

EXHIBIT F

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Public Service Commission of Wisconsin

Eric Callisto, Chairperson
Mark Meyer, Commissioner
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Public Service Commission of Wisconsin
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July 28, 2009

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Mr. Bradley D. Jackson
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Re: Petition of Charter Fiberlink, LLC for Arbitration of an
Interconnection Agreement Between the CenturyTel Non-Rural
Telephone Companies of Wisconsin and Charter Fiberlink, LLC

5-MA-148

Dear Sirs:

Enclosed please find the arbitration award in the above captioned matter.

Sincerely,

Dennis J. Klaila
Chair
Arbitration Panel

DK:dl:\5-MA-148\correspondence\5-MA-148 award cover letter

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition of Charter Fiberlink, LLC for Arbitration of an Interconnection Agreement Between the CenturyTel Non-Rural Telephone Companies of Wisconsin and Charter Fiberlink, LLC 5-MA-148

Petition of Charter Fiberlink, LLC for Arbitration of an Interconnection Agreement Between the CenturyTel Rural Telephone Companies of Wisconsin and Charter Fiberlink, LLC 5-MA-149

ARBITRATION AWARD

This is the final decision and arbitration award in the arbitration proceeding between Charter Fiberlink, LLC (Charter) and twelve CenturyTel operating companies of Wisconsin (CenturyTel).

Proceedings

On July 21, 2008, Charter petitioned the Commission for arbitration of an interconnection agreement with CenturyTel, pursuant to 47 U.S.C. § 252(b)(1).¹ Charter submitted two petitions for arbitration. The first petition requested arbitration of an interconnection agreement with CenturyTel's non-rural operating companies in Wisconsin (CenturyTel of the Midwest-Kendall, LLC; CenturyTel of Central Wisconsin, LLC; and Telephone USA of Wisconsin, LLC). The second requested arbitration of an agreement with the rural operating companies (CenturyTel of Fairwater-Brandon-Alto, LLC; CenturyTel of Forestville, LLC; CenturyTel of Larsen-Readfield,

¹ Hereafter, simple references to § 251, § 252 and other sections without a title reference shall mean sections of Title 47 of the United States Code. Similarly, references to a Rule shall mean the corresponding section of Title 47 of the Code of Federal Regulations. References to "the Act" shall mean the Telecommunications Act of 1996, Public Law 104-104, 110 Stats. 56 (1996), codified at scattered sections of Title 47, United States Code.

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LLC; CenturyTel of Monroe County, LLC; CenturyTel of Northwest Wisconsin, LLC, CenturyTel of Northern Wisconsin, LLC; CenturyTel of Southern Wisconsin, Inc.; CenturyTel of the Midwest-Wisconsin, LLC; and CenturyTel of Wisconsin, LLC). Because of the similarity of the issues and parties, the two petitions have been combined in a single proceeding.

CenturyTel filed its reply to Charter's petitions on August 15, 2008. On September 25, 2008, the Commission issued a Notice of Arbitration, appointing an arbitration Panel consisting of Dennis Klaila (chair), Anne W. Waymouth and Duane Wilson. The Commission appointed Michael Varda to serve as legal advisor to the Panel. The notice also provided that the Commission would apply the Commission's *Interim Procedures*.²

The arbitration hearing was held in Madison on December 9-10, 2008. The parties filed initial briefs on January 14, 2009, and reply briefs on January 29, 2009.

Parties

Charter is a Delaware limited liability company, with its primary place of business at 12405 Powerscourt Drive, St. Louis, MO 63131. Charter has a Certificate of Authority issued by the Commission that authorizes Charter to provide local exchange service and exchange access service in designated exchanges in Wisconsin, including within the affiliated incumbent service areas of CenturyTel. Under Wisconsin law, Charter is an alternative telecommunications utility under Wis. Stat. § 196.01(1d)(f). Under federal law, Charter is a telecommunications carrier for purposes of § 153(49) and a requesting telecommunications carrier for purposes of §§ 251(c)(1) and 252(a).

² Investigation of the Implementation of the Telecommunications Act of 1996 in Wisconsin, No. 05-TI-140 (Wis. PSC, May 23, 1996) (*Interim Procedures*).

CenturyTel, Inc. is a holding company and the parent utility for the twelve CenturyTel affiliated companies involved in this arbitration proceeding. The principal office address for CenturyTel, Inc. is 100 Century Park Dr., Monroe, LA 71203-2041. The twelve CenturyTel operating companies of Wisconsin provide local exchange, exchange access and other services as incumbent telephone companies within certain parts of Wisconsin. Under Wisconsin law, the CenturyTel operating companies are telecommunications utilities as defined in Wis. Stat. § 196.01(10). Under federal law, the CenturyTel operating companies are telecommunications carriers for purposes of § 153(49), and Incumbent Local Exchange Carriers (ILECs) for purposes of § 251(h). CenturyTel rural operating companies retain an exemption, as provided for in §251(f)(1)(A), from the additional obligations applicable to ILECs contained in § 251(c).

Issues

Charter initially submitted a disputed points list (DPL) consisting of 40 issues plus sub-issues. See Exhibit C of Charter's Petition for Arbitration, dated July 21, 2008. Also submitted, as Exhibit B of Charter's Petition for Arbitration, is the parties' draft interconnection agreement with competing proposed language. CenturyTel initially submitted a DPL consisting of 43 issues plus sub-issues. See Exhibit 2 of the CenturyTel Response to Charter's Petitions for Arbitration, dated August 15, 2008. These two DPL's indicated that Issues 18, 19, 20, 34, 35, 37, 38, 39, and 40 only apply to CenturyTel non-rural operating companies. On September 15, 2008, the Parties filed a Joint Revised Statement of Unresolved issues in both dockets 05-MA-148 and 05-MA-149 consisting of 43 issues plus sub-issues. However, the parties did not agree on the wording of each issue and included competing sets of wording for many of the issues. On December 3, 2008, the parties filed a Joint Revised Statement of Unresolved issues which

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indicated Issues 1, 6, 9, 26, 27, 31, 36, and 42 were resolved. Also on November 7, 2008, prior to the hearings, the parties jointly filed a statement to inform the Commission that Issues 5, 10, 12, 15(A), 15(B), 15(C), 27, 32, 37, 38, 39, and 40 would be addressed by the parties only in post-hearing briefs.

To the extent the parties did not agree on the wording of an issue, the discussion below provides both versions of the issues with an identification as to which version is Charter's version and which version is CenturyTel's version. Where the parties agree on the wording of an issue, that single description of the issue is included. In some cases the proposed contract language associated with each issue identified in the DPL includes language that is unrelated to the specific issue at hand and contains terms relevant to different issues. For example, see Issue 18. In those circumstances, in the discussion below, the Panel identifies the language it considers to be relevant to the issue at hand. Charter's proposed language is shown in **bold**. CenturyTel's proposed language is double underlined. On most issues, the Panel awards either Charter's or CenturyTel's proposed contract language, potentially with a few edits. However, in some cases, in particular where issues overlap, the Panel describes its award and leaves the redrafting of the contract to the parties.

Discussion of the Issues

Issue 1: Resolved.

Issue 2: How should the Agreement define the term Network Interface Device or "NID"?

Issue 25: Charter version: Should Charter have access to the customer side of the Network Interface Device ("NID") without having to compensate CenturyTel for such access?

CenturyTel version: CenturyTel believes that there are two issues presented in Issue 25:
(a) Should Article IX, Section 3.4 clarify that the End User controls Inside Wire except in those multi-tenant properties where CenturyTel owns and maintains such Inside Wire?

(b) Is Charter required to submit an order to and pay CenturyTel for accessing CenturyTel's NID when Charter connects its loop to the End User's Inside Wiring through the customer access side of the CenturyTel NID?

These issues concern the definition of the Network Interface Device (NID) and the terms for access to and ordering the NID as an unbundled network element (UNE). These proposed definitions and procedures implicate whether Charter uses CenturyTel's NID as a UNE such that Charter should compensate CenturyTel for that use.

Positions of the Parties

(a) Charter

Charter believes that it should be allowed to access the customer side of the NID, for the purpose of connecting its own loop facilities to the customer's inside wire. Charter believes such access does not constitute the use of the NID as an UNE and does not create any obligation for Charter to compensate CenturyTel.

(b) CenturyTel

CenturyTel believes that Charter uses CenturyTel's NID by connecting Charter's line to the customer's inside wire through the customer access side of CenturyTel's NID. CenturyTel believes Charter is using CenturyTel's NID as a UNE such that Charter should follow the appropriate ordering process, including paying CenturyTel's Service Order charge, Outside Facility Connection charge, and monthly NID UNE charge. CenturyTel also proposes specific language concerning multi-tenant properties.

Proposed Contract Language

Charter and CenturyTel each propose language for Art. II section 2.103; Art. VI sections 3.4, 3.5 and 3.51; and Art. XI (Pricing) with respect to the "Outside Facility Connection" charge.

2.103 **Network Interface Device (NID)**

A stand-alone Network Element defined as any means of interconnecting Inside Wiring to CenturyTel's distribution plant, such as a cross-connect device used for that purpose. The NID houses the protector, the point from which the Point of Demarcation is determined between the loop (inclusive of the NID and the End User Customer's Inside Wire pursuant to 47 CFR 68.105. For purposes of this definition, the phrase "End User Customer's side of the NID" is descriptive and does not convey any ownership or usage rights.

- 3.4 Except in those multi-unit tenant properties where CenturyTel owns and maintains control over inside wire within a building, mMaintenance and control of the End User Customer's inside wiring (*i.e.*, on the End User Customer's side of the NID) is under the control of the End User Customer. Conflicts between telephone service providers for access to the End User's inside wire on the End User's side of the NID must be resolved by the End User.
- 3.5 Charter may obtain unbundled access to the NID on CenturyTel's network side or the End User Customer's side on a stand-alone basis to permit Charter to connect its own loop facilities to the premises wiring at any customer location. Charter may not connect the End User Customer side of the NID except in accordance with these terms. Any repairs, upgrade and/or rearrangements to the NID

requested or required by Charter will be performed by CenturyTel based on the Time and Material Charges set out in Article XI (Pricing). CenturyTel, at the request of Charter, will disconnect the CenturyTel Local Loop from the NID, at charges reflected in Article XI (Pricing). Charter may elect to disconnect CenturyTel’s Local Loop from the NID on the customer’s side of the NID, but Charter shall not perform any disconnect on the network side of the NID. Under no circumstances, however, shall Charter connect to either side of the NID unless the CenturyTel network is first disconnected from the NID as set forth in this Article.

3.5.1 Notwithstanding any other provision of this Agreement, when Charter is connecting a Charter provided loop to the Inside Wiring of a customer’s premises through the customer side of the CenturyTel NID, Charter does not need to submit a request to CenturyTel and CenturyTel shall not charge Charter for access to the CenturyTel NID.

3.5.2 Notwithstanding any other provision of this Agreement, when Charter is connecting a Charter provided loop to the CLEC provided interface device (i.e. terminal equipment) to the Inside Wiring of a customer’s premises without connecting to the End User Customer side of the CenturyTel NID, Charter does not need to submit a request to CenturyTel and CenturyTel shall not charge Charter for the processes described herein.

II. UNE PRICING

Network Interface Device (stand alone)	<u>MRC</u>
Basic NID	\$1.30
Complex (12 x) NID	\$1.40
Network Interface Device (stand alone)	<u>NRC</u>
Initial Service Order (ISO)	\$33.38
Outside Facility Connection	\$43.69

Application of UNE Pricing

“Initial Service Order” (ISO) applies to every Local Service Request (LSR) for NIDs.

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

Discussion

While the Federal Communications Commission’s (FCC) rules provide some guidance on this issue, the rules are not fully dispositive of this issue. The relative emphasis given to

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particular words in the FCC rules affects the application of the rules to this particular situation.

Furthermore, as the parties have chosen to submit a contract dispute to the Commission for adjudication, Wis. Stat. § 199.199 applies, as do other pertinent provisions of Wis. Stat. ch. 196, as provided in the notice these dockets.

The relevant FCC rules are as follows:

Part 51 INTERCONNECTION

§ 51.309 Use of unbundled network elements.

(c) A telecommunications carrier purchasing access to an unbundled network facility is entitled to exclusive use of that facility for a period of time, or when purchasing access to a feature, function, or capability of a facility, a telecommunications carrier is entitled to use of that feature, function, or capability for a period of time. A telecommunications carrier's purchase of access to an unbundled network element does not relieve the incumbent LEC of the duty to maintain, repair, or replace the unbundled network element.

51.319 Specific Unbundling Requirements

(a) *Local loops.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to the local loop on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part and as set forth in paragraphs (a)(1) through (a)(9) of this section. The local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises. This element includes all features, functions, and capabilities of such transmission facility, including the network interface device. It also includes all electronics, optronics, and intermediate devices (including repeaters and load coils) used to establish the transmission path to the end-user customer premises as well as any inside wire owned or controlled by the incumbent LEC that is part of that transmission path.

(c) *Network interface device.* Apart from its obligation to provide the network interface device functionality as part of an unbundled loop or subloop, an incumbent LEC also shall provide nondiscriminatory access to the network interface device on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part. The network interface device element is a stand-alone network element and is defined as any means of interconnection of customer premises wiring to the incumbent LEC's distribution plant, such as a cross-connect device used for that purpose. An incumbent LEC shall permit a requesting telecommunications carrier to connect its own loop facilities to on-

premises wiring through the incumbent LEC's network interface device, or at any other technically feasible point.

PART 68--CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK

§ 68.105 Minimum point of entry (MPOE) and demarcation point.

(a) Facilities at the demarcation point. Carrier-installed facilities at, or constituting, the demarcation point shall consist of wire or a jack conforming to the technical criteria published by the Administrative Council for Terminal Attachments.

(b) Minimum point of entry. The "minimum point of entry" (MPOE) as used herein shall be either the closest practicable point to where the wiring crosses a property line or the closest practicable point to where the wiring enters a multiunit building or buildings. The reasonable and nondiscriminatory standard operating practices of the provider of wireline telecommunications services shall determine which shall apply. The provider of wireline telecommunications services is not precluded from establishing reasonable classifications of multiunit premises for purposes of determining which shall apply. Multiunit premises include, but are not limited to, residential, commercial, shopping center and campus situations.

(c) Single unit installations. For single unit installations existing as of August 13, 1990, and installations installed after that date the demarcation point shall be a point within 30 cm (12 in) of the protector or, where there is no protector, within 30 cm (12 in) of where the telephone wire enters the customer's premises, or as close thereto as practicable.

(d) Multiunit installations. (1) In multiunit premises existing as of August 13, 1990, the demarcation point shall be determined in accordance with the local carrier's reasonable and non-discriminatory standard operating practices. Provided, however, that where there are multiple demarcation points within the multiunit premises, a demarcation point for a customer shall not be further inside the customer's premises than a point twelve inches from where the wiring enters the customer's premises, or as close thereto as practicable.

The parties place different emphasis on particular words in the FCC rules in making their arguments. CenturyTel's arguments focus on the phrase where an ILEC allows a CLEC "to connect its own loop facilities to on-premises wiring *through* the incumbent LEC's network interface device" 47 C.F.R. § 51.319(c) (emphasis added). CenturyTel believes any time Charter houses its connection within any part of the NID, it is connecting its loop facilities *through* CenturyTel's NID. CenturyTel also refers to the language in 47 C.F.R. § 68.105(c) that permits

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the demarcation point to vary depending on the type of premise, *i.e.*, single unit or multiunit, and the date the premises was built. For single unit dwellings “the demarcation point shall be a point within 30 cm (12 in) of the protector or, where there is no protector, within 30 cm (12 in) of where the telephone wire enters the customer’s premises, or as close thereto as practicable.”

CenturyTel believes this demonstrates that CenturyTel owns and controls the NID in its entirety, including the facilities (*i.e.* wiring) up to the demarcation point. Thus the entire NID falls within the CenturyTel network. CenturyTel asserts that “[t]he NID is not the Point of Demarcation in single unit installations, but it contains the protector which the FCC utilizes in its rule to determine the Point of Demarcation apart from the NID.”³

CenturyTel points out that any end user customer access to a portion of the NID is controlled by tariff and when a customer terminates service, the customer no longer has the right to access CenturyTel’s NID. The NID remains the property of the telephone company.

CenturyTel says that Charter is using CenturyTel’s NID as a convenient weather-protected box within which to connect a Charter wire to the customer’s inside wire and such use constitutes use as a UNE. CenturyTel believes it does not matter whether Charter chooses to use only part of the NID. There is no partial use of a UNE at a discounted price. CenturyTel refers to 47 C.F.R. § 51.519(h) in asserting a price for a NID UNE is established on a “stand-alone basis.”

CenturyTel asserts that Charter uses CenturyTel’s NID to avoid the cost of deploying NIDs and thus Charter must compensate CenturyTel for the use by paying the applicable UNE charges.

CenturyTel believes there is no exemption from this requirement. CenturyTel believes that adoption of Charter’s position in this case would be an unconstitutional taking of CenturyTel’s property without compensation.

³ CenturyTel Int. Br. p. 22

On the other hand, Charter's arguments focus on the specific rule language that an ILEC "shall *permit a requesting* telecommunications carrier" (emphasis added) to access the NID, 47 C.F.R. § 51.319(c). Charter asserts it does not choose to use CenturyTel's NID on the occasions when Charter does house its connection within the NID. Charter asserts its use is involuntary and caused by CenturyTel's obstruction of the inside wire through CenturyTel's placement of its NIDs. Charter asserts such obstruction is inconsistent with the optional intent of the word "permit." *See* 47 C.F.R. § 51.319(c).

Further, Charter contends that the occasions where it does house its connection within CenturyTel's NID is not consistent with use of that NID as a UNE. Charter does not "use" the NID as contemplated by the FCC rules. Charter points out that the FCC does not define the term "use" with respect to NID access. Charter points out that CenturyTel does not dispatch a technician to disconnect its drop wire and CenturyTel continues to use the NID itself for grounding protection from lightning strikes, since CenturyTel's drop is still fully connected on the network side of the NID. Accordingly, CenturyTel has not provided "exclusive use of that facility" per 47 C.F.R. § 51.309. Charter points to CenturyTel's cost witness' testimony that CenturyTel's proposed charge is for use of the entire NID. Charter believes that CenturyTel is attempting to have Charter subsidize the entire cost of the CenturyTel NID, which CenturyTel continues to use itself as it tries to win back its former customers.

Charter believes the concept of "demarcation point" should not be included in the definition of NID. Charter refers to the language of 47 C.F.R. § 68.105(a), "[c]arrier-installed facilities at, or constituting, the demarcation point shall consist of wire or a jack conforming to the technical criteria" Charter points out that for purposes of this proceeding where the

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installations at issue have jacks/NIDs the demarcation point is at the NID and not some point 12 inches beyond the NID. Even applying the concept of demarcation point, CenturyTel's network would end at the RJ-11 jack and the customer's inside wire begins at the same RJ-11 jack. So all of Charter's activity takes place on the customer side of the demarcation point. Further the concept of a demarcation point is solely related to where end user customer control of inside wire begins and ends. Charter believes that CenturyTel's efforts to include the point of demarcation in the definition of the NID attempts to establish new substantive rights and obligations for CenturyTel that do not exist under federal law.

The Panel determines that the record in this case is more supportive of Charter's characterization that any use it makes of the NID is involuntary and that Charter is not choosing to use a NID UNE. The Panel determines that the record is less supportive of CenturyTel's characterization that any use of a NID constitutes use as a UNE requiring UNE compensation. In making this determination, the Panel also considers the factors listed in Wis. Stat. § 196.03(6), in particular, (a) promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219; (b) promotion of customer choice; and (f) promotion of efficiency and productivity; with the other factors not being relevant to the issue at hand.

The record better supports Charter's contention that, in the circumstances where Charter's connection remains in the empty compartment on the customer side of the NID, it was not Charter's business decision to do so. The primary reason Charter leaves its connection within the NID is because in those cases CenturyTel's NID is the only point where the wires congregate and insufficient wiring is accessible to make a direct connection to the end user.⁴ Charter does not appear to avoid any costs in its own network when the connection remains

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within the NID.⁵ Charter does not use the ground that is in the NID.⁶ CenturyTel cannot identify any functionality, other than possible weather protection that Charter receives. CenturyTel puts forward the logic that Charter must receive some functionality of a NID in that Charter uses the NID. This logic does not refute Charter's characterization that the use is because of obstruction where there is a lack of sufficient wiring to access the point of congregation of the customer inside wire. The record shows that with sufficient available wiring, Charter does not house any connection within the NID⁷ and thus does not seem to be seeking a weather protection function.

Accordingly, if CenturyTel's NID were always placed consistent with CenturyTel's stated "standard policy" it is not likely that Charter would leave any connection within the NID. CenturyTel's stated "standard policy" would leave at least 6 inches of wire inside the customer access side and make a "drip loop" of wire about 8 inches wide on the wire between the NID and the exit point.⁸ The record supports that Charter does not house its connections in the NID when this amount of wiring is available.

In this evolving dispute, there was a period of time when Charter always housed its connection within the NID referring to the convenience to the customer.⁹ Charter has adapted its installation methods without deterring customers and thus has limited the installations for which CenturyTel claims that charges apply. The record indicates that the current state of affairs in Wisconsin is such that, for about 90 percent of Charter's installations, Charter's technician can open the customer access side of the NID, disconnect the customer wire from CenturyTel's loop,

⁴ Transcript (Tr.) 320.

⁵ Tr. 294, 296.

⁶ Tr. 306.

⁷ Tr. 328.

⁸ Tr. 1326.

⁹ Tr. 315-317.

