BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

REPLY BRIEF SUBMITTED BY CENTURYTEL OF MISSOURI, LLC
IN RESPONSE TO CHARTER FIBERLINK-MISSOURI, LLC'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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DATED: December 4, 2008

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I. INTRODUCTION

On November 6, 2008, the Arbitrator approved the joint proposal of CenturyTel of Missouri, LLC ("CenturyTel") and Charter Fiberlink-Missouri, LLC ("Charter") that proposed findings of fact and conclusions of law be submitted for consideration in lieu of legal briefs, and that each of the Parties would reply to the other Party's proposed findings of fact and conclusions of law on December 4, 2008, the date set by the Arbitrator's prior Procedural Order. A 75-page limit was jointly recommended by the Parties for the reply filings, and was approved by the Arbitrator. CenturyTel respectfully submits this Reply Brief in accordance with the foregoing procedure.

CenturyTel will address in this Reply Brief each of the Issues that have been presented to the Arbitrator for decision with the exception of those Issues that have been resolved by mutual agreement of the Parties.[1] The Issues will be referred to herein by number (a complete statement of each Issue having been presented in Exhibit A attached to CenturyTel's Proposed Findings of Fact and Conclusions of Law) (the "*CenturyTel Proposed Order*"). The Issues will be addressed sequentially, consistent with the presentation in *CenturyTel Proposed Order* and will also address Charter's Proposed Findings of Fact and Conclusions of Law (the "*Charter Proposed Order*").[2]

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[1] Attachment B to the *CenturyTel Proposed Order* sets forth a complete list of all settled Issues and the language that the Parties have agreed upon for insertion in the Interconnection Agreement between the Parties (referred to herein as the "Agreement").

[2] Within various sections of the *Charter Proposed Order*, Charter has provided what it contends to be the relevant findings of facts. CenturyTel has more comprehensively reflected the controlling facts in its proposed conclusions and, as necessary, has cross referenced those facts that should be relied upon by the Arbitrator in resolving the issues in this proceeding. Thus, to the extent that Charter has stated what it believes to be relevant (albeit limited) findings of fact on any given issue and those proposed findings cannot be reconciled with the conclusions that CenturyTel seeks on the disputed issues as contained in the *CenturyTel Proposed Order* and herein, CenturyTel requests that the Arbitrator reject Charter's proposed findings of fact.

II. REPLY TO CHARTER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

ISSUES 2 AND 24[3]

Charter divides its discussion of Issues 2 ands 24 into "NID Compensation" and "CenturyTel's NID Rate".[4] CenturyTel will first address "NID Compensation".

The *CenturyTel Proposed Order*, paragraphs (12) through (37), sets forth a comprehensive analysis that fully supports resolution of Issues 2 and 24 in favor of CenturyTel's proposed language for the Agreement provided in the Joint Statement, pages 3 and 5-6. Charter has presented no basis to alter CenturyTel's analysis or the conclusions regarding these issues. Thus, CenturyTel submits that the Arbitrator should adopt CenturyTel's proposed language to resolve Issues 2 and 24.

To place the reasonableness of this conclusion in context, Charter's current practices relating to CenturyTel's NIDs demonstrate: (1) there is no question that CenturyTel owns the NIDs that are subject to potential use by Charter;[5] (2) Charter's Vice President, Technical Operations, admits that in 70% of the cases where Charter acquires a customer from CenturyTel, Charter has no need for the NID other than to access the customer access side thereof to disconnect the customer's inside wire from the CenturyTel loop;[6] (3) of the remaining 30% of cases, Charter either "back feeds" the customer wire into the customer premises to connect with Charter's facilities or makes the connection within the customer

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[3] Nearly five pages of the *Charter Proposed Order* set forth ordering language improperly suggesting that the Arbitrator deny CenturyTel's Motion to Strike pages 7:15 through 14:2 of Mr. Gates Rebuttal Testimony from the record. *See* CenturyTel's Motion to Strike filed with the Commission on October 24, 2008, pages 2-7. The email of Larry W. Dority to Arbitrator Pridgin dated November 6, 2008, set forth the Parties' agreements concerning the filing of proposed orders, reply briefs and the page limits of each. Mr. Dority stated, with the agreement of Charter's counsel, Mr. Comley, that: "In addition, the parties will address the motions to strike *in separate pleadings/briefs*." (emphasis added) CenturyTel notes, as will the Arbitrator and the Commission, that Charter availed itself of this agreed opportunity to separately address CenturyTel's Motion to Strike by filing a Response thereto on November 20, 2008. Irrespective of Charter's circumvention of the Parties' agreement with regard to addressing their respective Motions to Strike in "separate pleadings/briefs," CenturyTel will not address pages 47-52 of Charter's proposed findings herein. Rather, in keeping with the express terms and spirit of the Parties' agreement and in accordance with the Arbitrator's email of December 1, 2008, CenturyTel is filing a separate Reply to Charter's Response to the CenturyTel Motion to Strike that sets forth the legal and factual bases that require that the Arbitrator and the Missouri Public Service Commission ("Commission") grant such Motion to Strike pages 7:15 through 14:2 of the Gates Rebuttal Testimony.

[4] *Charter Proposed Order*, 54-64.

[5] *See, e.g., CenturyTel Proposed Order*, 5.

[6] *Id.*, 6.

access side of the CenturyTel NID;[7] and (4) connection within the CenturyTel NID "is a smaller percentage" than back feeding the customer's wire, which is always Charter's "first option."[8]

Based on these facts, what occurs in those instances in which the connection is actually made within the CenturyTel NID? The *Charter Proposed Order* provides the following:

> Charter typically opens the protective covering of the NID to reach the customer side and, after disconnecting CenturyTel's loop facility from the end user's inside wiring (often by disconnecting a cross-connect wire) either (i) attaches its own facilities to a clamp or terminal on the customer side of the NID, which clamp or terminal is connected to the inside wiring emanating from the end user customer's premise, or (ii) splices and encapsulates (known as 'scotchlocking') its own facilities directly to the end user's inside wiring.[9]

Based on Charter's summary, common sense demonstrates that Charter "uses" CenturyTel's NIDs. Since Charter uses CenturyTel's NIDs, Charter must pay CenturyTel for that use. Yet, Charter claims that the Federal Communications Commission ("FCC") does not define NID "use".[10] Charter is wrong. The FCC has indicated that:

> In the Local Competition First Report and Order, the Commission defined the NID as a cross-connect device used to connect loop facilities to inside wiring. We modify that definition of the NID ***to include all features, functions, and capabilities of the facilities used to connect the loop distribution plant to the customer premises wiring***, regardless of the particular design of the NID mechanism. Specifically, ***we define the NID to include any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose.***[11]

The FCC not only chose the word "used" in connection with the foregoing explanation, but also included within the definition of NID the concept that "any means of interconnection of customer premises wiring" is also relevant. These references demonstrate that Charter's position that the FCC never contemplated the concept of "use" of the NID is without merit.

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[7] *Id.*; Tr., 185:5-24,

[8] Tr., 188:2-189:3.

[9] *Charter Proposed Order*, 54-55 (emphasis added).

[10] *Id.*, 54.

[11] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, CC Docket No. 96-98, FCC 99-238, at para. 233 (Nov. 5, 1999).

Charter's position that its actions regarding facility connections within the CenturyTel NID or "scotchlocking" do not raise compensation obligations from Charter to CenturyTel is also meritless. FCC regulations establish the scope of access to the NID as an Unbundled Network Element that an ILEC is required to provide to a CLEC such as Charter as follows:

> An incumbent LEC shall provide a requesting telecommunications carrier 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."[12]

Charter's claim that it does not use CenturyTel's NID when it either attaches facilities to the terminals within the NID or scotchlocks its wiring to the customer's wiring within the NID is contrary to the FCC's guidance on this matter.[13] The FCC addressed the foregoing circumstance as use of the ILEC's NID in the *First Report and Order* stating:

> 392. …Therefore, we conclude that a requesting carrier is entitled to connect its loops, via its own NID, to the incumbent LEC's NID.
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> 396. … Our requirement of a *NID-to-NID connection* addresses the most critical need of competitors that deploy their own loops -- obtaining access to the inside wiring of the building. We recognize, however, that *competitors may benefit by directly connecting their loops to the incumbent LEC's NID, for example, by avoiding the cost of deploying NIDs. …*"[14]

Undeniably, Charter uses the NID for a weather-proof housing of its connection to the customer wiring and to protect that connection from tampering or damage.

A denial that Charter uses CenturyTel's NIDs offends reason and logic. Indeed, Charter's witness, Mr. Gates, admits that Charter is under no obligation to use the CenturyTel NIDs, and that

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[12] 47 C.F.R. § 51.307(c) (emphasis added).

[13] Charter's position is also contrary to the decision in AAA Case No. 51 494 Y 00524-07 (Aug. 24, 2007), the outcome of which is described in the Miller Direct Testimony, 9:2-14.

[14] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report & Order*, CC Docket Nos. 96-98 and 95-185, 11 FCC Rcd 15499 (1996) (the "*First Report and Order*"), at 15697 (para. 392) and 15698-99 (para. 396) (emphasis added) (footnotes omitted).

it does so for "engineering efficiency"[15] (*i.e.*, Charter does so to avoid the cost of installing its own NID or equivalent device). Clearly, applicable FCC Rules and the facts show that, when Charter opts to place its facilities and its connection to the customer's wiring within CenturyTel's NID, Charter is making use of the NID and CenturyTel is entitled to be compensated for that use.

Likewise, Charter erroneously claims that it "must" use CenturyTel's NID because the placement of the NID "obstructs the customer's inside wiring" and that the customer's wiring is "generally too short to allow for interconnection with Charter's facilities outside the NID."[16] Charter ignores salient facts. First, with regard to Mr. Blair's "biggest issue,"[17] to the extent the wires coming into the NID are not long enough to pull, Mr. Blair acknowledges "we're gonna have to put a splice there . . . and then we would route over to another box."[18] Clearly, an alternative course of action to Charter's use of CenturyTel's NID is to make a splice and install its own NID or equivalent device. Second, the FCC recognized that a CLEC could choose either to directly connect its facilities to the ILEC's NID (and thus avoid the cost of deploying NIDs)[19] or to install its own NIDs. Charter's position cannot be reconciled with these facts. The record clearly shows that CenturyTel and the FCC both recognize a CLEC's right to make this choice. However, to the extent that the CLEC determines to use CenturyTel's property, compensation is due for such use.[20]

Charter's efforts to convince the Arbitrator that he should allow Charter to avoid payment of proper compensation to CenturyTel for Charter's use of the CenturyTel NIDs does not end there. Rather, Charter attempts to establish a right to use the CenturyTel NIDs without compensation as

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[15] Tr., 129:6-14. *See also*, Miller Rebuttal Testimony, 10:5-11:14.

[16] *Charter Proposed Order*, 57-58.

[17] *Id.,* 58.

[18] Tr., 186:23-187:1.

[19] *See First Report and Order*, 11 FCC Rcd at 15698-15699 *(*para. 396).

[20] Miller Rebuttal Testimony, 10:8-21; 11:3-14.

derivative from its customer's status.[21] Charter's claim ignores the applicable FCC rules.

Charter's use of the NID is *not* on the customer side of the "demarcation point." The demarcation point is defined by regulation to consist of "protective apparatus *or wiring* at a subscriber's premises."[22] The location of the demarcation point is further clarified in 47 C.F.R § 68.105 to "be a point within 30 cm (12 in) of the protector or, where there is not protector, within 30 cm (12 in) of where the telephone wire enters the customer's premises, or a close thereto as practicable" for single unit installations existing as of August 13, 1990. The foregoing FCC rules demonstrate that the "demarcation point" is not "the jack into which CenturyTel's RJ11 connector (or cross-connect wire) is plugged," as argued by Charter.[23] The definition of "demarcation point" in Charter's own local tariff in Missouri is consistent with the foregoing analysis and states: "The Demarc Point will generally be within twelve inches of the protector or, absent a protector, within twelve inches of the entry point to the customer's premises."[24] Thus, Charter derives no rights to use CenturyTel's NIDs from its customer. Further, and in any event, any rights that CenturyTel's former customer (the new Charter customer) had to even access the NID terminate when such former customer ceases to be a CenturyTel customer.[25]

Without waiving its position that the issue of the NID rate is not properly before the Arbitrator,[26] CenturyTel now addresses the discussion contained within the *Charter Proposed Order* concerning "CenturyTel's NID Rate."[27] First and foremost, Charter's entire discussion of any rates concerning NID usage is entirely irrelevant to the Issue 2 and 24. CenturyTel requests that the Arbitrator and the Commission review the Joint Statement concerning Issues 2 and 24.[28] Article VI, §§ 3.3 and 3.5 set

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[21] *See Charter Proposed Order*, 55-56.

[22] 47 C.F.R. § 68.3 (emphasis added). *See also* Miller Direct Testimony, 10:7-13:10; *CenturyTel Proposed Order*, 6-7.

[23] *Charter Proposed Order*, 55. *See also* Miller Rebuttal Testimony, 5:3-7:8.

[24] *Id.*, 6:3-17 quoting from Charter's Missouri tariff, PSC MO No. 1, 7.

[25] Miller Direct Testimony, 12:19-13:10; Miller Rebuttal Testimony, 6:18-7:8.

[26] *See*, CenturyTel's Motion to Strike and CenturyTel's Reply to Charter's Response thereto.

[27] *Charter Proposed Order*, 60-63.

[28] An excerpt of the Joint Statement on Issues 2and 24 is attached as Appendix A for reference.

forth undisputed language that cross references Article XI (Pricing). For example, Section 3.3 states: "Rates and charges applicable to NIDs are set forth in Article XI (Pricing), and such rates and charges shall apply." Article XI, § II submitted as Exhibit B with Charter's Petition reveals what CenturyTel has previously brought to the Arbitrator's attention in CenturyTel's Motion to Strike: *None of the NID rates are shown as disputed by Charter.*[29] CenturyTel more fully sets forth the arguments that the rates for NID usage set forth in Article XI, § II of the Agreement are not disputed by Charter in its Reply to Charter's Response to CenturyTel's Motion to Strike. This Reply was filed with the Commission, and CenturyTel refers the Arbitrator to that Reply for CenturyTel's positions in this regard.

Second, Section 252(b) of the Act authorizes the Commission, upon a party's petition, "to arbitrate any *open issues*" between the parties to an interconnection agreement negotiation.[30] The Act also *requires* the petitioning party to "provide the . . . [C]ommission all relevant documentation concerning . . . the *unresolved issues* . . . [and] the position of each of the parties with respect to those issues."[31] Section 252(b) mandates that the Commission limit its consideration "to the issues set forth *in the petition* and *in the response*, if any."[32] Thus, the Commission only has authority and jurisdiction in this proceeding to determine open issues submitted to it for resolution by the parties through their respective pleadings – the petition and the response. As such, the entire discussion in Charter's Proposed Findings relating to "CenturyTel's NID Rate" is, as stated above, irrelevant to the Arbitrator's disposition of Issues 2 and 24.[33]

Without waiving its above-stated position that Charter did not dispute the NID rates set forth in Article XI (Pricing), in the unlikely event and assuming *arguendo* that the Arbitrator were to find

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[29] An excerpt of Exhibit B to Charter's Petition regarding Article XI, § II is attached as Appendix B for reference.

[30] 47 U.S.C. § 252(b)(1) (emphasis added).

[31] 47 U.S.C. § 252(b)(2)(A) (emphasis added) .

[32] 47 U.S.C. § 252(b)(4) (emphasis added).

[33] In addition, Charter's attack on CenturyTel's Initial Service Order of "ISO" rate of $33.38 that is set forth in *Charter Proposed Order*, 59, is also irrelevant and should not be given any consideration. Moreover, CenturyTel notes that Charter erroneously references a "$33.78 service order charge" which misstates the actual undisputed rate set forth in Article XI, § II. *See* Appendix B.

that CenturyTel's NID rates are an open issue for determination, CenturyTel must be provided an opportunity to establish its rates and charges for NID use by Charter. If the UNE rate is not agreed upon by the Parties (which, of course, CenturyTel advocates is the case), FCC Rule 47 C.F.R. § 51.509(h) provides:

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

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

The reasoning and the disposition of Issues 2 and 24 set forth at paragraphs (12) through (27) of the *CenturyTel Proposed Order* is consistent with common sense, the law, the record, and sound public policy. As such, CenturyTel's proposed language for the Agreement regarding Issues 2 and 24 should be adopted by the Arbitrator.

ISSUES 3 AND 41[34]

In paragraph (35) of the *CenturyTel Proposed Order*, CenturyTel recommends that the Arbitrator resolve Issue 3(a) by approving the undisputed language for the definition of "Tariff" in Article II, § 2.140 of the Agreement. In the *Charter Proposed Order*, Charter claims that its proposed additional language for Section 2.140 must be added in order that only specific terms from a Party's

[34] The Parties have agreed that Issues 3 and 41, relating to Tariffs and incorporation of Tariffs in the Agreement, should be addressed in tandem.

Tariff that are identified by the Parties are a part of the defined term "Tariff". Charter further claims that such addition to Section 2.140 is needed to comply with applicable Missouri law that requires a "clear reference" to a document incorporated by reference in a contract.[35]

Closer scrutiny of the Court's discussion of the requirements of Section 132 of the Restatement in the case cited by Charter reveals that Section 132 does not focus on whether a *portion of or the entirety* of a document is incorporated by reference in a writing. Rather, the focus is on the ability to clearly identify the document being referenced:

> Matters incorporated into contract by reference are as much a part of the contract as if they had been set out in the contract *in haec verba. So long as the contract makes clear reference to the document and describes it in such terms that its identity may be ascertained beyond doubt*, the parties to a contract may incorporate contractual terms by reference. . . . Where a writing refers to another document, *that other document, or the portion to which reference is made,* becomes constructively a part of the writing, and in that respect the two form a single instrument.[36]

Such cross-reference constitutes a "clear reference" to a document external to the Agreement and is consistent with the requirements of *Restatement (Second) of Contracts* § 132.[37]

Further, because the incorporated document in this instance is a common carrier tariff, the principles of the "filed rate doctrine" *require* that the entirety of the incorporated Tariff, and not selected portions, be incorporated into the Agreement. The U.S. Supreme Court has ruled that, to the extent a tariff is applicable to the provision of a common carrier service, it is *applicable in its entirety*.

> Rates, however, do not exist in isolation. They have meaning only when one knows the services to which they are attached. . . . 'If "discrimination in charges" does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge. . . . An unreasonable "discrimination in charges," that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.'

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[35] *Charter Proposed Order*, 4.

[36] *Intertel, Inc. v. Sedgwick Claims Mgmt. Servs., Inc.* 204 S.W.3d, 183, 196 (Mo. App. E.D. 2006) (emphasis added) (citation omitted). *See also Livers Bronze, Inc. v. Turner Constr. Co,* 264 S.W.3d 638, 643 (Mo. App. W.D. 2008).

