

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

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

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
SUBMITTED BY CENTURYTEL OF MISSOURI, LLC**

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DATED: November 20, 2008

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I. BACKGROUND

On July 31, 2008, Charter Fiberlink-Missouri, LLC (“Charter”) filed its petition in the above-captioned proceeding (the “Petition”) pursuant to § 252(b) of the 1996 revisions to the Communications Act of 1934, as amended (the “Act”), 47 USC 151 *et seq.* Charter requested that the Missouri Public Service Commission (the “Commission”) arbitrate thirty-nine (39) unresolved issues arising out of the Parties’ negotiations for an interconnection agreement.

On August 25, 2008, CenturyTel of Missouri, LLC (“CenturyTel”) filed its response to the Petition (the “Response”) pursuant to Section 252(b)(3) of the Act and Commission Rule 4 CSR 240-36.040. Exhibit 1 to the Response set forth CenturyTel’s positions with regard to each of Charter’s issues as well as two (2) additional issues for resolution by the Commission.

Pursuant to the Amended Order Setting Procedural Schedule entered by Arbitrator Ronald D. Pridgin (the “Arbitrator”) on August 27, 2008, the Parties submitted pre-filed direct testimonies on September 30, 2008, and pre-filed rebuttal testimonies on October 21, 2008. An evidentiary hearing in this matter was held before the Arbitrator at the Commission’s Offices on October 28-29, 2008. On November 6, 2008, the Arbitrator approved the Parties’ joint proposal that proposed findings of fact and conclusions of law be submitted for consideration in lieu of legal briefs, with the Parties’ replies due December 4, 2008.

II. LIST OF ISSUES

In accordance with the Procedural Schedule established by the Arbitrator, on September 2, 2008, the Parties filed a Revised Statement of Unresolved Issues (the “Joint Statement”) which identified either the Parties’ agreed upon or competing statement of each unresolved issue. Attached hereto and marked as Exhibit A is a matrix that sets forth the statement of the issues by Charter and CenturyTel.

III. COMMISSION JURISDICTION AND RELIEF REQUESTED

The Commission has jurisdiction of this matter pursuant to Section 252(b) of the Act and Commission Rule 4 CSR 240-36.040. The relief requested by the Parties, and the duty imposed upon the Commission pursuant to Section 252(b)(4)(C) of the Act is to resolve each issue set forth in the Petition and the Response in accordance with the applicable requirements of the Act.

IV. FINDINGS OF FACT

(1) Charter is a Delaware limited liability company with its primary place of business located at 12405 Powerscourt Drive, St. Louis, MO 63131. Charter holds a Certificate of Authority issued by the Commission that authorizes Charter to provide local exchange service and exchange access service in designated exchanges in the State of Missouri, including within the incumbent service area of CenturyTel.

(2) CenturyTel is a Louisiana limited liability company with its primary place of business located at Wentzville, Missouri. CenturyTel is a non-rural telephone company and is an incumbent local exchange carrier ("ILEC") authorized by the Commission to provide local exchange service in the State of Missouri.

(3) CenturyTel and Charter entered into negotiations of a new interconnection agreement (the "Agreement") based upon an initial request for negotiations by Charter provided to CenturyTel on or about August 14, 2007. By agreement of the Parties, the date on which Charter requested negotiations was re-set to February 22, 2008, such that the last day for the filing of the Petition by Charter was July 31, 2008.

(4) Charter and CenturyTel are operating under an existing interconnection agreement approved by the Commission. The existing agreement has been in place for approximately six (6) years and has established a functional network interconnection arrangement between the Parties.

The term of such agreement has expired and is now in “evergreen” status pending final resolution of the issues presented in this proceeding.

(5) The Parties’ negotiations have resulted in agreement by the Parties on portions of the Agreement. Further, the Parties have advised the Arbitrator that negotiated resolutions have been reached with regard to Issues 1, 6, 9, 25, 26, 30, 33, 34, and 39. The language agreed to by Parties regarding these issues is set forth in Exhibit B attached hereto. The Arbitrator finds that the language negotiated by the Parties’ on these issues is reasonable and hereby approves the same.

(6) On July 31, 2008, Charter filed the Petition with the Commission requesting arbitration of issues that Charter states remained unresolved as of that date and after the negotiations between the Parties. Charter provided its version of a “Disputed Points List” (the “Charter DPL”), attached to the Petition as Exhibit C.

(7) On August 25, 2008, CenturyTel filed the Response with the Commission to which was attached CenturyTel’s updated Disputed Points List (the “CenturyTel DPL”) which sets forth CenturyTel’s responses to the issues presented by Charter and also presented two (2) additional issues for resolution by the Commission.

(8) Each of the Parties has provided its version of the Agreement reflecting contract language agreed upon by the Parties as well as each Party’s proposed language specific to the issues that remain disputed or otherwise unresolved. Charter’s version of the Agreement is attached to the Petition as Exhibit B, and CenturyTel’s version of the Agreement is attached to the Response as Exhibit 2. All language appearing in normalized text and font in each version of the Agreement has been resolved or agreed upon by the Parties. With respect to contract terms and issues that remain in dispute between the Parties, CenturyTel’s proposed contract language is set forth in double-underlined font, and Charter’s proposed contract language is set forth in **bold font**.

A “Text Key” to this effect is included on the cover page of each Party’s version of the Agreement.

(9) In the interest of efficient presentation by the Arbitrator of his analysis and resolution of each of the Parties’ disputed issues, additional findings of fact pertinent to the issue under consideration will be set forth in the discussion and conclusions of law that follow.

V. DISCUSSION OF ISSUES AND CONCLUSIONS OF LAW¹

(10) In accordance with Commission Rule 4 CSR 240-36.040(19), the Arbitrator’s Draft Report shall present a “reasoned articulation of the basis for the decision on each issue, including how the decision meets the standards set in sections 251 and 252 of the Act.” The Arbitrator therefore considers all of the unresolved issues presented in the Petition and the Response. According to Rule 4 CSR 240-36.040(19), “[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.”

(11) The Arbitrator has considered the disputed issues presented in the Petition and the Response in accordance with the standards discussed above, and sets forth his decision in the following pages. Although the Arbitrator has provided a summary of the Parties’ position with regard to each issue, that summary is for convenience only. The Arbitrator has reviewed the entire record in this proceeding and it is upon that entire record that the following decisions are based.

¹ With regard to certain of the unresolved issues, the Parties have chosen to group issues based on subject matter that is common to the issues. The Arbitrator finds that organization of this Discussion of the Issues consistent with the Parties’ grouping of the issues is advisable and will be utilized in this Order. While the Parties agreed to the statement of the issues in many cases, at other times the Parties disagreed. Therefore, the Arbitrator will refer to the issue(s) by number. Exhibit A attached hereto includes a full statement of each issue.

ISSUES 2 AND 24

(12) The Parties agree that Issues 2 and 24, relating to Network Interface Devices (“NIDs”) should be addressed in tandem. Therefore, the Arbitrator concurs, and addresses these Issues jointly below.

A. Positions of the Parties

1. Charter’s Position

(13) Charter’s proposed language for Issue 2 is set forth on page 3 of the Joint Statement, and Issue 24 is set forth on pages 87-89 of the Joint Statement. Charter maintains that its definition of a NID in Article II, § 2.103 should be limited to a technical description of the NID, and that its definition is consistent with FCC rules. Charter’s proposed language on Issue 24 focuses on ownership and maintenance of customer Inside Wiring, and presumes that Charter owns or controls the “End User’s side of the NID.” However, through the testimony of its witnesses, Charter appears to have abandoned its presumption of ownership in favor of alternative arguments: (1) even if CenturyTel owns its NIDs in their entirety, Charter does not use them and there should be no Unbundled Network Element (“UNE”) charge, and (2) even if Charter uses CenturyTel’s NIDs as UNEs, the UNE charge should be zero.

(14) Both Charter witnesses addressing Issues 2 and 24 acknowledged CenturyTel’s ownership of the NID. (Tr. 93:1-2; 190:19-24) Mr. Blair, Charter’s Vice President, Technical Operations, described the technical features and use of a NID. (Blair Direct Testimony, 5:6-8:11) He further described the installation procedures employed by Charter technicians when establishing telephone service to customers formerly served by CenturyTel.

(15) Charter’s installation procedures vary depending on the type of telephone wiring at the customer’s location. If a customer has the “serial” type of wiring (as most older homes do), the Charter technician accesses the customer access side of the NID and disconnects the customer from the CenturyTel loop. (*Id.*; Tr. 195:12-196:4) Mr. Blair stated that 70% of Charter’s

installations use this method. CenturyTel does not dispute Charter's right to access the customer access side of CenturyTel's NID for the purpose of disconnecting the CenturyTel local loop from the customer's Inside Wiring, provided that Charter does not then use the NID to house any of its facilities. (Tr. 194:4-25)

(16) The second installation procedure that is used is in customer locations that have the "star" type of wiring. (Blair Direct Testimony, 11:12-13:12) Approximately 30% of Charter installations use this method, and there are two variations of it. (Tr. 195:12-196:2) Charter's preferred installation process involves a "back feed" of wire and a connection within the customer's premises that does not involve CenturyTel's NID in any way. (Tr. 185:7-24) This approach is diagramed and described in Charter's Residential Installation Procedures. (Ex. 23.P, Response to Data Request 8, Confidential Attachment A, pp. CH-Mo-DR-000041-000060)

(17) When the "back feed" procedure is not used, the Charter technician runs a line from Charter's Multimedia Terminal Adapter ("MTA") to the outside of the residence and "scotchlocks" the line to the customer's Inside Wiring inside the customer access side of CenturyTel's NID. (Blair Direct Testimony, 12:8-11)

(18) Charter maintains that it does not use CenturyTel's NID, even when it has scotchlocked its wire to the customer's Inside Wire inside the NID. Charter also claims that, even if it does use CenturyTel's NIDs in these cases, it does not cause CenturyTel to incur any costs by doing so, and the NID usage charge should therefore be zero. (Tr. 528)

2. CenturyTel's Response to Charter's Position

(19) CenturyTel's proposed language for Issue 2 is set forth on page 3 of the Joint Statement, and Issue 24 is set forth on pages 87-90 of the Joint Statement. CenturyTel advocates that the definition of the NID must integrate the Parties' agreed definitions of Point of Demarcation and Inside Wire in order to be meaningful in the context of applicable FCC

decisions. (Miller Direct Testimony, 8:16-10:3) CenturyTel points to the definition of Inside Wiring in 47 C.F.R. § 68.3 and the definition of Demarcation Point in 47 C.F.R. § 68.105 and concludes that the customer does not own or control CenturyTel's NID or its equipment housed therein. (*Id.*, 10:13-12:11)

(20) CenturyTel neither contests Charter's right to access the NID for the purpose of disconnecting the customer from CenturyTel's local loop nor claims such access is use for which CenturyTel is entitled to compensation. (*Id.*, 14:14-18; Miller Rebuttal Testimony, 8:1-4, 13-19) However, if Charter places its facilities within the NID, CenturyTel asserts that Charter is using the NID as a UNE pursuant to 47 C.F.R. §§ 51.319(c)² and 51.307(c),³ and compensation is due for such use pursuant to 47 C.F.R. § 51.509(h).⁴ (Miller Direct Testimony, 14:19-15:35) CenturyTel maintains that when Charter "scotchlocks" its wire to the customer's Inside Wire and leaves the interconnection inside the customer access side of the CenturyTel's NID, Charter uses CenturyTel's NID to house Charter's interconnection with the customer. (Miller Rebuttal Testimony, 8:23-9:27) As support for its position, CenturyTel refers to an AAA arbitration between Charter and CenturyTel affiliates in Wisconsin arbitrated by James Mauze, the former

² 47 C.F.R. § 51.319(c) identifies and defines the NID as a UNE and acknowledges that it may be used by a CLEC to connection to customer wiring: "... an incumbent LEC also shall provide nondiscriminatory access to the **network interface device on an unbundled basis**, in accordance with section 251(c)(3) of the Act and this part. The network interface device element is a stand-alone network element and is defined as any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device use for that purpose. An incumbent LEC **shall permit a requesting telecommunications carrier to connect its own loop facilities to on-premises wiring through the incumbent LEC's network interface device**, or at any other technically feasible point." (Emphasis added.)

³ 47 C.F.R. § 51.307(c) indicates that any use of a UNE whatsoever is included in the UNE definition: "access to an unbundled network element, along with **all of the unbundled network element's features, functions, and capabilities**, in a manner that allows the requesting telecommunications carrier to provide any telecommunications service that can be offered by means of that network element." (Emphasis added.)

⁴ 47 C.F.R. § 51.509(h) indicates that there must be a price for the stand alone NI UNE: "[a]n incumbent LEC **must establish a price** for a network interface device when the unbundled network element is purchased on a stand-alone basis pursuant to Sec. 51.319(c)." (Emphasis added.)

chairman of this Commission, who ruled in CenturyTel's favor and ordered Charter to compensate CenturyTel for the use of its NIDs in this fashion. (*Id.*, 17:17-18:2)

(21) Regarding the pricing for Charter's use of the CenturyTel NIDs, CenturyTel emphasizes that Article XI, § II of CenturyTel's form of the Agreement (attached to the Petition as Exhibit C ("UNE Pricing")) indicates that the Parties agree on the monthly recurring and the non-recurring rates for use of CenturyTel's NIDs by Charter.⁵ (Miller Rebuttal Testimony, 9:28-10:4, 12:7-9) In other words, Charter did not challenge that CenturyTel's NID UNE rates apply to Charter's use of CenturyTel's NIDs in its negotiations with CenturyTel or in its arbitration petition.

(22) In response to Charter's argument that CenturyTel incurs no costs when Charter uses CenturyTel's NIDs on an ongoing basis, CenturyTel says that the argument is wrong and irrelevant. As for CenturyTel's costs, there are the initial purchase and installation costs, maintenance costs, and replacement costs. (Tr. 532:6-12) When Charter takes customers from CenturyTel, CenturyTel must recover these costs over a smaller customer base, which puts pressure on CenturyTel to raise its rates in the face of competition from Charter and other CLECs. Revenues in the form of the NID UNE charges prescribed by the FCC offset this pressure. Furthermore, Charter's argument is undermined by its admission that the "bottom line" of its position is its desire to *minimize its costs*. (Tr. 93:12-15) The FCC's NID UNE requirements prohibit the subsidization of Charter by CenturyTel and its customers.

⁵ The issue of the rates for use of CenturyTel's NIDs by Charter as a UNE is also the subject of CenturyTel's Motion to Strike that seeks to strike portions of the rebuttal testimony of Charter's witness, Mr. Gates. Inasmuch that the Arbitrator has granted this aspect of CenturyTel's Motion to Strike, the applicability of rates set forth in Article XI, § II of the Agreement will be addressed in the Arbitrator's Discussion below.

B. The Arbitrator's Decision

(23) Based on the record, I find that Charter now agrees that CenturyTel owns its NIDs. Further, CenturyTel agrees that Charter may access CenturyTel's NIDs for the purpose of disconnecting the customer from CenturyTel's loop when Charter establishes service to the customer, and CenturyTel seeks no compensation for such access. According to Mr. Blair, 70% of Charter's customer installations would involve this type of access for disconnection.

(24) However, an undetermined portion of Charter's installations with "star" wiring involve the "scotchlocking" of Charter's wire to the customer's Inside Wire and housing the interconnection inside the customer access side of the NID. Reason and logic, as well as applicable FCC Rules, require the Arbitrator to conclude that, when Charter accesses CenturyTel's NID for the purpose of accomplishing an interconnection with the customer's Inside Wire and housing that interconnection inside CenturyTel's NID, Charter is using CenturyTel's NID as a UNE. The purpose of such use is to provide a weatherproof and secure location for Charter's connection to the customer's Inside Wire. Absent Charter's use of CenturyTel's NID, Charter would be required to adhere to its other installation methods or, if Charter so chooses, to install its own NID or equivalent device. Charter admitted that it does not have to use CenturyTel's NIDs in order to effect its interconnections with former CenturyTel customers. (Tr. 129:6-14, 141:3-18) If Charter chooses to effect its customer interconnection by the "star scotchlock" method, then Charter is using CenturyTel's NID as a UNE, and CenturyTel is entitled to compensation for such use. The Arbitrator agrees with former Commission Chairman Mauze that "[a]n ILEC customer has access to remove its wire from the ILEC's NID and become a CLEC's customer. After that, neither the customer nor the CLEC has the right to use the ILEC's NID, much less to house the CLEC's interconnection with the customer, unless the CLEC purchases the NID as a UNE." Award at 8, *CenturyTel, Inc. v. Charter Fiberlink, LLC*, AAA Case No. 51 494 Y 00524-07 (Aug.

24, 2007).⁶ It does not matter that Charter is only using part of CenturyTel's NIDs. As the Colorado Commission has ruled: "It is ultimately irrelevant whether the CLEC uses all of the functions and features of the NID – it is utilizing Qwest's facilities and is obligated to compensate Qwest in order to do so As the Multistate Facilitator has found, 'it would craft a slippery slope to establish the principle that CLECs can argue for reductions from standard UNE prices where they self declare that they are using only part of the capability of the UNE.'" *U S West Communications, Inc.*, 2001 Colo. PUC LEXIS 983 (2001)

(25) The Arbitrator has reviewed Article XI, § II regarding UNE Pricing, both in the form of the Agreement attached to the Petition as Exhibit B and attached to the Response as Exhibit 2. In both instances, the rates in such section appear in normalized text which, based on the "Text Key" shown on the cover pages of both forms of the Agreement, means "Resolved language (no disputes)." As such, the recurring and non-recurring rates that are to be applied to Charter's use of the CenturyTel NIDs are not before the Commission for decision. Indeed, pursuant to the terms of 47 U.S.C. § 252(b)(4)(C) a state commission's delegation of authority to arbitrate carrier disputes is limited to only those issues set forth in the petition and the response.

(26) Finally, as to the specifics of the dispute over the NID definition, Charter's witness could not provide a coherent reason why its NID definition was superior to CenturyTel's proposal. (Tr. 189-190, 194) By contrast, CenturyTel's witness Miller described precisely the inadequacy of Charter's definition in its failure to include relevant requirements of federal law and how this failure could result in Charter obtaining free use of CenturyTel's NIDs. (Miller Direct Testimony, 10-12)

⁶ The Award of approximately \$450,000 in NID usage charges was confirmed by a state court. Order for Judgment and Judgment, *CenturyTel, Inc. v. Charter Fiberlink, LLC*, Case No. 07CV4085 (Dane County, Wis. Cir. Ct. Jan. 24, 2008).

(27) Based upon the foregoing findings and conclusions of law, the Arbitrator finds that CenturyTel's definition of NID, as set forth on page 3 of the Joint Statement, and CenturyTel's language for Article VI of the Agreement regarding UNEs, as set forth on pages 87-90 of the Joint Statement, should be and hereby are approved.

ISSUES 3 AND 41

(28) The Parties agree that Issues 3 and 41, relating to Tariffs and incorporation of Tariffs in the Agreement, should be addressed in tandem. The Arbitrator concurs and will jointly address these Issues below.⁷

A. Positions of the Parties

1. Charter's Position

(29) Charter's proposed language to resolve Issue 3 is set forth on pages 5 and 6 of the Joint Statement, and Issue 41 is set forth on pages 122-130 of the Joint Statement. Issue 3 relates to the proper definition of the term "Tariff" and how Tariffs should be incorporated into the Agreement. Issue 41 relates to incorporation of Tariff language into the Agreement. According to Charter, the definition of "Tariff" in Article II, § 2.140 of the Agreement should include the qualifying language "that the Parties have specifically and expressly identified in this Agreement for the purpose of incorporating specific rates or terms set forth in such document by mutual agreement." By this language, Charter intends to limit the incorporation of Tariffs into the Agreement to only specified provisions. (Webber Direct Testimony, 5:15-18) Without this qualifying language, Charter believes that there will be ambiguity concerning the identity of the Tariffs and Tariff provisions that are intended to be incorporated into the Agreement. (*Id.*, 6:26-7:1)

(30) Similarly, Charter urges that Issues 3(b) and 41 should be resolved on the basis that only specific Tariff provisions should be incorporated into the Agreement. (*Id.*, 8:17-19; Tr.

⁷ In the pre-filed direct and rebuttal testimonies of CenturyTel's witness, Mr. Miller, CenturyTel also addressed Issue 14 in tandem with Issues 3 and 41. However, the Arbitrator will separately address Issue 14 below.

159:13-160:9) Charter suggests that such action will reduce subsequent disputes, will minimize time spent with interpretations of the Agreement, and may save the Commission time resolving disputes. (*Id.*, 10:15-18)

2. CenturyTel's Response to Charter's Position

(31) CenturyTel's proposed language to resolve Issue 3 is set forth on pages 5-6 of the Joint Statement, and Issue 41 is set forth on pages 122-130 of the Joint Statement. CenturyTel objects to Charter's proposed addition to the definition of "Tariff" (Miller Direct Testimony, 19:12-17), and offers the following clarifying sentence to Article II, § 2.140: "Either Party's Tariffs shall not apply to the other Party except to the extent that this Agreement expressly incorporates such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs."

(32) CenturyTel objects to incorporating only specific Tariff sections or subsections when Charter is taking a tariffed service. (*Id.*, 19:19-20:2 & 22:6-17) CenturyTel is concerned that incorporating only selected portions of an applicable Tariff will lead to claims by Charter that certain rates and terms do not apply to services that it orders from a Tariff and that this will create ambiguity and uncertainty. (*Id.*, 23:12-23) Further, CenturyTel argues that Charter's insistence on identifying particular sections of a Tariff ignores the fact that Tariff provisions may change independently of processes governing amendments to the Agreement. Thus, Tariff section references in the Agreement could become obsolete during the term of the Agreement. (*Id.*, 24:12-17)

(33) CenturyTel also asserts that Charter's approach to incorporate only portions of a Tariff is unlawful. CenturyTel maintains that the filed rate doctrine prohibits it from providing a tariffed service under terms and conditions that differ from the filed Tariff. (*Id.*, 22:1-4)

(34) CenturyTel disagrees with Charter's concern that incorporating CenturyTel's entire Tariff provisions when a Tariff is referenced in the Agreement would allow CenturyTel to "end run" the terms of the Agreement. CenturyTel emphasizes the following: (1) Charter can file with the Commission concerns and comments regarding any proposed change in a CenturyTel Tariff; (2) the dispute resolution process provided by the Agreement can be used by Charter to resolve any disagreement concerning application of Tariff terms; and (3) the Agreement expressly provides in Article I, § 3 that the terms of a Tariff may not "alter, curtail, or expand the rights or obligation of either Party under this Agreement, except by mutual consent." (Miller Rebuttal Testimony, 18:1-9)

B. The Arbitrator's Decision

(35) The Parties' agreed language defines "Tariff" in a manner that, in the Arbitrator's opinion, reflects an industry-standard definition. The agreed language reads as follows: "Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time." The Arbitrator determines that neither Party's qualifying language is necessary to provide a complete definition of the term "Tariff." Indeed, CenturyTel's proposed addition is duplicative of the last sentence of Article I, § 3 of the Agreement. Thus, the Arbitrator determines that neither Charter's nor CenturyTel's proposed language for Article II, § 2.140 will be adopted. Rather, the undisputed language quoted above is approved.

(36) Regarding the primary disagreement between the Parties concerning Issues 3(b) and 41 as to how Tariffs should be referenced and incorporated into the Agreement, the Arbitrator is persuaded that if the Parties choose to incorporate a Tariff in the Agreement by reference, as is indicated in multiple sections of the Agreement and as set forth in the Joint Statement, the entirety of the subject Tariff should be incorporated. It is axiomatic that the terms and conditions of a tariff

cannot be modified by contract or otherwise.⁸ If Charter takes a tariffed service from CenturyTel, the service must be governed by the tariff in its entirety. Neither Charter nor CenturyTel can pick and choose which tariff provisions will apply.

(37) Charter's concern as to possible confusion or conflicts between the provisions of the Tariff and the Agreement is addressed by the undisputed provisions of Article I, § 3 that states: "In no event shall a Tariff alter, curtail, or expand the rights or obligations of either Party under this Agreement, except by mutual consent." Thus, in the event of a conflict in Tariff terms and the terms of the Agreement, the terms of the Agreement prevail.

(38) The incorporation of tariffs in their entirety has the additional benefit of eliminating the unintended consequences that would arise if and when the tariffs are changed pursuant to federal or state law. By incorporating the tariff in its entirety by reference in the Agreement, ambiguity and potential disputes over application of tariff provisions are eliminated in the event that a Party orders additional services from a tariff or utilizes the tariff for purposes not originally included in the Agreement.

(39) In conclusion, the Arbitrator finds that the definition of Tariff set forth above is approved as the resolution of Issue 3(a). Further, the Arbitrator finds that CenturyTel's language for Article I, § 3 and CenturyTel's language for the various sections of the Agreement set forth on pages 122-130 of the Joint Statement relating to Issue 41 should be and hereby are approved.

ISSUE 4

(40) The Parties have agreed that Issue 4 is to be bifurcated as Issues 4(a) and 4(b). The Arbitrator concurs, and addresses these sub-issues below.

⁸ *E.g., AT&T v. Central Office Telephone*, 524 U.S. 214, 223-24 & 227 (1998).

