

**BEFORE THE
MISSOURI PUBLIC SERVICE COMMISSION**

Complaint 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. LC-2008-0049

POST-HEARING BRIEF OF CHARTER FIBERLINK

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POST-HEARING BRIEF OF CHARTER FIBERLINK

Charter Fiberlink-Missouri, LLC (“Charter”) hereby submits its Post-Hearing Brief in support of its claims against CenturyTel of Missouri, LLC (“CenturyTel”) in this proceeding.

I. INTRODUCTION

The questions presented to the Commission in this case are relatively simple. The Commission must decide whether CenturyTel breached the interconnection agreement between CenturyTel and Charter by: (1) assessing upon Charter number porting charges (and other charges related to record searches and directory listings), for which it is not entitled to payment; and (2) by threatening to unilaterally discontinue number porting unless Charter paid such disputed charges.¹

To answer the first question the Commission need look no further than the Parties’ interconnection agreement (the “Agreement”). That Agreement does not authorize, or even contemplate, the number porting “service order” charges assessed upon Charter by CenturyTel for the last five years. There is simply no provision that permits such charges, as CenturyTel

¹ See Case No. LC-2008-0049 Parties’ List of Issues, List and Order of Witnesses, Opening Statements and Cross Examination, filed March 21, 2008.

admitted repeatedly during the hearing. Therefore, the Commission must construe the contract on its face, and interpret the four corners of the document, to find that CenturyTel's porting charges are simply not allowed under the Agreement.

Resolution of the second question is equally clear. CenturyTel repeatedly threatened to stop responding to Charter's number porting requests, thereby potentially denying Missouri residents the ability to port their telephone numbers, unless Charter paid the unauthorized charges. These facts are not in dispute. CenturyTel's employee, Ms. Pam Hankins, said so in her own words when she sent the August 2007 demand letter to Charter, and when she admitted on the stand that CenturyTel intended to terminate the Agreement. CenturyTel's intentions were, therefore, clear. If the Commission had not issued its Stay Order on August 27, 2007, CenturyTel would have stopped responding to port requests, in violation of Section 9 of the Agreement. Therefore, CenturyTel clearly intended to breach its obligations under the Agreement by unilaterally ceasing performance.

In adjudicating Charter's claims the Commission has an opportunity to reinforce the principles of reasonable contract construction, and ensure that incumbent carriers like CenturyTel do not use the number porting process to impose additional costs on competitors like Charter. The Commission should therefore grant Charter's claims and rule that CenturyTel has breached the terms of the Agreement.

II. BACKGROUND

The facts in this case are, for the most part, not contested. The Parties are communications companies competing with one another to provide phones services to residential subscribers in Missouri. *See* Hearing Exhibit (Exh. 2), Schremp/Giaminetti Direct at 4, lines 8-20. Charter is a facilities-based carrier that competes in many of CenturyTel's service areas.

Exh. 3, Schremp/Giaminetti Rebuttal at 10, lines 14-17. The Parties have exchanged traffic with one another since 2002, after CenturyTel acquired local exchange properties from Verizon. Exh. 2, Schremp/Giaminetti Direct at 20, lines 26-28 and 21, line 1. During that transaction CenturyTel also assumed Verizon's obligations under the Agreement. *Id.*

Following CenturyTel's assumption of the Agreement, Charter competed for, and won, CenturyTel subscribers. *See id.* Some of those subscribers wished to keep their telephone numbers when they switched from CenturyTel to Charter. Exh. 2, Schremp/Giaminetti Direct at 9, lines 18-19. To ensure that the subscriber's request was satisfied, the Parties engaged in a process known as number porting. Exh. 2, Schremp/Giaminetti Direct at 20, lines 26-28. The number porting process is conducted between carriers to ensure that subscribers can "port" their numbers from one service provider to another. Exh. 2, Schremp/Giaminetti Direct at 4, lines 23-25 and 5, line 1. The porting process is a technical process, which involves the coordination and communication of activities and actions between the two providers. Exh. 2, Schremp/Giaminetti Direct at 5, lines 1-14. Porting occurs every day in Missouri for thousands of telephone numbers.

Some nine months after the Parties began to exchange traffic, and port numbers between their networks, CenturyTel began to bill Charter for completing port requests submitted by Charter (on the subscriber's behalf). Exh. 2, Schremp/Giaminetti Direct at 26, lines 14-16. CenturyTel billed Charter at a rate of \$19.78 and describing the charges as switch port charges. This rate and description was identical to the leasing of unbundled network element (UNE) switch ports found in the "UNE" section of the Agreement. Exh. 3, Schremp/Giaminetti Rebuttal at 18, lines 11-14. After receiving CenturyTel invoices with these charges, and some initial communications, Charter began to formally dispute these charges. Exh. 2,

Schremp/Giaminetti Direct at 12, lines 20-22. Thus, beginning in approximately June of 2003, Charter rendered a formal notice to CenturyTel of its dispute of these charges. Exh. 2, Schremp/Giaminetti Direct at 13, lines 20-22.

After it became clear that Charter would not agree to accept this liability CenturyTel threatened to stop responding to Charter's porting requests. Exh. 2, Schremp/Giaminetti Direct at 4, lines 8-20. CenturyTel conditioned its willingness to continue porting on Charter's payment of approximately \$68,000 in disputed charges. Exh. 2, Schremp/Giaminetti Direct at 15, lines 10-15. The Parties engaged in dispute resolution discussions, but no resolution was reached. Exh. 2, Schremp/Giaminetti Direct at 15, lines 17-25 and 16, lines 1-5. Charter ultimately paid the money demanded by CenturyTel in order to prevent termination of porting by CenturyTel, but reserved its right to seek a refund, and continued to dispute the "UNE" switch port charges assessed by CenturyTel. Exh. 2, Schremp/Giaminetti Direct at 15, lines 11-16.

The dispute remained unresolved for three years. Exh. 2, Schremp/Giaminetti Direct at 15, lines 1-2. CenturyTel continued to assess these charges, and Charter continued to dispute the charges. Exh. 2, Schremp/Giaminetti Direct at 16, lines 15-18. In addition, during that time CenturyTel also assessed other improper charges related to customer records searches and unique directory listing requests. *Id.* Charter disputed those charges as well. *Id.* Then, in the summer of 2007 and without notice, CenturyTel changed the rate it was applying to Charter, and began billing Charter a rate of \$23.44 (and \$23.48 depending on location of the order) for responding to Charter port requests. Exh. 2, Schremp/Giaminetti Direct at 9, lines 24-25; Exh. 3, Schremp/Giaminetti Rebuttal at 18, lines 23-25 and 20, lines 5-6; *see also* Tr. 135-138 (Giaminetti testimony concerning different rates charged by CenturyTel). The source for this rate was a CenturyTel local exchange tariff, which applies to end user subscribers that buy

telephone service from CenturyTel. Exh. 2, Schremp/Giaminetti Direct at 26, lines 12-14. Charter, of course, does not purchase telephone service from CenturyTel. Exh. 2, Schremp/Giaminetti Direct at 26, line 1.

Soon after CenturyTel increased the rate it charged for responding to Charter's number porting requests, it's employees sent a demand letter to Charter. Exh. 2, Schremp/Giaminetti Direct at 18, lines 1-13. In that letter CenturyTel demanded payment of all outstanding charges, and threatened to terminate the Agreement and stop porting numbers, if Charter did not accede to the demand for payments. *Id.* Shortly thereafter, Charter filed its complaint at this Commission, and asked the Commission to issue an order prohibiting CenturyTel from terminating this Agreement.

III. CENTURYTEL BREACHED THE AGREEMENT BY ASSESSING NUMBER PORTING CHARGES UPON CHARTER WHICH ARE NOT AUTHORIZED BY THE AGREEMENT

CenturyTel has no contractual basis to assess a number porting charge upon Charter. Indeed, the Agreement, which addresses in considerable detail the Parties' number porting obligations, does not contain a single reference to charges for number porting. Missouri courts have ruled that "[w]here [a] contract speaks plainly and unequivocally, language used must be given its plain meaning and enforced *as written*."² Enforcing the language in the Agreement as written, as this Commission must do, requires a finding that CenturyTel is prohibited from assessing a number porting charge on Charter, because the Agreement plainly and unequivocally

² *Cross v. Ladue Supply, Inc.*, 424 S.W.2d 108 (Mo. App. 1967) (citing *Community Federal Sav. & Loan Ass'n v. General Casualty Co.*, 274 F.2d 620 (8th Cir., 1960)) (emphasis added); *Peet v. Randolph*, 33 S.W.3d 614, 618-19 (Mo.App. E.D. 2000) (stating that the court must disregard either party's "secret surmise or undisclosed assumption" and ascertain the parties' meaning and intent as expressed in the language used and give effect to that intent); *see also Gateway Exteriors v. Suntide Homes*, 882 S.W.2d 275, 279 (Mo.App. E.D. 1994)(explaining that whether a contract is made and, if so, what the terms of that contract are, depend upon what is actually said and done and not upon the understanding or supposition of one of the parties).

does not authorize either Party to assess charges upon the other Party for the provision of number porting.

A. The Agreement Does Not Authorize, or Even Contemplate, Number Porting Charges Between the Parties

Section 15 of the Interconnection Attachment of the Agreement sets forth the Parties' mutual obligations with respect to local number portability. That section sets forth each Party's porting obligations in significant detail. Specifically, that provision (through twenty-three separate subsections) outlines the scope and process by which the Parties will provide local number portability on a reciprocal basis. Indeed, these provisions establish how the parties will provide, and request, "long-term" and "interim" portability, and portability through a process known as "full NXX code migration." Exh. 1, Agreement at Interconnection Attach. §§ 15.2, 15.3, and 15.4.