[37] Section 132 is a part of Topic 6 of the Restatement, which is in turn a part of Chapter 6 entitled "The Statute of Frauds." Section 132 is entitled "Several Writings" and reads in its entirety: "The memorandum may consist of several writings if one of the writings is signed and the writings in the circumstances clearly indicate that they relate to the same transaction." Without question, CenturyTel's proposal to reference an applicable Tariff in its entirety in the Agreement complies with the foregoing standard.

> The Communications Act recognizes this when it requires the filed tariff to show not only 'charges,' but also 'the classifications, practices, and regulations affecting such charges,' 47 USC § 203(a); and when it makes it unlawful to 'extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges' except those set forth in the tariff, § 203(c).[38]

Likewise, the Eighth Circuit has ruled that "[t]he filed rate doctrine does not apply to rates alone, but to any terms or practices that might affect the rates as well. . . . *American Telephone and Telegraph* reversed the Ninth Circuit's judgment that the filed rate doctrine did not apply to the case because the terms in question dealt with special services for filling orders and billing rather than directly with rates."[39] Both of these cases are binding precedent on this Commission, and both decisions stand for the proposition that if a Tariff is incorporated by reference into an interconnection agreement, *the entirety of the Tariff*, not selected provisions, are applicable.

CenturyTel's proposed resolution for Issue 3(a), and for Issues 3(b) and 41 as discussed below, meets the requirements of the "filed rate doctrine." Charter's proposed resolution does not. Thus, the Arbitrator should adopt CenturyTel's proposed language regarding Issue 3(a).

With regard to Issues 3(b) and 41, the focus is on the nature and extent of the incorporation by reference of a Tariff in the Agreement. Charter advocates for limited references to "specific rates or terms set forth" in the Tariff.[40] Indeed, under Issue 41 Charter sets forth eleven specific references to portions of tariffs, while CenturyTel proposes references to the entire tariffs.[41] The filed rate doctrine prohibits Charter (or CenturyTel, for that matter) from picking and choosing the provisions of a tariff that is referenced in the Agreement. Further, Charter's purported justification for selective references to portions of tariffs– avoidance of disputes– is not only incorrect as a matter of law, but is also flat wrong. If a party is taking a service under a tariff, the tariff in its entirety should (and must) apply to avoid disputes over the terms and conditions governing the service.

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[38] *AT&T v. Central Office Telephone*, 524 U.S. 214, 223-24 (1998) (citation omitted).

[39] *Imports, Etc., Ltd. v. ABF Freight System, Inc.*, 162 F.3d 528, 530 (8th Cir. 1998).

[40] *See*, Revised Statement of Unresolved Issues dated September 2, 2008 ("Joint Statement"), 5-6.

[41] *Id.*, 122-130.

The reasoning and the disposition of Issues 3 and 41 set forth at paragraphs (28) through (39) of the *CenturyTel Proposed Order* is consistent with law, sound public policy, and sound reasoning. As such, CenturyTel requests that the Arbitrator adopt CenturyTel's proposed language for the Agreement to resolve the entirety of Issues 3 and 41.

ISSUE 4

Issue 4(a)

The Parties agree that Issue 4 should be considered by the Arbitrator and the Commission as two sub-issues.[42] With respect to Issue 4(a), the Commission should adopt CenturyTel's language as it is commercially reasonable. At the same time, the Arbitrator should find that Charter's proposed language is unreasonable as it would force CenturyTel to continue to perform its obligations under the Agreement after Charter materially defaults (and failed or refused to cure that default), lost its Certificate of Operating Authority revoked by the Commission, or indicates that it is unable to meet its payment obligations under the Agreement.

CenturyTel's proposed language for Article III, § 2.6 would permit either Party to suspend its performance under or to terminate the Agreement in the event of the other Party's "Default". Charter's competing language would permit the non-defaulting Party only to commence a dispute resolution proceeding before the Commission in the event of a material default, even if the defaulting Party's non-performance concerns *undisputed* charges.[43] Thus, the non-defaulting Party would be able to suspend or terminate the Agreement only after going through a lengthy dispute resolution process, Commission review, and Commission approval of the non-defaulting Party's right to suspend or terminate service.[44]

Requiring a Commission proceeding to establish a default would allow a non-performing Party to shift the burden of initiating a time-consuming and costly Commission proceeding to the non-defaulting Party in order to exercise its right under the Agreement to suspend performance or

[42] However, the Parties present differing formulations of Issue 4(a) which are set out on page 9 of the Joint Statement.

[43] Miller Direct Testimony, 28:11-20; Giaminetti Direct Testimony, 10:1-13.

[44] Giaminetti Direct Testimony, 4:9-5:22.

terminate.[45] This would give a Party inclined to non-performance a strong incentive to leverage the other Party's enforcement burden and gain economic benefits by taking its non-performance up to, but not over, the line at which the other Party is forced to pursue enforcement through the Commission. And, if the non-defaulting Party's only recourse is to seek Commission intervention, the result could only be an increase in the Commission's already heavy workload. The result is unfair to both the Commission and the non-defaulting Party.[46]

Charter's citations to federal case law that addresses the issue regarding the proper venue for carriers to seek resolution of disputes that arise under Section 251/252 interconnection agreements are inapplicable to Issue 4(a).[47] The question presented in Issue 4(a) is not related to whether the Commission is the proper forum for resolving the Parties' disputes. This question is the subject of Issue 12 addressed below. Rather, Issue 4(a) addresses whether the non-defaulting Party must invoke the dispute resolution process of Article III, § 20 (including presentation of the default condition to the Commission for consideration) prior to termination. Charter's reliance on *Core Communications, Inc. v. Verizon Pennsylvania, Inc.* sheds no light on this issue**.**[48] The Third Circuit found that the FCC's ruling in *In re Starpower Communications, LLC*[49] represented a "reasonable solution to fill a gap that currently exists in the Telecommunications Act" and held that Core's presentation of a dispute concerning a breach of an interconnection agreement was not properly presented, in the first instance, to a federal

[45] Miller Direct Testimony, 30:18-31:7.

[46] Charter also asserts that the CenturyTel's language contravenes or conflicts federal bankruptcy law. However, Charter misinterprets the law and ignores other potential insolvency proceedings that could arise during the term of the Agreement. A contractual provision that declares a default upon insolvency does not "contravene" federal bankruptcy law. Instead, if Charter files for bankruptcy under federal law, then the entire Agreement would be subject to the Bankruptcy Code (United States Code Title 11) and the jurisdiction of the bankruptcy court. For example, the inclusion of the default provision will not change the application of the automatic stay requirements of 11 U.S.C. §362 and the requirement that Charter cure all defaults before the Agreement could be assumed.

[47] *Charter Proposed Order*, 10.

[48] *Charter Proposed Order*, 10 and n.10 (citing *Core Commc'ns v. Verizon Pa., Inc.*, 493 F.3d 333 (3rd Cir. 2007)).

[49] 15 FCC Rcd 11277 (2000).

district court, but rather should be presented to the relevant state commission for resolution.[50] The case simply does not address whether a non-defaulting party may suspend or terminate an interconnection agreement if the defaulting party fails to cure following notice required by the agreement or the definition of "default," which are the subjects of Issue 4(a). Thus, Charter's cited case law is irrelevant to the resolution of Issue 4(a).

With respect to Charter's purported primary concern in Issue 4(a) – that a Party's right to suspend or terminate service could adversely impact end users[51] – the record establishes that CenturyTel's policy is to provide a copy of any 30-day notice of default to the Commission.[52] 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. Moreover, a CenturyTel's witness testified that, in the absence of Commission involvement, CenturyTel would not disrupt any traffic exchange capability of Charter's subscribers under the termination provisions.[53] Thus, Charter's primary concern is overstated, and it certainly should not be used to justify the adoption of terms in Article III, § 2.6 that would potentially permit Charter to skirt its performance obligations under the Agreement.

CenturyTel's proposed language creates the proper incentive for the Parties to perform their respective obligations under the Agreement and provides appropriate tools for the non-defaulting Party to enforce the Agreement without unnecessary Commission intervention.[54] Accordingly, CenturyTel requests that its proposed Article III, § 2.6 be adopted by the Arbitrator to resolve Issue 4(a).

Issue 4(b)

CenturyTel also requests that the Arbitrator adopt CenturyTel's proposed language for Issue 4(b) because it protects CenturyTel's right to contract freely with third parties without the unnecessary

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[50] 493 F.3d at 344.

[51] *Charter Proposed Order*, 9-11.

[52] P. Hankins Rebuttal Testimony, 13:14-14:8; and Attachment Rebuttal PH-1.

[53] Miller Rebuttal Testimony, 22:8-18.

[54] Moreover, CenturyTel's proposed language is consistent with both the Texas Public Utility Commission's determinations in Docket No. 28821. *See CenturyTel Proposed Order*, 16-17.

and burdensome obligations sought to be imposed by Charter. In Article III, § 2.7, the Parties have agreed to language that would permit a Party to terminate the Agreement with respect to a specific operating area or portion thereof in the event that such Party sold or transferred such territory to a non-affiliated third party. However, Charter proposes additional language purporting to *condition* such right of termination on the third party's "unconditional and prompt acceptance of the terms of this Agreement[.]"[55] Charter's language is unnecessary given the protections afforded to Charter under federal and state law, and it unnecessarily would burden CenturyTel's ability to engage in transactions that occur within the telecommunications industry. Given these existing protections, Charter should not be permitted to restrict or encumber CenturyTel's right to freely contract with third parties.

Charter falsely asserts that, without its proposed language for Article II, § 2.7, CenturyTel could terminate the Agreement and "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."[56] As Charter should know, FCC 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.[57]

Entering into an interim arrangement would 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." Thus, should CenturyTel terminate the Agreement with respect to all or a portion of an operating area, in whole or in part, Charter has the right under federal law to immediately obtain interim

[55] Joint Statement, 12-13; *see also* Giaminetti Direct Testimony, 15:3-6.

[56] Giaminetti Direct Testimony, 14:7-10; *Charter Proposed Order*, 14.

[57] 47 C.F.R. § 51.715(a) (emphasis added).

interconnection terms with the acquiring carrier, until such time as Charter and the acquiring carrier can negotiate a more formal agreement.[58]

Further, Charter's due process rights to establish an interim arrangement are protected by CenturyTel's proposed language. CenturyTel's proposed Article III, § 2.7 provides that, 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) days' prior written notice of such termination."[59] This prior notice will provide Charter with adequate time to request an interim arrangement with the acquiring carrier.

Finally, an acquiring carrier may not have the same functionality, processes or procedures as CenturyTel and, therefore, may not be *capable* of "unconditionally" assuming the terms of the Agreement.[60] If the Commission were to adopt Charter's proposed language in § 2.7, it would effectively limit the universe of potential purchasers to only those that are capable of unconditionally stepping into the terms negotiated by CenturyTel. Such a limitation would constitute an unreasonable restraint or restriction on CenturyTel's right to freely contract with the universe of potential purchasers and an unreasonable "veto" on a Party's ability to sell all or a portion of its operating area.[61] CenturyTel's purchase of the Verizon Missouri properties in 2002 confirms the appropriateness of CenturyTel's proposed language for Article III, § 2.7. There, the Commission required CenturyTel to perform the Verizon interconnection agreement only to the extent of CenturyTel's capabilities.[62] Such decision confirms the appropriateness of CenturyTel's proposed language for Article III, § 2.7.

There is no question that Charter's proposed language, if adopted, would constitute an unreasonable restraint or restriction on CenturyTel's right to freely contract with third parties. However, given the protections already afforded Charter under federal law and past Commission precedent, the

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[58] Miller Direct Testimony, 35:3-8.

[59] *CenturyTel Proposed Order*, 19-20.

[60] Miller Direct Testimony, 35:15-25.

[61] *Id.*; Miller Rebuttal Testimony, 25:11-26:6.

[62] Miller Rebuttal Testimony, 26:7-14.

Arbitrator should reject Charter's proposed language as unnecessary and should adopt CenturyTel's proposed language for Article III, § 2.7.

ISSUE 5[63]

Contrary to the *Charter Proposed Order*, CenturyTel has in no way requested that the Arbitrator grant "either Party the right to delay, or withhold, the other Party's ability to freely contract with third parties including when one Party to the agreement sells all, or substantially all, of its assets."[64] Rather, the Arbitrator should reject Charter's proposed restriction on the ability of the Parties to assign, in whole or in part, its obligations, duties, or interests arising under the Agreement to a subsidiary or an affiliate of the assigning Party.

Though Charter suggests that a need for "flexibility" exists when "all or substantially all" of a Party's assets are being sold,[65] Charter fails to explain in either the Joint Statement or the *Charter Proposed Order* why that same need is not present in other situations. Charter also does not explain why either Party should be required to negotiate with the other over an assignment to a subsidiary or affiliate in situations where the assigning Party is not closing its doors. Although Charter asserts that any such negotiations "would be a business-to-business discussion that would likely be handled quickly and efficiently,"[66] Charter's position cannot be reconciled with the record in this proceeding. The history between two Parties, and the sheer number of issues involved in this arbitration, demonstrates that negotiations between these two Parties are anything but "quick" or "efficient" as Charter claims.

Additionally, the Arbitrator should find that CenturyTel's language addresses Charter's alleged concerns. CenturyTel's proposed language requires the non-assigning Party to be "reasonably satisfied" that the assignee can fulfill the assignor's duties. Further, 90 days written notice of the proposed

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[63] The Parties agreed Issue 5 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[64] *Charter Proposed Order*, 16.

[65] *Id.*

[66] *Id.*, 17.

assignment must be given to the non-assigning Party. Thus, should the non-assigning Party believe that the assignment is unreasonable, there will be sufficient time for the Parties to discuss those concerns, to bring those concerns before the Commission, or to take other appropriate action as necessary.

Given the general rule of law in favor of the ability to assign rights and duties under a contract,[67] as well as the lack of reasoning provided by Charter as to why assignments should be treated differently depending on whether all or substantially all of a Party's assets are being sold, the Arbitrator should approve the language set forth by CenturyTel to resolve Issue 5.

ISSUE 7

In the *Charter Proposed Order*, Charter asserts that it should not be required to warrant that it will remain a certified provider of local services in Missouri for the term of the Agreement, calling such a requirement "unreasonable" and "unnecessary."[68] Charter gives assurance that if Charter's language is adopted, CenturyTel "*does not have an obligation to perform under the agreement if such certification does not exist*."[69] This would be cold comfort to CenturyTel and would leave CenturyTel with no ability to terminate an Agreement with an entity that has no authority to provide service in Missouri. CenturyTel then would be exposed to all manner of liabilities to customers harmed.

Furthermore, Charter's assurance is illusory because Charter opposes the legal terms necessary to give CenturyTel an effective remedy when Charter loses its certification. Charter should understand the difference between a "representation" and a "warranty." Charter should understand that, unlike a representation, a warranty is presumed to be material and must always be strictly complied with.[70] As a result, Charter's objection to the warranty language is an attempt to make it more difficult for CenturyTel to terminate the Agreement should Charter lose its certification. If Charter is sincere in its assertion that CenturyTel should not be obligated to perform under the Agreement if Charter's proper

[67] *See CenturyTel Proposed Order*, 21-22.

[68] *Charter Proposed Order*, 17-18.

[69] *Id.*, 19 (emphasis added).

[70] *See CenturyTel Proposed Order*, 24.

"certification does not exist," then Charter should accept the terms that would give effect to and implement that assertion.

In sum, this issue is not about whether Charter should be required to provide "guarantees" related to its ongoing status as a certificated provider under the Agreement. Indeed, the Parties appear to agree that CenturyTel should *not* be required to perform under the Agreement if Charter loses its certification. Thus, the Commission should adopt terms that appropriately give effect to the consequences of Charter's failure to maintain those certifications, which consequences do not appear to be disputed by the Parties. If such failure constitutes a breach of "warranty" as opposed to a breach of a "representation," CenturyTel is more assured that its contractual remedy not to perform further under the Agreement (subject to Charter's right to cure) remains intact. For all of the reasons provided by CenturyTel, the Commission should adopt CenturyTel's proposed language in Article III, Section 8.4 to resolve Issue 7.

ISSUE 8

Issue 8(a)

Assertions of past billing disputes between the Parties do not justify Charter's inequitable proposal to apply a 1.5% per month interest rate to refunds recovered in the course of a billing dispute process. Charter takes the "late payment charge" applicable to the non-payment of *undisputed* bills (Article III, § 9.3) and, under a false notion of symmetry, suggests that it should be entitled to a commensurate "interest rate" on billed amounts that are refunded under the billing dispute process. In other words, Charter seeks to impose a contractual interest rate upon the recovery of *disputed* amounts.

As set forth more fully in the *CenturyTel Proposed Order*, several fundamental problems with Charter's proposal and position render it inequitable and objectionable. First, Charter's proposal is not "reciprocal" as CenturyTel has never advocated or proposed terms seeking to apply an interest rate when it recovers amounts from Charter through the billing dispute process that were *improperly withheld by Charter* under Article III, § 9.4.1 (the provision permitting the billed Party to withhold

payment of amounts disputed prior to the bill due date).[71] Moreover, Charter's proposal contains no such proposed language. As it stands, Charter's proposal seeks to apply the interest rate only in the event the billed Party (in this case, Charter) recovers a refund. Charter proposes no reciprocal or corresponding language that would contractually permit CenturyTel (or the billing Party) to recover interest when Charter (or the billed Party) withholds disputed billed amounts and it is later determined that Charter did so improperly. Thus, Charter's proposal is inequitable. Charter receives interest, but CenturyTel does not under similar circumstances. This alone is reason to reject Charter's proposal.

Second, Charter's position ignores the inequitable interplay between the undisputed provisions of Article III, § 9.4.2 and its proposed interest rate language. Section 9.4.2 provides Charter, as the billed Party, with an alternative mechanism for disputing bills. Rather than withholding amounts disputed prior to the bill due date (as provided by Section 9.4.1), Section 9.4.2 permits Charter to *pay* all billed amounts and then *later dispute* such already-paid amounts for up to one year. By proposing its interest rate language in this provision, Charter effectively seeks the ability to recover inordinate amounts of interest on refunds of already-paid amounts for up to a one-year period.[72] This is not how the Parties originally envisioned Section 9.4.2 to operate.

Section 9.4.2 is a "safety net" provision, permitting the billed Party, for up to one year, to seek recovery of amounts paid in error, recognizing that the billed Party may not be able to identify disputed charges prior to the bill due date. However, applying an interest rate to such refunds effectively provides the billed Party an incentive to make Section 9.4.2 the primary provision under which a Party seeks resolution of disputed amounts. It would effectively provide an incentive – in the form of large interest payments – for the billed Party to ignore its obligation to review and timely dispute charges under Section 9.4.1 and to rely principally on Section 9.4.2 instead, knowing that its failure to timely

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[71] *See CenturyTel Proposed Order*, 27-28. Interest would be recovered by CenturyTel on improperly withheld amounts only if the forum in which the billing dispute was ultimately resolved allows for it by rule or statute.