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and connect the customer wire to Charter's loop at a location other than in CenturyTel's NID.¹⁰

In the remaining 10 percent of the installations, Charter leaves its connection inside the customer access side of the NID as that is the only point where the congregation of all the wires is accessible. It is this remaining 10 percent that CenturyTel claims compensation is due for Charter's use of the NID as a UNE. This sequence is more consistent with the characterization that Charter has been modifying its installation methods in order to avoid CenturyTel's charges and is not consistent with Charter choosing to purchase a needed function of the NID as a UNE.

Charter further expresses a concern that the number of installations with obstruction could increase, as CenturyTel's witness testified that CenturyTel has begun deploying a new type of NI—one with a punch out or grommet in the back.¹¹ Using a back wall opening would not allow all the wiring described in CenturyTel's standard policy to enter a NID and thus would increase the number of installations where Charter could incur charges. CenturyTel's acknowledgement that it has begun to deploy NIDs that would not provide sufficient wiring for competing carriers to connect is more consistent with the Charter's characterization that CenturyTel is obstructing a competing carrier's access. Although CenturyTel claims to have a standard policy that provides sufficient wiring for competitor's access, it then also states it has begun deploying NIDs that would not be consistent with that policy. Further any stated policy by CenturyTel is a unilateral policy established through documents that CenturyTel controls.

To allow CenturyTel to chose methods of placement of its NID that would force Charter into "an option" requiring purchase of a UNE from CenturyTel is not consistent with the unbundling provisions of the Telecommunications Act of 1996 (Act). Generally, the Act

¹⁰ Tr. 313.

¹¹ Tr. 1266.

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requires incumbent LECs to provide use of their networks on an unbundled basis to facilitate competition and provide new competitors options where they can lease a portion of the incumbent's network instead of building their own networks. The specific elements of the network for which unbundling is required are restricted to those in which a competitor's ability to provide the services it seeks to offer would be impaired without access to the network element.¹² Creating situations that would limit a competing carrier's option to fully use its own network is not consistent with the purpose of unbundling. Certainly, the Commission's support of such a placement method would not be consistent with the factors listed in Wis. Stat. § 196.03(6) regarding promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219, promotion of customer choice; and promotion of efficiency and productivity. Further, to the extent that the Commission determines any practice or act to be unjust, unreasonable, insufficient, or preferential, the Commission can issue a remedial order under Wis. Stat. § 196.37(2).

Furthermore, CenturyTel's continued use of the NID for its own network grounding purposes¹³ is inconsistent with its claim that it is providing the NID as a UNE to Charter. The Panel interprets the deciding factor to be not whether Charter obtains any use from the NID, but whether CenturyTel has provided to Charter its entitled "exclusive use of that facility."¹⁴ This interpretation is consistent with the description of the NID as a stand-alone network element and with the cost of the element based on the entire cost of the NID.

Housing wiring within a NID, because insufficient wiring is available to reach a point outside the NID, appears to be a problem related to converting from a system of regulation of a

¹² 47 U.S.C § 251(c)(3) and §251(d)(2).

¹³ Tr. 1202, 1254.

monopoly incumbent provider to a system of regulation that relies on competition to the maximum extent possible. As NIDs are installed on a going forward basis, placement methods should be used that will provide sufficient wiring such that 100 percent of the installations would allow a competitor's placement of its connection outside the NID. It would be a deterrent to competition to increase the number of instances where insufficient wiring is available to place a connection outside the NID.

There are many other circumstances in opening markets to competition where some costs have been imposed on incumbents. (See Issue 16 regarding network upgrades). However, incumbents have also received the benefits of reduced regulation of most other aspects of their business. Allowing connections to be left within NIDs until NIDs have sufficient wire to place connections outside the NIDs appears to be a reasonable practice in a transition to a competitive environment. It would not be a confiscation of property without compensation. Furthermore, CenturyTel retains the option to remove its NID from the customer's premise at any time.

CenturyTel's proposal to insert the concept of the demarcation point into the definition of the NID would appear to limit Charter's access to the customer's inside wire. The FCC's definition of the term demarcation point is provided in the context of clarifying an end users' ability to connect terminal equipment to the telephone network. While the FCC used the term demarcation point in its definition of the local loop UNE, 47 C.F.R. § 51.319(a), that use appears to expand rather than diminish a competitor's access to a loop. The FCC does not include the term demarcation point in the definition of the NID. 47 C.F.R. §51.319(c). Adding the concept of demarcation point into the definition of the NID would not improve a competitor's access and could serve to diminish a competitor's access to the customer's inside wire. To

¹⁴ 47 C.F.R §51.309.

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insert the term “demarcation point” into the definition of the NID, as CenturyTel proposes, would not foster the promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219, the promotion of customer choice, or the promotion of efficiency and productivity.

Issues 2 and 25 Award

For the reasons stated above, the Panel awards the language proposed by Charter for Art. II, section 2.103; Art. VI, sections 3.4, 3.5 and 3.51, and Art. XI Pricing, as it relates to outside facility connection charges.

Issue 3(a): How should the Agreement define the term “Tariff?”

Issue 3(b): How should specific Tariffs be incorporated into the Agreement?

Issue 43: How should specific Tariffs be incorporated into the Agreement?

The parties propose to incorporate by reference specific provisions found in Century’s intrastate and interstate tariffs. Issue 43 identifies 13 such references. The issue in dispute concerns the scope and meaning of those references.

Position of the Parties

(a) Charter

The petitioner proposes the following language for Article I, Section 3 of the Interconnection Agreement:

Unless otherwise specifically determined by the Commission, in case of conflict between the Agreement and either Party’s Tariffs relating to ILEC and CLEC’s rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. In no event shall a Tariff alter, curtail, or expand the rights of either Party under this Agreement, except by mutual consent. Either Party’s Tariffs and/or State Price Lists shall not apply to the other Party except to the extent that this

Agreement expressly incorporates **specific rates or terms set forth in** such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs and/or State Price Lists.

The petitioner proposes the following language for Article II, Section 2.140 of the Interconnection Agreement:

2.140 Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time, **that the Parties have specifically and expressly identified in this Agreement for the purpose of incorporating specific rates or terms set forth in such document by mutual agreement.**

(b) CenturyTel

CenturyTel objects to the third sentence in Charter's proposal and would instead word Article I, Section 3 as follows:

Unless otherwise specifically determined by the Commission, in case of conflict between the Agreement and either Party's Tariffs relating to ILEC and CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. In no event shall a Tariff alter, curtail, or expand the rights of either Party under this Agreement, except by mutual consent. Either Party's Tariffs and/or State Price Lists shall not apply to the other Party except to the extent that this Agreement expressly incorporates such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs and/or State Price Lists.

CenturyTel also objects to Charter's proposed wording of Article II, Section 2.140 of the Interconnection Agreement, and would instead word that section as follows:

2.140 Any applicable filed and effective Federal or state tariff (and/or State Price List) of a Party, as amended from time-to-time. Either Party's Tariffs shall not apply to the other Party except to the extent that this Agreement expressly incorporates such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs.

Discussion

In prior arbitrations, the Panels awarded contract language preventing the ILEC party from forcing the CLEC party to accept the rates and terms set forth in an ILEC tariff in lieu of negotiation or arbitration of the same rates and terms in the interconnection agreement. The concern is that the ILEC party can typically change the tariff terms unilaterally, without prior notice to a customer of the change. If the interconnection agreement incorporates a tariff provision by reference, an amendment to the underlying tariff could result in a material change to the interconnection agreement without prior notice to the other contract party. For this reason, one prior Panel directed the parties to replace all tariff references with the corresponding tariff text, while another Panel gave the parties the option of replacing the tariff references with the corresponding text in the absence of mutual agreement.

Here, the parties appear to accept that tariff references may only be incorporated into the agreement if both parties agree to the reference. The parties dispute whether a tariff reference should be understood to refer merely to the cited provision or whether a reference incorporates the complete description of the service set forth in the tariff.

In their briefs, the parties debate the relevance of the filed rate doctrine to this dispute. This discussion is misdirected. The issue here is how best to ensure that the parties have clearly and knowingly agreed to the terms and conditions under which a service will be provided under the interconnection agreement. The simplest way to obtain this assurance is to forbid the parties from incorporating tariff provisions by reference altogether. However, it is clear that the list of tariff references proposed in Issue 43 is for the most part not controversial. Thus, those tariff

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references may provide a convenient shorthand to incorporate an agreed upon framework for the telecommunications service the parties will exchange.

With respect to the question of which proposed language set best captures the policy choice the Panel has advanced, the Panel awards the language proposed by CenturyTel. The problem with the Charter language is that it picks and chooses from a larger set of tariff provisions a subset that would govern the service within the interconnection agreement. Thus, in a sense, the parties would be creating a new version of the service at issue using language pulled out of the context of the tariff in which those provisions are found.

By contrast, the CenturyTel language would incorporate the existing service as it is presently offered under tariff. Under the CenturyTel language, the parties could either take the service feature as it currently offered under the tariff, with all the applicable rates, terms and conditions in effect, or replace the tariff reference with plain language text that sets forth the conditions of service in explicit, if lengthy, detail. This choice is more straightforward, and less likely to result in misunderstanding than the Charter proposal.

Issues 3 and 43 Award

The Panel awards the language proposed by CenturyTel for Article I, Section 3 and Article II, Section 2.140. The Panel expects given this award and the awards on other issues, the parties can reach their own agreement on redrafting the contract.

Issue 4(a): Charter version: Should the Agreement include terms that allow one Party to terminate the Agreement without any oversight, review, or approval of such action, by the Commission?

CenturyTel version: Should a Party be allowed to suspend performance under or terminate the Agreement when the other Party is in default, and the defaulting Party refuses to cure such default within thirty (30) days after receiving notice of such default? How should “default” be defined in the Agreement?

Issue 8: There are two separate issues presented in Issue 8:

Issue 8(a): Charter version: Should the bill payment terms related to interest on overpaid amounts be equitable?

CenturyTel version: Should the *billed Party* be entitled to receive interest from the billing Party on amounts paid to the billing Party in error and which are later returned to the billed Party?

Issue 8(b): Charter version: Should the bill dispute provisions ensure that neither Party can improperly terminate the Agreement in a manner that could impair service to the public?

CenturyTel version: Should the billing Party be permitted to suspend or discontinue accepting orders from the billed Party under certain conditions when the billed Party fails or refuses to pay “undisputed” charges?

Issue 13: Charter version: Should the Parties agree to a reasonable limitation as to the period of time by which claims arising under the Agreement can be brought?

CenturyTel version: There are two issues presented in this Issue 13: (a) If the Parties are unable to resolve a “billing dispute” through established billing dispute procedures, should the billed Party be required to file a petition for formal dispute resolution within one (1) year of providing written notice of such dispute, or otherwise waive the dispute?

(b) To the extent a “Claim” arises under the Agreement, should a Party be precluded from bringing such “Claim” against the other Party more than twenty-four (24) months from the date of the occurrence giving rise to the “Claim?”

Issue 4(a) covers a dispute over the language in Section 2.6, regarding suspension or termination of the interconnection agreement upon default and the definition of default. Both Parties propose language in Section 2.6 that makes reference to language in their respective proposed Section 9, including Sections 9.5, 9.5.1 and 9.5.2., which cover the effect of non-payment and where CenturyTel also proposes language to allow it to cease processing orders and to disconnect services. Sections 9.5, 9.5.1, and 9.5.2 are also disputed in Issue 8. Issue 8 and Issue 13 further cover a dispute regarding the language in Section 9.4 concerning the time period

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in which disputes must be raised. In light of the interrelationship of these issues, it is reasonable to analyze the three issues together.

Positions of the Parties:

(a) Charter

Charter believes the terms for suspension or termination of an agreement, in whole or in part, should allow for Commission oversight. Specifically, Charter seeks terms that in no event can a termination occur without an order from the Commission to do so. Charter objects to CenturyTel's proposed terms which it believes would allow CenturyTel to unilaterally terminate the agreement. As both Parties' end user customers rely on the physical interconnection to send and receive calls, self-help termination provisions should not be allowed. Charter believes that allowing a termination following the initiation of bankruptcy would conflict with the federal statutory "automatic stay" associated with bankruptcy.

In light of a history of inaccurate CenturyTel bills, Charter believes a 30 day notice of failure to pay undisputed amounts is not realistic. Charter believes that CenturyTel is not entitled to a presumption that CenturyTel's bills are accurate, and the burden of persuasion or burden of proof should fall on CenturyTel to show its bills are accurate. Charter states CenturyTel has refused to acknowledge disputes Charter has raised. For purposes of equity, interest should be paid reciprocally on both unpaid undisputed amounts, and paid but later disputed amounts. Charter proposes a two year time limit from the date of occurrence of the action for either party to raise claims regarding an action. Charter believes the two year time limit is consistent with Section 415 of the Communications Act. If CenturyTel has not pursued a claim for unpaid amounts within that time, the amounts would cease to be due.

(b) CenturyTel

CenturyTel believes that a lengthy process should not be needed to recover billed and undisputed charges. CenturyTel proposes adding the failure to pay undisputed amounts to the list of items constituting a default. CenturyTel believes that its bills are presumptively accurate unless Charter disputes the bill. CenturyTel's proposal would allow it to cease processing orders or disconnect services if the billed party does not remit undisputed amounts.

CenturyTel further proposes a process whereby Charter can pay a bill and later dispute it within one year of the date of the bill. However, interest would only be paid from the date Charter disputes the bill and not the date of the bill. This is reasonable because Charter has the option to dispute a bill and withhold payment. However, CenturyTel proposes that the dispute would need to be escalated to the dispute resolution process of Section 20.3 within one year of the bill date, or Charter would waive its right to withhold payment.

CenturyTel states that its proposals would not allow it to disrupt the exchange of traffic absent involvement of the Commission, as it proposes to cease to process orders or to disconnect services but not to terminate interconnection. CenturyTel believes its proposals are commercially reasonable and create proper incentives for both parties to perform their respective duties.

Proposed Contract Language

Charter and CenturyTel each propose certain language for Article III., Sections 2.6, 9.4, 9.4.1, 9.4.2, 9.5, 9.5.1, 9.5.2, and 20.4.

- 2.6 Suspension or Termination Upon Default. Either Party may suspend or terminate this Agreement, in whole or in part, in the event of a Default (defined below) by the other Party; *provided, however*, that the non-defaulting Party notifies the defaulting Party in writing of the Default and the defaulting Party does not cure the Default within thirty (30) calendar days of receipt of written notice thereof. has complied with the dispute resolution provisions of this Agreement, including Section 20. Following CenturyTel's notice to **CLEC of its Default, CenturyTel shall not be required to process new service orders until the Default is timely cured.

“Default” is defined to include:

- (a) A Party's insolvency or the initiation of bankruptcy or receivership proceedings by or against the Party; or
- (b) The **final** revocation by the Commission of a Party's Certificate of Operating Authority **and transition of End Users to another carrier**, or
- (c) **A decision pursuant to the Formal Dispute Resolution provisions of Section 20 of this Agreement that a Party has materially breached any of the terms or conditions hereof, except in no event should termination occur unless so ordered by the Commission** A Party's violation of any material term or condition of the Agreement; or
- (d) **Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9, and subject to either Party invoking its rights under Section 20, Dispute Resolution, except**

that in no event should termination occur unless so ordered by the Commission. A Party's refusal or failure in any material respect properly to perform its obligations under this Agreement, including but not limited to its refusal or failure to pay undisputed charges (pursuant to Section 9) within thirty (30) calendar days after the bill date.

9.4 Disputed Amounts. The following shall apply where a Party disputes, in good faith, any portion of an amount billed under this Agreement (“Disputed Amounts”). Both **CLEC and CenturyTel agree to expedite the investigation of any Disputed Amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution. If the Parties cannot resolve the dispute through established billing dispute procedures within 180 days of the billed Party providing written notice of Disputed Amounts to the billing Party, the billed Party shall file a petition for formal dispute resolution pursuant to Section 20.3 of this Article (without regard for any further informal dispute resolution negotiations that may be referenced in Section 20.3). If the billed Party fails to seek formal dispute resolution pursuant to Section 20.3 within one (1) year of the billed Party providing written notice to the billing Party of such Disputed Amounts, the billed Party waives its alleged entitlement to and/or right to withhold such Disputed Amount.

9.4.1 Disputed Amounts Withheld From Payment.

If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party may withhold payment of such Disputed Amounts only if it gives written notice to the billing Party of the amounts it disputes and includes in such notice the specific details and reasons for disputing each item. Such written notice shall be submitted in accordance with the **following agreed upon procedures; as set forth in Attachment 1 to the Interconnection Agreement guidelines for submitting billing dispute claims set forth in CenturyTel's CLEC Service Guide.** Disputed billing claims shall be submitted no later than the Bill Due Date. Failure by the billed Party to file any such claim on or prior to the Bill Due Date means that the total charges billed are due and payable to the billing Party on the due date. The billed Party shall pay all undisputed amounts no later than the Bill Due Date. The billed Party may not withhold payment of amounts past the due date pending a later filing of a dispute, but must pay all amounts due for which it has not provided a written notice of dispute on or prior to the Bill Due Date. If the billed Party disputes charges after the Bill Due Date and has not paid such charges, such charges shall be subject to late payment charges. If the billed Party disputes any charges and any portion of the dispute is resolved in favor of the billed Party, the Parties shall cooperate to ensure that the billing Party shall credit the invoice of the billed Party for that portion of the Disputed Amount resolved in favor of the billed Party, together with any late payment charges assessed with respect thereto no later than the second Bill Due Date after the resolution of the billing dispute. Nothing in this Section 9.4.1 shall constitute a waiver, or negation, of a Party's right to seek recovery of amounts already paid pursuant to Section 9.4.2 below.

9.4.2 Billing Disputes Related to Paid Amounts

If any portion of an amount paid to a Party under this Agreement is subject to a bona fide dispute between the Parties ("Disputed Paid Amount"), the billed Party may provide written notice to the billing Party of the Disputed Paid Amount, and seek a refund of such amount already paid, at any time prior to the date that is one (1) year after the date of the invoice containing the disputed amount that has been paid by the billed Party ("Notice Period"). If the billed Party fails to provide written notice of a Disputed Paid Amount within the Notice Period, the billed party waives its rights to dispute its obligation to pay such amount, and to seek refund of such amount. **At the billed Party's request, the billing Party will refund the entire portion of any Disputed Paid Amounts resolved in favor of the billed Party, subject to a rate of interest equal to one and one half (1 ½%) per month or the highest rate of interest that may be charged under Applicable Law, compounded daily, for the number of days from the Bill Date until the date on which such payment is made.**

9.5 Effect of Non-Payment.

- 9.5.1 If the billed Party does not remit payment of all undisputed charges on a bill by the Bill Due Date, the billing Party may **discontinue processing orders for relevant or like services provided under this Agreement on or after the tenth (10th) calendar day following the Bill Due Date initiate dispute resolution procedures under Section 20 of this Agreement.** The billing Party will notify the other Party in writing, via email or certified mail, at least five (5) Calendar Days prior to discontinuing the processing of orders for the relevant services. If the billing Party does not refuse to accept additional orders for service(s) on the date specified in such notice, and the billed Party's non-compliance continues, nothing contained herein shall preclude the billing Party from refusing to accept any or all additional orders for service(s) from the non-complying Party without further notice or from billing and collecting the appropriate charges from the billed Party. For order processing to resume, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. Additionally, the billing Party may require a deposit or assurance of payment (or additional deposit or assurance of payment) from the billed Party, pursuant to Section 6. In addition to other remedies that may be available at law or equity, the billed Party reserves the right to seek equitable relief, including injunctive relief and specific performance.
- 9.5.2 Notwithstanding 9.5.1 above, if the billed Party does not remit payment of all undisputed charges on a bill by the Bill Due Date, the billing Party may at its option disconnect any and all relevant or related services provided under this Agreement following written notification to the billed Party at least seven (7) Business Days prior to disconnection of the unpaid service(s). Such notification may be included in a notification to refuse to accept additional orders so long as the appropriate dates for each consequence are listed therein. If the billed Party subsequently pays all of such undisputed charges and desires to reconnect any such disconnected services, the billed Party shall pay the applicable charge set forth in this Agreement or in the applicable Tariff for reconnecting each service disconnected pursuant to this paragraph. In case of such disconnection, all applicable undisputed charges, including termination charges, shall become due and payable. If the billing Party does not disconnect the billed Party's service(s) on the date specified in such notice, and the billed Party's non-compliance continues, nothing contained herein shall preclude the billing Party from disconnecting all service(s) of the non-complying Party without further notice or from billing and collecting the appropriate charges from the billed Party. For reconnection of the non-paid service to occur, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. Additionally, the billing Party may require a

deposit or assurance of payment (or additional deposit or assurance of payment) from the billed Party, pursuant to Section 6. In addition to other remedies that may be available at law or equity, the billing Party reserves the right to seek equitable relief, including injunctive relief and specific performance. [RESERVED FOR FUTURE USE]

20.4 Limitation Period on Claims.

Except as otherwise specifically provided in this Agreement, no Claims will be brought for disputes arising from this Agreement more than twenty-four (24) months from the date of the occurrence which gives rise to the dispute. Notwithstanding the foregoing, Claims for indemnification will be governed by the applicable statutory limitation period.

[REDACTED]

“CLAIMS”

The term Claims means any pending or threatened claim, action, proceeding or suit.

Discussion:

The subject of termination of an interconnection agreement due to a default is not addressed directly by the Act or the implementing rules adopted by the FCC. However, the Commission is a state agency created by the legislature and has those powers that the state legislature has conferred upon it. Thus to the extent that the parties choose to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199, the administration of which is in the hands of the Commission, to resolve their disagreement and any other relevant provisions of Wis. Stat. ch. 196. Pursuant to Wis. Stat. § 196.37, the Panel will award terms it considers to be just and reasonable and provide for reasonable interactions between telecommunications carriers. The Panel finds provisions of both Parties' proposals to be unreasonable.

