

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Complaint of Charter Fiberlink, LLC Seeking)	
Expedited Resolution and Enforcement of)	
Interconnection Agreement Terms Between)	<u>Case No. LC-2008-0049</u>
Charter Fiberlink-Missouri, LLC and CenturyTel)	
of Missouri, LLC.)	

CENTURYTEL OF MISSOURI, LLC'S
POST-HEARING BRIEF

CenturyTel of Missouri, LLC ("CenturyTel"), in accordance with the Commission's Order Granting Extension of Time to File Briefs dated May 7, 2008, respectfully submits the following post-hearing brief in connection with the above-referenced matter.

Background

This dispute involves administrative processing services that CenturyTel performed for Charter, at Charter's request, in connection with service orders through which Charter requested the porting of phone numbers from CenturyTel.¹ Charter claims that, despite having ordered such services knowing full well that charges would apply, it should be allowed to avoid those charges in their entirety. The basis for Charter's claim is that the charges at issue are unlawful and that the parties' Interconnection Agreement ("ICA") (Ex. 1) does not allow for such charges. Because CenturyTel's charges are lawful, and otherwise enforceable against Charter, CenturyTel

¹ Charter originally claimed that fees related to customer records search requests (CSRs), directory listing fees, and other miscellaneous charges are at issue in this dispute. (Schremp Direct p. 8). However, Charter has been credited for any directory listing and miscellaneous charges, and CenturyTel is not seeking to recover for those charges. (Hankins Rebuttal p. 2). As to the CSRs, Charter acknowledges that it is generally obligated to pay such charges (Hearing Transcript, Vol. 3 p. 124-25). Its challenge is based on alleged non-performance of those services (Hearing Transcript, Vol. 3 p. 124), but Charter provided no evidence on that point, and there is no basis for finding the CSR charges to be invalid. In any event, the portion of the total amount in controversy that Charter contends is related to CSR fees is approximately \$8,500. (Schremp Direct p. 10-11). Accordingly this dispute is about the LSR charges applicable to Charter's number porting requests.

has asked the Commission, through its Answer and Counterclaim, to deny Charter's claims and to substantiate CenturyTel's charges in the amount of \$128,844.45 as due and owing.

This is not the first time that Charter has refused to pay for administrative processing services that were performed in connection with number porting service orders. In fact, Charter and CenturyTel engaged in informal dispute resolution procedures over this same issue during the spring and summer of 2004. At the time, Charter owed CenturyTel approximately \$64,867.61 in past-due service order charges. On June 15, 2004, pursuant to CenturyTel's invocation of agreement default terms for non-payment, Charter paid the past due charges under protest, noting that it would seek a full refund in the appropriate forum (*i.e.* in court or with the Commission) if the parties did not resolve the matter expeditiously. Charter's argument then, as it is now, was that the service order charges are unlawful, and not permitted under the parties' ICA. Based on these claims, Charter initiated a formal dispute resolution under the ICA by a letter dated June 15 and received by CenturyTel on June 16, 2004.

As the dispute resolution process proceeded, Charter maintained its claim that the charges were not appropriate and again threatened to take action to escalate the dispute if CenturyTel did not refund Charter's payment. Specifically, on June 26, 2004 Charter advised CenturyTel that "absent prompt resolution of these issues" it would "pursue all available remedies" including those available before the Commission. Later, by letter dated August 3, 2004 (Exhibit 11), Charter clarified its intent, by stating that if CenturyTel did not provide an explanation for the disputed charges, or provide an appropriate refund, it would "initiate an action for relief" within 45 days.

In response to Charter's request for an explanation of the disputed charges, CenturyTel sent a letter to Charter dated September 2, 2004 (Schedule 1 to Miller Surrebuttal, Ex. 7). In that

letter, CenturyTel explained why the charges were lawful and provided for in the ICA. On the next day, the parties held a phone conference during which CenturyTel reiterated its position, and informed Charter that it was sustaining its charges and would not be providing a refund.

After the September 3, 2004 phone conference, Charter took no further action to recover the \$64,867.61 in payments that it claimed it did not owe. Despite having threatened to do so, Charter did not file a lawsuit, request a ruling from the Commission, or seek any other relief. In other words, Charter did not escalate the 2004 dispute, as it said it would if it was dissatisfied with the result of the dispute resolution process, or CenturyTel's explanation of its charges.

With the dispute process having concluded without any action from Charter to seek a refund, CenturyTel believed that Charter was satisfied with, or at least was willing to accept, the result of that process, and the explanation that CenturyTel had provided at Charter's request. From CenturyTel's perspective, the dispute resolution process had been resolved in its favor. It certainly had no reason to seek a ruling from the Commission, to file a lawsuit, or to take any other action in furtherance of the dispute process. It had already received its payment, and was not an aggrieved party.

Charter, on the other hand, having paid \$64,867.61 that it claimed it did not owe, had every incentive to file a grievance with the Commission or to otherwise escalate the dispute—if it believed its position was correct. The fact that it did not, sent a loud and clear message to CenturyTel—the dispute was over, the point had been conceded, and CenturyTel was entitled to retain the disputed payments.