[72] *See id.*, 28-29.

dispute charges under Section 9.4.1 would be rewarded with large interest payments. This runs contrary to public policy favoring the timely resolution of billing disputes.[73]

Responding to this criticism, Charter simply proposes a "finding of fact" to the effect that there is "[n]o record evidence . . . to demonstrate that Charter would use the interest accrual process unfairly."[74] In making this assertion, Charter implicitly recognizes that its proposed language creates the incentive for abuse: Charter does not refute that an opportunity for "gaming" these terms exists. Thus, Charter's proposed finding of fact is at least a tacit acknowledgement that its proposed language provides the very incentives that concern CenturyTel.

Finally, Charter ignores another inequitable result of its proposal. Charter seeks to apply interest on refunds "for the number of days from the Bill Date until the date on which such payment is made."[75] As explained above, given that Section 9.4.2 permits the billed Party to dispute and recover overpayments up to one year, Charter effectively seeks interest on any refunds back to the original bill date, as opposed to when it put CenturyTel on notice that such paid charges are actually in dispute. CenturyTel should not be required to pay interest on disputed amounts in its possession for any period of time during which it is not on notice that such amounts are in dispute.[76]

Given the inequitable and perverse incentives built into Charter's proposed language, the Commission should adopt CenturyTel's proposed language to resolve Issue 8(a).

Issue 8(b)

The *CenturyTel Proposed Order* already identifies the proper bases for deciding Issue 8(b) in favor of CenturyTel's proposed language in Article III, §§ 9.5.1 and 9.5.2. Indeed, this issue was addressed and resolved by the Commission in Docket No. TO-2005-0336 ("M2A" proceeding).[77] In

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[73] *Id.*, 29.

[74] *Charter Proposed Order*, 20.

[75] Joint Statement, 21.

[76] *CenturyTel Proposed Order*, 29.

[77] *See id.*, 31-32.

essence, the Parties' dispute whether CenturyTel should be permitted to suspend service or ultimately discontinue service under the Agreement in the event that Charter fails or refuses to pay "undisputed charges." In response to a similar question posed in the M2A proceeding, the Commission affirmatively stated: "The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection."[78] Moreover, in response to Charter's proposal that CenturyTel not be permitted to terminate service due to unpaid, undisputed charges without first seeking permission from the Commission, the Commission unequivocally stated in the M2A proceeding: "SBC [the ILEC] need not ask specific permission from the Commission before terminating service to a non-paying CLEC."[79] There is no reason for the Commission to deviate from its prior determination in the instant proceeding.

Charter's only argument for adopting terms diametrically opposed to those approved in the M2A proceeding is that, in the past, the Parties have disagreed about whether a charge is "disputed" or "undisputed."[80] That argument, however, does not outweigh the necessity of adopting terms that provide CLECs with the necessary incentives to pay legitimate undisputed charges or that provide the ILEC with necessary protections to ensure that it receives payment for services rendered. To the extent Charter believes it has disputed a charge when CenturyTel asserts such charges are undisputed, the record evidence demonstrates that Charter is willing and able to advocate its position and interests under existing Commission rules.[81] Baseline consequences associated with failing to pay undisputed charges are needed. If a legitimate controversy exists regarding whether certain charges really are disputed, the Commission can intervene to resolve that controversy in the narrower set of instances where it arises.

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

[79] *Id.*

[80] *Charter Proposed Order*, 23.

[81] *See, e.g.*, Giaminetti Rebuttal Testimony, 25:27-26:11.

The Arbitrator should adopt CenturyTel's proposed language to resolve Issue 8(b) as it is consistent with the Commission's prior determinations in the M2A proceeding. Charter's proposed language is not consistent with the Commission's prior determinations and should be rejected.

ISSUE 10[82]

Charter's position on Issue 10 should be rejected as it is based on two incorrect assertions. First, Charter contends that CenturyTel is a member to AT&T's 13 State-CLEC ICA.[83] "CenturyTel," as defined by the Agreement, refers to CenturyTel of Missouri LLC.[84] CenturyTel of Missouri LLC unquestionably is an ILEC; thus, it is clearly not a party to such an agreement.[85]

Second, in referencing the decision in the LightCore Proceedings – a case that, once again, did not involve CenturyTel – Charter contends that "CenturyTel" (*i.e.*, CenturyTel Solutions, LLC and LightCore) argued in favor of certain change-in-law provisions that were included in the interconnection agreement at issue in that case.[86] However, the language addressed in the LightCore Proceedings regarding the change-in-law provision is more closely related to the language proposed by CenturyTel in Article III, § 12.1 of this very Agreement. Section 23.1 of the agreement adopted in the LightCore Proceedings required those Parties to renegotiate the affected provisions of that agreement and to amend

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[82] The Parties agreed Issue 10 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[83] *Charter Proposed Order*, 24.

[84] Agreement, at *Preface and Recitals* ¶ 1.

[85] Even if Charter is attempting to refer to the interconnection agreement between Southwestern Bell Telephone (d/b/a SBC Missouri) and Xspedius Management Co. Switched Services and Xspedius Management Co. of Kansas City, LLC (both d/b/a/ Xspedius Communications, L.L.C.), that was adopted by CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC (d/b/a LightCore) in Case No. LK-2006-0095 before this Commission (the "LightCore Proceedings"), the text quoted in the *Charter Proposed Order* at 24 is not present in Section 23.1 of that Agreement as argued by Charter. Additionally, CenturyTel's review of that agreement does not show the language in any other section. Rather, Charter appears to be quoting language in an interconnection agreement to which a *Charter* affiliate or subsidiary – not CenturyTel and not a CenturyTel affiliate or subsidiary – is a party with AT&T. *See In the Matter of the Interconnection Agreement between Southwestern Bell Telephone, L.P., d/b/a SBC Missouri, and Charter Fiberlink-Missouri, L.L.C.*, Case No. TK-2006-0047 (Filing Nos. 2, 3, 6, 7, and 10). The language contained within Section 21.1 of that interconnection agreement (*i.e.*, not Section 23.1 as stated by Charter) matches the language referred to in *Charter Proposed Order* at 24 to the effect that "the Parties shall have sixty (60) days from the Written Notice [of either Party] to attempt to reach agreement on appropriate conforming modifications."

[86] *Charter Proposed Order*, 25.

the agreement as required to reflect a change-in-law.[87] Section 12.1 of the Agreement requires this as well.[88] Additionally, Section 23.1 of the LightCore agreement required those parties to follow a specified dispute resolution process could they not agree to an appropriate modification of the agreement.[89] Likewise, the language proposed by CenturyTel in Section 12.1 also addresses what should happen should the Parties not agree to an appropriate modification.[90] In short, Section 23.1 of the LightCore agreement does not address the retroactive application of a change in law, as does Article III, § 12.3, the section in dispute in Issue 10. Therefore, Charter's arguments with regard to Issue 10 are entirely off-point and should be rejected.

At the same time, CenturyTel has amply demonstrated that its proposed language to resolve Issue 10 is entirely reasonable and appropriate. CenturyTel's proposal properly ensures 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. Likewise, 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.

As discussed in the *CenturyTel Proposed Order*,[91] this approach is just and reasonable, as it requires an appropriate refund or payment based upon the services that were not being performed during the time period in question, or the additional services being performed, as the case may be. Therefore, for all of the reasons provided by CenturyTel, the Arbitrator should approve the language proposed by

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[87] *See supra* note 85.

[88] *See* Agreement, Article III, § 12.1 (requiring the Parties to "amend the agreement" and to "initiate negotiations to remove or modify such [changed] terms upon the written request of either Party" upon a change in law).

[89] *See supra* note 85.

[90] *See* Agreement, Article III, § 12.1 (requiring the Parties to arbitrate a dispute under 47 U.S.C. § 252 should they not agree on the addition, removal, or modification of terms to amend the Agreement).

[91] *CenturyTel Proposed Order*, 33-34.

CenturyTel in Issue 10, relating to Article III, § 12.3.

ISSUE 11

Charter fails to mention the most important disputed term related to Issue 11 in the *Charter Proposed Order*: CenturyTel's proposed Article III, § 53. Charter asserts that "CenturyTel's proposal would effectively permit it to unilaterally modify the contractual obligations [in the Agreement]"[92] and that the terms of the Service Guide would "take precedence over the Agreement."[93] Charter is wrong on both points. Charter advanced these concerns in negotiations, and CenturyTel's proposed Section 53 was drafted specifically to address them. Yet, in its written testimony and through the filing of the *Charter Proposed Order*, Charter ignores proposed Section 53.[94]

As CenturyTel's proposed Section 53 provides, CenturyTel agrees to limit the Service Guide's applicability to only those subject matters that are specifically referenced in the Agreement. Section 53 also clarifies that the incorporated procedures set forth in the Service Guide are *intended to "supplement" the terms of the Agreement, and cannot be construed as contradicting or modifying the terms of the Agreement*, or, for that matter, as imposing upon Charter a substantive term unrelated to operational procedure that is not otherwise found in the Agreement. Finally, Section 53 provides for the delayed implementation of a change in procedure that "materially and adversely impacts" Charter's business while the Parties work to resolve the issue, and should the Parties be unable to resolve such issue, either Party may use the dispute resolution procedure to seek ultimate resolution.[95] Given the concessions and clarifications expressly embodied in Section 53, the Arbitrator should find that Section 53 properly balances the Parties' competing concerns and should adopt CenturyTel's proposed language for Issue 11.

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[92] *Charter Proposed Order*, 27-28.

[93] *Id.*, 28.

[94] *See, e.g.*, Miller Direct Testimony, 41:8-11.

[95] *See CenturyTel Proposed Order*, 36-38.

The Arbitrator also should recognize the serious negative implications of adopting Charter's proposed language. Charter's proposed language would introduce chaos into CenturyTel and Charter's operational relationship. Charter effectively could decide if and when it was willing to follow a simple operational process or procedure. What happens if Charter decides not to follow a simple ordering procedure or an established maintenance escalation process? Must CenturyTel customize a procedure for Charter and treat it differently than other CLECs interconnected with CenturyTel? Must CenturyTel train its personnel on its internal operating processes and procedures applicable to CLEC interactions, and then provide special training on Charter-specific processes and procedures? Charter's proposal will cause uncertainty and future disputes between the Parties. Therefore, it should be rejected.

Finally, regardless of how often Charter asserts it in print, Charter's statement that "it is not common for documents like CenturyTel's Service Guide to bind CLECs via the agreements" is false.[96] The record is replete with examples in which ILECs have incorporated the terms of service guide-type documents into their interconnection agreements[97] (albeit on terms more onerous than those proposed by CenturyTel under Section 53), including in Charter's current interconnection agreement with Verizon.[98]

For all of the reasons provided by CenturyTel, the Arbitrator should approve the language proposed by CenturyTel for the resolution of Issue 11.

ISSUE 12[99]

The Arbitrator should reject Charter's contention that CenturyTel's proposed language would "undercut a Party's federal law right to a hearing before the Commission or FCC or a court of competent jurisdiction."[100] Commercial arbitration would only occur under CenturyTel's proposed language in the situation where *both* the FCC and this Commission have either declined to hear a dispute or lack

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[96] *Charter Proposed Order*, 28.

[97] *See* Miller Direct Testimony, 44:23-45:20; Miller Rebuttal Testimony, 32:1-33:2.

[98] Miller Rebuttal Testimony, 32:1-33:2.

[99] The Parties agreed Issue 12 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[100] *Charter Proposed Order*, 31.

jurisdiction to do so.[101] However, even where arbitration occurs under CenturyTel's proposed language, the Federal Arbitration Act allows for appeal to a court of law in certain situations.[102] Thus, Charter's argument that it is being denied its day in court is certainly an overstatement.

In situations where both the FCC and the Commission either decline or lack jurisdiction to hear a dispute, the Arbitrator should determine that arbitration is the appropriate forum for dispute resolution. Arbitration provides flexibility, cost savings, the ability to choose an expert arbitrator, and timely resolution of disputes.[103] Moreover, state commissions in Arkansas, Michigan, and Oregon have adopted similar language compelling arbitration in "gap cases" that will not be addressed either by the Commission or the FCC, further supporting the conclusion that CenturyTel's proposed language is reasonable.[104]

For all of the reasons provided by CenturyTel, the Arbitrator should approve the language proposed by CenturyTel to resolve Issue 12.

ISSUE 13

As shown by the competing issue statements on Issue 13, the Parties' proposed language on this issue differs significantly. CenturyTel proposes additional language for Article III, § 9.4 that relates only to billing disputes, the procedures for disputing a billed amount, and the time frames within which the billed Party must seek formal dispute resolution.[105] Conversely, Charter seeks to add Article III, § 20.4 to the Agreement which creates a two-year statute of limitations applicable to all "Claims" arising under the Agreement. Such a provision would require a Party to initiate a Claim within two years following the date of the occurrence that gives rise to the Claim, or the Claim is waived.[106]

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[101] *CenturyTel Proposed Order*, 39.

[102] *See, e.g.*, 9 U.S.C. §§ 10 and 11.

[103] *CenturyTel Proposed Order*, 38-39.

[104] *Id.*, 40-41.

[105] *See* Joint Statement, 42-43.

[106] *Id.*, 43-44.

Charter contends that the one-year period within which CenturyTel requires a billed Party to initiate a formal dispute with regard to a billing issue conflicts with 47 U.S.C. § 415 (the general statute of limitations in the Act), which provides a two-year limitation period.[107] However, Charter fails to recognize that CenturyTel's one-year limitation period proposed in Section 9.4 applies *only to billing disputes.* Other claims arising under the Agreement would be subject to the applicable statutory limitation period, which may be the two-year limitation period supported by Charter. At the same time, CenturyTel's proposed addition to the agreed upon language of Section 9.4 establishes specific procedures and time frames for the Parties to proceed with formal dispute resolution of a billing matter if good faith negotiations fail. These procedures and the time limit are fair, equitable, and commercially sound practices. Though Charter claims that certainty in the terms of the Agreement with regard to "a specific time frame by which either Party can make a claim against the other" is desirable,[108] Charter cannot deny that CenturyTel's proposed language for Section 9.4 provides greater certainty with regard to both time frames and specific procedures than Charter's proposed language.

Charter further complains that CenturyTel's proposed language places the burden on the billed Party to escalate a billing issue to formal dispute resolution and places the burden of proof on the billed Party. These are not rational concerns. The provisions of Section 9.4, as well as the testimony of CenturyTel's witness, confirms that when CenturyTel receives notice from Charter of a disputed billed amount, CenturyTel would be obligated to investigate such dispute in good faith and to report its findings to Charter.[109] Section 9.4's undisputed language sets forth a mutual covenant of the Parties to "work in good faith in an effort to resolve and settle the dispute." Only if such efforts fail following 180 days after notice of the disputed billing, would Charter be required to proceed to initiate a formal dispute

[107] *Charter Proposed Order*, 32-33.

[108] *Id.*, 32.

[109] Miller Direct Testimony, 47:16-48:5.

prior to passage of one year following the notice. Only Charter would be in possession of the reasons supporting its positions in the dispute; thus, Charter should initiate the process.

The reasoning and the disposition of Issue 13 set forth in the *CenturyTel Proposed Order* is consistent with the commercial practice and sound reasoning. Thus, and for all of the reasons provided by CenturyTel, the Arbitrator should approve CenturyTel's proposed language to resolve Issue 13.

ISSUE 14

Charter's discussion of Issue 14 in the *Charter Proposed Order*[110] sets forth either a misunderstanding or a misrepresentation of CenturyTel's position concerning this Issue. Therefore, clarification and correction is necessary. Charter states:

> CenturyTel asks us to approve its right to seek reimbursement from Charter for all 'reasonable' costs. Miller, Direct at 20, lines 3-4. But CenturyTel cannot, or will not, identify such costs at this time. Instead, CenturyTel seeks the right to recover these unidentified, or ill-defined, 'expenses' by assessing non-recurring charges upon Charter.[111]

In contrast, the record discloses CenturyTel's true position regarding Issue 14 to be that

> if Charter requests CenturyTel to perform a service or do something that is not otherwise provided in the Agreement, and CenturyTel is otherwise willing to provide such service or engage in some act for the benefit of Charter, Charter should pay the actual costs incurred by CenturyTel. Moreover, CenturyTel's language makes clear that prior to undertaking any effort, the Parties must first agree that the charges are reasonable. See CenturyTel Proposed Section 22.1.[112]

If Charter asks CenturyTel to engage in action on Charter's behalf that is not addressed in the Agreement, CenturyTel will seek reimbursement of its costs. However, contrary to Charter's claim, such costs will not be "unidentified" or "ill-defined". Rather, such costs will be identified to Charter, and Charter must agree with CenturyTel that such costs are reasonable *prior* to CenturyTel proceeding with performance.

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[110] *See Charter Proposed Order*, 34-37.

[111] *Id.*, 35. The reference to the Miller Direct Testimony in this quoted section of *Charter Proposed Order* should be a reference to the Miller Rebuttal Testimony.

[112] Miller Direct Testimony, 25:24-26:5.

Further, if a rate or charge has not been identified in the Pricing Article of the Agreement relative to a service or facility offered under the Agreement, it is only reasonable, as CenturyTel has demonstrated, that such service or facility should be subject to "TBD Prices" established under Article III, § 46 of the Agreement.[113] Charter's rejoinder is that "CenturyTel's proposal would allow it to assess charges upon Charter to perform functions that are not currently provided for in the Agreement for potential expenditures or costs which CenturyTel has not identified."[114] Charter is wrong. Section 46 expressly provides that "the Parties shall meet and confer to establish a price. In the event the Parties are unable to agree upon a price for a TBD item, either Party may then invoke the dispute resolution process set forth in Article III, Section 20." Thus, Charter is wrong. Regardless of Charter's effort to "spin" CenturyTel's proposal and testimonies, CenturyTel's proposal treats any undetermined charges for services provided in the Agreement as "TBD Prices" and requires the Parties to meet and confer, thereby establishing the charges either by mutual agreement or pursuant to Commission approval in accordance with the Agreement's dispute resolution process.

Finally, CenturyTel's proposed language to resolve Issue 14 does not "increase the potential for future disputes."[115] CenturyTel's proposal reduces such likelihood. As noted above, if the charge in question relates to a service not addressed in the Agreement, the charge will only be made *based upon the prior mutual agreement of the Parties.* The specific dispute resolution procedures discussed above only require Commission intervention on unresolved issues. Thus, a reasoned review of CenturyTel's proposal leads to the conclusion that the foregoing procedures *reduce the likelihood of disputes.*

Based upon the foregoing and for all of the reasons set forth by CenturyTel, the Arbitrator should approve CenturyTel's proposed language to resolve Issue 14.

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[113] *Id.*, 27:8-13. As can be seen from CenturyTel's discussion of Issue 32 *infra*, it is possible that the Arbitrator's and the Commission's resolution of the Parties' directory assistance obligations may be an example of a service for which the Agreement does not provide for a rate or charge.

[114] *Charter Proposed Order*, 36.

[115] *Charter Proposed Order*, 36.

