request associated with local number porting. In fact, based on the *LNP Clarification Order*, the FCC ruled that the costs associated with a service order process are not recoverable under its end user surcharge recovery mechanism. Accordingly, the language offered by CenturyTel that allows both Parties to recover their costs associated with local service requests is reasonable and should be included in the Agreement.

As the record reflects and supports, this conclusion is consistent with traditional notions of cost causation and cost recovery, and provides for the recovery of costs not included within the Section 52.33 cost categories recoverable under a tariffed end-user

---

[268] *LNP Clarification Order* at footnote 49.

[269] *Michigan Commission Decision* at 23; *Arkansas Order* at 10; *Oregon Commission Decision* at 13; *Colorado Commission Decision* at 57; (Texas) Sprint Communications Company L.P. Arbitration with Consolidated Communications of Fort Bend Company, Arbitration Award, Texas Public Utility Commission, Docket No. 31577 (December 19, 2006).

surcharge. Thus, CenturyTel's proposed language in Article IX, § 1.2.3 is accepted and should be included in the Agreement.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article X - OSS

28. Does CenturyTel have the right to monitor and audit Charter's access to its OSS systems?[270]

Findings of Fact

84. The license granted to Charter pursuant to the Agreement is a limited license, and monitoring of Charter's use of CenturyTel's OSS system is appropriate to ensure compliance with the terms of the license. Further, since the OSS system contains customer proprietary network information, CenturyTel should be allowed to monitor/audit Charter's use to confirm compliance with applicable laws.[271]

85. There is no reason for CenturyTel to provide further details to Charter concerning when and how CenturyTel plans to conduct its monitoring of use of the OSS system for potential misuse or abuse by Charter,[272] as Article X, § 8.3.3 requires information obtained by CenturyTel be treated as "Confidential Information" pursuant to

---

[270] Charter's phrasing of this issue is: "Should CenturyTel be entitled to monitor, and audit, Charter's use of OSS systems which Charter may use to make a service request, or other similar request, of CenturyTel?"

[271] Ex. 21, p. 54, l. 2-14.

[272] Ex. 22, p. 38, l. 10 – p. 39, l. 4.

Article III, § 14.0, and in light of CenturyTel's corporate policy regarding the use of a competitor's proprietary information.[273]

86. Charter's position that prior consent to CenturyTel's monitor/audit rights may be withheld in Charter's sole discretion means that Charter could simply withhold consent for any or no reason, and CenturyTel would have no recourse. Charter could insist that it be provided an amount of details on CenturyTel's monitoring as to defeat its purpose, as would advance notice to Charter.[274]

Conclusions of Law and Discussion

It is clear from the record and the undisputed terms of the Agreement that the OSS system is owned by CenturyTel and that pursuant to Article X of the Agreement, Charter is procuring a limited license to use such system. CenturyTel has a legitimate interest in reserving its rights to monitor or audit Charter's use of this system to confirm that such use is consistent with the terms and conditions of the Agreement as well as applicable law. On the other hand, Charter has a legitimate interest in being reasonably assured that the information gathered by CenturyTel in the course of monitoring or auditing Charter's use of the OSS system is not used to Charter's competitive detriment.

As Charter's witness has pointed out, Article X, § 12 of the Agreement contains agreed upon language that requires both Parties to comply with all applicable laws in connection with performance under the Agreement, including 47 U.S.C. § 222, which relates to the privacy of customer information.[275] Further, Article X, § 8.3.3 provides that

[273] *Id.* at 40, l. 2 – p. 41, l. 6.

[274] *Id.* at 41, l. 7-15.

[275] Ex. 10, p. 3, l. 16-27.

any information that CenturyTel obtains pursuant to Section 8.0 shall be treated as Confidential Information pursuant to Article III, § 14.0, which is again agreed upon language intended to protect such information from misuse. Finally, CenturyTel has *existing* corporate policy entitled "Acceptable Use of Information Provided by Competitors" that addresses, among other matters, limitations on access to and use of information relating to a competitive carrier.[276]

In the face of these multiple assurances by CenturyTel that monitoring/auditing of Charter's use of CenturyTel's OSS system will be for proper purposes, Charter has proposed language that its witness confirms would allow it to deny CenturyTel the right to monitor/audit in Charter's *sole discretion.* "Sole discretion" has been judicially interpreted to mean "unfettered authority."[277] Charter's conditioning of its consent to CenturyTel's monitoring/auditing of use of its OSS system in this manner is unreasonable and unnecessary.