Following the completion of the dispute resolution process, CenturyTel continued to bill Charter for services rendered pursuant to local service requests ("LSRs") that Charter submitted to CenturyTel. As has been Charter's general practice, Charter did not pay its bills. By mid-

summer 2007, the amount that Charter owed to CenturyTel had grown to the point where CenturyTel was not willing to allow Charter to receive the benefit of CenturyTel's services without paying the growing past-due balance. CenturyTel thus made demand upon Charter to pay the past-due balance.

Rather than living up to its payment obligations, Charter chose to further delay the payment process by filing its Complaint in this matter – raising the exact same issues that had been the subject of the 2004 dispute resolution. In doing so, Charter made the unsupportable assertion that its 2004 dispute was still in progress, unresolved, and that, for the reasons Charter had previously relied on, CenturyTel is not entitled to payment for the \$128,844.45 worth of services that Charter ordered from CenturyTel subsequent to the resolved 2004 dispute, knowing full well that CenturyTel charged for such services and expected to be paid. Charter thus asks the Commission to reach the inequitable result of allowing Charter to profit from its inaction following the 2004 dispute, and its apparent acceptance of the result of that dispute, by avoiding its legitimate business obligations.

The Commission should not lend its authority to such an absurd result for two reasons. First, the position that Charter finds itself in is of its own making. If Charter felt that it had a valid challenge to the charges at issue, it should have, consistent with its word and prior threats, brought that challenge in 2004. Having failed to do so, the precedent of the 2004 dispute resolution pursuant to agreement terms should stand; Charter should be made to pay for the services it ordered, with full knowledge that charges would apply. Second, and perhaps more importantly, regardless of the obvious inequity in Charter's position, CenturyTel's charges are lawful and provided for by agreement, and CenturyTel is thus entitled to payment for its services.

Issues Presented

Charter contends that CenturyTel breached the parties' ICA by billing Charter for charges that are prohibited by federal law, and/or that are not contained in the parties' ICA. Charter also claims that CenturyTel breached the ICA by threatening to discontinue the processing of Charter's number porting requests unless Charter paid its past-due bill. CenturyTel denies any breach of the ICA, and specifically contends that the charges at issue are lawful and provided for in the ICA. Accordingly, CenturyTel is asking the Commission to find that Charter owes CenturyTel a debt of \$128,844.45 for services that CenturyTel rendered on its behalf.

This proceeding thus involves two basic issues. First, does federal law allow CenturyTel to charge for administrative services performed in processing the service orders through which Charter requests the porting of a number? And second, is Charter obligated to pay CenturyTel for the administrative processing services CenturyTel provided to it? Because the answer to both of these questions is "yes", the Commission should find in CenturyTel's favor.

Arguments and Authorities

I. CenturyTel should prevail on its counterclaims and Charter's claims should be denied because CenturyTel's charges for processing Charter's number porting service orders are lawful.

The main issue in this dispute is Charter's contention that federal law prohibits carriers from charging competitors for the administrative services performed in processing service orders that request the porting of a phone number. But Charter has not provided the commission with any authority that supports this assertion. Instead, Charter merely alleges that such charges are prohibited by 47 C.F.R. §52.33 and the Federal Communications Commission's ("FCC") 2002 Number Portability Reconsideration Order, which say nothing about administrative processing

charges. Contrary to Charter's cursory and self-serving analysis, however, CenturyTel's service order charges are not contrary to federal authority. Accordingly CenturyTel's charges are appropriate, and Charter should be required to pay them.

A. The cost recovery rule permits recovery of the charges at issue in this case even before expiration of the five-year end-user fee.

The dispute over the lawfulness of CenturyTel's charges involves interpretation of the scope of the FCC's Local Number Portability ("LNP") cost recovery rule reflected in its various rulings and 47 C.F.R. §52.33. The FCC first announced its cost recovery ruling in its Third Report and Order, through which it allowed ILECs to recover the cost of implementing the FCC's LNP requirement through a five-year federally tariffed end-user fee.² The Third Report and Order was then implemented through 47 C.F.R. §52.33, which provides for the monthly end-user fee. At issue in this case is whether that fee, and the cost-recovery rule in general, prohibits CenturyTel from charging Charter for administrative services provided in processing Charter's service orders that request the porting of a number.

The parties agree the costs that carriers were permitted to recover through the end-user fee cannot be recovered through another mechanism, during the five-year cost recovery period. What the parties dispute is whether the charges at issue here—those associated with the administrative processing of service orders that request the porting of a number—fall within the scope of charges permitted to be recovered through the end user fee. Because they do not, it was lawful for CenturyTel to charge Charter for its administrative processing services.