ISSUE 15

Issue 15(a)[116]

Relying entirely on a tort case relating to the sale of a defective tree seat that was sold to a consumer who was "severely injured" when the tree seat collapsed, Charter argues that Missouri law requires a contributory or comparative fault standard in the situation of an agreement primarily involving contract obligations.[117] While comparative fault or contributory negligence may be appropriate in the context of *tort claims*, Charter does not explain how the concept would, or even could, apply in practice to a breach of contract claim or a claim for patent infringement. Charter also fails to cite any case law where such a concept was applied in a situation involving contract-based claims such as those being addressed in Issue 15.

Further, Charter contends that public policy supports limiting its indemnity obligations in the context of CenturyTel's "negligence, gross negligence, or intentional or willful misconduct."[118] Charter's position cannot be reconciled with the fact that it does not include such a limitation to its indemnity obligations in its tariffs or customer agreements.[119] Are those tariffs and agreements also contrary to public policy? Of course not. Charter's position contradicts Charter's requirements for its own customers.

Charter's argument that the provision is inequitable rings hollow.[120] CenturyTel's proposed language for Issue 15(a) is reciprocal. Thus, Charter is as likely to benefit from CenturyTel's proposed indemnification provision as CenturyTel. Moreover, Charter's proposed "process" for handling a third-

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[116] The Parties agreed Issue 15(a) would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[117] *Charter Proposed Order*, 38-39.

[118] Joint Statement, 48 and 52 (Charter's proposed language for Section 30.1); *Charter Proposed Order*, 39.

[119] 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.

[120] *Charter Proposed Order*, 39.

party claim[121] likely would result in a long, drawn-out process involving many lawyers and eliminating many of the benefits of indemnification.[122] Indeed, Charter itself cannot come to describe its proposed language as indemnification. Charter states that through its proposed process, it would only "technically" be continuing to indemnify CenturyTel against the claims.[123]

Finally, the Arbitrator should reject Charter's assertion that CenturyTel's proposed language for Article VII, § 9.4 is inconsistent with its proposed language in Article III, § 30.1.[124] These are two entirely different provisions with an entirely different scope of application. Under Article VII, § 9.4, a provision relating to liability and indemnification for providing E911 services, CenturyTel's proposed language does not require it to indemnify Charter and is narrowly drafted to encompass claims relating to one subject. In contrast, Article III, § 30.1 applies generally to "any and all claims" and requires CenturyTel to reciprocally indemnify Charter.

In such a situation, it is not inconsistent that CenturyTel would agree to include a limitation on Charter's duty to indemnify CenturyTel in Article VII, § 9.4, but reject such a limitation in Article III, § 30.1. In the E911 context of Section 9.4, the potential claims to which CenturyTel is at risk are narrower and, under CenturyTel's proposed language, Charter does not receive the reciprocal benefit of indemnification from CenturyTel.[125] Therefore, in the context of the E911 provision, the benefits of indemnification that are at risk under Charter's proposed language are less than the potential benefits to be lost under a provision that applies to Article III, § 30.1's "any and all claims." As a result, in the interest of reaching an agreement, it is not inconsistent that CenturyTel would agree to language in Article VII, § 9.4 that it rejects in Article III, § 30.1.

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[121] *Id*., 37-38.

[122] *CenturyTel Proposed Order*, 48-51 (discussing benefits of indemnification such as helping the Parties to identify and plan for economic risks, clearly outlining which Party will bear responsibility for mounting a defense, preventing unnecessary litigation costs, among others).

[123] *Charter Proposed Order*, 38.

[124] *Id*., 39.

[125] Notably, however, as more fully discussed in Issue 36 of *CenturyTel Proposed Order*, Charter has not provided any example as to why it may require indemnification under Article VII, § 9.4.

For all of the reasons set forth by CenturyTel, the Arbitrator should reject Charter's arguments with regard to Issue 15(a) and adopt CenturyTel's proposed language to resolve Issue 15(a).

Issue 15(b)[126]

Without any citation to legal authority, Charter contends that CenturyTel bears the burden of demonstrating that the additional limitation of warranties it proposes to include in the Agreement is "either necessary[] or appropriate."[127] Even if the "necessary or appropriate" standard is correct, CenturyTel has amply explained the basis for its language and the reasonableness of it.[128] Moreover, the Arbitrator must choose the result that best implements the applicable requirements of the Act, even if that means taking steps such as requiring the Parties to submit additional final offers or adopting its own language.[129] Thus, on either of these bases, Charter's contention is without merit.

In contrast to Charter's implication,[130] CenturyTel does not contend that the Uniform Computer Information Transactions Act ("UCITA") should be applied to the Agreement in whole. Rather, CenturyTel only refers to UCITA as a draft law that incorporates limitations of warranties in a context similar to that at issue in this case. Like UCITA, this Agreement moves beyond merely providing goods. This Agreement relates to the provision of information and services. Additionally, Charter does not address the fact that Missouri has adopted the *Restatement (Second) of Torts* § 552, which creates warranty-like liability for inaccurate information that is supplied for the guidance of others. As noted in the *CenturyTel Proposed Order*, it is upon this section of the *Restatement* that UCITA's warranties are based.[131] Given the relationship at issue between Charter and CenturyTel, the warranties of "reasonable care," "lack of negligence," and "accuracy of completeness or responses," each clearly relate to the Parties' duties regarding interconnection and exchange of traffic contemplated under the Agreement.

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[126] The Parties agreed Issue 15(b) would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[127] *Charter Proposed Order*, 40.

[128] *CenturyTel Proposed Order*, 47-49 and 51-52.

[129] 4 C.S.R. 240-36.040(5)(E) and (19).

[130] *Charter Proposed Order*, 40-41.

[131] *CenturyTel Proposed Order*, 52.

In short, the warranties about which CenturyTel is concerned are real, and there is no reason to favor disclaimer language that is incomplete. Therefore, CenturyTel requests that the Arbitrator adopt CenturyTel's language regarding Issue 15(b) for all of the reasons provided by CenturyTel.

Issue 15(c)[132]

Contrary to Charter's assertion, the limitation on damages proposed by CenturyTel is far from "arbitrary" or "artificial."[133] Although Charter sees "no valid reason" to limit the damages to be paid by *either* Party to the other,[134] such liability limitations repeatedly have been recognized by this Commission and others as necessary to ensure that rates remain reasonable to consumers and that a telecommunications company does not incur financial hardship.[135] Indeed, the validity of such a provision is supported by looking to both Charter's and CenturyTel's tariffs and customer agreements.[136]

Regarding Charter's assertion that "gross negligence" should be excluded from any limitation on damages, the Arbitrator should reject such an assertion. Missouri does not recognize the concept of gross negligence, and including such language would add needless ambiguity and confusion to the Agreement.[137]

Accordingly, CenturyTel requests that the Arbitrator adopt CenturyTel's language regarding Issue 15(c) for all of the reasons CenturyTel has provided.

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[132] The Parties agreed Issue 15(c) would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[133] *Charter Proposed Order*, 42.

[134] *Id.*, 43.

[135] *CenturyTel Proposed Order*, 48-49, and 53.

[136] *See, e.g.*, 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.

[137] *CenturyTel Proposed Order*, 53-54.

ISSUE 16

The Arbitrator should adopt CenturyTel's proposed language to resolve Issue 16. As with other issues, the *Charter Proposed Order* suffers from a series of mistaken premises that, in this instance, arise from the misstatement of the issue by Charter. Contrary to Charter's claim, CenturyTel's proposed language in Section 47 would not "directly or indirectly prohibit one Party from undertaking any plan or program to implement modifications to its network."[138] CenturyTel has made this clear.[139]

Likewise, CenturyTel's proposed Section 47 will *not* require Charter to "compensate CenturyTel for costs associated with upgrades to CenturyTel's network"[140] that arise from the traditional network upgrade improvement plans that carriers like CenturyTel undertake.[141] Again, CenturyTel has made that fact clear.[142] Accordingly, and to the extent that its reference is to CenturyTel, Charter's statement that there "should be no opportunity for one carrier to force expenses, costs and upgrades on the other carrier"[143] is not applicable.

Further, Charter claims that its "proposed language is also consistent with the Act."[144] This assertion is unsupported by any citation. As has been shown by CenturyTel, Charter's language is *not* consistent with the Act.[145] CenturyTel's demonstration and position remain valid and should be adopted by the Arbitrator.

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[138] *Charter Proposed Order*, 45.

[139] *CenturyTel Proposed Order*, 56 and 59; Watkins Direct Testimony, 25:11-18; Watkins Rebuttal Testimony, 25:17-21.

[140] *Charter Proposed Order*, 45.

[141] Inexplicably, Charter has inserted language within the proposed language contained in Issue 47 as follows: "CLEC shall be solely responsible for the cost and activities associated with accommodating [CenturyTel's] changes in its own network." *Id*., 44 (quoting CenturyTel proposed language, Article III, § 47). The insert "[CenturyTel's]" is not within Section 47, Joint Statement, 63, and Charter's insert improperly creates an issue where none exists. CenturyTel is not suggesting that the upgrades addressed in Section 47 are those associated with CenturyTel's network. The reference to "its" within the last phrase of the quote is to the CLEC and *not* to CenturyTel.

[142] *CenturyTel Proposed Order*, 56 and 59; Watkins Rebuttal Testimony, 21:21-22:1; 22:14-19.

[143] *Charter Proposed Order*, 45.

[144] *Id.*

[145] *CenturyTel Proposed Order*, 57-58.

CenturyTel has made clear that when it makes changes to its network to which Charter interconnects there needs to be a provision that ensures that CenturyTel is not responsible for the costs in Charter's network.[146] Apparently, Charter agrees based upon its statement that "[s]imilarly, Charter is responsible for the technology, and the cost of that technology on its side of the POI [Point of Interconnection]."[147] But, in pressing for reciprocity for reciprocity's sake,[148] Charter's position would create undefined exposure to CenturyTel because there are no standards applicable to Charter's network upgrades that it may deploy and because CenturyTel does not interconnect with Charter's non-ILEC network.[149]

For all of the reasons provided by CenturyTel, and in a manner consistent with that which Charter has already agreed in Missouri,[150] CenturyTel requests that the Arbitrator adopt CenturyTel's proposed language in Article III, § 47. Such result is consistent with the law and facts in this record.

ISSUE 17

Charter acknowledges that it presented no evidence regarding this Issue 17.[151] Charter's proposal for resolution of this issue simply boils down to a claim that the remedy provided in 47 C.F.R. § 64.1140(a) is sufficient to protect CenturyTel from damages that it would experience as a result of an undisputed unauthorized port of a CenturyTel customer's number to Charter.[152] CenturyTel submits that Charter's position be rejected and that CenturyTel's proposed language to resolve Issue 17 be adopted by the Arbitrator.

Section 64.1140(a) provides that an authorized carrier, as defined in Section 64.1100(c), may recover "an amount equal to 150% of all charges paid to the submitting telecommunications carrier by

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[146] *Id.*, 56-57; Watkins Direct Testimony, 24:9-15; 25:1-9.

[147] *Charter Proposed Order*, 45.

[148] Gates Direct Testimony, 24:21-23.

[149] *CenturyTel Proposed Order*, 58-59.

[150] *Id.*, 57; Watkins Rebuttal Testimony, 23:12-24:16.

[151] *Charter Proposed Order*, 46.

[152] Charter's proposal is set forth on pages 45-47 of the *Charter Proposed Order*.

such [slammed] subscriber" from the submitting carrier that presents an unauthorized port. Critically important, however, is that Section 64.1140(a) expressly provides that: "The remedies provided in this part *are in addition to any other remedies available by law*." Thus, a remedy provided in a contract between the authorized carrier and the carrier submitting an unauthorized porting order would be a remedy available by law. Importantly, the FCC rule does not provide that the 150% of all charges remedy is in lieu of the authorized carrier's legal remedies; rather, such legal remedies are *additional.*

In order to recover for unauthorized porting activities pursuant to the FCC's rules, the authorized carrier (in this instance, CenturyTel) would be required to utilize the procedures provided under 47 C.F.R. § 64.1170 and to involve the Commission in the establishment of the recovery. Such a procedure would, in and of itself, involve the expenditure of time and financial resources by both the Commission and CenturyTel. As such, it is both reasonable and necessary that a contract remedy for this type of slamming activity should be available to CenturyTel to avoid such expenditures. The amount of compensation per affected line that Charter would be required to pay to CenturyTel pursuant to CenturyTel's proposed language for Article III, § 50.2 is $50.00. This amount is a reasonable liquidated damage amount to compensate for switching the affected customer back to her or his authorized carrier – in this case, CenturyTel.

CenturyTel's proposed language for the Agreement regarding Issue 17 has been shown to be entirely reasonable. Accordingly, for all of the reasons CenturyTel has provided, CenturyTel requests that its proposed language for the Agreement regarding Issue 17 be adopted to resolve this issue.

ISSUE 18

For the reasons set forth in the *CenturyTel Proposed Order* and herein, CenturyTel submits that the Agreement should provide: (1) for additional POIs to those currently in place between the Parties' respective networks under those circumstances outlined by CenturyTel; (2) that each POI must be within the CenturyTel network; and (3) that no interpretation of this resolution can impose a superior form of

interconnection upon CenturyTel.[153] Nothing within the *Charter Proposed Order* should sway the Arbitrator from using the proposed language of CenturyTel to resolve Issue 18.

Although it has been thoroughly discredited, it is not at all surprising that Charter continues its mantra that a "single POI per LATA" is a generalized requirement.[154] However, conspicuously absent from Charter's submission is any cite to an FCC rule that references a single POI per LATA. In fact, the only decision cited by Charter is one that is derived from a Section 271 action with a Bell Operating Company ("BOC").[155] Nonetheless, according to Charter, it "has a right under federal law to establish such a single POI arrangement, and that such arrangement is the most efficient and cost effective manner of the Parties to exchange traffic."[156] CenturyTel has demonstrated that the concept of a single POI per LATA has no application to a non-BOC such as CenturyTel. Accordingly, regardless of the number of times that Charter repeats its theory, Charter's "single POI per LATA" assertions, as applied to CenturyTel, are without merit. Charter's position is based on five (5) interrelated premises, each of which is wholly without merit.

First, Charter contends that a "single POI per LATA" is a generalized "right" under applicable FCC's decisions.[157] Charter's reliance upon four (4) FCC actions[158] – the FCC's *Unified Intercarrier*

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[153] There can be no dispute that the imposition upon an ILEC of a "superior" form of interconnection is unlawful as such requirement would violate Section 251(c)(2)(C)'s requirement that interconnection provided to the CLEC must be no greater than the "at least equal in quality." 47 U.S.C. § 251(c)(2)(C); *see also Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997) ("*IUB I*"); and *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744, 758 (8th Cir. 2000) ("*IUB II*")**.**

[154] *See, e.g.*, *Charter Proposed Order*, 64, 65 and 68.

[155] *CenturyTel Proposed Order*, 67-69. In fact, in the FCC's decision that initially established the Part 51 rules, there is only one reference to the word "LATA" and that is in the context of choices for deaveraging of network element rates. *See First Report and Order*, 11 FCC Rcd at 15870 (para. 758); *see also* Watkins Direct Testimony, 37:1-5.

[156] *Charter Proposed Order*, 64.

[157] *Charter Proposed Order*, 66.

[158] *Id.*, 66-67

Compensation NPRM,[159] the FCC's *Unified Intercarrier Compensation Further NPRM*,[160] the *Verizon Arbitration Order*[161] and the *SWBT Texas 271 Order*[162] – is entirely misplaced.

With respect to the *Unified Intercarrier Compensation NPRM*, Charter cites to paragraph 112.[163] Although Charter notes that it omitted the footnote,[164] in doing so, Charter omitted an important reference. In this omitted footnote, the FCC cross-references its prior footnote 91,[165] in which, the FCC references 47 C.F.R. § 51.321 (more on that below) as well as the *SWBT Texas 271 Order*.[166] Charter also cites to paragraph 87 in the *Unified Intercarrier Compensation Further NPRM*.[167] The footnote reference that is omitted by Charter at the end of that quote again cites to the *SWBT Texas 271 Order*.[168] With respect to the *Verizon Arbitration Order*, Charter cites to paragraph 52.[169] The footnote that Charter omits from the citation to paragraph 52[170] references the *Unified Intercarrier Compensation*

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[159] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking*, CC Docket No. 01-92, FCC 01-132 (rel'd April 27, 2001) ("*Unified Carrier Compensation NPRM*").

[160] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, FCC 05-33 (rel'd March 3, 2005) ("*Unified Carrier Compensation Further NPRM*").

[161] *See In the Matter of Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket Nos. 00-218, 00-249, and 00-251, FCC 02-1731 (rel'd July 17, 2002) ("*Verizon Arbitration Order*").

[162] *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*"). Southwest Bell Telephone Company is a Bell Operating Company. *See* 47 U.S.C. § 153(5).

[163] *Id*., 66, n.82.

[164] *Id*.

[165] *Intercarrier Compensation NPRM*, para. 112, n.179.

[166] *Id*., para. 72, n.91.

[167] *Charter Proposed Order*, 66-67 and n.85.

[168] *Unified Intercarrier Compensation Further NPRM*, para. 97, n.276.

[169] *Charter Proposed Order*, 66 and n.83.

[170] *Id*.

NPRM at paragraphs 72 and 112 (which ultimately rely on the *SWBT 271 Texas Order* as noted above).[171]

Therefore, and as previously explained by CenturyTel,[172] these four FCC actions all rely on a single provision of an agreement entered into between Southwestern Bell Telephone Company ("SWBT") (which is a BOC) and MCI Worldcom ("MCI") addressed in the *SWBT 271 Texas Order*. The FCC's *SWBT 271 Texas Order*, in turn, cites to and quotes within footnote 174 a provision within the SWBT/MCI interconnection agreement, which CenturyTel quoted.[173]

Once again, CenturyTel notes that a private contractual provision between SWBT and MCI *cannot* bind CenturyTel, much less establish a generalized rule. The genesis of the discussion by the FCC related to SWBT. Assuming that there was some obligation imposed on that BOC, that obligation cannot be imposed upon a non-BOC like CenturyTel. Thus, Charter's reliance on the four FCC actions to create "the single POI per LATA rule"[174] is wholly without merit.[175]

Second, Charter claims that the only relevant issue with respect to the establishment of POIs is technical feasibility.[176] In effect, Charter is asking the Arbitrator to ignore the other Section 251(c)(2) requirements that interconnection must be within the ILEC's network and that the interconnection arrangement must not be more than equal to that which CenturyTel provides to itself, affiliates and other carriers.[177] The Arbitrator cannot do this. As a general principle, "[s]tatutory construction is a 'holistic

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[171] *Verizon Arbitration Order*, para. 52, n.118.

[172] *CenturyTel Proposed Order*, 65.

[173] *Id*., 68-69.

[174] *Charter Proposed Order*, 67.

[175] *Id*., 64, 68. Setting aside its improper and misplaced rhetoric, Charter's suggestion is meritless that CenturyTel "moved away" from its position that there was no single POI per LATA rule within its rebuttal case. *Id*., 69. The rebuttal case addressed the contentions made in testimonies of Charter and cannot be viewed as an alteration of the opening testimonies. CenturyTel was not required to repeat its earlier testimony which would be logical outgrowth of Charter's contention.

[176] *See, e.g.*, *Charter Proposed Order*, 65, 68, 70 and 73.