ISSUE 4(a)

A. Positions of the Parties

1. Charter's Position

(41) Charter's proposed language to resolve Issue 4(a) is set forth on pages 9-10 of the Joint Statement. Charter asserts that the Agreement should include language that allows for termination of the Agreement only under certain circumstances, and then only after Commission review and approval. (Tr. 257:20-25, Giaminetti Direct Testimony, 4:9-13) According to Charter, unilateral termination by a Party should not be allowed because such action could adversely impact subscribers of one or both Parties. (*Id.*, 6:5-10) Charter maintains that a Section 251 interconnection agreement is not in the nature of a commercial contract; thus, default provisions typical to commercial contracts are not proper. (Giaminetti Rebuttal Testimony, 3:10-21)

(42) Charter proposes that any finding of default by a Party would be predicated on initiation of the dispute process under the Agreement, and, if the Parties could not resolve the dispute, presentation of the dispute to the Commission. (Giaminetti Direct Testimony, 9:12-21) Charter claims that this process is necessary to assure that no adverse consumer impact results from termination, while providing for a method to terminate the Agreement if an uncured default exists. (*Id.*, 11:2-16) Charter's definitions of the events constituting a Default under the Agreement reflect the foregoing while also allowing termination without Commission approval in the case of a Party's insolvency, initiation of a bankruptcy or receivership proceeding, or final revocation of a Party's Certificate of Operating Authority. (Joint Statement, 9-10)

2. CenturyTel's Response to Charter's Position

(43) CenturyTel's proposed language to resolve this Issue is set forth on pages 9-10 of the Joint Statement. CenturyTel states that the language it 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. (Miller

Direct Testimony, 28:21-22:9) 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. (*Id.*, 29:12-19) CenturyTel believes that 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, and unfairly shifts 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. (*Id.*, 30:18-31:2)

(44) CenturyTel refers the Arbitrator to the resolution of an analogous issue by the Texas Public Utility Commission in Docket 28821 in CenturyTel's favor. (Miller Direct Testimony, 32:1-26) Further, CenturyTel points to the provisions of Charter's Missouri Local Tariff which allow termination of service without Commission intervention if events of default occur. (Miller Rebuttal Testimony, 23:22-24:24)

B. The Arbitrator's Decision

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

(46) The Arbitrator concludes that it would be unreasonable for the Agreement to require that the Commission make an affirmative finding that a default exists as a condition precedent to a Party's right to suspend performance or terminate the Agreement. Rather, I agree that the non-

defaulting Party's provision of 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. (Hankins Rebuttal Testimony, 13:14-22 & Rebuttal Schedule PH-1) 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. 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. (Miller Rebuttal Testimony, 22:10-23) 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, a Party may seek intervention from the Commission to issue a "standstill" order pending the Commission's comprehensive review of the circumstances. (Giaminetti Rebuttal Testimony, 5:12-7:5) At that point, the Commission would have the discretion to involve itself, or not, before the Agreement is terminated.

(47) The Arbitrator agrees with the Texas Commission that CenturyTel's proposed default language is consistent with "reasonable and accepted business practice." (Discussion of Docket No. 28821 in Miller Direct Testimony, 32:1-20) CenturyTel's proposed language creates the proper incentive for the Parties to perform their respective obligations under the Agreement and 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.

ISSUE 4(b)

A. Positions of the Parties

1. Charter's Position

(48) Charter's proposed language to resolve this Issue is set forth on pages 12-13 of the Joint Statement. Charter asserts that without its proposed language for Article II, § 2.7, CenturyTel could terminate the Agreement which "would leave Charter without any connection to the public switched telephone network, and without any means of ensuring that its subscribers' phone calls can be delivered to, or received from, other carriers." (Giaminetti Direct Testimony, 14:7-10) Further, Charter objects to CenturyTel's proposed language because, if the Agreement terminated in the event of a sale, "Charter would therefore be forced to negotiate an entirely new agreement." (*Id.*, 14:12-13) Consequently, Charter seeks approval of its proposed language, which would condition a Party's ability to terminate the Agreement on the acquiring entity's assumption of the terms of the Agreement. (*Id.*, 15:3-6)

2. CenturyTel's Response to Charter's Position

(49) CenturyTel's proposed language to resolve this Issue is set forth on page 12 of the Joint Statement. CenturyTel opposes Charter's additions to Article III, § 2.7, in order to preserve CenturyTel's right to terminate its obligations under the Agreement in the event of sale of an exchange or portion thereof. (Miller Direct Testimony, 34:5-8) CenturyTel states that Charter's service disruption concern is misplaced because of the protections provided by 47 C.F.R. § 51.715. (*Id.*, 34:12-35:8) CenturyTel maintains that Charter's position is: (1) inconsistent with operational realities that may make imposition of the obligations of the Agreement upon an acquiring Party impractical; (2) an unreasonable restraint or "veto" on a Party's ability to sell all or a portion of its operating area; and (3) likely to devalue the assets subject to sale. (*Id.*, 35:20-37:16; Miller Rebuttal Testimony, 25:25:11-26:14)

B. The Arbitrator's Decision

(50) The Arbitrator concludes that CenturyTel's position regarding Issue 4(b) reflects industry practice, is consistent with the public interest, and does not threaten the continuity of service to Charter's end users. Thus, Charter's proposed additional language in Article III, § 2.7 is rejected. In reaching this conclusion, the Arbitrator has carefully considered the end user service disruption risks that Charter states will occur without its proposed language. Charter's concerns are not well founded.

(51) The FCC's procedures provide the means by which any telecommunications carrier without an existing interconnection arrangement with an incumbent LEC may request such an arrangement:

[T]he incumbent LEC *shall provide* transport and termination of telecommunications traffic *immediately* under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under Sections 251 and 252 of the Act.⁹

Thus, Charter's contention that termination of the Agreement would leave Charter "without any means of ensuring that its subscribers' phone calls can be delivered to, or received from, other carriers, without Charter's proposed language" cannot be reconciled with Charter's rights under Section 51.575 of the FCC's rules. Similarly, entering into such an interim arrangement should not prejudice Charter's financial interests since 47 C.F.R. § 51.715(d) provides that, if final negotiated or arbitrated rates for transport and termination differ from interim arrangements, the Commission "shall require carriers to make adjustments to past compensation."

(52) Further, Charter's due process rights to establish an interim arrangement are protected by CenturyTel's proposed language of Article III, § 2. In the event of a sale or transfer of a service area or portion thereof, CenturyTel "shall provide the other Party with at least ninety (90)

⁹ 47 C.F.R. § 51.715 (emphasis added).

days' prior written notice of such termination." This prior notice will provide Charter with adequate time to request an interim arrangement with the acquirer.

(53) The Arbitrator also concludes that requiring assignment of the Agreement to an acquirer would unnecessarily interfere with CenturyTel's right to enter into market-based asset sales, and could devalue CenturyTel's assets. Thus, for all of the foregoing reasons, the Arbitrator finds that CenturyTel's proposed language for Article III, § 2.7 should be and hereby is approved.

ISSUE 5

A. Positions of the Parties¹⁰

1. Charter's Position

(54) Charter proposes to restrict 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. The other restrictions contained within Article II, § 5 have been agreed to by the Parties.¹¹

2. CenturyTel's Response to Charter's Position

(55) CenturyTel argues that it is inappropriate to restrict a Party's ability to totally or partially assign the Agreement to a subsidiary or affiliate without the other Party's consent to situations in which the assigning Party is selling all, or substantially all, of its assets.¹²

B. The Arbitrator's Decision

(56) Issue 5 revolves around the conditions under which a Party should have the right to assign its rights and obligations under the Agreement to a subsidiary or an affiliate without the consent of the other Party.

¹⁰ The Parties jointly agreed that Issues 5, 10, 12, 15(A), (B) and (C), 26, 31, 35, 36, 37, and 38 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. As a consequence, the discussion of the Parties' positions relating to these issues is derived from the Joint Statement.

¹¹ Charter's position on this issue is more fully stated at pages 14-15 of the Joint Statement.

¹² CenturyTel's position on this issue is more fully stated at pages 14-15 of the Joint Statement.

(57) 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.

(58) 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 assignor's obligations; and (4) to situations where the other Party has first been given 90 days written notice.

(59) 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).

(60) The general rule of law favors a party's right to assign duties and rights under a contract.¹³ 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,

¹³ RICHARD A. LORD, WILLISTON ON CONTRACTS § 74.22 (Westlaw database updated 2008).

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.

(61) 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.

(62) 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 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.

ISSUE 7

A. Positions of the Parties

1. Charter's Position

(63) Charter objects to CenturyTel's proposal that Charter be required to "represent and warrant" to CenturyTel that Charter is a certified local provider of Telecommunications Exchange Service in the State.¹⁴ Instead, Charter asserts that other language in the Agreement requiring Charter to show proof of such certification upon CenturyTel's request is sufficient.¹⁵ While Charter has not proposed competing language to this effect, Charter also asserts that it is willing to

¹⁴ Joint Statement, pages 19-20.

¹⁵ Webber Rebuttal Testimony, 20:1-2.

“represent,” but not “warrant,” that it is a certified local provider of Telecommunications Exchange Service in Missouri.¹⁶

2. CenturyTel’s Response to Charter’s Position

(64) CenturyTel asserts that Charter should be required to “represent and warrant” that it is a certified local provider of telecommunication services in Missouri. CenturyTel asserts that its extension and performance of Section 251 obligations to Charter, as expressed in the Agreement, is fundamentally predicated on Charter’s status as a certificated local provider, and CenturyTel is not required to perform such duties on Charter’s behalf if Charter ceases to be local provider of telecommunications services. CenturyTel, therefore, asserts Charter should be required to “warrant” that Charter is certificated and that it will *continue to be so certificated* during the term of the Agreement.¹⁷

B. The Arbitrator’s Decision

(65) CenturyTel’s obligation to enter into an interconnection agreement with Charter pursuant to Sections 251 and 252 of the Act is predicated on Charter having obtained the status of competitive local exchange carrier (“CLEC”) for the purpose of providing local telecommunications service in CenturyTel’s service areas.

(66) With respect to providers of local telecommunications services in Missouri, *Mo. Rev. Stat.* § 392.450.1 provides, in relevant part:

The commission shall approve an application for a certificate of local exchange service authority to provide basic local telecommunications service or for the resale of basic local telecommunications service only upon a showing by the applicant, and a finding by the commission, after notice and hearing that the applicant has complied with the certification process established pursuant to section 392.455.

¹⁶ *Id.*, 19:27-31; 20:8-12.

¹⁷ Joint Statement, pages 19-20.

A carrier's statutory obligation to obtain a certificate of local exchange service authority ("COA") also carries with it the obligation to maintain that COA for as long as it purports to provide local telephone service in the state. Should that COA be revoked by the Commission, or should Charter fail to renew or otherwise maintain the COA, Charter's continued provision of local telecommunications services thereafter would be illegal, and CenturyTel would have no obligation under the Act to extend the terms of the Agreement to Charter.

(67) This issue, therefore, essentially comes down to the difference between a "representation" and a "warranty." *Black's Law Dictionary* comments on the differences:

A warranty differs from a representation in four principal ways: (1) a warranty is an essential part of a contract, while a representation is usually only a collateral inducement, (2) an express warranty is usually written on the face of the contract, while a representation may be written or oral, (3) *a warranty is conclusively presumed to be material*, while the burden is on the party claiming breach to show that a representation is material, and (4) *a warranty must be strictly complied with*, with substantial truth is the only requirement for a representation.¹⁸

Given that Charter's entitlement to invoke the rights of a CLEC under the Agreement is entirely dependent on it being a holder of a COA in Missouri, there can be no question that the continuing validity of Charter's COA is material to the Parties' entering into and continuing to be bound by the Agreement.

(68) For the reasons set forth above, the Arbitrator concludes that CenturyTel's proposed language in Issue 7 (Article III, § 8.4) should be adopted and incorporated into the Parties' final Agreement.

¹⁸ BLACK'S LAW DICTIONARY (8th ed. 2004) (emphasis added).

ISSUE 8

(69) The Parties have agreed that Issue 8 is to be bifurcated as Issues 8(a) and 8(b). As a consequence thereof, the Arbitrator will separately address these sub-issues below.

ISSUE 8(a)

A. Positions of the Parties

1. Charter's Position

(70) Charter's position on Issue 8(a) is set forth on pages 20-21 of the Joint Statement. Charter asserts that when the billed Party disputes the overpayment of a bill and later recovers a refund of such overpayment through the billing dispute process, the billing Party should pay interest on such refund that "mirrors" the late payment charge (1½ % per month) assessed elsewhere in the Agreement for failure to pay undisputed bills.¹⁹

2. CenturyTel's Response to Charter's Position

(71) CenturyTel's position on Issue 8(a) is set forth on pages 20-21 of the Joint Statement. CenturyTel's position is that 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. First, CenturyTel asserts that Charter's proposal to apply an "identical interest rate" to underpayment and overpayments conflates two very different circumstances – one pertaining 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) and the other pertaining to a Party's recovery of "disputed" amounts (either underpayments or overpayments) through the disputed bill resolution process.²⁰

(72) Second, CenturyTel asserts that adopting Charter's proposal would provide the billed Party with the perverse incentive to not review its bills or submit billing disputes on a timely basis.

¹⁹ Joint Statement, 20-21; Giaminetti Direct Testimony, 22:11-14, 25:4-18.

²⁰ Watkins Rebuttal Testimony, 8:6-18, 10:1-16.

CenturyTel contends that 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.²¹ Finally, CenturyTel asserts that, even if the Arbitrator determines in the course of resolving a disputed bill that 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.²²

B. The Arbitrator's Decision

(73) Each Party claims that the other confused, misunderstood, or misstated its position on Issue 8(a).²³ In addition to reviewing the evidence filed by the Parties and their testimony at the hearing on the merits, the Arbitrator 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.

(74) Article III, § 9 contains three separate provisions that relate to this disputed issue and inform its resolution—§§ 9.3, 9.4.1 and 9.4.2. Section 9.3 applies a "late payment charge" for the failure to pay *undisputed* amounts billed.²⁴ 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

²¹ *Id.*, 7:5-8:5.

²² *Id.*, 8:19-9:18.

²³ *See, e.g.*, Watkins Rebuttal Testimony 7:7-8; Giaminetti Rebuttal Testimony 22:16-17.

²⁴ Article III, § 9.3 of CenturyTel's proposed Agreement; Article III, § 9.3 of Charter's proposed Agreement.

amounts prior to the bill due date and to *withhold* payment of such amounts.²⁵ 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.²⁶ It is to this specific provision—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.

(75) While Charter asserts that it “only seeks the same opportunity for refunds of *overpayment*, at the same interest rate, that CenturyTel seeks for *underpayments*,”²⁷ 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 made no proposal 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).²⁸ 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

²⁵ *Id.*, Article III, § 9.4.1.

²⁶ *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.” (Giaminetti Rebuttal Testimony, 28:22.) 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; Watkins Rebuttal 10:4-16.) 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 *id.*, 23:5-7 (“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’.”)).

²⁷ Giaminetti Direct Testimony, 22:13-14 (emphasis added).

²⁸ 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.” *Id.*, 25:13-16. 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.

manner, any net payments and interest between the Parties. In contrast, Charter's proposal is to apply an explicit and specific interest rate whenever it recovers a refund of *disputed* charges in the course of a bill dispute proceeding.²⁹ 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.

(76) Discerning the true differences between the Parties' respective positions, however, does not address the issue as to whether the billed Party, under this Agreement, should be entitled to interest on 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.

(77) First, Charter states that its position "is that terms for bill payment, and refunds, should be equitable."³⁰ 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.³¹

(78) Second, in the context of this specific Agreement, the interplay between Charter's proposed language and the already-resolved language in Section 9.4.2 creates the potential for an

²⁹ See Joint Statement, 21.

³⁰ Giaminetti Direct 22:12.

³¹ See Giaminetti Rebuttal 22:10-11.

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 situations where Charter (1) fails to timely review and dispute a bill, (2) instead relies on Section 9.4.2 to dispute the charges paid under that bill up to one year later, and then (3) recovers a refund of the disputed charges over a year later with interest accruing as of the date of the original bill.

(79) 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. While Charter testified that it is not its business practice to intentionally delay the resolution of billing disputes in the hopes of recovering large interest payments on refunded charges,³² the Arbitrator agrees with CenturyTel³³ 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. Perhaps more important, because the Agreement can be adopted by other CLECs, Charter's business practices are only marginally relevant.

(80) 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.

(81) 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

³² See generally Giaminetti Direct Testimony, 24:29-27:22.

³³ Watkins Rebuttal Testimony, 7:14-8:5.

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.

ISSUE 8(b)

A. Positions of the Parties

1. Charter's Position

(82) Charter's proposed language on Issue 8(b) (Article III, §§ 9.5.1 & 9.5.2) is set forth on pages 21-22 of the Joint Statement. Charter asserts that, in the event the billed Party fails or refuses to pay undisputed charges by the bill due date, the billing Party should not be permitted to take certain self-help measures – suspending the processing of orders, refusing to accept new orders, or discontinuing service – without the Commission's permission.³⁴ Rather, in this circumstance, Charter asserts that the billing Party's only recourse should be “to initiate dispute resolution procedures” under the dispute resolution provisions of Article III, § 20.

2. CenturyTel's Position

(83) CenturyTel's proposed language on Issue 8(b) (Article III, §§ 9.5.1 & 9.5.2) is set forth on pages 21-24 of the Joint Statement. CenturyTel asserts that 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.³⁵ 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.³⁶ Contractual remedies provide an appropriate incentive for the billed Party to pay undisputed charges.³⁷ CenturyTel further asserts that Charter's proposed language – which would require the billing

³⁴ Giaminetti Direct Testimony, 27:24-28:7; Giaminetti Rebuttal Testimony, 25:24-26.

³⁵ P. Hankins Direct Testimony, 17:3-14.

³⁶ *Id.*, 17:15-23.

³⁷ *Id.*, 19:8-20.

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.³⁸ Finally, CenturyTel asserts that its proposed language contains similar remedies that this Commission has approved in other interconnection agreements, including an agreement to which Charter is a party.³⁹

B. The Arbitrator’s Decision

(84) 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.

(85) In the M2A proceeding, Docket No. TO-2005-0336, the Commission addressed the following issue: “What should the ICA provide with respect to non-payment and procedures for disconnection?”⁴⁰ SBC had proposed language that 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.⁴¹ In that proceeding, the Commission stated: “SBC’s language is reasonable and should be adopted. The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection.”⁴² Notably, this language was

³⁸ *Id.*, 18:10-15.

³⁹ *Id.*, 19:21-21:19.

⁴⁰ Final Arbitrator’s Report, Docket No. TO-2005-0336, Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 49.

⁴¹ *Id.* at 49-50.

⁴² *Id.* at 52 (emphasis added).

incorporated into the interconnection agreement entered into by Charter and SBC in Missouri.⁴³ 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."⁴⁴ Specifically, the Commission held that "SBC need not seek specific permission from the Commission before terminating service to a non-paying CLEC."⁴⁵

(86) 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 Docket No. TO-2005-0336. The principles underpinning SBC's language in Docket No. TO-2005-0336 align with CenturyTel's language. In Docket No. TO-2005-0336, the Commission stated that a CLEC should have "ample warning . . . before disconnection occurs."⁴⁶ 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.

(87) 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 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

⁴³ 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.

⁴⁴ Giaminetti Rebuttal Testimony, 22:24-26.

⁴⁵ Final Arbitrator's Report, Docket No. TO-2005-0336, Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 52.

⁴⁶ *Id.*

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).

ISSUES 10⁴⁷

A. Positions of the Parties

1. Charter's Position

(88) Charter contends that a change in law should only be given retroactive effect where the applicable authority (*i.e.*, the Commission, the FCC, a court, or legislature) requires it or where the Parties' mutually agree to do so. Additionally, Charter's language would include appropriate true-up terms and conditions only if ordered to do so by the relevant authority and only if required by the change in law.⁴⁸

2. CenturyTel's Response to Charter's Position

(89) With regard to Issue 10, CenturyTel argues that a change in law should be given retroactive effect in the following situations: (1) when required by the applicable authority; (2) if the authority is silent, when *either* of the Parties requests the other to incorporate the change into the Agreement; and (3) with regard to new service rates, new rates should be effective on the date of the amendment that incorporates such new service is approved by the Commission. CenturyTel's language would require appropriate true-up terms and conditions for billing or payment for the existing services and/or facilities that are affected by the change in law, if any.⁴⁹

⁴⁷ As indicated previously, the Parties agreed Issue 10 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties' positions relating to this issue is derived from the Joint Statement.

⁴⁸ Charter's position on Issue 10 is more fully set forth on pages 25-27 of the Joint Statement.

⁴⁹ CenturyTel's position on Issue 10 is more fully set forth on pages 25-27 of the Joint Statement.

B. The Arbitrator's Decision

(90) The Arbitrator approves the language proposed by CenturyTel for Article III, § 12.3. The Arbitrator finds that requiring a carrier to true-up its payments in response to a change in law is just and reasonable. If CenturyTel is obligated to begin providing a new service or facility as of a certain date, then Charter should be required to adequately compensate CenturyTel for that new service or facility and true-up any payments previously made that do not reflect the revised charges. Likewise, should the change result in CenturyTel reducing the rate associated with an offering to Charter, CenturyTel should be required to appropriately refund Charter's payments.

(91) Second, the Arbitrator adopts CenturyTel's proposed language to the effect that, if the relevant authority does not specify an effective date for the change in applicable law, the amended terms and conditions should apply retroactively to the date on which the Party requesting to amend the Agreement first delivers notice under Article III, § 12.1 of the Agreement. This is a date that is readily identified, and it reflects a point in time when at least one of the Parties provides notice that it believes the change in law provisions are triggered.

(92) Moreover, the Arbitrator rejects Charter's contention that CenturyTel's proposed language for Issue 10 is "effectively one-sided" to CenturyTel's benefit. Although the Parties settled Issue 26 following completion of the hearing, in Issue 26 of the Parties' Joint Statement, Charter identified a change of law—porting intervals—that would benefit Charter (since it is more likely that end users would initially migrate to Charter rather than vice versa). This example demonstrates that CenturyTel's language applies evenly to both Parties; it simply depends on how the law changes.

(93) For the foregoing reason, the Arbitrator approves the language proposed by CenturyTel in Issue 10, relating to Article III, § 12.3.

ISSUE 11

A. Positions of the Parties

1. Charter's Position

(94) Charter's proposed language on this issue is set forth on pages 27-37 of the Joint Statement. Charter opposes incorporation of any reference to the CenturyTel Service Guide (the "Guide") into the Agreement because it is "subject to change by CenturyTel without any oversight by the Commission or meaningful input from Charter."⁵⁰ Charter's primary concern is that CenturyTel could "unilaterally modify the terms of the agreement simply by modifying the CenturyTel Service Guide."⁵¹ Consequently, Charter seeks to omit any references to the Guide in the Agreement. To the extent the Guide is referenced in the Agreement, Charter seeks language clarifying that the Guide is to be used only as a reference between the Parties, and that the Guide is not contractually binding upon Charter.⁵²

2. CenturyTel's Response to Charter's Position

(95) CenturyTel asserts that the Guide establishes common operational procedures by which it interacts with all CLECs, including Charter.⁵³ CenturyTel maintains that it is imperative for CLECs to abide by a common set of such procedures so that CenturyTel can ensure parity of treatment and processes for all interconnected carriers.⁵⁴ CenturyTel further asserts that incorporating the Guide ensures operational uniformity, allowing CenturyTel to be more efficient in its interactions with carriers than it otherwise would be if each interconnected carrier were allowed to ignore the Guide's procedures and demand their own customized procedures.⁵⁵

⁵⁰ Gates Direct Testimony, 16:15-17.

⁵¹ *Id.*, 17:6-10.

⁵² *Id.*, 17:17-19.

⁵³ Miller Direct Testimony, 40:17-20.

⁵⁴ *Id.*, 40:21-41:3.

⁵⁵ *Id.*, 43:18-44:9.

Finally, CenturyTel asserts that it has proposed language in Article III, § 53 in direct response to the concerns raised by Charter and that such language strikes a proper balance addressing both Parties' concerns.⁵⁶

B. The Arbitrator's Decision

(96) The Arbitrator concludes that CenturyTel's proposed language should be adopted to resolve Issue 11, and that CenturyTel's proposed language in Article III, § 53 sufficiently addresses Charter's core concerns. Thus, the Arbitrator adopts the following language and/or provisions proposed by CenturyTel: Article III, §§ 9.4.1, 16, 41.1, and 53; Article VI, § 2.3; Article IX, § 1.2.2; and Article X, § 6.3. Charter's competing proposals in each of these sections of the proposed Agreement are rejected.

(97) In order to implement the relationship between CenturyTel and interconnected CLECs, like Charter, CenturyTel has published the Guide which sets forth the basic operational procedures for interacting with CenturyTel. The Guide serves several important purposes, including: (1) establishing a set of common operational procedures applicable to all CLECs; (2) ensuring parity of treatment vis-à-vis CenturyTel and all CLECs; (3) providing Charter with critical operational information it will need to interact with Charter during the term of the Agreement; and (4) ensuring ease of interaction between the interconnected parties.⁵⁷

(98) In response to Charter's stated concerns, CenturyTel proposed Article III, § 53.⁵⁸ CenturyTel's proposed Section 53 is notable for several reasons. After clearly describing the purposes of the Guide, Article III, § 53.1 expressly limits the applicability of the Guide to Charter regarding only the five discrete matters for which the Guide is specifically referenced in the

⁵⁶ *Id.*, 41:8-43:17.

⁵⁷ *See* Miller Direct Testimony, 40:17-41:3.

⁵⁸ *Id.*, 41:8-43:17.

Agreement: (1) the procedure for submitting billing disputes (Joint Statement, Issue 11 (Article III, § 9.4.1)); (2) the provision and updating of CenturyTel's contact information and escalation contact lists (*id.* (Article III, § 16)); (3) the processes and procedures for reporting and resolving circuit troubles or repairs (*id.* (Article VIII, § 2.4)); (4) setting forth the LNP ordering process (*id.* (Article IX, § 1.2.2); and (5) setting forth the ordering, provisioning, billing and maintenance procedures applicable under the Agreement (*id.* (Article X, § 6.3)).⁵⁹

(99) The Arbitrator concludes that CenturyTel's proposed Section 53 appropriately limits the applicability of the Guide to specific and appropriate subject matters. With respect to those subject matter areas, the Arbitrator concurs with CenturyTel that Charter should be required to follow the operational procedures set forth in the Guide. It would be unduly burdensome and inefficient for CenturyTel if, as Charter suggests, Charter is permitted to ignore CenturyTel's uniform operational procedures and demand alternative or customized procedures.

(100) With respect to Charter's primary concern that CenturyTel could unilaterally modify the terms of the Agreement by modifying the provisions of the Guide, the Arbitrator finds that Charter's concerns are overstated for two primary reasons. First, in direct response to these concerns, CenturyTel proposed language in Section 53 states that the intent of the Guide is only to "supplement" the Agreement with applicable operational practices and procedures and that "the Guide shall not be construed as contradicting or modifying the terms of this Agreement, nor shall it be construed as imposing a substantive term unrelated to operational procedure (*e.g.*, payment terms) upon **CLEC that is not otherwise contained in this Agreement."⁶⁰ Similarly, Article III, § 41.1 provides that "[w]here a dispute arises between the Parties with respect to a conflict

⁵⁹ See also, *id.*, 41:8-20.