The tariffed end-user LNP charge authorized by 47 C.F.R. §52.33 only allows ILECs to recover carrier specific costs that are "directly related to providing long-term number

² *In the Matter of Telephone No. Portability*, Third Report and Order, 13, FCC Rcd 11701 (1998) ("Third Report and Order")

portability.”³ Carrier specific costs that are not directly related to providing long-term number portability are not recoverable through the end-user fee.⁴ Instead, those costs can be recovered through other cost recovery mechanisms.⁵

1. **The administrative services that CenturyTel performs in processing Charter's service orders are not directly related to providing LNP.**

The administrative services that CenturyTel provides in response to Charter's LSRs do nothing to provide or further “long-term portability,” and thus are not directly related to providing LNP. Instead, the services that CenturyTel provides are administrative services provided any time a carrier asks CenturyTel to process an order for the carrier, regardless of what that order may relate to, and cannot be said to be directly related to long-term number portability. A detailed explanation of the administrative services that CenturyTel provides in processing Charter's LSRs is contained in Exhibit 5, Guy Miller's Direct Testimony at pp. 12-13. These services are completely separate and apart from the work CenturyTel performs in porting a number.⁶

Because the administrative services that CenturyTel provides in responding to a LSR are not directly related to long-term portability, CenturyTel has the right to recover the charges for such services from Charter, and other carriers.⁷ With regard to costs that are not directly related to providing long-term number portability, the FCC has stated “we find no indication that Congress intended to place such costs within the scope of the competitive neutrality requirement

³ 47 CFR § 52.33.

⁴ Third Report and Order at 11724 ¶ 37.

⁵ *Id.*

⁶ Ex. 5, Miller Direct at pg. 14.

⁷ *In the Matter of Telephone No. Portability*, Memorandum Opinion & Order on Reconsideration and Order on App. for Rev, 17 FCC Rcd 2578, 2629-30 ¶104 (2002) (Reconsideration Order).

of §251(e)(2).”⁸ Therefore, because the administrative charges at issue are not directly related to providing long-term number portability, Charter is obligated to pay those charges, and the cost recovery rule simply does not apply.

Charter’s argument—that because the LSRs at issue here involve requests to port numbers, the administrative services that CenturyTel provides in connection with processing those LSRs are directly related to long-term number portability—is unavailing. Charter does nothing to demonstrate how performing the administrative tasks required to process a service order furthers long-term number portability. Nor does Charter explain how CenturyTel’s administrative processing services are the type of “initial implementation costs of number portability” that the end-user fee was designed to allow carriers to recover.⁹ Instead, the most that can be said about the administrative services that CenturyTel provides in processing LSRs for number porting is that those services are incidental to number portability. And the FCC has made clear that costs that Carriers incur “as an incidental consequence of number portability,” are not directly related to providing number portability.¹⁰

Instead, as the FCC expressly concluded, carrier-specific costs that are 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.¹¹ In a separate order (Cost Classification Order, 13 FCC Rcd), the FCC later clarified the phrase “porting telephone numbers from one carrier to another” refers to “the systems for [1] uploading and downloading [location routing number] information

⁸ *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11724 ¶ 36 (1998) (“Third Report and Order”).

⁹ Reconsideration Order ¶ 87.

¹⁰ Third Report and Order, at 11740, ¶72.

¹¹ *Id.*

to and from the regional Number Portability Administration Centers (“NPACs”) and for [2] transmitting porting orders between carriers.”

CenturyTel receives LSRs for a wide variety of reasons, including requests to order a line for resale, to designate a number as unpublished, to order unbundled network elements, and to make changes to existing services. Whenever it receives an LSR for any of these services, CenturyTel’s employees have to perform the administrative functions cited in Mr. Miller’s direct testimony.¹² As to LSRs for porting a number, CenturyTel incurs those charges as an incidental consequence of the number portability requirements, but such services are not directly related to long-term number portability, as defined by the FCC. The FCC Order refers to the costs of “systems” used “for transmitting porting orders.” The administrative costs associated with processing an LSR are not included in “transmittal system” costs.

The fact that CenturyTel’s administrative charges do not fall within the category of charges that the FCC deemed “directly related” to providing LNP is confirmed by the FCC’s decision in *In the Matter of Telephone Number Portability, Bell South Corporation Petition for Declaratory Ruling and/or Waiver*.¹³ In that proceeding, Verizon Wireless argued that Bell South intended to improperly assess CMRS carrier transaction-based charges when Verizon requested the porting of telephone numbers from Bell South. Verizon asked the FCC to find that such costs were only recoverable through end-user charges, as set forth in 47 C.F.R. §52.33.¹⁴ Bell South responded that the transaction-based fees are imposed whenever a carrier submits a LSR to Bell South, and that LSRs do not always involve the porting of a telephone number.¹⁵

¹² Ex. 5, Miller Direct at 12-13.

¹³ FCC 04-91 (“Bell South Order”).

¹⁴ *Id.* at ¶8, n. 41.