[177] 47 U.S.C. §§251(c)(2)(B) and (C).

endeavor.'"[178] Thus, the meaning of a lone statutory line does not exist in isolation, but must be read in the context of the overall statutory scheme in which it is found.[179] Indeed, other states have come to the same proper conclusion with regard to the interrelated and interdependent requirements of Section 251(c)(2).[180] Moreover, Charter also has failed to demonstrate the continued validity of its references to the FCC's technical feasibility discussion in light of *IUB I* and *IUB II*.[181] Charter's statements cannot rationally supplant the underlying public policy reasons supporting the reasonableness of CenturyTel's proposal with respect to the factors to be considered for the establishment of additional POIs.[182] Accordingly, Charter's parsing of the reference in Section 251(c)(2) to "technical feasibility" without reference to the other factors within Section 251(c)(2) should be rejected.

Third, in addition to its meritless position regarding a "single POI per LATA" rule, Charter suggests that Section 251(c)(2)(b) and the FCC's rules – in particular Section 51.305 and Section 51.321 – implement the concept of a "single" POI.[183] Charter fails to note, though, that the network being addressed is the *ILEC's* network that is used by the ILEC for the exchange of local traffic and that network must be evaluated in light of *all* of the Section 251(c)(2) requirements. The record demonstrates that CenturyTel does not operate a "network" that provides for exchanging "local" traffic in the various exchanges within which Charter operates. Rather, the facilities that exist are used for the transport of access traffic (*i.e.*, the LEC originating and terminating functions for telephone toll service).[184] Charter's claims also cannot be reconciled with the fact that it has multiple POIs with CenturyTel currently and the fact that those POIs are sufficient for the connections and the exchange of

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[178] *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

[179] *Id.*; *In re Skaggs*, 349 B.R. 594, 599 (Bkrtcy. E.D.Mo. 2006) ("'In interpreting one part of a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (quoting *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975)).

[180] *CenturyTel Proposed Order*, 71-72.

[181] Watkins Rebuttal Testimony, 31:7-17.

[182] *Id.*, 72-73; *see also* Joint Statement, 66-71 (CenturyTel Proposed Sections 2.2.2, 3.2.2 (in its entirety) and 2.3.2.4.4).

[183] *Charter Proposed Order*, 65, 67, 69-70.

[184] 47 U.S.C. §§ 153(16) and (48); Tr., 337:10-15.

traffic today.[185] Charter fails to explain why the existing arrangements must be altered. Therefore, Charter's position is factually and legally suspect.

Fourth, Charter claims that what it is requesting the Arbitrator to approve is technically feasible because facilities exist between the exchanges of CenturyTel within which Charter competes. According to Charter, CenturyTel "already has the capacity to send traffic between, and among, CenturyTel end offices in the areas served by Charter."[186] Charter also suggests that the Arbitrator should be "convinced that existing network arrangements on CenturyTel networks will mitigate potential concerns regarding CenturyTel's ability to receive traffic at a single POI on its network," and that "a single POI" would not "constitute either a technically infeasible interconnection arrangement or an unreasonably costly arrangement."[187] Charter's contentions are factually inaccurate.

Although Charter references the transport of "traffic", the record (as noted above) indicates that the CenturyTel facilities carrying such "traffic" are deployed for the transport of "access" traffic and not local traffic.[188] Thus, no facilities exist for the exchange of the *local* traffic that the Agreement addresses. As a result, Charter seeks to impose upon CenturyTel the obligation to *establish new facilities and/or trunking arrangements* in violation of the Act.

Under Charter's theory, CenturyTel would be required to institute *new local* traffic transport network arrangements that do not exist today and, thus, are not provided to itself or any other carrier. As a result, these new arrangements will require CenturyTel to incur costs. Contrary to Charter's contention,[189] the actual magnitude of the costs cannot be determined because Charter has not specifically proposed how it would intend to use its otherwise improper "single POI per LATA"

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[185] Tr., 419-421.

[186] *Charter Proposed Order*, 71.

[187] *Id.*

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

[189] *Charter Proposed Order*, 73, n.98.

proposal on the areas within which it competes with CenturyTel.[190] In any event, logic dictates that costs will be incurred by CenturyTel for the new network arrangements needed to satisfy Charter's request for a superior form of interconnection.[191]

Finally, Charter suggests that CenturyTel's proposal would impede Charter's network decisions and "could allow CenturyTel to force Charter to build out a ubiquitous network based on the same geographic reach as the CenturyTel network."[192] Charter goes on to claim that "by forcing CLECs to use multiple POIs of CenturyTel's choice and location, CenturyTel is prohibiting CLECs, like Charter, from enjoying the efficiencies CenturyTel built into the network for its own use, and improperly shifting the costs of building out the CenturyTel network to its competitors." [193] Charter also claims that "allowing CenturyTel to determine the number and location of POIs would allow CenturyTel to have control over Charter's investment decisions and could force Charter to invest in facilities that are not justified from a market or engineering standpoint."[194]

Charter's claims are, at best, overstatements and cannot be reconciled with the fact that Charter

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[190] In a quote provided by Charter from the FCC, the reference suggests that ILECs must "modify" their networks. *Charter Proposed* Order, 69-70. While the *IUB I* Court indicated acceptance of the FCC's statements regarding some "modification" by an ILEC of its facilities, *IUB I*, 120 F.3d at 813, n.33, the *IUB I* Court also stated that competitive carriers requesting interconnection should have access "only to an incumbent LEC's existing network – not to a yet *unbuilt* superior one." *Id*. at 813 (emphasis added). Even the FCC agrees that "superior" interconnection goes beyond Charter's inferred "modifications" of the CenturyTel network. According to the FCC, incumbents are not required "to *alter substantially* their networks in order to provide superior quality interconnection and unbundled access." *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, and 98-147, FCC 03-36, released August 21, 2003 at ¶ 15 (citing *IUB I* at 753) (emphasis added). Though the FCC's statements were made while discussing UNEs, the concept of superior interconnection is derived from Section 251(c)(2)(C), which is at issue in this proceeding. Moreover, *establishing* new facilities and/or trunking arrangements is clearly a substantial change to an existing network.

[191] Charter reiterates its claims that a single POI would be more efficient for CenturyTel "due to lower fiber transports costs." *Charter Proposed Order*, 70, n. 97 (quoting Gates Direct Testimony at 45:12-13). While such an arrangement may be more efficient for Charter since it improperly shifts Charter's costs to CenturyTel, the cost onsets associated with CenturyTel accommodating Charter's proposal cannot be suggested to result in more efficiencies to CenturyTel, notwithstanding the fact that imposing such arrangements would be an unlawful form of superior interconnection.

[192] *Id.*, 73.

[193] *Id.*

[194] *Id.*

has multiple POIs today in the area in which it competes and those POIs are sufficient.[195] Moreover, CenturyTel's proposed language would require the Parties to engage in the development of whatever additional POIs would be required in the future,[196] subject to Commission oversight and review if necessary. In addition, there is no evidence in the record to suggest that there are any efficiencies associated with CenturyTel's network connected with the exchange of *local* traffic that are not being shared. CenturyTel's proposal would *not* require a mirroring of the CenturyTel network in that Charter or any CLEC could expand its local calling area through the construction of its own facilities or making network arrangements with other carriers. Thus, each Party would retain its individual investment decisions or seek Commission involvement if such investment was deemed inappropriate. As a result, Charter's hyperbole is misplaced and should be rejected as those efforts cannot be reconciled with CenturyTel's proposed language.

Accordingly, for all of the reasons provided by CenturyTel, the Arbitrator should adopt CenturyTel's position on Issue 18 and direct the Parties to conform the Agreement to the language proposed by CenturyTel.

ISSUE 19

For the reasons stated in the *CenturyTel Proposed Order* and herein, the Arbitrator should: (1) adopt CenturyTel's threshold for a DS1 level of traffic at 200,000 minutes of use per month; (2) require the provision of a Percent Local Use ("PLU") factor in order to ensure proper billing of traffic; and (3) ensure that the existing trunking arrangements between the Parties are not abandoned.[197] Such action is consistent with the law, the record, and rational public policy.

Although Charter mischaracterizes the issue as whether Charter may be required to limit its use of transit arrangements to new markets,[198] Charter concedes that the true dispute in Issue 19 is over the

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[195] Tr., 419-421.

[196] Joint Statement, 66-71 (CenturyTel Proposed Sections 2.2.2, 3.2.2 (in its entirety), and 2.3.2.4.4).

[197] *CenturyTel Proposed Order*, 77-79.

[198] *Charter Proposed Order*, 74.

volume of two-way exchanged traffic that, once met, would require the Parties to migrate to a form of dedicated interconnection. The *Charter Proposed Order* fails to provide any basis for adopting Charter's 240,000 minute threshold. In contrast, CenturyTel has demonstrated that its 200,000 minute threshold is a workable standard based on CenturyTel's experience, as well as being the standard from prior agreements that Charter has with CenturyTel. CenturyTel's demonstration is more than sufficient to find that CenturyTel's 200,000 minute threshold is proper,[199] and the only one based on the record. Likewise, CenturyTel's additional requests for a PLU and the assurance of no abandonment of the existing interconnection arrangements between the Parties also stand unrebutted in the *Charter Proposed Order*. Consequently, CenturyTel requests that its 200,000 minutes of use, the PLU factor, and the non-abandonment of the existing interconnection arrangement be adopted to resolve Issue 19.[200]

Although these actions properly resolve Issue 19, Charter nevertheless claims that it has the "right" to use indirect transit arrangements up to the DS1 level.[201] To avoid any suggestion that such contentions have merit, CenturyTel addresses those claims.

The Arbitrator should reject Charter's claims for at least three reasons. First, Charter's position fails to acknowledge that the Parties have in place direct trunking arrangements with multiple POIs that work and meet the needs of both Parties.[202] The record also demonstrates that the use of transit arrangements is inferior because they raise network management, traffic measurement and proper compensation issues.[203] Moreover, Charter's own witness testified that he knows of no plans of Charter

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[199] *CenturyTel Proposed Order*, 75, 78. CenturyTel also notes that the FCC has also used the 200,000 minute of use threshold as the level of establishing a DS1. *Verizon Arbitration Decision*, at para. 116 and n.384.

[200] In the event that Charter uses its reply brief to argue various aspects of this issue, then CenturyTel respectfully requests that the Arbitrator reject Charter's position. The proposed orders were the time that the Parties' respective positions and bases for them were to be presented to the Arbitrator for resolution. Charter should not be permitted to "game" that system by arguing for the first time on reply whatever merits it believes supports its position, let alone undermine the integrity of the post-hearing filing process and fundamental fairness.

[201] *Charter Proposed Order*, 74, 75-76.

[202] Tr., 420-421.

[203] *CenturyTel Proposed Order*, 75-76.

to abandon its existing arrangements with CenturyTel.[204] Thus, it stands to reason that any transit arrangement be limited to *new markets* as proposed by CenturyTel.[205]

Second, Charter's suggestion that it has a right under Section 251(a) to unlimited use of transiting arrangements cannot be reconciled with the proper scope of the statute.[206] Section 251(a) provides for no governing standards and cannot otherwise be interpreted to require CenturyTel to be responsible for transiting charges to deliver traffic beyond its network. Charter agrees that the POI defines the Parties' respective financial obligations.[207] The requirement of the POI applies regardless of whether the form of interconnection is direct or indirect as it is a seminal requirement of Section 251(c)(2). Nonetheless, Charter's position would oblige CenturyTel to transport traffic to a tandem that is beyond not only its network (and thus beyond the POI that must be within the CenturyTel network (47 U.S.C. § 251(c)(2)), but also any transport associated with its existing local traffic. Thus, if adopted, Charter's position would result in a superior form of interconnection that cannot be imposed upon CenturyTel under *IUB I* and *IUB II*.

Third, Charter's reliance on Commission decisions and a decision from the Tenth Circuit is misplaced. The Commission's *Socket Decision*[208] continues to be the subject of unresolved litigation, Charter's reliance on *SBC Missouri (M2A)* is equally baseless.[209] Charter's witness conceded that SBC

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[204] *Id*., 78-79. Setting aside Charter's "double speak," Mr. Gates indicates that Charter has no plan to abandon the existing interconnection arrangements Charter has with CenturyTel. "*Although I do not know of any company plans to move away from these arrangeme*nts, it is not unreasonable to include terms in the agreement to cover the potential that such a situation could arise." Gates Direct Testimony, 55:2-4 (emphasis added).

[205] Joint Statement, 72 (CenturyTel Proposed Section 3.3.1.1).

[206] Charter suggests that has a "federally-established right to choose indirect interconnection when it is the most appropriate means of exchanging traffic," and that "the Act contains no limitations on this right." *Id.*, 75-76.

[207] *See, e.g.*, Gates Direct Testimony, 30:11-12.

[208] *Final Commission Decision*, Case No. TO-2006-0299, issued June 27, 2006 ("*Socket Decision*").

[209] *Charter Proposed Order*, 75; *Arbitration Order*, Case No. TO-2005-0036, issued July 11, 2005 ("*SBC Missouri (MA2)*") at 9 (adopting and incorporating by reference to the extent not modified by the *Final Arbitrator's Report* issued June 21, 2005).

Missouri's network is not the same as CenturyTel's.[210] Thus, whatever the Commission has decided with respect to the extent of SBC Missouri's transit arrangements through its network cannot be imposed upon CenturyTel.

Charter also cites *Atlas/Oklahoma Corporation Commission*[211] for the proposition that a "CLEC has the right to choose to avail itself of either direct interconnection under 251(c), or indirect interconnection under Section 251(a)."[212] Charter's assertion fails to address the actual language of the court and the context within which it was stated. Specifically, the court stated that "[t]he physical interconnection contemplated by § 251(c) in no way undermines telecommunications carriers' obligations under §251(a) to interconnect 'directly or indirectly.'"[213] This statement prefaces the court's ultimate holding in this aspect of the case, which states: "In full accordance with our previous analysis, we hold that the RTCs' obligation to establish reciprocal compensation arrangements with the CMRS provider in the instant case is not impacted by the presence or absence of a direct connection."[214] There is no dispute in this proceeding with respect to reciprocal compensation. Thus, the court's decision is not relevant to the issue at hand.

Accordingly, CenturyTel requests that the Arbitrator reject Charter's claims and position on Issue 19. In doing so, and for all of the reasons provided by CenturyTel, the Arbitrator should adopt CenturyTel's language to resolve Issue 19 as it is the only position that can be fully reconciled with the record in this proceeding, applicable law, and rational public policy.

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[210] Charter witness Gates states that SBC "is the only carrier capable of providing transit service connecting all carriers, primarily because of the ubiquitous local network it has deployed." Gates Direct Testimony, 50:9-10; *CenturyTel Proposed Order*, 73.

[211] *Atlas Telephone Company v. Oklahoma Corporation Commission*, 400 F.3d 1256, 1258 (10th Cir. 2005) ("*Atlas/Oklahoma Corporation Commission*").

[212] *Charter Proposed Order*, 75, n. 103.

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

[214] *Id*.

ISSUE 20

For the reasons stated in the *CenturyTel Proposed Order* and herein, the Arbitrator should adopt: (1) the six-month time frame proposed by CenturyTel for the negotiation of cost-based rates for the direct connection facilities, also referred to as entrance facilities;[215] and (2) the use of the Article 20 dispute resolution process for any remaining, unresolved issues. The only issues currently before the Arbitrator for resolution are the time period for the Parties' negotiations and the procedures to be used to address remaining unresolved issues.[216] While Charter acknowledges the former,[217] Charter has no response to the procedures to be used other than its vague reference to "filing an action with the Commission."[218] Thus, other than Charter's "relative use factor" or ("RUF") (which, as explained below is an end run on the negotiation process), the only truly disputed issue ripe for decision is the amount of time for negotiations by the Parties to determine the rate.

Charter proposes 90 days based on its desire to "shorten[ ] this period"[219] from CenturyTel's proposed six months. The need to shorten any time period is negated by the true up that will ensue once final rates are determined. Likewise, CenturyTel's time frame allows the Parties to engage in real negotiations as it affords the opportunity for the necessary "gives and takes" inherent in such

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[215]The issue that will need to be negotiated between the Parties is associated with the pricing directives contained in the FCC's remand decision associated with the Triennial Review Order. *In the Matter of Unbundled Access to Network Elements, Order on Remand*, WC Docket 04-313, FCC 04-290, 20 FCC Rcd 2533 (2005) (the "*TRRO*"). The *TRRO* was addressing "entrance facilities" which are the same as direct interconnection facilities – "dedicated transmission facilities that connect ILEC and CLEC locations." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 544, 589 (D.C. Cir. 2004).

[216] Charter claims that there is an issue regarding the true-up process. (*Charter Proposed* Order, 76 and 79) CenturyTel properly and amply demonstrated that no such issue exists as its Section 2.3.1.1 of Article V regarding true-up of rates ensures that such true-up will be back to the effective date of the Agreement arising from this proceeding. *CenturyTel Proposed Order*, 81.

[217] *Charter Proposed Order*, 76 (The Issue is "the time period that they should use to negotiate a final rate before the issue is escalated to the Commission.").

[218] Joint Statement, 77 (Charter's Proposed Section 2.3.1). In contrast, by relying on the Article III, § 20 dispute resolution process to govern any disagreement on the rate that may exist at the end of the negotiation period (an issue left unaddressed by Charter), *Id.*, 77-78 (CenturyTel's Proposed Section 2.3.1, CenturyTel's proposal brings to the resolution of Issue 20 a finite and determined set of procedures by which any unresolved issue can be addressed by the Commission.

[219] *Charter Proposed Order*, 79.

discussion.[220] Thus, CenturyTel's six-month negotiation period is reasonable. Charter's position of 90 days should be rejected.

In addition, Charter raises an issue that is not before the Commission for resolution until and unless the Parties' reach an impasse: what cost-based standard is to be used if the Parties disagree on the rate.[221] Charter's position constitutes an end run around the negotiation process, and should be rejected.

Without waiving its position that Issue 20 is limited, CenturyTel does want to ensure that the record is clear with respect to Charter's argument regarding the application of the "relative use factor" or "RUF." Charter has again confirmed the only logical reading of its testimony – the RUF is nothing more than an *arbitrary method* for establishing the interim rate in order to approximate its view of TELRIC–based rates.[222] Thus, Charter's proposed RUF end-runs the negotiations and, due to the true-up of interim rates, is wholly unnecessary.

Accordingly, CenturyTel requests that the Arbitrator reject Charter's claims and position on Issue 20. In doing so, and for all of the reasons stated, CenturyTel requests that the Arbitrator adopt CenturyTel's language in Article V, § 2.3.1 to resolve Issue 20 as it is the only position that can be fully reconciled with the record in this proceeding, the true dispute of the Parties, and public policy.

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[220] Watkins Direct Testimony, 68:1-12.

[221] *Charter Proposed Order*, 76.