Clearly, the drafters of this Agreement put considerable thought into the number porting obligations of each Party, and memorialized those obligations in very specific, and detailed, terms. Notably, however, this section makes no mention of either party having the authority to impose charges upon the other for number porting. Nor does this section establish any liability for requesting porting from the other Party. Although that portion of the Agreement sets forth very specific details about each Party's number porting obligations, it does not include any provision for either Party to pay, or assess, number porting charges to the other.

This fact is uncontested. CenturyTel has admitted, through its witness Mr. Guy Miller, that "[t]here is no specific sentence in [Section 15] which says that Charter will or will not pay ... for an LSR." Tr. 221, lines 13-16; *see also* Tr. 220, lines 2-19. And the PSC Staff's Witness, Mr. Voight, also testified that there is no provision in the Agreement that authorizes

CenturyTel's charges. Exh. 10, Voight Rebuttal at 14, lines 4-9. The record is clear; the Agreement does not authorize porting charges between the Parties.

In stark contrast to the absence of language authorizing charges, the Agreement includes many provisions where the Parties expressly and unequivocally agreed to charge each other for fulfilling certain obligations. Tr. 109, lines 14-16 (Ms. Giaminetti testified that where the terms are set forth in the Agreement, Charter is "paying those charges"). For example, Section 7 of the 911 Attachment provides that "Charter will *compensate* Verizon for connections to its 911/E-911 platform"; Section 7.2 of the Interconnection Attachment states that the "Parties shall *compensate each other* for the transport and termination of Reciprocal Compensation Traffic"; also in the Interconnection Attachment, Section 12.5 expressly states that "Charter *shall pay* Verizon for Transit Service that Charter originates at the rate specified in the Pricing Attachment."³

Thus, the Agreement very specifically, and expressly, provides for compensation obligations in a number of different areas. The fact that there exists no similar, or analogous, language that imposes any compensation obligations for number porting demonstrates that no charge was contemplated, or included, for porting. The Agreement does include compensation provisions for other elements of interconnection and, it is reasonable to conclude that based on that juxtaposition the drafters never intended to include porting charges.⁴ This reasoning is

³ See also e.g., Exh. 1, Agreement at Collocation Attachment § 2 (Charter shall provide collocation "in accordance with terms, conditions and *prices* to be negotiated by the Parties ..."); Exh. 1, Agreement at Resale Attachment § 6 ("rates and charges for Verizon Telecommunications Services purchased by Charter for resale pursuant to this Attachment shall be provided in this Attachment ..."); Exh. 1, Agreement at Resale Attachment § 4 ("Charter shall ... pay all charges for any Verizon Telecommunications Services provided by Verizon pursuant to this Resale Attachment.").

⁴ Furthermore, Section 15.5 provides that the "Parties shall provide for the requesting of End Office LNP capability on a *reciprocal* basis." Exh. 1, Agreement at § 15.5. This language establishes that fulfilling the other Party's port requests is a form of "in kind" compensation, where both Parties derive benefits for reciprocal obligations assumed by both Parties.

supported by the principle of construction “*expressio unius est exclusio alterius*”; which holds that the express mention of one term implies the exclusion of another term not expressly mentioned.⁵

Not only is the Interconnection Attachment devoid of any language that would permit number porting charges, there is no specific rate element in the Price List that applies to porting. *See* Tr. 150, lines 21-22 (Mr. Miller stated that neither “Section 15 or no other section other than the pricing attachment has specific charges...”); Tr. 101, lines 18-22 (Ms. Giaminetti testified that there is “no rate in the rate sheet for LSR charge”). This fact is significant considering that the Price List sets forth literally hundreds of different rates that would (or at least could) be applied under this Agreement. The detailed rates listed in the Price List suggest that if number porting charges were, in fact, contemplated, the drafters would have identified a rate element in the rate sheet of the Agreement (Pricing Attachment Appendix A) for that activity.

Indeed, consider that within the rate sheet’s *eighteen pages* of specific rates and charges there are at least twenty different rates applicable to resale arrangements, Exh. 1, Agreement, Pricing Attachment Appendix A at 126-128, and over one-hundred different rates applicable to unbundled network elements. Exh. 1, Agreement, Pricing Attachment Appendix A at 129-140. But there is no rate for number porting, or for responding to porting requests. This leads to the unavoidable conclusion that the drafters of this contract (and the original Parties thereto) did not agree to charge each other for number porting. If they had intended to do so, they would have set forth a rate in the rate sheet along with all the other rates and charges.

Further support for the conclusion that this Agreement does not authorize porting charges is supported by the fact that CenturyTel has specifically included such terms in other

⁵ *See State ex. Rel. Goldberg v. Barber & Sons Tobacco Co.*, 649 S.W.2d 859 (Mo. banc 1983).

interconnection agreements in Missouri. Mr. Voight's testimony identifies one example where CenturyTel memorialized its desire to impose a charge for the provision of number portability by inserting unequivocal and express language in its interconnection agreement. Tr. 312, lines 3-5; Tr. 313, lines 7-10. In CenturyTel's agreement with Socket Telecom, Inc., there is a \$3.92 charge for number porting in the Local Number Portability section of that agreement, and there is a specific rate set forth in the attached rate sheet. Tr. 312, lines 3-12 (Voight explained that the Socket agreement, in stark contrast to the Charter/CenturyTel agreement, set forth number porting clearly in the interconnection agreement); Exh. 10, Voight Rebuttal at 5, lines 7-8. Also, as CenturyTel admitted during the hearing, it has also entered into an amendment with a company known as TMP, Tr. 312, lines 8-9, which includes rate of \$12.56 for number porting. Exh. 14, TMP Amendment, Attachment II. In stark contrast, CenturyTel's agreement with Charter does not contain any similar language setting forth a specific rate or charge for responding to porting requests. That explains why Mr. Miller testified at the hearing that he would "be much more explicit" when asked how he would draft the Agreement if he were writing it today. *See* Tr. 212, lines 23-25.

Because no language in the Agreement authorizes CenturyTel's number porting charges, such charges are impermissible. If CenturyTel wanted to assess number porting charges upon Charter it should have proposed an amendment to the Agreement that set forth express and unequivocal terms authorizing such charges. It did not do so. As such, CenturyTel cannot now claim that it is permitted to impose porting charges when such an arrangement was never agreed to by and between the Parties.

B. The Agreement Should Not be Construed As Incorporating Documents Which Are Not Specifically and Expressly Incorporated by Reference

Recognizing that the Agreement does not expressly authorize porting charges, CenturyTel argues that the Agreement should be read to incorporate a series of rates and terms from other documents, namely CenturyTel's General and Local Exchange Tariff, PSC Mo. No. 1 ("Local Exchange Tariff"), and the CenturyTel Service Guide ("Service Guide"). Tr. 190, lines 2-15. This assertion is flawed on all accounts. With respect to the Local Exchange Tariff, the Agreement does not incorporate the Local Exchange Tariff because there is no *specific* and *express* reference to that tariff in the Agreement. Further, the Local Exchange Tariff is not applicable to Charter. Similarly, the Service Guide is also not incorporated into the Agreement because it is not a tariff, and there is no specific and express reference to the Service Guide in the Agreement. The Commission should therefore reject CenturyTel's claims to incorporate these documents into the Agreement.

i. *The Local Exchange Tariff is Not Incorporated Into the Agreement, and Is Not Applicable to Charter*

Although there is no specific and express reference to the Local Exchange Tariff in the Agreement, CenturyTel claims that the document is incorporated into the Agreement. To this end, CenturyTel suggests that certain language in the Agreement should be construed broadly to incorporate *all* tariffs, without exclusion. Exh. 5, Miller Direct at 23, lines 6-8. This assertion, however, fails for two reasons. First, there is no specific and express reference to the Local Exchange Tariff in the Agreement. Second, the Agreement only purports to incorporate "applicable" tariffs, and the Local Exchange Tariff is not applicable to Charter.

Under Missouri law, incorporation by reference is only appropriate when the document to be incorporated is described in such terms that its identity may be ascertained beyond doubt.⁶ It

⁶ *Intertel, Inc. v. Sedgwick Claims Management Services, Inc.*, 204 S.W.3d 183, 196 (Mo.App.E.D. 2006) (citing Restatement (Second) of Contracts Section 132 cmt. c. (1981)) (the law recognizes that in limited circumstances an extraneous document may constitute part of the parties' agreement "[s]o long as the

is clear then that in order for a separate document to become part of a contract, the separate document must be *specifically* and *expressly* identified.⁷ As Mr. Voight explained in his testimony, the Commission should adhere to this rule and only sanction tariff incorporation when the tariff is “*expressly* set forth in Commission-approved interconnection agreements.”⁸ Exh. 10, Voight Rebuttal at 9, lines 20-21 (emphasis in original).

There is no specific and express reference in the Agreement to the Local Exchange Tariff. In fact, Mr. Miller conceded that the Agreement “does not list any tariff by specific name.” Tr. 185, line 12. A review of the relevant language in the Agreement confirms that fact. Section 1.1 of the Agreement provides that “[t]his Agreement includes: (a) the Principal Document; (b) the Tariffs of each Party applicable to the Services that (which Tariffs are incorporated into and made a part of this Agreement by reference).”

CenturyTel relies upon this language to support its contention that the Local Exchange Tariff is incorporated by reference into the Agreement. Indeed, CenturyTel claims that the term “tariff,” as defined, incorporates the Local Exchange Tariff, and *every other* “applicable” tariff

contract makes *clear reference* to the document and describes it in such terms that its identity may be ascertained beyond doubt.”).