¹⁵ *Id.* n. 49

The FCC noted that the administrative charges Bell South was attempting to impose on Verizon, which are the same type of charges at issue here, would not have qualified for recovery through a tariffed end-user LNP recovery charge pursuant to 47 C.F.R. §52.33.¹⁶ Implicit in that finding is the fact that such charges are not directly related to long-term number portability because, if they were, the charges would be appropriate to recover through end-user LNP charges. The Bell South order thus stands for the proposition that administrative charges associated with processing LSRs are not directly related to providing number portability, even where the LSR requests the porting of a phone number. Accordingly, such charges are not recoverable through monthly end-user LNP recovery fees, but may be recovered through other mechanisms.

In the context of an arbitration of an interconnection agreement between a CLEC (Sprint) and an ILEC (Consolidated) (Docket No. 31577), the Texas Public Utility Commission has also ruled that it is appropriate to charge a service order fee for processing a porting LSR. Consolidated argued that it should be allowed to charge a service order charge for LSRs that request the porting of a number, because the charge is for an administrative cost it incurs that is caused by Sprint. In agreeing with Consolidated, the arbitrators stated “each Party is entitled to impose a ‘just and reasonable’ charge to the other Party for porting a customer to that Party.” The Arbitrators also agreed that “the cost-causer should bear the costs of LSRs.”

The fact that CenturyTel cannot recover its administrative service charges through the monthly end-user LNP recovery fee also further explains why the charges Charter seeks to avoid are appropriate. If CenturyTel cannot recover its administrative costs from end users, and Charter is entitled to request porting of numbers without paying CenturyTel’s administrative costs, CenturyTel is left in a position where it is forced to perform work for Charter, without the

¹⁶ *Id.*

possibility of being paid for that work – a situation that this Commission should not assume that Congress or the FCC intended to create.

In short, the administrative services that CenturyTel performs in processing Charter's service orders are not directly related to LNP, and the cost recovery rule thus does not prohibit CenturyTel from charging for those services.

2. The fact that carriers are required to provide LNP does not mean that they must do so for free.

Charter argues that because LNP is a "legal duty," CenturyTel is not providing a "service" to Charter, and thus Charter should not have to pay CenturyTel for that "service." But, if Charter's position were correct, carriers would almost never be able to charge each other, because most services they provide are required by federal telecommunications law. Contrary to Charter's position, however, the concept of a "legal duty" is not exclusive from the concept of providing a service, or allowing competitors to charge one another for services rendered.

An ILEC, like CenturyTel, has a legal duty to provide interconnection, to provide collocation, to provide Unbundled Network Elements and to provide LNP, among other obligations of federal law. Under Charter's theory, CenturyTel should not be able to charge for those services. But nowhere in its orders does the FCC state that a LEC must fulfill its "legal duties" by performing work or providing services to a competitor for free. In fact, the FCC orders consistently illustrate just the opposite—that a LEC is entitled to recover its costs when those costs are caused by another LEC. For example, 47 CFR § 51.215 allows the recovery of costs from other carriers associated with the legal duty to allow dialing parity; and CFR § 51.515 allows the assessment of access charges upon other LECs when continuing to meet the previous legal duty regarding unbundled switching. There is simply no merit to Charter's argument that all services required to be provided by law must be provided for free.

B. The vast majority of charges at issue in this case arose after the expiration of the five-year end-user recovery period, and are thus lawful regardless of whether they are directly related to providing LNP.

Arguendo, even if CenturyTel's administrative processing services could be construed as directly related to providing LNP, such that they would have been prohibited under the cost-recovery rule, CenturyTel was free to charge for those services as of March 2004. The end-user fees, authorized by 47 C.F.R. §52.33 could only be billed for a five-year period. After that five-year period, carriers are allowed to recover costs through normal cost-recovery mechanisms. As the FCC has noted "after the five-year recovery of implementation costs of number portability with the end-user charge, carriers can recover any remaining costs through existing mechanisms available for recovery of general costs of providing service."¹⁷ Accordingly, even costs that are directly related to providing LNP can be recovered through normal cost-recovery mechanisms after the end-user fee expires.

CenturyTel's end-user assessment in Missouri was initiated by Verizon on March 10, 1999, prior to CenturyTel acquiring the properties. The five-year assessment period thus ended in March of 2004. Accordingly, even if CenturyTel's administrative-processing services are directly related to long-term number portability, and thus subject to the cost-recovery rule's initial limitations, Charter's argument was moot as of March 2004. After that time, CenturyTel was fully entitled to recover for administrative-service-order processing via normal cost-recovery methods, even if those services were originally subject to 47 CFR 52.33. All of the charges that CenturyTel seeks be paid for through this proceeding were assessed subsequent to March 2004.

C. Other facts and circumstances demonstrate the lawfulness of the charges at issue.

¹⁷ Reconsideration Order, ¶ 85.