[222] *Id*., 78-79. Again without waiving its position that there is no pricing standard issue currently before the Commission in this arbitration, Charter's position regarding the application of TELRIC as "settled law," *Charter Proposed Order*, 77-78 and 80, is not at all the only conclusion that is proper. While Charter quotes *Southwestern Bell Telephone, L.P. v. Missouri Public Service Commission*, 530 F.3d 676, 684 (8th Cir. 2008) for the proposition that CLECs "'must'" be provided TELRIC rates, *Charter Proposed Order*, 78, the Eighth Circuit's discussion was based on the Commission's finding that TELRIC *applied to Southwestern Bell's provision* of entrance facilities, not CenturyTel. *Southwestern Bell*, 530 F.3d at 680. Charter also overlooks the fact that the Eighth Circuit cited with approval *Illinois Bell Telephone Company v. Charles Box et al.*, Nos. 07-3557 and 07-3683 (*slip opinion*) (7th Cir. May 23, 2008) ("*Illinois Bell*"). *Southwestern Bell*, 530 F.3d at 684. The Seventh Circuit stated: "What the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.' TELRIC is a cost-based rate, *though not the only one*." *Illinois Bell* at 6. Second, even if TELRIC costing standards applied (which, again, is an issue not before the Commission), the Parties are free to negotiate rates that are without regard to any Section 251(c) standards should they wish (47 U.S.C. § 252(a)(1)), a concept that Charter also does not note.

ISSUE 21

Contrary to Charter's contention,[223] Section 251(c)(2)'s framework includes several interrelated factors that *each* must be addressed, not simply technical feasibility. Charter's position cannot be reconciled with that framework and must be rejected. Accordingly, for the reasons stated in the *CenturyTel Proposed Order* and herein, CenturyTel requests that the Arbitrator find 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 the directives arising from *IUB I and IUB II*.

Through the *Charter Proposed Order*, Charter acknowledges that its one-way trunk proposal would allow Charter to impose upon CenturyTel facility obligations beyond those that CenturyTel has today. Specifically, under Charter's language, CenturyTel would be financially responsible for trunking *not to its side of the POI* which Charter witness Gates has indicated on multiple occasions,[224] but *from Charter's side of the POI to the Charter switch*.[225] This suggestion irreconcilably conflicts with Charter's position on each Party's proper facility responsibility to its side of the POI and results in a superior form of interconnection being imposed by CenturyTel.

Charter's remaining contentions regarding one-way trunks are equally specious. First, Charter contends that CenturyTel's proposal would have Charter be responsible for the cost of one-way facilities required by CenturyTel to "get CenturyTel's traffic to Charter."[226] CenturyTel's language does nothing of the sort. CenturyTel's proposal requires the delivery of traffic to the properly established POI consistent with each of Section 251(c)(2)'s requirements and without requiring CenturyTel to provide to

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[223] *Charter Proposed Order*, 81.

[224] *See, e.g.*, Gates Direct Testimony, 30:11-12; 31:5-8, 45:15-18.

[225] Joint Statement, 80-81 (Charter Proposed Section 3.2.3 ("[W]here one-way trunks are deployed then each Party is responsible for establishing any necessary interconnection facilities, over which such one-way trunks will be deployed *to the other Party's* switch.") (emphasis added)).

[226] *Charter Proposed Order*, 80.

Charter a superior form of interconnection.[227]

Second, there is no basis for Charter's suggestion that CenturyTel's position provides CenturyTel "'veto' power over Charter in regard to the types of trunks it chooses to deploy."[228] In the sentence before that statement, Charter acknowledges that CenturyTel's language would require any disagreement to "proceed through the dispute resolution process,"[229] a process that, ultimately, will involve the Commission if necessary.

Accordingly, Charter's position is meritless and should be rejected. In doing so, CenturyTel submits that the Arbitrator should adopt CenturyTel's proposed language for Article V, § 3.2.3, particularly since each Party acknowledges that it intends to primarily use two-way trunking between their networks.[230]

ISSUE 22

While CenturyTel agrees with Charter that the issue is how the DS1 "threshold is to be met,"[231] Charter's proposed resolution of Issue 22 does *not* rely upon the "best available information" for this determination as it limits traffic volume consideration to past actions and, unlike CenturyTel's proposal, does not rely upon reasonable, good faith estimates of anticipated volumes. Try as it may, Charter cannot reconcile its refusal to use traffic projections[232] with the fact that projections are common place in the telecommunications industry and are further constrained by the reasonable, good faith actions of the Parties.[233] Thus, Charter's claim that "speculative volumes or volumes that may or may not exist in the future"[234] cannot be used to justify its position.[235]

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[227] 47 U.S.C. §§251(c)(2)(B) and (C); *see generally IUB I*; *IUB* II.

[228] *Charter Proposed Order*, 81.

[229] *Id*.

[230] *Compare Charter Proposed Order*, 81 and *CenturyTel Proposed Order*, 83.

[231] *Charter Proposed Order* 81-82.

[232] *Id*., 82.

[233] *CenturyTel Proposed* Order, 87-88.

[234] *Charter Proposed Order*, 83.

Charter's efforts to paint CenturyTel's language as raising potential disputes and otherwise "vague" and potentially resulting in increased cost[236] also should be rejected. Charter has failed to demonstrate that reasonable and good faith traffic projections by either Party could raise any level of potential dispute greater than that which may arise in other areas of the Agreement.[237] The language also is not "vague", as the concept of projections is readily understandable as a matter of logic and industry practice.[238] Likewise, direct trunks will require costs for both Parties, thus acting as a constraint on *each* of their conduct as well as providing an additional layer of diligence to ensure reasonable, good faith traffic projections. Accordingly, CenturyTel requests that the Arbitrator adopt CenturyTel's proposed language in Article V, § 3.4.2.1.1, providing for the use of projected demand.[239]

ISSUE 23

For the reasons stated in the *CenturyTel Proposed Order* and herein, CenturyTel submits that the Arbitrator should adopt CenturyTel's proposed language found in Article V, § 4.6.5 to resolve Issue 23. Although Charter originally attempted to establish a "cap" on the proposed transport and switching rates applicable to CenturyTel's reasonable attempts to route an unqueried call,[240] Charter has now abandoned that position by not arguing that point at all within the *Charter Proposed Order*.[241] Thus, the rates

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[235] Logically if a "projection is incorrect and traffic volumes do not reach the threshold level, DEOTs [direct end office trunks] would be unnecessary." *Id*., 82. However, the opposite is also true: *If traffic projections are not used and traffic increases, DEOTs should have been deployed to avoid service degradation.*

[236] *Id*., 83.

[237] *CenturyTel Proposed Order*, 88.

[238] *Id*., 87 and 88

[239] Joint Statement, 83 (CenturyTel's Proposed Language).

[240] Gates Rebuttal Testimony, 79:21-26.

[241] Charter may very well attempt to argue that its reference to the Charter proposed language was sufficient to preserve its position. *See Charter Proposed Order*, 86; *see also* Joint Statement, 85-86 (Charter Position). The Arbitrator should not countenance such argument. If there was a basis for such a "cap" (which of course there is not (*see CenturyTel Proposed Order*, 90 and 91), then Charter should have raised it in order that CenturyTel could have had a chance to reply.

proposed by CenturyTel – the query charge, the tandem switching, tandem transport termination and tandem transport facility mileage rate elements – should each apply.[242]

Consistent with its prior advocacy, Charter's position on Issue 23 is again based on a series of false premises that should be rejected by the Arbitrator. First, Charter suggests that its proposed language "would simply ensure that in those circumstances when CenturyTel performs an 'N-1 query' on *CenturyTel's behalf*, CenturyTel will then route the call to the called party's service provider."[243] Any effort to engage in the routing being addressed in Issue 23 is *not* for CenturyTel's behalf. Rather, such effort is for *the benefit of Charter since Charter failed to meet its N-1 query obligations in the first instance*. Charter also cannot suggest that it is needless for the "Commission to make"[244] a finding that the query, transport, and switching rates apply in those instances where Charter is not "meeting its number porting obligations when it fails to properly query a call that is routed to a subscriber with a ported number."[245] Charter failure to fulfill its N-1 obligations is the situation that triggers the need to address Issue 23 in the first place.

Second, it appears throughout Charter's discussion of Issue 23 that it wants the Arbitrator to presume that there is some legal obligation for CenturyTel to engage in the extraordinary routing that CenturyTel has agreed to undertake for Charter's unqueried calls, albeit subject to the understanding that CenturyTel will undertake reasonable efforts where it is technically feasible to do so in a manner consistent with the existing network hierarchy and third party relationships that CenturyTel may have.[246] As Charter indicates, it wants to "ensure" such routing[247] and that "CenturyTel *will perform* these query

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[242] *See Joint Statement*, 84 (CenturyTel Proposed Language, Article V, § 4.6.5).

[243] *Charter Proposed Order*, 83 (emphasis added).

[244] *Id*., 85.

[245] *Id*., 84-85.

[246] *CenturyTel Proposed Order*, 90 and 91.

[247] *Charter Proposed Order*, 83 and 85 (*quoting* Gates Testimony, page number or transcript references missing).

functions on the relatively few occasions when Charter does not perform its own query."[248] However, Charter fails to cite to any support for such legal obligation, and there is none. Therefore, the "reasonable efforts" and "technically feasible" standards that CenturyTel has proposed are reasonable, and they are all that can be imposed in light of CenturyTel's offer to engage in the query and routing functions subject to these standards.

Finally, Charter references "queries," "N-1 queries," and "query functions,"[249] but never explicitly acknowledges that the query is a separate charge. Since the query must be completed to identify the proper carrier serving the end user to which the call should have been routed by Charter,[250] any possible inference that Charter is not responsible for the query charge *in addition* to the CenturyTel switching and transport rate elements for routing the call must be rejected.

Far from being unclear as Charter suggests,[251] CenturyTel's position is crystal clear as to the rates, the basis for the rates, and the need to take reasonable steps where technically feasible to route the call to a third party. Accordingly, CenturyTel requests that the Arbitrator reject Charter's claims and position on Issue 23. In doing so, and for all of the reasons stated by CenturyTel, the Arbitrator should adopt CenturyTel's language in Article V, §4.6.5 to resolve Issue 23.

ISSUE 27

The *CenturyTel Proposed Order* supports the adoption of CenturyTel's Article IX, § 1.2.3 to resolve this issue, and thereby permits both Parties to charge each other Local Service Request ("LSR") charges for requests made to each other related to porting telephone numbers. The *Charter Proposed Order* mischaracterizes this issue,[252] erroneously arguing that adoption of CenturyTel's proposed language would allow for a unilateral charge. The language proposed by CenturyTel is mutual and

[248] *Id.*, 85.

[249] *Id.*

[250] *Id.*, 84.

[251] *Id.*, 83.

[252] *Charter Proposed Order*, 96 incorrectly presents this issue as "Can CenturyTel impose charges on Charter for actions it takes in order to fulfill an *end user* customer's request to port a telephone number to Charter?"

allowed by FCC decisions.[253] Additionally, the costs that are to be recovered from this charge by both Parties are *not* those costs that are recovered by FCC's Section 52.33 end-user service charges.[254]

The *Charter Proposed Order* asserts that LSR charges related to number porting are improper as the costs are carrier-specific costs directly related to providing LNP and are recovered under the end user surcharge mechanism arising from 47 C.F.R. § 52.33.[255] Charter makes this contention even though Charter recognizes that costs are incurred for processing local service requests.[256] The *Charter Proposed Order* is erroneous and should not be adopted by the Arbitrator.

The evidence demonstrates that CenturyTel incurs costs for the processing of local service requests[257] and that its proposed LSR rates represent the administrative costs associated with processing such requests and the LSR rates recover those costs.[258] While the *Charter Proposed Order* claims otherwise,[259] CenturyTel demonstrated that these costs are not part of the actual porting process[260] and that similar charges are routinely included in interconnection between CenturyTel and CLECs.[261]

Charter argues that the costs that are at issue here are already recovered by the carrier-specific recovery mechanism established by the FCC under Section 52.33.[262] Charter's contention is untrue and should be rejected. Although the FCC has enacted regulations that allow certain specific LNP costs to be included in end user surcharges,[263] if CenturyTel had attempted to include its LSR charges in its LNP end user surcharge (as the *Charter Proposed Order* effectively suggests), the FCC would have rejected

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[253] *CenturyTel Proposed Order*, 93.

[254] *Id.*, 93.

[255] *Charter Proposed Order*, 98-99; *see also* Gates Direct Testimony, 77:1-9.

[256] *CenturyTel Proposed Order*, 93; *see also* Gates Rebuttal Testimony, 93:8-17.

[257] *CenturyTel Proposed Order*, 92; *see also* Reynolds Direct Testimony, 4:13-7:12.

[258] *CenturyTel Proposed Order*, 93; *see also* Watkins Direct Testimony, 89:13-15.

[259] *Charter Proposed Order*, 96.

[260] *CenturyTel Proposed Order*, 93; *see also* Watkins Direct Testimony, 93:15-94:16; Reynolds Direct Testimony, 8:16-10:11.

[261] *CenturyTel Proposed Order*, 95.

[262] *Charter Proposed Order*, 99-100.

[263] *CenturyTel Proposed Order*, 94-95.

those costs, as it is has done in an analogous context of addressing a LNP cost recovery request by BellSouth Corporation.[264] If the costs identified by CenturyTel could *not* be recovered through a federal end user surcharge, then the costs should be recoverable through the LSR charges proposed by CenturyTel. Absent that conclusion, either CenturyTel or its other customers would be forced to subsidize Charter and its new customers with respect to these costs. That result is untenable and wholly inconsistent with the general notions of costs causation.

For all the reasons set forth by CenturyTel, the Arbitrator should adopt the *CenturyTel Proposed Order* and approve CenturyTel's proposed language for the Agreement regarding Issue 27.

ISSUE 28

The Arbitrator should adopt CenturyTel's proposed language included in Article X, §§ 8.3.1, 8.3.2 and 8.3.3 to resolve Issue 28.

First, the record confirms that Charter's concerns regarding misuse of competitively sensitive information by CenturyTel are without basis. CenturyTel's proposed language would not grant unrestricted rights to monitor and audit Charter's use of CenturyTel's Operation Support System ("OSS") as claimed by Charter.[265] Article X, § 8.3.3 requires information obtained by CenturyTel be treated as "Confidential Information" pursuant to Article III, § 14.0, and further, CenturyTel has a corporate policy regarding the use of a competitor's proprietary information.[266] Further, contrary to Charter's claim, CenturyTel's rights to audit or monitor Charter's use of the OSS will not lead to CenturyTel's using such information in an anti-competitive manner.[267]

CenturyTel's *existing* corporate policy entitled "Acceptable Use of Information Provided by Competitors" addresses, among other matters, limitations on access to and use of information relating to

[264] CenturyTel Proposed Order, 95.

[265] *Charter Proposed Order*, 108.

[266] Miller Rebuttal Testimony, 40:6-41:6.

[267] *Charter Proposed Order*, 108.

a competitive carrier.[268] In addition, Charter's witness pointed out that 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.[269] Further, Article X, § 8.3.3 provides that any information that CenturyTel obtains pursuant to § 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. Without question, these protections amply protect Charter against the improper use of competitively sensitive information. Charter's concerns are speculative and assume that applicable law, policy and Agreement terms will be ignored. Charter's speculations should be rejected.

Second, the Arbitrator should reject Charter's assertion that it should be allowed, in its sole discretion, to bar CenturyTel from auditing or monitoring Charter's use of the OSS.[270] "Sole discretion" has been judicially interpreted to mean "unfettered authority."[271] Charter's conditioning of its consent to CenturyTel's monitoring/auditing of use of its OSS in this manner is unreasonable and unnecessary. Approving Charter's proposed language for Article X, §§ 8.3.2 and 8.3.3 would mean that Charter could deny CenturyTel the right to monitor or audit Charter's use of the OSS *for any or for no reason whatsoever*. CenturyTel has demonstrated that there is no reason to provide further details to Charter concerning when and how CenturyTel plans to conduct its monitoring of use of the OSS. For example, to provide such additional information to Charter would undermine the deterrent regarding misuse of CenturyTel's OSS that the ability to monitor is intended to create.[272] Likewise, nothing would preclude Charter from insisting that it be provided an amount of detail regarding CenturyTel's monitoring so as to

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[268] *Id.*, 40:9-16.

[269] Lewis Rebuttal Testimony, 4:22-25.

[270] Tr., 201:21-202:3.

[271] *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).

[272] Miller Rebuttal Testimony, 38:13-39:4.

defeat the purpose of such monitoring; the same being true of providing advance notice to Charter.[273] Charter's ability to veto, in its sole discretion, CenturyTel's right to audit or monitor Charter's use of CenturyTel's own OSS is unreasonable and should be rejected.

In summary, while Charter declares that, in principle, it does not object to CenturyTel's right to monitor Charter's use of the OSS, Charter's proposal to deny CenturyTel's ability to exercise such right in its sole discretion, *i.e.*, for *any or no reason whatsoever,* totally and unreasonably constrains CenturyTel's rights to monitor or audit Charter's use of CenturyTel's OSS pursuant to a grant of a limited license to use. This unreasonable attempt to co-opt CenturyTel's legitimate rights must be denied. Accordingly, the Arbitrator should reject Charter's position regarding Issue 22 and adopt CenturyTel's proposed language for Article X, § 8.3 (including §§ 8.3.1, 8.3.2 and 8.3.3).

ISSUE 29

In resolving Issue 29, CenturyTel requests that the Agreement include language that preserves CenturyTel's ability to recover costs with respect to upgrades and enhancements to CenturyTel's OSS. Charter's criticism of CenturyTel's request is that it "would require Charter to agree to an open-ended provision that gives CenturyTel the discretion to impose charges upon Charter for performing functions not otherwise provided for in the Agreement."[274] Charter's mischaracterization of CenturyTel's language should be rejected.

CenturyTel's language only preserves CenturyTel's right to recover its costs with respect to upgrades and enhancements to its OSS. Before any additional costs can be billed or collected from Charter, CenturyTel must first obtain Commission approval to charge Charter the new rates. A review of CenturyTel's language demonstrates that *no unilateral change by CenturyTel is permissible*.[275]

The Joint Statement clearly confirms the requirement for Commission approval. For example the language proposed by CenturyTel states that "CLEC will be responsible for paying such OSS

[273] *Id.*, 41:8-15.

[274] *Charter Proposed Order,* 111.

[275] *CenturyTel Proposed Order,* 99-100.

charges under this Agreement only if and to the extent determined by the Commission."[276] Charter's position and assertions are unsupported, ignore the language requested by CenturyTel, and should be disregarded by the Arbitrator.

The reasoning and the disposition of Issue 29 contained in the *CenturyTel Proposed Order* is consistent with the law, sound public policy, and sound reasoning. As such, and for all of the reasons provided by CenturyTel, CenturyTel's proposed language for the Agreement regarding Issue 29 should be approved by the Arbitrator.

ISSUE 31[277]

For the reasons explained by CenturyTel, CenturyTel's liability for its errors or omissions in publishing Charter's End User directory listings should be limited to the amount paid to it for providing the service. In the event that a CenturyTel error or omission leads to publishing an End User Customer's or Charter's data that did not desire a published listing, and in the absence of intentional misconduct, CenturyTel should not bear any liability to Charter or its End User Customer, and Charter should fully indemnify CenturyTel for such an error.[278] Charter's position to the contrary should be rejected by the Arbitrator for the following reasons.