In contrast, CenturyTel's proposed language for Article X, §§ 8.3.1, 8.3.2 and 8.3.3 is reasonably calculated to serve CenturyTel's need to confirm Charter's proper use of the OSS system while, at the same time, providing protection to Charter's competitively sensitive information. As such, the Arbitrator finds that the language proposed by CenturyTel for resolution of this Issue 28 should be and hereby is approved.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

[276] Ex. 22, p. 40, l. 2 – p. 41, l. 16.

[277] *Tymshare, Inc. v. Covell*, 727 F.2d 1145, 1154 (D.C. Cir. 1984); *see also Missouri Nat'l. Educ. Ass'n v. Missouri State Bd. of Educ*., 34 S.W.3d 266, 280 (Mo.App. 2000).

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

Findings of Fact

87. CenturyTel has not provided any evidence on the nature of the costs it seeks to "recover" through its proposed contract language.[278]

Conclusions of Law and Discussion

CenturyTel should not have the right to assess any charges upon Charter for the recovery of any OSS costs or "expenses" that CenturyTel may incur, except as specifically authorized under the terms of the Agreement. Indeed, as Mr. Webber testified, the Parties should only be permitted to recover their respective costs or "expenses" in accordance with the corresponding rates expressly identified in the Pricing Article of the Agreement.[279] In contrast, CenturyTel's proposed language would allow CenturyTel to assess charges upon Charter for alleged costs that CenturyTel has not identified, or quantified.[280]

There is no evidence in the record that indicates when, or whether, CenturyTel proposes to upgrade or enhance its OSS during the term of the Agreement.[281] Significantly, CenturyTel has yet to make clear what its unspecified costs may entail, how

---

[278] Ex. 3, p. 25, l. 18-21.

[279] *Id.* at 24, l. 17-22.

[280] *Id.* at 26, l. 8-10.

[281] *Id.* at 25, l. 16-18.

such costs would be recovered, or the extent to which the proposed recovery of such costs would require an examination of, and potential changes to, the existing rate elements.[282]

CenturyTel's proposal would require Charter to agree to an open-ended provision that gives CenturyTel the discretion to impose charges upon Charter for performing functions not otherwise provided for in the Agreement.[283] Such a result creates uncertainty as to Charter's contractual and financial obligations.[284] This uncertainty could lead to disputes between the Parties over whether a charge is properly authorized under the terms of the Agreement.

CenturyTel may address new, upgraded, or enhanced OSS, and the recovery of any associated costs, through the contract amendment processes set forth in Section 4 (Amendments) and/or Section 12 (Changes in Law) of the agreement. Those sections provide a means by which CenturyTel could propose an amendment that specifically, and expressly, identifies the enhancements or upgrades, and the associated costs it seeks to recover or that it is required to implement as a result of a change of law.[285] If the terms of CenturyTel's proposed amendment are reasonable, and consistent with applicable laws and regulations, the Parties should reach an agreement subject to the Commission's prior approval.[286]

---

[282] *Id.* at 25, l. 18-21.

[283] *Id.* at 25, l. 21-23.

[284] *Id.*

[285] *Id.* at 26, l. 21-23.

[286] *Id.* at 27, l. 7-10.

Decision

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

The Arbitrator finds this issue in favor of Charter.