In addition to the FCC's clear pronouncements, other factors, including (1) the fact that Charter pays for such services elsewhere; (2) the Commission's prior authorizations of charges for such services, (3) Staff's testimony, and (4) principles of competitive neutrality, support the conclusion that CenturyTel's charges are lawful.¹⁸

1. **Charter pays the same type of charges at issue here in other states.**

Charter's argument that the charges in dispute here are unlawful conveniently ignores the fact that Charter is assessed, and pays for, charges for processing porting LSRs in other areas. Charter admitted at the hearing that it pays such charges in Wisconsin to TDS, Wood County Telephone and Concord Telephone.¹⁹ Charter also admitted that it does not pay charges that are unlawful.²⁰ Thus, according to Charter's own testimony, it pays the Wisconsin charges because those charges are lawful. It thus follows as a matter of factual and logical necessity that CenturyTel's identical charges are also lawful.

2. **This Commission has previously authorized charging for administrative services performed in processing service orders that request the porting of a phone number.**

This dispute is not the first opportunity that the Commission has had to deal with the appropriateness of charging for administrative services provided in processing a competitor's service order requesting the porting of a number. In fact, the Commission approved such charges in CenturyTel's Interconnection Agreement Arbitration with Socket in Case No. TO-2006-0299. Certainly the Commission would not have approved service order processing charges for number porting requests if such charges are unlawful.

¹⁸ CenturyTel also notes that other ILECs, including AT&T and Qwest, charge for administrative services performed in processing service orders that request the porting of a number. (Ex. 5 at p. 20).

¹⁹ Hearing transcript at 108-110; 139.

²⁰ *Id.* at 106.

3. Mr. Voight's testimony on behalf of the Staff concurs with CenturyTel's position that the charges at issue in this case are lawful.

The Commission's Staff has acknowledged the lawfulness of the charges at issue in this dispute. Specifically, Commissioner Jarrett asked Mr. Voight whether CenturyTel can charge the service charges at issue. Mr. Voight's answer was "yes".²¹ He indicated that the FCC's various pronouncements on number portability confirm that carriers incur administrative costs in porting telephone numbers, and that he was not aware of any law that would preclude carriers from seeking to recover those legitimate costs.²² More directly, Mr. Voight agreed that the charges at issue here are legitimate charges that CenturyTel is legally permitted to recover.²³

4. Requiring the porting entity to bear the administrative cost of processing service orders that request the porting of a number is not consistent with principles of competitive neutrality.

Charter claims that due to "practicality and fairness," there is no need to assess charges for the processing of LNP LSRs.²⁴ But this is an unpersuasive and self-serving argument. Charter makes this claim only because the porting has been one-sided; away from CenturyTel and to Charter, making Charter the net payer until some future date at which time porting back and forth would presumably even out and LSR processing reimbursements offset, to become a non-issue. There is nothing "fair" about one party bearing the unrecoverable cost of hiring and training personnel and undertaking expenses for no other reason than to work orders for another party. In fact, such a scheme would be contrary to the competitive neutrality that the cost recovery rule was designed to ensure.

²¹ Hearing transcript at 311-312.

²² *Id.*

²³ *Id.*

²⁴ Schremp Direct at 7.

The fact is that the overwhelming majority of porting requests between Charter and CenturyTel involve the porting of numbers from CenturyTel to Charter. Thus, it is CenturyTel that is incurring the vast majority of the charges, while Charter is reaping the benefit of CenturyTel's work, and the fees generated from ported numbers. There is nothing fair or competitively neutral about that process. Instead, it would be more competitively neutral to require the carrier that will be benefiting from the ported number, in terms of future service fees, to pay the administrative costs associated with its porting requests. Such a mechanism, where the benefited party pays the costs associated with receipt of its benefit, makes sense in a competitive marketplace. Instead of taking this approach, Charter asks the Commission to add insult to injury by requiring a carrier that has just lost a customer to pay for the "privilege" of transferring that customer's number to its competitor. The FCC should not be presumed to have intended such a Draconian result.

II. CenturyTel should prevail on its counterclaims and Charter's claims should be denied because Charter agreed to pay for the charges at issue.

Charter's second argument in this dispute is that even if CenturyTel's charges are lawful, Charter can still avoid paying them because they are not clearly set forth in the parties' ICA. Contrary to Charter's argument, however, the ICA does provide a basis for CenturyTel's charges.

CenturyTel submits that in deciding this issue, the Commission must examine two separate questions. First, does the ICA contemplate that CenturyTel would perform its administrative services for Charter free of charge? Second, assuming that the agreement does not so provide, what is the charge applicable for CenturyTel's service order processing services? When viewed in the light of competitive, factual, and economic reality, the ICA clearly indicates that the parties intended for Charter to pay service order processing charges, and agreed to the

rates provided for such charges. For this reason, CenturyTel's charges are valid, and Charter should be required to pay them.

A. The parties clearly contemplated that Charter would pay for the administrative services that CenturyTel performs in processing service orders that request the porting of a phone number.