First, with regard to the publication of an End User Customer's information where that customer did not desire the information to be published, Charter completely fails to recognize that *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.[279] Thus, the only way that CenturyTel or a third party publisher would obtain information on such a customer to publish is *if Charter provides that information in breach of its duties under the Agreement.*

Charter should not be allowed to shift responsibility for its errors in providing end user

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[276] Joint Statement, 99.

[277] The Parties agreed Issue 31 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[278] *See CenturyTel Proposed Order*, 101-08 for a full discussion of these issues.

[279] Agreement, Article XII, § 2.1.2; Joint Statement 102-05; *Charter Proposed Order*, 112-14.

information onto CenturyTel or a third party publisher. Indeed, Charter asserts in the *Charter Proposed Order* that the Agreement must contain "proper incentives to ensure that this information is not published."[280] In this case, the "proper incentive" is to require Charter to indemnify CenturyTel since Charter should not have provided the information to CenturyTel or a third party publisher. Moreover, Charter fails to explain why CenturyTel should incur the costs of setting up additional safeguards to ensure that *Charter* is complying with *Charter's* contractual duties to its customers and to CenturyTel. This is an unreasonable result given that *Charter* has a contractual relationship with its end users and can negotiate contractual liability limitations or indemnity terms that it deems necessary to protect its interests.

For similar reasons, requiring CenturyTel to indemnify Charter should such information be published is contrary to Charter's assertion that risk be allocated "fairly, and in a manner than is proportionate to each Party's respective obligations and responsibilities."[281] It is not fair to force CenturyTel to indemnify Charter where: (1) Charter is in a position to negotiate appropriate damage limitations with its customers to protect itself against such risk; and (2) the information is only able to be published as a result of *Charter's* error in providing the information in the first place. CenturyTel does not assert that it should avoid liability in the event of its intentional misconduct or that Charter should have to indemnify CenturyTel in such a situation. CenturyTel is only asserting that it should have no liability for the publication of information Charter never should have released. Charter's error allowed the publication to occur, and Charter should bear the responsibility for its mistake.

Second, as discussed in the *CenturyTel Proposed Order*, the liability limitations proposed by CenturyTel are reasonable and necessary to ensure that customers are charged reasonable rates for directory listings – a concept recognized by the Missouri Supreme Court.[282] Requiring CenturyTel to

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[280] *Charter Proposed Order*, 113.

[281] *Charter Proposed Order*, 114.

[282] *CenturyTel Proposed Order*, 103, n.119.

bear virtually unlimited liability in publishing this information would be unreasonable in light of the amount CenturyTel is receiving for the publication of the information.[283] Thus, contrary to Charter's assertion, this damage limitation is not "artificial" or otherwise contrary to "public policy."[284] The cap is necessary to ensure reasonable rates.

Indeed a similar damage limitation was approved by the Missouri Supreme Court in *Warner v. Southwest Bell Telephone Co.*[285] That provision stated:

> C. ERRORS-The Telephone Company's liability for damages arising from errors or omissions in the making up or printing of its directories or in accepting listings as presented by customers or prospective customers shall be limited to the amount of actual impairment of the customer's service, and in no event shall it exceed the amount paid for the service during the period covered by the Directory in which the error or omission occurs.[286]

The Court held that this provision was an "effective" limitation of liability in the event of ordinary negligence, but that it would not constitute an exemption for "willful and wanton conduct."[287] The *Warner* Court recognized that although some New York courts had refused to apply the provision in a situation of "gross negligence," Missouri did not recognize gross negligence.[288]

In this situation, CenturyTel's proposed language for Article XII, § 7.1 states, in pertinent part:

> 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.

This language is substantially similar to the above-quoted language that has been approved and interpreted by the Missouri Supreme Court. Therefore, Charter's assertion that CenturyTel is "artificially cap[ping] the amount of damages available to Charter, even in the context of damages that

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[283] *Id.*, 103.

[284] *Charter Proposed Order*, 112-13.

[285] 428 S.W.2d 596 (Mo. 1968), *motion for rehearing or transfer to Court en banc denied* June 10, 1968.

[286] *Id*. at 600.

[287] *Id*. at 603.

[288] *Id*.

arose from CenturyTel's *grossly negligent* actions," should be rejected.[289] As *Warner* held, Missouri does not recognize gross negligence; therefore, with the exception of wanton and willful misconduct, the *Warner* Court indicated that such a provision is effective.

Accordingly, for all of the reasons provided by CenturyTel, the Arbitrator should adopt the language proposed by CenturyTel, with the exclusion of the term "gross negligence," as discussed in the *CenturyTel Proposed Order*. Additionally, should the Arbitrator adopt CenturyTel's position on Issue 31, CenturyTel reaffirms its acceptance of a portion of Charter's proposed language for Issue 15(c), as discussed in the *CenturyTel Proposed Order*.[290]

ISSUE 32

Despite Charter's testimony on Issue 32 and language within the *Charter Proposed Order*, the Arbitrator should note a crucial, undisputed fact: Charter's own witness acknowledges that CenturyTel is currently making directory assistance information relating to Charter customers available on a satisfactory basis.[291] The *Charter Proposed Order* confirms that fact: "CenturyTel's current vendor queries both databases which Charter subscriber listing information to be available to CenturyTel's subscribers."[292] Thus, the foregoing statements can reasonably be read as an admission that CenturyTel's current practices satisfactorily cause Charter's directory assistance information to be available and accessible to persons requesting such information.

Furthermore, it is undisputed that CenturyTel does not itself provide directory assistance. Rather, it contracts for provision of such service by a third party vendor. The vendor populates and dips the database to which Charter submits its directory assistance listings,[293] and that same database will be

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[289] *Charter Proposed Order*, 113.

[290] *CenturyTel Proposed Order*, 102-03 and 108.

[291] Lewis Direct Testimony, 12:17-21 and Tr., 205:9-23; 211:17-19. CenturyTel's witness who addressed Issue 32 also substantiated this fact. *See*, Miller Rebuttal Testimony, 43:11-16.

[292] *Charter Proposed Order*, 116.

[293] Charter's response to CenturyTel Data Request 17 acknowledges that Charter provides its directory assistance listings to Volt Delta which maintains a national directory assistance database.

the exclusive source of CenturyTel directory assistance listings effective in January 2009.[294] As a consequence, the facts are that Charter and CenturyTel place their directory assistance information in the Volt Delta national database, and CenturyTel's directory assistance vendor provides Charter with access to that database equivalent in type and quality to that which CenturyTel has itself. Since the record also fails to demonstrate any plan by CenturyTel to alter its activities, Issue 32 should be resolved based on CenturyTel's proposed language.

Independently, however, the above-described non-discriminatory access is consistent with the requirements of 47 U.S.C. § 251(b)(3). Further, such access reflects the definition provided in Section 51.217 of the FCC's rules: "Nondiscriminatory access refers to access to telephone numbers, operator services, directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives."[295] The *Charter Proposed Order* refers to the FCC's *SLI/DA Order*[296] with Charter claiming that it has the right to "nondiscriminatory rates, terms and conditions" with respect to having its listing information "placed" into CenturyTel's local directory assistance databases that CenturyTel causes to be maintained.[297] Charter has failed to demonstrate that it is *not* receiving access in a manner consistent with this standard. Again, Charter has placed its directory assistance information in the same databases in which CenturyTel's equivalent information resides; such placement is occurring on a nondiscriminatory basis; and Charter acknowledges that the process is working satisfactorily. Thus, Charter's objectives are being accomplished, and will continue to be accomplished based upon the language CenturyTel proposes for Article III, § 8 of the Agreement.

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[294] Miller Direct Testimony, 60:14-20.

[295] 47 C.F.R. § 51.217.

[296] *Charter Proposed Order*, 116-117, citing *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information under the Telecommunications Act of 1934 [sic], As Amended, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking*, 14 FCC Rcd 15550, para. 160 (1999).

[297] *Charter Proposed Order*, 117.

As a result, Charter's efforts to change the status quo should be rejected. Even though Charter acknowledges that the current arrangements are working satisfactorily, that fact is apparently insufficient in that Charter additionally seeks to have CenturyTel accept and forward Charter's subscriber listing information to the directory assistance databases maintained by CenturyTel's third party vendor.[298] Using CenturyTel as a "middle man" for the purpose of placing Charter's subscriber listing information in CenturyTel's vendor's databases has several drawbacks, as Mr. Miller has testified.[299] Additionally, CenturyTel bears an administrative cost for submitting its own directory assistance listings to the vendor for inclusion in the database.[300] To the extent that costs are incurred by CenturyTel to accept and provide Charter's directory listings to the vendor, such costs must be paid by the cost causer – Charter.[301] Charter's position ignores these additional requirements and should, therefore, be rejected.

Additionally, Charter's position assumes that CenturyTel has not refused to act as a "middle man" for Charter's directory assistance listing placement. Charter is wrong. As Mr. Miller testified, Charter was offered terms for such service in the past and chose the current arrangement instead.[302] Mr. Miller's direct testimony was unrebutted by Charter. It is for this reason that terms and rates for CenturyTel's acceptance and processing of Charter's listings do not appear in the terms of the Agreement. Charter's arguments regarding any "duty" imposed upon CenturyTel are therefore not relevant as they ignore the facts of the negotiations and the relationship between the parties.

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[298] *Id.*

[299] Miller Direct Testimony, 61:1-16. First, to the extent that CenturyTel's personnel perform work for Charter's benefit, compensation would be due. *Id.* Second, directory listing data is submitted by CenturyTel to its vendor through manual entry via CenturyTel's billing system, and delays in making Charter's listings available could occur. *Id.* Third, interposing CenturyTel as a middle man and the requirement to perform the manual processes for data entry could introduce errors in the entry of Charter's listing data. *Id.*

[300] *Id.*, 59:7-11.

[301] *Id.*, 59:1-4.

[302] Miller Direct Testimony, 61:17-62:14.

Accordingly, for all of the reasons provided by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language for the Agreement regarding Issue 32.

Assuming, *arguendo*, that Charter's language is not rejected, Charter's position and the resulting Parties' actions will need to be reconciled with the applicable FCC rules. To that end, none of the legal authorities cited by Charter in support of the *Charter Proposed Order* precludes a local exchange carrier from charging a CLEC for providing nondiscriminatory access to directory assistance.[303] To the contrary, 47 C.F.R. § 51.217(a)(2)(i)-(ii) provides:

> 'Nondiscriminatory access' refers to access to . . . directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives. Nondiscriminatory access includes, but is not limited to: (i) Nondiscrimination between and among carriers *in the rates, terms, and conditions of the access provided;* and (ii) The ability of the competing provider to obtain access that is *at least equal in quality to that of the providing LEC.* [Emphasis added]

CenturyTel's evidence that is referenced above demonstrates that CenturyTel is required to pay charges to its vendor for placement of CenturyTel's directory assistance listings in the vendor's database. If CenturyTel is to act as Charter's middle man for placing Charter's directory assistance listings in the vendor's database, the FCC's nondiscrimination requirements mandate that Charter reimburse the vendor's charges to CenturyTel on account of receiving Charter's listing information from CenturyTel. Further, Charter would be required to pay the costs incurred by CenturyTel in connection with processing Charter's listing information. Since Charter chose not to use CenturyTel's offered terms and rates in the past and did not make a request of CenturyTel for such services during the current negotiations, the Parties' Agreement does not currently set forth terms and a rate in Article XI, § V for providing the foregoing services by CenturyTel to Charter. In the event that Charter's proposed language regarding Issue 32 were to be approved by the Arbitrator, CenturyTel must be accorded the opportunity to establish a rate or rates to be added to Article XI, § V that Mr. Gates agrees at page 87, lines 9-11 of his Direct Testimony are needed for the performance of service(s) for Charter. In such

[303] *See Charter Proposed Order*, 118-21.

case, the following paragraph and revised Conclusion would need to be added to the *Charter Proposed Order*:

> To the extent that Charter determines to alter its current practice of making its own arrangements for services with a third-party directory assistance provider, including but not limited to arrangements to provide its own end user customers' directory assistance listings to such third-party provider for inclusion in a national database accessible to CenturyTel, and rather, obtains access to such services through CenturyTel, Charter shall reimburse CenturyTel for charges by the third-party provider in an amount not to exceed the amount paid by CenturyTel for like services. Further, CenturyTel shall calculate the costs it incurs as a consequence of providing Charter with nondiscriminatory access to directory assistance listings, the Parties shall engage in good faith negotiations to establish the rate(s) for such services for inclusion in Article XI, § V of the Agreement, and in the event that such negotiations are unsuccessful, the Parties shall seek the Commission's resolution of any dispute concerning such rate(s).
>
> Conclusion
>
> For all of the foregoing reasons we adopt Charter's language for Issue 32 subject to the requirements of the preceding paragraph concerning cost reimbursement to CenturyTel, and establishment of rates for CenturyTel's services in providing Charter with nondiscriminatory access to directory assistance listings.

This addition is the only result that will allow assurance that the applicable costs are recovered by the cost causer and compliance with the FCC's rules. This result also is within the Arbitrator's authority pursuant to Commission Rule 4 CSR240-36(5)(E) and (19). Thus, this modification by the Arbitrator is entirely appropriate should the Arbitrator be inclined to adopt Charter's proposed resolution of Issue 32 which CenturyTel urges the Arbitrator to refrain from doing for the reasons set forth above.

ISSUE 35[304]

To place this issue in context, CenturyTel notes that the language it proposes regarding Issue 35 is nearly identical to the language in CenturyTel of Missouri's General and Local Exchange Tariff and CenturyTel's Wholesale 911 tariff, PSC MO No. 10.[305] Thus, under the terms of the Agreement, Charter would receive treatment identical to that of other CLECs that seek service under the CenturyTel tariff. Therefore, there is no basis for Charter's assertion that it is against public policy to limit the

[304] The Parties agreed Issue 35 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[305] *Id.*, 110-11.

amount of damages for which CenturyTel may be liable in this fashion.[306]

As discussed in *CenturyTel Proposed Order*, reasonable limitations on liability are necessary to ensure reasonable rates and have repeatedly been upheld by Missouri courts, even in cases where a negligence claim is made under *Mo. Rev. Stat.* § 392.350 (or its predecessor statute).[307] Contrary to Charter's claim,[308] CenturyTel does not contend that it should escape liability in the case of "gross negligence, wanton or willful misconduct."[309] CenturyTel only contends, as in *Warner v. Southwest Bell Telephone Co.*,[310] that its liability should be limited where appropriate.[311] In *Warner*, the Missouri Supreme Court upheld limitation of liability language in situations other than those involving intentional and willful misconduct. CenturyTel only asks that language similar to *Warner* be used in this Agreement. Should a claim be made under one of these sections in the future, the language proposed by CenturyTel will surely be interpreted by Missouri courts or the Parties themselves in a manner consistent with the decision in *Warner* or other applicable precedent.

Finally, the Arbitrator should reject Charter's assertion that the limitation of liability language should apply reciprocally.[312] Charter's purported basis for such a demand is that it provides certain 911 services to Charter's end-user customers, so it should also benefit from the liability limitations in Article VII, § 9.3.[313] However, Charter has failed to address how a liability limitation will benefit it in this Agreement with regard to its obligations to its customers. Therefore, Charter's claim for reciprocity

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[306] *Charter Proposed Order*, 110-13.

[307] C*enturyTel Proposed Order*, 110-13 (*citing Poor v. Western Union Telegraph Co.*, 196 S.W. 28 (Mo. 1917); *Western Union Telegraph Co. v. P.S.C.*, 264 S.W. 669 (Mo. 1924); *Sturm v. Western Union Telegraph Co.*, No. 89-6109-CV-SJ-6, 1990 WL 118281 (W.D. Mo. Aug. 10, 1990)).

[308] *Charter Proposed Order*, 87.

[309] CenturyTel's proposed language in Article VII, § 9.3 states, in pertinent part, "other than an act or omission constituting gross negligence, wanton or willful misconduct." Joint Statement, 113.

[310] 428 S.W.2d 596 (Mo. 1968), *motion for rehearing or transfer to Court en banc denied* June 10, 1968. *See also* discussion *supra* Issue 31.

[311] *CenturyTel Proposed Order*, 111-12; *see also* discussion *supra* Issue 31.

[312] *Charter Proposed Order*, 87.

[313] *Id*.

should be rejected. Indeed, Charter itself recognizes that it is CenturyTel that bears "greater obligations" than Charter with respect to 911 network facilities.[314]

For all of the reasons provided by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language in Art. VII, §§ 9.3 and 9.6 to resolve Issue 35.

ISSUE 36[315]

Although Charter claims that there is "no evidence in the record" to show that "only CenturyTel" is responsible for managing the Database Management System ("DBMS") and relaying subscriber information to the counties,[316] this claim should be rejected because: (1) it fails to recognize that Issue 36 is a "briefing only" issue on which the Parties agreed not to present testimony; (2) mischaracterizes CenturyTel's statements in the Joint Statement; and (3) completely fails to recognize that the proposed interconnection agreements are in the record.

CenturyTel did not claim to be the "only" entity with such responsibility in the Joint Statement. The language proposed by the Parties makes clear that either CenturyTel or a third party database provider (*i.e.*, not Charter) will be responsible for managing the DBMS and relaying such information.[317] Thus, the Agreement does not indicate that Charter will manage the DBMS or relay information to counties.

Moreover, at best, it is entirely unclear how Charter can assert that the contract language proposed in Article VII, § 9.4 "applies to potentially all claims arising from any 911 service."[318] The indemnity language proposed by CenturyTel in Section 9.4 only applies to claims asserted against CenturyTel that are the "result of any act or omission of [Charter] or any of its employees, directors, officers, contractors or agents" in connection with the design, development, adoption, implementation,

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[314] *Id.*, 87.

[315] The Parties agreed Issue 36 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[316] *Charter Proposed Order*, 91.

[317] CenturyTel Response, Exhibit 2, Agreement (Article VII, §§ 3.4, 4.5, and 4.6).

[318] *Charter Proposed Order*, 91.

maintenance, or operation of E911 or for the release of subscriber information in connection with the provision of E911 service."[319] Thus, the indemnity language applies where it is *Charter's* act or omission that leads to the claim.

Additionally, as specified in Article VII, § 9.2 of the Agreement, E911 is "offered solely to assist [Charter] in providing E911 in conjunction with applicable fire, police, and other public safety agencies. By providing E911 to [Charter], CenturyTel does not create any relationship or obligation, direct or indirect, to any third party other than [Charter]."[320] The language in Section 9.2 is not disputed by either Party. CenturyTel's proposed language in Section 9.4 requires Charter to indemnify CenturyTel for claims relating to the E911 system, advancing Section 9.2's statement that CenturyTel is not to have any relationship or obligation to any person or entity other than Charter in providing E911. Should the Arbitrator approve Charter's reciprocal indemnification language under Section 9.4, undisputed Section 9.2 would be stripped of its effect, as CenturyTel would then have very real relationships with and obligations to third parties other than Charter. The reciprocal indemnification requested by Charter would make CenturyTel liable for those third parties' potential claims in situations beyond CenturyTel's "negligence, gross negligence, or wanton or willful misconduct in connection with designing, developing, adopting, implementing, maintaining, or operating any aspect of E911 or for releasing subscriber information, including non-published or unlisted information in connection with the provision of E911 Service."[321] This result should be rejected.