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The Panel agrees with Charter that parts of CenturyTel's proposed language would allow CenturyTel to unilaterally terminate the agreement. The language proposed by CenturyTel for Section 2.6 would allow it to cease processing orders upon notice of default. That combined with the language in Section 9.5.1 would allow CenturyTel to discontinue processing orders when payment is 10 days late, given 5 days notice; and disconnect services with 10 days notice. Ceasing to process orders or disconnect service is no less detrimental to an ongoing business than cutting off interconnection. The time periods proposed by CenturyTel are inadequate and would not allow Charter to seek Commission intervention under Wis. Stat. § 196.199 in which a party has five days to allege a failure has a significant adverse effect on the ability to provide services to customers, and the Commission has 30 days to make a determination on that request. The Panel believes nothing in the interconnection agreement should serve to limit Charter's ability under Wis. Stat. § 196.199 to bring matters to the Commission that could have a significant adverse affect on Charter's ability to provide telecommunications services to its customers or potential customers. However, Charter's proposal does not include any specified time frame for default. In docket 05-MA-147, a sixty day time frame was adopted for this purpose.¹⁵ Further, like docket 05-MA-147, the Panel will not require an order from the Commission for termination of an agreement. Like docket 05-MA-147, this Panel's concern is this could require duplicative processes.

While CenturyTel believes its proposals are commercially reasonable, CenturyTel fails to recognize the context in which billing disputes now occur between telecommunications carriers. It is not a cut and dry matter that a service has been provided, and therefore must be paid for.

¹⁵ Arbitration Award, *Petition for Arbitration of Interconnection Rates, Terms and Conditions Between Charter Fiberlink, LLC and Wood County Telephone Company d/b/a/ Solarus*, No. 05-MA-147 (Wis. PSC Oct. 23, 2008).

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Issues arise as to whether or not a service has been provided. For an example see issue 2 regarding NID charges. Billing is used as a forum in which interpretations are asserted concerning the obligations and duties of carriers under the Act. Charter provides the further example of local number portability charges in Missouri, where the Missouri commission determined CenturyTel's application of a rate from its local exchange tariff was not permissible and was in violation of the terms of the interconnection agreement between Charter and CenturyTel.¹⁶ Charter points out that CenturyTel has simply refused to acknowledge Charter disputes. The Panel will award language such that any assertion of default is subject to the dispute resolution procedures of Section 20 with the ability to seek Commission resolution. Further, allowing a termination of an interconnection agreement at the time of an initiation of bankruptcy proceedings would conflict with the federal statutory "automatic stay" associated with bankruptcy. The Panel will award language consistent with the bankruptcy process.

However, a carrier should not be permitted to dispute bills for the purpose of avoiding payment completely. Charter's proposal, to require CenturyTel to pursue a claim for unpaid amounts within two years of occurrence or the amounts would cease to be due, is not reasonable. Valid charges should not cease to be due until paid. To achieve greater certainty in business and operations both parties should work together to resolve disputes. Charter's reference to Section 415 of the Communications Act is inappropriate as that is a time period in which to raise a dispute, not a time period in which to end a dispute which is the context Charter proposes. Charter's concerns, regarding Charter as the initiator of a billing complaint and Charter's concern that the burden of persuasion or burden of proof should be placed upon CenturyTel to show its bills are accurate, are out of context. The procedures under Wis. Stat. § 196.199

¹⁶ Case No. LC-2008-0049.

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provide for an investigation in which all the relevant factors can be considered. However, it is reasonable for Charter to withhold payment, with possible escrow provisions, for as long as a good faith billing disputed exists. It would be arbitrary to require payment after one year when a good faith dispute is not settled.

It is reasonable for CenturyTel to limit the time frame to raise a dispute to one year as CenturyTel only provides itself the ability to back bill a previously unbilled amount within one year of providing services per section 9.1. Reciprocity is a reasonable standard for both back billing and raising billing disputes. Further, it is reasonable to limit the payment of interest on refunded amounts to the date a dispute is raised in order to provide appropriate incentives to review bills on a timely basis.

Issues 4(a), 8(a), 8(b), and 13 Award

As both parties have referred to the language awarded in a recent arbitration award in docket 05-MA-147 in association with default, this award will draw from that language with variation for the specific issues raised in the case. The Panel awards the following language in lieu of the language proposed by either of the two parties:

2.6 Suspension or Termination Upon Default. Subject to either Party invoking its rights under Section 20, Dispute Resolution, either Party may terminate this Agreement in whole or in part in the event of a default by the other Party as defined by this section 2.6; provided however, that the non-defaulting Party notifies the defaulting Party in writing (“Default Notice”) of the alleged default and the defaulting Party does not cure the alleged default within sixty (60) calendar days of receipt of the Default Notice.

Default is defined as:

- (a) A Party’s insolvency or initiation of bankruptcy or receivership proceedings by or against the Party, consistent with any order, decision, or other binding action taken by the bankruptcy court, or similar adjudicator of the parties’ rights in the event of receivership or bankruptcy; or

- (b) The final revocation by the Commission of a Party's Certificate of Operating Authority, and transition of End Users to another carrier; or
- (c) A decision pursuant to the Formal Dispute Resolution provisions of Section 20, Dispute Resolution, that a Party has materially breached any of the terms or conditions hereof; or
- (d) Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9, Billing and Payments/Disputed Amounts, subject to either Party invoking its rights under Section 20, Dispute Resolution.

Notwithstanding any other provision of this Section 2.6 and except as may be prohibited by applicable federal law, either party, as allowed by Wis. Stat. § 196.199, may seek relief from the other party's claims, assertions, actions, or inaction in breach of this Agreement.

9.4 Disputed Amounts. The following shall apply where a Party disputes, in good faith, any portion of an amount billed under this Agreement ("Disputed Amounts"). Both Charter and CenturyTel agree to expedite the investigation of any Disputed Amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution.

9.4.1 Disputed Amounts Withheld From Payment. Charter proposed language.

9.4.2 Billing Disputes Related to Paid Amounts. Charter proposed language, except "from the date the dispute is raised" shall replace "from the Bill Date."

9.5 and 9.5.1 Effect of Non-Payment. Charter proposed language.

9.5.2 Omitted

20.4 Limitation Period on Claims. Omitted.

Issue 4(b): What terms should govern the right of a Party to terminate this Agreement upon the sale of a specific operating area?

Issue 5: Charter version: Should the Agreement allow either Party to assign the Agreement to a third-party in connection with a sale, without having to first obtain the other Party's consent?

CenturyTel version: Should a Party's right to assign its rights and obligations under the Agreement *without consent* to a subsidiary or Affiliate be restricted to only those assignments made in conjunction with the sale of all or substantially all of the Party's assets?

Issue 4(b) addresses sales or transfers of an operating area or a portion thereof to a non-affiliated entity. Issue 5 addresses assignment of an interconnection agreement to an affiliated company. The issues address whether the purchasing party or affiliate should be required to assume all the duties and obligations of the existing interconnection agreement.

Positions of the Parties

(a) Charter

In relation to Issue 4(b), Charter proposes that any “third-party buyer/transferee should be required to assume the terms of the Agreement” as a precondition for a sale/transfer. Charter expresses concern that both parties would need to “remain connected to the public switched telephone network.” Charter also notes that it has “exerted considerable time, and expense, to negotiate and arbitrate the terms of the Agreement.” Charter believes the benefits of such efforts “should last for the duration of the Agreement.”

However, in Issue 5, Charter further proposes that “in the event of a sale of substantially all assets” either Party can assign all of its rights and duties without being required to seek the consent of the other Party. It is not clear whether Charter’s proposal is intended to apply just to affiliates or whether it is intended to apply to non-affiliates as well. In its brief Charter refers to “third parties (which includes either Party’s Affiliates or subsidiaries).” Charter’s statement of Issue 5 does not include the word affiliate. In relation to consent, Charter states, “there is no dispute between the Parties with respect to language that requires that “consent shall not be unreasonably withheld, conditioned, or delayed.”

(b) CenturyTel

For issue 4(b) concerning the sale of a specific operating area or portion thereof to a non-affiliated third-party, CenturyTel proposes that the existing interconnection agreement would terminate upon 90 days notice. CenturyTel believes any concerns regarding interconnection with the new non-affiliated purchasing company would be addressed by 47 C.F.R. § 51.517(d) which requires an immediate interim transport and termination arrangement pending negotiation or arbitration of a new agreement. CenturyTel objects to Charter's language that would require the non-affiliated purchasing party to assume the existing interconnection agreement. CenturyTel believes such terms would effectively give Charter veto power over any sale and would likely devalue the assets that are subject to the sale.

In relation to Issue 5, regarding an assignment to an affiliated party, CenturyTel proposes that either Party should be allowed to assign the rights and duties under an interconnection agreement to an affiliate without the other Party's consent so long as 90 days notice is given; the affiliate assumes all the rights and duties in writing; and the other Party is reasonably satisfied that the affiliate will be able to fulfill the assigned obligations. CenturyTel believes Charter's proposed language would limit such an assignment to an affiliate to only those situations "where a Party is closing its doors (*i.e.* selling all or substantially all of its assets)." CenturyTel says that Charter has provided no reason for adding such a limitation.

Proposed Contract Language

Charter and CenturyTel each propose certain language for Article III, section 2.7, and section 5.

- 2.7 Termination Upon Sale. Notwithstanding anything to the contrary contained herein, a Party may terminate this Agreement as to a specific operating area or portion thereof if such Party sells or otherwise transfers the area or portion thereof to a non-affiliate. **The right of termination provided herein is expressly conditioned upon, and subject to, unconditional and prompt acceptance of the terms of this Agreement by the non-affiliated Party.** The selling or transferring Party shall provide the other Party with at least ninety (90) calendar days' prior written notice of such termination, which shall be effective on the date specified in the notice the non-Affiliated Party provides formal, written notice of its acceptance and assumption of the rights, obligations, and duties of the Party selling or transferring the area, and the other Party being reasonably satisfied that the Party acquiring the area is able to fulfill the obligations hereunder. **Such acceptance and assumption shall be memorialized in a form mutually agreed upon by both Parties.** Notwithstanding termination of this Agreement as to a specific operating area, this Agreement shall remain in full force and effect in the remaining operating areas. The Parties agree to abide by any applicable Commission Order regarding such sale or transfer.

5. ASSIGNMENT

Any assignment, in whole or in part, by either Party of any right, obligation, duty or interest arising under the Agreement without the written consent of the other Party, which consent shall not be unreasonably withheld, conditioned or delayed, shall be null and void, except that either Party may assign, **in conjunction with the sale of all or substantially all assets, and** to the extent consistent with Applicable Law, all of its

rights, and delegate its obligations, liabilities and duties under this Agreement, either in whole or in part, to any entity that is, or that was immediately preceding such assignment, a subsidiary or Affiliate of that Party without consent, upon ninety (90) calendar days' written notification. The effectiveness of an assignment shall be conditioned upon the assignee's written assumption of the rights, obligations, and duties of the assigning Party, and the other Party being reasonably satisfied that the assignee is able to fulfill the assignor's obligations hereunder. Any attempt to make an assignment or delegation in violation of this section shall constitute a default of this Agreement.

Discussion

There is no testimony for issue 5. The parties stated their intention to limit their arguments to briefs for issue 5.¹⁷ There is testimony in relation to Issue 4(b). The Panel looks to 47 C.F.R. § 51.715(d) as referenced by CenturyTel. When the Commission would approve or reject such future interconnection agreements, the standard the Commission would apply would

be that agreements must comply with the requirements of 47 U.S.C. §§ 251 and 252. Further, the Panel notes that CenturyTel is an incumbent local exchange carrier per 47 U.S.C. § 251(h) and any entity that may purchase its operating area would become a successor or assign to CenturyTel. Additionally, a sale or an acquisition in Wisconsin does not require Commission approval under Wis. Stat. §196.805. The Commission is given supervisory jurisdiction as necessary to enforce Wis. Stat. §§ 196.204 and 196.219. This narrow authority may not address all the terms that may arise in association with a sale or an acquisition of an operating area or portion thereof, so the primary authority would be compliance with 47 U.S.C. §§ 251 and 252. As the parties have chosen to submit a contract dispute to the Commission for adjudication, the parties have necessarily chosen to use Wis. Stat. § 199.199 to resolve their disagreement. Accordingly, the Panel also considers the factors listed in Wis. Stat. § 196.03(6), in particular, (a) promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219; (b) promotion of customer choice; and (f) promotion of efficiency and productivity; with the other factors not being relevant to the issue at hand.

Testimony was provided concerning a similar transfer that has previously taken place in Wisconsin. CenturyTel purchased properties from Verizon in 2002. In that instance CenturyTel temporarily performed under the existing interconnection agreement, but to the extent possible given the differences between CenturyTel and Verizon. Such performance was limited to one year and gave CenturyTel and any affected CLECs time to negotiate replacement interconnection

¹⁷ The Parties agreed that Issue 5 would be “briefing only.” Letter from Parties to Dennis Klaila, Arbitrator, No. 05-MA-148 (Wis. PSC Nov. 7, 2008) (PSC REF #: 103924).

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agreements.¹⁸ However, in light of the Commission's lack of authority over approval of sales or exchanges, this was an approval of terms that the companies had agreed upon.

The technical issues that have been raised are that an acquiring provider may not have the same functionalities, processes, or procedures that CenturyTel has at the time of a sale.¹⁹ CenturyTel is concerned that potential purchasers may not be capable of unconditionally stepping into the terms of an agreement negotiated by CenturyTel.

For issue 4(b), the Panel agrees with CenturyTel that any concerns regarding interconnection with the new non-affiliated purchasing company would be addressed by 47 C.F.R. 51.517(d) which requires an immediate interim transport and termination arrangement pending negotiation or arbitration of a new agreement. The Panel determines that Charter's proposed language, which would require the non-affiliated purchasing party to assume the existing interconnection agreement, could unnecessarily impede market entry by exchange purchasing competitors. The non-affiliated purchasing entity may have its own systems to be integrated with Charter's systems. Forcing a buyer into the terms of CenturyTel's interconnection agreement could inhibit market entry by exchange-buying competitors. This would not promote and preserve of competition. The Commission could oversee any new interconnection agreement according to the requirements of 47 U.S.C. §§ 251 and 252. However, the Commission would not want to mislead any entity regarding the powers of the Commission. The Panel will not include CenturyTel's proposed sentence "The Parties agree to abide by any applicable Commission Order regarding such sale or transfer" in light of the Commission's limited authority under Wis. Stat. § 196.805.

¹⁸ TR 1220

¹⁹ TR 1155

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On issue 5, Charter and CenturyTel seem to be arguing about different terms. Charter emphasizes the language regarding consent, while CenturyTel expresses concern about the Charter's added language regarding a sale. In relation to assumption of an interconnection agreement, the Panel believes CenturyTel's proposal for affiliates in Issue 5 provides reasonable protection to Charter, and provides CenturyTel a reasonable ability to organize its business. The Panel determines Charter's addition of language regarding a sale only adds confusion regarding section 5's applicability to affiliates or to non-affiliates and would complicate the Commission's enforcement of that section. The Panel determines that CenturyTel's language is preferable for efficiency purposes.

Issues 4(b) and 5 Award

That Panel awards CenturyTel's proposed language for Article III, section 2.7, and section 5 except that the sentence, "The Parties agree to abide by any applicable Commission Order regarding such sale or transfer" in section 2.7 is omitted.

Issue 6: Resolved.

Issue 7: Should Charter be required to "represent and warrant" to CenturyTel, or simply provide proof of certification, that it is a certified local provider of Telephone Exchange Service in the State?

CenturyTel seeks to add the requirement that Charter should "represent and warrant" that it is a certified local provider of telephone exchange service.

Positions of the Parties

(a) Charter

Charter objects to CenturyTel's proposed language. Charter believes that language is unreasonable in that it would require that Charter to guarantee at all times as to its certification

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status. Charter points out it may not always assert full control over such status. Charter further points out that it has agreed to provide proof of certification upon request. Further, a potential breach also may have nothing to do with Charter's ability to perform under the interconnection agreement.

(b) CenturyTel

CenturyTel believes Charter should be required to represent and warrant that it is a certified local provider of telephone exchange service throughout the entire term of the interconnection agreement. CenturyTel points out that performance of 47 U.S.C. §§ 251 and 252 obligations is predicated on Charter's certification status as a certified local provider of telephone exchange service. CenturyTel seeks language so that CenturyTel will not be required to perform under the interconnection agreement if Charter loses or fails to maintain its certification status. CenturyTel points out other interconnection agreements with Charter in Wisconsin contain such terms.

Proposed Contract Language

CenturyTel proposed certain language additions for Art. III. Section 8.4.

8. AUTHORIZATION AND AUTHORITY

- 8.1 Each person whose signature appears on this Agreement represents and warrants that he or she has authority to bind the Party on whose behalf he or she has executed this Agreement. Each Party represents he or she has had the opportunity to consult with legal counsel of his, her or its choosing, and **CLEC has not relied on CenturyTel's counsel or on representations by CenturyTel's personnel not specifically contained in this Agreement, in entering into this Agreement.
- 8.2 CenturyTel represents and warrants that it is a corporation duly organized, validly existing and in good standing under the laws of the State of Wisconsin and has full power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement.
- 8.3 **CLEC represents and warrants that it is a Limited Liability Company (LLC) duly organized, validly existing and in good standing under the laws of the State of Delaware, and has full power and authority to execute and deliver this Agreement and to perform its obligations under this Agreement.
- 8.4 **CLEC Certification. Notwithstanding any other provision of this Agreement, CenturyTel shall have no obligation to perform under this Agreement until such time as **CLEC has obtained such FCC and Commission authorization(s) as may be required by Applicable Law for conducting business in the State as **CLEC. **CLEC must represent and warrant to CenturyTel that it is a certified local provider of Telephone Exchange Service in the State. **CLEC will provide a copy of its Certificate of Operating Authority or other evidence of its status to CenturyTel upon request. **CLEC shall not place any orders under this Agreement until it has obtained such authorization.

Discussion

CenturyTel filed both initial and rebuttal testimony on this issue, whereas Charter only filed rebuttal testimony. Both parties agree that CenturyTel does not have an obligation to perform under 47 U.S.C. §§ 251 and 252, on which this interconnection agreement rests, if Charter is not certified as a local provider of telephone exchange service. The terms in dispute address the implementation of this restriction.

In testimony, CenturyTel's witness explained that Charter is a cable competitive local exchange carrier (CLEC) that offers voice service over the same broadband connection that it uses to provide internet service. CenturyTel's witness further testified that circumstances have

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occurred where a cable CLEC has obtained status as a certified local provider of telephone exchange service and later decided to change its status to that of a Voice over Internet Protocol (VoIP) provider and not a telecommunications carrier. CenturyTel witness explained that such status also affects the Commission's jurisdiction over Charter, and that the lack of clarity regarding Charter's status could play havoc with the handling of complaints or the dispute resolution process.²⁰ Charter did not rebut any of these points.²¹

The Panel evaluated Charter's arguments. The Panel determines that regardless of the fact that a potential breach may have nothing to do with Charter's ability to perform under the interconnection agreement, it does affect Charter's right to obtain the services provided under the agreement. In evaluating whether the proposed language is reasonable, the Panel also looks to the fact that Charter's has agreed to the "represent and warrant" language in sections 8.1, 8.2, and 8.3 of the interconnection agreement. The Panel sees no reason why those terms would be reasonable in that context and not reasonable in the context of section 8.4.

The Panel determines that Charter's ongoing status as a local provider of telephone exchange service is a material consideration in the interconnection agreement. It is reasonable that the terms of the interconnection should include a provision whereby failure to maintain such status would be a material breach of a term of the interconnection agreement. Such a material breach could then trigger the provisions of section 2.6 of Article III, regarding suspension or termination of the agreement upon a default. The Panel has included a dispute resolution process in Section 2.6, which will restrict any self-help actions on the part of CenturyTel. The Panel determines that CenturyTel's proposal is reasonable.

²⁰ Tr. 1157-1158.

²¹ Tr. 68-70.

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Issue 7 Award

The Panel awards CenturyTel's proposed language for Article III, section 8.4.

Issue 8: Addressed in Issue 4.

Issue 9: Resolved.

Issue 10: When should certain changes in law be given retroactive effect?

This issue concerns whether changes in law should be reflected retroactively when an interconnection agreement is amended to reflect a change in law.

Positions of the Parties

(a) Charter

Charter believes that "any retroactive effect, or true-up of rates should occur upon express direction by the authority whose actions precipitated the change of law event." To the extent decision-making bodies "do not direct the Parties to give retroactive effect to the decision, the Parties should do so only where mutually agreed upon." In the statement of position on the DPL, Charter identifies what it believes to be a one-sided bias in CenturyTel's proposal, as removal of services would be given retroactive effect, but the addition of new services would not be available until an amendment has been executed by both parties. Charter believes changes in law requiring an addition of new services would likely be to its benefit, where removal of services would likely be to its detriment, as the Total Element Long-Run Incremental Cost (TELRIC) pricing requirement is typically the obligation that is removed.