The language in the ICA reflects the parties' intent that Charter would pay for the processing of its number porting LSRs. Section 15 of the ICA requires the submittal of an LSR for each port request. It is common practice within the industry to charge for LSR processing, including those LSRs for LNP. By selecting an LSR as the mechanism for ordering a port, the parties thus expressed an intent that charges would apply. More to the point, LSR is a *defined term* in the ICA. As that term is defined, a LSR is used, and can therefore *only* be used within the context of ordering Resale and UNEs.²⁵ Charges apply in either case. The parties' drafters thus chose a mechanism (an LSR) for which charges apply, as the means for requesting a port.

B. CenturyTel's local exchange tariff provides the applicable charge for CenturyTel's processing of Charter's service orders that request the porting of a telephone number.

Understanding that the ICA demonstrates that Charter is obligated to pay for work CenturyTel performs in processing Charter's LSRs, the next question for the Commission to address is: what is the applicable charge? The answer to that question lies in a simple analysis of what happens when Charter requests the porting of a number. When Charter does so, it is requesting that CenturyTel perform services for Charter, and it submits a service order (an LSR) to make that request. The charge applicable to Charter's request for the porting of a number is

²⁵ E.g. O'Brien v. Missouri Cities Water Co., 574 S.W.2d 13, 17 (Mo. App. 1978.); State Farm Fire & Cas. Co. v. Berra, 891 S.W.2d 150, 152 (Mo. App. E.D. 1995) (noting that parties are bound by the definitions they give to the terms in their contracts).

thus CenturyTel's applicable service ordering charge. That charge is found in CenturyTel's local exchange tariff.

1. **Under the ICA's pricing attachment, the prices for services are to be found in the applicable tariff.**

Section 1.1 of the ICA indicates that the parties' agreement includes both the principal document and the applicable "tariffs" of each party. The word "tariff" is defined in the glossary to the ICA, which is expressly made a part of the ICA through Section 3. As defined in Section 2.85 of the glossary, the word "tariff" includes "any applicable Federal or state tariff of a Party, as amended from time-to-time." The term also includes "any standard agreement or other document, as amended from time to time, that sets forth the generally available terms, conditions and prices under which a Party offers a Service."

The parties' Interconnection Agreement also contains a Pricing Attachment, which is made part of the agreement through Section 3. The Pricing Attachment relates to charges for services to be provided under the ICA, and provides a mechanism for determining where the charges associated with the various services can be found.²⁶ For charges not expressly set forth in Section 2 or 3 of the Pricing Attachment, Section 1.3 provides that the charge for a service shall be the charge stated in the providing party's applicable tariff. Accordingly, by its terms, the ICA indicates that the charge for any service that CenturyTel provides to Charter is the charge reflected in the applicable tariff.

Charter has argued that CenturyTel's local exchange tariff is not part of the ICA because it is not referenced with sufficient particularity to effectively incorporate it under Missouri law. Contrary to Charter's argument, however, a document is sufficiently referenced for incorporation

²⁶ The term "service" is defined in glossary section 2.78, and includes "any Interconnection arrangement, Network Element, Telecommunications Service, Collocation arrangement, or other service, facility or arrangement, offered by a party under the Agreement."

purposes if the identity of the document can be ascertained beyond doubt.²⁷ The ICA incorporates all of the parties' applicable state and Federal tariffs. Those tariffs are filed with the FCC and the Commission, and were available for viewing by Charter when it signed the ICA. Charter is not in a position to claim that CenturyTel's tariffs aren't part of the agreement because it lacked the ability to identify those tariffs. It is inconceivable that a carrier with Charter's experience does not know how to find CenturyTel's tariffs.²⁸

2. CenturyTel's local exchange tariff is the tariff that contains the charge applicable to the services at issue here.

Section 5 of PSC Mo. No. 1 CenturyTel of Missouri, LLC General and Local Exchange Tariff provides for charges of \$23.44 and \$23.48 when a business places an initial order for a discreet service. Each LSR relating to the porting of a number is Charter's initial order for a specific service, *i.e.* the porting of a specific telephone number. Charter is the business that

²⁷ Intertel, Inc. v. Sedgwick Claims Management Services, Inc., 204 S.W.3d 183, 196 (Mo. App. E.D. 2006); Jim Carlson Construction, Inc., v. Bailey, 769 S.W.2d 480, 482 (Mo. App. W.D. 1989)

²⁸ Charter may also argue, based on a recent recommended decision of the FCC's enforcement bureau in EB-08-MD-002, that the services at issue in this case are not telecommunication services under Federal law. CenturyTel does note that paragraph 13 of the recommended decision suggests that Verizon's role in processing porting LSRs is not telecommunications services, but that finding has no impact on this case. First, section 1.3 of the pricing attachment indicates that the charge for a "Service" is to be found in the applicable tariff. Service is defined in section 2.78 of the glossary. While the definition of service includes "Telecommunications Service," it also includes any "other service, facility or arrangement offered by a party." Thus, regardless of whether the service that CenturyTel performs in processing Charter's LSRs is a telecommunications service, it is a "service" and the charge for that service is to be found in the applicable tariff.