⁶⁰ See CenturyTel's proposed Article III, § 53.2.

between the CenturyTel Service Guide and this Agreement, the terms of this Agreement shall prevail.”⁶¹

(101) Second, CenturyTel’s proposed Section 53.2 expressly provides that “[i]f Charter believes that a change to the Guide materially and adversely impacts its business, the implementation of such change, upon Charter’s written request, will be delayed as it relates to Charter for no longer than sixty (60) days to provide the Parties with an opportunity to discuss a resolution to the alleged adverse impact, including but not limited to other potential modifications to the Guide.” This language permits Charter to delay, for two months, the implementation of any change to the Guide that materially and adversely affects its business while the Parties negotiate in good faith to resolve the adverse impact. To the extent the Parties cannot resolve the adverse impact, Section 53.2 expressly provides that the Parties will use the existing dispute resolution process in the Agreement to resolve the dispute.

(102) Given the protections afforded Charter by CenturyTel’s proposed Section 53, the Arbitrator concludes that it is reasonable to require Charter to be contractually bound by the operational procedures in the Guide that specifically referenced in CenturyTel’s proposed language under Issue 11.

ISSUE 12⁶²

A. Positions of the Parties

1. Charter’s Position

(103) Charter contends that disputes should only be submitted to binding commercial arbitration in situations where both Parties mutually agree. Otherwise, Charter contends that disputes should be litigated before the Commission, the FCC, or a court of competent jurisdiction.

⁶¹ Joint Statement, 27.

⁶² As indicated previously, the Parties agreed Issue 12 would be “briefing only.” See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties’ positions relating to this issue is derived from the Joint Statement.

Charter also contends in the Joint Statement that since “it is very unlikely, if not impossible” that this Commission would simply refuse to hear disputes arising out of this Agreement, as CenturyTel’s proposal contemplates,” the Arbitrator should reject CenturyTel’s proposal for compulsory arbitration.⁶³

2. CenturyTel’s Response to Charter’s Position

(104) CenturyTel contends that in the event that both the Commission and the FCC decline jurisdiction to hear a dispute, or lack jurisdiction to do so, the Parties’ dispute should be resolved by commercial arbitration. Requiring compulsory arbitration in these instances (1) is within the Commission’s power; (2) avoids any gaps in the FCC’s jurisdiction; and (3) allows the Parties to take advantage of commercial arbitration’s many benefits over litigation, including cost-savings, an expert arbitrator, and timely dispute resolution.⁶⁴

B. The Arbitrator’s Decision

(105) The Parties are in agreement that disputes which arise under the Agreement should be submitted to the Commission or the FCC for decision.⁶⁵ The point on which the Parties’ current positions diverge is the dispute resolution procedure that is to be applied in the event that both the Commission and the FCC either declines jurisdiction or determines that it lacks subject matter jurisdiction over a particular dispute.⁶⁶

(106) The Arbitrator concludes that in these situations, which will hopefully be rare, the Parties should submit the disputes to binding arbitration, which provides numerous advantages

⁶³ Charter’s position on this issue is more fully stated at pages 37-39 of the Joint Statement.

⁶⁴ CenturyTel’s position on this issue is more fully stated at pages 37-42 of the Joint Statement.

⁶⁵ See *id.*, 37-38.

⁶⁶ Notably, CenturyTel’s proposed language for the Agreement also incorporates a provision that the Parties may, pursuant to 47 U.S.C. § 252(e)(5), seek resolution of a dispute by the FCC in the event that the Commission fails to act in response to such dispute. However, the FCC has ruled that disputes concerning payments pursuant to an interconnection agreement will not be accepted by the FCC. *In re Qwest Commc’ns Corp. v Farmers and Merchants Mut. Tel. Co.*, FCC 07-175, 22 FCC Rcd 17,973; 2007 WL 28727554 (rel’d October 2, 2007), ¶ 29. Thus, in this type of situation, commercial arbitration is reasonable and should be required.

over litigation, including: flexibility, cost savings, ability to choose an expert arbitrator, and timely dispute resolution.⁶⁷ Moreover, the opportunity to select an expert arbitrator should help ensure that relevant precedent will be appropriately applied and that the decision maker is familiar with the types of issues faced by Charter and CenturyTel in the course of carrying out this Agreement.

(107) Indeed, several state commissions have recently approved language similar to that proposed by CenturyTel in this proceeding. Although these decisions are not binding upon the Commission, they are instructive as to the reasonableness of the conclusion reached herein.

(108) As the Arkansas Public Service Commission recognized in July 2008, it is very unlikely that a state commission would refuse to resolve a dispute arising under an interconnection agreement.⁶⁸ However, if such a situation did arise, the Arkansas Commission recognized that the FCC has determined in *Star Power Communications LLC*⁶⁹ that “a state commission may compel commercial arbitration as a part of an interconnection agreement.”⁷⁰ The Arkansas Commission also agreed with CenturyTel’s emphasis on the benefits of arbitration such as cost savings, ability to choose an expert arbitrator, and timely dispute resolution.

(109) The Michigan Public Service Commission reached a similar conclusion in June 2008, emphasizing the benefits of arbitration in the context of developing an interconnection agreement.⁷¹ As the Michigan Commission stated:

⁶⁷ *Finney v. National Healthcare Corp.*, 193 S.W.3d 393, 396-97 (Mo. Ct. App. 2006) (noting that arbitration’s advantages included: being “cheaper and faster than litigation,” having “simpler procedural and evidentiary rules,” minimizing (normally) hostility between the parties and disruptions to business dealings, and being more flexible); *CPK/Kupper Parker Commc’ns, Inc. v. HGL/L. Gail Hart*, 51 S.W.3d 881, 883-84 (Mo. Ct. App. 2001) (noting the same advantages as in *Finney*, as well as the advantage of an arbitrator experienced in the area of law).

⁶⁸ *In the Matter of a Petition for Arbitration by Sprint Commc’ns Co. L.P. v. CenturyTel of Mountain Home, Inc.*, Docket No. 08-031-U (Ark. Pub. Serv. Comm’n July 18, 2008) (*Arkansas Commission Decision*).

⁶⁹ 15 FCCR 11277 (FCC June 14, 2000).

⁷⁰ *Arkansas Commission Decision* at 2.

⁷¹ *In the matter of the Petition of Sprint Communications Company L.P. for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with CenturyTel Midwest – Michigan, Inc.*, Case No. U-15534 (Mich. Pub. Serv. Comm’n June 10, 2008) (*Michigan Commission Decision*).

[W]here there is an interconnection agreement dispute[,] the reasons and purposes of arbitration including cost savings, more timely resolution and the party's ability to select an expert arbitrator lend themselves to the broader purposes of the adoption of interconnection agreements in principle.⁷²

The Michigan Commission also agreed that the procedures outlined in CenturyTel's proposed language relating to the appointment of an arbitrator under established rules, conditions limiting discovery, written submissions by the Parties, and limitations on an arbitrator's ability to order punitive or consequential damages were "sound and reasonable."⁷³ The language at issue in the Michigan proceeding was nearly identical to that at issue in this proceeding. Likewise in September 2008, the Public Utility Commission of Oregon approved the decision of its arbitrator approving nearly the same arbitration language approved by the Michigan Commission.⁷⁴

(110) Based upon the foregoing reasoning and authorities, the Arbitrator approves the language proposed by CenturyTel regarding Issue 12, relating to Article III, §§ 20.2 and 20.3.

ISSUE 13

A. Positions of the Parties

1. Charter's Position

(111) Charter's proposed language to resolve this Issue is set forth on pages 42-44 of the Joint Statement. Charter's position is that the Agreement should require a Party to bring a claim arising under the Agreement within twenty-four (24) months of the date of the occurrence giving rise to the dispute; thereafter, the claim would be deemed waived. (Webber Direct Testimony, 13:19-24) As explained by one of Charter's witnesses, its proposed language would be applied to a disputed CenturyTel bill as follows: (1) CenturyTel performs the service and renders an invoice; (2) Charter reviews the invoice for accuracy and notifies CenturyTel of an intent to dispute the

⁷² *Id.* at 6-7.

⁷³ *Id.*

⁷⁴ See *In the Matter of Sprint Commc'ns Co. L.P. Petition For Arbitration of an Interconnection Agreement with CenturyTel of Oregon, Inc., Order*, ARB 830, (Or. Pub. Util. Comm'n Sept. 30, 2008) (*Oregon Commission Decision*).

billing (if inaccurate); (3) following receipt of the notice, the Parties engage in informal or formal dispute resolution; and (4) if such actions did not bring resolution, CenturyTel would be required to bring a claim against Charter to recover the billed amounts. (*Id.*, 18:1-14) Charter maintains that CenturyTel should be “forced to pursue its claims for payment, or ultimately give up its rights to payment.” (*Id.*, 18:18-20) Charter states that its proposed 24-month dispute cutoff is to eliminate the need for reserves and accruals and to cause long-standing unresolved disputes between the Parties to be concluded. (Webber Rebuttal Testimony, 24:21-23)

2. CenturyTel’s Response to Charter’s Position

(112) CenturyTel’s proposed language to resolve this Issue is set forth on pages 42 and 43 of the Joint Statement. According to CenturyTel, the language it proposes for Article III, §§ 9.4 and 20.4 is intended to address issues relating to past and on-going billing disputes with Charter. (Miller Direct Testimony, 47:16-48:5) In contrast to the Charter process summarized above, CenturyTel proposes that after it 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. It would then be up to Charter to either accept such findings or to escalate the dispute to the Commission for resolution. (*Id.*) 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. Further, 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. (*Id.*, 49:1-7) CenturyTel opposes Charter’s language in Article III, §20.4 as an improper attempt to cut off a party’s right to recover amounts properly owing. (*Id.*, 50:1-16)

(113) CenturyTel maintains that when it 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

commercial practices, Charter should make the decision whether to escalate the dispute to the Commission. (Miller Rebuttal Testimony, 35: 5-20)

B. The Arbitrator's Decision

(114) A considerable amount of time and effort has been devoted by the Parties 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 on a going-forward basis. The Parties are in agreement with regard 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.” (Joint Statement, 42) Where informal efforts do not resolve a pending dispute, the Parties propose contrasting approaches to the initiation and waiver of formal dispute rights.

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

(116) The Arbitrator concludes that it is commercially reasonable to require the Parties to expeditiously resolve billing disputes that may arise. CenturyTel's proposed language best accomplishes this goal by requiring the billed Party to make a decision 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, adoption of 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.

(117) 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.

ISSUE 14

A. Positions of the Parties

1. Charter's Position

(118) Charter's proposed language to resolve this Issue is set forth on pages 45 and 47 of the Joint Statement. Charter's position is that neither Party should be permitted to recover costs or expenses from the other Party unless specifically authorized to do so under the terms of the Agreement, and specifically in accordance with the rates identified in the Pricing Article of the Agreement. (Webber Direct Testimony, 20:1-5) As a corollary, Charter maintains that, absent mutual agreement by the Parties, the Agreement should not be construed to allow either Party to assess charges. Charter advocates that in the event that CenturyTel performs a function for Charter which is not addressed in the Agreement, the amendment process specified in Article III, §§ 4 or 12 should be utilized.⁷⁵ (*Id.*, 22:31-23:5 and Tr. 171:9-172:4) Charter objects to CenturyTel's proposal regarding "to be determined" pricing. (Webber Direct Testimony, 23:19-24:6)

2. CenturyTel's Response to Charter's Position

(119) CenturyTel's proposed language to resolve this Issue is set forth on pages 45-48 of the Joint Statement. CenturyTel's position is that if Charter requests CenturyTel to perform a service that is not otherwise provided in the Agreement, and CenturyTel is willing to provide the service,

⁷⁵ As further justification for the appropriateness of CenturyTel's position, CenturyTel notes that subsequent to the hearing, Charter agreed to settle Issue 9 using TBD for the stranded plant charge.

Charter should pay the costs incurred by CenturyTel and the Parties must first agree to the applicable charges for the service prior to CenturyTel's undertaking the services. (Miller Direct Testimony, 25:24-26:5) This process, set out in CenturyTel's proposed wording of Article III, § 22.1, is necessary to avoid disputes between the Parties and to avoid performance of services by CenturyTel for Charter without compensation which would constitute subsidization of Charter's business. (*Id.*, 27:4-13) In the event that a charge has not been established in the Pricing Article of the Agreement for a service or facility offered under the Agreement, such service or facility should be subject to "TBD Prices" established under Article III, § 46. (*Id.*, 27:8-13) In essence, CenturyTel's position is that it should not be required to perform a service for or provision facilities to Charter unless and until agreement has been reached as to the rates and charges therefore. (Miller Rebuttal Testimony, 20:8-1)

B. The Arbitrator's Decision

(120) The principle is well-established in telephony and elsewhere that a party who causes costs should pay the costs. It is sound policy that terms of interconnection agreements should, insofar as possible, minimize the likelihood that disputes will arise between parties that will consume resources of the parties and the Commission to resolve. Charter's proposed addition to Article I, § 3 certainly seems to be intended to avoid creation of a performance obligation by CenturyTel and a payment obligation by Charter until there is mutual agreement by the Parties on a particular service and the charges therefore. However, Charter's proposed language is not as fully developed as the language CenturyTel proposes for Article I, § 3 and Article III, § 22.1. In the Arbitrator's judgment, CenturyTel's proposed language more comprehensively accomplishes the resolution of this Issue 14 and in so doing, its incorporation into the Agreement should minimize the likelihood of future disputes.

(121) For these reasons, the Arbitrator concludes that CenturyTel's proposed language for Article I, § 3 and Article III, § 22.1 is fair and reasonable, and finds that such language for should be and hereby is approved.⁷⁶

ISSUE 15⁷⁷

(122) The Parties agree that Issue 15 is to be divided into Issues 15(a), 15(b), and 15(c). The Arbitrator concurs and decides each of the three sub-issues separately below; however, given the interrelatedness of these issues, the Arbitrator finds it advisable to first jointly discuss the Parties' positions on these issues and the applicable legal principles.

A. Positions of the Parties

1. Charter's Position

(123) With regard to Issue 15(a), Charter proposes in Art. III, § 30.1 that neither Party should be required to indemnify the other to the extent that a claim arises from the Indemnified Party's negligence, gross negligence, or intentional or willful misconduct. As stated in the Joint Statement, Charter contends that the concept of contributory negligence should be utilized to limit a Party's indemnification obligations.⁷⁸

(124) With regard to Issue 15(b), Charter argues that the warranties of "reasonable care," "lack of negligence," and "accuracy of completeness or responses," "have no relation to each Party's obligations with respect to the interconnection and exchange of traffic contemplated under

⁷⁶ The Arbitrator notes that as a part of the Parties' agreed settlement of Issue 9, the Parties have agreed that Article XI, § I.E shall be based upon "to be determined" or "TBD" pricing with regard to stranded interconnection plant/facility. The resolution of Issue 9 is independent from the resolution of Issue 14 set forth herein.

⁷⁷ The Parties jointly agreed that Issues 5, 10, 12, 15(A), (B) and (C), 26, 31, 35, 36, 37, and 38 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. As a consequence, the discussion of the Parties' positions relating to these issues is derived from the Joint Statement.

⁷⁸ Charter's position on Issue 15(a) is more fully set out in pages 48-52 of the Joint Statement.

this Agreement.” Thus, Charter argues that disclaimers of warranties should be limited to the warranties of merchantability and fitness for a particular purpose, among others.⁷⁹

(125) Finally, regarding Issue 15(c), Charter contends that the Parties’ damages should not be limited to the cost of the monthly charge, plus any related costs/expenses that the other Party may recover and the costs/expenses for which the Agreement elsewhere provides recovery. Additionally, Charter argues that each Party’s liability to the other in situations other than those specified in Section 30.3.3 should not be limited to the total of amounts charged to a CLEC by CenturyTel under the Agreement during the contract year in which the cause of action accrued or arose. Charter also argues that neither Parties’ liability should be limited in situations involving gross negligence and/or where liability arises under the indemnity provisions of the Agreement.⁸⁰

2. CenturyTel’s Response to Charter’s Position

(126) With regard to Issue 15(a), CenturyTel contends that Charter’s proposal to include the concept of contributory negligence with the indemnification provision is unworkable and eliminates many of an indemnification agreement’s benefits.⁸¹

(127) As for Issue 15(b), CenturyTel proposes to disclaim the warranties of “reasonable care, workmanlike effort, results, lack of negligence, or accuracy or completeness of responses” and the warranties of “quiet enjoyment, quiet possession, [and] correspondence to description” in addition to the warranties disclaimed by Charter. CenturyTel argues that such warranty disclaimers are

⁷⁹ Charter’s position on Issue 15(b) is more fully set out on pages 53-54 of the Joint Statement.

⁸⁰ Charter’s position on Issue 15(c) is more fully set out on pages 54-62 of the Joint Statement. It should also be noted that Charter’s stated position in the Joint Statement on Issue 15(c) indicates that the additional limitations set forth in Section 30.4 of the Agreement are not reciprocal in CenturyTel’s proposed language. However, such contention does not appear to have a basis in fact, and Charter has not specifically identified how the provisions in the language proposed by CenturyTel are not reciprocal. Similarly, Charter’s stated position statement in the Joint Statement provides that Charter proposes liability not be limited in those instances where liability arises under the indemnity provisions of this Agreement. However, Charter does not identify the language it proposes to add, or any CenturyTel language it disagrees with, on this point. Further, when reviewing Sections 30.3.3.1 and 30.3.3.13 – provisions on which there is minimal dispute by the Parties – Charter’s point on this matter is unclear.

⁸¹ CenturyTel’s Position on Issue 15(a) is more fully set forth on pages 48-52 of the Joint Statement.

appropriate as the subject matter of the Agreement relates to information and services—not just goods.⁸²

(128) With regard to Issue 15(c), CenturyTel contends that each Party’s liability to the other should be limited to the amount charged by CenturyTel for its services as reflected in Charter’s and CenturyTel’s tariffs and customer agreements in Missouri. Additionally, CenturyTel objects to Charter’s inclusion of gross negligence as an exclusion to this limitation, as it is unworkable and would prevent early resolution of a dispute, and also rejects Charter’s attempt to reference specific tariff provisions. CenturyTel also proposes language to clarify that Charter’s indemnification obligations are triggered by using reference databases or signaling networks by or through Charter and contends that the term “claims” should be separately defined for the purposes of this provision.⁸³

B. The Arbitrator’s Decision

(129) Before addressing each sub-issue within Issue 15, it is necessary to first address general principles and rules of law applicable to provisions for indemnification and limitation of liabilities and damages, as they have implications for all three sub-parts.

(130) Proper indemnification provisions will help each Party to evaluate its economic risks at an early stage. Additionally, this language will help each Party develop a plan to address the risks that it faces with less uncertainty about the future. Moreover, indemnification language outlining which entity will be the responsible for defending which third-party claims as they arise can ensure that the proper Party incurs the litigation costs when a claim arises and prevent duplication of efforts due to uncertainty over which Party is potentially liable. Thus, a proper indemnification provision will reduce each Party’s respective overall costs associated with risk assessment and

⁸² CenturyTel’s Position on Issue 15(b) is more fully set forth on pages 53-54 of the Joint Statement.

⁸³ CenturyTel’s Position on Issue 15(c) is more fully set forth at pages 54-62 of the Joint Statement.

unnecessary litigation costs. Since these costs are recovered through the rates charged by each Party, a proper indemnification provision will reduce costs that will be reflected in a Party's rates to its customers.

(131) The establishment of a properly constructed indemnification provision has also been acknowledged by other state commissions and courts. For example, state commissions have recognized that indemnification provisions and limitations on liabilities and damages similar to those proposed by CenturyTel are "prudent" in a competitive business environment, "appropriate," and "in the public interest." This Commission has previously determined that "reciprocal responsibility" between two companies was "appropriate and in the public interest."⁸⁴ Likewise, the Georgia Public Service Commission has emphasized that, "in a competitive environment, it is prudent to include in a contract agreement provisions which govern the failure of either Party to adhere to specific conditions contained therein."⁸⁵ Thus, the Georgia Commission required that an interconnection agreement include "mutually agreeable contract language . . . to govern indemnification clauses, dispute resolutions, and penalty provisions."⁸⁶ Liability limitations also protect companies from catastrophic losses and financial distress, thereby helping to ensure that reasonable rates are charged to customers.⁸⁷

⁸⁴ *Re AT&T Commc'ns of the Sw., Inc.*, Case No. TO-97-63, 1996 WL 883976 (Mo. P.S.C. Dec. 10, 1996).

⁸⁵ *Re AT&T Commc'ns of the Southern States, Inc.*, Docket No. 6801-U, 1996 WL 773789 (Ga. P.S.C. Dec. 3, 1996).

⁸⁶ *Id.*

⁸⁷ *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668 (Tex. 1999) (citing *Cole v. Pacific Tel. & Tel. Co.*, 112 Cal. App.2d 416, 246 P.2d 686, 688 (1952); *Landrum v. Florida Power & Light Co.*, 505 So.2d 552, 554 (Fla. Dist. Ct. App. 1987); *Southern Bell Tel. & Tel. Co. v. Invenchek, Inc.*, 130 Ga. App. 798, 204 S.E.2d 457, 460 (1974); *In re Illinois Bell Switching Station Litig.*, 161 Ill.2d 233, 641 N.E.2d 440, 446 (1994); *Singer Co. v. Baltimore Gas & Elec. Co.*, 79 Md. App. 461, 558 A.2d 419, 427 (1989); *Wilkinson v. New England Tel. & Tel. Co.*, 327 Mass. 132, 97 N.E.2d 413, 416 (1951); *Computer Tool & Eng'g, Inc. v. Northern States Power Co.*, 453 N.W.2d 569, 573 (Minn. Ct. App. 1990); *Montana ex rel. Mountain States Tel. & Tel. Co. v. District Court*, 160 Mont. 443, 503 P.2d 526, 528-29 (1972); *Bulbman, Inc. v. Nevada Bell*, 108 Nev. 105, 825 P.2d 588, 590-91 (1992); *Coachlight Las Cruces, Ltd. v. Mountain Bell Tel. Co.*, 99 N.M. 796, 664 P.2d 994, 998-99 (N.M. Ct. App. 1983); *Lee v. Consolidated Edison Co.*, 413 N.Y.S.2d 826, 828 (1978); *Behrend v. Bell Tel. Co.*, 242 Pa. Super. 47, 363 A.2d 1152, 1165 (1976), *vacated and remanded*, 473 Pa. 320, 374 A.2d 536 (1977), *aff'd on remand*, 257 Pa. Super. 35, 390 A.2d

ISSUE 15(a)

(132) Issue 15(a) relates to: (1) when each Party should be required to indemnify the other; and (2) whether the defined term “Claims” should be used in Section 30.1 with regard to claims by End User Customers as opposed to the phrase “losses, claims, demands, damages, expenses, suits, or other actions, or any liability whatsoever, including, but not limited to, costs and attorneys’ fees.”

(133) With regard to Part (1) of Issue 15(a), it is apparent that when a third party states a claim, the Parties will need to decide quickly who is responsible for defending the claim. Both Parties’ language in Section 30.1 requires the Party seeking indemnification take steps to ensure this result by requiring that reasonably prompt notice of a third party claim be given. Nonetheless, Charter invokes a “contributory negligence” standard in an attempt, as Charter states, to limit indemnity obligations where the Party to be indemnified has contributed to the alleged harm. Charter’s change, however, creates an obstacle to carrying out prompt defense of the claim because Charter and CenturyTel would first have to determine which Party is responsible for the harm alleged by the third party.

(134) Instead of promptly addressing a claim brought by a third party, Charter’s proposed “contributory negligence” standard would require Charter and CenturyTel to first engage in a potentially litigious and lengthy process to determine whether an indemnity obligation even exists. That is not a practical solution when an answer, motion to dismiss, or other document must be filed within a stated period of time. Additionally, joint representation of the Parties would likely be precluded due to the conflicts created by Charter’s proposal. Moreover, Charter has not explained how the tort concept of “contributory negligence” would apply to non-tort claims such

233 (1978); *Allen v. General Tel. Co.*, 20 Wash. App. 144, 578 P.2d 1333, 1337 (1978)). *See also Adams v. Northern Illinois Gas Co.* 809 N.E.2d 1248 (Ill. 2004) (“A reasonable rate is in part dependent on a rule limiting liability.”).

as breach of contract or patent infringement. Charter's language likely will increase the cost of, increase the time involved in, and diminish any chance of success in responding to a third party claim. This outcome defeats the Parties' ability to promptly respond to a third party claim, as both Parties agree should be done.

(135) In addition to creating an unworkable situation between the Parties, Charter's proposed language would impose obligations on CenturyTel that are not imposed on Charter under its own tariffs and customer agreements. The indemnification exclusions Charter proposes for Section 30.1 are not included in the indemnification provisions of Charter's tariffs and customer agreements.⁸⁸ For these reasons, the Arbitrator rejects Charter's attempt to impose these unworkable exclusions on CenturyTel and adopts CenturyTel's proposed language on this issue.

(136) With regard to Part (2) of Issue 15(a), the Arbitrator also rejects Charter's attempt to import the restrictive list of matters that would be included in the term "Claims" into the third paragraph of Section 30.1. Instead, the Arbitrator adopts CenturyTel's phrase "losses, claims, demands, damages, expenses, suits, or other actions, or any liability whatsoever, including, but not limited to, costs and attorneys' fees" in the context of addressing claims by End User Customers and claims related to the content transmitted by the indemnifying party's End User Customers. This approach implements the policy set forth in the second paragraph of Section 30.1. Thus, CenturyTel's language regarding this Issue 15(a) is adopted.

ISSUE 15(b)

(137) The Arbitrator agrees with CenturyTel's proposal to ensure that there are disclaimers of warranties that would apply to the provision of information and services that are at issue in this

⁸⁸ See Charter Internet Residential Customer Agreement, Section 7; Charter Commercial Terms of Service, Section 12; Charter Fiberlink – Missouri, LLC Local Exchange Tariff P.S.C. MO. No. 1, Sections 1.5.3, 1.7.1; Charter Fiberlink – Missouri, LLC Switched Access Services Tariff P.S.C. MO. No. 2, Section 1.5; and Charter Fiberlink – Missouri, LLC Intrastate Interexchange Tariff P.S.C. MO. No. 4, Sections 2.2, 2.3.

Agreement. Thus, the Arbitrator rejects Charter's contention that the warranties of "reasonable care," "lack of negligence," and "accuracy of completeness or responses," are unrelated to the Parties' duties regarding "interconnection and exchange of traffic contemplated under this Agreement." Further, given Charter's objections to CenturyTel's position on these warranties, it seems reasonable to conclude that the Agreement is, as CenturyTel describes, an agreement to provide information and services for which it is inappropriate to only exclude the warranties such as merchantability and fitness for a particular purpose.