For all of the reasons set forth by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language regarding Issue 36.

ISSUE 37[322]

Without any accompanying explanation, the *Charter Proposed Order* states that the 911 liability

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[319] Joint Statement, 115-16 (CenturyTel Proposed Language).

[320] CenturyTel Response, Exhibit 2, Agreement (Article VII, § 9.2).

[321] Joint Statement, 115-16 (CenturyTel Proposed Language).

[322] The Parties agreed Issue 37 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

provisions at issue in Issue 37 should apply to both Parties.[323] However, Issue 37 addresses a situation where information is being released *by CenturyTel* to emergency response agencies in response to a call placed to an E911 service.[324] Charter does not explain why a provision relating to the release of information to an emergency response agency – an action taken by CenturyTel – should apply to Charter. Charter does not manage the DBMS or relay this information to the public agency; therefore, the need for such limitation is not present. Should Charter be concerned with liability to its customers or some other party, it can separately negotiate such a contractual limitation of liability as needed.

Accordingly, for all of the reasons set forth by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language to resolve Issue 37.

ISSUE 38[325]

As discussed in the *CenturyTel Proposed Order*, CenturyTel's proposed language addresses situations such as where Charter is selling its services to a nomadic VoIP provider or to a shared tenant provider and where certain EAS traffic or improperly numbered traffic such as "foreign dial tone" does not route correctly to the PSAP, due to no fault of CenturyTel.[326] Charter's proposed language does not address these concerns and restates only a portion of Charter's obligations under the Agreement.

Although Charter's one purported concern is the potential ambiguity that a lack of definition for the term "nonregulated services" may cause,[327] Charter has not proposed any definition to clarify the term. However, by necessary implication, the term includes all services that are not regulated and is not ambiguous as Charter claims.[328] In contrast, CenturyTel has set forth multiple, valid concerns that its language addresses, and Charter does not address these concerns whatsoever in the *Charter Proposed Order* or in the Joint Statement.

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[323] *Charter Proposed Order*, 92.

[324] Joint Statement, 116.

[325] The Parties agreed Issue 38 would be "briefing only." *See* October 16, 2008, letter from counsel to the Arbitrator.

[326] *CenturyTel Proposed Order*, 116-17.

[327] *Charter Proposed Order*, 92-94.

[328] *Id*.

Therefore, for all of the reasons set forth by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language to resolve Issue 38.

ISSUE 40

CenturyTel requests the inclusion of rates for processing local service requests related to number porting. In addition to arguing against the payment of LSR charges in total,[329] Charter also makes unsupported assertions against the rates proposed by CenturyTel because Charter does not have any real evidence to support its assertions. It only has the hope that its improper rhetoric will be believed. Charter's efforts should be rejected by the Arbitrator.

The evidence at the hearing demonstrated that the expert opinion of both of CenturyTel's expert cost witnesses confirmed that the rates contained in the CenturyTel draft of the Agreement comply with the costing methodology standards applicable under 47 U.S.C. § 251.[330] Although there may be more than one acceptable method to determine a rate that complies with the requirements of 47 U.S.C. §251,[331] CenturyTel's proposed rates do comply.

The *Charter Proposed Order* contains some new attacks on CenturyTel's proposed rates, but none of them should be given weight by the Arbitrator. Charter suggests that the rates proposed by CenturyTel are the result of an embedded cost study.[332] Charter is wrong. The cost study and related testimony shows that the rates are based on a forward looking methodology.[333]

Next, Charter claims that CenturyTel's rates are invalid because the LSR should be "automated" and thus CenturyTel's process is not the least cost.[334] This claim is without merit. There is no evidence from any witness that an automated process, even if it was possible for CenturyTel, would result in a

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[329] *See* Issue 27, *supra*.

[330] *CenturyTel Proposed Order*, 118-19; Reynolds Direct Testimony, 13:4-7; Schultheis Rebuttal Testimony, 11:10-14; *CenturyTel Proposed Order*, 118.

[331] Schultheis Rebuttal Testimony, 11:19-20.

[332] *Charter Proposed Order*, 104.

[333] Schultheis Rebuttal Testimony 5:18-11:14.

[334] *Charter Proposed Order*, 105.

lower rate than proposed by CenturyTel. Likewise, there is no evidence or testimony that suggests a direct correlation between automation and lower costs (and, thus, lower rates). Accordingly, Charter's assumption and its position arising therefrom should be rejected.

Charter attempts to draw a conclusion that, since Mr. Schultheis would have used some different inputs in a new study, the new study would have a profound impact on the results.[335] This assertion cannot be reconciled with Mr. Schultheis' testimony that the rates comply with the methodology requirements of 47 U.S.C. §251. There is also no evidence to support Charter's assertion. To the contrary, one of Mr. Schultheis' inputs would have resulted in the increase in labor rates, so the LSR rates may have been actually higher in an organic study completed by Mr. Schultheis.[336]

Charter's efforts to discredit CenturyTel's proposed LSR rate are without merit. The LSR rates proposed by CenturyTel comply with the Act and are properly included in the Agreement. The reasoning and the disposition of Issue 40 contained in the *CenturyTel Proposed Order* is consistent with the law, supported by the evidence and sound public policy. Accordingly, for all of the reasons cited by CenturyTel, the Arbitrator should adopt CenturyTel's proposed language regarding Issue 40.

[335] *Id.*

[336] Tr., 495:1-14.

III. CONCLUSION

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

(a) Issue an order adopting and approving the language that CenturyTel proposes to resolve all open issues in this proceeding;

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

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

DATED: December 4, 2008

Respectfully submitted,

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Certificate of Service

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APPENDIX A:
EXCERPTS FROM SEPTEMBER 2, 2008 JOINT STATEMENT (ISSUES 2 AND 24)

Issue No.	Issues	§	Charter's Language	Charter's Position	CenturyTel's Language	CenturyTel's Position
2.	How should the Agreement define the term Network Interface Device or "NID"?	Art. II, § 2.103	2.103 **Network Interface Device (NID)** A means of interconnecting Inside Wiring to CenturyTel's distribution plant, such as a cross-connect device used for that purpose. The NID houses the protector.	The definition of Network Interface Device (NID) should be consistent with FCC rules, in that it should not: alter or modify the location of the demarcation point; imply that CenturyTel always owns and maintains control over inside wire; or imply that end users do not own inside wire on the customer side of the NID. CenturyTel's proposed definition contravenes FCC definitions in several ways, and attempts to establish new substantive rights and obligations for Century Tel under the Agreement that do not exist under federal law. The definitions should not be used as a means to impose new substantive rights and obligations, but instead should be used simply to define terms consistent with FCC rulings.	2.103 **Network Interface Device (NID)** A means of interconnecting Inside Wiring to CenturyTel's distribution plant, such as a cross-connect device used for that purpose. The NID houses the protector, the point from which the Point of Demarcation is determined between the loop (inclusive of the NID) and the End User Customer's Inside Wire pursuant to 47 CFR 68.105.	This definition is directly related to the proper resolution of the other unresolved, NID-related issue (Issue 24). Thus, Issue 2 and Issue 24 should be addressed in tandem and resolved in relation to each other as proposed by CenturyTel. Charter's suggestion that CenturyTel's definition "contravenes FCC definitions in several ways" is simply wrong. The Commission should adopt CenturyTel's proposed definition of Network Interface Device or "NID" because it is consistent with applicable law and FCC regulations. The terms NID, Inside Wire and Point of Demarcation are all related. The Parties have resolved the definitions of "Inside Wire" (Art. II, Sec. 2.71) and "Point of Demarcation" (Art. II, Sec. 2.114), but not the definition of the "NID." However, unlike Charter's proposed definition that simply states that "[t]he NID houses the protector," CenturyTel's proposed definition establishes the interplay between these three critical definitions in a manner consistent with applicable requirements. In contrast, Charter's definition creates ambiguity as it avoids describing the relationship between the NID, the Point of Demarcation and the customer's Inside Wire.

Issue No.	Issues	§	Charter's Language	Charter's Position	CenturyTel's Language	CenturyTel's Position
						The relationship between these elements – NID, Inside Wiring and Point of Demarcation – is critical as they define where CenturyTel's local distribution network ends and the customer's Inside Wiring begins. The absence of a clear statement of that relationship will only lead to additional disputes between the Parties regarding Charter's access to CenturyTel's NID. Charter's unauthorized use of CenturyTel's NIDs has already led to litigation under Charter's existing interconnection agreements with CenturyTel in Wisconsin. In a recent AAA arbitration, Charter was found to be liable for CenturyTel's UNE charges for NID usage under the parties' "non-rural" agreement. AAA Case No. 51 494 Y 00524-07 (Aug. 24, 2007). The arbitrator's decision was confirmed by State of Wisconsin Circuit Court for Dane County in January 2008 (Case No. 07CV4085). Last month, CenturyTel brought suit against Charter in the State of Wisconsin Circuit Court for LaCrosse County (Case No. 08-CV-4085) for unjust enrichment and conversion in connection with Charter's unauthorized use of CenturyTel's NIDs in CenturyTel's rural exchanges in Wisconsin. It is essential that this Agreement not only clearly define, consistent with applicable law, what constitutes the Point of Demarcation between CenturyTel's facilities and the end user's Inside Wire, but also what the

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						Network Interface is not. CenturyTel's proposed definition does so and explicitly cross-references the FCC's rule, 47 C.F.R § 68.105.
24.	**Should Charter have access to the customer side of the Network Interface Device ("NID") without having to compensate CenturyTel for such access?** CenturyTel believes that there are two issues presented in this issue: (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? (b) Is Charter required to submit an order to and pay CenturyTel for accessing CenturyTel's NID when Charter	3.3, 3.4, 3.5, and 3.5.1	3.3 Subject to the provisions of this Section 3.0 and its subsections, CenturyTel shall provide access to the NID under the following terms and conditions. Rates and charges applicable to NIDs are set forth in Article XI (Pricing), and such rates and charges shall apply. 3.4 **M**aintenance and control of the End User Customer's inside wiring ***(i.e.,* on the End User Customer's side of the NID)** is under the control of the End User Customer. Conflicts between telephone service providers for access to the End User's inside wire **on the End User's side of the NID** must be resolved by the End User. 3.5 Charter may access the NID on CenturyTel's network side or the End User Customer's side on a stand-alone basis to permit Charter to connect its own loop facilities to the premises wiring at any customer location. Any repairs, upgrade and/or rearrangements to the	The question of who owns and maintains control over Inside Wiring is a question of federal and state law, to which the Parties can not simply contract around. CenturyTel's language suggests that CenturyTel may in fact own and maintain control over Insider Wire within certain buildings, which is contrary to applicable law. Charter should be allowed to access the customer side of the NID, for the purpose of connecting its own loop facilities to the customer's inside wire. Such access does not constitute the use of the NID as an unbundled network element, and does not create any obligation for Charter to pay CenturyTel.	3.3 Subject to the provisions of this Section 3.0 and its subsections, CenturyTel shall provide access to the NID under the following terms and conditions. Rates and charges applicable to NIDs are set forth in Article XI (Pricing), and such rates and charges shall apply to any Charter use of the CenturyTel NID. Charter's use of the NID is defined as any circumstance where a Charter provided wire is connected to End User Customer's Inside Wiring in any manner and such connection is housed within housed within any portion of the NID. 3.4 Except in those multi-unit tenant properties where CenturyTel owns and maintains control over inside wire within a building, maintenance and control of the End User Customer's Inside Wiring is under the control of the End User Customer. Conflicts between telephone service providers for access to the End User's Inside Wire must be resolved by the End User. 3.5 Charter may access the NID on CenturyTel's network	Aspects of this issue relate directly to Issue 2. Thus, Issue 2 and Issue 24 should be addressed in tandem and resolved in relation to each other as proposed by CenturyTel. Issue 24(a): The End User maintains control over Inside Wire, "[e]xcept in those multi-unit tenant properties where CenturyTel owns and maintains control over Inside Wire within a building." Charter objects to the quoted language above arguing that it is inconsistent with applicable law. CenturyTel's language is not inconsistent with applicable law. CenturyTel's language is fully consistent with the underlying principle reflected in the FCC rules that contemplate instances in multi-unit properties where ILEC owns Inside Wire. See 47 C.F.R. §51.319(b)(2). Issue 24(b): In its position statement, Charter asserts that it should be permitted "to access" CenturyTel's NID for the purpose of connecting its own loop facilities to the customer's inside wire. This is apparently what Charter means in its proposed Section 3.5.1 when it

Issue No.	Issues	§	Charter's Language	Charter's Position	CenturyTel's Language	CenturyTel's Position
	connects its loop to the End User's Inside Wiring through the customer access side of the CenturyTel NID?		NID requested or required by Charter will be performed by CenturyTel based on the Time and Material Charges set out in Article XI (Pricing). CenturyTel, at the request of Charter, will disconnect the CenturyTel Local Loop from the NID, at charges reflected in Article XI (Pricing). Charter may elect to disconnect CenturyTel's Local Loop from the NID on the customer's side of the NID, but Charter shall not perform any disconnect on the network side of the NID. Under no circumstances, however, shall Charter connect to either side of the NID unless the CenturyTel network is first disconnected from the NID as set forth in this Article. **3.5.1 Notwithstanding any other provision of this Agreement, when Charter is connecting a Charter provided loop to the inside wiring of a customer's premises through the customer side of the CenturyTel NID, Charter does not need to submit a request to CenturyTel and CenturyTel shall not charge Charter for access to the CenturyTel NID.**		side or the End User Customer's access side on a stand-alone basis to permit Charter to connect its own loop facilities to the premises wiring at any customer location. Charter may not access the NID except in accordance with these terms. Any repairs, upgrade and/or rearrangements to the NID requested or required by Charter will be performed by CenturyTel based on the Time and Material Charges set out in Article XI (Pricing). CenturyTel, at the request of Charter, will disconnect the CenturyTel Local Loop from the NID, at charges reflected in Article XI (Pricing). Charter may elect to disconnect CenturyTel's Local Loop from the NID on the End User Customer's access side of the NID, but Charter shall not perform any disconnect on the network side of the NID. Under no circumstances, however, shall Charter connect to use either side of the NID unless the CenturyTel network is first disconnected from the NID as set forth in this Article. 3.5.1 Notwithstanding any other provision of this Agreement, when Charter is connecting a Charter provided	"is connecting a Charter provided loop to the Inside Wiring of a customer's premises ***through*** *the customer side of the CenturyTel NID*." This language is at best vague, but is clarified by Charter's position statement. By its position statement, Charter claims a right to place its loop facilities within CenturyTel's NID, by either connecting to the customer's Inside Wire inside the customer access side of CenturyTel's NID, or running its loop facility through the customer access side of CenturyTel's NID to connect with the customer's Inside Wire. In either case, Charter would place its loop facilities inside of CenturyTel's NID. Charter contends that housing all or part of its connection with the customer within the NID "does not constitute the use of the NID as an unbundled network element, and does not create any obligation for Charter to pay CenturyTel." Charter's position defies common sense. Charter's placement of its facilities inside CenturyTel's NID constitutes use of the NID, just as CenturyTel uses the NID when it connects its loop facilities to the End User Customer's Inside Wire. Section 3.5 provides that "Charter may access the NID on CenturyTel's network side or the End User Customer's access side on a stand-alone basis to permit Charter to connect its own loop facilities to the

Issue No.	Issues	§	Charter's Language	Charter's Position	CenturyTel's Language	CenturyTel's Position
					loop to the End User Customer's Inside Wiring at the Charter provided interface device (i.e. terminal equipment) without also connecting within the End User Customer access side of the CenturyTel NID, Charter does not need to submit a request to CenturyTel and CenturyTel shall not charge Charter for access to the CenturyTel NID, unless any portion of such connection, including but not limited to the End User Customer's Inside Wire or the Charter provided loop, is housed within any portion of the NID. If any portion of such connection is housed within any portion of the NID, NID use charges shall apply. Removing the End User Customer's Inside Wire from the protector lugs and leaving the capped off customer wire within the NID is the only situation not considered use of the NID.	premises wiring at any customer location." CenturyTel agrees that the Parties have agreed that Charter may elect to disconnect CenturyTel's loop on the customer access side of NID, and there is no charge associated with the access provided to perform this activity except if Charter houses any portion of its connection with the customer's Inside Wire within the NID. Where Charter elects to place its loop facilities in CenturyTel's NID, it must compensate CenturyTel for the use. Charter has no right to use CenturyTel's NIDs without compensation. Charter conceded in the Wisconsin arbitration (as referenced by CenturyTel in Issue 2) that the NID is owned in its entirety by CenturyTel. While CenturyTel's retail tariff provides CenturyTel customers with a right to access the side of the NID where the customer's Inside Wire connects to CenturyTel facilities (the customer's "access side" of the NID), this right is neither unfettered nor free. The customer's access is restricted by the retail tariff rules designed to protect the NID and CenturyTel's system – and the customer pays for the NID through CenturyTel's regulated rates. When the customer ceases to be a customer of CenturyTel, the customer loses the right of access to CenturyTel's NID. CenturyTel has agreed that Charter may access CenturyTel's NID to disconnect the customer's Inside Wire, but if Charter

Issue No.	Issues	§	Charter's Language	Charter's Position	CenturyTel's Language	CenturyTel's Position
						wants access for the purpose of placing any of its (or the customer's) plant inside the NID, Charter must compensate CenturyTel for the use of the NID. This issue was fully litigated in a recent AAA arbitration proceeding concerning CenturyTel's Wisconsin properties, and CenturyTel prevailed. The arbitrator's ruling could not be clearer: "In the end, the location of the demarcation point simply does not matter. No matter where that point is, a CLEC does not have the right to use an ILEC's network facilities without compensation. An 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 have 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." Findings, Conclusions and Award of Arbitrator at p.8, *CenturyTel, Inc. v. Charter Fiberlink, LLC*, AAA Case No. 51 494 Y 00524-07 (Aug. 24, 2007).

APPENDIX B:
EXCERPT FROM EXHIBIT B TO CHARTER'S PETITION (ARTICLE XI, § II)

ARTICLE XI: PRICING

I. RESALE PRICING N/A

II. UNE PRICING

Network Interface Device (stand alone)	MRC
Basic NID	$1.91
Complex (12 x) NID	$1.91

Network Interface Devise (stand alone)	NRC
Initial Service Order (ISO)	$33.38
Outside Facility Connection	$43.69

Application of UNE Pricing
"Initial Service Order" (ISO) applies to every Local Service Request (LSR) for NIDs.

"Outside Facility Connection" applies in addition to the ISO charge when incremental fieldwork is required **and where **CLEC specifically requests that CenturyTel perform such incremental fieldwork.**