Article XII – Directory Services

31. How should each party's liability be limited with respect to information included, or not included, in directories?

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In the event of publication of an End User Customer's listing information for a customer who requested *Charter* to provide it non-published status, CenturyTel should not be required to incur liability beyond situations involving its intentional or willful misconduct. *Charter* is solely responsible for providing its customer listings for publication. *Charter* is contractually prohibited from providing to CenturyTel or a third party publisher the listings of any of its customers who do not wish to have published listings.[287]

Thus, if an End User Customer requests that Charter provide it non-published status listing, but its information is published, such publication would be due to Charter's error or omission. Charter should not be permitted to shift any such risk to CenturyTel. Furthermore, CenturyTel should not be required to incur the additional costs that would be caused by additional systems and/or processes to monitor Charter's own submissions and Charter's compliance with due dates imposed by the third party directory publisher.

Consequently, this is not a situation where CenturyTel is attempting to exclude liability for *its* ordinary negligence on an issue for which it bears responsibility under *Mo. Rev. Stat.* § 392.350. Under the terms of the Agreement, *Charter* is the entity who would bear responsibility for the inclusion of such a customer's information in the directory. *Charter* is the entity with the *sole* responsibility of providing or not providing such information to CenturyTel. CenturyTel's proposed language limiting liability to "gross negligence or intentional misconduct" is limited solely to a situation in which it publishes an End User Customer's or CLEC's listing information who did not want that information published.

This is not a situation where any and all liability is excluded for all directory listing situations. This exclusion applies only in a situation where Charter, not CenturyTel, bears the sole responsibility for the information provided to CenturyTel that is published. Thus, it applies in a situation where it is Charter's negligence that results in the error.

---

[287] Agreement, at Art. XII, § 2.1.2. Specifically, the agreed upon language at this section states, ""Under no circumstances shall [Charter] provide End User Customer data as a part of the Primary Listing Information for those End User Customers who do not desire published listings."

Decision

The Arbitrator finds this issue in favor of CenturyTel.

32. How should the Agreement define each party's obligations with respect to fulfilling directory assistance obligations consistent with Section 251(b)(3) of the Act?

Findings of Fact

88. CenturyTel is meeting its obligation to provide Charter with non-discriminatory access to directory assistance.[288]

89. CenturyTel objects to Charter's proposal that it accept and process Charter's listings without compensation, and maintains that this would be contrary to the requirements of 47 C.F.R. § 51.217 that requires CenturyTel to provide directory assistance services to Charter on the same "rates, terms, and conditions" on which CenturyTel obtains such services.[289]

90. CenturyTel is not a directory assistance provider.[290]

Conclusions of Law and Discussion

The mutual obligations of Charter and CenturyTel with regard to directory assistance are provided in 47 U.S.C. § 251(b)(3) which, in pertinent part, states: "Each local exchange carrier has the following duties: . . . to permit all such providers to have nondiscriminatory

[288] Ex. 21, p. 58, l. 18-28.

[289] *Id.* at 59, l. 1-11.

[290] *Id.* at 59, l. 13-17.

access to . . . directory assistance . . . ." The definition of "nondiscriminatory access" is provided in 47 C.F.R. § 51.217.

It is undisputed that neither Party provides directory assistance, but rather contracts with third party vendors for the performance of this service function. While Charter's witnesses have testified that past difficulties were experienced with a prior vendor of CenturyTel, these same witnesses acknowledge that such problems have been eliminated and that there are no issues with the directory listing information for Charter customers now being provided by CenturyTel's replacement directory assistance vendor.[291]

The evidence reveals that Charter submits its directory assistance listings to Volt Delta, which maintains a national database, and that CenturyTel's directory assistance vendor dips the Volt Delta database for information. Further, CenturyTel's directory assistance vendor will use only the Volt Delta database in the future (planned to be effective as of January 2009).[292] As such, Charter is being provided nondiscriminatory access to directory assistance equivalent in type and quality to that which CenturyTel provides to itself. The Arbitrator finds that the foregoing arrangement satisfies the requirements of Section 251(b)(3) and the FCC regulations thereunder.

CenturyTel's proposed language for Article XII, § 8.0 reflects the facts in the record as well as satisfying the requirements of 47 U.S.C. § 251(b)(3). As such, the Arbitrator finds that CenturyTel's language for Article XII, §§ 8.0 set forth on pages 105-107 of the Joint Statement relating to Issue 32 should be and hereby is approved for the reasons identified in the above discussion.