(138) As such, the *Restatement (Second) of Torts* § 552 (1997) recognizes that warranty-like liability exists for inaccurate information that is supplied for the guidance of others, based upon a standard of reasonable care. Numerous Missouri courts recognize Section 552 as setting the applicable standard of care in such a situation.⁸⁹ Additionally, although it has only been adopted in Maryland and Virginia, it should be noted that the Uniform Computer Information Transactions Act ("UCITA") recognizes an implied warranty of accurate information based upon *Restatement (Second) of Torts* § 552, as well as a method of disclaiming this warranty through language that CenturyTel has proposed.⁹⁰ Similarly, the reference to "quiet enjoyment" in CenturyTel's proposed language for Section 30.2 is similar to that in UCITA § 401(d), which addresses methods of disclaiming the warranties of non-infringement, non-interference, and exclusivity. In short, the warranties about which CenturyTel is concerned are real, and there is no reason to favor disclaimer language that is incomplete. Therefore, the Arbitrator adopts CenturyTel's language regarding this Issue 15(b).

⁸⁹ See, e.g., *CADCO, Inc. v. Fleetwood Enters., Inc.*, 220 S.W.3d 426 (Mo. App. E.D. 2007) (citing § 552 in discussion of negligent misrepresentation); *Gurley v. Montgomery First Nat. Bank, N.A.*, 160 S.W.3d 863 (Mo. App. S.D. 2005) (expressly stating that § 552 had been adopted in Missouri); *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809 (Mo. App. E.D. 2002) (same); *Ligon Specialized Hauler, Inc. v. Inland Container Corp.*, 581 S.W.2d 906 (Mo. App. E.D. 1979) (regarding § 552 as "persuasive").

⁹⁰ UCITA §§ 404 & 406(b).

ISSUE 15(c)

(139) Charter has proposed deleting provisions in Section 30.3.1 that limit recovery of direct damages, during any given year, to an amount equal to the total amount paid by Charter to CenturyTel during such year. CenturyTel's approach, limiting damages to the amount charged by CenturyTel for services, is well-established in the telecommunications industry, as reflected in the tariffs and customer agreements of both CenturyTel and Charter.⁹¹ The Arbitrator rejects Charter's attempt to prevent this industry standard approach from being applied to CenturyTel.

(140) Charter also proposes adding gross negligence to the specified exclusions to each Party's limitation of liability contained in Section 30.3.3 (the addition of gross negligence is in Section 30.3.3.7). This change is rejected for three reasons. First and foremost, *Missouri law does not recognize gross negligence*.⁹² Therefore, a drafter who tries to release "negligence, but not gross negligence" gains nothing with such an attempt and may in fact "create a more troublesome ambiguity."⁹³ As the Missouri Court of Appeals has stated, "[A] release expressly releasing one but not another degree of negligence, if our law does not so differentiate, may create an ambiguity in a negligence case."⁹⁴ The Agreement should avoid ambiguities. Charter's proposed addition of "gross negligence" would create one. Accordingly, Charter's addition is rejected.

⁹¹ See Charter Internet Residential Customer Agreement, Section 6.2; Charter Commercial Terms of Service, Sections 6, subsections (k),(l) and (m); Charter Fiberlink – Missouri, LLC Local Exchange Services Tariff P.S.C. MO. No. 1, Sections 1.5.2, 1.5.3, 1.5.4, 1.5.8; Charter Fiberlink – Missouri, LLC Switched Access Services Tariff P.S.C. MO. No. 2, Section 1.5; Charter Fiberlink – Missouri, LLC Intrastate Interexchange Tariff P.S.C. MO. No. 4, Section 2.2; and CenturyTel of Missouri, LLC General and Local Exchange Tariff P.S.C. MO. No. 1, Section 2.B.

⁹² *Southers v. City of Farmington*, 263 S.W.3d 603, 611 n.8 (Mo. June 10, 2008) (en banc) (stating "Missouri does not recognize gross negligence," and "It . . . remains the [common] law of Missouri that there are no legal degrees of negligence." (quoting *Fowler v. Park Corp.*, 673 S.W.2d 749, 755 (Mo. 1984) (en banc))).

⁹³ *Milligan v. Chesterfield Village GP, LLC*, 239 S.W.3d 613, 618 n.5 (Mo. Ct. App. 2007).

⁹⁴ *Id.*

(141) Second, Charter’s own tariffs and customer agreements do not provide an exception to Charter’s limitation of liability based on Charter’s gross negligence or any other Charter conduct, even intentional misconduct.⁹⁵ Thus, there is no basis to apply any different standard here, and Charter has provided none.

(142) Finally, even assuming for the moment that Missouri courts would recognize the concept of gross negligence, creating an exception to liability limitations based upon gross negligence creates a situation ripe for conflict and uncertainty. If an indemnitor may escape liability as a result of gross negligence, but not ordinary negligence, the probable result is that an indemnitor will attempt to take such a route. As a result, there can be no summary adjudication of the issue and very little predictability as to the final result. Contractual language should reduce the need for litigation, not encourage it. Charter’s proposed language would have the perverse effect of encouraging more and longer lawsuits over the degree of a Party’s culpability. That result is not something to be advanced in the Agreement.

(143) Charter has also proposed replacing the references to “applicable provisions” of certain CenturyTel tariffs with specific tariff section references. (*See* Sections 30.3.3.9 and 30.3.3.13) This change is unworkable and is rejected. As discussed in connection with Issues 3 and 41, even assuming for the purposes of argument that Charter has accurately referenced applicable liability provisions with respect to *current* CenturyTel tariffs, the substance, organization, and numbering of such tariffs could change, either by a revision requested by CenturyTel and approved by the Commission or by Commission requirement. Thus, Charter’s language has the potential for

⁹⁵ *See* Charter Internet Residential Customer Agreement, Section 6.2; Charter Commercial Terms of Service, Sections 6, subsections (k),(l) and (m), and Section 11, subsection (a); Charter Fiberlink – Missouri, LLC Local Exchange Services Tariff P.S.C. MO. No. 1, Section 1.5; Charter Fiberlink – Missouri, LLC Switched Access Services Tariff P.S.C. MO. No. 2, Section 1.5; and Charter Fiberlink – Missouri, LLC Intrastate Interexchange Tariff P.S.C. MO. No. 4, Section 2.2

becoming inaccurate in the future, with resulting confusion and unintended consequences. Accordingly, Charter's revision is rejected.

(144) Finally, the Arbitrator rejects Charter's proposal to exclude the application of the Agreement's limitation of liability provisions (Sections 30.3.1 and 30.3.2) to *any* indemnification provision in the Agreement related to provisioning of Directory Listing or Directory Assistance Services.⁹⁶ In making this determination, the Arbitrator notes first that the Parties have agreed to exclude "indemnification under Section 30.1" from the liability limitations in Sections 30.3.1 and 30.3.2. Given the significance of giving up these liability limitations, the Arbitrator finds CenturyTel's position of specifically identifying the applicable sections of the Agreement to which Section 30.3.3 will apply to be more reasonable than a broad reference to any and all indemnity provisions in the Agreement. Therefore, the Arbitrator adopts CenturyTel's language regarding Issue 15(c).⁹⁷

ISSUE 16

A. Positions of the Parties

1. Charter's Position

(145) Charter's position on this issue is set forth on pages 62 to 63 of the Joint Statement. Charter states that the dispute between the Parties is "whether one party can force the other party to accommodate – through additional activities, expenses or investment – the network changes of the other party." (Gates Direct Testimony, 23:9-11) Charter believes this dispute should be resolved by requiring both Parties to have similar responsibilities. (*Id.*, 23: 11-12) Thus, both Parties "should be allowed to modify and upgrade their networks and each Party is solely responsible for accommodating the changes to its network that are due to the other Party's modification of its network." (*Id.*, 24:18-20; 24:23-25:2) Mr. Gates testifies that under the Act

⁹⁶ Notably, CenturyTel's proposed language would also cap this amount as indicated in the Parties' Joint Statement.

⁹⁷ See also discussion *infra* Issue 31.

and the FCC's rules, both Parties are responsible for their costs on their side of the POI and that CenturyTel's language could be construed to require Charter to pay for CenturyTel's upgrade costs, a result that he has never seen since the passage of the Act. (*Id.*, 25:10-26:22)

(146) According to Mr. Gates, Charter's proposed language fixes this one-sided aspect of CenturyTel's proposal by making the language regarding network upgrades reciprocal. (*Id.*, 27:3-15; 28:6-9) In addition, Mr. Gates testifies that there should be no negative effect on CenturyTel by making the language reciprocal because Charter would be subject to the "basic principles of nondiscrimination, and just and reasonable terms, under both Missouri state law and federal law." (*Id.*, 28:12-17) In response to CenturyTel's position on this issue, Mr. Gates reiterates that CenturyTel is responsible for its network upgrade costs and its costs on its side of the POI as is Charter on its side of the POI. (Gates Rebuttal Testimony, 36:7-10, 37:19-38:2)

2. CenturyTel Response to Charter's Position

(147) CenturyTel's position on this issue is set forth on pages 62 to 64 of the Joint Statement. CenturyTel indicates that 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." (Watkins Direct Testimony, 19:15-17 (emphasis in original)) Mr. Watkins contends that 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 and cannot seek interconnection from Charter. (*Id.*, 19:17-20:22) Mr. Watkins states that nothing in CenturyTel's language affects Charter's ability to upgrade its network (*Id.*, 25:11-18; Watkins Rebuttal Testimony, 17-21) and, on rebuttal, states that nothing in CenturyTel's language would make Charter responsible for the costs CenturyTel incurs for CenturyTel's network upgrades. (*Id.*, 21:21-22:1; 22:14-19) Rather, 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. (Watkins Direct Testimony, 24:9-15; 25:1-9) CenturyTel also bases its opposition on the fact that there are no governing standards applicable to Charter such as those that are applicable to CenturyTel. (*Id.*, 21:1-22:11; 22:14-22; 23:1-3; 23:6-8; 23:10-24:2; Watkins Rebuttal Testimony, 22:1-6)

(148) Mr. Watkins notes that Mr. Gates' reference to an FCC decision in Issue 9 is also consistent with CenturyTel's position on Issue 16 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. (Watkins Rebuttal Testimony, 25:3-12)

(149) Setting aside Mr. Gates' mistaken premise that CenturyTel's proposed language would require Charter to pay for CenturyTel's network upgrade costs, Mr. Watkins notes that Mr. 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. (*Id.*, 23:5-25) In addition, Charter has very similar language in place in its interconnection agreement with AT&T in Missouri. (*Id.*, 23:25-24:16) Thus, Mr. Watkins testifies that these facts undermine Mr. Gates' testimony regarding never having seen such a provision. (*Id.*, 24:16-17) Finally, Mr. Watkins rejects Mr. Gates' suggestion that making the provision "mutual" would not negatively impact CenturyTel for all of the reasons he has provided. (*Id.*, 26:1-8)

B. The Arbitrator's Decision

(150) From the outset, I find that 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. I also

find that 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. 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, I agree 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.

(151) At the same time, and while it is true that Charter has duties under Section 251(a)(2) and other general nondiscriminatory requirements under other applicable law, Charter has provided no reference to any specific or explicit implementation rules or requirements under that provision because there are none. 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.

(152) Likewise, Charter's suggestion that there would be no adverse affect on CenturyTel if the provision was 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.

(153) 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 I do 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. However, I do note that Charter has made clear that it will be responsible for the costs of its network on its side of the POI. That position from Charter is clear and shall not be altered in any manner by the action I recommend be taken on Issue 16. 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. Therefore, I give no weight whatsoever to this aspect of Charter's position.

(154) For the foregoing reasons, CenturyTel's proposed language regarding Section 47 shall be included in the Agreement.

ISSUE 17

A. Positions of the Parties

1. Charter's Position

(155) Charter's proposed language for the Agreement to resolve this Issue is set forth on pages 64-65 of the Joint Statement. Charter's witnesses did not file testimony regarding Issue 17 even though Issue 17 was not among the "briefing only" issues identified in the letter dated October 16, 2008 from the Parties' counsel to the Arbitrator. Thus, Charter's position is derived from the Joint Statement. In the Joint Statement, Charter states that the provisions of Article III, §§ 50.1 and 50.2 should not apply to Charter because the FCC's "anti-slamming" regulations (47 C.F.R. § 64.1100 et seq.) establish the liability and remedy if a subscriber is changed without necessary authorization. (Joint Statement, 64.)

2. CenturyTel's Response to Charter's Position

(156) CenturyTel's proposed language for the Agreement to resolve this Issue is set forth on pages 64-66 of the Joint Statement. Initially, CenturyTel disputes Charter's formulation of Issue 17 and restates the issue in terms of whether the Agreement should contain terms addressing the applicable process if Charter submits an unauthorized request for CenturyTel to port an end user's telephone number to Charter, and what compensation should be payable to CenturyTel in this circumstance. (Miller Direct Testimony, 51:17-52:5) CenturyTel maintains that the 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. (*Id.*, 52:9-18) CenturyTel states that it 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. (*Id.*, 53:8-18)

B. The Arbitrator's Decision

(157) 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, and 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.

(158) While the FCC's "anti-slamming" regulations generally address this subject, the Arbitrator does not find any inconsistencies or conflicts between CenturyTel's proposed language and such regulations, and Charter has not identified any. Absent advocacy by Charter in support of its position, 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.

ISSUE 18

A. Positions of the Parties

1. Charter's Position

(159) Charter's position on this issue is set forth on pages 66 to 71 of the Joint Statement. Charter contends that "CLECs like Charter have the right to a single [Point of Interconnection ("POI")]." (Gates Direct Testimony, 48:2) Charter contends that it should have the flexibility to establish one POI per Local Access and Transport Area ("LATA") because of the increased costs that multiple POIs would create for Charter and the purported "ubiquitous network" that CenturyTel operates in Missouri (*id.*, 23:9-17; 37:18-22; 38:10-15; 42:4-8), even though Charter admits to having multiple POIs in various areas. (*Id.*, 29:5-8) Charter relies on aspects of the FCC's *Unified Intercarrier Compensation* rulemaking,⁹⁸ the FCC's *SWBT Texas 271 Order*,⁹⁹ and on 47 C.F.R. § 51.312(a) for its position.

⁹⁸ See *In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, FCC 05-33, released March 3, 2005 ("*Unified Intercarrier Compensation*").

(160) Ultimately, Charter claims that a single POI with CenturyTel is a technically feasible method of interconnection and is the rule. (*Id.*, 33:1 to 34:3; 36:1-10; Gates Rebuttal Testimony, 42:4-43:3, 450:6-18) In further support of this conclusion, Charter claims that any distinction between a “Bell Operating Company” (“BOC”) and other ILECs like CenturyTel is “meaningless” because the requirements of Section 251 and the FCC’s rules apply to all ILECs. (*Id.*, 38:18-40:14) Moreover, Charter claims that technical feasibility is presumed with a single POI per LATA arrangement, and CenturyTel is required to demonstrate otherwise, which it has not done. (Gates Direct Testimony, 35:11-36:21; Gates Rebuttal Testimony, 47:15-17)

(161) Charter disagrees with CenturyTel’s witness Watkins regarding assertions of technical infeasibility. Indicating “ILECs with multiple serving areas in a state routinely build or lease facilities between those areas” (Gates Rebuttal Testimony, 44:10-12), Charter references a confidential facility map which Charter claims demonstrates the existence of facilities in the areas where Charter provides service (*id.*, 44:20-45:16), leading Charter to the conclusion that “if required to establish a single POI with Charter, CenturyTel would appear to be technically capable of sending all of its traffic in these five services areas to, and from, that single POI arrangement with Charter.” (*Id.*, 45:20-46:1) Moreover, Mr. Gates states, on behalf of Charter, that “Charter is asking only that CenturyTel provide what it is already providing itself – transport of traffic on its side of POI.” (*Id.*, 51:14-15) The fact that CenturyTel provides this “form of traffic exchange to itself is evidence that the arrangement that Charter seeks is technically feasible” according to Mr. Gates. (*Id.*, 51:19-21) Finally, Mr. Gates, on behalf of Charter, states “I am not aware of any

⁹⁹ *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to § 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Memorandum Opinion and Order*, CC Docket No. 00-65, FCC 00-238 (rel’d June 30, 2000) (“SWBT Texas 271 Order”).

commission finding that a single POI requirement resulted in a `superior quality' interconnection request.” (*Id.*, 51:11-12)

(162) Charter claims that CenturyTel’s multiple POI proposal is possibly attempting to shift its costs to Charter. (*Id.*, 40:17-18; 44:20-45:7) According to Charter, CenturyTel “is obligated to provide interconnection for Charter facilities at POI(s) which Charter properly determines best serve its network architecture and business plans.” (*Id.*, 41:13-15) Charter goes on to state that it is “more cost effective” for CenturyTel to institute a single POI per LATA (*id.*, 42:5-46:6), albeit from a “theoretical” perspective. (*Id.*, 44:14-17)

2. CenturyTel’s Response to Charter’s Position

(163) CenturyTel’s position on this issue is set forth on pages 66 to 72 of the Joint Statement. CenturyTel’s witness Steven Watkins provides support for CenturyTel’s position and responds to Charter’s contentions. Mr. Watkins testifies that Charter’s reliance on LATA concepts is misplaced, and was based on the specific network and service arrangements of the BOCs at the time of the break-up of the former AT&T, not the network of CenturyTel. (Watkins Direct Testimony, 26:19-23; 27:11-18; 36:4-9) A “LATA” designation is relevant only to the BOCs’ line of business restrictions (such as interLATA toll) (*id.*, 35:19-36:3) and not to non-BOC ILECs like CenturyTel. (*Id.*, 27:20-28:2; Watkins Rebuttal Testimony, 28:8-9) With respect to the claim from Charter that there is a “single POI per LATA” rule, CenturyTel maintains that the concept of a “single POI per LATA” evolved from negotiation between CLECs and the BOCs which were conducted based on the BOCs’ expansive and ubiquitously interconnected networks and the BOCs’ efforts to obtain Section 271 relief from their then current line of business restrictions. In any event, CenturyTel notes that the individual agreement that SWBT may have with a CLEC does not establish any general duty or requirement for other carriers. (*Id.*, 37:6-38:6; 39:7-11; Watkins Rebuttal Testimony, 27:18-28:8; 30:7-12)

(164) Moreover, any reliance by Charter on the FCC's *Unified Intercarrier Compensation* proceeding is misplaced as it is only a notice of proposed rulemaking, and as to the issue of POIs, no new rule has been promulgated by the FCC (*id.*, 38:10-17), and no decision has been released. (Watkins Rebuttal Testimony, 27:14-18; 28:13-19)

(165) Mr. Watkins also testifies that the CenturyTel and BOC networks are different. A BOC has a more ubiquitous network; CenturyTel's network is geographically limited and dispersed across a wide area. (Watkins Direct Testimony, 28:1-2) As a result, CenturyTel may not have deployed network for the "transport of *local interconnection traffic* between" two of its areas. (*Id.*, 28:5-8; 13-15) Rather, CenturyTel's existing network has not been designed and sized for traffic other than access traffic. (*Id.*, 28:15-22) To that end, during the hearing, Mr. Watkins testified that the facilities arrangements that are in place between the areas also served by Charter are used for access services and not local service. (Tr., 337:10-15; *See also* Watkins Rebuttal Testimony, 33:17-34-7) Moreover, Mr. Watkins notes that Charter witness Gates confirms Mr. Watkins' analysis on "page 50 of [Mr. Gates'] direct testimony, he recognizes that SBC 'is the only carrier capable of providing transit service connecting all carriers, primarily because of the ubiquitous local network it has deployed.' CenturyTel has no ubiquitous local network in each LATA." (Watkins Rebuttal Testimony, 35:1-3)

(166) In light of the above, Mr. Watkins testifies that Charter is requesting interconnection that is superior to that which CenturyTel provides for its own traffic. According to CenturyTel, if Charter's position was adopted, CenturyTel would be required to construct or create network trunking arrangements solely for the benefit of Charter. Such result is contrary to 47 U.S.C. §251(c)(2) of the Act which only requires interconnection that is "at least equal" to what CenturyTel provides to itself. (Watkins Direct Testimony, 29:14-33:3) CenturyTel states that, at most, the requirements of Section 251(c)(2) "*do not require* the ILEC to provision interconnection

arrangements with the requesting competing carrier that are more complex or more costly than the arrangements that the ILEC provides for itself or with any other party.” (*Id.*, 33:9-11) Mr. Watkins also points out that, even when the FCC discussed superior interconnection (although now rescinded by a court decision), the FCC required the CLEC to pay for that superior interconnection. (*Id.*, 31:3-12; 32:21-33:3; 42:3-8) Accordingly, these concepts, as applied to this proceeding, result in the conclusion that “Charter is asking for terms that may require CenturyTel *both* to provision a new form of local service and to be responsible for transport for that new local service to distant locations beyond that for any other local traffic for which CenturyTel currently is responsible.” (*Id.*, 33:12-16; 34:10-22) The practical ramification of this result is that Charter would shift to CenturyTel the cost of this new transport arrangement for local calls to points “no other CenturyTel handled local calls are transported.” (Watkins Rebuttal Testimony, 35:13-14; *Id.*, 35:15-36:15)

(167) In any event, CenturyTel disputes the notion that the type of arrangements that Charter seeks would be more efficient or cost effective for CenturyTel. (*Id.*, 41:6-21) Likewise, Charter’s effort to interject discussion into the record by testimony regarding the apparent decline of the CLEC industry has no relevance, according to Mr. Watkins, with respect to the proper application of the prohibition against imposing a “superior” form of interconnection upon CenturyTel. (*Id.*, 39:15-40:6) Moreover, CenturyTel also disputes the notion that its proposal would require Charter to duplicate CenturyTel’s network. (*Id.*, 40:10-16)

(168) CenturyTel next turned to Charter’s effort to suggest that this issue is addressed solely as a question of “technical feasibility,” an effort that is incorrect. Mr. Watkins’ testimony that technical feasibility is “only *one* of the relevant criteria included in Section 251(c)(2);” the equally valid additional criterion of having the POI located “within” the network of CenturyTel with the resulting interconnection provided being that which is “not more than equal” to that which

CenturyTel provides to itself must also be considered. (*Id.*, 41:12-42:2; Watkins Rebuttal Testimony, 26:20-26:2; 29:1-10) “[W]ithout a specific proposal to evaluate, any discussion of the POI issue and what the resulting trunking and interconnection arrangements would be is related to a discussion of hypothetical possibilities and positions” (*id.*, 31:21-23), particularly where, as here, Charter has provided no such specifics regarding the interconnection arrangements it purportedly seeks. (*Id.*, 32:4-13; 33:6-16; 34:11-21)

(169) Finally, Mr. Watkins testifies that Charter’s proposal could overburden facilities as a result of unpredictable volumes of local traffic. Should this occur, end user service quality would suffer. (Watkins Direct Testimony, 29:3-11; 40: 11-22)

(170) Based on the foregoing, CenturyTel requests that the Commission adopt its language. CenturyTel’s language would require the consideration of the relevant variables and factors that would determine the need to establish additional POIs within the CenturyTel network and/or new trunk groups for the exchange of local interconnection traffic. The need to establish additional POIs and trunk groups would be based on, among other things, existing facility capacity (*e.g.*, connecting trunks), traffic volumes, relative costs of different networking options, and projections of future capacity needs. Each of these conditions would be preserved in the CenturyTel proposed language. (*Id.*, 39:14-40:9; Watkins Rebuttal Testimony, 32:14-20)

B. The Arbitrator’s Decision

(171) For the reasons stated herein, I find that CenturyTel’s position on the Issue 18 complies with the law, the facts, and rational public policy. Thus, CenturyTel’s language is adopted as it will provide for: (1) multiple POIs between the Parties’ respective networks under those circumstances outlined by CenturyTel as and when applicable; (2) that each POI must be within the CenturyTel network; and (3) that there shall be no interpretation of the requirements arising from this resolution that will or could impose a superior form of interconnection upon CenturyTel

as such would be contrary to the requirements of applicable court decisions.

(172) The essence of Issue 18 is whether, as Charter proposes, the Parties should have a single POI between their networks indefinitely, versus whether, as CenturyTel proposes, the Agreement should provide for an interconnection arrangement that reflects the actual ILEC network. Although it is unclear why Charter is seeking this arrangement because the record reflects that Charter's existing multiple POIs are sufficient for the interconnection that Charter requests and needs (Tr., 420-421), the issue has nonetheless been presented by the Parties and will be resolved accordingly.

(173) From the outset, the record supports the finding that Charter has proposed no specific interconnection arrangement that can be examined with any degree of specificity. The record is also clear that interconnection should not be examined in the abstract. Thus, in light of the fact that Charter provided no specific network interconnection proposal, CenturyTel only needs to demonstrate that Charter's proposal could require trunking and network arrangements that do not exist within CenturyTel's network. That showing has been made, and it is more than sufficient to demonstrate the proper resolution with respect to Issue 18. Absent that conclusion, Charter could be rewarded for its lack of specificity with respect to its interconnection proposal, a result clearly contrary to rational public policy and fundamental fairness.

(174) Because Charter has based its positions on a series of false premises, I will address those aspects first to avoid any confusion of what must be considered in resolving POI-related issues. First, I find that nothing in the Act precludes multiple POIs or multiple trunk groups for the exchange of local traffic with a non-Bell Operating Company ILEC such as CenturyTel, particularly in those instances in which such requirements are triggered by traffic volumes and the continuing need for quality service to the end users of each Party. Charter's proposed "single POI indefinitely" conclusion for Issue 18 is not supported by the facts, law or rational public policy.

(175) Second, Charter’s reliance on Local Access and Transport Area (“LATA”) concepts is misplaced since: (1) the concept of a “LATA” was based on the specific network and service arrangements of the BOCs at the time of the break-up of the former AT&T, not the networks of the independent LECs such as CenturyTel; and (2) a “LATA” designation is relevant only to the BOCs’ line of business restrictions (such as interLATA toll).

(176) Third, the record amply demonstrates that Charter’s theory of a “single POI per LATA” when applied to CenturyTel has no basis in fact. Charter’s suggestion that a “single POI per LATA” is a *universally applicable general rule* cannot be reconciled with the underlying legal bases that Charter provides. Charter relies upon the FCC’s *Unified Intercarrier Compensation NPRM* proceeding. This FCC proceeding is only a notice of proposed rulemaking. As to the issue of POIs, the record reflects that no new rule has been promulgated by the FCC. In the *Unified Carrier Compensation NPRM*, in turn, the FCC cited solely to the *SWBT Texas 271 Order* for this same proposition.¹⁰⁰ Thus, Charter’s reliance for its position on Issue 18 rests solely on the FCC’s cited basis for the “single POI per LATA” concept arising from the *SWBT Texas 271 Order*. Charter’s reliance, however, is misplaced.