⁷ Missouri is not alone in requiring that a document be *specifically identified* for incorporation to take effect as many other jurisdictions adhere to this same principle. See e.g., *OBS Co. v. Pace Constr. Corp.*, 558 So.2d 404, 406 (Fla.1990) (“It is a generally accepted rule of contract law that, where a writing *expressly* refers to and *sufficiently describes* another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing.”); *Garrett v. State Farm Mut. Ins. Co.*, 112 Or.App. 539 (1992) (“When a written contract refers in *specific terms* to another writing, the other writing is part of the contract.”); *Longfellow v. Saylor*, 737 N.W.2d 148, 154 (Iowa 2007) (“Doctrine of incorporation requires the contract to make a *clear and specific reference* to an extrinsic document to incorporate the document into the contract.”); *Shark Information Services Corp. v. Crum and Forster Commercial Ins.*, 634 N.Y.S.2d 700 (N.Y.A.D.1 Dept. 1995) (“Incorporation by reference is appropriate only where document to be incorporated is referred to and described in instrument as issued so as to *identify referenced document beyond all reasonable doubt*.”); *Shaw v. Regents of University of California*, 67 Cal.Rptr.2d 850 (Cal.App.3.Dist. 1997)(“For terms of another document to be incorporated into document executed by parties, reference must be *clear and unequivocal* ...”).

⁸ See also Tr. 310, lines 2-8 (Mr. Voight explained that the PSC staff does not “have an issue with carriers referencing tariffs rates for charges among themselves ... our objection is that should – when – when they wish to rely on tariffs that there should be an *explicit* reference”) (emphasis added).

on file at the Commission, or at the FCC. Tr. 183, lines 1-4, and 185, lines 7-14. Thus, to be clear, CenturyTel does not assert that the Local Exchange Tariff is specifically and expressly identified. In fact, they *admit* that there is no reference to that Tariff in the Agreement. Tr. 183, lines 10-12. Instead, CenturyTel argues that the definition broadly captures any, and all, applicable tariffs.

In fact, the Agreement only uses the generic term “tariffs,” which by definition, is not an express and specific reference to a particular document that can be ascertained beyond doubt.⁹ In contrast, it is clear from the terms of the Agreement that where the parties desired to incorporate a tariff, the Agreement does so with express and specific reference to certain specific tariffs.¹⁰ Thus, the Agreement does not incorporate the Local Exchange Tariff because that document is not specifically and expressly identified in the Agreement, as required by Missouri law.

CenturyTel’s suggestion that the Agreement incorporates every potentially “applicable” tariff, if adopted, would make it very difficult for the parties to know, with any level of certainty, what obligations they are bound to. In fact, if the Commission were to accept CenturyTel’s broad construction of the language, the Agreement’s generic reference to “tariffs” could be used to incorporate an endless number of documents. Some of these documents could conceivably contain terms and conditions that go well beyond what the Parties originally intended, and could effectively negate existing terms. That unacceptable result would effectively moot the mutually

⁹ See also Tr. 310, lines 7-9 (Mr. Voight testified that the PSC staff did not think that the references in the interconnection agreement were explicit enough to incorporate the charges in the Local Exchange Tariff).

¹⁰ For example, the Agreement makes specific reference to the “Collocation tariff”, “Intrastate Access tariff”, “State 911 tariff” and the “E911 tariff.” Exh. 1, Agreement at Collocation Attachment § 1, Missouri Appendix A to the Pricing Attachment § 1, Pricing Attachment § 4.

agreed upon terms of the contract, and is clearly why Missouri law requires that documents be expressly and specifically identified.

CenturyTel's tariff incorporation arguments also fail because the Agreement only incorporates "applicable" tariffs. Indeed, only those tariffs "of each Party applicable to the Services that are offered for sale by it in the [Agreement]." Exh. 1, Agreement at § 1.1. The Local Exchange Tariff does *not*, on its face, apply to Charter because Charter does not buy local telephone, or local exchange, services from CenturyTel. Similarly, Charter is not a "customer," as that term is defined in the Local Exchange Tariff; and because the services set forth in the Local Exchange Tariff have nothing to do with CenturyTel's provision of number porting.

First, the Local Exchange Tariff is a document that sets forth CenturyTel's offering of local exchange services (telephone services) to end user subscribers in Missouri. The services in the Local Exchange Tariff are limited to local telephone and related services that CenturyTel provides to end user customers. For example, such services include "local exchange service", "calling services", "digital data services", "coin and coinless telephone services", "operator and directory services", etc. Charter does not purchase any of these services from CenturyTel. Tr. 204, lines 14-19; *see also* Exh. 2, Schremp/Giaminetti Direct at 26, lines 6-7. In fact, a brief overview of Charter's business operations clearly demonstrates that there is no reason why Charter would purchase services out of the Local Exchange Tariff. Charter is not an end user customer, but is instead a co-carrier with CenturyTel. Exh. 2, Schremp/Giaminetti Direct at 26, lines 6-7. Charter is a facilities-based competitor with its own network and switching equipment. Exh. 3, Schremp/Giaminetti Rebuttal at 10, lines 14-15. Charter does not resell CenturyTel services, nor does it purchase unbundled network elements from CenturyTel. Exh. 3, Schremp/Giaminetti Rebuttal at 10, lines 16-17. Rather, Charter is a direct competitor with

CenturyTel in the provision of local phone services. Exh. 3, Schremp/Giaminetti Rebuttal at 10, lines 17-18. Consequently, Charter has no reason to purchase local telephone or local exchange services from CenturyTel.

Second, the Local Exchange Tariff does not apply because Charter is not a “customer” as that term is defined in the Agreement. Section 5, Sheet 1, § A.1 of the Local Exchange Tariff states that: “Service charges are nonrecurring charges shown in this Section and apply when the following activities are performed at the request of a *customer*.” (emphasis added). The term “customer” is defined as an “individual, partnership, association or corporation which *contract for telephone service...*” with CenturyTel.¹¹ Charter does not “contract for telephone service” with CenturyTel.¹² In contrast, CenturyTel’s current wholesale tariff, which governs terms and conditions of CLEC access to 911 and directory listings, defines a “customer” as a Competitive Local Exchange Carrier. Mr. Miller acknowledges that point in his Surrebuttal testimony. Exh. 7, Miller Surrebuttal at 9, lines 7-12, 20. What this demonstrates, is that there are some tariffs that specifically apply to CLECs, like Charter, which their terms will clearly establish. In contrast, the Local Exchange Tariff’s terms do not clearly establish its application to CLECs like Charter. Therefore, the Local Exchange Tariff does not apply because Charter is not a “customer” within the meaning of that term.

¹¹ Local Exchange Tariff, Section 3, Original Sheet 3 (emphasis added).

¹² Significantly, Mr. Miller, at the hearing, could not testify with any level of certainty whether or not Charter has ever purchased local exchange services from CenturyTel. Instead, the only connection that Mr. Miller claimed to draw between Charter and the Local Exchange Tariff was based on the mere possibility that a senior executive from Charter who just happened to live outside of Charter’s service territory would purchase a telephone line service from CenturyTel, at the behest of Charter. Tr. 196, lines 15-23. That was the only evidence that CenturyTel proffered at the hearing and even that limited scenario could not be confirmed by CenturyTel. Tr. 195, lines 15-23. And even if that was confirmed, it clearly does not involve number porting, and therefore would not provide CenturyTel a basis for assessing charges out of the Local Exchange Tariff.

Finally, the services contemplated under the Local Exchange Tariff clearly do not have anything to do with CenturyTel's provision of number porting. The Local Exchange Tariff makes no mention whatsoever of number porting, local number portability, or any other terms that would suggest that the document was intended to apply to the provision of number portability. *See* Tr. 201, lines 7-15 (CenturyTel witness, Mr. Miller, acknowledging that number porting is not mentioned in the Local Exchange Tariff). Further, number porting is *not* a local exchange service – a prerequisite for the application of the Local Exchange Tariff, a point which Mr. Miller concedes. Tr. 198, lines 15-16. For these reasons, the Local Exchange Tariff does not apply to Charter.

ii. *The CenturyTel Service Guide is Not a Tariff, and There is No Express Language That Incorporates It Into the Agreement*

CenturyTel also erroneously claims that the CenturyTel Service Guide is incorporated by reference into the Agreement. Tr. 190, lines 13-15. Specifically, CenturyTel claims that the Service Guide is encompassed in the Agreement's definition of "Tariff" because it provides "generally available terms, conditions and prices under which a Party offers a Service." *See* Exh. 5, Miller Direct at 26, lines 7-10. This argument is one element of CenturyTel's novel theory that the Agreement first incorporates the Service Guide, which in turn incorporates the Local Exchange Tariff, and which together impose liability upon Charter for service charges applied to end users (in lieu of any number porting charges not found in the Agreement).

CenturyTel's theory fails for two clear reasons: first, the Service Guide is not a tariff; and second, it is not specifically and expressly identified in the Agreement. The plain (and undisputed) fact is that there is no specific reference to CenturyTel's Service Guide in the Agreement. Indeed, CenturyTel's witness Mr. Miller conceded that the Agreement does not specifically incorporate the Service Guide. Tr. 209, lines 1-8. In addition, CenturyTel's

contention that the Service Guide is incorporated into the Agreement is unsound because it relies on the premise that the Service Guide constitutes a “standard agreement or other document ... that sets forth the generally available terms, conditions and prices under which a Party offers a service.” Exh. 1, Agreement, Glossary § 2.85.2. The Service Guide does not fall within the meaning of a “standard agreement” because Charter has never agreed to its terms, or accepted it as imposing binding obligations on Charter. To the contrary, the Service Guide is nothing more than a reference guide that is unilaterally prepared by CenturyTel. Charter provided no input into the preparation and drafting of the Service Guide.