(b) CenturyTel

CenturyTel proposes "a change in law should be given retroactive effect in the following situations: (1) when required by the applicable authority; (2) if the authority is silent, effective

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back to the time when either of the Parties requests the other to incorporate the change into an Agreement; and (3) with regard to new services, effective on the date the amendment incorporating such new service is approved by the Commission.” CenturyTel states that the settled issue 27 concerning porting intervals was a change in law that was beneficial to Charter. CenturyTel believes this example demonstrates that CenturyTel’s language applies even handedly to both parties. Further CenturyTel believes its proposal “would mitigate against one Party unnecessarily delaying the amendment process simply to avoid the effect of change in law.” CenturyTel believes that under its proposal “no matter how long it takes to negotiate an appropriate amendment to reflect a change in law, the effective date of the amended terms would not be subject to manipulation if both Parties understand that the amended terms would be applied retroactively to the date on which a Party requested the amendment.”

Proposed Contract Language

Charter and CenturyTel each propose certain language additions to Art. III, section 12.3.

12. CHANGES IN LAW

The terms and conditions of this Agreement shall be subject to any and all changes in Applicable Law, including but not limited to changes to rules and regulations that subsequently may be prescribed by any federal, state or local governmental authority having competent jurisdiction.

- 12.1 Change in Law. Notwithstanding anything in this Agreement to the contrary, if, as a result of any legislative, judicial, regulatory or other governmental decision, order, determination or action, or any change in Applicable Law subsequent to the Effective Date, (i) any material provision of this Agreement is materially affected, changed or altered, (ii) CenturyTel is no longer required to provide a service, facility, payment or benefit otherwise required to be provided by this Agreement, or (iii) CenturyTel is required to provide a service, facility, payment or benefit not already provided to **CLEC under the terms of this Agreement, then the Parties shall amend this Agreement pursuant to Section 4 and this Section 12 to reflect such change in Applicable Law, or as the Parties otherwise agree. The Parties shall initiate negotiations to remove or modify such terms upon the written request of either Party. The Parties agree to negotiate such added, removed or modified terms and conditions within the timeframe established by, and pursuant to, 47 U.S.C. § 252. If the Parties cannot agree upon the addition, removal or modification of terms to amend the Agreement, either Party may arbitrate the disputed issues before the Commission pursuant to 47 U.S.C. § 252.
- 12.2 Addition of New Services. If a change in Applicable Law requires CenturyTel to offer a new service, facility, payment or benefit under this Agreement, **CLEC may submit to CenturyTel a written request to amend this Agreement to add terms and conditions for the provision of the new service, facility, payment or benefit in accordance with Section 12.1. The terms and conditions for the new service, facility, payment or benefit arrived at through such negotiations shall

become effective upon execution by both Parties, unless the Commission requires that such terms and conditions become effective upon Commission approval, in which case such amended terms and conditions shall become effective upon Commission approval. Regardless of when such amended terms become effective, **CLEC may begin ordering the new service, facility, payment or benefit pursuant to the terms of the amended Agreement as soon as the amended Agreement or amendment, whichever the case may be, has been executed by both Parties.

- 12.3 **Retroactive Application of Change in Law.** Except as set forth in Section 12.2 with respect to the addition of new services, if If the Parties amend the terms and conditions of this Agreement to **add**, remove, or modify terms of the Agreement following a change in Applicable Law, **and pursuant to this Section 12**, such amended terms and conditions shall apply retroactively to the effective date for the change specified by Applicable Law, if so ordered by the FCC, court of competent jurisdiction, or the Commission (“Relevant Authority”). If the Relevant Authority does not specify a date certain for when such change in Applicable Law shall take effect, such amended terms and conditions shall apply retroactively to the date on which the Party that first submitted a written request to amend the Agreement pursuant to Section 12.1 delivered such notice to the other Party. Further, **to the extent a true-up of any billing or payment for existing services and/or facilities is required by the change in Applicable Law**, the Parties shall include in the change in law amendment appropriate true-up terms and conditions for the billing or payment for existing services and/or facilities affected by the change in Applicable Law, if any, if so ordered by the Relevant Authority.

Discussion

There is no testimony on this issue. Per 47 U.S.C. § 252 (c)(3) state commissions are authorized to “provide a schedule for implementation of the terms and conditions by the parties to the agreement” when making arbitration awards. However, that section does not provide any guidance as to the factors to consider in setting such an implementation schedule. In the *Triennial Review Remand Order*,²² a landmark decision involving a change in law concerning

²² Report and Order and Order on Remand and Further Notice and Proposed Rulemaking, *In the Matter of: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Rel. Aug. 21, 2003, FCC 03-36, para. 701, *Triennial Review Remand Order* (TRRO)

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carrier's obligations under § 251, the FCC provided the following analysis when considering factors relevant to this issue.

Thus, to the extent our decision in this Order changes carriers' obligations under section 251, we decline the request of several [Bell Operating Companies] that we override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with renegotiation of contract provisions. Permitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252. We do not believe the lag involved in negotiating and implementing new contract language warrants the extraordinary step of the Commission interfering with the contract process. ...

CenturyTel has not provided any legal support as to why the standard § 252 process should be overridden. Charter's proposal effectively applies the standard § 252 process. Any deliberative body considering a change of law would also consider an appropriate implementation method. To the extent a deliberative body is silent, it would also be known that the standard § 252 process would apply absent specific directions. The standard § 252 process includes specific time frames. The Panel agrees with the FCC analysis that interfering with this process would be an extraordinary step.

Both parties ask the Panel to consider biased effects, or fears of delay. These considerations seemingly reflect a shared belief that changes in law will be favorable to incumbents in removing obligations and unfavorable to competitive local exchange carriers because they will be unlikely to add to ILEC obligations. While CenturyTel does point out one recent change was favorable to competitive local exchange carriers, its proposal would have the effect of removing services more quickly than it would add new services. The Panel determines that without any record, it would be inappropriate to consider a differential benefit expected to result from changes in law in general. As the Panel finds no reason to override the standard § 252 process, the Panel determines Charter's proposal is preferable.

Issue 10 Award

The Panel awards Charter's proposed language for Art. III, section 12.3.

Issue 11: Charter version: Should CenturyTel be allowed to incorporate its Service Guide as a means of imposing certain process requirements upon Charter, even though Charter has no role in developing the process and procedural terms in the Service Guide?

CenturyTel version: Should certain business and operational processes and procedures set forth in CenturyTel's "Service Guide" be incorporated by reference into the Agreement?

Should the CenturyTel Service Guide be incorporated for:

- (1) Establishing bill dispute processes?**
- (2) Providing escalation lists?**
- (3) Ordering processes and provisioning intervals?**
- (4) Reporting and resolving circuit troubles or repairs?**
- (5) Submitting LNP requests?**
- (6) "Service ordering, provisioning, billing, and maintenance processes and procedures?"**

This issue considers whether the Service Guide, along with future CenturyTel updates to the Service Guide, should be incorporated by reference into the interconnection agreement.

Positions of the Parties

(a) Charter

Charter believes that the Service Guide should be used as a reference tool and should not be incorporated in the interconnection agreement. Charter expresses concern that CenturyTel has unilateral control over the Service Guide, and if incorporated into the interconnection agreement, this could result in CenturyTel making future changes to the Service Guide which would modify contractual obligations under the interconnection agreement without the oversight or review by the Commission. Charter believes it is entitled to "a legally certain document that will only change upon mutual consent or by order of a competent authority."

(b) CenturyTel

CenturyTel believes that incorporation of the Service Guide is necessary to assure parity of treatment between all competitive local exchange carriers by applying a set of common operating procedures. CenturyTel states that it added its proposed Article III, section 53, to address Charter's core concerns. Under section 53, the Service Guide will only supplement the interconnection agreement and will not modify the terms of the interconnection agreement. The Service Guide will apply only with respect to those six items listed above. Charter will also be given electronic notification of changes and a 60-day period during which any changes will be suspended if the change adversely impacts Charter. CenturyTel further notes that the Commission required it to publish a handbook or guide that provides instructions for competitors on how to use CenturyTel's operational support systems per a requirement of an alternative regulation plan for CenturyTel of Wisconsin, LLC, and other CenturyTel affiliates. The Commission also directed CenturyTel to update the guide as appropriate. The Commission's stated goal of these requirements was to foster productivity and efficiency. CenturyTel believes that if it was required to customize a procedure for Charter and treat it differently than other competitive local exchange carriers, then the goal of fostering productivity and efficiency would be frustrated.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. III, sections 41, 9.4.1, and 16, Article VI, section 2.3, Article VIII, section 2.4, Article IX, section 1.2.2, and Article X, section 6.3. CenturyTel also proposes the addition of Art. III. Section 53, while Charter intentionally omits that section.

Article III.

41. STANDARD PRACTICES

- 41.1 The Parties acknowledge that CenturyTel shall be adopting some industry standard practices and/or establishing its own standard practices to various requirements hereunder applicable to the CLEC industry which may be added in the CenturyTel Service Guide, which is further described in Section 53. . Charter agrees that CenturyTel may implement such practices to satisfy any CenturyTel obligations under this Agreement. Where a dispute arises between the Parties with respect to a conflict between the CenturyTel Service Guide and this Agreement, the terms of this Agreement shall prevail. **The CenturyTel Service Guide is to be used as a reference only, and is not a part of the Agreement, and is not contractually binding on **CLEC.**

53. CENTURYTEL SERVICE GUIDE

53.1 The CenturyTel Service Guide ("Guide") is a handbook that contains CenturyTel's operating procedures for service ordering, provisioning, billing, maintenance, trouble reporting and repair for wholesale services. In addition to setting forth operational procedures to facilitate the implementation of this Agreement, the Guide serves as a conduit for the conveyance of day-to-day information that **CLEC will need to operate under this Agreement (e.g., repository for CenturyTel's contact and escalation lists available to **CLEC). **CLEC agrees that, where the terms of this Agreement specifically reference the Guide, **CLEC will abide by the Guide with respect to such specifically-referenced matters. **CLEC may receive email notification of any changes made to the Guide so long as **CLEC subscribes to such electronic notification procedure, which subscription is at no cost to **CLEC.

53.2 The Guide is intended to supplement the terms of this Agreement where specifically referenced in the Agreement; however, the Guide shall not be construed as contradicting or modifying the terms of this Agreement, nor shall it be construed as imposing a substantive term unrelated to operational procedure (e.g., payment terms) upon **CLEC that is not otherwise contained in this Agreement. Where a dispute arises between the Parties with respect to a conflict between the Guide and this Agreement, the terms of this Agreement shall prevail. If Charter believes that a change to the Guide materially and adversely impacts its business, the implementation of such change, upon Charter's written request, will be delayed as it relates to Charter for no longer than sixty (60) days to provide the Parties with an opportunity to discuss a resolution to the alleged adverse impact, including but not limited to other potential modifications to the Guide. If the Parties are unable to resolve the dispute regarding the change to the Guide, the Parties will resolve the dispute pursuant to the Dispute Resolution procedures set forth in Section 20.3.

53.3 The Parties acknowledge that, under their prior interconnection agreement, they have or have had disputes pertaining to the applicability and effect of certain provisions in the Guide ("prior Guide disputes"). Section 53.2 is intended to prevent such disputes on a going-forward basis under this Agreement. Nevertheless, neither this Section 53 nor any of the concessions reflected therein shall be considered an admission by either Party with respect to any prior Guide dispute, and neither Party will attempt to use Section 53.2 for that purpose. To that end, each Party expressly reserves its rights with respect to any position taken in any prior Guide dispute, and nothing in this Agreement shall be deemed or construed to limit or prejudice any position a Party has taken or may take before the Commission, the FCC, or a court of applicable jurisdiction regarding any prior Guide dispute.

9.4.1 Disputed Amounts Withheld From Payment.

If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party may withhold payment of such Disputed Amounts only if it gives written notice to the billing Party of the amounts it disputes and includes in such notice the specific details and reasons for disputing each item. Such written notice shall be submitted in accordance with the **following agreed upon procedures; as set forth in Attachment 1 to the Interconnection Agreement guidelines for submitting billing dispute claims set forth in CenturyTel's CLEC Service Guide.** Disputed billing claims shall be submitted no later than the Bill Due Date. Failure by the billed Party to file any such claim on or prior to the Bill Due Date means that the total charges billed are due and payable to the billing Party on the due date. The billed Party shall pay all undisputed amounts no later than the Bill Due Date. The billed Party may not withhold payment of amounts past the due date pending a later filing of a dispute, but must pay all amounts due for which it has not provided a written notice of dispute on or prior to the Bill Due Date. If the billed Party disputes charges after the Bill Due Date and has not paid such charges, such charges shall be subject to late payment charges. If the billed Party disputes any charges and any portion of the dispute is resolved in favor of the billed Party, the Parties shall cooperate to ensure that the billing Party shall credit the invoice of the billed Party for that portion of the Disputed Amount resolved in favor of the billed Party, together with any late payment charges assessed with respect thereto no later than the second Bill Due Date after the resolution of the billing dispute. Nothing in this Section 9.4.1 shall constitute a waiver, or negation, of a Party's right to seek recovery of amounts already paid pursuant to Section 9.4.2 below.

16. CONTACTS BETWEEN THE PARTIES

Each Party shall update its own contact information and escalation list and shall provide such information to the other Party for purposes of inquiries regarding the implementation of this Agreement. Each Party shall accept all inquiries from the other Party and provide a timely response. CenturyTel will provide and maintain its contact and escalation list in its CenturyTel Service Guide ("Guide") as amended and updated from time to time. The Guide is provided to **CLEC on CenturyTel's Website, and any updates also will be provided on the Website in the event such information changes. Information contained in the Guide will include a single contact telephone number for CenturyTel's CLEC Service Center (via an 800#) that **CLEC may call for all ordering and status inquiries and other day-to-day inquiries between 8 a.m. and 5 p.m., Monday through Friday (except holidays). In addition, the Guide will provide **CLEC with contact information for the personnel and/or organizations within CenturyTel capable of assisting **CLEC with inquiries regarding the ordering, provisioning and billing of interconnection and UNE services. Included in this information will be the contact information for a person or persons to whom **CLEC can escalate issues dealing with the implementation of the Agreement and/or for assistance in resolving disputes arising under the Agreement.

Article VI.

- 2.3 Ordering Processes & Provisioning Intervals. Unless expressly stated otherwise in this Article, the ordering processes and standard provisioning intervals applicable to UNEs made available pursuant to this Article shall be as set forth in

Article VIII.

- 2.4 ****CLEC agrees to follow the process and procedures for reporting and resolving circuit trouble or repairs as as may be agreed to by the Parties set forth in the CenturyTel Service Guide, or as otherwise agreed to by the Parties. Before contacting CenturyTel's Trouble Maintenance Center (CTMC), **CLEC must first conduct trouble isolation to ensure that the trouble does not originate from **CLEC's own equipment or network or the equipment of **CLEC's customer.**

Article IX.

- 1.2.2 A Party requesting a number to be ported must send the other providing Party a Local Service Request (LSR). If **CLEC requests that CenturyTel port a number, the Parties shall follow the “Local Number Portability Ordering Process” set forth in CenturyTel Service Guide, which will comply with applicable FCC rules, regulations and orders. ****CLEC’s consent to follow the Local Number Portability Ordering Process in the CenturyTel Service Guide shall not be deemed as consent that the Service Guide is incorporated into, or otherwise**

made a part of, this Agreement. Further, **CLEC’s consent to follow the Local Number Portability Ordering Process in the CenturyTel Service Guide shall not establish any liability upon **CLEC, nor shall CenturyTel assess any charges on **CLEC for number porting, or service order charges associated with such requests.

Article X.

- 6.3 Except as specifically provided otherwise in this Agreement, service ordering, provisioning, billing and maintenance processes and procedures shall be governed by the CenturyTel Service Guide. **Notwithstanding the foregoing, the CenturyTel Service Guide is to be used as a reference only, and is not a part of the Agreement, and is not contractually binding on CLEC. The standard service order charges set forth pursuant to this Agreement shall apply to all orders placed via OSS or pre-OSS services., except as specifically provided otherwise in this Agreement.**

Discussion

The Panel determines that, as it is the duty of a state commissions to approve interconnection agreements under § 252(b)(4), it would be inconsistent with this approval process to require Charter to incorporate terms that would allow CenturyTel to make unilateral changes to the interconnection agreement without Commission approval. Interconnection agreements are individual agreements between specific carriers. If a one-size-fits-all approach was intended for interconnection, then Statements of Generally Available Terms and Conditions (SGAT) per § 252(f) would have been the sole form of agreement available. CenturyTel’s desire to impose uniform procedures and not customize procedures is inconsistent with the use of individual interconnection agreements.

While incorporation of documents, along with future modifications to such documents, into an interconnection agreement can be mutually agreed to, it would not necessarily be wise to routinely require such a provision. Agreeing to such terms entails a degree of mutual trust. In this particular case, there have been prior Service Guide disputes. Charter has also explained that it wants a complete agreement where any changes would be subject to the amendment process and Commission oversight. Charter's request under the circumstances is reasonable and is consistent with the approval process per § 252(b)(4).

As far as CenturyTel's concern regarding parity in treatment of competitive local exchange carriers, CenturyTel can develop performance measures to monitor and assure non-discriminatory treatment. While CenturyTel was ordered to develop a guide, the Panel agrees with Charter the purpose of alternative regulation plans is to foster competition and not to "hand CenturyTel a means with which to further hamper or increase the cost of competitive entry."

In relation to CenturyTel alternative regulation plans, in 2003 in docket 2815-TI-103 the Commission adopted an alternative regulatory plan for CenturyTel of the Midwest-Kendall (2003 Plan). This plan has been extended in dockets 2815-TI-104, and docket 2815-TI-105, with a further extension as recently as March 10, 2009. Section 7.4 of the 2003 plan included planning and research into the implementation of an automated operational support system. This also included the addition of performance measurements standards and results, as well as change management plans. If CenturyTel desires to promote efficiency and productivity through the establishment of uniform practices, it can consider the addition of change management plans including a meaningful process for competitive local exchange carrier input, and performance measures. Such actions could help foster mutual trust between carriers. Ideally, trust would

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develop to the point where carriers would agree to incorporate a Service Guide with updates in the future.

Issue 11 Award

Based on the above analysis, the Panel awards Charter language for Art. III, sections 41, 9.4.1, and 16, Article VI, section 2.3, Article VIII, section 2.4, Article IX, section 1.2.2, and Article X, section 6.3. Art. III. Section 53 is omitted.

Issue 12: Charter version: Should the Agreement allow one Party to force the other Party into commercial arbitration under certain circumstances?

CenturyTel version: If neither the FCC nor the Commission accepts jurisdiction over a dispute between the Parties arising out of the Agreement, should the Agreement permit a Party to submit such dispute to binding commercial arbitration before a mutually agreed upon arbitrator?

This issue concerns whether to include a clause in the interconnection agreement that a party can compel the other party to use binding commercial arbitration if both the Commission and the FCC decline jurisdiction or determine a lack of subject matter jurisdiction over a particular dispute.

Positions of the Parties

(a) Charter

Charter believes a binding commercial arbitration clause should only be adopted through mutual agreement. Charter points out the case law is unanimous that it is the responsibility of state commissions to interpret and enforce the terms of an approved interconnection agreement. Charter states, if a state commission declines to hear a dispute, a party can proceed to the FCC or state or federal court as appropriate. Charter believes it should not be compelled to use the

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alternative approach of binding commercial arbitration, but such an approach should only be adopted through mutual agreement.

(b) CenturyTel

CenturyTel believes the interconnection agreement needs a provision to address how disputes should be handled in the event that both the Commission and the FCC either decline jurisdiction or determine a lack of subject matter jurisdiction over a particular dispute.

CenturyTel believes, in such a circumstance, one party should be able to compel the other party to resolve the dispute through binding commercial arbitration. CenturyTel notes the many merits of using binding commercial arbitration such as cost savings. CenturyTel points other state commissions that have recently approved language similar to its proposal here. CenturyTel believes this provision is necessary to cover potential gaps in jurisdiction.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. III, sections 20.2 and 20.3.

20.2 Informal Resolution of Disputes.

At the written request of a Party, each Party will appoint a knowledgeable, responsible representative, empowered to resolve such dispute, to meet and negotiate in good faith to resolve any dispute arising out of or relating to this Agreement. The location, format, frequency, duration, and conclusion of these discussions shall be left to the discretion of the representatives. Upon mutual agreement, the representatives may utilize other alternative dispute resolution procedures such as mediation to assist in the negotiations. Discussions and correspondence among the representatives for purposes of these negotiations shall be treated as Confidential Information developed for purposes of settlement, exempt from discovery, and shall not be admissible in any action between the Parties without the concurrence of all Parties. Documents identified in or provided with such communications, which are not prepared for purposes of the negotiations, are not so exempted and may, if otherwise discoverable, be discovered or otherwise admissible, and be admitted in evidence, in the arbitration or lawsuit. Unless otherwise provided herein, or upon the Parties' agreement,

either Party may invoke formal dispute resolution procedures including arbitration or other procedures as appropriate, not earlier than thirty (30) days after the date of the dispute notice, provided the Party invoking the formal dispute resolution process has in good faith negotiated, or attempted to negotiate, with the other Party.

20.3 Formal Dispute Resolution.

20.3.1 If the negotiations referenced in Section 20.2 above fail to produce an agreeable resolution within thirty (30) days, then the Parties agree that all unresolved disputes arising under this Agreement, including without limitation, whether the dispute in question is subject to arbitration, shall be submitted to the Commission for resolution in accordance with its dispute resolution process and the outcome of such process will be binding on the Parties, subject to any right to appeal a decision reached by the Commission under applicable law.