(177) A review of the FCC’s reference to a “single POI per LATA” within the *SWBT Texas 271 Order* (§ 78) was *solely to a provision within an agreement* between SWBT and MCI relevant at the time and in the context of the Section 271 proceeding related to SWBT. The full text of that FCC-provided citation contained in footnote 174 is as follows:

See SWBT Texas II Application, App. 5, Tab 45, MCI (WorldCom) Agreement Attach. 4, § 1.2.2. Section 1.2.2 of the WorldCom Agreement states: ‘MCI(WorldCom) and SWBT agree that MCI (WorldCom) may designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within

¹⁰⁰ *See Unified Intercarrier Compensation NPRM*, ¶ 91, fn 91. While footnote 91 also cites to 47 C.F.R. § 51.321, that section addresses the interconnection requirements under Section 251(c)(2) of the Act and the provision of Unbundled Network Elements (“UNEs”). The provision of UNEs by CenturyTel is not a part of Issue 18.

the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities.' SWBT Texas II Application, App. 5, Tab 45, WorldCom Agreement Attach. 4, § 1.2.2.¹⁰¹

Charter has not and cannot explain how language set forth in an interconnection agreement applicable only to SWBT and MCI could possibly bind, or is even factually relevant to, CenturyTel. Similarly absent from Charter's position is any explanation of how a private agreement between two completely different competing companies operating in another state (neither of which has any interest or connection to this arbitration) creates a generalized regulatory rule. Absent mutual agreement of the Parties (which is not present here), an agreement between SWBT and MCI simply cannot bind CenturyTel (or, for that matter, Charter), and no private agreement can create an agency rule of general application.

(178) Finally, CenturyTel notes that the context of the FCC's discussion in that case was SWBT's request for § 271 relief. Section 271, and any resulting obligations or relief requirements associated with the same, applies only to BOCs.¹⁰² CenturyTel is not a "Bell Operating Company" as that term is defined in the Act.¹⁰³

(179) Accordingly, for all of these reasons Charter's reliance on the *Unified Carrier Compensation NPRM* and, ultimately only on the *SWBT Texas 271 Order*, as precedent for a generalized "single POI per LATA" rule that is binding upon CenturyTel is clearly misplaced. Charter's efforts to suggest otherwise are rejected in their entirety.

(180) With these misplaced theories addressed, the facts in the record demonstrate that the

¹⁰¹ *SWBT Texas 271 Order*, ¶ 78, fn 174.

¹⁰² See, e.g., 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.").

¹⁰³ See 47 U.S.C. § 153(4).

CenturyTel and BOC networks are different. A BOC's network is more ubiquitous, and Charter witness Gates agrees. CenturyTel's trunking network to which Charter pointed is, as the record reflects, not used for traffic other than exchange access traffic. Moreover, the record confirms that there is no single point in a LATA within which CenturyTel operates where CenturyTel has facilities linking all of the CenturyTel end offices in the LATA, and particularly with respect to facilities that are used for local service traffic. In contrast, CenturyTel has adequately explained that such a single point could *only* be created if CenturyTel were to build or purchase new trunking routes or provision a new form of service and transport beyond what it does today.

(181) Therefore, as a result of Charter's request, if the Arbitrator were to require CenturyTel to undertake such building or purchasing of trunking routes or to require CenturyTel to provision for Charter a local transport service beyond what CenturyTel does with its own local traffic today, such action would result in a form of superior interconnection that is contrary to 47 U.S.C. §251(c)(2) which, among other relevant criteria, only requires interconnection that is "at least equal in quality" to that which CenturyTel provides to itself.¹⁰⁴

(182) Turning next to Charter's proposed construction of Section 251(c)(2), I find such construction unconvincing and contrary to the explicit provisions contained in Section 251(c)(2). Charter is incorrect that the only issue to be addressed with respect to the impact of Section 251(c)(2) is "technical feasibility." Section 251(c)(2) has multiple subsections that *each* must be

¹⁰⁴ *Iowa Utilities Bd. v. FCC*, 219 F.3d 744, 758 (8th Cir. 2000) ("*IUB II*") ("[T]he superior quality rules violate the plain language of the Act," and the "at least equal in quality" does not mean "superior quality" and "[n]othing in the statute requires the ILECs to provide superior quality interconnection to its competitors."); *see also Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) ("*IUB I*") (Competitive carriers requesting interconnection should have access "only to an incumbent LEC's existing network – not to a yet unbuilt superior one"; the nondiscrimination aspect of the Act "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; *it does not mandate that incumbent LECs cater to every desire of every requesting carrier.*") (emphasis added); *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, and 98-147, released August 21, 2003 at ¶ 15 (The FCC acknowledges that the Eighth Circuit concluded that incumbents are not required "to alter substantially their networks in order to provide superior quality interconnection and unbundled access.")

addressed and considered. For example, I agree with CenturyTel that the language chosen by Congress to be contained within Section 251(c)(2) states explicitly that the POI must be within the network of CenturyTel (47 U.S.C. § 251(c)(2)(B)) and the interconnection that results between the Parties must not be more than equal that provided by CenturyTel to itself, affiliates or other carriers. (47 U.S.C. § 251(c)(2)) While “technical feasibility” is one element of Section 251(c) (47 U.S.C. § 251(c)(2)(B)) as well as the FCC’s rules, it would be improper to disregard or to avoid an analysis of *each of the companion concepts* in Section 251(c)(2). Thus, Charter’s effort to pigeon hole the issue as one solely of “technical feasibility” is fundamentally at odds with the scope of what Charter seeks, the actual requirements under the full set of interconnection criteria set forth in Section 251(c)(2) of the Act, and the conclusions of the Eighth Circuit Court of Appeals in *IUB I* and *IUB II*.

(183) To this end, Charter’s witness effectively states that Charter is unaware of other state commissions that have found that interconnection requests would result in superior forms of interconnection if Charter’s single POI per LATA proposal were to be implemented. A review of the state commission decisions regarding the proper construction of Section 251(c)(2) indicates otherwise.

(184) State commissions in Michigan,¹⁰⁵ Arkansas,¹⁰⁶ Oregon¹⁰⁷ and Colorado¹⁰⁸ have all approved the need to address all the statutory criteria contained in Sections of 251(c)(2) with

¹⁰⁵ *Michigan Commission Decision, supra* note 71; *In the matter of the Petition of Sprint Commc’ns Co. L.P. for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with CenturyTel Midwest – Michigan, Inc.*, Case No. U-15534, Order of the Commission (July 1, 2008) (“*Michigan Commission Decision II*”).

¹⁰⁶ *Arkansas Commission Decision, supra* note 68. Under applicable procedures in Arkansas, the Presiding Officer’s action has become the action of the Arkansas Commission.

¹⁰⁷ *Oregon Commission Decision, supra* note 74.

¹⁰⁸ *See In the Matter of Sprint Commc’ns Co. L.P.’s Petition for Arbitration with CenturyTel of Eagle, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as Amended by the Telecommunications Act of 1996, Initial Commission Decision*, Docket No. 08B-121T, mailed October 3, 2008.

respect to proper interconnection. For example, the Michigan Commission stated that:

Neither 47 CFR 51.305(a) nor 47 USC 251(c)(2) require only one POI; they require the provision of interconnection at any technically point in the ILEC's network, "that is at a level of quality that is equal to that which the incumbent LEC provides itself." 47 C.F.R. 51.305(a)(3). That language does not preclude multiple POIs. As CenturyTel states, it does not own transport networks between all of its exchanges; so, for CenturyTel to carry out Sprint's request, it would be required to provide Sprint with local calling transport superior to the level of quality it provides for itself. While Sprint may wish to argue that the federal regulation does not preclude an ILEC from offering service to a competitive local exchange carrier (CLEC) that is superior to its own service, the ILEC is certainly not obligated to do so.

(*Michigan Commission Decision II*, 7-8). The Arkansas Commission agreed:

Under 47 U.S.C. § 251 CenturyTel has a duty to provide "for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network" to allow for the transmission and routing of an exchange service and exchange access. The Act further states that a carrier may request interconnection at any technically feasible point within the carrier's network and must receive access equal in quality to that provided by the local exchange carrier to itself or any subsidiary or affiliate. The manner in which Sprint seeks to interconnect with CenturyTel goes beyond the requirements of 47 USC § 251(c)(2) therefore, the language proposed by CenturyTel in the DPL Issue No. 4 is deemed reasonable and is adopted.

(*Arkansas Commission Decision*, 4)

(185) While these decisions are not binding upon the Commission, they are instructive in demonstrating that Charter's narrow construction of Section 251(c)(2) cannot stand. As the record here demonstrates, the use of a single POI per LATA is not consistent with Section 251(c)(2)'s framework since it would require CenturyTel to transport *local traffic* beyond points that it does today and/or to deploy new facilities or modify facilities that do not currently carry local traffic. Absent adoption of CenturyTel's language for the Agreement relating to this Issue 18, the record also reflects the possibility that Charter's proposal could overburden facilities as a result of unpredictable volumes of local traffic. Should this occur, end user service degradation could result. There can be no question that the public interest is advanced by avoiding this possibility.

(186) Based on the foregoing, therefore, CenturyTel's language regarding Issue 18 is entirely appropriate and should be approved. CenturyTel's proposed language would require the consideration of the relevant variables and factors that would determine the need to establish additional POIs within the CenturyTel network and/or new trunk groups for the exchange of local interconnection traffic. Those factors are each reasonable and confirm the appropriateness of adopting CenturyTel's language.

ISSUE 19

A. Positions of the Parties

1. Charter's Position

(187) Charter's position on this issue is set forth on pages 72 to 74 of the Joint Statement. Charter suggests that this issue involves the circumstances under which Charter may use indirect interconnection to exchange traffic with CenturyTel, and, more specifically, the use of a transit arrangement to do so. (Gates Direct Testimony, 49:7-22) Mr. Gates testified that indirect interconnection is an efficient method of exchanging traffic until sufficient volumes are present to justify direct interconnection. (Gates Rebuttal Testimony, 57:15-17) Charter, presumably, plans to use SBC as the transit provider because, according to Charter, SBC "is the only carrier providing transit service connecting all carriers, primarily because of the ubiquitous local network it has deployed." (Gates Direct Testimony, 50:9-10)

(188) According to Charter, it has a statutory right under Section 251(a) of the Act to utilize a transit-based form of indirect interconnection, and there are no limitations on such right. (*Id.*, 51:41-52:4; Gates Rebuttal Testimony, 55:32-37) As such, Charter asserts that CenturyTel seeks to place "specific limits" on Charter's use of indirect interconnection including as a "start-up" activity (*id.*, 56:3-8, 57:1-3), claiming that the "triggers" that CenturyTel is seeking are "very similar" to those rejected by the Commission in Case No. TO-2006-00299 ("*Socket Telecom*"). (Gates Direct Testimony, 52:7-20) Charter witness Gates testifies that the Commission ruled in

that case that a carrier may choose indirect interconnection, and that conditions placed on such choice were, according to Mr. Gates, “not consistent with Section 251(a) and the Commission’s previous interpretations of that section.” (*Id.*, 53:18-20) Charter also questions why such recognition was not made by CenturyTel in its testimony on Issue 19. (Gates Rebuttal Testimony, 53:17-54:2)

(189) Setting aside this discussion, however, Charter has agreed to a specific threshold for the migration away from the use of indirect interconnection where the volume of traffic exchanges between the Parties’ networks exceeds 240,000 minutes of use for three (3) consecutive months. (Gates Direct Testimony, 54:2-10) Although Charter indicates that it has direct connections with CenturyTel now, Charter seeks to utilize indirect interconnection for adjacent exchange services as well as moving away from such arrangements in the future (although Mr. Gates indicates that he knows of no plans of Charter to do so). (*Id.*, 54:15-54:8)

(190) Finally, Mr. Gates disagrees with CenturyTel witness Watkins that Section 251(a) is separate and distinct from the interconnection requirements related to the exchange of traffic. (*Id.*, 60:13-17) He also claims that case law recognizes the fact that “direct interconnection in one instance does not preclude the use of indirect interconnection in another instance.” (*Id.*, 61:9-17) Mr. Gates further suggests that using others to provide transport of traffic “doesn’t increase CenturyTel’s costs or responsibilities.” (*Id.*, 62:13-14) He also states that use of a transit carrier would not affect the ability of the terminating carrier to identify or measure traffic assuming that the “originating carrier sends the appropriate information” through the transit arrangement (*Id.*, 62:19-22), and he notes that the Parties’ agreement to provide Signaling System No. 7 (“SS7”) information eliminates any concerns regarding traffic identification and measurement that CenturyTel may have. (*Id.*, 63:10-29) As a result, Mr. Gates concludes that the “additional requirements” included in CenturyTel’s proposed Section 3.3.1.4, and in particular CenturyTel’s

proposal to require a Percent Local Use (“PLU”) factor, are “superfluous and add no real value to the agreement” (*id.*, 64:14-16) since there is no joint use trunking being proposed. (*Id.*, 65:3-10)

2. CenturyTel’s Response to Charter’s Position

(191) CenturyTel’s position on this issue is set forth on pages 72 to 77 of the Joint Statement. According to CenturyTel, this issue concerns the migration from a transit arrangement (which would combine the traffic of multiple carriers and multiple jurisdictions on one facility to CenturyTel from the transit provider tandem) to a form of interconnection that is dedicated to Charter’s traffic. (Watkins Direct Testimony, 43:5-15; 44:18-45:8) The threshold for this migration is a DS1 level of traffic (*i.e.*, 200,000 minutes of use (*Id.*, 66:1-6)), and CenturyTel’s language would allow the Parties to continue to use the transit form of indirect interconnection if mutually agreed. (*Id.*, 44:7-11) Regarding the 200,000 minute threshold, that threshold is based on prior agreements between Charter and CenturyTel. (*Id.*, 66:6-8) Moreover, according to CenturyTel, this threshold is also a “workable representation” of a DS1 based on CenturyTel’s experience that Charter has not challenged. (Watkins Rebuttal Testimony, 47:6-8)

(192) Mr. Watkins explains that CenturyTel’s position is based on a voluntary offer to agree to the DS1 threshold associated with the use of a tandem transit form of indirect interconnection, and that such offer is without waiver of the fact that the Act’s requirements regarding the establishment of a POI and the avoidance of a superior form of interconnection still apply. (Watkins Direct Testimony, 47:9-49:10; 49:15-50:2; 55:1-56:24) With respect to the scope of Section 251(a), Mr. Watkins testifies that Section 251(a) is separate and distinct from the interconnection requirement related to the exchange of traffic, and otherwise cannot be interpreted in a manner that imposes a greater burden upon CenturyTel than those under Section 251(c). (*Id.*, 50:6-53:8; 54:17-22) Moreover, he notes that CenturyTel is already in compliance with its Section 251(a) obligations. (*Id.*, 54:16)

(193) Mr. Watkins also testifies that limiting the use of a transit form of indirect interconnection is consistent with public policy. Absent such limit on the use of transit, constraints on the ability of each carrier to design its own network architecture would be an issue as well as proper traffic identification, measurement and billing. In addition, unfettered use of a transit arrangement would raise competitive issues based on the need for carriers to be reliant upon a third party carrier whose tandem the traffic is transiting. Further, obligating CenturyTel to transit traffic beyond its network indefinitely would impose upon CenturyTel a prohibited form of superior interconnection. (*Id.*, 57:1-22)

(194) At any traffic volume level, however, CenturyTel asserts that a transit arrangement is operationally inferior in that it creates significant concerns about network management, traffic measurement, and proper compensation. As a result, Mr. Watkins testifies that CenturyTel addresses this concern with terms and conditions for traffic identification and measurement within its proposed Article V, Section 3.3.1.4 that Charter proposes to omit, even where the threshold level of traffic has not been reached. (*Id.*, 64:1-13) Specifically, in these instances, Mr. Watkins states that CenturyTel remains concerned that it “may not be able to obtain accurate and complete records for the traffic that the intermediary tandem provider “transits” to CenturyTel over commingled trunks (or, for that matter, the nature of all of the commingled traffic and quantities of each type).” (*Id.*, 64:10-13) CenturyTel’s PLU provisions would address this concern and avoid later disputes by requiring “the carrier that is sending traffic to the other Party through the third party transit provider to provide accurate factors based on call detail records which can be verified and would be representative of the portion that is local interconnection traffic and subject to the compensation terms under the interconnection agreement.” (*Id.*, 64:20-23; 65:2-5)

(195) In rebuttal, Mr. Watkins acknowledges that Charter has narrowed the scope of the issue only to the level of traffic that would constitute a DS1. (Watkins Rebuttal Testimony, 44:1-7)

Moreover, CenturyTel, through Mr. Watkins' rebuttal testimony, agreed to eliminate the \$200 per month transit charge condition within its proposed language in an effort to narrow the differences between the Parties. (*Id.*, 46:11-16) In doing so, Mr. Watkins made clear that the traffic to be used to determine the DS1 threshold is to be based on total traffic exchanged between the Parties, including any future ISP-bound traffic that may be exchanged between them. Mr. Watkins indicates that this clarification is necessary to avoid any confusion regarding the determination of the DS1 threshold should other carriers elect to opt-in to the agreement. (*Id.*, 46:17-23)

(196) Finally, CenturyTel does not believe that Charter should be able to migrate its dedicated form of interconnection in existence today with CenturyTel based on the attendant drawbacks that Mr. Watkins identified in his direct testimony. New areas where Charter would enter would be subject to the DS1 transit arrangement proposal. (*Id.*, 48:5-19) Mr. Watkins also questions Mr. Gates' reference to the Commission's *Socket Telecom* decision regarding transit. (*Id.*, 48:22-49:6)

B. The Arbitrator's Decision

(197) Based on the Parties' testimonies, three areas of disagreement must be resolved by the Arbitrator: (1) the proper level of total traffic exchanged between the Parties that will, in turn, be used to define a "DS1"; (2) whether the provision of a PLU by the party using a transit arrangement will be required; and (3) whether Charter should be permitted to migrate to an indirect interconnection from the existing dedicated trunking arrangements it has in place today with CenturyTel.

(198) From the outset, the Parties have agreed that there should be a trigger to determine when a migration will occur from a transit arrangement to a dedicated trunking arrangement. Based on the record, and for the reasons stated by CenturyTel regarding the ramifications associated with the potential unfettered use of a transit arrangement, the Arbitrator finds that a

trigger related to a DS1 level of traffic is appropriate. However, the Parties' have competing per-minute thresholds. CenturyTel proposes 200,000 total minutes per month (including future ISP-bound traffic that may be exchanged); Charter proposes 240,000 minutes per month. Because Charter has previously agreed to the 200,000 monthly minute threshold, and it is otherwise based on CenturyTel's operating experience, the CenturyTel threshold is adopted. Because Charter has failed to explain adequately its justification for a change to the 240,000 minute threshold or a deviation from the already established threshold agreed to previously with CenturyTel, there is no apparent basis to adopt a revised threshold.

(199) Second, the Arbitrator agrees with CenturyTel that it is appropriate to require a PLU by the originating party in the circumstances described by CenturyTel. CenturyTel has explained the need for this factor and that is to ensure proper billing of traffic that is carried over facilities that may have multiple carriers' traffic and multiple jurisdictions. Although Charter assumes that the provision of SS7 information is for billing purposes, even where more specific SS7 information is to be provided – TNS and CIC – that provision is subject to the qualifier within Section 3.4.4 of being required to be provided "where available." Thus, even in the more specific reference within Section 3.4.4, the provision of SS7 information is uncertain and thus, the requirement of the PLU is reasonable.

(200) Accordingly, the Arbitrator finds that the PLU is to be provided under the CenturyTel proposed terms. In those instances, the PLU will ensure proper billing between the Parties and should, as CenturyTel notes, avoid future disputes regarding compensation. Proper compensation between the Parties is necessary, and the PLU will advance that goal.

(201) Finally, based on this record, the Arbitrator finds CenturyTel's willingness to allow transit arrangements by Charter into new areas entirely reasonable. Charter's witness stated that he knows of no plans for Charter to abandon the existing dedicated trunking arrangements that are

in place between Charter and CenturyTel, and the Arbitrator is persuaded that the legitimate concerns stated by CenturyTel regarding the operationally inferior nature of a transit arrangement are something that can and should be avoided. Thus, the potential for Charter to abandon its existing interconnection arrangements is not something that should be undertaken lightly as this record confirms.

(202) Accordingly, for all of the foregoing reasons, CenturyTel's position on Issue 19 and its language is adopted. The DS1 level of traffic will be established at 200,000 minutes of use (including any ISP bound traffic) and the PLU will be required to be provided.

ISSUE 20

A. Positions of the Parties

1. Charter's Position

(203) Charter's position on this issue is set forth on pages 77 to 80 of the Joint Statement. Charter asserts that there are two aspects of this issue: (1) Whether CenturyTel is obligated to lease interconnection facilities at rates based on the FCC's Total Element Long Run Incremental Cost ("TELRIC") standard and (2) if the answer to the first question is "yes," how will the rate be established? (Gates Direct Testimony, 56:5-10) Charter suggests that the rates must be based on TELRIC. (*Id.*, 58:6-19; 60:10-16) With respect to the second aspect of the issue, Charter states that the area of disagreement relates to the length of time that the Parties will negotiate the rates before bringing any disagreement to the Commission for resolution. Charter states that it proposes three (3) months, with CenturyTel proposing six (6) months. (*Id.*, 59:3-10) Finally, Charter states that the Parties disagree on the interim rate level, with Charter requesting that CenturyTel's tariffed rate being reduced by a 50% "Relative Use Factor" ("RUF") which Charter believes to better approximate the "final Section 251(c)(2) TELRIC rate." Charter also proposed a true-up of the rate. (*Id.*, 12-22)

(204) In rebuttal, Mr. Gates requests that the Commission “affirmatively restate” that the rates at issue must be based on TELRIC. (Gates Rebuttal Testimony, 67:1) Mr. Gates states that absent such affirmation, CenturyTel will argue that the rates need not be based on TELRIC. (*Id.*, 67:2-68:11) According to Mr. Gates, the Commission has the expertise to make the determination now and there is no need to be involved in the dispute resolution process which will only lead to additional delays. (*Id.*, 68:21-69:4; 70:4-23) Mr. Gates also states in his rebuttal that the three month period Charter requested was necessary to avoid “delays” in the resolution of the issue. Mr. Gates also claims that CenturyTel did not provide for a true-up of the rates. (*Id.*, 69:17-20)

2. CenturyTel’s Response to Charter’s Position

(205) CenturyTel’s position on this issue is set forth on pages 77 to 79 of the Joint Statement. According to CenturyTel, the only dispute that requires Commission resolution at this point is the period of time after this arbitration that the Parties should be afforded to negotiate (six months being CenturyTel’s proposal and 90 days being Charter’s proposal), and, if there is no agreement, whether the Parties’ Article 20 dispute resolution procedures should be used. (Watkins Direct Testimony, 67:7-21)

(206) Given the Parties’ agreement to negotiate rates after this proceeding closes, CenturyTel asserts that Charter’s discussion regarding pricing standards is not presently before the Commission. (Watkins Rebuttal Testimony, 50:14-18) CenturyTel also notes that Charter’s proposed RUF is inconsistent with the agreed-to provision that each Party be responsible for the facilities on its side of the POI; thus, Charter is responsible for 100% of the facility costs at issue. (*Id.*, 51:21 to 52:3)

(207) CenturyTel indicates that the six month period it proposes is reasonable, and, based on its experience in such matters, will provide the necessary time to complete the exchange of proposals and to engage in good faith negotiations. Mr. Watkins also states that the Parties have

agreed to true-up rates (Watkins Direct Testimony, 68:1-12), explaining at the hearing that the Joint Statement continued to include an error from CenturyTel's original DPL that did not pick up the true-up language. (Tr., 360-61) Nonetheless, true-ups, according to CenturyTel, would be conducted as required by Section 2.3.1.1 of Article V. (Watkins Rebuttal Testimony, 52:17-22)

(208) With respect to CenturyTel's use of the Agreement's dispute resolution procedures, Mr. Watkins notes that such procedures are already agreed to by the Parties and that these procedures address all possible scenarios that could arise in addition to avoiding Charter's "vague and undefined" reliance on "action with the Commission." (*Id.*, 68:15-22)

B. The Arbitrator's Decision

(209) The Arbitrator agrees with CenturyTel and directs that CenturyTel's language be included in the Agreement. Based on testimony provided at the hearing, CenturyTel confirmed that there is a true up required under its filed language in Section 2.3.1.1 of Article V. As a result, there is no need for the RUF proposed by Charter since the true-up will address any monies due and owing between the Parties when a final rate is determined. Setting aside this practical result that avoids the need for considering the RUF, it is clear based on Mr. Gates' testimony that the factor was and is nothing more than a "guesstimate" of what a TELRIC rate may be. However, that is the essence of the subject matter of their further negotiations – what cost-based rate will be used for entrance facilities/interconnection facilities. Only if a dispute arises as a result of the Parties' further discussions would there be a need for the Commission to be involved in this issue. Since there is no dispute before the Commission at this time, there is no need for the Arbitrator to pre-judge the issue. Nor would it be appropriate to do so at this juncture as any pronouncement – regardless of which Party it may favor – would make the negotiation process a nullity.

(210) Thus, the only dispute associated with Issue 20 that is ripe for the Arbitrator to resolve at this time is the issue that CenturyTel has articulated. A close review of the competing

provisions indicates that the Parties have delayed any resolution of the rates for entrance facilities/interconnection facilities. As indicated above, until and unless a dispute arises regarding the rate, there is no pending issue for the Arbitrator to resolve. Therefore, the Arbitrator agrees with CenturyTel that a six month period provides the Parties adequate time to discuss and attempt to resolve the rate issue. Since a true-up is envisioned for any permanent rate, there is no reason for not allowing this time period for the Parties' discussions. Such a time period provides the maximum opportunity to resolve the rate without further proceedings. Thereafter, the formal dispute resolution should be employed to avoid any question as to the proper procedures to be used to bring a potential unresolved rate issue to the Commission.