Furthermore, the Service Guide has never been reviewed and approved by the Commission. It would be unreasonable for the Commission to conclude that a document that CenturyTel unilaterally prepares, without notice or consent of Charter (or other CLECs), can include rates, terms and conditions that are binding upon Charter. It would also be patently unfair and unreasonable to construe the Service Guide as a tariff that is binding upon Charter, given that tariffs are subject to Commission review and approval, which is not true of the Service Guide. Nevertheless, CenturyTel asserts that the Service Guide is not subject to the Commission’s review and approval, while at the same time asserting that the document is in fact binding upon Charter. CenturyTel can not have it both ways.

Moreover, it appears that the Service Guide was modified after Charter entered into the Agreement to unilaterally include language covering service order charges for porting requests. Exh.4, Shremp/Giaminetti Surrebuttal at 7, lines20-27 and TS Schedule 1 (CenturyTel Service Guide dated April 14, 2005). As such, it would be unreasonable for the Commission to allow CenturyTel to use its Service Guide as a means of maneuvering around the fact that it did not

have a contractual basis for assessing porting charges under the terms of the original arrangement between the parties.

C. The Dispute Resolution Provisions of the Agreement Contemplate Adjudication and Resolution of this Dispute by the Commission

CenturyTel attempts to justify its improper charges through several unsupported assertions that the dispute resolution terms of the Agreement preclude, or somehow prohibit, Charter's request for relief. CenturyTel's arguments in this regard are somewhat of a "moving target" in that the company's arguments have evolved during this proceeding.

First, at the outset of this case, CenturyTel filed a motion to dismiss Charter's complaint asserting that the Commission had no jurisdiction because the Agreement's dispute resolution provisions had not been completed. *See* CenturyTel Motion to Dismiss at 6, Case No. LC-2008-0049. CenturyTel later abandoned that argument, and in Mr. Miller's Direct Testimony he stated that CenturyTel recognized that these claims needed to be adjudicated, and that the company "did not intend to further pursue" its arguments concerning dispute resolution processes. *See* Exh. 5, Miller Direct at 31, lines 1-2. However, Mr. Miller claimed, in his Surrebuttal testimony, that the dispute process was, in fact, completed. *See* Exh. 7, Miller Surrebuttal at 8, lines 1-9. This last point, CenturyTel contends, somehow precludes Charter from seeking relief from the Commission. *But see* Tr. 98, lines 18-25 (Ms. Giaminetti testified that Charter initiated a formal dispute process). CenturyTel also suggests that Charter's decision not to escalate the dispute to the Commission in 2004 constitutes a waiver of Charter's right to complain about the porting charges at this time.¹³

¹³ CenturyTel asserts the claim that Charter waived its right to dispute the porting charges even though Charter consistently and methodically disputed these charges on a monthly basis by manually inputting all of the detailed disputes into CenturyTel's web portal. Tr. 141, lines 9-15.

These arguments fail to recognize that the Agreement's dispute resolution provisions do not support CenturyTel's arguments.

First, there is no language which requires either Party to escalate claims, at the risk of waiving those claims, within a certain period of time. *See e.g.* Tr. 233, lines 1-15 (Mr. Miller concedes that there is no provision in the Agreement requiring that invoices be disputed within 30 days). To the contrary, Section 48 of the Agreement specifically states that neither Party shall be deemed to have waived any rights simply by virtue of the fact that such Party has not pursued specific claims immediately after a dispute arises.¹⁴ *See* Exh. 1, Agreement § 48.

Second, the language of the dispute resolution process does not state that a dispute shall be concluded, or resolved, upon the actions of one Party or another. Although CenturyTel claims that it concluded the dispute when it "affirmed" its own charges, it has no right to make such proclamations under the Agreement. Disputes are resolved upon mutual consent, or upon a decision by the Commission, not by unilateral proclamation.

Third, the record clearly establishes that following the communications in 2004, Charter continued to dispute these charges, and did so in several different ways. *See e.g.*, Exhs. 15 and 16 (list of Charter dispute statements). In the first instance, Charter relied upon section 9.3 of the Agreement which allows one Party to make a prospective dispute of an entire class of charges. Charter did so in July of 2004. Exh. 2, Schremp/Giaminetti at 14, lines 8-9. Then, following that prospective dispute, Charter continued to dispute CenturyTel's charges on a monthly basis. Exh. 2, Schremp/Giaminetti at 13, lines 20-22. Finally, and most significantly, ***Charter never paid*** these charges after the 2004 communications were concluded. Therefore, CenturyTel can

¹⁴ CenturyTel argues that this provision should be read to apply to CenturyTel's benefit (in the case of its failure to assess porting charges for the first nine months of the Agreement); but not Charter's benefit. Although there is no language in the Agreement to support this reading, Mr. Miller claims that the non-waiver clause applies to CenturyTel, but does not apply to Charter. Tr. 263, lines 11-16. There is, of course, no basis for that claim, as the language of Section 48 specifically applies to "either Party."

not credibly claim that it believed this dispute to be resolved, or that Charter continued submitting port requests based upon a “tacit acknowledgement that it would be billed” by CenturyTel.

Thus, it is beyond dispute that Charter has always disputed these charges, both before and after, the 2004 communications. It is also clear that Charter prospectively disputed the entire class of these charges, as was its right under Section 9.3 of the Agreement, in 2004. These facts undermine CenturyTel’s claims that the dispute was somehow resolved, or terminated, in 2004. Nor is there any credibility to CenturyTel’s argument that Charter’s decision not to escalate the dispute in 2004 constitutes an implied waiver. As CenturyTel’s own witness admits, Section 48 of the Agreement clearly establishes that neither Party waives any rights by virtue of a decision not to act.

IV. CENTURYTEL IS NOT ENTITLED TO COMPENSATION FOR FULFILLING ITS STATUTORY NUMBER PORTING DUTIES UNDER FEDERAL LAW

In defense of its improper charges CenturyTel repeatedly asserts that it is simply seeking “compensation” for a “service” that it renders to Charter. *See* Tr. 155, lines 2-18; Exh. 7, Miller Surrebuttal, at 2, lines 12-21. CenturyTel claims that when it responds to a number porting request from Charter, its employees undertake certain actions to ensure that the number is properly ported. Exh. 7, Miller Surrebuttal, at 3, lines 14-16. These actions, CenturyTel claims, constitute the provision of a “service” to Charter, for which compensation is due.

This argument fails for two reasons. First, CenturyTel ports numbers from its network to Charter’s network not as a service to Charter, but because it has a statutory obligation to do so under Section 251(b)(2) of the Act. Second, there is no way to determine what “compensation” CenturyTel may be due because CenturyTel has never explained what its costs, if any, actually entail. In general economic principles, the concept of compensation is predicated upon the

recovery of the cost of a product, plus a rate of a return above the seller's costs. But if there is no cost information in the record, it is impossible to determine what, if any, compensation, if any, may be due.

A. Number Porting Is A Duty Under Federal Law, Owed To Subscribers, Not A Service Provided By CenturyTel to Charter

With respect to the first question, CenturyTel misleads this Commission by claiming that its actions in responding to subscriber port requests constitute a “service.” What it calls a “service” are in fact the very acts that it must undertake to fulfill its federal statutory duties under Section 251(b)(2) of the Act. As this Commission knows, Section 251(b)(2) of the Act requires local exchange carriers (LECs) to provide number portability.¹⁵ The reason for imposing this duty upon all LECs is equally clear, it benefits consumers and promotes competition. As the FCC explained:

The ability of end users to retain their telephone numbers when changing service providers gives customers flexibility in the quality, price, and variety of telecommunications services they can choose to purchase. Number portability promotes competition between telecommunications service providers by, among other things, allowing customers to respond to price and service changes without changing their telephone numbers. The resulting competition will benefit all users of telecommunications.¹⁶

It is not disputed that the actions that CenturyTel takes to respond to port requests from Charter are undertaken to fulfill its statutory duty to provide number portability. Mr. Miller specifically acknowledged that CenturyTel, like all local exchange carriers, does so because the company has “a duty under 251(b) to [provide] portability.” Tr. 160, lines 5-10. Mr. Miller testified that although the duty to provide portability may be owed to other carriers (in this case Charter), “the end user subscriber has a benefit of being able to keep their number.” Tr. 160,

¹⁵ 47 U.S.C. § 251(b)(2).

¹⁶ *In re Telephone Number Portability*, First Report and Order, 11 FCC Rcd 8352, at 8368, ¶ 30 (1996).

lines 20-21. CenturyTel, therefore, must ensure that numbers are ported from its network to requesting carrier networks, and vice versa, when a *subscriber* so requests.¹⁷

Mr. Miller's testimony on this issue acknowledges that CenturyTel, when responding to porting requests from Charter, is providing number portability, as it is *required to do* under federal law. As a result, those actions do not constitute the provision of a service to Charter, but instead represent the actions that CenturyTel must undertake to comply with its federal statutory duties. Although CenturyTel may argue that this conclusion is somehow "unfair", the conclusion rests upon the simple principle that when Congress enacted Section 251 of the Act, it clearly understood that creating new obligations and duties upon incumbent LECs, like CenturyTel, would impose cost and operational burdens on those companies. As the FCC itself explained, "[a]lthough telecommunications carriers, both incumbents and new entrants, *must incur costs* to implement number portability, the long term benefits that will follow as number portability gives consumers more competitive options outweigh these costs."¹⁸ But those burdens are the price of developing competition in the local exchange market, and may not be shifted back on to competitors.