---

[291] Ex. 9, p. 12, l. 18; p. 14, l. 17-19; Ex. 22, p. 43, l. 11-16.

[292] Ex. 21, p. 60, l. 14-20.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

Article VII - 911

35. Should both parties' liability for errors associated with the provision of 911 services be limited by contract, in a manner that is consistent with applicable law?[293]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In Issue 15, the Arbitrator noted that this Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[294] The Arbitrator will follow that decision.

This question arises in the context of the 911 sections of the draft Agreement. The provision of 911 services in Missouri is generally a matter of great significance, and one which must be carefully reviewed to ensure that service providers obligated to provide these important services are held accountable for their actions.

---

[293] CenturyTel's phrasing of the issue is: "Should CenturyTel's liability for 911 system errors be limited to the reasonable costs of replacement services?"

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

The differences between their respective proposals are evident. First, Charter proposes that the limitation of liability language apply reciprocally, to both Parties' benefit.[295] CenturyTel, in contrast, proposes language that would only benefit CenturyTel, and which would not benefit Charter. Regardless of the scope of liability adopted herein, there is no reason that these provisions should not apply to the benefit of both Parties. Both Parties provide 911 services to their respective end user customers. The Arbitrator fails to see why only one Party should benefit from the protections of this language.

The Arbitrator recognizes that CenturyTel, as an incumbent provider, has greater obligations with respect to certain 911 network facilities. But Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel.

With respect to the question of what liability standard should apply, as noted above, it is against public policy for a party to escape, or limit, liability when that Party's fault rises to the level of gross negligence, or intentional or willful misconduct. This principle is especially true in light of the significant public policy concerns surrounding the provision of 911 services. Any Party that proposes to limit its liability for harm caused by gross negligence or intentional misconduct bears the burden of demonstrating that such liability limitations are appropriate.

Nor does CenturyTel explain why this Commission should depart from the concept it has used in prior proceedings. For example, in the 2005 SBC arbitration proceeding, Case No. TO-2005-0336, the Commission approved SBC's proposed contract language, which

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

specifically carved out liability arising from gross negligence, recklessness or intentional misconduct from the 911 liability limitations provisions of the final agreement.[296]

More significantly, however, the courts of Missouri have construed our statutes in a manner that is not consistent with CenturyTel's attempts to limit its liability. That statute provides that any telecommunications company that causes some act or omission which results in loss or damages "shall be liable to the person or corporation affected thereby for all loss, damage or injury caused thereby or resulting therefrom."[297] In construing this language, and in consideration of the common law rights to recover punitive damages, the Missouri Court of Appeals concluded that telephone companies can not escape liability (and damages) when the "acts complained of were done wrongfully, intentionally, or without just cause or excuse."[298]

Further, the *Overman* court noted that cases in Missouri recognize the propriety of imposing punitive damages against a telephone company "in a proper case." To this point the *Overman* court cited, with approval, the decision in *Warner v. Southwestern Bell Telephone Company,*[299] in which the Missouri Supreme Court stated that a tariff limiting the amount of damages for errors and omission (in directories) are generally valid and enforceable, but they "do not exempt a defendant when its conduct has been wanton and willful, . . ."[300]

---

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

[297] § 392.350 RSMo.

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

[299] 428 S.W.2d 596, 603 (Mo. 1968).

[300] *Overman*, 675 S.W. 2d at 424 (citing *Warner v. Southwestern Bell Telephone Company*, 428 S.W.2d 596, 603 (Mo. 1968)).

Indeed, the *Overman* court concluded that in none of the Missouri cases on the books did the courts ever rule “that a telephone company is not liable for intentional torts, and those for resultant punitive damages.”[301] As a result, the court concluded, that “[t]he only conclusion is that the Missouri General Assembly has chosen not to act in specifying or limiting the types of damages recoverable for violations of § 392.200, or of the common law.”[302] Thus, in accordance with these decisions, the Arbitrator will not allow either party to limit its liability when it has acted in an intentional, willful or grossly negligent manner.