ISSUE 21

A. Positions of the Parties

1. Charter's Position

(211) Charter's position on this issue is set forth on pages 80 to 82 of the Joint Statement. Charter contends that it should be able to deploy one-way trunks under certain circumstances and contends that CenturyTel is attempting to impose interconnection costs upon Charter. (Gates Direct Testimony, 61:7-12) Although Mr. Gates indicates that Charter "routinely" uses two way trunks, Mr. Gates testifies that he understands the FCC's rules to allow Charter to select one-way trunks subject to technical feasibility issues pursuant to 47 C.F.R. §51.305(f). (*Id.*, 62:34-63:3) As such, Mr. Gates maintains that CenturyTel's proposal that one-way trunks can only be deployed when the Parties agree should be rejected because it provides CenturyTel a veto over Charter's rights. Moreover, Mr. Gates states that CenturyTel's position would require Charter to be responsible for the cost of facilities that CenturyTel would need to deploy to send its traffic to Charter. (*Id.*, 63:5-12) This result, in Charter's view, is not equitable and otherwise is contrary to prior Commission action in *Socket Telecom*. (*Id.*, 63:14-19)

(212) Mr. Gates, in rebuttal, disagrees with the interpretation of Section 51.305(f) of the FCC's rules provided by CenturyTel witness Watkins, claiming that Mr. Watkins' interpretation takes the concept of "efficiency" out of context. (Gates Rebuttal Testimony, 72:24-73:3) Mr. Gates also indicates that any claim of "superior" interconnection through the use of one-way trunks by CenturyTel is incorrect. (*Id.*, 73:15-17)

2. CenturyTel's Response to Charter's Position

(213) CenturyTel's position on this issue is set forth on pages 80 to 83 of the Joint Statement. CenturyTel indicates that there are two aspects of this issue: (1) under what terms and conditions should one-way trunks be used; and (2) regardless of whether one-way trunks or two-way trunks are used, where should the POI be located and what are the responsibilities of each Party on its side of the POI. CenturyTel makes clear that its language allows the deployment of one-way trunks. Further, CenturyTel witness Watkins states that because the Parties are exchanging traffic with each other, two-way trunks are likely to be more efficient for both Parties, leaving the use of one-way trunks to those instances where technical considerations require the Parties to properly identify, measure and bill the traffic. (Watkins Direct Testimony, 69:13-25) Contrary to Charter's view, Mr. Watkins cites Section 51.305(f) for the proposition that the rule applies to a requirement to provide two-way trunking and that the FCC's decision discussing the rule makes clear that the rule was instituted to avoid raising the costs of new entrants by imposing the requirement to use one-way trunks. Since the Parties agree to use two-way trunking and there are no cost imposition issues, Section 51.305(f) does not apply in this instance. (*Id.*, 70:7-17)

(214) CenturyTel expressed its concern that Charter's proposal attempts to impose greater costs on CenturyTel by requiring CenturyTel, under Charter's language, to be responsible for one-way facilities on Charter's side of the POI. Mr. Watkins contends that result is inconsistent with the Act's requirements as to the proper establishment of the POI and would potentially require

CenturyTel to deliver its traffic to a Charter switch located at some distant location outside of CenturyTel's network. Such a result, in turn, is contrary to the requirements under Section 251(c)(2) of the Act. (*Id.*, 71:12-74:10) Moreover, as CenturyTel does not transport local calls beyond its network, Charter's one-way trunk proposal creates the potential for a "superior" form of interconnection discussed by Mr. Watkins in response to Issue 18. (*Id.*, 74:13-74-16) To avoid this, CenturyTel proposes that if a Party deploys one-way trunks, each Party must be responsible for all facilities on its side of a POI that fully satisfies the requirements of Section 251(c)(2). (*Id.*, 73:12-18)

(215) In rebuttal, Mr. Watkins points out that the Parties agree that they both will likely use two-way trunks and that such use is more efficient. (Watkins Rebuttal Testimony, 54:1-5) Moreover, Mr. Watkins states that Charter has not addressed the POI-related issues at all, and that Charter's effort to limit the discussion of one-way trunks to technical feasibility is improper. (*Id.*, 54:9-18) As to Charter's claim that CenturyTel is attempting to shift costs to Charter, Mr. Watkins indicates that the opposite is true. (*Id.*, 55:1-4) Moreover, Mr. Watkins testifies that CenturyTel's potential responsibility for facilities on Charter's side of the POI, if one-way trunks are deployed by Charter, contradicts Mr. Gates' other testimony. Even though Mr. Watkins points out that Mr. Gates' statements do not appear to address all of the requirements under Section 251(c)(2) for the proper establishment of the POI (*i.e.*, that the POI must be within the CenturyTel network, must be at a technically feasible location and must not result in a more than equal level of service to Charter), there are three (3) places within Mr. Gates' testimony where he indicates that the Parties are responsible for facilities on their respective side of the POI. (*Id.*, 55:7-23) In summary, Mr. Watkins notes:

If Charter really believes that two-way trunks are most likely to be the preferred and efficient approach for both carriers, and if it is Charter's intent not to stretch the interconnection requirements under Charter's one-way trunks proposal to

require CenturyTel to be responsible for delivery of local traffic to a POI beyond points required by the Act, then there does not seem to be any issue. For these reasons, the CenturyTel language should be adopted.

(*Id.*, 56:11-16)

B. The Arbitrator's Decision

(216) While Issue 21 is characterized by Charter as an issue of choice of trunking, the Arbitrator agrees with CenturyTel that Charter's proposed language for Article V, Section 3.2.3 undermines the method by which a POI must be properly established as required under Section 251(c)(2) of the Act and, in particular, *IUB I and IUB II*. The Arbitrator has already addressed that framework under Issue 18 and I see no reason to alter that conclusion here. Rather, as applied, Charter's language could impose a superior form of interconnection upon CenturyTel by requiring CenturyTel to be "responsible for establishing any necessary interconnection facilities, over which such one-way trunks will be deployed to the *other Party's switch*." (Joint Statement, 80-81) To the extent that Charter's switch is located at a point that is not within the incumbent area of CenturyTel, and/or the transport of local traffic over one-way trunks required by CenturyTel would be to distant locations beyond points that CenturyTel transports local traffic today, Charter's language represents a request for a superior form of interconnection that is beyond the requirements of Section 251(c)(2).

(217) Regardless of its intent, the result arising from Charter's language, if adopted, is exactly what CenturyTel witness Watkins suggests – CenturyTel providing to Charter a form of superior interconnection, and Charter has provided no substantive response to that fact. Just as in resolving Issue 18, I must apply *all* of the requirements of Section 251(c)(2) to Charter's one-way trunk proposal.

(218) Moreover, the Arbitrator agrees with CenturyTel's position with respect to Section 51.305(f) of the FCC's rules. The rule is succinct: "If technically feasible, an incumbent LEC

shall provide two-way trunking upon request.” 47 C.F.R. §51.305(f) That rule addresses the provision of two-way trunking which the Parties have agreed to use. Mr. Watkins’ explanation of the underlying rationale for this rule – the avoidance of increasing a CLEC’s costs associated with one-way trunking – is reasonable. Thus, I find the better reading of Section 51.305(f) as applicable to this record is that provided by CenturyTel.

(219) Accordingly, for the foregoing reasons, Charter’s language for one-way trunks is rejected and CenturyTel’s language is adopted.

ISSUE 22

A. Positions of the Parties

1. Charter’s Position

(220) Charter’s position on this issue is set forth on pages 83 to 84 of the Joint Statement. Charter states that Issue 22 is whether the Parties should use actual traffic levels to determine when a DS1 level of traffic is reached over a three month period rather than actual or forecasted traffic levels as proposed by CenturyTel. (Gates Direct Testimony, 65:7-12) Charter’s concerns relate to the use of forecasts, which Mr. Gates claims are “based on speculative volumes or volumes that may or may not exist in the future.” (*Id.*, 66:14-15) Moreover, the use of the forecasts, according to Charter, could lead to additional disputes as to which Party’s forecasts are more accurate, as well as potentially increasing Charter’s costs necessary to deploy additional direct facilities. (*Id.*, 66:16-22)

(221) In rebuttal, Mr. Gates discounts CenturyTel’s concerns regarding network degradation, suggesting it is inappropriate rhetoric. (Gates Rebuttal Testimony, 75:22-76:5) While reiterating many of his prior assertions regarding forecasts, Mr. Gates suggests that the best available information to use is the actual data. (*Id.*, 76:17-77:14) Mr. Gates also testifies that service quality issues will not arise because Charter has the same interests as CenturyTel to ensure call quality and completion for its customers. (*Id.*, 18-22)

2. CenturyTel's Response to Charter's Position

(222) CenturyTel's position on this issue is set forth on pages 83 to 84 of the Joint Statement. CenturyTel's view of Issue 22 is that the Parties should use the "best available information" to establish direct end office trunks based on "actual volumes and reasonable projections of traffic. . . ." Since CenturyTel's language would follow such standard, CenturyTel believes that its language would "remain dynamic and reflective of the level of the exchange of traffic between the Parties." (Watkins Direct Testimony, 76:18-23) As such, the underlying purpose of CenturyTel's proposed section is to "avoid overburdening other trunk groups and network degradation and . . . ensure quality service to both providers' end users." (*Id.*, 77:5-7; 77:9-21) In rebuttal, Mr. Watkins calls Mr. Gates' testimony regarding the use of forecasts "troubling" in that both Parties reasonably can be assumed to "act in good faith to estimate the upcoming volumes of traffic in order to properly estimate what may occur." (Watkins Rebuttal Testimony, 57:11-14) Moreover, Mr. Watkins points out that forecasts are common industry practice and that, if forecasts show that traffic is increasing, Charter should want to ensure that the necessary facilities are in place to anticipate the traffic increase and to ensure quality service. (*Id.*, 57:14-23)

B. The Arbitrator's Decision

(223) The scope of the disagreement between the Parties regarding this issue is very narrow. Based on the record, the disagreement is whether only actual demand should be used (Charter's position) or whether actual and reasonable forecasts of demand should be used (CenturyTel's position). As a matter of rational public policy, it is appropriate to use the best available information as noted by CenturyTel and that includes forecasts. Thus, CenturyTel's standard of determining a DS1 level over a three (3) month period or three (3) of the last five (5) months is adopted.

(224) CenturyTel properly notes that forecasts are common place in the industry (a fact that has not been challenged by Charter) and Mr. Gates' suggestion that the use of forecasts would result in speculative results simply cannot be reconciled with the traditional use of forecasts. The fact that disagreements may arise regarding the use of forecasts is tempered by the fact that CenturyTel recognizes that the forecasts must be "reasonable" and made in "good faith." Accordingly, since many provisions of the Agreement will likely require the Parties to conduct their affairs under these "reasonableness" and "good faith" standards, Charter's objection to the use of forecasts because of potential disputes is not a reasonable basis for rejecting the use of forecasts as the resolution of Issue 22. Accordingly, Charter's language is rejected and CenturyTel's language regarding Issue 22 is adopted.

ISSUE 23

A. Positions of the Parties

1. Charter's Position

(225) Charter's position on this issue is set forth on pages 84 to 87 of the Joint Statement. Charter indicates that the Parties are not too far apart with respect to this issue since Charter has never disclaimed its obligation to perform the "N-1" query function required to properly route a call where, as here, telephone numbers have been ported. (Gates Direct Testimony, 69:16-23) At the same time, Mr. Gates states that Charter is seeking "an affirmative statement that when CenturyTel charges Charter for routing this unqueried call, CenturyTel will, in fact, route the unqueried call" (*Id.*, 69:24-26), a statement also made by Mr. Gates in his rebuttal. (Gates Rebuttal Testimony, 79:14-16) With respect to the routing of calls, Mr. Gates indicates that Charter is willing to pay for the routing required by CenturyTel of an unqueried call provided the charge does not exceed \$.005 for the combined tandem switching and tandem transport and termination rate. (*Id.*, 79:21-26) Mr. Gates then recites his view of the requirements of Section 251(a) regarding transiting and concludes, based on a recitation of various state commission

actions (including one from this Commission) that transiting is an interconnection obligation to be priced at TELRIC even though Mr. Gates also recognizes that the FCC has not ruled on this obligation. (*Id.*, 80:13-83:25) Mr. Gates concludes that, absent an obligation imposed upon an ILEC to provide transiting services, CLECs would be forced to duplicate ILEC facilities and would not be able to secure “reasonable rates, terms and conditions for transit” through “commercial negotiations.” (*Id.*, 84:3-10)

2. CenturyTel’s Response to Charter’s Position

(226) CenturyTel’s position on this issue is set forth on pages 84 to 87 of the Joint Statement. CenturyTel’s view of Issue 23 is that it is comprised of two sub-issues. First, whether Charter should be required to perform the data queries where it is the N-1 carrier? Second, where such N-1 obligations are not fulfilled and calls are improperly routed to a CenturyTel end office, what should Charter be required to pay to CenturyTel for its effort to complete such calls to third parties? (Watkins Direct Testimony, 78:1-12) To place the issue in context, Mr. Watkins describes the agreed-to language in Sections 4.6.1 through 4.6.4 that relates to the provision of transit service through a tandem office. (*Id.*, 78:16-79:8) Mr. Watkins notes that 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. (*Id.*, 79:10-14)

(227) With this as background, CenturyTel explains the N-1 query function and the need for it to ensure proper routing of a call. (*Id.*, 79:17-78:16) Mr. Watkins also indicates that, where Charter is the N-1 carrier, Charter agrees that it must do the N-1 query. (*Id.*, 80:19-81:5; Watkins Rebuttal Testimony, 58:28-29) Thus, with respect to Issue 23(a), CenturyTel requests that the Commission explicitly confirm Charter’s responsibility to undertake its N-1 responsibility when Charter is required to do so. (Watkins Direct Testimony, 81:7-9)

(228) With respect to the second aspect of Issue 23 – the routing of unqueried of calls – Mr. 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. (*Id.*, 82:16-83:6) Calling these efforts “extraordinary measures” (*Id.*, 83:1), Mr. 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. (*Id.*, 83:9-14; Watkins Rebuttal Testimony, 59:20-21, 60:1-3, 61:7-10) 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 Termination” – should be paid and are the elements that CenturyTel has included within the Agreement. (Watkins Direct Testimony, 84:5-10; 85:17-22) If Charter is not willing to pay these charges, Charter should undertake the routing and querying itself. (*Id.*, 84:12-21)

(229) CenturyTel indicates, effectively, that the rate elements should be applied and not be subject to the not-to-exceed \$0.005 rate that Charter suggests. (*Id.*, 85:1-4) In rebuttal, Mr. Watkins states that 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. (Watkins Rebuttal Testimony, 60:10-22) Moreover, and without waiver of its position that the issue of TELRIC pricing was improperly raised, CenturyTel does not believe that TELRIC pricing of the network functions it performs is appropriate for the reasons stated by Mr. Watkins in response to Issue 19, the burdens such arrangements would impose, the fact that the functions undertaken by CenturyTel are identical to those within the CenturyTel intrastate access tariff, and the network capacity requirements that may need to be deployed to accommodate an unlimited number of carriers seeking transit service, all results that TELRIC pricing would exacerbate. (Watkins Direct Testimony, 86:1-87:17)

B. The Arbitrator's Decision

(230) As with certain other issues before the Commission, the scope of this dispute is limited. 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.

(231) 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. While Charter effectively proposes that its \$0.005 rate that it included in the Joint Statement was intended to be a not-to-exceed rate, I agree with CenturyTel that it is not altogether clear exactly what that means. Therefore, I agree 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. I also note that this rate is for the transiting function alone. The query required by CenturyTel to undertake is an additional charge that CenturyTel may assess against Charter.

(232) 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 for completion a Charter unqueried call. Because compensation will be due by Charter to 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. I find that 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.

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.

ISSUE 27

A. Positions of the Parties

1. Charter's Position

(233) Charter's position on this issue is set forth on pages 94 to 96 of the Joint Statement. Charter proposes to include language in the Agreement that would prohibit either Party from charging the other for the costs associated with processing service orders related to requests for the porting of telephone numbers. (Joint Statement, 94-95) Charter asserts that these charges have been held by the FCC to be improper because the costs are carrier-specific costs directly related to providing local number portability ("LNP"). (Gates Direct Testimony, 76:18-77:3) Charter believes these costs were proper for recovery pursuant to 47 C.F.R. § 52.33. (*Id.*, 77:4-9) Charter recognizes that costs are incurred for processing local service requests. (Gates Rebuttal Testimony, 93:8-17) However, based on its interpretation of FCC rules and decisions, Charter concludes that the FCC rules prohibit the assessment of a service order charge on activities relating to the porting of telephone numbers. (*Id.*, 75:17-79:2 and Gates Rebuttal Testimony 88:20-89:6)

2. CenturyTel's Response to Charter's Position

(234) CenturyTel's position on this issue is set forth on pages 94 to 96 of the Joint Statement. 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. (Joint Statement, 94-95) CenturyTel incurs costs for the processing of local service requests. (Reynolds Direct Testimony 4:13-7:12) CenturyTel testifies that the service order rates represent the administrative costs of processing the local service request and the

recovery of those costs. (Watkins Direct Testimony, 89:14-15) These costs are not part of the actual porting process (*Id.*, 94:10-16; 93:15-94;16; Reynolds Direct Testimony 2:4-19) and are routine terms and conditions for interconnection between CenturyTel and CLECs. (Watkins Direct Testimony, 93:12-14; 94:17-95:8) Charter's position attempts to confuse these separate items. (Watkins Rebuttal Testimony 62:7-9) CenturyTel states that recovering the administrative costs for processing service requests from the carrier that sends the request is appropriate. (Reynolds Direct Testimony, 10:12-17) This position is supported by the FCC's LNP Clarification Order¹⁰⁹ that is consistent with CenturyTel's position that the administrative costs should not be included in the end-user LNP assessment (Reynolds Direct Testimony, 12:1-3) and that these charges have not been prohibited by the FCC (Watkins Rebuttal Testimony, 63:3-13)

B. The Arbitrator's Decision

(235) 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. Charter has not rebutted CenturyTel's position that the costs at issue are separate and apart from the actual porting process or that the imposition of an administrative charge is not a routine term and condition for interconnection between CenturyTel and CLECs. In fact, the testimony of Charter witness Giaminetti (Tr., 239:14-20) and CenturyTel Exhibit 26 reflects 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 regarding Issue 27 is allowed under the FCC rules and orders, which do not prohibit such charges, and is also consistent with the public interest. Moreover, CenturyTel's position allows both Parties to recover their costs for processing local service requests regarding number portability.

¹⁰⁹ *In the Matter of Tel. Number Portability*, BellSouth Corp. 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*").

(236) The Arbitrator carefully reviewed and considered the significant FCC decisions cited by Charter and CenturyTel.¹¹⁰ 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.¹¹¹

(237) 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 providing number portability and are therefore not recoverable through the federally tariffed end-user LNP charge. In fact, the

¹¹⁰ 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.

¹¹¹ *Third Report and Order* at para. 72.

FCC stated that “[w]ere BellSouth to seek recovery of such costs through its [federal end user] tariff, they would be rejected.”¹¹²

(238) 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 this Commission, I do note that 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.¹¹³

(239) The FCC has not mandated nor 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 surcharge. Thus, CenturyTel’s proposed language in Article IX, § 1.2.3 is accepted and should be included in the Agreement.

¹¹² *LNP Clarification Order* at footnote 49.

¹¹³ *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).

ISSUE 28

A. Positions of the Parties

1. Charter's Position

(240) Charter's position on this issue is set forth on pages 96 to 98 of the Joint Statement. Charter's position with regard to Issue 28 is that CenturyTel should only be permitted to monitor or audit Charter's use of the CenturyTel OSS systems if, and only if, CenturyTel first defines the meaning of "monitoring" or "auditing." Charter does not object, in principle, to CenturyTel's right to monitor Charter's use of the system. (Lewis Direct Testimony, 4:11-16)¹¹⁴ Charter seeks "some reasonable, and explicit parameters" as to how CenturyTel would monitor and audit Charter's use of the system. (*Id.*, 4:16-18) Charter explains that it uses the CenturyTel OSS system to obtain basic customer information so that Charter can provide competing voice service to the customer, or Charter may submit a port of a customer through the OSS system. Thus, Charter's concern is that CenturyTel's monitoring activities and the information derived therefrom could be used for CenturyTel's competitive purposes. (*Id.*, 7:22-8:15) As a consequence, Charter has proposed additional language for Article X, §§ 8.3.2 and 8.3.3 that would condition CenturyTel's right to monitor or audit Charter's use of CenturyTel's OSS system on Charter's prior consent. Charter's witness, Ms. Lewis testified that Charter's intention is that such consent may be withheld in Charter's sole discretion. (Tr. 201:21-202:3)

(241) In Ms. Lewis' Rebuttal Testimony, Charter presented several alternative provisions from other interconnection agreements to which Charter affiliates are parties relating to an incumbent LEC's audit of CLEC use of OSS systems.¹¹⁵ (Lewis Rebuttal Testimony, 5:22-7:7 &

¹¹⁴ Because Charter witness, Ms. Patti Lewis, adopted the testimonies that were pre-filed by Ms. Amy Hankins, all references herein to such testimonies will be attributed to Ms. Lewis.

¹¹⁵ CenturyTel filed a Motion to Strike Hankins Rebuttal Testimony 6:23-7:7 on October 24, 2008, which the Arbitrator took under advisement at the opening of the hearings. *[Insert an appropriate description of the resolution of this aspect of the Motion.]*

Schedule AH-1) However, Charter did not amend its proposed language in the relevant sections of the Agreement related to this Issue.

2. CenturyTel's Response to Charter's Position

(242) CenturyTel's position on this issue is set forth on pages 96 to 99 of the Joint Statement. CenturyTel's position is that the license granted to Charter pursuant to the Agreement is a limited license and that 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. (Miller Direct Testimony, 54:2-14) In response to Charter's assertion that the terms of CenturyTel's monitoring or auditing are too open-ended, CenturyTel refers to the language of Sections 8.3.2 and 8.3.3 that addresses the permissible scope of the audit. (*Id.*, 55:5-28)

(243) CenturyTel sees no reason to provide further details to Charter concerning when and how CenturyTel planned to conduct its monitoring of use of the OSS system for potential misuse or abuse by Charter (Miller Rebuttal Testimony, 38:10-39:4), as Article X, § 8.3.3 requires information obtained by CenturyTel be treated as "Confidential Information" pursuant to Article III, § 14.0, and in light of CenturyTel's corporate policy regarding the use of a competitor's proprietary information. (*Id.* 40:2-41:6) Finally, 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. (*Id.*, 41:7-15)

B. The Arbitrator's Decision

(244) 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. On the one hand, 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.

(245) 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. (Lewis Rebuttal Testimony, 3:16-27) Further, Article X, § 8.3.3 provides that 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. (Miller Rebuttal Testimony, 40:2-41:6)

(246) 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 and requires 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.”¹¹⁶ 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.

ISSUE 29

A. Positions of the Parties

1. Charter’s Position

(247) Charter’s proposes to include no specific language in the Agreement to resolve this Issue as set forth on pages 99-100 of the Joint Statement. Charter asserts that the language proposed by CenturyTel is unnecessary because there is already a process in the Agreement that CenturyTel can use to address any costs associated with new, upgraded or enhanced operation support system (“OSS”). The sections referred to by Charter are Section 4, Amendments and Section 12, Changes. (Webber Direct Testimony, 31:17-32:5)

2. CenturyTel’s Response to Charter’s Position

(248) CenturyTel’s proposed language for the Agreement to resolve this Issue is set forth on page 99 of the Joint Statement. CenturyTel emphasizes that this language only preserves CenturyTel’s right to recover its costs with respect to upgrades and enhancements to its OSS, should such upgrades and enhancements occur during the term of the Agreement. CenturyTel asserts that its proposal sets forth a process where Charter would only pay additional charges related to new, upgraded or enhanced OSS if CenturyTel first obtains Commission approval of the

¹¹⁶ *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. Ct. App. 2000).

new rates and if the Commission also determines that Charter should be responsible for payment of such charges. (Reynolds Direct Testimony, 14:11-19) No unilateral change by CenturyTel is permissible. (Reynolds Rebuttal Testimony, 3:4-14)

B. The Arbitrator's Decision

(249) The Arbitrator concludes that CenturyTel's position regarding Issue 29 is appropriate, consistent with the public interest, and protects both Parties regarding costs associated with new, upgraded or enhanced OSS. This issue is limited to addressing only costs related to OSS that may occur during the term of the Agreement. As such, the provision proposed by CenturyTel is very narrow.

(250) The Arbitrator carefully considered the provisions in the Agreement cited by Charter (Section 4, Amendments and Section 12, Changes). However, the Arbitrator does not believe that these provisions adequately protect CenturyTel regarding the narrow scope of OCC costs. Additionally, the process protections included in CenturyTel's proposal, requiring Commission approval of any pricing modification, sufficiently protect Charter's interest. (Joint Statement, 99) Specifically the proposed language provides that the charges will only become effective as "determined by or otherwise approved by the Commission upon CenturyTel's submission in accordance with Applicable Law. . . CLEC will be responsible for paying such OSS charges under this Agreement only if and to the extent determined by the Commission." (*Id.*) CenturyTel's language does not allow a unilateral pricing modification. (Reynolds Rebuttal Testimony, 3:4-14) Thus, CenturyTel's proposed additional language in Article X, § 15.2 is accepted and should be included in the Agreement.