The conclusion that number porting is not a service was affirmed by the FCC's Enforcement Bureau in a recent recommended decision adjudicating cable telephony provider complaints concerning marketing activities undertaken by Verizon during the number porting process. In that proceeding the FCC's Enforcement Bureau determined that Verizon's marketing activities are not prohibited under federal law because Verizon's role in responding to number porting requests does *not* constitute the provision of a service to the requesting carrier.

¹⁷ This fact also reminds us the subscriber is, ultimately, the cost causer in these situations. That is why the FCC directed incumbents, like CenturyTel, to recover their costs from subscribers, not other carriers.

¹⁸ See *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 at ¶ 4 (1998)

Specifically, in *Bright House Networks, LLC, et. al. v. Verizon California, Inc., et. al.*,¹⁹ the FCC’s Enforcement Bureau ruled that Verizon’s role in the number porting process does not constitute the provision of a telecommunications service. The Bureau concluded that number porting does not constitute a service; rather, it entails carrier-to-carrier arrangements, coordinated with the Number Portability Administration Center (“NPAC”), to ensure that future calls are properly routed to the customer’s chosen carrier. In other words, although number portability requires carrier-to-carrier coordination, it does not involve the provision of a carrier-to-carrier telecommunications service.²⁰ Thus, the Bureau determined that Verizon’s role in facilitating number porting requests is not a telecommunications service.

Notably, Verizon’s actions in facilitating number porting requests are the very same actions that CenturyTel must take when Charter submits a number porting request to CenturyTel.²¹ The process is the same for both carriers. As a result, the Enforcement Bureau’s decision also applies to CenturyTel’s actions in responding to port requests. As such, CenturyTel’s claims that it is providing a service when it coordinates ports with Charter, is inconsistent with the FCC Enforcement Bureau’s recent conclusion that responding to port request does not constitute the provision of a telecommunications service.²²

The Enforcement Bureau decision also sheds light on another aspect of CenturyTel’s defenses: that these charges are the industry “norm,” and that every other ILEC assesses these

¹⁹ DA 08-860, File No. EB-08-MD-002 at ¶ 12 (rel. April 11, 2008).

²⁰ *Id.* at ¶ 13.

²¹ *See id.* at ¶ 5 (describing porting process); Exh. 5, Miller Direct, at 12, lines 10-22 and 13, lines 1-20, (explaining CenturyTel process for responding to number port requests).

²² The Enforcement Bureau’s decision also recognizes a distinction between ILEC responses to CLEC number port requests, and those responses to CLEC requests for resold services or UNEs. As the Bureau explained ILECs “plainly provide[] telecommunications service to another carrier when, for example, [the ILEC] provides another carrier with unbundled network elements (UNEs), switched access service, or resale service.” *See id.* at ¶ 13. Thus, CenturyTel may have a basis for assessing service charges if Charter were ordering UNEs or resold services. But as the record demonstrates, that is not the case here. *See* Exh. 3, Schremp/Giaminetti Rebuttal at 10, lines 14-17.

charges. That argument is plainly contradicted by the Bureau’s finding that Verizon “does not charge a fee to other carriers for its role in porting numbers.”²³ In other words, Verizon does not charge any other competitive carrier for responding to porting requests submitted by those competitive carriers. This fact is significant for several reasons.

First, this fact specifically refutes Mr. Miller’s repeated claims that number porting charges are the industry norm, and that all other incumbent providers assess these charges. Tr. 155, lines 14-18; Exh. 5, Miller Direct at 20, lines 1-8. When confronted with this fact on the stand, Mr. Miller had no credible response, other than to speculate that Verizon may have only very recently modified its practice. Tr. 173, lines 24-25, and 174, lines 1-9; *see also* Tr. 173, lines 10-25 (Mr. Miller acknowledges that Verizon does not assess LNP charges). But there is no evidence to support Mr. Miller’s speculation. In fact the very agreement in question is an older Verizon agreement wherein no charges for porting are included.

Second, the fact that Verizon does not assess number porting charges should help inform the Commission as to how to construe the Agreement. As the record demonstrates, this Agreement was originally a Verizon drafted and negotiated Agreement, which was assumed by CenturyTel upon its acquisition of Verizon’s service areas. Tr. 148, lines 11-20. If Verizon “does not charge a fee to other carriers for its role in porting numbers” (as the FCC has found), then one would expect that Verizon-drafted interconnection agreements would reflect that fact. In other words, there would be no contract language authorizing porting charges in Verizon-drafted agreements, because Verizon never intended to assess such charges on other carriers. Therefore, construing this Agreement as not authorizing number porting charges is entirely consistent with how Verizon has conducted its porting operations.

²³ *Id.* *See also* Exh. 12, Answer of Verizon, FCC File No. EB-08-MD-002 at ¶ 14 (stating that “Verizon does not impose any charge either for its role in the LNP process or for processing LSRs.”).

These facts support the conclusion that CenturyTel is not entitled to compensation for simply fulfilling its statutory duty under federal law. It is clear that CenturyTel's role in the porting process, and its actions in responding to Charter port requests, are mandated by law and do not constitute the provision of a service. Equally clear is that CenturyTel's claims that these charges are the industry norm are unfounded. And, indeed, the very entity that CenturyTel assumed the Agreement from, Verizon, does not assess these charges on other carriers.

B. CenturyTel Is Not Entitled to Payment for Porting Under A Theory of Implied Contract, or Unjust Enrichment

Despite the plain and unequivocal language in the Agreement, CenturyTel also urges the Commission to look beyond the terms of the Agreement and impose liability upon Charter under a theory of implied contract, or unjust enrichment. Specifically, CenturyTel argues that it would be "unfair" for CenturyTel to be required to port numbers to Charter for free.²⁴ To this end, Mr. Miller testified that "when a competitor performs work for another competitor, it intends to be paid. That's a common understanding in telecom law or telecom regulations, as I have read it as a non-attorney." Tr. 155, lines 14-18. Thus, CenturyTel asks this Commission to impose obligations upon Charter that are not otherwise provided for in the Agreement.

CenturyTel's argument relies upon Mr. Miller's contention that there exists some ambiguous "common understanding in telecom law or telecom regulations."²⁵ In other words, what CenturyTel seems to be arguing, is that to ensure that CenturyTel is treated "fairly," the

²⁴ *But see* Brewer v. Devore, 960 S.W.2d 519, 522 (Mo.App. S.D.1998) (citing *Wintermute v. Delgado*, 919 S.W.2d 248, 250 (Mo.App. 1996); *Dalton v. Rainwater*, 901 S.W.2d 316, 318 (Mo.App. 1995)) (explaining that "[w]here the terms of the contract are clear, this Court does not supply additional terms, but applies the agreement as written. This [C]ourt cannot make a contract for the parties they did not make or impose upon them obligations not assumed in the contract").

²⁵ Notably, Mr. Miller does not offer any citation to federal or state statutes, regulations, or common law to support this claim. Tr. 155, lines 16-18.

Commission should find an implied covenant between Charter and CenturyTel which obligates Charter to pay for number porting.

This reasoning, however, is contrary to Missouri law, which provides that “[i]t is not enough to say that the implied covenant is necessary to make the agreement fair, or that without such covenant it would be improvident or unwise, or that the contract will operate unjustly.”²⁶ Indeed, “[i]mplied obligations must rest entirely upon the presumed intention of the parties, as gathered from the terms actually expressed in the writing itself; and it must appear that it was so clearly within the contemplation of the parties that they deemed it unnecessary to expressly stipulate with reference thereto, or it must appear that it is necessary to infer such an obligation to effectuate the full purpose of the contract.”²⁷ The plain language of the Agreement does not indicate that the parties contemplated the imposition of porting charges. To the contrary, the Agreement is silent on this point, and therefore indicates that the Parties did not intend to impose porting changes on one another.²⁸ Thus, the Commission should reject CenturyTel’s claim that number porting charges are implicitly incorporated into the Agreement.

In addition, CenturyTel has asserted that Charter’s failure to pay CenturyTel for processing its porting requests constitutes unjust enrichment at CenturyTel’s expense. This contention, however, rests upon the flawed premise that CenturyTel is providing a “service” for Charter. Under Missouri law, an unjust enrichment has occurred where a benefit was conferred upon a person in circumstances in which retention of the benefit, without paying its reasonable

²⁶ See *Conservative Fed. Savings & Loan Assoc. v. Warnecke*, 324 S.W.2d 471, 478 (Mo.App. 1959) (citing 21 C.J.S. Covenants § 9, p. 888; 17 C.J.S. Contracts § 328, p.778; 21 C.J.S. Covenant, Action of § 14, p.868).

²⁷ *Id.*

²⁸ See e.g., *Conservative Fed. Savings & Loan Assoc.*, 324 S.W.2d at 478 (citing *Foley v. Euless*, 214 Cal. 506) (noting that “[n]o implied provision can be inserted as against the express terms of the contract, or to supply a covenant upon which it was intentionally silent”).

value, would be *unjust*.²⁹ The courts have emphasized that the most significant element for a claim of unjust enrichment is the requirement that the enrichment be unjust.³⁰ To that end, “[m]ere receipt of benefits’ is not enough when there is no showing that it would be unjust for defendant to retain the benefit received.”³¹

Simply stated, if CenturyTel ported numbers to Charter, without charges (or under protest), Charter would not be unjustly enriched. Indeed, CenturyTel ports a number to Charter’s network because of its statutory obligations to do so, and because the express terms of the Agreement require CenturyTel to port numbers to Charter without charges. Thus, there is no unjust enrichment because CenturyTel’s actions are mandated by federal law, and expressly contemplated under the terms of the Agreement, without any right of compensation.