Second, the finding of the enforcement bureau does not alter the Commission Staff's conclusion that the services that CenturyTel provides in processing Charter's port requests constitutes local exchange service. (Hearing Transcript, p. 306). The enforcement bureau's decision was an interpretation of the definition of "Telecommunications Service" under federal law. Staff's conclusion was based on an interpretation of Missouri law. (*Id.*). The definition of "Telecommunication service" under Missouri law is broader than the federal definition. (RSMo. §386.020(53)). Accordingly, the enforcement bureau's recommended decision is not implicated in this case.

Third, even assuming *arguendo* that the enforcement bureau's recommended decision is applicable, and somehow questions CenturyTel's practice of charging a tariffed rate for the services at issue, this would not change the outcome of this proceeding. The recommended decision was released on April 18, 2008, long after the services at issue were provided. Accordingly, to the extent that the recommended decision may have an impact on this proceeding, which it does not, there would be no basis for applying that decision to the charges at issue here. Instead, under paragraph 4.6 of the ICA, the decision of the enforcement bureau would simply require that the parties renegotiate a basis for the charges on a going-forward basis.

places the initial order for service, and it must pay for that service. Accordingly, Charter is obligated to pay this fee when Charter submits its porting LSRs to CenturyTel.

Charter would have the Commission believe that the Local Exchange Tariff is somehow excluded from the tariffs incorporated into the Agreement. Yet nowhere in the Agreement do the terms exclude *any* tariff, much less exclude the Local Exchange Tariff by name. Instead, "tariff" is a defined term in the Agreement, incorporating *all* tariffs, without exclusion.²⁹ If the parties had intended to exclude the local exchange tariff from the ICA, they could have done so. There is no reason why the local exchange tariff cannot contain an applicable value for services provided under the ICA.

C. **Even if the charge in the local exchange tariff did not apply, the pricing attachment of the ICA would still require Charter to pay for the services it requests.**

Based on its narrow, restricted and self-serving interpretation of the ICA, Charter concludes that CenturyTel's local exchange tariff does not provide a charge applicable to the services that Charter requests when it submits a LSR to CenturyTel requesting the porting of a number. From this conclusion, Charter determines that it does not have to pay anything for the services it has requested. There are at least three problems with Charter's conclusion. First, as is set forth above, the local exchange tariff does provide the applicable rate for the services Charter has requested, and that CenturyTel has provided. Second, Charter's conclusion that no charge should apply is contrary to common sense, the realities of the market, the intent of applicable law and the parties' ICA. Third, Charter's conclusion ignores the language in the ICA's Pricing Attachment, which does not end the analysis at the applicable tariff. Contrary to what Charter has argued, if the applicable charge is not found in the local exchange tariff, the analysis

²⁹ "2.85- Tariff [*line spacing*] 2.85.1- Any applicable Federal or state tariff of a Party, as amended from time-to-time;"

continues, and the parties are then referred to the Pricing Attachment. The Pricing Attachment provides an alternative basis for CenturyTel's charges.

To be clear, CenturyTel contends that, viewing the ICA and its incorporated documents in light of economic realities and common sense, the applicable charge in this case is the local exchange tariff charge cited above. However, Charter, and to some extent the Staff, have urged the Commission to take a restrictive, narrow and strict construction view of the ICA, and suggest that under that sort of analysis, the local exchange tariff rate does not apply. CenturyTel disagrees. However, even assuming *arguendo* that Charter's position is accurate, applying a strict construction analysis to the ICA still demonstrates that Charter is obligated to pay for the services that CenturyTel has rendered.

This is so because the ICA requires number-porting requests to be submitted through a LSR, which, as a defined term in the agreement, is a form through which the parties establish, add, change or disconnect re-sold telecommunication services and network elements. Accordingly, any LSR submitted by the parties carries with it the definition the parties subscribe to it, which requires the application of a rate within the context of resold telecommunications services or network elements. The Pricing Attachment provides such rates. Accordingly, under Charter's strict construction analysis, those are the charges that apply to LSRs that Charter submits to request the porting of a number.

CenturyTel is not arguing that the services that CenturyTel has provided to Charter are resold services or UNEs, they are not. Instead, CenturyTel asks the commission to respect the definition of LSR that the parties agreed to, and to recognize that by agreeing to use a LSR for ordering a number port, the parties agreed to charge the rates applicable for LSR processing, *i.e.* a resale or UNE rate. Under Missouri law, when parties have given a specific definition to a

term within their contract, that term should be given the meaning assigned to it by the parties.³⁰ Accordingly, nothing prohibited the parties to the ICA from defining terms so as to apply what would otherwise be inapplicable rates for processing Charter's number porting service orders.

To illustrate this point, consider a service station that offers a preferred customer program that includes a reduced carwash rate with any "gas purchase." Applying the plain and ordinary meaning of the term "gas purchase" a customer who purchases windshield wipers from the service station would not qualify for the discount under the program. But if the term "gas purchase" is defined to include gas, oil, wipers, and other automotive products, the customer must be given the discount, or the definition is given no effect and the agreement is inappropriately altered. The same logic applies here. In order for the definition of "LSR" to be given effect, a resale or UNE rate must apply.