ISSUE 31¹¹⁷

A. Positions of the Parties

1. Charter's Position

(251) Charter contends that CenturyTel should be liable for its own errors or omissions resulting in subscriber listing errors in CenturyTel's published directories and that where one Party is grossly negligent or engages in an intentional act of misconduct, that Party should be subjected to liability to end user subscribers or to the other Party in the amount of actual damages. Charter also asserts that CenturyTel should not be allowed to limit its liability in such situations either (1) where it is negligent or grossly negligent or (2) where it has engaged in intentional or willful misconduct. Finally, Charter proposes that CenturyTel should indemnify it for any error or omission in an end user customer listing for which CenturyTel is liable and that neither Party's liability should be limited where that Party or its publisher causes the error in publication of an end user customer's data or listing. (Joint Statement, 102-103)

2. CenturyTel's Response to Charter's Position

(252) CenturyTel argues that subjecting it to potentially unlimited liability for an error or omission on the part of it or its publisher's ordinary negligence is unreasonable. Instead, CenturyTel contends that liability for such an error should be limited to the amount paid by a CLEC to CenturyTel under Article XII. Notably, CenturyTel does not object to liability being imposed where it is found to have been grossly negligent or to have engaged in intentional misconduct. CenturyTel notes that Charter is solely responsible for all information required for inclusion in the CenturyTel directory; therefore, CenturyTel objects to indemnifying Charter if CenturyTel's or its publisher's error or omission caused an error in publication of an end user customer's data or listings. CenturyTel also emphasizes that Charter includes similar restrictions

¹¹⁷ As indicated previously, the Parties agreed Issue 31 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties' positions relating to this issue is derived from the Joint Statement.

on liability for directory errors and omissions in its own tariff. Additionally, CenturyTel proposes language whereby Charter “expressly represents that it is authorized to enter into this provision on behalf of itself and its end user customers.” (Joint Statement, 102-103)

(253) It should also be recognized that, as briefing only issues, testimony has not previously been offered on either Issue 31 or Issue 15(c). Since the time that CenturyTel’s First Disputed Points List was submitted with its response on August 25, 2008, and the Joint Statement was submitted one week later on September 2, 2008, CenturyTel’s position on the relationship of these two issues has evolved.¹¹⁸ Should the Arbitrator resolve Issue 31 in CenturyTel’s favor, CenturyTel is willing to accept a *portion* of Charter’s proposed language in Issue 15(c). Specifically, in Article III, § 30.3.3.13, CenturyTel is amenable to adding the following language from Charter’s proposal to CenturyTel’s proposed language, as indicated in **bold**:

30.3.3.13 Liability arising under any indemnification provision contained in **this Agreement**, a separate agreement or the applicable provisions of the CenturyTel of Missouri, LLC, PSC No. 10, Wholesale Services Tariff on file with the Missouri Public Service Commission related to provisioning of Directory Listing or Directory Assistance Services.

However, should the Arbitrator reject CenturyTel’s position on Issue 31, CenturyTel does not believe that the Arbitrator should include the “**this Agreement**,” language identified in bold for Article III, § 30.3.3.13, as Charter’s proposed language in Issue 31 significantly (and inappropriately) increases CenturyTel’s potential liability. As noted above, Charter is solely responsible for all information required for inclusion in the CenturyTel directory. Thus, if CenturyTel’s obligations relating to this information are expanded in the manner Charter has

¹¹⁸ It should also be noted that in the first Disputed Points List that was filed as Exhibit 1 to CenturyTel’s Response on August 25, 2008, CenturyTel specifically stated that the final legal briefs filed in this matter may conflict with the DPL and that it intended its legal briefs to control.

suggested under Issue 31, then CenturyTel's overall liability in this respect should be limited as provided in Sections 30.3.1 and 30.3.2.

B. The Arbitrator's Decision

(254) CenturyTel should not be subjected to potentially unlimited liability in the event of ordinary negligence where an End User Customer's listing is published and that End User Customer did not desire a published listing. Given that the rates established in Article XI, § 5 show that CenturyTel will be paid for only specific types of directory listings that it includes from Charter in its directory, or that it will be paid for certain listings pursuant to the CenturyTel of Missouri PSC No. 1 General and Local Exchange Tariff, unlimited liability for ordinary negligence is unreasonable and contrary to the public interest. As is the case with disclaimers of warranty and damage limitations discussed in Issue 15, reasonable limits on liability for directory listing errors or omissions are needed to ensure customers are charged reasonable rates.¹¹⁹ However, the Arbitrator also recognizes that both CenturyTel and Charter have proposed language restricting application of the liability limitation provision in Article XII, §§ 7.0 to 7.3 in the event of CenturyTel's gross negligence. This aspect of both Parties' language presents a problem as Missouri does not recognize differing degrees of negligence.¹²⁰

¹¹⁹ In *Warner v. SW Bell Tel. Co.*, 428 S.W.2d 596, 601-02 (Mo. 1968), *motion for rehearing or transfer to Court en banc denied* June 10, 1968, the Missouri Supreme Court noted that limitations of liability for directory listing errors or omissions to the amount paid for the service are upheld primarily for two reasons: (1) the liability limitation is contained within a tariff that becomes a part of the law and (2) "since the utility is strictly regulated in its rights and privileges, it should likewise be regulated to some extent in its liabilities, and that such limitations are at least indirectly considered and involved in establishing its rates." In making this decision, the Court cited a number of cases, including, for example *Cole v. Pacific Tel. & Tel. Co.*, 246 P.2d 686 (Cal. Ct. App. 1952), which stated:

The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, "its liability is and should be defined and limited." There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind. Reasonable rates are in part dependent upon such a rule. (citations omitted)

¹²⁰ See discussion *supra* Issue 15(c); *Warner*, 428 S.W.2d at 603.

(255) Charter’s recommended language would cause CenturyTel to be liable for its or its publisher’s “negligence”, in addition to “gross negligence, or intentional or willful misconduct.” Thus, CenturyTel would be liable for its or its publisher’s ordinary negligence, even though such an imposition of liability deviates from industry norms¹²¹ and even though *Charter is solely responsible* for all information required for inclusion in the CenturyTel directory. CenturyTel should not be held to a higher standard of conduct than that commonly used in end user terms and conditions of directory listing contracts or tariffs. Expanding the scope of liability to include “negligence,” as proposed by Charter, is justified neither by public policy considerations nor Missouri law.

(256) 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.¹²² Thus, if an End User Customer

¹²¹ This point is illustrated in part by provisions in Charter’s tariffs, *see, e.g.*, Charter Fiberlink-Missouri, LLC P.S.C. MO. No.1, Local Exchange Tariff, Section 1.5.4 Directory Errors and Omissions, and ICAs it has entered into with other companies. For instance, in an ICA with AT&T (SBC Missouri), Case No. TK-2006-0047, Charter agreed to

release, defend, indemnify, and hold harmless SBC . . . from any claim, demand or suit that asserts any infringement or invasion of privacy or confidentiality of any person or persons caused or claimed to be caused, directly, or indirectly, by SBC . . . employees and equipment associated with provision of DA Services, including but not limited to suits arising from disclosure of the telephone number, address, or name associated with the telephone called or the telephone used to call DA Services.

Appendix DA, at § 10.2. In the same ICA, Charter also agreed to release SBC Missouri

from any and all liability for damages due to errors or omissions in the directory assistance listing information provided under this Appendix, or by reason of delay in providing the directory assistance listing information, including, but not limited to, special, indirect, consequential, punitive or incidental damages.

Appendix DAL, at 5.2.

¹²² Agreement, at Art. XII, § 2.1.2.

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.

(257) Thus, 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.¹²³

(258) Moreover, Charter, and not CenturyTel, has the contractual relationship with Charter's customers. Thus, assuming *arguendo* that such indemnity is not already present, Charter is in a

¹²³ The Arbitrator also finds that should the Commission disagree with its reasoning on this point, he recommends that the Commission find that it is appropriate to reject both Parties' position on this issue. In that situation, given the necessity of the damage cap in this situation, the Arbitrator recommends that the Commission instead utilize its discretion under 4 CSR 240-36.040(19) to avoid a result that is either clearly unreasonable or not in the public interest and adopt language that maintains CenturyTel's proposed language regarding the limitation on damages while also making clear CenturyTel may not exclude liability for its ordinary negligence.

position to negotiate contractual liability limitations or indemnity terms from its customers if it deems such action necessary to protect its interests. CenturyTel's position simply places the risk in question on the Party that has a direct relationship with the end user. Therefore, for this and for the reasons identified above, the Arbitrator also rejects Charter's proposal that CenturyTel indemnify Charter for the errors or omissions of it or its publisher in connection with an error in publication of an end user customer's data or listings.

(259) One problem still remains, namely, both Parties' proposed language includes the phrase "gross negligence." At best, this phrase introduces unnecessary ambiguity into the Agreement; at worst, it potentially conflicts with Missouri law, which does not recognize differing degrees of negligence.¹²⁴ The discussion of Issue 15 adequately details Missouri's law on the concept of gross negligence, so that discussion will not be restated here. However, gross negligence, as defined by many states that recognize the concept, is very similar to the concepts of intentional or willful misconduct in that it requires a conscious, voluntary act in light of the awareness of risk to others to establish gross negligence,¹²⁵ concepts included in both Charter's and CenturyTel's proposed language in Article XII, Section 7.1.

¹²⁴ See discussion *supra* Issue 15; see also *Warner*, 428 S.W.2d at 600 & 603 (Recognizing that Missouri courts do not recognize degrees of negligence, the Missouri Supreme Court stated that the limitation on liability for directory errors or omissions was *effective in situations of mere negligence*, but not for "willful and wanton conduct," where the tariff provision at issue simply limited any recovery in the case of an error or omission (*i.e.*, the tariff did not specify any exceptions whatsoever to the liability limitation by its terms).)

¹²⁵ *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1377 (11th Cir. 2000) (interpreting Florida law) (finding gross negligence requires finding that the defendant knew that certain circumstances existed that constituted a clear and present danger, but still undertook a conscious, voluntary act or omission that was likely to cause injury); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 314 (5th Cir. 2002) (interpreting Texas law) (requiring findings that (1) from the objective view of the actor, the act or omission involved an extreme danger of risk and (2) the actor had an actual, subjective awareness of the risk involved to others' rights, safety, or welfare); *Houston Exploration Co. v. Halliburton Energy Servs., Inc.*, 269 F.3d 528, 531 (5th Cir. 2001) (interpreting Louisiana law) (regarding gross negligence as conduct that is willful, wanton, and reckless that falls short of intent to do wrong); *Curley v. AMR Corp.*, 153 F.3d 5, 13 (2d Cir. 1998) (interpreting New York law) (defining gross negligence as that conduct evincing a reckless disregard for the rights of others or smacks of intentional wrongdoing); *Palace Exploration Co. v. Petroleum Development Co.*, 374 F.3d 951, 954 (10th Cir. 2004) (interpreting Oklahoma law) (defining gross negligence as the intentional failure to perform a manifest duty in reckless disregard of

(260) Because including the term “gross negligence” introduces, at a minimum, unnecessary ambiguity, the Arbitrator exercises his discretion under Rule 4 CSR 240-36.040(19) to avoid a result that is either clearly unreasonable or not in the public interest. Therefore, the Arbitrator approves language limiting CenturyTel’s liability to a CLEC or its end user customers for any errors or omissions in any end user customer’s or CLEC’s listing published by CenturyTel, or for the publication of any end user customer’s data where such end user customer does not desire a published listing, *“except with respect to errors or omissions caused by the intentional or willful misconduct of CenturyTel.”* In all other respects, CenturyTel’s proposed language for Section 7.1 is approved.¹²⁶ This language is consistent (1) with industry practices and (2) with each Party’s language on this issue, with the exception of Charter’s desire to include ordinary negligence as a situation in which CenturyTel’s liability for a directory error should not be limited.

(261) In all other respects, the Arbitrator finds that CenturyTel’s language for Article XII, §§ 7.0 to 7.3 set forth on pages 102-105 of the Joint Statement relating to Issue 31 should be and hereby is approved for the reasons identified herein.

the consequences or in callous indifference to life, liberty, or property of another such that a finding of a willful, wanton, deliberate act is justified).

¹²⁶ Thus, the full text of Art. XII, Section 7.1 should state:

7.1 CenturyTel’s liability to **CLEC or any **CLEC End User Customer for any errors or omissions in Directories published by CenturyTel and/or Publisher (including, but not limited to, any error in any End User Customer or **CLEC listing), or for any default or breach of this Article, or for any other claim otherwise arising hereunder, shall be limited to amounts paid by **CLEC to CenturyTel under this Article. Except with respect to errors or omissions caused by the intentional or willful misconduct of CenturyTel, CenturyTel shall have no liability to **CLEC’s or its End User Customers for any errors or omissions in any End User Customer or **CLEC listing published by CenturyTel, or for the publication of any End User Customer data where such End User Customer does not desire a published listing. **CLEC shall fully indemnify CenturyTel in accordance with the provisions of Section 7.2 below as to any errors or omissions in a **CLEC End User Customer listing for which CenturyTel is not liable under this section. **CLEC expressly represents that it is authorized to enter into this provision on behalf of itself and its End User Customers.

(262) With regard to the relationship between Issue 31 and Issue 15(c), the Arbitrator finds CenturyTel's conditional acceptance of the language "this Agreement," to be reasonable, and, as the Arbitrator has accepted CenturyTel's position on Issue 31, with the limitations noted above, the Arbitrator also accepts Charter's language of "this Agreement," in Article III, § 30.3.3.13, finding such a modification to be a reasonable limitation on liability for both Parties.

ISSUE 32

A. Positions of the Parties

1. Charter's Position

(263) Charter's proposed language for the Agreement to resolve this Issue is set forth on pages 105-107 of the Joint Statement. Charter requests that the Agreement set forth each Party's obligations to ensure that each Party's subscribers can obtain correct basic listing information relating to the other Party's subscribers. (Lewis Direct Testimony, 12:9-15) Charter acknowledges that currently directory assistance information is available on a satisfactory basis. (*Id.*, 12:17-21 and Tr. 205:9-23; 211:17-19) However, Charter experienced past problems with availability of directory assistance information due to problems that CenturyTel experienced with its vendor and therefore requests that language be included in the Agreement concerning directory assistance obligations of the Parties. (*Id.*, 14:25-15:2; Lewis Rebuttal Testimony, 11:21-12:6)

2. CenturyTel's Response to Charter's Position

(264) CenturyTel's proposed language for the Agreement to resolve this Issue is set forth on pages 105-107 of the Joint Statement. CenturyTel's position is that it is meeting its obligation to provide Charter with non-discriminatory access to directory assistance. (Miller Direct Testimony, 58:18-28) CenturyTel objects to Charter's apparent demand 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. (*Id.*, 59:1-11)

CenturyTel is not a directory assistance provider. (*Id.*, 59:13-17)

B. The Arbitrator’s Decision

(265) 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 access to . . . directory assistance” The definition of “nondiscriminatory access” is provided in 47 C.F.R. § 51.217.

(266) 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. (Lewis Direct Testimony, 12:18; 14:17-19; Miller Rebuttal Testimony, 43:11-16)

(267) The evidence in the record 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). (Miller Direct Testimony, 60:14-20) 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.

(268) 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.

ISSUE 35¹²⁷

A. Positions of the Parties

1. Charter’s Position

(269) Similar to the arguments set forth in regard to Issue 15(c), Charter contends that damages relating to liability for 911 system errors should not be limited to “an amount equal to the prorated allowance of the applicable rate set forth in Article XI (Pricing) for the service or facilities provided to **CLEC for the time such interruption to service or facilities continues, after notice by **CLEC to CenturyTel.” Additionally, Charter contends that the limitations on liability for civil damages should extend to it as well as CenturyTel and that, as in Issue 15(c), any limitation on liability should not apply in situations of negligence, gross negligence, or intentional or willful misconduct.¹²⁸

2. CenturyTel’s Response to Charter’s Position

(270) CenturyTel points out that the Article VII, § 9 provisions it proposes essentially mirror similar provisions in CenturyTel of Missouri’s General and Local Exchange Tariff, PSC MO No.

¹²⁷ As indicated previously, the Parties agreed Issue 35 would be “briefing only.” See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties’ positions relating to this issue is derived from the Joint Statement.

¹²⁸ Charter’s position on Issue 35 is more fully set forth on pages 113-115 of the Joint Statement.

1,¹²⁹ and CenturyTel's Wholesale 911 tariff, PSC MO No. 10.¹³⁰ Additionally, CenturyTel reasserts its stated positions on the limitations of liability and damages from Issues 15 and 31.¹³¹

B. The Arbitrator's Decision

(271) Consistent with its determinations on Issues 15 and 31, the Arbitrator adopts the language proposed by CenturyTel for Issue 35. In making this determination, the Arbitrator notes once again that reasonable limitations on liability are necessary to ensure that services are provided at reasonable rates.¹³² However, under Charter's proposed language, the potential liability associated with a 911 system error is unlimited and constitutes a concern greater than was even present with an error or omission in the directory listings given the unknown ramifications of a 911 error. The Arbitrator also notes that CenturyTel's language is nearly identical to language contained within CenturyTel of Missouri's General and Local Exchange Tariff, PSC MO No. 1,¹³³ and CenturyTel's Wholesale 911 tariff, PSC MO No. 10.¹³⁴ Therefore, this language will result in similar treatment of Charter in comparison to other CLECs purchasing similar services from CenturyTel.¹³⁵ Thus, the Arbitrator adopts CenturyTel's language regarding Sections 9.3 and 9.6.

(272) At the same time, I again note that both Charter's and CenturyTel's language uses the term "gross negligence." In this situation, however, the phrase does not present the same difficulties as it did in Issues 15 and 31, as the phrase is not being used in conjunction with a phrase on ordinary negligence and as the phrase is not being used to import liability on the Party

¹²⁹ See MO PSC No. 1, at Section 11, First Revised Sheet 40 – First Revised Sheet 42.

¹³⁰ See MO PSC No. 1, at Original Page 15 – Original Page 17.

¹³¹ Additionally, CenturyTel's position on Issue 35 is set forth, in part, on pages 113-115 of the Joint Statement.

¹³² See discussion *supra* note 119.

¹³³ See MO PSC No. 1, at Section 11, First Revised Sheet 40 – First Revised Sheet 42.

¹³⁴ See MO PSC No. 1, at Original Page 15 – Original Page 17.

¹³⁵ With similarities to the tariff in mind, the Arbitrator also does not agree with Charter's implication that *Mo. Rev. Stat.* § 392.350 makes CenturyTel's liability limitations inapplicable.

that should not bear it. As noted by Charter, *Mo. Rev. Stat. § 392.350* creates a situation in which a telecommunications company is liable for losses, damages, or injuries caused by a forbidden or unlawful act or by the failure to do an act required by the Missouri statutes or Missouri Commission. Additionally, *Reed v. Western Union Telegraph Co.*¹³⁶ makes clear that a telecommunications company may be liable for ordinary negligence if it fails to carry out its duties. However, as noted above, under Missouri law, there is no distinction between gross negligence and ordinary negligence. Thus, CenturyTel's language does not create an unlawful exclusion.

(273) That is not to say, however, that Missouri law does not allow for such liability to be limited. Indeed, in *Poor v. Western Union Telegraph Co.*¹³⁷ and *Western Union Telegraph Co. v. P.S.C.*,¹³⁸ the Missouri Supreme Court held that while telecommunications companies were liable for ordinary negligence, the limitation on damages provisions at issue in the company's tariffs were enforceable. Likewise, in a more recent case, *Sturm v. Western Union Telegraph Co.*,¹³⁹ the district court recognized that a claim for negligence against a telecommunications company for failure to deliver a telegram was based on *Mo. Rev. Stat. § 392.350*; however, the court validated the liability limitation at issue. As the Court stated in *Western Union Telegraph Co. v. P.S.C.*, "In determining their charges, telegraph companies as well as carriers have the right to apply the principle that the compensation should bear a reasonable relation to the risk and responsibility undertaken." This is the same principle underlying Issues 15 and 31.

¹³⁶ 37 S.W. 904 (Mo. 1896).

¹³⁷ 196 S.W. 28 (Mo. 1917).

¹³⁸ 264 S.W. 669 (Mo. 1924).

¹³⁹ No. 89-6109-CV-SJ-6, 1990 WL 118281 (W.D. Mo. Aug. 10, 1990).

(274) For the foregoing reasons, the Arbitrator adopts CenturyTel's language in Art. VII, Sections 9.3 and 9.6.

ISSUE 36¹⁴⁰

A. Positions of the Parties

1. Charter's Position

(275) Charter argues that the indemnity provisions at issue in Section 9.4 should apply to both Parties and that CenturyTel is seeking an unfair advantage by requesting the indemnification provisions apply only to it.¹⁴¹

2. CenturyTel's Response to Charter's Position

(276) CenturyTel argues that its language is a standard indemnity provision and is reasonable because CenturyTel is responsible for managing the Database Management System ("DBMS") and relaying subscriber information to the different counties. CenturyTel also points out that Charter is responsible for providing CenturyTel the subscriber information it transmits to counties under Article VII, § 4.5. Thus, CenturyTel could face liability if Charter transmits inaccurate information. Finally, third parties such as wireless or nomadic VoIP providers may assert claims against CenturyTel based on Charter's acts or omissions.¹⁴²

B. The Arbitrator's Decision

(277) Although CenturyTel provides many examples of the type of liability it could incur as a result of Charter's acts or omissions, Charter has failed to identify any situation in its position statement in the Joint Statement as to why it may require indemnification from CenturyTel in Article VII, § 9.4. At most, Charter appears to argue for reciprocity for the sake of reciprocity, providing no reason for such a result. Thus, as Charter has failed to identify any reason as to why

¹⁴⁰ As indicated previously, the Parties agreed Issue 36 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties' positions relating to this issue is derived from the Joint Statement.

¹⁴¹ Charter's position on Issue 36 is more fully set forth on pages 115-116 of the Joint Statement.

¹⁴² CenturyTel's position on Issue 36 is more fully set forth on pages 115-116 of the Joint Statement.

it should be indemnified by CenturyTel, the Arbitrator adopts CenturyTel's proposed language for Article VII, § 9.4.

ISSUE 37¹⁴³

A. Positions of the Parties

1. Charter's Position

(278) Charter argues that the limitation of liability provisions at issue in Article VII, § 9.7 should apply to both Parties and that CenturyTel is seeking an unfair advantage by requesting the limitation of liability provisions apply only to it.¹⁴⁴

2. CenturyTel's Response to Charter's Position

(279) CenturyTel contends that the limitation of liability provisions at issue in Article VII, § 9.7 are appropriate for reasons similar to those stated in Issue 36. Additionally, CenturyTel notes that Missouri law does not provide a telecommunications carrier such as CenturyTel with statutory immunity from liability for E911 services.¹⁴⁵

B. The Arbitrator's Decision

(280) 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 using the information to provide 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.

(281) 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

¹⁴³ As indicated previously, the Parties agreed Issue 37 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties' positions relating to this issue is derived from the Joint Statement.

¹⁴⁴ Charter's position on Issue 37 is more fully set forth on page 116 of the Joint Statement.

¹⁴⁵ CenturyTel's position on Issue 37 is more fully set forth on page 116 of the Joint Statement.

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.¹⁴⁶ 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.

(282) 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.

(283) 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 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. Whether Charter is subject to potential liability to its customers (or anyone else) for transmitting inaccurate information to CenturyTel is an entirely separate matter. As noted in Issue 31, Charter is in a position to negotiate appropriate limitations of liability with its customers (or whomever else may be able to state a claim against it

¹⁴⁶ 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.”)

for transmitting inaccurate information to CenturyTel) if it deems such action necessary to protect its interests.

(284) Therefore, for the foregoing reasons, the Arbitrator adopts CenturyTel's proposed language regarding Issue 37.

ISSUE 38¹⁴⁷

A. Positions of the Parties

1. Charter's Position

(285) Charter contends that the term "nonregulated telephone service" is ambiguous because it is not meaningfully defined and will, therefore, invite disputes. For similar reasons, Charter argues that limitation of liability with regard to 911 services is therefore inappropriate.¹⁴⁸

2. CenturyTel's Response to Charter's Position

(286) CenturyTel states that its proposed language will address situations where Charter is selling its services to a nomadic VoIP provider or to a shared tenant provider. CenturyTel is also concerned that certain EAS traffic or improperly numbered traffic such as "foreign dial tone" will not route correctly to the PSAP, due to no fault of CenturyTel. CenturyTel objects to Charter's language because it does not address these concerns and only restates part of Charter's obligations under the Agreement.¹⁴⁹

B. The Arbitrator's Decision

(287) The Arbitrator agrees with CenturyTel that Charter's proposed language details only a limited portion of Charter's obligations under the Agreement,¹⁵⁰ creating a potential for ambiguity that is likely greater than any ambiguity by using the undefined term "nonregulated telephone

¹⁴⁷ As indicated previously, the Parties agreed Issue 38 would be "briefing only." See October 16, 2008, letter from counsel to the Arbitrator. Thus, the Parties' positions relating to this issue is derived from the Joint Statement.

¹⁴⁸ Charter's position on Issue 38 is more fully set forth on page 117 of the Joint Statement.

¹⁴⁹ CenturyTel's position on Issue 38 is more fully set forth on page 117 of the Joint Statement.

¹⁵⁰ Article VII, §§ 4.0 to 4.6.2.

services.” Moreover, the very nature of “nonregulated telephone services” is such that it includes all services that are not regulated, which is, by law, a defined set of services. Thus, such a definition is likely unnecessary. Indeed, Charter certainly could have proposed such a definition to alleviate the one concern with CenturyTel’s language that it states in the Joint Statement. CenturyTel has also articulated several situations in which it is concerned about liability, and the Arbitrator finds those concerns to be reasonable. Thus, the Arbitrator adopts CenturyTel’s language for Article VII, § 9.8.

ISSUE 40

A. Positions of the Parties

1. Charter’s Position

(288) Charter’s position on this issue is set forth on pages 121 to 122 of the Joint Statement. Charter proposes to exclude all language in the Agreement that provides pricing for a Party to charge another Party for the processing of a local service requests related to porting a telephone number. Consistent with its position on Issue 27, Charter suggests that there should be no local service request charge relating to a request to port a telephone number. (Joint Statement, 121-122) Charter offered no pricing evidence to justify a local service request price for the Agreement relating to local service requests sent by CenturyTel to Charter. Charter did assert that no reliable cost support had been provided to justify the proposed rates presented by CenturyTel. (Gates Direct Testimony, 82:3-8) Additionally, Charter made some additional unsupported assertions attacking the study. (Gates Rebuttal Testimony, 95:3-21) Charter ultimately requested that if rates for local service requests are going to be provided in the Agreement, the Commission should first “fully investigate CenturyTel’s alleged costs in a cost proceeding to ensure their compliance with the FCC’s rules and this Commission’s rules . . .” (Gates Rebuttal Testimony, 94:20-95:1)

2. CenturyTel’s Response to Charter’s Position

(289) CenturyTel's position on this issue is set forth on pages 121 to 122 of the Joint Statement. CenturyTel's position is consistent with its position regarding Issue 27. CenturyTel has presented a cost study to support the rates proposed by CenturyTel. This information was first provided to Charter in July 2008 (Schultheis Rebuttal Testimony, 3:20-21) and was the subject of discovery by Charter. (Reynolds Direct Testimony 13:8-10; Schultheis Rebuttal Testimony 3:21-23) 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 are compliant with the costing methodology standards applicable under 47 U.S.C. § 251. (Reynolds Direct Testimony, 13:4-7; Schultheis Rebuttal Testimony, 11:10-14)

(290) CenturyTel's expert did state that the cost study was not conducted exactly how he would have designed the study. (Tr., 494:20-24) This statement at the hearing confirmed the expert's prefiled testimony that there is more than one way to develop a cost study. (Schultheis Rebuttal Testimony, 11:19-20) Additionally, even though the study may not have been conducted in the same manner, CenturyTel's expert stated that the study's "methodology is sound and the result of applying the methodology to the costs and demand amply supports the rates at issue in this proceeding." (*Id.*, 11:21-23) Mr. Schultheis' testimony establishes that he completely reviewed and investigated the cost study and believes it to be in compliance with the requirements for pricing in this proceeding. (*Id.*, 5:18-11:6 (describing study and methodology used to determine rates) and 11:7-14, (stating that the rates provided by CenturyTel should be used in the Agreement and were compliant with the costing methodology standards required by 47 U.S.C. § 251.))