Furthermore, although CenturyTel repeatedly claimed a right to compensation based upon its alleged costs, the company failed to present any evidence in the record concerning such alleged costs. *But see* Tr. 248, lines 7-11 (Mr. Miller testified that “CenturyTel asks for the right to recover some of our *costs* for doing work for them ...”). Indeed, despite repeated requests from Charter for additional information concerning costs, CenturyTel readily admits that it has never conducted any cost studies to determine what, if any, costs it may incur in responding to port requests from Charter. Tr. 170, lines 21-25 and 171, lines 1-11; Exh. 7, Schremp/Giaminetti Surrebuttal, Attachment of CenturyTel’s Discovery Responses at 2 (CenturyTel stated that it “has not yet completed any formal cost study to quantify the specific amount of costs associated with the administrative services that it performs in processing Charter’s LSRs associated with its

²⁹ *S&J, Inc., v. McLoud & Company, LLC*, 108 S.W.3d 765, 768 (Mo.App. S.D. 2003).

³⁰ *Id.* (citing *Associate Engineering Co. v. Webbe*, 795 S.W.2d 606, 608 (Mo.App. E.D. 1990)).

³¹ *Id.* (quoting *Farmers New World Life Ins. Co., Inc. v. Jolley*, 747 S.W.2d 704, 706 (Mo.App. W.D. 1988)). The court also explained that “[t]here must be [sic] something more than passive acquiescence, such as fault or undue advantage on the part of the defendant, for defendant’s retention of the benefit to be unjust.” *Id.*

request to port numbers”). Generally speaking, the basic economic principles of “compensation” are predicated upon the principles of recovering the cost of a product, or input plus a reasonable rate of return on such costs. But if there is no cost information in the record, it is impossible to determine what, if any, compensation is due. Therefore, there is no evidentiary basis for this Commission to determine whether CenturyTel would be fairly compensated if Charter were required to pay these charges.

For the same reasons, it is no argument to say that Charter implicitly agreed to these charges because it submitted port requests, knowing that CenturyTel intended to assess charges. *See* Exh. 5, Miller Direct at 28, lines 16-21. The fact is, Charter has consistently and vigorously disputed these charges since 2004. So there can be no claim that Charter’s number port requests constituted some form of implicit “offer” and “acceptance” because CenturyTel has been on notice for *four years* that Charter disputed the charges. Thus, Mr. Miller’s assertion that Charter’s service requests constituted a form of implicit “orders” does not square with the facts. For all of these reasons, it is clear that CenturyTel is not entitled to recovery of its alleged costs, or payment for its work in responding to porting requests.

C. FCC Regulations Require Recovery of Costs, If Any, From End Users, Not Other Carriers

Because the Commission can resolve these disputed issues on the contract itself, it need not reach the question of whether CenturyTel’s charges are impermissible under federal law. However, if the Commission chooses to address that issue, the question can be easily resolved on these grounds as well. The Commission can do so simply by recognizing that the FCC has *already* answered this question, in the negative, when it ruled in a 2002 Cost Reconsideration Order that: “incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier “customers,” nor

may they recover carrier-specific costs through interconnection charges to other carriers where no number portability functionality is provided.”³²

The FCC’s affirmation of that principle was made in the context of its further review of its cost recovery rule, found at 47 C.F.R. § 52.33. That rule provides that: “[i]ncumbent local exchange carriers may recover their carrier-specific costs directly related to providing number portability by establishing in tariffs filed with the [FCC] a monthly number portability charge...”³³ Put simply, the cost recovery rule requires that ILECs recover their costs of providing number portability through end-user tariff charges, not by assessments on requesting LECs.

The FCC’s clear statement prohibiting charges for porting leaves no doubt that the FCC does not permit incumbent carriers to assess charges upon other carriers for number porting. This decision has never been reversed, modified, or overturned, and as such remains good law to this day. There is no legal authority contra, and CenturyTel has failed to offer any authority that purports to negate the FCC’s statement on the issue.

Unable to rebut that authority, CenturyTel tries to avoid this binding FCC precedent by arguing that the charges at issue here have nothing to do with number portability, that they are simply administrative order processing costs that fall outside of the scope of the FCC’s prohibition.³⁴ But CenturyTel misleads the Commission in this respect, because the FCC has

³² *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) (“2002 Cost Reconsideration Order”).

³³ 47 C.F.R. § 52.33(a) & (a)(1). There are limited exceptions to this general rule, which arise only if the ILEC is reselling local service, providing UNE switch ports to a CLEC, or providing a number porting “query” service. Note that in some limited instances, it may be appropriate to apply the charge to competitive carriers. But because Charter does not resell CenturyTel service, or lease UNEs, the exception is not implicated here.

³⁴ CenturyTel argues that it performs an “administrative” function when processing porting requests from Charter. Exh. 5, Miller Direct at 14, lines 2-16. This function is allegedly separate and unrelated to the

specifically held that the carrier-specific costs of implementing number portability *include* the very costs at issues here. Specifically, such costs include those associated with transferring telephone numbers to other carriers, and the exchange of porting orders between carriers; the very same functions for which CenturyTel claims to incur costs when responding to Charter's port requests.

The cost recovery rule was promulgated in the FCC's 1998 Third Report and Order on Telephone Number Portability,³⁵ which established a regime for LECs to recover their costs of implementing long term number portability. The FCC allowed incumbent LECs to recover these costs through: a monthly number portability end-user charge;³⁶ and, a number portability query-service charge that applies to carriers on whose behalf the incumbent LEC performs queries.³⁷

In that order the FCC identified three separate categories of costs associated with implementing number portability: (1) shared costs; (2) carrier-specific costs directly related to providing number portability; and (3) carrier-specific costs not directly related to providing number portability.³⁸ The cost recovery rule applies to the second category, carrier-specific costs directly related to providing number portability.

CenturyTel has raised the defense that its charges are not charges for number porting, *per se*, but are instead simply charges associated with the administrative costs of responding to "service requests" from Charter. Despite the fact that CenturyTel has identified its charges as "porting charges" in many invoices, Exh. 2, Schremp/Giaminetti at 7, lines 5-8, it now argues

so called "transmission" functions that it performs when porting orders between carriers. Exh. 5, Miller Direct at 16, lines 1-11. As such, Mr. Miller argues that CenturyTel's porting charges may be lawfully assessed upon Charter because these charges are not directly related to providing LNP. Exh. 5, Miller Direct at 14, lines 18-21.

³⁵ *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701 (1998) ("Third Report and Order").

³⁶ *Id.* at 11776, para. 142. See 47 C.F.R. §§ 52.33(a), (a)(1).

³⁷ *Third Report and Order*, 13 FCC Rcd at 11778, para. 147. See 47 C.F.R. §§ 52.33(a), (a)(2).

³⁸ *Id.* at ¶¶ 68-77.

that these charges are not charges for porting, but are instead simply charges to recover administrative costs associated with responding to porting requests. To that end, CenturyTel claims that its charges recover the costs of administrative services that it performs in processing LSRs,³⁹ and that such costs are not directly related to the provision of number porting. CenturyTel argues, therefore, that its charges are not prohibited by the cost recovery rule because they recover costs that fall outside of the category of costs covered by that rule.

CenturyTel's arguments fail because the FCC has specifically defined the activities at issue in this case, i.e., porting telephone numbers from CenturyTel's network to Charter's, and transmitting porting orders between the two companies, as activities that are directly related to providing number portability, and therefore covered by the cost recovery rule. Specifically, in the *Third Report and Order*, the Commission defined carrier specific costs directly related to providing number portability (and thus covered by the cost recovery rule) as "costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the *porting of telephone numbers from one carrier to another*."⁴⁰ And the FCC declined to define such costs as one-time costs, but instead explained that the "*ongoing costs*" of establishing number portability are covered under the rule.⁴¹

Further, in a later reconsideration order, the FCC concluded that the only eligible LNP costs are "costs carriers incur specifically in the provision of number portability services, such as

³⁹ CenturyTel has explained that it performs the following administrative tasks when processing LSR orders: review of the order to ensure that the order has been correctly completed by the ordering carrier, manually entering the order into its billing and provisioning system, providing firm order commitments and other such communications to the ordering carrier, and overseeing internal coordination to ensure the timely completion of the order. See Exh. 5, Miller Direct at 12, lines 10-22, and 13, lines 1-20.

⁴⁰ *Third Report and Order*, at ¶ 72.

⁴¹ *Id.* at ¶ 38.

... porting of telephone numbers from one carrier to another.”⁴² As the FCC explained, the phrase “porting telephone numbers from one carrier to another” refers to systems for uploading and downloading local routing number information to and for “*transmitting porting orders* between carriers.”⁴³

Considered as a whole, these statements tell us that the FCC has found that a carrier-specific cost directly related to providing number porting is the “porting of telephone numbers from one carrier to another,” which specifically includes “*transmitting porting orders* between carriers.” These are the very functions at issue here, and for which CenturyTel claims a right of compensation.⁴⁴ Thus, the FCC has specifically identified the functions at the core of CenturyTel’s service order charges for porting, i.e. porting numbers in response to the transmittal of porting orders, as that which is covered by the cost recovery rule.⁴⁵

CenturyTel cites to the 2004 BellSouth Declaratory Ruling for support. But that decision does not reverse, modify or otherwise overturn the FCC’s 2002 decision in the 2002 Cost Reconsideration Order prohibiting these charges. Nor does the BellSouth decision stand for the proposition that CenturyTel suggests. In support of its arguments CenturyTel relies on a single footnote in the Bellsouth Order granting BellSouth’s request to extend the period of time for

⁴² *In the Matter of Telephone Number Portability Cost Classification Proceeding*, Memorandum Opinion and Order, 13 FCC Rcd 24495 at ¶ 12 (1998) (emphasis added). In this order the FCC adopted a two part test for defining those costs that are directly related to number portability, and therefore covered by the cost recover rule. Under that test such costs: (1) would not have been incurred by the carrier “but for” the implementation of number portability; and (2) were incurred “for the provision of” number portability service. *Id.* at ¶ 10.

