BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC	Case No. TO-2009-0037

COMMENTS OF CHARTER FIBERLINK-MISSOURI, LLC OF THE ARBITRATOR'S DRAFT REPORT

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December 22, 2008

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COMES NOW, Charter Fiberlink-Missouri, LLC ("Charter"), pursuant to the procedural schedule in this case,[1] to present the comments set forth below to the Arbitrator's Draft Report ("Arbitrator's Report" or "Report") in this matter, and respectfully requests that the Commission modify and/or reverse his rulings as noted herein.

I. INTRODUCTION

The Arbitrator's Draft Report in this proceeding reflects, in most instances, a thorough and well-reasoned analysis of each of the disputed issues. The Report, which was written and released under a very challenging deadline, reflects a reasonable and lawful outcome on the majority of issues in dispute. Accordingly, the Commission should accord the Arbitrator the necessary deference and affirm his findings in large part. In recognition of the deference owed to the Arbitrator, Charter presents the following comments on a very limited set of issues, and only where the Arbitrator's Draft Report reflects clear errors of fact, or law. Accordingly, other than the errors identified in these comments, the Commission should adopt the Arbitrator's Draft Report.

II. STANDARD OF REVIEW

The standard for review of the Arbitrator's Report is narrow. Specifically, pursuant to 4 CSR 240-36.040(20), the Commission should modify or reverse only clear factual, legal, or technical errors set forth in the Arbitrator's Report. Further, the Commission should accord no weight to comments that merely reargue positions taken in briefs.[2] Indeed, the Commission has previously recognized its considerable discretion to reject assertions of error made by commenting parties that are not explicitly permitted by this rule. *In re Southwestern Bell*

[1] ORDER SETTING PROCEDURAL SCHEDULE, Case No. TO-2009-0037 (rel. Aug. 26, 2008).

[2] 4 CSR 240-36.040(20) ("Comments that merely reargue positions taken in briefs will be accorded no weight").

Telephone, L. P., Case No. TO-2005-0336, 2005 WL 1949838 (Mo. P.S.C.) (rejecting a commenting party's assertion of error as falling outside the scope 4 CSR 240-36.040(20)).

III. COMMENTS TO ARBITRATOR'S DRAFT REPORT

A. **Issue 17**: Should the Agreement contain terms setting forth the process to be followed if Charter submits an "unauthorized" request to CenturyTel to port an End User's telephone number, and should Charter be required to compensate CenturyTel for switching the unauthorized port back to the authorized carrier?

The Arbitrator's ruling on this issue rests, in part, on an apparent conclusion that Charter did not present any arguments in support of its position on this issue. *Report* at 65. Specifically, the Report states that "absent any advocacy by Charter in support of its position,…" the Arbitrator concludes that CenturyTel's position must be adopted. *Id*.

But the Arbitrator's statement is flawed, because Charter very clearly did present "advocacy in support of its position." Specifically, Charter presented legal arguments and support for its position at pages 45-57 of its Initial Brief, and pages 29-30 of its Reply Brief. In those papers Charter demonstrated: (1) that CenturyTel would qualify as an "authorized" carrier under FCC regulations; *Charter Initial Brief* at 46; (2) that CenturyTel, as an "authorized carrier," would therefore be subject to the remedial rights afforded to such carriers under FCC rules; *Id*. at 47; and, (3) that Charter would be liable under FCC regulations for any "slamming" event, and in such circumstances could be subject to penalty payments equal to 150% of the amounts collected from the subscriber during the "slamming" event. These points, both individually and collectively, demonstrate that there is simply no need for the additional slamming penalties which the Arbitrator concluded are appropriate in the arbitrated interconnection agreement.

Moreover, CenturyTel's proposal also ignores the fact that FCC's slamming regulations *already* allow for the recovery of the authorized carrier's costs, ***plus*** an additional amount which

is intended to act as a disincentive for carriers to engage in slamming activities. Specifically, the FCC established a remedy that both allows the authorized carrier to retain an amount of money equal to "all charges paid by the subscriber" to the unauthorized carrier, and also ensures that subscribers are "made whole" by reimbursing the subscribers the amount they paid in excess of what they would have paid their preferred carrier absent the slam (or a proxy for such amount).[3] The FCC has explained that under its slamming penalty rules the unauthorized carrier will be required to "disgorge to the authorized carrier an amount adequate to satisfy both of these obligations."[4] Notably, though, in considering the proper penalties for slamming events the FCC determined that an appropriate proxy for this harm is 150% of the amounts collected by the unauthorized carrier from the subscriber following a slam.[5] In so doing the FCC specifically rejected a penalty of 200% of the amounts collected by the unauthorized carrier.