20.3.1 If the negotiations referenced in Section 20.2 above fail to produce an agreeable resolution within thirty (30) days, **then either Party may proceed with any remedy available to it pursuant to law, equity or agency mechanisms, including, but not limited to, instituting an appropriate proceeding before the Commission, the FCC, or a court of competent jurisdiction. In addition, upon mutual agreement of the Parties, such disputes may also be submitted to binding commercial arbitration before a mutually agreed upon arbitrator.**

20.3.2 In the event that the Commission fails to act in response to any dispute arising under this Agreement, the dispute may be submitted to the FCC pursuant to 47 U.S.C. § 252(e)(5). If the FCC declines to accept jurisdiction over any such dispute, or if the Commission declines to accept jurisdiction over any dispute arising under this Agreement, the dispute shall be submitted to binding arbitration by a single arbitrator pursuant to the Commercial Arbitration Rules of the American Arbitration Association. A Party may demand such arbitration in accordance with the procedures set out in those rules. Discovery shall be controlled by the arbitrator and shall be permitted to the extent set out in this section or upon approval or order of the arbitrator. Each Party may submit in writing to a Party, and that Party shall so respond, to a maximum of any combination of thirty-five (35) (none of which may have subparts) of the following: interrogatories; demands to produce documents; requests for admission. Additional discovery may be permitted upon mutual agreement of the Parties. The arbitration hearing shall be commenced within ninety (90) days of the demand for arbitration. The arbitration shall be held in Wisconsin, unless otherwise agreed to by the Parties or required by the FCC. The arbitrator shall control the scheduling so as to process the matter expeditiously. The Parties shall submit written briefs five days before the hearing.

The arbitrator shall rule on the dispute by issuing a written opinion within thirty (30) days after the close of hearings. The arbitrator has no authority to order punitive or consequential damages. The times specified in this section may be extended upon mutual agreement of the Parties or by the arbitrator upon a showing of good cause. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction.

20.3.3 Costs. Each Party shall bear its own costs of these procedures. A Party seeking discovery shall reimburse the responding Party the reasonable costs of production of documents (including search time and reproduction costs). The Parties shall equally split the fees of the arbitration and the arbitrator.

Discussion

There is no testimony on this issue. The parties stated their intention to limit their arguments to briefs.²³ State commissions clearly are the entity that approve interconnection agreements per 47 U.S.C. §252(e)(1). Both parties agree that, as state commissions are required to approve interconnection agreements, state commissions also interpret and enforce interconnection agreements. This is supported by case law. CenturyTel believes there is some ambiguity as to whether the FCC must assume enforcement of interconnection agreements if a state commission fails to act to enforce the agreement. The statutes are clear that if a state commission would fail to act to approve an interconnection agreement, then the FCC “shall issue an order preempting the state commission’s jurisdiction of that proceeding.” 47 U.S.C. §252(e)(5). CenturyTel points to an FCC decision where the FCC declined to “entertain” a “collection action” regarding fees owed by one telecommunications company to another.²⁴ Charter points out that the case involved a tariff dispute and not an interconnection agreement dispute. The Panel sees no reason why the process for enforcement of an interconnection

²³ The Parties agreed that issue 12 would be subject to “briefing only.” Letter from Parties to Dennis Klaila, Arbitrator, Docket No. 05-MA-148 (Wis. Psc. Nov. 7, 2008) (PSC REF #: 103924).

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agreement where a state commission fails to act would be any different from the process if a state commission failed to approve or reject an interconnection agreement, as § 252(e)(5) does refer to “other matter[s] under that section.”

However, the Panel does not need to decide this matter. To the extent CenturyTel is concerned that a state commission may lack or decline jurisdiction, that is not an issue in Wisconsin. The Panel does not see any potential for gaps in jurisdiction in Wisconsin. Per Wis. Stat. § 196.199(2) the Commission has the power to enforce all the terms of an interconnection agreement as follows:

COMMISSION POWERS. (a) The commission has jurisdiction to approve and enforce interconnection agreements and may do all things necessary and convenient to its jurisdiction.

CenturyTel points out that a clause requiring the use of binding commercial arbitration is permissible in an interconnection agreement. CenturyTel refers to the authority under § 252(a)(4)(C), where in resolving issues in an arbitration proceeding, the Commission can impose “appropriate conditions as required to implement subsection (c)” The Panel does not see any deficiency in the existing enforcement provisions that would require the terms proposed by CenturyTel, at least for the Wisconsin jurisdiction.

In regard to the existence of such a clause in other interconnection agreements, if parties arrive at a negotiated interconnection agreement with a binding commercial arbitration clause, there would be no grounds to reject it under § 252(e)(2). The Panel agrees with Charter that such terms can be adopted upon mutual agreement. However, Charter has clearly stated in this case that it does not want such a clause. The Panel sees no basis for the Panel to impose such terms

²⁴ *In re Qwest Commc'ns Corp v Farmers and Merchants Mut. Tel. Co.*, FCC 07-175, 22 FCC Rcd 17,973; 2007 WL 28727554 at ¶ 29 released Oct. 2, 2007.

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over Charter's clear objection to the terms. The Panel will not award CenturyTel's proposed binding commercial arbitration clause.

Issue 12 Award

The Panel awards Charter's proposed language for Art. III, sections 20.2 and 20.3.

Issue 13: Addressed in Issue 3.

Issue 14: Charter version: Should CenturyTel be allowed to assess charges upon Charter for as yet unidentified, undefined, potential "expenses" that CenturyTel may incur at some point in the future?

CenturyTel version: There are two issues presented in this Issue 14: (a) If Charter requests that CenturyTel provide a service or perform an act not otherwise provided for under the Agreement, and Charter preapproves the quoted costs of CenturyTel's performance, should the Agreement include a provision requiring Charter to pay such costs as pre-approved by Charter? (b) If a service or facility is offered under the Agreement but does not have a corresponding charge set forth in the Pricing Article, should such service or facility be subject to "TBD" pricing pursuant to Article III, Section 46?

In this issue CenturyTel seeks to add provisions to the interconnection agreement in order for CenturyTel to be able to recover its expenses related to future services that may be requested by Charter.

Positions of the Parties

(a) Charter

Charter believes that neither party should be permitted to recover costs or "expenses" from the other party unless it is specifically authorized to do so under the terms of the interconnection agreement. Charter objects to terms that would allow CenturyTel to charge Charter, in the form of non-recurring charges, for unidentified, or ill-defined future expenses. Charter points to its previous experience with CenturyTel in Missouri where CenturyTel asserted it had provided LNP services and invoiced Charter only to later have the Missouri commission

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determine there was no basis for the charges. Charter omits section 22.1 of Article III, and believes parties should rely on Article III, section 4, Amendments, and Article III, section 12.1, Changes in law, with the added protection of the dispute resolution process of Article III, section 20, to address future services and charges. In that manner CenturyTel could propose an amendment detailing the future services to be provided by CenturyTel upon request from Charter; detail the costs or expenses CenturyTel seeks to recover; and provide the basis for requiring Charter to compensate CenturyTel. Charter believes its proposed process is consistent with Article I, section 3, regarding the scope of the agreement.

(b) CenturyTel

CenturyTel believes that if Charter requests CenturyTel to perform a service that is not provided for in the interconnection agreement, and CenturyTel is willing to provide the service, Charter should pay the costs incurred by CenturyTel. CenturyTel notes the process it proposes requires the agreement by both parties prior to CenturyTel undertaking to provide the services. Prices would be established on a To Be Determined (TBD) basis as described in Article III, section 46. CenturyTel notes that this process is similar to the process that was agreed upon to resolve Issue 9 regarding stranded interconnection facilities.

Proposed Contract Language

CenturyTel proposes to add section 22.1 of Art. III. Charter intentionally omits this section. Charter and CenturyTel each propose certain language additions to Article I, section 3, regarding the scope of the agreement.

3. SCOPE OF THE AGREEMENT

The following constitute parts of this Agreement:

Agreement:	Preface & Recitals
Article I:	Purpose, Intent and Scope of Agreement
Article II:	Definitions
Article III:	General Terms & Conditions
Article IV:	[Intentionally omitted]
Article V:	Interconnection & Transport & Termination of Traffic (Interconnection)
Article VI:	Access to Unbundled Network Elements (UNEs)
Article VII:	E911 Service Connection and Database Access

Article VIII:	Maintenance
Article IX:	Additional Services (NP; Access to Poles, Ducts, Conduit & ROWs;)
Article X:	Access to Operations Support Systems (OSS)
Article XI:	Pricing
Article XII:	Directory Services
	Signature Page

The terms and conditions set forth in the Agreement, together with those set forth in its given Articles, are integrally and legitimately related, and shall govern the provision of services and/or facilities by CenturyTel to **CLEC.

Unless otherwise specifically determined by the Commission, in case of conflict between the Agreement and either Party's Tariffs relating to ILEC and CLEC's rights or obligations under this Agreement, then the rates, terms and conditions of this Agreement shall prevail. In no event shall a Tariff alter, curtail, or expand the rights or obligations of either Party under this Agreement, except by mutual consent. Either Party's Tariffs and/or State Price Lists shall not apply to the other Party except to the extent that this Agreement expressly incorporates **specific rates or terms set forth in** such Tariffs by reference or to the extent that the other Party expressly orders services pursuant to such Tariffs and/or State Price Lists.

Notwithstanding any other provision of this Agreement, neither Party will assess a charge, fee, rate or any other assessment (collectively, for purposes of this provision, "charge") upon the other Party except where such charge is specifically authorized and identified in this Agreement, and is (i) specifically identified and set forth in the Pricing Article, or (ii) specifically identified in the Pricing Article as a "TBD" charge. Where this Agreement references a Tariff rate or provides that a specific service or facility shall be provided pursuant to a Tariff, the Tariff rates associated with such specifically referenced service or facility shall be deemed a charge that has been specifically authorized under this provision. **The Parties do not intend for this provision to be construed to create any obligation upon CenturyTel to provide, or for **CLEC to pay, for a service that is not otherwise identified in this Agreement. If a service or facility otherwise offered under the Agreement does not have a corresponding charge specifically set forth in the Pricing Article, or is not specifically identified in the Pricing Article as being subject to "TBD" pricing, such service and/or facility is not available to **CLEC under this Agreement.**

22. EXPENSES

- 22.1 In performing under this Agreement, if **CLEC makes a request not already provided for in this Agreement, CenturyTel may be required to make expenditures or otherwise incur costs that are not otherwise reimbursed under this Agreement. In such event, CenturyTel is entitled to reimbursement from **CLEC for all such reasonable and necessary costs to the extent pre-approved by **CLEC. For all such costs and expenses, CenturyTel shall receive through nonrecurring charges (“NRCs”) the actual costs and expenses incurred, including labor costs and expenses, overhead and fixed charges, and may include a reasonable contribution to CenturyTel’s common costs. If **CLEC makes a request that involves expenditures or costs not otherwise covered under this Agreement, CenturyTel will provide a quote to **CLEC in a timely manner and **CLEC must agree to accept the quoted charges prior to CenturyTel’s initiation of work.
- 22.2 Except as specifically set out in this Agreement, each Party shall be solely responsible for its own expenses involved in all activities related to the subject of this Agreement.

Discussion

The Panel views this as an issue regarding how to add future services, which likely in most instances involve non-recurring charges, to the interconnection agreement. A further question is how such future services should be priced. The Panel notes the similarity of this issue to Issue 30 regarding CenturyTel’s proposal to reserve itself a right to recover costs associated with future upgrades or enhancements to CenturyTel’s Operating Support Systems (OSS).

The Panel considers pertinent statutes, rules, and orders and in particular the following information. FCC rules in pertinent parts related to the non-recurring charges are as follows:

Subpart F—Pricing of Elements

§ 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term “element” includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements. ...

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, ...

§ 51.505 Forward-looking economic cost.

(a) In general. The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward- looking common costs, as described in paragraph (c).

§ 51.507 General rate structure standard.

(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.....

(e) Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.

The Panel also turns to the following prior Commission determination related to non-recurring charges in the Final Decision issued March 22, 2002, in docket 6720-TI-161,

Investigation Into Ameritech Wisconsin's Unbundled Network Elements.

Nonrecurring costs are one-time costs for activities required to initiate or provide telecommunications services and UNEs. Such activities are accomplished through Ameritech's Operation Support Systems (OSS). (at p. 166)

...
...Ameritech argued that NRCs [Non-recurring Charges] must be based on the systems that Ameritech has actually put in place with the degree of mechanization they plan to make in the near future. Ameritech further argued that forward-looking costs should be based on its systems or it will be denied recovery of costs it will actually incur. It argued that anything else is fantasizing about some imaginary, most efficient provider.

However, the Commission recognizes that CLECs do not have a choice to look to another provider to order loops, which were constructed and placed into service under decades of monopoly regulation. Ameritech lacks sufficient market incentive to control costs in the provision of UNEs to CLECs. If Ameritech

designs and constructs inefficient or suboptimal systems and is allowed to pass on these costs to CLECs, it increases CLECs' cost of doing business. In addition, if Ameritech's own retail ordering and provisioning systems are designed to cost less to operate, it would give Ameritech an automatic price advantage over its competitors. However, the Commission balances this concern with the equal concern that if CLECs do not pay reasonable costs for NRCs, it will give CLECs an advantage over Ameritech and other facilities-based providers that perform their own activities associated with NRC.

No. 6720-TI-161, at 167 (Wis. PSC March 22, 2002).

From the record as developed, it is not clear to the Panel whether the future services at issue would be services provided under § 251. However, as the language is proposed in the context of an interconnection agreement, the discussion given here will be based on the assumption that indeed the services would be provided under § 251.

The problem the Panel has with CenturyTel's proposal is that it includes statements which are inconsistent with the pricing standards in § 252(d) and the FCC's associated rules. The language that CenturyTel proposes for section 22.1 states that it would be "entitled to reimbursement" and that the nonrecurring charges would be based on "actual costs and expenses incurred." This statement conflicts with the FCC's rules as quoted above, which require non-recurring charges to be based on forward-looking costs. The Panel finds CenturyTel's proposal in relation to this issue to be very different from the agreed upon resolution to Issue 9 regarding stranded interconnection facilities. That resolution lists a particular service that may be provided and states future pricing will be determined. At that time, of course, pricing would require compliance with applicable pricing standards. CenturyTel's proposal here seeks to establish pricing standards and those standards are inconsistent with the requirements of § 252(d) and the FCC's implementing rules.

In regard to whether a service should be provided, CenturyTel's proposed language states that if a service is not listed in the current agreement, or there is not a price in the pricing appendix, that "such service or facility is not available to Charter under this Agreement." The Panel determines that if the service is required to be provided under 47 U.S.C. § 251, then both CenturyTel and Charter would be obligated to negotiate an amendment to the interconnection agreement.

The Panel cannot approve language that does not comply with 47 U.S.C. §§ 251 and 252. The Panel sees nothing in Charter's proposed language that is inconsistent with 47 U.S.C. §§ 251 and 252. Therefore Charter's proposed language is preferable.

Issue 14 Award

The Panel awards Charter proposed language for Article I, section 3. The Panel awards Charter's proposal to omit section 22.1 of Article III.

Issue 15(a): Charter version: Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to be negligent, reckless, wanton or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?

CenturyTel version: (1) Should indemnification obligations be triggered by agreed-upon threshold issues or instead become the basis for protracted disputes between the Parties? (2) Should the items of damage and cost for which the Indemnifying Party is responsible be indemnified where the claimant is that Party's customer?

Issue 15(b): Charter version: Should the Agreement include language whereby CenturyTel purports to disclaim warranties that have no application, either potential or actual, to the exchange of traffic under this interconnection agreement?

CenturyTel version: Should the disclaimer of warranties be limited to product-based language or extend to the information services that are the subject of the Parties' Agreement.

Issue 15(c): Charter version: Should the Agreement limit direct damages to an amount equal to “monthly charges” assessed between the Parties; and otherwise limit liability in an equitable manner?

CenturyTel version: Should the Agreement limit damages in a manner that is consistent with telecommunications industry practice and Charter’s own customer agreements and tariffs?

Issues 15(a), 15(b), and 15(c) involve indemnity to be paid between carriers related to liabilities potentially arising from service provided to end user customers or other third-party claims, where both carriers have contributed to the provision of the service. Issues 15(a), 15(b) and 15(c) are so interrelated that analyzing the three issues together is reasonable. Issue 15(a) covers whether a comparative negligence approach to indemnification should be adopted. Issue 15(b) covers whether to include disclaimers between carriers of warranties of reasonable care, workmanlike effort, results, lack of negligence, or accuracy or completeness of responses. Issue 15(c) covers whether damages should be capped at the monthly charges for service or whether damages should be measured by actual, direct damages.

Positions of the Parties

(a) Charter

Issue 15(a): Charter proposes language which would limit either Party’s indemnity obligation to the extent that the indemnified Party engages in certain acts that give rise to potential third-party claims. Specifically, if the indemnified Party has engaged in acts that are deemed negligent, or reckless, wanton or willful misconduct, then that Party (the indemnified party) may not demand indemnification to the extent that it was at fault. Charter believes this is a workable approach and Wisconsin courts routinely weigh the relative liability of each party to

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an action based upon the comparable fault of each party to the transaction. Charter proposes a new definition of the term “claims.”

Issue 15(b): In response to CenturyTel’s proposed language to add a disclaimer of warranties of reasonable care, workmanlike effort, results, lack of negligence, or accuracy, or completeness of responses, Charter believes CenturyTel bears the burden of demonstrating that the language is necessary and that CenturyTel has not met that burden. Charter states that the Uniform Computer Information Transactions Act, which CenturyTel sites as support for its proposal, is a draft code that addresses software licensing and related transactions which is completely unrelated to the network interconnection functions at issue.

Issue 15(c): Charter believes that damages should be measured by actual, direct damages and does not believe damages should be capped at monthly charges as proposed by CenturyTel. Charter believes that damages should not be limited that arise from reckless or wanton misconduct of the other party, where CenturyTel only removes the limit on damages for willful misconduct. Charter believes CenturyTel’s proposed cap would prevent a party from being fully compensated for its actual damages. Charter believes that damages based on actual, direct damages will provide appropriate incentives to both parties to take due care with respect to the network and the facilities of the other party.

(b) CenturyTel

Issue 15(a): CenturyTel contends that including the concept of contributory negligence within the indemnification provision is unworkable and eliminates many benefits of an indemnification agreement. CenturyTel believes Charter’s proposed language will create an obstacle to carrying out a prompt and cost-efficient defense of third-party claims because Charter

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and CenturyTel would first have to determine which party is responsible for the harm alleged by the third-party, and to what degree. CenturyTel believes Charter's proposed definition of claims is too restrictive.

Issue 15(b): CenturyTel proposes language adding a disclaimer of warranties of reasonable care, workmanlike effort, results, lack of negligence, or accuracy, or completeness of responses. CenturyTel believes this is necessary as the Agreement's subject matter relates to information and services and not just goods. CenturyTel states that the proposed language is based on the Uniform Computer Information Transactions Act as adopted in Maryland and Virginia.

Issue 15(c): CenturyTel believes damages should be capped at the amount charged for services which it states is the practice reflected in both Charter's and CenturyTel's tariffs and customer agreements in Wisconsin. In relation to the terms "negligent, or reckless, wanton or willful misconduct," CenturyTel believes there is no meaningful difference between the terms willful and wanton as both involve the exhibition of "an utter indifference to or conscious disregard for safety." CenturyTel believes Charter's additional language is surplus language and will create interpretation issues that can and should be avoided.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. III, sections 30.1, 30.2, 30.3 and 30.4.

30.1 Indemnification Against Third-Party Claims.

Each Party (the Indemnifying Party) agrees to indemnify, defend, and hold harmless the other Party (the Indemnified Party) and the other Party s Subsidiaries, predecessors, successors, Affiliates, and assigns, and all current and former officers, directors, members, shareholders, agents, contractors and

employees of all such persons and entities (collectively, with Indemnified Party, the Indemnitee Group), from any and all Claims, **except to the extent that such Claims arise from the Indemnified Party s negligence, or reckless, wanton or willful misconduct.** For purposes of this Section 30, Claim means any action, cause of action, suit, proceeding, claim, or demand of any third party (and all resulting judgments, bona fide settlements, penalties, damages, losses, liabilities, costs, and expenses (including, but not limited to, reasonable costs and attorneys fees)), (a) based on allegations that, if true, would establish (i) the Indemnifying Party s breach of this Agreement; (ii) the Indemnifying Party s misrepresentation, fraud or other misconduct; (iii) the Indemnifying Party s negligence; (iv) infringement by the Indemnifying Party or by any Indemnifying Party product or service of any patent, copyright, trademark, service mark, trade name, right of publicity or privacy, trade secret, or any other proprietary right of any third party; (v) the Indemnifying Party s liability in relation to any material that is defamatory or wrongfully discloses private or personal matters; or (vi) the Indemnifying Party s wrongful use or unauthorized disclosure of data; or (b) that arises out of (i) any act or omission of the Indemnifying Party or its subcontractors or agents relating to the Indemnifying Party s performance or obligations under this Agreement; (ii) any act or omission of the Indemnifying Party s customer(s) or End User(s); (iii) the bodily injury or death of any person, or the loss or disappearance of or damage to the tangible property of any person, relating to the Indemnifying Party s performance or obligations under this Agreement; (iv) the Indemnifying Party s design, testing, manufacturing, marketing, promotion, advertisement, distribution, lease or sale of services and/or products to its customers, or such customers use, possession, or operation of those services and/or products; or (v) personal injury to or any unemployment compensation claim by one or more of the Indemnifying Party s employees, notwithstanding any protections the Indemnifying Party might otherwise have under applicable workers compensation or unemployment insurance law, which protections the Indemnifying Party waives, as to the Indemnified Party and other persons and entities to be indemnified under this Section 30.1 (other than applicable employee claimant(s)), for purposes of this Section 30.1. Reasonable costs and attorneys fees, as used in this Section 30.1, includes without limitation fees and costs incurred to interpret or enforce this Section 30.1. The Indemnified Party will provide the Indemnifying Party with reasonably prompt written notice of any Claim. At the Indemnifying Party s expense, the Indemnified Party will provide reasonable cooperation to the Indemnifying Party in connection with the defense or settlement of any Claim. The Indemnified Party may, at its expense, employ separate counsel to monitor and participate in the defense of any Claim.