Finally, also rejected are CenturyTel’s attempts to limit the total amount of damages that it may be liable for if it engages in grossly negligent behavior, or intentional/willful misconduct. Consistent with its position on issue 15(c), above, Charter argues that the Parties should not limit their damages in a way that would preclude one Party from obtaining meaningful relief from the other, when the party at fault is grossly negligent or engages in intentional misconduct.

This issue has already been decided. As noted in the discussion of issue 15(c), in the 2005 arbitration proceeding between SBC and various competitive LECs, the Commission affirmed the Arbitrator’s ruling that “it is contrary to public policy to cap liability

[301] *Id*. at 424.

[302] *Id*.

for intentional, willful, or grossly negligent action."[303] Because the Commission has already decided this very question, the Arbitrator will reject CenturyTel's proposal here.[304]

Decision

The Arbitrator finds this issue in favor of Charter.

36. Should each party be required to indemnify and hold harmless the other party except where the indemnified party has engaged in acts that constitute negligence, gross negligence, intentional or willful misconduct in connection with E911 service?[305]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In the discussion of Issue 35, the Arbitrator concluded that the 911 liability provisions should benefit both Parties reciprocally. Both Parties provide 911 services to their

---

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

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

[305] CenturyTel's phrasing of the issue is: "Should CenturyTel be protected from 3rd party liability related to Charter's errors in providing subscriber information to CenturyTel?"

respective end user customers, and therefore both Parties have potential liability concerns arising from their provision of 911 service to their respective end users.

CenturyTel claims that this provision should only apply for CenturyTel's benefit, because only CenturyTel "is responsible for managing the Database Management System and relaying subscriber information to the counties."[306] That may be true. However, it does not address the basic premise of this indemnity language, which applies to "any damages, claims, [or] causes of action…"

The specific contract language at issue here is quite broad, in that it would impose indemnity obligations for "any damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise which may be assessed by any person, business, governmental agency, or other entity . . . as a result of any act or omission [of the other Party] . . ."[307] Thus, it does not apply only to the specific claims that may arise as a result of CenturyTel's unique obligations in administering the 911 system.

Instead, it applies to potentially all claims arising from any 911 service. As previously noted, Charter also provides 911 service to its end users as required by state law, and therefore may be faced with "potential damages, claims, causes of actions, or other injuries whether in contract, tort, or otherwise." Charter therefore may also face certain 911 liability, and should therefore be afforded the same indemnity protections which CenturyTel seeks for itself.

Given these facts, the Arbitrator declines to adopt contract language that would allow only one Party to benefit from the protections of this language. This conclusion stands, even though CenturyTel, as an incumbent provider, has greater obligations with

---

[306] DPL at 115 (CenturyTel Position Statement).

[307] *Id.*

respect to certain 911 network facilities. Nevertheless, as discussed above, Charter is also responsible for establishing, and maintaining lines and trunks to connect to the incumbent 911 network, and therefore bears much of the same risk as CenturyTel. Accordingly, Charter's proposal to make this language reciprocal, to apply to both Parties' benefit, will be adopted.

Decision

The Arbitrator finds this issue in favor of Charter.

37. Should the Agreement limit both Parties' liability related to the release of information, including nonpublished and nonlisted information in response to a 911 call?

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

In this situation, CenturyTel's proposed language provides that if information is released to emergency response agencies responding to calls placed to an E911 service, CenturyTel will not be liable for the good faith release of information not in the public record. In contrast, Charter proposes the neither party should be liable in the event of the other Party's negligence. The Arbitrator finds CenturyTel's language to be reasonable and adopts the same.

Limiting CenturyTel's liability for the good faith release of information is proper as a matter of public policy and makes sense. First and foremost, CenturyTel is the Party releasing the information to "emergency response agencies," in response to a call placed to an E911 service (*i.e.*, this is an emergency situation requiring a quick response). Additionally, Charter bears sole responsibility for the content of information in the DBMS database that could potentially be released by CenturyTel.[308] Finally, Missouri law does not provide a carrier such as CenturyTel any form of statutory immunity from liability in a situation such as is presented.