Thus, there is no need for this Commission to approve an additional penalty, in the form of CenturyTel's proposed penalties, because the penalties authorized by FCC rules already establish proper disincentives for potential slamming events, while at the same time sparing carriers the difficult and expensive process of re-rating the services provided to the end user customer during the slamming event. For these reasons the Commission should revise the Arbitrator's Report to reflect the fact that Charter did present legal arguments, and sound reasoning, in support of its position that no additional "slamming" penalties are necessary under the Agreement.

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[3] *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, First Order on Reconsideration, CC Docket No. 94-129, FCC 00-135, 15 FCC Rcd 8158 at ¶ 17 (2000).

[4] *Id*. at ¶ 17.

[5] *Id*.

B. **Issue 18**: Should Charter be entitled to interconnect with CenturyTel at a single Point of Interconnection (POI) within a LATA?

In resolving Issue 18 the Arbitrator correctly applied federal law to determine that Charter is entitled to interconnect at a single point of interconnection ("POI") with CenturyTel at any technically feasible point on the CenturyTel network. *Report* at 66-76. The Arbitrator's thorough and detailed legal analysis rests, in large part, upon the fact that CenturyTel is not permitted to deny interconnection absent a showing of technical infeasibility. As such, the Arbitrator's Report recognizes that Charter may designate a POI on CenturyTel's network, consistent with its rights under federal law.

However, at the conclusion of this ruling the Arbitrator includes the following statement: "in instances where a POI already exists between CenturyTel and Charter, the Arbitrator will order the practice to continue." *Report* at 76. This single sentence, which is not tied to any findings of fact or conclusions of law set forth in the previous ten pages of analysis, effectively nullifies Charter's single POI rights affirmed by the Arbitrator in the ten pages preceding this statement. In other words, the Arbitrator's decision to order the parties to continue using existing POIs invalidates the conclusion that Charter may establish a single POI, consistent with its rights under federal law.

At this time Charter serves several different CenturyTel exchanges without the benefit of a single POI arrangement.[6] As a result, Charter is not able to avail itself of its rights under federal law to establish a single POI with CenturyTel in Missouri. Indeed, that is precisely why Charter raised this issue during negotiations with CenturyTel, and included it in this arbitration proceeding: to affirm its single POI rights under federal law so that it has the ability to migrate to a single POI arrangement with CenturyTel in Missouri. For example, if Charter were to request

[6] Watkins Tr. 342, lines 6-16.

interconnection through a mid-span meet arrangement (an arrangement where both parties connect their networks at a point between their switches on the incumbent's network), instead of the existing interconnection arrangements at CenturyTel's switches, which the parties' agreed-to language currently allows, see Agreement, Art. V, § 2.3.2 (mid-span fiber meet interconnection arrangements), Charter would not be permitted to do so under the Arbitrator's Report. Consequently, Charter would be prohibited from realizing the increased economic and operational efficiencies intended by the Act.[7]

As issued, the Arbitrator's decision eliminates Charter's right to establish a single POI because it requires Charter to continue existing POIs with CenturyTel to the exclusion of its right to establish a single POI with CenturyTel. There is no factual basis, or legal rationale, for granting Charter its single POI rights on the one hand, and then ordering Charter to continue its use of multiple POIs with CenturyTel, on the other hand. In so doing, the Arbitrator eliminates all of the legal rights granted to Charter under federal law, and affirmed in the Arbitrator's thorough and well-reasoned analysis of Section 251(c) and FCC's rules and orders, as set forth on pages 66 through 75 of the Report.

The Commission must address the contradiction in the Arbitrator's Report and resolve this significant inconsistency. In so doing, (i) the Commission should affirm the Arbitrator's findings and analysis with respect to Charter's federal legal rights to establish a single POI on CenturyTel's network, and (ii) the Commission must also reverse and eliminate the Arbitrator's conclusion that Charter must continue to use existing POIs with CenturyTel. That decision

[7] The FCC has held, in another context, that a "fundamental purpose" of section 251 is to "promote the interconnection of all telecommunications networks by ensuring that incumbent LECs are not the only carriers that are able to interconnect ***efficiently*** with other carriers." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Fourth Report and Order, 16 FCC Rcd 15435, 15478, para. 84 (2001) (*Collocation Remand Order*), *aff'd sub nom. Verizon Telephone Cos. v. FCC*, Nos. 01-1371 *et al.* (D.C. Cir., decided June 18, 2002) (*Verizon v. FCC*) (emphasis added).

conflicts with Charter's existing rights under federal law, and must be revised to address the inherent contradiction in the Arbitrator's Report.