Notwithstanding anything to the contrary in this Section 30.1, a Party may not seek indemnification with respect to any Claim by that Party s customer(s) or End

User(s), but rather shall be the Indemnifying Party with respect to all Claims by its customer(s) and End User(s).

The Indemnifying Party agrees to release, indemnify, defend, and hold harmless the Indemnitee Group and any third-party provider or operator of facilities involved in the provision of products, services or facilities under this Agreement from all losses, claims, demands, damages, expenses, suits, or other actions, or any liability whatsoever, including, but not limited to, costs and attorneys fees, Claims suffered, made, instituted, or asserted by the Indemnifying Party s End User Customer(s) arising from or relating to any products, services or facilities provided by or through the Indemnified Party or such third party provider or operator, **except to the extent that any such Claims were caused by the Indemnified Party s or other third-party provider s or operator s negligence, or reckless, wanton, or willful misconduct.** The Indemnifying Party further agrees to release, indemnify, defend, and hold harmless the Indemnitee Group from all **Claims, losses, claims, demands, damages, expenses, suits, or other actions, or any liability whatsoever, including, but not limited to, costs and attorneys fees,**suffered, made, instituted, or asserted by any third party against an Indemnified Party arising from or in any way related to actual or alleged defamation, libel, slander, interference with or misappropriation of proprietary or creative right, or any other injury to any person or property arising out of content transmitted by the Indemnifying Party s End User Customer(s).

30.2 Disclaimer of Warranties.

EXCEPT FOR THOSE WARRANTIES EXPRESSLY PROVIDED IN THIS AGREEMENT OR REQUIRED BY STATUTE, EACH PARTY ON BEHALF OF ITSELF AND ITS AFFILIATES AND SUPPLIERS DISCLAIMS ALL WARRANTIES AND DUTIES, WHETHER EXPRESS OR IMPLIED, AS TO THE SERVICES, PRODUCTS AND ANY OTHER INFORMATION OR MATERIALS EXCHANGED BY THE PARTIES, INCLUDING BUT NOT LIMITED TO ANY IMPLIED WARRANTIES, DUTIES, OR CONDITIONS OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE. REASONABLE CARE, WORKMANLIKE EFFORT, RESULTS, LACK OF NEGLIGENCE, OR ACCURACY OR COMPLETENESS OF RESPONSES. EXCEPT FOR THOSE WARRANTIES EXPRESSLY PROVIDED IN THIS AGREEMENT OR REQUIRED BY STATUTE, THERE IS NO WARRANTY OF TITLE, QUIET ENJOYMENT, QUIET POSSESSION, CORRESPONDENCE TO DESCRIPTION AUTHORITY, OR NONINFRINGEMENT WITHRESPECT TO THE SERVICES, PRODUCTS, AND ANY OTHER INFORMATION OR MATERIALS EXCHANGED BY THE PARTIES UNDER THIS AGREEMENT

30.3 Limitation of Liability; Disclaimer of Consequential Damages; Exceptions.

30.3.1 Except as provided in Section 30.3.3, each Party's liability to the other, whether in contract, tort or otherwise, shall be limited to direct damages. which shall not exceed the monthly charges, plus any related costs/expenses the other Party may recover, including those under Section 22.1 above, and plus any costs/expenses for which the Parties specify reimbursement in this Agreement for the liability arose. Except as provided in Section 30.3.3, each Party's liability to the other during any Contract Year resulting from any and all causes will not exceed the total of any amounts charged to **CLEC by CenturyTel under this Agreement during the Contract Year in which such cause accrues or arises. For purposes of this Section 30.3.1, the first Contract Year commences on the first day this Agreement becomes effective, and each subsequent Contract Year commences on the day following the anniversary of that date

30.3.2 EXCEPT AS PROVIDED IN SECTION 30.3.3, NEITHER PARTY WILL BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, RELIANCE, OR SPECIAL DAMAGES SUFFERED BY SUCH OTHER PARTY (INCLUDING WITHOUT LIMITATION DAMAGES FOR HARM TO BUSINESS, LOST REVENUES, LOST SAVINGS, OR LOST PROFITS SUFFERED BY SUCH OTHER PARTY), REGARDLESS OF THE FORM OF ACTION, WHETHER IN CONTRACT, WARRANTY, STRICT LIABILITY, OR TORT, INCLUDING WITHOUT LIMITATION, NEGLIGENCE OF ANY KIND WHETHER ACTIVE OR PASSIVE, AND REGARDLESS OF WHETHER THE PARTIES KNEW OF THE POSSIBILITY THAT SUCH DAMAGES COULD RESULT.

Should either Party provide advice, make recommendations, or supply other analysis related to the services or facilities described in this Agreement, this limitation of liability shall apply to the provision of such advice, recommendations, and analysis.

30.3.3 Section 30.3.1 and Section 30.3.2 do not apply to the following:

30.3.3.1 Indemnification under Section 30.1; 30.3.3.2 Breach of any obligation of confidentiality referenced in this Agreement;

30.3.3.3 Violation of security procedures;

30.3.3.4 Any breach by **CLEC of any provision relating to **CLEC's access to or use of Operations Support Systems;

30.3.3.5 Failure to properly safeguard, or any misuse of, customer data;

30.3.3.6 Statutory damages;

30.3.3.7 Liability for **reckless, wanton, intentional** or willful misconduct;

30.3.3.8 Liability arising under any applicable Tariff;

30.3.3.9 Liability arising under any indemnification provision contained in this Agreement or any separate agreement or **in Section(s) [insert] of the applicable provisions of the [insert relevant Tariff]** on file with the Public Service Commission of 911/E911 services;

30.3.3.10 Each Party's obligations under Section 27, Intellectual Property, of this Article III;

30.3.3.11 Section 30.4.2 and/or Section 30.4.3 of this Article III;

30.3.3.12 Section 45, Taxes, of this Article III, and/or

30.3.3.13 Liability arising under any indemnification provision contained in **this Agreement**, a separate agreement or **in Section(s) of the applicable provisions of the [insert relevant Tariff]** on file with the Public Service Commission of Wisconsin related to provisioning of Directory Listing or Directory Assistance Services.

30.4 Liability of Each Party. In addition to the general limitation of liability in this Section 30, the following shall also limit each Party's under this Agreement.

30.4.1 Inapplicability of Tariff Liability. CenturyTel's general liability, as described in its local exchange or other Tariffs, does not extend to **CLEC, **CLEC's End User Customer(s), suppliers, agents, employees, or any other third parties. Liability of CenturyTel to **CLEC resulting from any and all causes arising out of services, facilities or any other items relating to this Agreement shall be governed by the liability provisions contained in this Agreement and no other liability whatsoever shall attach to CenturyTel. Without limiting the generality of any other provision herein, CenturyTel shall not be liable for any loss, claims, liability or damages asserted by **CLEC, **CLEC's End User Customer(s), suppliers, agents, employees, or any other third parties arising out of or relating to CLEC's combination or commingling of its components with those components provided by CenturyTel to **CLEC. **CLEC's general liability, as described in its local exchange or other Tariffs, does not extend to CenturyTel, CenturyTel's End User Customer(s), suppliers, agents, employees, or any other third parties. Liability of **CLEC to CenturyTel resulting from any and all causes arising out of services, facilities or any other items relating to this Agreement shall be governed by the liability provisions contained in this Agreement and no other liability whatsoever shall attach to **CLEC.

30.4.2 **CLEC Tariffs or Contracts.

Nothing in this Agreement shall be deemed to create a third-party beneficiary relationship between CenturyTel and any of **CLEC's End User Customers, suppliers, agents, employees, or any other third parties except to the extent any such party is included within the applicable Indemnitee Group, for the purpose of indemnification as provided herein only. Nothing in this Agreement shall be deemed to create a third-party beneficiary relationship between **CLEC and any of CenturyTel's End User Customers, suppliers, agents, employees, or any other third parties except to the extent any such party is included within the applicable Indemnitee Group, for the purpose of indemnification as provided herein only.

30.4.3 No Liability for Errors.

If **CLEC uses the signaling networks and call-related databases identified herein, then CenturyTel is not liable for mistakes in CenturyTel's signaling networks (including but not limited to signaling links and Signaling Transfer

Points (STPs) and call-related databases (including but not limited to the Line Information Database (LIDB), Toll Free Calling database, Local Number Portability database, Advanced Intelligent Network databases, Calling Name database (CNAM), 911/E911 databases, and OS/DA databases). **If **CLEC uses the signaling networks and call related databases identified herein, then **CLEC shall indemnify, defend and hold harmless CenturyTel and CenturyTel s Indemnatee Group from any and all **Claims** claims, demands, causes of action and liabilities whatsoever, including costs, expenses and reasonable attorneys fees incurred on account thereof, by or to **CLEC s End User Customer(s), suppliers, agents, employees, or any other third parties based on any reason whatsoever arising out of or relating to any use of such signaling networks and call related databases by or through CLEC. For purposes of this Section 30.4.3 mistakes shall not include matters arising exclusively out of the **reckless, wonton or** willful misconduct of CenturyTel or its employees or agents.**

Discussion

There is no testimony on these issues. The parties stated their intention to limit their arguments to briefs.²⁵ However, the parties have not tied their arguments to any specific state or federal telecommunications statutes, rules, or orders. The Panel determines that it must evaluate the proposed language in the context of the responsibilities between telecommunications carriers. The Panel looks to the provisions of federal and state statutes to evaluate this dispute. Under 47 U.S.C. § 251(c), incumbent local exchange carriers are given additional obligations including the duty to provide interconnection that is “at least equal in quality to that provided by the local exchange carrier to itself ...” and the duty to provide interconnection “on rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”

Under 47 U.S.C. § 251(a) all telecommunications carriers have the general duty not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to sections 255 and 256. This is a “bright-line” standard with

²⁵ The Parties agreed that Issues 15A, 15B, and 15C would be “briefing only.” Letter from the Parties to Dennis Klaila, Arbitrator, No. 05-MA 148 (Wis. PSC. Nov. 7, 2008) (PSC REF#: 103924).

which all carriers must comply. There is nothing relative about it. Further the duty to comply is mandatory; good intentions do not excuse non-compliance.

State commissions are given the role to enforce these provisions regarding interactions between carriers. Wis. Stat. § 196.199 includes specific authorization and procedures to handle disputes that arise between carriers with differing limits on Commission ordered forfeitures depending on whether a failure is willful or not. Further Wis. Stat. § 196.219 provides further enforcement powers in relation to protection of telecommunications consumers (which includes a telecommunications provider) and allows the commencement of civil actions. Wis. Stat. § 196.199(4m) allows the Commission to request the attorney general to bring an action “to compensate any person for any pecuniary loss caused by the failure of a utility or provider to comply with this section.”

The Panel is concerned that the indemnity section of the interconnection agreement should not expand, limit, or otherwise alter the duties between carriers or the Commission’s ability to supervise compliance those duties. Accordingly, the Panel will add a preamble to this section clarifying the overriding application of these requirements.

In evaluating the remaining language the Panel will select terms and conditions it determines are “just, reasonable, and nondiscriminatory” and will provide interconnection that is “at least equal in quality to that provided by the local exchange carrier to itself.” Typically, in supervising the non-discrimination and the “at least equal in quality” requirements discussed above, the Commission has adopted performance measures.²⁶ To the extent parties further

²⁶ See Final Decision (Phase I), *Investigation Into Ameritech Wisconsin Operational Support Systems*, No. 6720-TI-160 (Wis. PSC. Sept. 25, 2001), Order Denying Rehearing and Corrections to Final Decision (Phase I), adopting interim order dated November 29, 2000, and further amending orders, approving performance measurement business rules for Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin.

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decide to trigger liquidating damages for failure to meet performance measurement standards, those have been agreed upon terms between the parties. In 2003 in docket 2815-TI-103 the Commission adopted an alternative regulatory plan for CenturyTel of the Midwest-Kendall (2003 Plan). This plan has been extended in dockets 2815-TR-104 and 2815-TR-105 with a further extension as recently as March 10, 2009. Section 7.4 of the 2003 plan included planning and research into the implementation of performance measurements standards and results. Based on that planning, it is reasonable to infer an intent to use a similar approach for CenturyTel for supervising non-discrimination.

The Panel is not aware of any other interconnection agreement in Wisconsin that has adopted a comparative negligence approach. As there is no testimony on these issues, the Panel cannot determine whether the parties considered the potential of using performance measurements. The Panel is reluctant to adopt a comparative negligence approach without first considering approaches that have been adopted in other interconnection agreements in Wisconsin. The Panel determines that CenturyTel's approach to potential third-party claims is more consistent with the approach that has been used in other interconnection agreements. However, the Panel will include a clause to allow reopening the agreement for the purpose of adding performance measurements.

The Panel further determines that it is not reasonable to add CenturyTel's proposed language to add a disclaimer of warranties of reasonable care, workmanlike effort, results, lack of negligence, or accuracy, or completeness of responses, in light of the added duties applicable to incumbent carriers, in particular, interconnection that is equal in quality to that provided to

itself. CenturyTel can be expected to provide workmanlike effort, results, lack of negligence, or accuracy, or completeness of responses to itself and also to interconnecting carriers.

The Panel further determines it is not reasonable to cap damages at the monthly charges for service, as interconnection agreements between carriers are different from terms and conditions of contracts with end user customers. Further, the provisions for damages in Wis. Stat. §§ 196.199 and 196.219 are not limited to the monthly charges for service. The Panel will award language that is consistent with the existing enforcement powers of the Commission.

No explanation is given by CenturyTel for its proposed additions to sections 30.4.1 and 30.4.2. The Panel will not include that new language, as the purpose of the proposed language has not been explained.

Further the Panel determines that section 30.4.3, Liability for Errors, should be removed from the interconnection agreement as all carriers must comply with the requirements of with the guidelines and standards established pursuant to 47 U.S.C. §§ 255 and 256.

The Panel distinguishes its decision regarding general liability in this set of issues from its decisions specific to directories and 911 in Issues 32, 38, 39, and 40. In those instances, specific limitation of liability provisions, which were developed during the monopoly provision of service, continue to be applicable and in the public interest as related to directories and 911 service.

Issue 15 Award

The Panel awards the following language:

30. LIABILITY AND INDEMNIFICATION

Nothing in this section shall be interpreted to expand, limit, or otherwise alter the general duties of all telecommunications carriers, the obligations of all local exchange carriers, or the

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additional obligations of incumbent local exchange carriers under 47 U.S.C. §§ 251 (a), (b) and (c).

30.1 CenturyTel's proposed language

30.2 Charter's proposed language

30.3 Limitation of Liability; Disclaimer of Consequential Damages; Exceptions as

follows:

30.3.1 Except as provided in Section 30.3.3, each Party's liability to the other, whether in contract, tort or otherwise, shall be limited to the damages applicable under Wis. Stat. §§ 196.199, and 196.219.

30.3.2 Undisputed language

30.3.3 CenturyTel's proposed language

30.4 Charter's proposed language

30.4.1 Charter's proposed language

30.4.2 Charter's proposed terms

30.4.3 Deleted

30.5 Reopener

Either CenturyTel or Charter may reopen this Agreement for the purpose of adding Performance Measurements.

Issue 16: Charter version: Should both Parties be allowed to modify, and upgrade, their networks; and should the other Party be responsible for assuming the cost of such network upgrades or modifications?

CenturyTel version: Should the Agreement contain a provision providing that CenturyTel is solely responsible for the costs and activities associated with accommodating changes to its network that are required due to Charter's modifications to its network?

This issue concerns the responsibility for costs associated with network upgrades.

Positions of the Parties

(a) Charter

Charter believes each party should be solely responsible for the cost of any technology upgrades or other network modifications on its own network. Charter believes its proposed language provides the required equity between the parties. Charter relies on the definition of a point of interconnection (POI), whereby each party is responsible for its own costs on its side of the POI. Charter is concerned that CenturyTel's proposed language could require Charter to be responsible for the cost to upgrade CenturyTel's network on CenturyTel's side of the POI. Further Charter is concerned that based on CenturyTel's proposed language, CenturyTel may argue that Charter does not have a right to upgrade its network.

(b) CenturyTel

CenturyTel believes that the interconnection requirements 47 U.S.C. § 251(c)(2) are not reciprocal. This section contains duties that are only applicable to incumbent local exchange carriers. CenturyTel also points out that the requirements concerning notification of network changes of 47 C.F.R. §§ 51.325 through 51.335 are only applicable to incumbent local exchange carriers. CenturyTel is concerned that Charter's proposed language "would create unlimited financial exposure to CenturyTel because there are no standards applicable to Charter's network upgrade that it may deploy."

Proposed Contract Language

Both parties propose certain language additions to Art. III, section 47.

47. TECHNOLOGY UPGRADES

Notwithstanding any other provision of this Agreement, CenturyTel each Party shall have the right to deploy, upgrade, migrate and maintain its network at its discretion. Nothing in this Agreement shall limit CenturyTel's ability to modify its network through the incorporation of new equipment or software or otherwise. ****CLEC shall be solely responsible for the cost and activities associated with accommodating such changes in its own network. Nothing in this Agreement shall limit CLEC's ability to modify its network through the incorporation of new equipment or software or otherwise. CenturyTel shall be solely responsible for the cost and activities associated with accommodating such changes in its own network.** Notwithstanding the foregoing, both Parties have the duty not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 255 or 256 of the Act.

Discussion

The Panel looks to the following FCC definitions in deciding this issue.

47 C.F.R. § 51.5 Terms and Definitions.

Meet point interconnection arrangement.

A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Technically feasible....

...The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. ...

The Panel sees no difference between an initial request for interconnection and a request for an upgraded form of interconnection. So long as Charter's request for interconnection complies with the requirements of § 251(c)(2), CenturyTel must comply and CenturyTel will be responsible to build and maintain its network to the meet point. This includes CenturyTel duty to make modification to its facilities or equipment to respond to such a request.

The notification that incumbent local exchange carriers provide for network changes per 47 C.F.R. §§ 51.325 through 51.335²⁷ then also requires Charter to upgrade its network on its side of the POI when CenturyTel upgrades its network. In this manner the existing framework provides for reciprocity in relation to network upgrades. Charter's proposed language best reflects these requirements.

Issue 16 Award

The Panel award Charter's proposed language for Art. III, section 47.

Issue 17: Charter version: Should Charter be contractually bound by terms concerning liability for carrier change requests that exceed its obligations under existing law?

²⁷ § 51.325 Notice of network changes:

Public notice requirement.

(a) An incumbent local exchange carrier ("LEC") must provide public notice regarding any network change that:

- (1) Will affect a competing service provider's performance or ability to provide service;
- (2) Will affect the incumbent LEC's interoperability with other service providers; or
- (3) Will affect the manner in which customer premises equipment is attached to the interstate network.
- (4) Will result in the retirement of copper loops or copper subloops, and the replacement of such loops with fiber-to-the-home loops or fiber-to-the curb loops, as those terms are defined in § 51.319(a)(3).

(b) For purposes of this section, *interoperability* means the ability of two or more facilities, or networks, to be connected, to exchange information, and to use the information that has been exchanged.

(c) Until public notice has been given in accordance with §§ 51.325 through 51.335, an incumbent LEC may not disclose to separate affiliates, separated affiliates, or unaffiliated entities (including actual or potential competing service providers or competitors), information about planned network changes that are subject to this section.

(d) For the purposes of §§ 51.325 through 51.335, the term *services* means telecommunications services or information services.

§ 51.327 Notice of network changes:

Content of notice.

(a) Public notice of planned network changes must, at a minimum, include:

- (1) The carrier's name and address;
- (2) The name and telephone number of a contact person who can supply additional information regarding the planned changes;
- (3) The implementation date of the planned changes;
- (4) The location(s) at which the changes will occur;
- (5) A description of the type of changes planned (Information provided to satisfy this requirement must include, as applicable, but is not limited to, references to technical specifications, protocols, and standards regarding transmission, signaling, routing, and facility assignment as well as references to technical standards that would be applicable to any new technologies or equipment, or that may otherwise affect interconnection); and
- (6) A description of the reasonably foreseeable impact of the planned changes.

(b) The incumbent LEC also shall follow, as necessary, procedures relating to confidential or proprietary information contained in § 51.335.

CenturyTel version: 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?

In this issue CenturyTel seeks contract provisions to recover its costs associated with unauthorized carrier change requests.

Positions of the Parties

(a) Charter

Charter believes the FCC rules protect and compensate CenturyTel in the event Charter submits an unauthorized change request. The FCC rule 47 C.F.R. § 64.1140 establishes carrier liability for slamming. Under that rule, CenturyTel would be the subscriber’s properly authorized carrier, and Charter would be required to pay CenturyTel 150 percent of all charges paid to Charter. Any additional payment sought by CenturyTel would be tantamount to an additional penalty. CenturyTel has provided no cost support for its proposed additional \$50 payment to CenturyTel and in light of the provisions of the FCC rules such payment would be double recovery of any costs incurred by CenturyTel.

(b) CenturyTel

CenturyTel acknowledges that under 47 C.F.R. § 64.1140 CenturyTel, as the authorized carrier, is entitled to recover 150 percent of all charges that were paid to Charter. However, such remedies are not exclusive, but “are in addition to any other remedies available by law.” CenturyTel believes its proposed \$50 charge will compensate CenturyTel for its costs associated with correcting Charter’s unauthorized change requests. CenturyTel believes this would be efficient and reasonable.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. III. Sections 50.1 and 50.2.