In this situation, CenturyTel is releasing information to an *emergency response agency responding to an E911 call*. Given the context of such a release (*i.e.*, an emergency involving public health, safety and welfare), limiting CenturyTel's liability for civil damages for such a release *so long as CenturyTel acts in good faith*, is a reasonable solution and is in the public interest. In situations where CenturyTel is releasing information as a result of an E911 call, quick action is going to be required. Moreover, this is not a situation in which the information is being released to, for example, the local newspaper reporter or town gossip. The information is being released to an emergency response agency to assist that agency's response to an emergency.

With regard to Charter's contention that the provision should apply to both Parties, Charter fails to explain in the Joint Statement why it is entitled to a similar limitation. As discussed above, there are clear reasons why CenturyTel requests such a limitation, including that it is *CenturyTel* that manages the DBMS and relays the subscriber

[308] Agreement, Article VII, § 4.5.1 ("Once E911 trunking has been established and tested between **CLEC's end Office and appropriate Selective Routers, **CLEC or its representatives shall be responsible for providing **CLEC's End User 911 Records to CenturyTel for inclusion in CenturyTel's DBMS on a timely basis.")

information to the public agency. Charter does not manage the DBMS or relay this information to the public agency, therefore the need for such limitation is not present.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

38. Should CenturyTel be permitted to limit its liability for so-called "nonregulated" telephone services in connection with 911 services – even where that term is not defined under the Agreement?[309]

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

Incorporated by reference is the discussion under Issue 35 and Issue 36 regarding 911 liability. Thus, the same decision with respect to 911 liability on those issues will apply here.

Specifically, the Arbitrator found that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."[310] Generally, in arbitrating the disputed issues, the Arbitrator is charged with the task of ensuring that each Party's respective obligations under the Agreement are unambiguous. For that reason, the Arbitrator is reluctant to

[309] CenturyTel's phrasing of the issue is: "Should CenturyTel be liable for incorrectly routed 911 service, when such incorrect routing is not CenturyTel's fault?"

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

accept CenturyTel's proposal because it has failed to carry its burden of proof with respect to the purpose, or intent, of its language.

Troubling is the meaning of the term "nonregulated" telephone services. CenturyTel has not defined that term in its proposed language, nor has CenturyTel offered any meaningful explanation of how any liability with respect to the provision of these so-called "nonregulated" telephone services would arise in the first place. Put simply, the Arbitrator does not see the need, or wisdom in adopting this language.

This approach is consistent with the basic purpose of an interconnection agreement, which, pursuant to Sections 251 and 252 of the Telecommunications Act, is intended to definitively establish the rights and obligations of the Parties. In other words, the Agreement must be clear and unambiguous to accomplish the purposes of those Sections 251 and 252. In contrast, if CenturyTel's proposed language were adopted, the Agreement would include ambiguous terminology that would create uncertainty as to Charter's obligations on a going-forward basis. Ambiguity with respect to Charter's obligations to CenturyTel, especially as it pertains to a limitation on CenturyTel's liability in connection with certain vital 911 services, should be avoided. Doing so will likely lead to fewer disputes between the parties.

Decision

The Arbitrator finds this issue in favor of Charter.

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

Findings of Fact

91. CenturyTel requests the inclusion of the rates in the Agreement, and provided expert opinion that the rates contained in the CenturyTel draft of the Agreement comply with the costing methodology standards applicable under 47 U.S.C. § 251.[311]

Conclusions of Law and Discussion

The Arbitrator has already determined that the Agreement should allow both Parties to assess a non-recurring charge for a request to port a telephone number. This issue is framed as: "Should the Pricing Article include Service Order rates and terms?" Based upon the decision that the service orders for porting requests are appropriate, the Agreement should also include service order rates and terms. Accordingly, the Agreement should include the rates and terms set forth by CenturyTel for Article II, § 2.70.

Decision

The Arbitrator finds this issue in favor of CenturyTel.

41. How should specific Tariffs be incorporated into the Agreement?

For the reasons stated under Issue 3, the Arbitrator finds this issue in favor of Charter.

[311] Ex. 15, p. 13, l. 4-7; Ex. 17, p. 11, l. 10-14.