⁴³ *Id.* at ¶ 14.

⁴⁴ Moreover, these costs also meet the two part test established by the FCC because CenturyTel would not have incurred these costs “but for” its porting obligations, and they were incurred because CenturyTel is obligated to provide number porting to its subscribers.

⁴⁵ Furthermore, CenturyTel’s argument that these costs are carriers specific costs that are not directly related to providing number portability is not consistent with the FCC’s characterization of such costs. The FCC found that carrier-specific costs not directly related to providing number porting are “the costs of network upgrades necessary to implement a database method.” Examples of such costs include “the costs of upgrading SS7 capabilities or adding intelligent network (IN) or advanced intelligent network (AIN) capabilities.” *Third Report and Order*, at ¶¶ 62, 68.

ILECs to assess tariffed end user charges. In that order the FCC reiterated that portability costs are recoverable only through end-user charges, but in a footnote declined to rule on the validity of certain “transaction charges” assessed by BellSouth on other carriers.⁴⁶ CenturyTel argues that because the FCC did not take the opportunity to specifically prohibit these “transaction charges” (which CenturyTel asserts are analogous to its LNP service order charges) the agency tacitly agreed that such charges are acceptable.

But CenturyTel grossly mischaracterizes the FCC’s holding in the BellSouth Order. In fact, in footnote 49, the FCC expressly did *not* decide the validity of BellSouth’s “transaction charges,” and instead declined to rule on that question. Arguably, they had no reason to do so because just two years earlier, in 2002, the FCC had just ruled that incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier “customers.”⁴⁷ More significantly, the FCC specifically reaffirmed its conclusion that the costs of establishing number portability include ongoing costs, such as the *costs involved in transferring a telephone number to another carrier*.⁴⁸ This fact seriously undermines CenturyTel’s contention that that decision stands for the proposition that the FCC approved service order charges.

These decisions establish that the FCC finds that the costs of providing number portability include the cost of *transferring* telephone numbers between networks of other LECs, which includes the cost of *sending and receiving* porting orders to the other LECs. In other words, the very same function that CenturyTel claims are unrelated to porting – receiving and responding to porting orders from Charter in order to transfer telephone number – are *specifically*

⁴⁶ *In the Matter of Telephone Number Portability, BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, Order, 19 FCC Rcd 6800, ¶ 10, n. 49 (2004) (“*BellSouth Order*”).

⁴⁷ *2002 Reconsideration Order*, at ¶ 62.

⁴⁸ *BellSouth Order*, at n. 77 (emphasis added).

covered by the FCC's cost recovery regulations. Accordingly, CenturyTel's claim that its charges are unrelated to number porting, and therefore outside the scope of the FCC's regime, are contrary to the FCC's conclusions. The Agreement requires the Parties to comply with all federal regulations, rules and administrative decisions. Exh. 1, Agreement, Interconnection Attachment at § 15.1. CenturyTel's failure to comply with FCC regulations prohibiting these types of charges constitutes a breach of the terms of the Agreement, in that the porting charges are not permissible under federal law.

Assuming, *arguendo*, that CenturyTel were correct that its costs do not fall within those covered by the FCC cost recovery rule, the FCC's 2002 prohibition of carrier charges still bars CenturyTel from assessing these charges on Charter. Remember, the FCC stated that "incumbent LECs may not recover any number portability costs through interconnection charges or add-ons to interconnection charges to their carrier 'customers,' *nor may they recover carrier-specific costs* through interconnection charges to other carriers *where no number portability functionality is provided*."⁴⁹ The latter clause in this statement clearly applies to CenturyTel, because CenturyTel claims to have incurred carrier-specific costs in responding to port requests from Charter (although it has not offered any evidence of such costs), and it also claims that these costs are incurred in the provision of administrative tasks unrelated to porting, and where no number portability functionality is provided. Exh. 6, Miller Rebuttal, at 14 lines 18-21 and 16, lines 5-6. If those statements are accurate, then the FCC's prohibition also applies here because the FCC specifically prohibited such charges even where no number portability functionality is provided. Thus, this statement bars CenturyTel from imposing these charges, regardless of whether they are directly related to providing number porting.

⁴⁹ *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).

Finally, a number of CenturyTel subsidiaries have in fact filed end user tariffs with the FCC to recover their costs of implementing number portability. Exh. 4, Schremp/Giaminetti, TS Schedule 2 (CenturyTel's Discovery Response to Data Request No. 22). Thus, to the extent that the additional charges on CLECs at issue here do in fact recover a portion of the costs of providing number portability, CenturyTel is effectively engaging in a form of double recovery by assessing cost recovery charges on both end users and other LECs. That fact also mitigates CenturyTel's argument that the recovery period ended in 2004, and that CenturyTel is now free to recover any costs it deems appropriate. Exh. 5, Miller Direct at 32, lines 11-13. In fact, the existence of those federal tariffs demonstrates that CenturyTel has already recovered any costs it may have incurred in providing number portability. Also, although the FCC limited the recovery period, it has never rescinded its 2002 statement prohibiting carrier-to-carrier interconnection charges, or add-ons to interconnection charges.⁵⁰

V. ALLOWING CENTURYTEL TO ASSESS CHARGES WITHOUT ANY CONTRACTUAL BASIS WILL INCREASE BARRIERS TO ENTRY, RAISE COMPETITOR'S COSTS, AND DISCOURAGE COMPETITION

A. State Commissions In Indiana, Texas, New York and Massachusetts Have Prohibited Porting Service Charges

Several state commissions have recently taken a skeptical view of carrier attempts to impose number porting, or service transfer, charges on other carriers. For example, the Indiana Utility Regulatory Commission rejected the imposition of LNP service order charges in a recent arbitration proceeding.⁵¹ In that case the Indiana commission reasoned that imposing service charges served as an impediment to number porting, and was likely to impede competition.⁵²

⁵⁰ 2002 Cost Reconsideration Order, 17 FCC Rcd 2578, at ¶ 62.

⁵¹ *In re Sprint Communications Company, L.P.*, 2006 WL 2663730, *40 (Ind. U.R.C. 2006)

⁵² *Id.*

Further, state commissions in New York, Minnesota, and Massachusetts have rejected a CLEC's attempt to impose upon the ILEC a "service transfer charge" whenever a customer disconnects local exchange service from the CLEC and switches to the requesting ILEC.⁵³ The charges at issue in those cases are analogous to CenturyTel's service order charges for number porting. Generally, the state commissions in New York, Minnesota, and Massachusetts concluded that service transfer charges are not permitted because the charges: (1) served as an unfair impediment to competition; (2) are not supported by a cost study; and (3) are not being assessed by the ILEC, who was performing the same service-transfer related tasks at no charge to the CLEC.

However, the Texas Public Utility Commission ruled, in a 2006 arbitration proceeding, that number porting charges could be included in an interconnection agreement between Sprint and several rural ILECs.⁵⁴ In that case the Arbitrator determined that each party is entitled to impose "just and reasonable" charges for porting a customer to another party, based upon the conclusion that the porting-out LEC was the cost-causer.

But the Texas PUC's decision is limited in several significant ways. First, the Arbitrator ruled that the rate must be based on the evidence that the rate is "just, reasonable and forward-looking, or cost-based."⁵⁵ Second, upon reconsideration, the full Commission determined that

⁵³ *In re Complaint of Verizon New England, Inc. d/b/a Verizon Massachusetts Concerning Customer Transfer Charges Imposed by Broadview Networks, Inc.*, D.T.E. 05-4 (Mass. DTE 2006); *In re Complaint and Petition of Verizon New York Inc. Concerning Service Transfer Charges Imposed by Broadview Networks, Inc.*, Case 05-C-0066, Order Granting, In Part, Complaint and Petition at 7 (N.Y. PSC 2005); *In the Matter of McLeodUSA's Tariff Filing Introducing Wholesale Order Processing Charges that Apply When McLeodUSA's Customers Shift to Other Telecommunications Carriers*, M-04-395 (Minn. PUC 2004).

⁵⁴ *Petition of Sprint Communications Company, LP for Compulsory Arbitration Under the FTA to Establish Terms and Conditions for Interconnection Terms with Consolidated Communications of Fort Bend Company and Consolidated Communications Company of Texas*, PUC Doc. No. 31577 (Tex. PUC 2006).

⁵⁵ *Id.* at 53.

the ILEC failed to offer cost-study evidence to support its proposed rate, and the Commission concluded that the failure to do so constituted a waiver of the rural ILECs' right to establish a cost-basis for LSRs for porting. Therefore, the full Commission effectively precluded the assessment of porting charges by ordering the rural ILEC to include a rate of \$0.00 in their interconnection agreement with Sprint. Exh. 14, Order Approving Arbitration Award with Modification, Docket No. 31577 (Tex. PUC 2007). Notably, the Texas PUC decision is the state commission decision (that Charter is aware of), explicitly finding a basis for assessing number porting charges notably, it stands in contrast to the many authorities cited herein which prohibit such charges. Moreover, it is interesting to note that the Texas PUC itself would not permit CenturyTel to assess number porting charges on Charter in this instance, because CenturyTel has not offered any proof or evidence of its alleged costs, which eliminates any opportunity to actually validate whether such charges actually recover CenturyTel's "costs."