C. **Issue 27**: Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter's network?

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

In resolving this issue, the Arbitrator's decision contains two fatal flaws. First the Arbitrator fails to address undisputed facts in the record showing that the costs at issue here are ongoing costs associated with CenturyTel's number porting obligations. Second, the Arbitrator's decision also fails to address binding federal law which establishes that the FCC has specifically prohibited interconnection-based number porting service charges like those proposed by CenturyTel.

With respect to the factual issue, the Arbitrator concludes that the costs underlying the CenturyTel local service request charge are separate and apart from the costs recovered under the FCC's LNP cost recovery mechanism. *Report* at 91. However, the record shows that the costs which CenturyTel seeks to recover are necessary for, and a predicate to, the porting of telephone numbers from CenturyTel to Charter. Specifically, the record reflects the following facts:

- At the end user's request, Charter initiates inter-carrier communications with CenturyTel to convey an end user's request to port their number from CenturyTel's network to Charter's (via an ordering form known in the industry as an LSR, or "Local Service Request" form). Reynolds Direct at 5, lines 4-6.

- Upon receipt of this request, CenturyTel undertakes certain actions that are necessary to ensure that the number is ported to Charter's network. Watkins Direct at 93, lines 5-23; 94, lines 1-9; and Reynolds Direct at 5, lines 4-23; 6, lines 1-21; 7, lines 1-7.

- CenturyTel's proposed charges arise when Charter conveys the customer's request to port their telephone number from one provider to another. Gates Rebuttal at 86, lines 4-8, and Gates Rebuttal Testimony exhibit "Attachment TJG-6."[8]

[8] CenturyTel has admitted, in a series of discovery responses, that these charges would not arise "but for" the fact that Charter is competing with CenturyTel, and actively porting numbers (and more importantly,

- CenturyTel's proposed charges would be assessed whenever that activity occurs, i.e., when a number is ported from its network to Charter's network. Watkins, Tr. 363, lines 5-10; 362, lines 16-21.[9]

- CenturyTel's costs associated with responding to number porting request (via LSRs) from Charter are specific to CenturyTel (carrier-specific costs), unrelated to general network upgrade costs. Watkins, Tr. 364, lines 22-25; 365, lines 1-4.

Moreover, the testimony of CenturyTel witness Mr. Watkins indisputably establishes that CenturyTel's proposed charges apply when porting requests, or "LSRs", are exchanged between Charter and CenturyTel. Watkins, Tr. 363, lines 5-10. And Mr. Watkins acknowledged that the work undertaken by CenturyTel is a necessary predicate to responding to Charter's request to port a telephone number from CenturyTel to Charter. Watkins, Tr. 362, lines 16-25; 363, line 1. These actions clearly constitute the actions necessary for the "transmission of porting orders" between Charter and CenturyTel, which the FCC specifically recognized as a component of a carrier's number porting costs.[10] Therefore, undisputed evidence in the record shows that CenturyTel's costs are ongoing, in that they arise every time Charter submits a porting order; and the costs are clearly incurred in connection with the transmission of porting orders between Charter and CenturyTel. For that reason, the Arbitrator's decision that these costs are unrelated to number porting, and outside of the FCC's cost recovery rules, constitutes factual error and must be reversed.

The second fatal flaw of the Arbitrator's Report is the failure to address the binding, and

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subscribers) away from CenturyTel's network. *See* CenturyTel Response to Charter RFI Nos. 19-21, and 24-27. Gates Rebuttal at 86, lines 4-8, and Gates Rebuttal Testimony exhibit "Attachment TJG-6."

[9] (CenturyTel witness Watkins explaining that "each time a number is ported there is a local service request that must be processed" and that "a charge would apply."); *and* Gates Rebuttal at 86, lines 2-4 ("Whatever the name [of the charge], it's coincident with Charter having won a customer and that customer porting its number to Charter.").

[10] *In the Matter of Telephone Number Portability Cost Classification Proceeding*, Memorandum Opinion and Order, 13 FCC Rcd 24495 at ¶ 14 (1998) (emphasis added).

express, prohibition on interconnection charges as expressed in FCC orders implementing the FCC's number portability cost recovery rules. Specifically, in its 2002 Reconsideration Order, the FCC explained that "***incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier 'customers***, ..." [11] Although the Arbitrator's Report raised, and applies, several FCC orders addressing the question of number porting cost recovery, it does not address the FCC's 2002 Reconsideration Order, and the specific prohibition on charges set forth in that order. Nor does the Arbitrator explain how CenturyTel can be permitted to assess its number porting service order charges when the FCC has specifically rejected precisely this type of charge.