The resold services' portion of the Pricing Attachment refers to non-recurring charges. CenturyTel's service charges are, of course, non-recurring charges, in that once the service is performed to process the port request, there are no further charges. The charge is not assessed on a monthly basis, and does not otherwise re-occur.

Non-recurring charges are then broken out into pre-ordering, ordering and provisioning, product specific, and custom handling sections. Because Charter's LNP LSRs are ordering the porting of a phone number, the ordering and provisioning section is most appropriate. That section is further broken down into Engineered and Non-Engineered service orders.³¹ Obviously, the administrative processing of a porting request does not require engineering, so the Engineered charges would not apply. This then leaves four potential Non-Engineered service order charges that could apply, one for New Service, one for Changeover, one for "As Specified"

³⁰ E.g. O'Brien v. Missouri Cities Water Co., 574 S.W.2d 13, 17 (Mo. App. 1978.); State Farm Fire & Cas. Co. v. Berra, 891 S.W.2d 150, 152 (Mo. App. E.D. 1995).

³¹ "Non-Engineered" means that engineering design work is not needed for this service.

and one for Subsequent Service Orders. The Pricing Attachment indicates that a "Non-Engineered Initial Service Order—Changeover" applies only to Basic Services for services migrating from Verizon [CenturyTel] to Charter. End-user service may remain the same or change.³²

Under Charter's strict construction analysis, because an LSR can only be submitted within the context of resold service and UNEs, one of the rates for those two things must apply. The Non-Engineered Initial Service Order—Changeover charge is the charge that is most applicable to the service that CenturyTel is performing for Charter when it administratively processes Charter's number porting LSRs, and is thus the charge that should apply.³³ That charge is \$21.62. Because the Pricing Attachment rate is more than what Charter has been charged, if that rate applies Charter has been under-billed, and has no cause for complaining about the amount due to CenturyTel.

III. Charter is indebted to CenturyTel in the amount of \$128,844.45

The basis for the amount Charter owes to CenturyTel is explained in Pam Hankins's direct testimony and in the exhibits thereto. Charter has not raised a dispute about CenturyTel's calculations. Accordingly the amount in controversy is not an issue, and CenturyTel will simply refer the Commission to Ms. Hankins's testimony regarding the amount due. As is noted above,

³² "Basic Services" refers to residential and business lines.

³³ In processing both resale and porting LSRs, the CenturyTel representative retrieves the LSR from the ordering website and reviews the LSR to ensure all sections have been completed by the submitting CLEC. The representative then opens the end-user account in the billing system, double-checks the LSR information against the account and checks to see if the account has an Access Line Freeze or other issues that need to be addressed by referring the LSR back to the submitting CLEC. If all information on the LSR is complete and correct, the order entry activities then take place – typing in the due date, choosing the Reason Code, choosing the company the customer is moving to, checking the Billing and Records checkbox, completing the Contact info group box, entering detailed notes taken from the LSR including account number, end-user name, address, and telephone number and the company the end user is moving to. The representative then opens the appropriate CenturyTel operating company account of the CLEC and manually enters all of the end-user and CLEC information needed to process and bill for the order. Errors are identified and corrected. The order is then sent to the personnel who perform the actual work to move the customer.

the dispute that Charter raises concerns the basis for the charges, not CenturyTel's calculation of the amount due. Charter claims that it doesn't have to pay the charges because they are allegedly unlawful and not provided for in the ICA. Because the charges are lawful, however, and because they are based on the agreement of the parties, Charter is indebted to CenturyTel in the amount of \$128,844.45³⁴ as of December 2007.³⁵

³⁴ In fact the amount that charter should owe is well in excess of that amount, because CenturyTel inadvertently billed Charter a reduced rate for a period of several years, and did not seek to back bill Charter for the difference when the error was corrected. (Hankins Direct pp. 11-12).

³⁵ CenturyTel did not present evidence of amounts owed by Charter for services provided after December 2007, but has billed Charter for such services, and reserves the right to recover the amount due for such services in a subsequent proceeding if necessary.

Conclusion

For the forgoing reasons, CenturyTel respectfully requests that the Commission: (1) find that CenturyTel's charges are lawful and otherwise enforceable, and that Charter owes CenturyTel a balance due in the amount of \$128,844.45 for services rendered; (2) find that CenturyTel is entitled to retain the \$64,867.61 at issue in the parties prior billing dispute; (3) enter an order authorizing CenturyTel to suspend any or all services to Charter as a result of Charter's payment default; (4) grant CenturyTel such other and further relief as the Commission deems fair, just, and proper; and (5) deny Charter any and all relief requested.

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Certificate of Service

I hereby certify that on the 11th day of June, 2008, I served the foregoing CenturyTel of Missouri, LLC's Post-Hearing Brief on the following persons via electronic mail. Because this document was filed electronically, it is being served both electronically and by hard copy, on the persons listed below, consistent with Commission rules and practice:

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