50. UNAUTHORIZED CHANGES

50.1 **The Parties agree that each Party is required to comply with End User subscriber carrier change requests, as set forth in 47 C.F.R. § 64.1100, et. seq. (“Changes in Preferred Telecommunications Service Providers”), and as any applicable rules or regulations promulgated by the Commission. As such, each Party will comply with such rules and regulations to ensure that End User subscribers are not changed without required authorizations.**

Procedures. If **CLEC submits an order for number portability or Unbundled Network Elements under this Agreement in order to provide service to an End User Customer that at the time the order is submitted is obtaining its local services from CenturyTel or another LEC using CenturyTel resold services or Unbundled Network Elements, and the End User Customer notifies CenturyTel that the End User Customer did not authorize **CLEC to provide local Telephone Exchange Services to the End User Customer, **CLEC must provide CenturyTel with proof of authorization from that End User Customer within thirty (30) calendar days of notification by CenturyTel. If **CLEC cannot provide proof of authorization within such time frame, **CLEC must, within three (3) Business Days thereafter:

(a) direct CenturyTel to change the End User Customer back to the LEC providing service to the End User Customer before the change to **CLEC was made;

(b) provide any End User Customer information and billing records **CLEC has obtained relating to the End User Customer to the LEC previously serving the End User Customer; and

(c) notify the End User Customer and CenturyTel that the change back to the previous LEC has been made.

50.2 CenturyTel will bill **CLEC fifty dollars (\$50.00) per affected line in lieu of any additional charge in order to compensate CenturyTel for switching the End User Customer back to the original LEC. Any compensation that may be due either Party for the other Party’s actions associated with unauthorized subscriber changes will be established by FCC regulations governing subscriber change procedures at 47 C.F.R. § 64.1100, et. seq.

Discussion

CenturyTel submitted testimony on this issue. Charter did not. The Panel turns to the FCC rules regarding unauthorized change requests which both Parties referenced in their briefs. The Panel agrees with CenturyTel that the payment of 150 percent of the charges collected by Charter under 47 C.F.R. § 64.1140 is not the exclusive form of remedy available to CenturyTel and its purpose is primarily to compensate the end user customer. The Panel agrees that further remedy is available for CenturyTel to recover its costs. While Charter's brief contended that CenturyTel has provided no cost support for its proposed \$50 charge, Charter failed to provide any witness to dispute the reasonableness of the charge. Pursuant to § 252(b)(4)(B) the Panel may proceed on the best information available. The Panel determines that CenturyTel's proposed \$50 charge is reasonable to compensate CenturyTel for the costs it would incur to correct an unauthorized change made by Charter.

Issue 17 Award

The Panel awards CenturyTel's proposed language for Art. III. Sections 50.1 and 50.2.

Issue 18 Charter version: Should Charter be entitled to interconnect with CenturyTel (Non-Rural Companies) at a single point of interconnection (POI) within a Local Access and Transport Area (LATA)?

Century version: (Non-Rural Only) What terms and conditions that govern the Point of Interconnection (POI) and trunking arrangements should be included in the interconnection Agreement?

In the current interconnection agreement between Charter and CenturyTel (Non-Rural Companies) the companies have POI's between their networks located at each of the CenturyTel companies where local traffic is exchanged. This dispute stems from Charter's request to exercise its right to interconnect at a single point within each LATA where Century companies

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are located and that issue received most of the attention from both parties in the hearing and briefs. However, the issue as framed by CenturyTel is much broader than the question of a single POI.

Position of the Parties

(a) Charter

Charter's position is that under §251(c)(2), as interpreted by the FCC, it is entitled to interconnect with Century at any technically feasible point, including the option to interconnect at a single POI per LATA. The critical portion of the statute is § 251(c)(2)(B): *at any technically feasible point within the carrier's network*. In 47 C.F.R. § 51.305, any technical feasible point is to include at a minimum:

- (i) The line-side of a local switch;
- (ii) The trunk-side of a local switch;
- (iii) The trunk interconnection points for a tandem switch;
- (iv) Central office cross-connect points;
- (v) Out-of-band signaling transfer points necessary to exchange traffic at these points and access call-related databases; and
- (vi) The points of access to unbundled network elements as described in §51.319.

While the statute and rules do not specifically mention a right to interconnect at a single POI within a LATA, Charter's position is supported by language in the FCC's *Southwestern Bell-Texas § 271 Decision* where the FCC held that the statute's intent is to allow CLECs the option to select the "most efficient points at which to exchange traffic with incumbent LECs, thereby lowering the competing carriers' cost of, among other things, transport and termination."

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The FCC further found that a CLEC “has the option to interconnect at only one technically feasible point in each LATA.”²⁸

The *Southwestern Bell-Texas §271 Decision* was cited in a FCC *Virginia Arbitration Order* to support the FCC’s decision to accept the CLEC’s position that they were entitled to request a single POI in a LATA in their interconnection agreements with Verizon.²⁹ The FCC also proposed to add the single POI requirement to its rules in rulemaking notices issued in 2001 and in 2005, but the proposed rule has yet to be formally adopted.³⁰

The remainder of Charter’s position is that the exception to the single POI based on technical feasibility does not apply to the CenturyTel exchanges where it wishes to interconnect because CenturyTel had an interexchange network to carry access traffic that can be adapted to carry local traffic to a single POI.

(b) CenturyTel

CenturyTel has the burden of showing the inapplicability of what seems to be a straightforward FCC interpretation of §251(c)(2) that entitles Charter to a single POI per LATA. CenturyTel attempts to do this by noting that the original FCC finding on a single POI came in a Section 271 decision based on a contract. Because Section 271 only applies to former Bell Operating companies (BOCs) and not to smaller independent ILECs, CenturyTel’s position is

²⁸ Memorandum Opinion and Order, *Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to provide In-Region, InterLATA Services in Texas*, 15 F.C.C.R. 18,354, 18,390, ¶ 78 (2000) (*Southwestern Bell-Texas § 271 Decision*).

²⁹ Memorandum Opinion and Order, *In the Matter of Petition of WorldCom, Inc. et al, Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, 17 F.C.C.R. 27,039, 27,064, ¶ 52 (2002) (*Virginia Arbitration Award*).

³⁰ Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 16 F.C.C.R. 9610, 9634, 9650, ¶¶ 72, 112 (2001); and Further Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, 20 F.C.C.R. 4685, 4728, ¶ 92 (2005).

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that the single POI decision only applies BOC's. Similarly, CenturyTel pointed out that LATAs were created so BOCs could separate local service which was not open to competition at the time from intrastate and interstate access service, which had been opened to competition. CenturyTel is not a BOC and asserts that the concept of LATAs only applies to BOCs and for this reason a decision about a single POI per LATA would not apply to CenturyTel.

CenturyTel's second distinction from the FCC's single POI position is that proof of technical feasibility is not the only §251(c)(2) interconnection requirement and that § 251(c)(2)(C) limits Charter to an interconnection arrangement *that is at least equal in quality to that provided by the local exchange provider to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection*. CenturyTel asserts that the § 251(c)(2)(C) provision means that CenturyTel is not required to provide interconnection to Charter that would be superior to what it provides to itself or other providers. This position was adopted by the 8th Circuit court in decisions made in 1997 and again in 2000,³¹ and by arbitration awards by a number of state commissions.³² CenturyTel further asserts that interconnecting with Charter outside of its local exchange network, which would be necessary to provide Charter with a single POI per LATA, would be a superior form of interconnection to what CenturyTel provides for its own local exchange traffic. CenturyTel concludes that it is not required to provide Charter with a single POI per LATA because it is not required to provide this superior form of interconnection.

³¹ *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 813 (8th Cir. 1997) (*IUB I*) and *Iowa Utils. Bd. v. FCC*, 219 F. 3d, 744, 758 (8th Cir.2000) (*IUB II*).

³² See the brief of CenturyTel pages 69 to 72 for a discussion of arbitration awards in Arkansas, Michigan, Colorado and Oregon.

CenturyTel also provided evidence that it does not have facilities in any one of its non-rural local affiliates that could be used to connect to Charter at all potential points within a LATA.³³ This leads to CenturyTel's third distinction regarding the single POI rule, which is that Charter is required to establish interconnection agreements with each CenturyTel affiliated company and cannot assume that all CenturyTel-affiliated companies are a single entity. This means that even if the Commission decided that the FCC's single POI rule applies in this situation, it would only apply on an individual company basis and not on a holding company basis.³⁴ In other words, at most the single POI requirement would mean that there should be one POI per LATA within the network of each of CenturyTel's three non-rural affiliates.³⁵

Proposed Contract Language

Charter and CenturyTel each propose certain language additions to Art. V., section 2.2.2. In the DPL each party also proposes language for sections other than 2.2.2 as well. The Panel evaluates those other sections in its determinations on other issues.

2.2.2 Points of Interconnection (POIs): A Point of Interconnection (POI) is a point in the network where the Parties deliver Local Traffic to each other, and also serves as a demarcation point between the facilities that each Party is responsible to provide. Requirements for a Local POI are set forth in Section 3.3.2 of this Article. In some cases, multiple POI(s) may be necessary to provide the best technical implementation of Interconnection requirements to each End Office within a CenturyTel company's service area. ****CLEC may interconnect at any single technically feasible point on the CenturyTel network within a LATA. The technically feasible point at which **CLEC elects to interconnect will be the established POI for such LATA.**

³³ Century Reply Brief (R. Br.) 37.

³⁴ Century R. Br. 39.

³⁵ Century R. Br. 40-41.

Discussion

There was considerable discussion by both parties about the nature of CenturyTel's interexchange network and whether it can currently carry interexchange traffic between all of CenturyTel's exchanges. It appears to the Panel that CenturyTel does have an interexchange network which carries access traffic and in some instances EAS traffic between most of its local exchanges. During the period when this interconnection agreement will be in force, Charter does not plan on providing service in all of CenturyTel's non-rural exchanges, and there is evidence that CenturyTel's interexchange network would make it technically feasible to use a single POI to serve the exchanges where it intends to compete, even if there are other isolated CenturyTel exchanges.³⁶

The critical issue for the Panel is whether the existence of an interexchange backbone, owned by CenturyTel, but not by its individual local affiliates, is enough to create a mandate for a single POI among all of the exchanges of CenturyTel non-rural affiliated companies within each LATA. The Panel is not persuaded that the concept of a LATA does not apply to CenturyTel and the Panel believes that it is required to follow the FCC's interpretation of § 251. The Panel, however, finds that each CenturyTel affiliate is a separate legal entity under Wisconsin law and that Charter needs to establish separate interconnection points within the network of each affiliate. This should provide no barrier to Charter's ability to compete with CenturyTel because it already has existing POI's where it competes with CenturyTel for local service.

The Panel also does not interpret § 251 to mandate that CenturyTel go outside its local exchange network in order to interconnect with Charter. To the extent that Century has extended

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area service (EAS) between its local exchanges, Charter is entitled to a single point of interconnection with those exchanges, but where CenturyTel has a local exchange that does not have local facilities that connect to other CenturyTel exchanges, Charter is only entitled to a POI within CenturyTel's local network that serves that exchange.

To the extent CenturyTel argued that CenturyTel is not required to provide interconnection to Charter that would be superior to what it provides to itself or other providers, the Panel determines that the record is conflicting on the issue as to whether Charter's proposed interconnection is superior or inferior. In this Issue 18, CenturyTel argues Charter's proposed interconnection would be superior in that CenturyTel would be "responsible for transport for that new local service to distant locations beyond that for any other local traffic for which CenturyTel is currently responsible."³⁷ However, in Issue 19 in relation to Charter's proposed interconnection, CenturyTel argues, "this network approach is inferior in that it creates significant concerns about network management, traffic measurement, and proper compensation."³⁸ Accordingly, the Panel simply decides that interconnection must be within CenturyTel's affiliate's network.

Issue 18 Award

The Panel awards the following variation on CenturyTel's language for section 2.2.2 of the agreement.

2.2.2 Points of Interconnection (POIs): A Point of Interconnection (POI) is a point within a CenturyTel-Affiliate company's network where the Parties deliver Local Traffic to each other, and also serves as a demarcation point between the facilities that each Party is responsible for.

³⁶ Charter Brief (Br.) 72-74.

³⁷ Tr. 724.

³⁸ Tr. 754.

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The Panel declines to award the rest of the language for Issue 18 requested by CenturyTel because the Panel was not sufficiently briefed on this language and it appears that the provisions requested may depend upon what is awarded in other issues. The Panel expects that given its award of a variation on CenturyTel's language for Section 2.2.2 and the awards on other related issues, the parties can reach their own agreement regarding the other sections in the contract.

Issue 19: Charter version: Should Charter's right to utilize indirect interconnection as a means of exchanging traffic with CenturyTel be limited to only those instances where Charter is entering a new service area or market?

CenturyTel version: Should the Agreement between the Parties limit the voluntary utilization of third party transit arrangements to a DS-1 level of traffic?

The two parties' statement of the issue creates overlaps with other issues, including Issue 18 concerning the Point of Interconnection (POI). Further the proposed contract language and briefs also contain further differing issues. The Panel has sorted out the overlaps in the following manner. The first issue is whether Charter's right to use indirect interconnection is limited to entering new service areas. CenturyTel further raises the issue whether a Percent Local Use (PLU) factor is needed for billing purposes when indirect interconnection is used. The Panel will evaluate whether or not indirect interconnection is voluntary, and the use of a PLU factor in this Issue 19.

Second, there is a further issue as to whether to limit indirect interconnection to a threshold of traffic, and if so, the statement of the threshold, such as DS-1 level of traffic. Third, CenturyTel also raises an issue whether the existing trunking arrangements should be allowed to be abandoned. Issue 22 will address thresholds at which direct interconnection is applicable and whether existing interconnections can be abandoned.

The Panel will also relate its decision on this issue to its decision on Issue 18 that the POI is required to be within each individual CenturyTel Affiliate company's network.

Positions of the Parties

(a) Charter

Charter believes it has a statutory right under § 251(a) to utilize indirect interconnection as a means of exchanging traffic with CenturyTel. Charter believes there is no statutory or regulatory limitation on the use of indirect interconnection. Charter did not address CenturyTel's issues concerning percent local use and maintaining existing direct interconnections. Charter does point out that CenturyTel's proposal to use a percent local use demonstrates that CenturyTel must offer indirect interconnection to some other carrier in order to suggest this concept.

(b) CenturyTel

In light of CenturyTel's statement of the Issue 19 as primarily based on the assumption that indirect interconnection is voluntary, much of CenturyTel's discussion of indirect interconnection was contained in Issue 18. CenturyTel equates the use of indirect interconnection as creating a POI outside its territory. As the POI defines the parties' financial obligations,³⁹ indirect interconnection could be interpreted to be a requirement that CenturyTel is

³⁹ Both parties agree to this concept. The following are references in the record demonstrating this agreement. Per Charter witness Gates, "The fact is: the POI establishes the demarcation point for cost responsibility. The parties have agreed to that concept, and Mr. Watkins has affirmed that the principle should be applied to this Agreement." (Tr. 562.)

Per Charter witness Gates, "The FCC recognized when it codified Rule 703(b), that the financial responsibilities for interconnection for the exchange of traffic should be borne solely by each carrier on its side of the POI. This rule prohibits carriers from shifting cost of transporting traffic to the POI to other carriers. In order words, each carrier is responsible for the costs of delivering its traffic to other carriers for termination." (Tr. 430.)

Per CenturyTel witness Watkins, "The framework for interconnection is that once the POI is established, each Party is responsible for the facilities on its side of the POI, and each Party is responsible for the delivery of its originating local traffic to the other Party at the POI." (Tr. 762.)

47 C.F.R. § 51.703 Reciprocal compensation obligations of LECs

(b) A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.

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responsible for the cost to deliver traffic beyond its network. CenturyTel believes that the provision of § 251(a) cannot be interpreted to create a greater obligation than § 251(c) and associated rules through which CenturyTel is responsible for costs on CenturyTel's side of a POI that is located within its territory. CenturyTel further raises the question whether a Percent Local Use (PLU) factor is needed for billing purposes when indirect interconnection is used. CenturyTel also expresses concern that Charter should not be allowed to abandon the existing trunking arrangements.

Proposed Contract Language

The Panel attempts to identify the specific language each party has proposed relative to the specific issue of whether there are limits on the use of indirect interconnection and application of a PLU. Both parties provide varying language in this regard for Article V, Interconnection, Transport and Termination, section 3.3.1.1 and 3.3.1.4.

3.3.1.1 Either Party may deliver Local Traffic and ISP-bound Traffic indirectly to the other for termination through any carrier to which both Parties' networks are interconnected directly or indirectly. The Originating Party shall bear all charges payable to the transiting carrier(s) for such transit service with respect to Local Traffic and ISP-bound Traffic.

3.3.1.4 Local Traffic and ISP-bound Traffic exchanged by the Parties indirectly through a transiting carrier shall be subject to the same Reciprocal Compensation, if any, as Local Traffic and ISP-bound Traffic exchanged through Direct Interconnection.

3.3 Network Connection and POI

3.3.1 Indirect Network Connection

3.3.1.1 Indirect Network Connection in intended only for de minimis traffic associated with **CLEC “start-up” market entry into a CenturyTel local exchange. Therefore Indirect Network Interconnection will be allowed only on routes between CenturyTel end offices and a **CLEC switch in instances where, and only so long as, none of the triggers set forth in Section 3.3.2.4 of this Article have been reached.

3.3.1.4 To the extent a Party combines Local Traffic and Jointly-Provided Switched Access Traffic on a single trunk group for indirect delivery through a tandem, the originating Party, at the terminating Party’s request, will declare quarterly Percentages of Local Use (PLUs). Such PLUs will be verifiable with either call summary records utilizing Calling Party Number (CPN) information for jurisdictionalization of traffic or call detail samples. Call detail or direct jurisdictionalization using CPN information may be exchanged in lieu of PLU, if it is available. The terminating Party should apportion per minute of use (MOU) charges appropriately.

Discussion

The Panel agrees with Charter that it has a statutory right under § 251(a) to utilize indirect interconnection. The Panel finds no basis for limiting indirect interconnection to “start-up” market entry only. However, the Panel also agrees with CenturyTel that 47 U.S.C. § 251(a) does not set forth any particular standards under which carriers must negotiate or arbitrate terms of indirect interconnection.⁴⁰ The Panel further agrees that the use of indirect interconnection also raises the concern that mixed types of traffic can be delivered over indirect forms of interconnection; that is traffic subject to access charges could be mixed with traffic subject to reciprocal compensation for local traffic under 47 U.S.C. § 251(b).

⁴⁰ The standards for negotiation and arbitration contained in 47 U.S.C. § 252 are applicable to the requirements of 47 U.S.C. § 251(b) and (c).

The Panel does not agree that the use of indirect interconnection creates a POI outside CenturyTel's territory. The POI has been interpreted to define each the party's financial obligations. Even though Charter chooses to use indirect interconnection, Charter still must establish a POI within the network of each CenturyTel Affiliate company per the Panel's decision on issue 18. In the case of transit-type indirect interconnection arrangements, the POI would be the point at which a transit service provider delivers traffic to a point within the CenturyTel Affiliate company network, such as CenturyTel's local switch.

Accurate jurisdictional identification is necessary for proper billing. CenturyTel proposed the use of a PLU factor. Traffic delivered through indirect interconnection is still subject to a determination as to whether the traffic is local or non-local. PLU factors are commonly used in interconnection agreements for the purpose of differentiating between local and non-local traffic. It is reasonable for a PLU factor to be used when indirect interconnection is used.

Issue 19 Award

The Panel determines that when indirect interconnection is used, the POI that determines financial responsibility will be the point at which the transit service provider delivers traffic to a point within the CenturyTel affiliate company's network. A percent local use factor will be used to determine whether traffic is subject to access charges or reciprocal compensation.

The Panel expects that, given the above description of its award and its award on related issues, the parties can reach their own agreement on redrafting the contract.

Issues 20 and 23:⁴¹ Charter version: Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?

⁴¹ Issue only applicable to CenturyTel non-rural companies. While the DPL lists Issue 23, the DPL refers Issue 23 back to Issue 20.

CenturyTel version: How long should the Agreement provide that the Parties negotiate cost-based rates for such [direct connection] facilities before they may seek Commission intervention?

This issue concerns the terms for pricing of interconnection facilities also known as direct connection facilities and the time period to negotiate rates before Charter could seek Commission resolution of any pricing dispute. Reviewing the proposed contract language, it further concerns interim rates, the use of a relative use factor (RUF) in the interim rates while rates are being negotiated, and the language for a true-up of the interim rates following negotiations.

Positions of the Parties

(a) Charter

Charter characterizes the issue as whether CenturyTel is obligated to lease to Charter interconnection facilities at cost-based rates pursuant to 47 U.S.C. 251(c)(2). In implementing the outcome of this decision, Charter also seeks terms for interim rates that apply a relative use factor (RUF), a true-up back to the effective date of the interconnection agreement, and a 90-day time period to negotiate before Charter could seek Commission resolution of any dispute.

Charter believes the pricing standard applicable to § 251(c)(2), interconnection is TELRIC. Charter believes its position on this issue has been clear. Charter asks the Panel to affirm TELRIC is the applicable pricing standard. Charter believes CenturyTel's attempts to argue that the actual pricing standard is not currently before the Panel is "simply a poorly disguised attempt to avoid its obligation to provide these facilities at a TELRIC rate."