The FCC's statement at paragraph 62 of its 2002 Cost Reconsideration Order expressly prohibits interconnection charges associated with ***both*** "number portability costs" and those carrier-specific costs "where no number portability functionality is provided."[12] Accordingly, even if the Arbitrator's finding that these costs are "separate and apart from the costs" of providing number porting (which Charter does not concede), the prohibition in paragraph 62 of the 2002 Reconsideration Order ***still applies*** to CenturyTel because the FCC has said charges are prohibited even "***where no number portability functionality is provided***."[13]

Accordingly, the Arbitrator's ruling on this issue constitutes legal error in that it fails to consider, and apply, a clear statement by the FCC as to the lawfulness of these charges. This Commission must therefore reverse the Arbitrator's ruling on issues 27 and 40 to reflect the fact that the FCC has specifically rejected interconnection charges on co-carriers for number porting

[11] *In the Matter of Telephone Number Portability*, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, 17 FCC Rcd 2578 at ¶ 62 (2002) (hereinafter "*2002 Cost Reconsideration Order*") (emphasis added).
[12] 2002 Number Portability Cost Reconsideration Order at ¶ 62.
[13] *Id* (emphasis added).

(whether labeled as "service order charges" or otherwise).

In the alternative, should the Commission decline to reverse the Arbitrator's Report on these issues, the Commission must nevertheless affirm that any service order charges for number porting must be established under the TELRIC pricing standard. Because number porting cost recovery standards are governed by Section 251(e)(2), any Commission-approved rate must comply with the pricing standard applicable to other Section 251 obligations, the TELRIC standard. The evidence in the record demonstrates that CenturyTel's proposed rates are not based upon the TELRIC standard, or methodology.[14] Accordingly, and only if it rejects the FCC's clear prohibition on such charges, the Commission should order CenturyTel to undertake a cost study to determine the appropriate TELRIC-based rates for CenturyTel number porting service order charges.[15]

D. **Issue 32**: How should the Agreement define each Party's respective directory assistance obligations under Section 251(b)(3)?

The overriding question for Issue 32 is whether the Agreement should include language that clearly, and explicitly, establishes each Party's directory assistance obligations. The Arbitrator effectively ruled that the Agreement should not include such language. Specifically, the Arbitrator ruled that CenturyTel currently provides Charter nondiscriminatory access to directory assistance, equivalent in type and quality to that which CenturyTel provides to itself. *Report* at 102. As such, the Arbitrator concluded that what CenturyTel provides to Charter

[14] Schultheis Tr. 485, lines 8-22.

[15] This approach is consistent with the actions of at least two other state commissions to which the Arbitrator cited to in footnote 258 of the Report. *See, e.g., In the Matter of Petition for Arbitration by Sprint Commc'ns Co. L.P. v. CenturyTel of Mountain Home, Inc.* Docket No. 08-03-U (Ark. Pub. Serv. Comm'n July 18, 2008) (ordering adoption of CenturyTel rates as interim, pending further cost proceeding); and, *In The Matter Of Sprint Communications Company L.P.'S Petition For Arbitration With Centurytel Of Eagle, Inc., Pursuant To Section 252(B) Of The Communications Act Of 1934, As Amended By The Telecommunications Act Of 1996*, Decision No. C08-1059; DOCKET NO. 08B-121T, Colorado Public Utilities Commission, *2008 Colo. PUC LEXIS 853* at * 96 (Colo. PUC 2008) (ordering CenturyTel to prepare a TELRIC cost study for its proposed rates).

satisfies the requirements of Section 251(b)(3) and associated FCC regulations. But this finding is problematic because it ignores pertinent factual evidence in the record that CenturyTel does *not* accept Charter listings for inclusion in the appropriate database, as it is required to do under federal law.

The Arbitrator failed to clearly consider, and resolve, the two independent questions that this issue raises: 1) whether CenturyTel is required to accept, directly, Charter directory listings for placement in the appropriate directory assistance database; and 2) once the listing is included in the proper directory assistance database, whether CenturyTel is required to ensure that its own subscribers can obtain Charter listing information in the directory assistance database (by querying the proper databases).