B. The Arbitrator's Decision

(291) The Arbitrator has already determined in connection with Issue 27 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.

(292) CenturyTel was the only Party to present evidence regarding rates that should be contained in the Agreement. Charter does present summary testimony questioning the rates proposed by CenturyTel, but did not provide any substantive testimony or support regarding the details of these criticisms. Charter requests that, instead of including the rates proposed by CenturyTel, the Commission should open a cost docket to investigate and determine the rates for service orders.

(293) The support for the rates proposed by CenturyTel and the testimony provided by Mr. Schultheis has been reviewed and the Arbitrator believes his testimony to be credible. The expert opinions of Mr. Schultheis and Mr. Reynolds provide a sufficient basis to determine that the rates proposed by CenturyTel should be used in the Agreement. As a result, there is no need for a cost proceeding as suggested by Charter.

(294) Accordingly, the Agreement should include the rates and terms set forth by CenturyTel for Article II, § 2.70.

VI. CONCLUSION

(295) Pursuant to the Amended Order Setting Procedural Schedule, the Parties shall have to and including December 22, 2008, to file Comments on the foregoing Arbitrator’s Draft Order, after which the Arbitrator will consider all Comments and will issue the Final Order not later than January 6, 2009, for consideration by the Commission.

DATED: November 20, 2008

Respectfully submitted,

/s/ Larry W. Dority

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Certificate of Service

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

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EXHIBIT A: PARTIES' STATEMENT OF THE ISSUES

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
1.	RESOLVED Should the proposed Agreement cover all "IP-enabled Traffic?"	RESOLVED Should the Parties' Agreement use the definition of Interconnected VoIP Service traffic as defined, and codified in federal regulations?
2	How should the Interconnection Agreement define the term Network Interface Device or "NID"?	How should the Interconnection Agreement define the term Network Interface Device or "NID"?
3	There are two separate issues presented in Issue 3: (a) How should the Agreement define the term "Tariff"? (b) How should the Tariffs be referenced and incorporated into the Agreement?	There are two separate issues presented in Issue 3: (a) How should the Agreement define the term "Tariff"? (b) How should the Tariffs be referenced and incorporated into the 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 cure such default within thirty (30) days after receiving notice of such default? How should "default" be defined in the Agreement?	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?
4(b)	What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?	What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?
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?	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?

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
6	RESOLVED Under what conditions should CenturyTel be permitted to require a deposit or assurance of payment from Charter?	RESOLVED Under what conditions should CenturyTel be permitted to require a deposit or assurance of payment from Charter?
7	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?	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?
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?	Should the bill payment terms related to interest on overpaid amounts be equitable?
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 refuses to pay "undisputed" charges?	Should the bill dispute provisions ensure that neither Party can improperly terminate the Agreement in a manner that could impair service to the public?
9	RESOLVED If CenturyTel builds interconnection plant or facilities at Charter's request and Charter fails to use such plant or facilities within six (6) months, may CenturyTel reserve the right to assess a stranded interconnection plant/facility charge on Charter?	RESOLVED Should Charter be required to pay a penalty charge for facilities that it forecasts, but which CenturyTel determines that Charter has not fully utilized?
10	When should certain changes in law be given retroactive effect?	When should certain changes in law be given retroactive effect?

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
11	<p>Should certain business and operational processes and procedures set forth in CenturyTel's "Service Guide" be incorporated by reference into the Agreement?</p> <p>Parties' Agreed-to Statement of Sub-issues:</p> <p>Should the CenturyTel Service Guide be incorporated for: establishing bill dispute processes?</p> <p>Should the Century Tel Service Guide be incorporated for: providing escalation lists?</p> <p>Should the Century Tel Service Guide be incorporated for: reporting and resolving circuit troubles or repairs?</p> <p>Should the CenturyTel Service Guide be incorporated for: submitting LNP requests?</p> <p>Should the CenturyTel Service Guide be incorporated for: "service ordering, provisioning, billing and maintenance processes and procedures"?</p>	<p>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?</p> <p>Parties' Agreed-to Statement of Sub-issues:</p> <p>Should the CenturyTel Service Guide be incorporated for: establishing bill dispute processes?</p> <p>Should the Century Tel Service Guide be incorporated for: providing escalation lists?</p> <p>Should the Century Tel Service Guide be incorporated for: reporting and resolving circuit troubles or repairs?</p> <p>Should the CenturyTel Service Guide be incorporated for: submitting LNP requests?</p> <p>Should the CenturyTel Service Guide be incorporated for: "service ordering, provisioning, billing and maintenance processes and procedures"?</p>
12	<p>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?</p>	<p>Should the Agreement allow one Party to force the other Party into commercial arbitration under certain circumstances?</p>

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
13	<p>There are two issues presented in this Issue 13:</p> <p>(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 providing written notice of such dispute, or otherwise waive the dispute?</p> <p>(b) To the extent a "Claim" arises under the Interconnection 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"?</p>	<p>Should the Parties agree to a reasonable limitation as to the period of time by which claims arising under the Agreement can be brought?</p>
14	<p>There are two issues presented in this Issue 14:</p> <p>(a) If Charter requests that CenturyTel provide a service or perform an act not otherwise provided for under the Agreement, and Charter pre-approves the quoted costs of CenturyTel's performance, should the Agreement include a provision requiring Charter to pay such costs as pre-approved by Charter?</p> <p>(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.</p>	<p>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?</p>

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
15(a)	<p>Issue 15(a) consists of two sub- parts):</p> <p><u>Part (1):</u> Should indemnification obligations be triggered by agreed-upon threshold issues or instead become the basis for protracted disputes between the Parties?</p> <p><u>Part (2):</u> Should the items of damage and cost for which the Indemnifying Party is responsible be identified where the claimant is that Party's customer?</p>	<p>Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to be negligent, grossly negligent, or constituting intentional or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?</p>
15(b)	<p>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?</p>	<p>Should the Parties disclaim implied warranties related to the provision of "information and services" that may arise under the Uniform Computer Information Transactions Act (UCITA)?</p>
15(c)	<p>Should the Agreement limit damages in a manner that is consistent with telecommunications industry practice and Charter's own customer agreements and tariffs?</p>	<p>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?</p>
16	<p>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?</p>	<p>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?</p>
17	<p>Should the Interconnection 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?</p>	<p>Should Charter be contractually bound by terms concerning liability for carrier change requests that exceed its obligations under existing law?</p>
18	<p>What terms and conditions that govern the Point of Interconnection (POI) and trunking arrangements should be included in the Interconnection Agreement?</p>	<p>Should Charter be entitled to interconnect with CenturyTel at a single point of interconnection (POI) within a LATA?</p>

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
19	Should the Agreement between the Parties limit the voluntary utilization of third party transit arrangements to a DS1 level of traffic?	Should Charter's right to utilize indirect interconnection as a means of exchanging traffic with CenturyTel be limited to only those instances where Charter is entering a new service area, or market?
20	How long should the Agreement provide the Parties to negotiate cost-based rates for such facilities before they may seek Commission intervention?	Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?
21	<p>There are two separate issues presented in Issue 21.</p> <p>(a) Under what terms and conditions should one-way trunks be used for the exchange of traffic within the scope of this Agreement?</p> <p>(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?</p>	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?
22	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?	What threshold test should be used to determine when the Parties will establish direct end office trunks?

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
23	<p>There are two separate issues presented in Issue 23:</p> <p>(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?</p> <p>(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?</p>	<p>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?</p>
24	<p>CenturyTel believes that there are two issues presented in this issue:</p> <p>(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?</p> <p>(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?</p>	<p>Should Charter have access to the customer side of the Network Interface Device ("NID") without having to compensate CenturyTel for such access?</p>
25	<p>RESOLVED</p> <p>How should the Parties define certain extraordinary and unique port requests which may require a unique process known as "project management"?</p>	<p>RESOLVED</p> <p>How should the Parties define certain extraordinary and unique port requests which may require a unique process known as "project management"?</p>
26	<p>RESOLVED</p> <p>Should the Agreement set forth the specific interval applicable to port requests using an LSR and the specific time deadline for returning a Firm Order Confirmation (FOC) associated with such LSR?</p>	<p>RESOLVED</p> <p>Should the Parties agree to complete number port requests pursuant to the intervals and confirmation periods ("FOCs") required by applicable law?</p>

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
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?	Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter's network?
28	Does CenturyTel have the right to monitor and audit Charter's access to its OSS?	Does CenturyTel have the right to monitor and audit Charter's access to its OSS?
29	Should the Agreement preserve CenturyTel's rights to recover from Charter certain costs of providing access to "new, upgraded, or enhanced" OSS?	Should the Agreement preserve CenturyTel's rights to recover from Charter certain unspecified costs of providing access to "new, upgraded, or enhanced" OSS?
30	RESOLVED What information regarding Directory close dates is CenturyTel required to provide Charter and in what manner?	RESOLVED What information regarding Directory close dates is CenturyTel required to provide Charter and in what manner?
31	How should each Party's liability be limited with respect to information included, or not included, in Directories?	How should each Party's liability be limited with respect to information included, or not included, in Directories?
32	How should the Agreement define each Party's directory assistance obligations under Section 251(b)(3)?	How should the Agreement define each Party's directory assistance obligations under Section 251(b)(3)?
33	RESOLVED Is Charter entitled to lease CenturyTel facilities for the purpose of connecting Charter's network to CenturyTel's 911 networks? If so, is Charter entitled to lease such facilities at TELRIC rates?	RESOLVED Should CenturyTel be required to make 911 facilities available to Charter at cost-based rates pursuant to Section 251(c)?
34	RESOLVED Should Charter be required to obtain certain specific routing parameters in the event that it decides to use a third party provider in the future?	RESOLVED What obligations does Charter have to obtain certain specific routing parameters, even though Charter traffic does not utilize, or require, such parameters?
35	Should CenturyTel's liability for 911 system errors be limited to the reasonable cost of replacement services?	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?

Issue No.	CenturyTel's Statement of the Issues	Charter's Statement of the Issues
36	Should CenturyTel be protected from third party liability related to 911 system errors caused by Charter?	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?
37	Should CenturyTel be protected from third party liability related to Charter's errors in providing subscriber information to CenturyTel?	Should the Agreement limit both Parties' liability related to the release of information, including nonpublished and nonlisted information, in response to a 911 call?
38	Should CenturyTel be liable for incorrectly routed 911 service, when such incorrect routing is not CenturyTel's fault?	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?
39	RESOLVED Should CenturyTel be entitled to assess certain additional 911-related fees and assessments upon Charter?	RESOLVED Should CenturyTel be entitled to assess certain additional 911-related fees and assessments upon Charter?
40	Should the Pricing Article include Service Order rates and terms? (This issue is related to issue 27, above.)	Should the Pricing Article include Service Order rates and terms? (This issue is related to issue 27, above.)
41	How should specific Tariffs be incorporated into the Agreement? (This issue is related to Issue 3.)	How should specific Tariffs be incorporated into the Agreement? (This issue is related to Issue 3.)

EXHIBIT B: STATEMENT OF ISSUES RESOLVED BY THE PARTIES

Since the filing of Charter's Petition, the Parties have continued to negotiate on the issues, and they have agreed to the below stated language on Issues 1, 6, 9, 25, 26, 30, 33, 34, and 39. The Arbitrator finds the Parties' negotiated language on these issues to be reasonable and hereby approves the same.

ISSUE 1

[Article II, §§ 2.80, 2.89; Article V, §§ 4.2.1, 4.2.1.2, 4.2.1.3 and 4.2.6]

The Arbitrator approves the following language for Articles II and V of the Agreement:

Article II:

2.80 Interconnected VoIP Service Traffic

Interconnected VoIP Service Traffic is traffic that is provisioned via a service that: (1) enables real-time, two-way voice communications; (2) requires a broadband connection from the user's location; (3) requires Internet protocol-compatible customer premises equipment (CPE); and (4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

2.89 Local Traffic

For purposes of Article V of this Agreement, Local Traffic is traffic (excluding CMRS traffic) that is originated and terminated within the CenturyTel Local Calling Area, or mandatory Extended Area Service (EAS) area, as defined in **Section 1** of the CenturyTel of Lake Dallas Inc. General Exchange Tariff on file with the Public Utility Commission of Texas. Local Traffic does not include optional local calling (i.e., optional rate packages that permit the end-user to choose a Local Calling Area beyond the basic exchange serving area for an additional fee), referred to hereafter as "optional EAS". Local Traffic includes Information Access Traffic to the extent that the end user and the ISP are physically located in the same CenturyTel Local Calling Area. Local Traffic includes Interconnected VoIP Service Traffic to the extent that the originating end user and the terminating end user are physically located in the same CenturyTel Local Calling Area.

Article V:

- 4.2.1 The Telecommunications traffic exchanged between **CLEC and CenturyTel will be classified as Local Traffic, ISP-Bound Traffic, Interconnected VoIP Service Traffic, intraLATA Toll Traffic, or interLATA Toll Traffic.

...

4.2.1.2 “ISP-Bound Traffic” means traffic that originates from or is directed, either directly or indirectly, to or through an information service provider or Internet service provider (ISP) who is physically located in an exchange within the local calling area of the originating End User. Traffic originated from, directed to or through an ISP physically located outside the originating End User’s local calling area will be considered toll traffic and subject to access charges.

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

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

...

4.2.6 As set forth in Section 4.2.1.3 of this Article, Interconnected VoIP Service Traffic shall be assigned to the corresponding jurisdiction for compensation purposes, if all the signaling parameters are included with the traffic exchange. Calling Party Number (“CPN”) and Jurisdictional Indicator Parameter (“JIP”) of the originating Interconnected VoIP Service Traffic shall

indicate the geographical location of the actual IP caller location, not the location where the call enters the PSTN.

ISSUE 6

[Article III, §6].

The Arbitrator approves the following language for Article III of the Agreement:

6. ASSURANCE OF PAYMENT

- 6.1 When a Deposit/Assurance of Payment Is Required. Charter shall be required, upon CenturyTel's request, to provide CenturyTel with a deposit for, or an adequate assurance of payment of, amounts due (or to become due) to CenturyTel hereunder, upon the occurrence of one or more of the following conditions:
- 6.1.1 Charter has received at least two (2) delinquent notices¹⁵¹ in the prior twelve months;
 - 6.1.2 Charter is a new entrant to the market or an affiliate to an existing CLEC ("New Entrant") and has not been in service long enough to have already established satisfactory credit by having made at least twelve (12) consecutive months of timely payments to CenturyTel for charges incurred as a CLEC;
 - 6.1.3 there is deemed by CenturyTel to be an "impairment of credit" of the "New Entrant," as defined in Section 6.1.2, at the initial establishment of credit. For purposes of this Section 6.1.3, an "impairment of credit" will be determined from information available from financial sources, that the New Entrant has not maintained a BBB or better long term debt rating or an A-2 or better short term debt rating by Standard and Poor's for the prior six months;
 - 6.1.4 Charter (a) fails to timely pay a bill rendered to it (except such portion of a bill that is subject to a good faith, bona fide dispute and as to which the Billed Party has complied with the billing dispute requirements set forth in this Agreement), and (b) the amount of such undisputed delinquency exceeds five percent (5%) of the aggregate amount billed by CenturyTel to Charter under this Agreement for the month in question; or
 - 6.1.5 Charter (a) admits its inability to pay its debts as such debts become due, (b) has commenced a voluntary case (or has had an involuntary case commenced against it) under the U.S. Bankruptcy Code or any other law

¹⁵¹ Delinquent notices as used in this Section 6, refer to notices issued to Charter by CenturyTel for unpaid, undisputed amounts.

relating insolvency, reorganization, winding-up, composition or adjustment of debts or the like, (c) has made an assignment for the benefit of creditors, or (d) is subject to a receivership or similar proceeding.

- 6.2 If a deposit is required under Section 6.1 above, Charter shall remit the deposit amount to CenturyTel within thirty (30) calendar days of receipt of written notification requiring such deposit. If Charter fails to furnish the required deposit, CenturyTel may, at its sole discretion, suspend processing Charter's orders until the deposit is remitted.
- 6.3 Calculating the Amount of Deposit/Assurance of Payment. Unless otherwise agreed by the Parties, a deposit required under Section 6.1 will be calculated based on the greater of (1) CenturyTel's anticipated two (2)-month charges to Charter (including, but not limited to, both recurring and non-recurring charges) as reasonably determined by CenturyTel, for interconnection facilities and any other facilities or services to be furnished by CenturyTel under this Agreement, or (2) \$5,000.
- 6.4 Modifying the Amount of Deposit/Assurance of Payment. Throughout the Term of this Agreement, CenturyTel reserves the right to request an additional amount of the deposit or assurance of payment required of Charter if Charter is repeatedly delinquent in making its payments, or Charter is being reconnected after a disconnection of service. "Repeatedly delinquent" means any undisputed payment received thirty (30) calendar days or more after the bill due date, three (3) or more times during a twelve (12) month period. In such a case, the deposit amount shall be re-evaluated based upon actual billing totals and shall be increased if Charter's actual billing average for the most recent three (3)-month period exceeds the deposit amount held. However, in no event will the total amount of deposit required under this Section 6 exceed the total of Charter's actual billing average for the most recent three (3)-month period.
- 6.5 Return of Deposit. If, during the course of this Agreement, Charter provides a deposit pursuant to this Section 6, and subsequently establishes a minimum of eighteen (18) consecutive months good payment history with CenturyTel when doing business as a local service provider, CenturyTel shall return the initial deposits, with interest; provided, however, that the terms and conditions set forth herein shall continue to apply for the remainder of the Term. In determining whether Charter has established a minimum of eighteen (18) consecutive month's good payment history, Charter's payment record for the most recent eighteen (18) monthly billings shall be determinative.
- 6.6 Form of Deposit/Assurance of Payment. Unless otherwise agreed by the Parties, the deposit or assurance of payment shall consist of (a) a cash security deposit in U.S. dollars held by CenturyTel, (b) an irrevocable standby letter of credit naming CenturyTel as the beneficiary thereof, (c) a surety bond in a form acceptable to CenturyTel, or (d) some other form of security as the Parties may mutually agree.

- 6.7 Interest on Cash Deposit. CenturyTel shall pay interest on any such cash deposit in accordance with state requirements for End User deposits if such exist.
- 6.8 Drawing on Deposit/Assurance of Payment. Where a deposit is required under this Section 6, CenturyTel may (but is not obligated to) draw on the letter of credit or cash deposit, as applicable, upon notice to Charter in respect of any undisputed amounts to be paid by Charter for services or facilities rendered under this Agreement that are not paid within thirty (30) calendar days of the date that payment of such amounts is required by this Agreement.
- 6.9 Charter's Replenishment of Deposit/Assurance of Payment. If CenturyTel draws on the letter of credit or cash deposit, in accordance with the terms of this Agreement, upon request by CenturyTel, Charter shall provide a replacement or supplemental letter of credit or cash deposit conforming to the requirements of Section 6.3 or 6.4, whichever is applicable.
- 6.10 Effect on Other Obligations. The fact that a deposit or other assurance of payment is requested by CenturyTel hereunder shall in no way relieve Charter from compliance with the requirements of this Agreement (including, but not limited to, any applicable Tariffs) as to advance payments and timely payment for facilities or services, nor constitute a waiver or modification of the terms herein pertaining to the discontinuance of services for nonpayment of any undisputed amounts, payment of which is required by this Agreement.

ISSUE 9

[Article III, §§ 11, 11.5 and 11.6, and Article XI (Pricing), § I(E)]

The Arbitrator approves the following language for Articles III and XI of the Agreement:

Article III:

11. CAPACITY PLANNING AND FORECASTS

Within twenty (20) Business Days from the Effective Date of this Agreement, or as soon after the Effective Date as practicable, to the extent the Parties have not been interconnected pursuant to a prior interconnection agreement, the Parties agree to meet and develop joint planning and forecasting responsibilities which are applicable to interconnection arrangements. Such responsibilities for new interconnection arrangements, and for interconnection trunks or facilities ordered pursuant to a prior interconnection agreement, shall include but are not limited to the following:

....

- 11.5 Capacity forecasts are not binding on either Party. Charter will not be liable to CenturyTel for any situation in which facilities that Charter actually orders do not match Charter's capacity forecast

for such facilities or for any facilities forecasted by Charter but not actually ordered or deployed by Charter.

- 11.6 CenturyTel reserves the right to assess **CLEC a TBD charge for stranded interconnection plant/facility capacity forecast by **CLEC but not used by **CLEC within six (6) months after a forecast period to the extent that CenturyTel built the plant/facility based on **CLEC's order.

Article XI:

I(E). Stranded Interconnection plant/facility per Article III, Section 11.6: "TBD"

ISSUE 25

[Article IX, § 1.2.2.3]

The Arbitrator approves the following language for Article IX of the Agreement:

1.2.2.3 For purposes of this Article, the Donor Party may request to use a project management approach for the implementation of LSRs for large quantities of numbers ported from a single End User location, within a given state. For purposes of this provision, "large quantities" shall mean seventy-five (75) or more numbers. The Donor Party also may request to use a project management approach for the implementation of LSRs for complex ports, which shall be defined as those ports that include complex switch translations (*e.g.*, Centrex, ISDN, AIN services, remote call forwarding, or multiple services on the loop). Under such managed projects ("projects"), the Parties may negotiate implementation details including, but not limited to: due dates, cutover intervals and times, coordination of technical resources, and completion notice.

ISSUE 26

[Article IX, § 1.2.2.1]

The Arbitrator approves the following language for Article IX of the Agreement:

1.2.2.1 The LSR will have a requested due date that is not less than the standard interval of four (4) Business Days.

1.2.2.2 Both Parties agree to provide a Firm Order Confirmation (FOC) to the Recipient Party within 24 hours from the time a LSR is received.

ISSUE 30

[Article XII, Sec. 2.1.2.3]

The Arbitrator approves the following language for Article IX of the Agreement:

2.1.2.3 **CLEC must submit all listing information intended for publication by the applicable Directory close date. CenturyTel shall provide **CLEC with publication schedules, including Directory close dates for the Directories associated with the areas where Charter is providing local service, as well as a list of Directories for which Directory close dates have changed since the last publication schedule was provided. CenturyTel, or its Publisher, shall also provide **CLEC with a list of exchanges for each Directory to enable **CLEC to submit the appropriate listing information for each Directory. All information provided under this provision will be posted on the CenturyTel.com web site, and notification will be provided to **CLEC via CenturyTel's email notification process when the data is updated.

ISSUE 33

[Article VII, § 3.3.1]

The Arbitrator approves the following language for Article VII of the Agreement:

3.3.1 CenturyTel shall provide and maintain sufficient dedicated E911 circuits/trunks from each applicable Selective Router to the PSAP(s) of the E911 PSAP Operator, according to provisions of the applicable State authority, applicable NENA standards and documented specifications of the E911 PSAP Operator. CenturyTel will permit **CLEC to lease 911 facilities from **CLEC's network to CenturyTel's Selective Router(s) at the rates set forth in Article XI (Pricing). **CLEC has the option to secure alternative 911 facilities from another provider to provide its own facilities

ISSUE 34

[Article VII, § 4.6.1]

The Arbitrator approves the following language for Article VII of the Agreement:

If **CLEC uses a third party database provider, and provides Nomadic VoIP Service, as defined in Section 4.3.2 (above), **CLEC shall obtain its own routable but non-dialable ESQs for each PSAP to which CenturyTel provides or shall provide coverage, and shall supply these ESQs to CenturyTel for the Selective Routers servicing each such PSAP. If warranted by traffic volume growth, or if upon request by a PSAP or other governmental or quasi-governmental entity, **CLEC shall promptly obtain the appropriate number of additional ESQs to be allocated to each PSAP as may be appropriate under the circumstances. The term “ESQ” as used herein, shall be defined as an Emergency Services Query Key, which is used by the National Emergency Numbering Association (“NENA”) as a key to identify a call instance at a VoIP Positioning Center, and which is associated with a particular selective router/emergency services number combination.

ISSUE 39

[Article XI (Pricing), § IV(A), (B)]

The Arbitrator approves the following language for Article XI of the Agreement:

IV.911

A. 911 Facilities from the Charter POI to CenturyTel’s SR.

911 Facilities from Charter POI to <u>CenturyTel SR</u>	<u>Monthly Recurring</u>	<u>Nonrecurring</u>
DS1 Termination	\$51.00/mo.	\$ 174.43
DS1 Transport (if applicable)	\$0.61 per mile	\$ 0.00

B. Trunk charges will be paid to CenturyTel for each E911 PSAP to which Charter connects, in addition to the 911 Facilities charges set forth in A.

911 Trunk Charge (per channel)	\$85.00	\$170.00
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C. The E911 Gateway charge set forth in Section IV(C)(i) below only applies to the extent the **CLEC is establishing the gateway connection for the first time. All other services identified under this Section IV(C) are provided only upon **CLEC’s request:

Exhibit B, Continued

Automatic Location Identification (ALI) Database		Monthly <u>Recurring</u>	<u>Nonrecurring</u>
i.	Per Article VII 3.4.5 – If **CLEC uses CenturyTel's E911 gateway	No Charge	\$ 380.00 [†]
ii.	If **CLEC does not utilize CenturyTel's E911 Gateway		
	a. Database Administration, per database	\$ 380.00	\$ 0.00
	b. Database, per non-CENTURYTEL subscriber record for which CENTURYTEL will verify via the MSAG	\$ 0.04	\$0.35
iii.	Third Party FRAD Connectivity		
	Third Party Frame Relay Access Device (FRAD) Connectivity provides for retrieval of ALI Database Information for wireless and competitive Local Providers using a non-CenturyTel Third Party Database Provider over a Non-Call Associated Signaling (NCAS) solution.		
	1) FRAD Access	\$63.44	\$ 0.00
	2) Steerable ALI Software	\$ 71.42	\$1000.00
D.	When requested by **CLEC, additional file copy of the MSAG	\$ 0.00	\$250.00

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