B. Charging Competitors for Implementing Number Porting and Subscriber Change Increases Barriers to Competition and Threatens Competitive Neutrality

Section 251(e)(2) requires that the costs of establishing number portability be "borne by all telecommunications carriers on a competitively neutral basis." 47 U.S.C. § 251(e)(2). This principle of competitive neutrality was also an important component of the FCC's cost recovery orders (discussed above). Those orders also stand for the proposition that the costs associated with the obligation to provide number porting must be established in a competitively neutral fashion.

But allowing CenturyTel to assess charges on Charter (which does not assess charges on CenturyTel, Tr. 132, lines 17-25) would undermine, rather than enhance, competition and the

competitive neutrality the FCC sought to establish.⁵⁶ As the FCC itself explained, “[i]f the Commission ensured the competitive neutrality of only the distribution of costs, carriers could effectively undo this competitively neutral distribution by recovering from other carriers.”⁵⁷ Thus, the FCC was clearly concerned that the very types of charges at issue in this proceeding could undermine competitive neutrality and possibly create barriers to competition (by increasing competitor's costs).

These concepts are not foreign to this Commission. Indeed, the Missouri Commission filed comments in these FCC proceedings in support of the same principle. And this Commission specifically argued that “it is reasonable to expect ... individual carriers to bear their direct specific costs of providing number portability. Given that new competitors will also be required to bear similar costs for their own networks, no particular competitive disadvantage to either incumbent or new entrant is apparent.”⁵⁸

Thus, a decision to allow CenturyTel’s charges would be contrary to the Commissioner’s own comments, the precedent set in other states, and would effectively impair the competitive neutrality that the FCC sought to achieve in implementing its number porting cost recovery rules.

VI. CENTURYTEL IS NOT ENTITLED TO COMPENSATION FOR THE CUSTOMER RECORDS SEARCH AND UNIQUE DIRECTORY LISTING CHARGES

CenturyTel is also not entitled to compensation from Charter for the customer records search and “unique” directory listing charges at issue here for several reasons. First, CenturyTel never fulfilled its obligations under the Agreement in relation to certain directory listing requests made by Charter, and for which these charges were a predicate. Second, the charges are based

⁵⁶ As Ms. Giaminetti testified, on the stand, a ruling in favor of CenturyTel would increase Charter’s costs. Tr. 71, lines 18-21.

⁵⁷ *Third Report and Order*, at ¶ 39.

⁵⁸ *Third Report and Order* at ¶ 137, n. 475.

upon rates from portions of the Agreement, concerning rates for resale and unbundled services that do not apply to Charter.

As Charter's testimony established, CenturyTel assessed customer records search ("CSR") charges upon Charter for those occasions when CenturyTel reviewed customer records to ensure that Charter's subscriber information is accurately listed in public directories. These charges were assessed by CenturyTel during the period between March, 2003 to March, 2004. CenturyTel assessed a charge of \$4.21 for every records search made that was associated with such requests, for a total of \$8,550.04.

Charter sought these records to ensure that Charter's subscriber information retained in CenturyTel's databases would be properly listed in public telephone number directories produced by CenturyTel. However, CenturyTel never performed the work necessary to effectuate Charter's directory listing requests (which utilized the records research that Charter requested). In other words, the records searches were a necessary predicate to Charter's directory listing requests. However, after CenturyTel performed the searches, they failed to then conduct the work necessary to effectuate Charter's directory listing request.

In addition, CenturyTel also assessed monthly recurring charges associated with certain "unique" directory listing requests by Charter. For example, on behalf of its subscribers Charter requested that CenturyTel provide its subscribers non-publish or non-list status in CenturyTel directories. However, as noted above, CenturyTel failed to actually perform the work that Charter had requested in conjunction with these charges. Charter disputed the charges associated with the work that CenturyTel failed to perform. The total disputed amount of charges in this category, at the time of this filing, is \$7,382.83.

As such, CenturyTel failed to perform an essential function under the Agreement. Where a party to a contract fails to perform an essential obligation under the Agreement, it is not entitled to compensation. Only when the performing party satisfies all of its obligations, and performs those tasks necessary to fulfill the other party's requests, is it entitled to the compensation which would otherwise be due. Accordingly, CenturyTel is not entitled to compensation for responding to requests that were a predicate to services that CenturyTel never performed.

Moreover, CenturyTel improperly assessed charges from the Agreement which apply only to those situations where Charter resells services, or leases UNEs. As CenturyTel witness Ms. Hankins admitted on the stand, the rates that CenturyTel assessed upon Charter for responding to customer service requests were rates that were taken from the resale and UNE portions of the Agreement's Price List. Tr. 296, lines 17-25; *see also* Exh. 9, Hankins Rebuttal at 12, lines 16-20; and 13, lines 1-6. As Ms. Hankins, in her own words, told this Commission "[t]here is a rate provided in the UNE section, and that's what we've been billing Charter." Tr. 298, lines 20-22.

But the record is clear and uncontested on this point: Charter does not resell services or lease UNEs from CenturyTel. Exh. 3, Schremp/Giaminetti at 10, lines 15-17. Therefore, it has no liability to CenturyTel for rates, prices, or terms that apply only to UNEs and resold services. The Price List clearly distinguishes and segregates such rates from rates associated with other obligations in the Agreement. These rates can not be used as a proxy, or substitute, by CenturyTel to create liability for that which is not clearly established in the Agreement. Thus, Charter is not liable to CenturyTel for the customer records search charges and unique directory listing charges assessed by CenturyTel.

VII. CENTURYTEL ALSO BREACHED THE AGREEMENT BY THREATENING TO STOP PORTING NUMBERS BETWEEN ITS NETWORK AND CHARTER'S NETWORK

CenturyTel breached the Agreement by engaging in unilateral self-help actions that effectively forced Charter to pay properly disputed porting charges under threat of disconnection. Specifically, CenturyTel breached the Agreement by: (1) failing to follow the express terms of the Agreement that require the Parties to continue to fulfill their contractual obligations while working to resolve billing disputes; and (2) threatening to stop processing Charter's port requests unless the disputed charges were paid.

CenturyTel's unilateral actions to stop processing Charter's port requests are outside of the scope of permissible procedures under the Agreement. There is no procedure in the Agreement for addressing billing disputes that authorizes CenturyTel to threaten disconnection and effectively cease performance when charges are properly disputed. In fact, Section 9 of the Agreement establishes the procedures for disputing charges assessed by the other party. Charter complied with the terms of the Agreement as it provided notice to CenturyTel, on a timely and consistent basis, that the number porting charges were the subject of a good faith dispute. Charter then supported that good faith dispute of the charges with notice of the specific details and reasons for disputing each item, as required by that section of the Agreement. As a result, Charter properly disputed the charges consistent with the processes set forth in the Agreement.

Nevertheless, despite Charter's proper dispute of these charges, CenturyTel threatened to stop processing Charter's porting requests. CenturyTel initially sent a threat letter to Charter on July 11, 2007 demanding payment of certain disputed charges. Then on August 14, 2007, CenturyTel's Corporate Carrier Relations Manager Pam Hankins stated in an email that it is CenturyTel's position that Charter is "in default" of the Agreement because Charter had not paid

certain properly disputed charges and that CenturyTel would ultimately “stop processing all Charter orders” unless Charter paid the charges on or before August 28, 2007. *See also* Exh. 18 Hankins Demand Letter at 1 (Ms. Hankins stated that “the Agreement between CenturyTel and Charter will be terminated, and CenturyTel will terminate the provision of all services to Charter”). Indeed, Ms. Hankins testified, on the stand, that CenturyTel intended to terminate the Agreement if Charter did not pay. This unilateral decision to cease performance under the Agreement by no longer processing Charter’s orders not only breached the Agreement, but it also had the effect of potentially prohibiting subscribers in Missouri from porting their numbers.⁵⁹ Tr. 241, lines 2-12 (Mr. Miller made quite clear, on the stand, that if Charter failed to pay porting charges, customers would not be able to port to Charter); *see also* Tr. 283, lines 14-16 (Ms. Hankins testified that if Charter did not pay porting charges, CenturyTel “would terminate the contract”); Exh. 18, Hankins Demand Letter.

Because Charter has properly disputed the number porting charges consistent with the requirements of Section 9, CenturyTel has no basis under the terms of the Agreement to engage in self-help actions and threaten disconnection. Therefore, CenturyTel’s unilateral self-help actions are not permitted under the procedures for addressing billing disputes, and thereby constitute a breach of the terms of the Agreement.

VIII. CONCLUSION

For the foregoing reasons, Charter respectfully requests that the Commission issue an order that enforces the terms of the Agreement and which requires CenturyTel to:

⁵⁹ *See* Order Directing CenturyTel to Continue to Process Charter Service Order Requests While This Complaint is Pending, Case No. LC-2008-0049, at 2 (holding that “[t]he threatened discontinuation of service could result in Charter being unable to port the telephone numbers of subscribers wishing to transfer service to Charter ... That is a threat of serious harm to property justifying immediate action by the Commission”).

(1) refund the \$68,867.61 Charter paid to CenturyTel, under duress, to ensure that Charter's porting requests continued to be honored in 2004;

(2) continue porting numbers to Charter, but without charge;

(3) discontinue assessing improper number porting charges upon Charter; and

(4) discontinue assessing all other categories of improper charges (that are the subject of this proceeding) upon Charter.

Finally, the Commission should find that CenturyTel has failed to comply with the Agreement, in the manner described herein, and is therefore liable for penalties and damages.

Respectfully submitted,

By: /s/ K.C. Halm
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Dated: June 11, 2008

CERTIFICATE OF SERVICE

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

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