With respect to the first question, the Arbitrator's ruling fails to consider the leading FCC decision on this matter that clearly states that ILECs like CenturyTel must place a competitor's customer listing information in a directory assistance database. Specifically, as the FCC has explained, the section 251(b)(3) requirement of non-discriminatory access to directory listing refers to incumbent LEC's act of placing a competitive LEC's customer's listing in a directory assistance database or in a directory compilation for external use (such as white pages).[16] That obligation ensures that competitors like Charter have the right to have their customer listing information "placed" into CenturyTel's local directory assistance databases on

[16] *Charter's Proposed Order* at 116-117 (stating that "the FCC explained: 'the section 251(b)(3) requirement of non-discriminatory access to directory listing is most accurately reflected by the suggestion … that directory listing be defined as a verb that refers to *the act of placing a customer's listing in a directory assistance database* or in a directory compilation for external use (such as white pages)'") (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, ¶ 160 (1999) ("*SLI/DA Order*")).

nondiscriminatory rates, terms and conditions. In fact, the Arbitrator's ruling recognized that the Parties' current practice is to engage in something other than that which is required by federal law. Specifically, at this time both CenturyTel and Charter place their own listings directly into the relevant national directory assistance database. *Report* at 101 (noting that both parties independently send their listings to Volt Delta). It is important to note that the Arbitrator did not find, nor does the record support the fact, that the parties place their listings into the same *local* directory assistance databases, because CenturyTel's vendor controls such databases.[17]

But this finding, that Charter is required to place its listings directly into the directory assistance databases, is precisely the action which the FCC has said CenturyTel must undertake as part of its non-discrimination obligations under Section 251(b)(3). But the Arbitrator's Report completely overlooks this point, and fails to acknowledge that consistent with the FCC's findings CenturyTel should be required to place Charter's listing in the local directory assistance database in the same manner that it places its own end user listings there. Thus, the Arbitrator erroneously ruled on this issue given the record evidence and the fact that CenturyTel's actions are in stark contrast to the FCC's statements concerning non-discriminatory access to directory listing.

Indeed, the primary reason that Charter raised this issue was to change current practice and to ensure consistency with federal law. Accordingly, the Commission should modify the Arbitrator's Report by concluding that CenturyTel has the obligation to place Charter listings in the local directory assistance database(s), as required by federal law.

As to the second question, although the Arbitrator's Report addresses the question of whether CenturyTel satisfies its obligation to ensure that Charter's listings are made available to CenturyTel subscribers, it does not address the related question of whether CenturyTel must

[17] Hankins (Lewis) Direct at 13, lines 23-26; and 14, lines 1-4.

query the proper databases to ensure that Charter listings are available to any person who requests such information. In fact, the Arbitrator's ruling simply fails to address the FCC's reasoning that the nondiscriminatory access obligations of Section 251(b)(3) includes "[t]he ability of the competing provider to obtain access that is at least equal in quality to that to that of the providing LEC."[18] Nor does his ruling take notice of the two supporting federal court cases that concluded that an ILEC cannot divest its responsibilities under Section 251(b)(3) by outsourcing its directory assistance obligations to a third party.[19]

As such, the only logical conclusion based on these findings would have been for the Arbitrator to require CenturyTel to ensure that it, or its vendor, always queries the appropriate directory assistance database so that Charter's end user subscriber directory listing information is made available to the requesting CenturyTel subscriber. Nevertheless, the Arbitrator's Report is silent on this point as the Arbitrator failed to address this question entirely. For these reasons, the Commission should modify the Arbitrator's Report by expressly affirming that CenturyTel has the obligation to query appropriate directory assistance databases to ensure Charter subscriber listing information is available to any requesting person. Indeed, modification of the Arbitrator's Report in this way will ensure that CenturyTel's practices will conform with the practices followed by other ILECs like AT&T, Verizon, and Qwest.[20]

IV. CONCLUSION

For the foregoing reasons, the Commission should modify and/or reverse the Arbitrator's ruling with respect to the issues noted above.

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[18] 47 U.S.C. § 251(b)(3).

[19] *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768 (E.D. Mich. 1999); *U.S. West Comm., Inc. v. Hix*, 93 F. Supp. 2d 1115 (D. Colo. 2000).

[20] *See, e.g.*, Lewis Tr. 213, lines 6-16 (discussing submission of directory information in other markets, to other ILECs).

Respectfully submitted,

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Dated: December 22, 2008

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the Comments Of Charter Fiberlink-Missouri, LLC of the Arbitrator's Draft Report was served by hand-delivery or electronic mail, on the 22nd day of December, 2008, on the following:

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