Charter believes that it is inappropriate to simply use CenturyTel's access rates as interim rates and wants to apply the RUF as an approximation of TELRIC rates based on experience

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with TELRIC rates. Charter believes its proposed 90-day⁴² time frame is a reasonable time period “to engage in good faith negotiations” and believes CenturyTel’s proposed six-month negotiation “drags out the resolution process.” Charter seeks to bring the issue directly to the Commission at the end of that time period and not engage in further dispute resolution processes before seeking that resolution. Charter acknowledges that CenturyTel stated that its language includes a true-up process, but Charter believes CenturyTel’s language is vague and Charter seeks clearer language regarding the true-up.

(b) CenturyTel

CenturyTel believes the only two sub-issues before the Panel are “(1) a six-month time frame for negotiating cost-based rates for direct connection facilities, and (2) the use of the Article 20 dispute resolution process for any remaining, unresolved pricing issues.” CenturyTel believes the cost-based standard is not an issue before the Panel and Charter’s position “constitutes an end run around the negotiation process.” CenturyTel proposes to make arguments in such a negotiation process based on paragraph 140 the FCC’s *Triennial Review Remand Order*.⁴³ CenturyTel also refers to a Seventh Circuit court decision which contained the following language: “What the FCC said in ¶ 140 is that ILECs must allow use of entrance facilities for interconnection at cost-based rates. TELRIC is a cost-based rate, though not the only one.”⁴⁴ CenturyTel does not expand its argument on this point but asserts that the cost-based standard is not an issue before the Panel.

⁴² DPL includes 30 days, but testimony and briefing state that a 90-day time frame is sought.

⁴³ Order on Remand, *In the Matter of Unbundled Access to Network Elements*, 20 F.C.C.R. 2533 (2005) (*Triennial Review Remand Order* or *TRRO*).

⁴⁴ *Illinois Bell Tel. Co. v. Box*, 526 F. 3d 1069, 1072 (7th Cir. 2008) (*Box*).

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CenturyTel believes its proposed six-month period will afford opportunities for the necessary give and take of a negotiation process. CenturyTel believes there is no need to shorten the time frame, as there will be a true-up process once the final rates are determined. CenturyTel believes the dispute resolution process of Article 20 will bring “a finite and determined set of procedures to the resolution of Issue 20.” CenturyTel believes the proposed RUF is “an arbitrary method” that “end-runs the negotiations” and is “wholly unnecessary” in light of the true up.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. V., Interconnection and Transport and Termination, section 2.3.1., and Art. XI, Pricing, section III., Interconnection Pricing, sections C. and D.

2.3.1 Leased Facility Interconnection (“LFI”)

2.3.1.1 Where facilities exist, Charter may lease facilities from CenturyTel **at cost-based rates pursuant to Section 251(c)(2), pursuant to CenturyTel’s applicable Tariff identified in Section II, Article XI (Pricing),** may lease facilities from a third party, or may construct or otherwise self-provision facilities.

[Charter’s latest proposal:]

Where facilities exist, Charter may lease facilities from CenturyTel **at cost-based rates pursuant to Section 251(c)(2). Upon the Effective Date of this Agreement, the Parties shall attempt to negotiate such cost-based rates for up to thirty (30) days. If the Parties cannot reach agreement with respect to such cost-based rates within 30 days of the Effective Date, either Party may seek to resolve the dispute by filing an action with the Commission to determine the appropriate rate pursuant to Section 251(c)(2) of the Act. If a party files such an action with the Commission, that action, including resolution of any permissible appeals thereto, shall be the sole mechanism for resolving the dispute. Until such time as the Commission finally determines the appropriate rate pursuant to Section 251(c) (2), such facilities shall be provided pursuant to the CenturyTel Tariff identified in Section II, Article XI (Pricing). After the Commission finally determines the appropriate cost-based rate pursuant to Section 251(c) (2), the rate for such facilities will be trued-up back to the Effective Date of this Agreement.** Charter also may lease facilities from a third party, or may construct or otherwise self-provision facilities.

[CenturyTel’s latest proposal:]

Where facilities exist, Charter may lease facilities from CenturyTel. Such facilities shall be provided pursuant to the CenturyTel Tariff identified in Section II, Article XI (Pricing), which currently governs

Charter’s leasing of such facilities pursuant its prior interconnection agreement with CenturyTel. The rates set forth in such Tariff shall be deemed “interim rates.” Upon the Effective Date of this Agreement, the Parties shall attempt to negotiate new rates for such facilities, which rates shall be cost-based pursuant to Section 251(c)(2) of the Act and shall replace the interim rates once agreed upon by the Parties. If the Parties cannot reach agreement with respect to such new rates within six (6) months of the Effective Date of this Agreement, either Party may seek to resolve the dispute pursuant to the formal dispute resolution procedures set forth in Article III, Section 20. Charter also may lease facilities from a third party, or may construct or otherwise self-provision facilities.

C. Entrance Facilities / Leased Facility Interconnection

**Rates set forth in Section(s)
26.2.2(A)(1), 26.2.2(A)(2) and
26.3 of Intrastate Access
Service Tariff-CenturyTel of
the Midwest-Wisconsin, LLC
Intrastate Access Tariff #1**

Cost Based Rates

D. Initial Factors:

Initial Originated Local Traffic Factor 50%

Discussion

In relation to federal statutes, rules, and orders, the Panel determines that the applicable statute is § 251(c)(2). However, nothing in the FCC’s implementing rules or orders specifically identifies how to address the time period to negotiate a provision within an approved interconnection agreement, or interim rates, or true-ups of interim rates. As the parties have chosen to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199 to resolve those portions of their disagreement, which in turn, as indicated in the notice, allows consideration of other provisions of Wis. Stat. ch. 196 as may be pertinent hereto. In making its determinations herein, the Panel considered the factors listed in Wis. Stat. § 196.03(6), in particular, (a) promotion and preservation of

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competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219; (b) promotion of customer choice; and (f) promotion of efficiency and productivity; with the other factors not being relevant to the issue at hand.

While Charter uses the term “interconnection facilities” and CenturyTel uses the term “direct connection facilities” (also known as entrance facilities) in their respective statements of the issue, the language proposed by both parties recognizes the applicability of § 251(c)(2) to the facilities in question. Charter’s statement of the issue, “Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?” clearly put the pricing standard before the Commission. CenturyTel has had its opportunity to address the issue. It is reasonable to construe this issue broadly and clarify the pricing standard applicable to § 251(c)(2) interconnection with this award. If CenturyTel wanted to argue that the facilities are interconnection, but not interconnection under § 251(c)(2),⁴⁵ CenturyTel should have said just that. If CenturyTel wanted to argue that the facilities are not required to be unbundled under § 251(c)(3), Unbundled Access, CenturyTel should have said just that. If CenturyTel wanted to assert that some other cost-based standard was applicable to § 251(c)(2) interconnection, it has had its opportunity to do so.⁴⁶ Failure to clear up CenturyTel’s self-created ambiguity would only serve to delay implementation of the rates

⁴⁵ CenturyTel did make this argument in regard to the facilities in question in Issues 34 and 35 regarding 911. In relation to Issue 34 regarding the pricing of end office trunks for purposes of delivering 911 traffic to CenturyTel’s selective routers, CenturyTel also argued that the facilities are not interconnection under 47 U.S.C. § 251(c)(2), and the Panel agreed that the end office trunks in question in that issue were not interconnection under § 251(c)(2).

⁴⁶ To the extent it has determined that certain facilities do not meet the necessary and impair standard of § 251(d)(2) to require a network element to be unbundled under § 251(c)(3), the FCC has applied the standard of just and reasonable rates per 47 U.S.C. § 201. The FCC has also applied the just and reasonable rate standard of § 201 to access under § 271(c)(2)(B) for network elements no longer required to be unbundled under § 251(c)(3) but for which access is still required by Bell Operating Companies under § 271(c)(2)(B). Just and reasonable rates under § 201 are also considered to be cost-based rates. However, in this issue all parties agree the facilities at issue are interconnection under § 251(c)(2), making these alternative pricing methods inapplicable.

required under federal statute and rule.

The Panel agrees with Charter witness' statement of authority for the TELRIC pricing standard.⁴⁷ The pricing standard specifically applicable to interconnection for purposes of § 251(c)(2) is the pricing standard contained in § 252(d)(1).⁴⁸ That statute's pricing standard applies to network elements and interconnection. The FCC has determined that the pricing standard applicable to network elements is TELRIC per 47 C.F.R. § 51.503.⁴⁹ Hence, the TELRIC standard applies to interconnection under 47 U.S.C. § 251(c)(2).⁵⁰ Even though CenturyTel pointed to the statement that "TELRIC is a cost-based rate, though not the only one," in the *Box*, at 1072, it has not developed any argument based on this reference. That statement was peripheral to the Seventh Circuit's principal holding, that TELRIC may be applied under § 251(c)(2): "It is enough for us to conclude that federal law permits a state agency to use the TELRIC method to regulate the price for the interconnection services that an ILEC must furnish under § 251(c)(2)." *Id.* It is clearly allowable for the Panel to determine that the pricing standard applicable to § 251(c)(2) interconnection is TELRIC.

⁴⁷ Tr. 581.

⁴⁸ § 252(d) PRICING STANDARDS (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES
Determinations by a State commission of the just and reasonable rate for interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and just and reasonable rate for network elements for purposes of subsection (c)(3) of such section-

(A) Shall be-

(i) Based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable) and

(ii) Nondiscriminatory, and

(B) May include a reasonable profit.

⁴⁹ § 51.503 **General pricing standard.**

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC's rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission—

(1) Pursuant to the forward-looking economic cost-based pricing methodology set forth in §§ 51.505 and 51.511.

Panel

However, the discussion in *Box* also addresses the scope of permissible uses for TELRIC-priced entrance facilities as follows:

What then of the original (and principal) use of an entrance facility: linking networks to allow CLEC-to-ILEC traffic (and ILEC-to-CLEC traffic)? The FCC stated:

[O]ur finding of non-impairment with respect to entrance facilities does not alter the right of [CLECs] to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, [CLECs] will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the [ILEC's] network.

Triennial Review Remand Order at ¶ 140. The state commission relied on this passage when ordering AT&T to make entrance facilities available at TELRIC prices to CLECs for interconnection.

AT&T protests that this nullifies the FCC's order. What's the point of specifying that CLECs cannot demand access to entrance facilities as unbundled network elements, AT&T inquires, if state commissions can turn around and require the same access at the same price anyway? The answer, as the district court observed, is that CLECs do not enjoy the "same" access to entrance facilities under the state commission's decision as they did before the FCC's order. Until then CLECs could use entrance facilities for both interconnection and backhauling. Under the state's order, CLECs use entrance facilities exclusively for interconnection, just as the FCC said in ¶ 140. The state commission tells us that ILECs can detect and block any attempted use of an entrance facility for backhauling. (Every carrier, ILEC or CLEC, must be able to determine the traffic's destination in order to route it accurately.)

Box, at 1072.

The *Box* decision does differentiate between entrance facilities used exclusively for interconnection and entrance facilities used for both interconnection and backhaul. Accordingly, while the Panel determines that the pricing standard applicable to § 251(c)(2) interconnection is TELRIC; the Panel also clarifies that TELRIC-priced entrance facilities are to be used

⁵⁰ The Panel rejects any confusion injected by CenturyTel regarding "bottleneck" facilities. The "bottleneck" necessary and impair standards of 47 U.S.C. § 251(d)(2) only apply to access to unbundled network elements and do

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exclusively for interconnection. This determination will (a) promote and preserve competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219; (b) promote customer choice; and (c) promote efficiency and productivity.

Regarding the remaining sub-issues, the Panel awards a 90-day time frame to negotiate. This should provide a reasonable period of time to negotiate in good faith. The Panel agrees with Charter that CenturyTel's true-up language is vague and Charter's language is clearer. The true-up is intended to cover the time period back to the effective date of the interconnection agreement. The Panel further agrees with Charter that the application of the RUF is a reasonable approximation of TELRIC rates based on experience with TELRIC rates. In relation to the use of dispute resolution, as this award already includes a 90-day time frame to negotiate, the Panel determines that it is not reasonable to require further dispute resolution processes under Article 20 before the matter can be brought to the Commission for resolution. These decisions regarding the procedures for implementation of cost-based rates under § 251(c)(2) will serve to (a) promote and preserve competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219, (b) promote of customer choice; and (c) promote of efficiency and productivity.

Issue 20 Award

The Panel awards Charter's proposed language for Art. V., Interconnection and Transport and Termination, section 2.3.1, substituting 90 days for 30 days. The Panel clarifies that the pricing standard applicable to § 251(c)(2) interconnection is TELRIC. Such TELRIC-priced entrance facilities are to be used exclusively for interconnection. The Panel expects that given its award here along with the award on other issues that the parties can reach their own agreement on redrafting the remaining sections of the contract.

not apply to interconnection. Also see Issue 21 regarding the forms of interconnection: meet point, and collocation.

Issue 21: Charter version: Should Charter be allowed to deploy one-way trunks at its discretion; and without having to assume the entire cost of interconnection facilities used to carry traffic between the Parties' respective networks?

CenturyTel version: There are two separate issues presented in Issue 21: (a) Under what terms and conditions should one-way trunks be used for the exchange of traffic within the scope of this Agreement? (b) Regardless of whether one-way or two-way trunks are deployed, where should Points of Interconnection (POIs) be located and what are each party's responsibilities with respect to facilities to reach the POI?

This issue concerns whether or not one-way trunks can be required; which carrier has the discretion of choosing one-way trunks; and which carrier is financially responsible for each section of one-way trunking when one-way trunks are used.

Positions of the Parties

(a) Charter

Charter believes it has a federal right to deploy one-way trunks. Charter believes the FCC rules place the selection of one-way versus two-way trunks in the hands of the connecting competitive local exchange carrier, subject to issues of technical feasibility. 47 C.F.R. § 51.305(f). Charter disputes CenturyTel's proposal that any disagreement regarding one-way trunks should be subject to the dispute resolution process in Article III, section 20. Charter believes this proposal would improperly give CenturyTel veto power over Charter's right to select one-way trunks.

(b) CenturyTel

CenturyTel is concerned that Charter's proposed language could be interpreted to require CenturyTel to be financially responsible for one way trunks that are not on CenturyTel's side of the properly established POI. CenturyTel states that its proposal would only require CenturyTel to provide for one-way trunks to and from the POI and not to provide one-way trunks from the

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POI to a Charter switch at some distant location, such as Stevens Point or Fitchburg, outside CenturyTel's network. CenturyTel believes that Charter's proposal, under which each party would be responsible to deploy one-way trunks to the other party's switch, would "undermine the method by which a POI must be properly established as required under Section 251(c)(2) of the Act." CenturyTel believes Charter's position on this issue is inconsistent with Charter's position on Issue 18 regarding financial responsibility. CenturyTel believes Charter's proposal would require it to unlawfully create a superior form of interconnection by making CenturyTel financially responsible for facilities outside CenturyTel's network. CenturyTel's proposed language would require that any disagreement regarding one-way trunks would be subject to the dispute resolution process in Article III, section 20.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions for Art. V., section 3.2.3.

3.2.3 Notwithstanding the preceding paragraph 3.2.2 above, the Parties recognize that certain technical and billing issues may necessitate the use of one-way trunking for an interim period. Either Party may provision its

own one-way trunks. Regardless of whether one-way or two-way facilities are provisioned **Notwithstanding any other provision of this Article V, (including those provisions which establish that each Party is individually responsible to provide facilities to the POI), where one-way trunks are deployed then each Party is responsible for establishing any necessary interconnection facilities, over which such one-way trunks will be deployed, to the other Party's switch. Subject to the terms herein, each Party is individually responsible to provide facilities to the POI. The Parties will negotiate implement the appropriate trunk configuration, whether one-way or two-way giving consideration to relevant factors, including but not limited to, existing network configuration, administrative ease, any billing system and/or technical limitations and network efficiency. Any disagreement regarding appropriate trunk configuration shall be subject to the dispute resolution process in Section 20 of Article III.**

Discussion

The Panel evaluates this issue based upon the duty of an incumbent local exchange carrier to provide interconnection under § 251(c)(2) and the associated financial responsibilities of the carriers under that section. The Panel determines that Charter mischaracterizes this issue as compliance with 47 C.F.R. § 51.305(f), which merely requires an ILEC to provide two-way trunking upon request. The rule was based on the following analysis:

We conclude here, however, that where a carrier requesting interconnection pursuant to section 251(c)(2) does not carry a sufficient amount of traffic to justify separate one-way trunks, an incumbent LEC must accommodate two-way trunking upon request where technically feasible. Refusing to provide two-way trunking would raise costs for new entrants and create a barrier to entry. Thus we conclude that if two-way trunking is technically feasible, it would not be just, reasonable, and non-discriminatory for the incumbent LEC to refuse to provide it.⁵¹

⁵¹ First Report and Order, *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499, 15,612-13, ¶ 219 (1996) (subsequent history omitted).

The rule, 47 C.F.R. § 51.305(f), in no way provides CLECs with a federal right to deploy one-way trunks. The supporting narrative above explains that an incumbent's imposition of a requirement to use one-way trunks could raise costs to new entrants and create a barrier to entry. Thus the rule requires an incumbent to provide two-way trunks to avoid imposition of an inefficient network configuration on a competitor. To the extent any inference can be made from this rule regarding one-way trunks, it would seem, reciprocally, that a competitor should not be able to impose an inefficient network configuration upon an incumbent by demanding one-way trunks.

The record better supports CenturyTel's characterization that Charter seeks terms that could be used to undermine the method by which a POI must be properly established as required under § 251(c)(2). The Panel agrees with CenturyTel that it should not be financially responsible to deploy a one-way trunk from the meet point interconnection to the other party's switch. CenturyTel is only financially responsible to deploy one-way trunks to and from its switch and the meet point. The following are provisions of statutes and FCC rules that support this determination.

47 C.F.R. § 51.321 Methods of obtaining interconnection and access to unbundled elements under section 251 of the Act.

(a) Except as provided in paragraph (e) of this section, an incumbent LEC shall provide, on terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the requirements of this part, any technically feasible method of obtaining interconnection or access to unbundled network elements at a particular point upon a request by a telecommunications carrier.

(b) Technically feasible methods of obtaining interconnection or access to unbundled network elements include, but are not limited⁵² to:

(1) Physical collocation and virtual collocation at the premises of an incumbent LEC; and

⁵² The "but are not limited to" language also comes into play in this award. In issue 20, entrance facilities are also a form of § 251(c)(2), interconnection.

(2) Meet point interconnection arrangements.

47 C.F.R. § 51.5 Terms and Definitions.

Meet point interconnection arrangement.

A meet point interconnection arrangement is an arrangement by which each telecommunications carrier builds and maintains its network to a meet point.

Interconnection. Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic.

Technically feasible....

...The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible. ...

47 U.S.C. § 251(c)(2)(B)

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. – In addition to the duties contained in subsection (b) each incumbent local exchange carrier has the following duties:

(2) INTERCONNECTION –The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network-

(B) at any technically feasible point within the carrier’s network.

(emphasis added)

Under these statutes and rules, CenturyTel would be financially responsible to modify its facilities and build and maintain its network to a “meet point” or a point of collocation. The meet point or collocation would be within CenturyTel’s network. Charter’s proposal would require CenturyTel to be financially responsible for facilities beyond the meet point and all the way to Charter’s distant switch. The Panel’s interpretation of the FCC rules, in the circumstance where one-way trunks are used, is that Charter would be financially responsible to lease, or build and maintain one-way trunks to and from its switch and the meet point, and likewise CenturyTel would be financially responsible to lease, or build and maintain one-way trunks to and from its switch and the meet point. Thus, it would be Charter’s financial responsibility for the network costs for the full distance of both one-way trunks (to the extent traffic can be expected in both

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directions) from Charter's switch to the meet point regardless of the distance involved. Charter's proposal to make CenturyTel financially responsible for the cost of one direction, of a one-way trunking arrangement, which would cover the distance from the meet point to Charter's switch, would unreasonably shift costs onto CenturyTel and is inconsistent with these requirements.

Where the record supports that one-way trunks are less efficient than two-way trunks, unless addressing some billing concerns, it is hard to conceive of a circumstance where Charter would prefer one-way trunks indefinitely when costs are assigned consistent with these rules. To the extent that there are any disputes, such as whether one-way trunks should be used or where the meet point interconnection should be located, it would be reasonable to negotiate those terms and if necessary to use the dispute resolution process.

Issue 21 Award

The Panel awards CenturyTel's proposed language for Art. V, section 3.2.3 with the removal of the words "for an interim period," as it is consistent with the above discussion. The Panel expects that given its award here and the awards on other related sections, the parties can reach their own agreement regarding any remaining sections in the interconnection agreement that may relate to this issue.

Issue 22: Charter version: What threshold test should be used to determine when the Parties will establish direct end office trunks?

CenturyTel version: Should the Parties utilize reasonable projections of traffic volumes in addition to actual traffic measurement in their determination of whether the threshold has been reached for purposes of establishing dedicated end office trunks versus after-the-fact traffic measurement solely for such determination.

Both Parties both propose threshold limits, such that when usage exceeds the threshold, direct end office trunks will be utilized. Charter believes the limits should be compared to actual

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traffic volumes. CenturyTel proposes comparisons to forecasted traffic volumes. In addition, the Panel will also address in this issue the basis for such a threshold, which the Panel had deferred from Issue 19. CenturyTel, also in Issue 19, raised an issue whether the existing trunking arrangements should be allowed to be abandoned, which will now be addressed here. To the extent there is also language related to one-way trunks in the proposed contract language for this issue, the Panel addressed that issue in its determination of Issue 21.

Positions of the Parties

(a) Charter

In Issue 19, Charter points to Wis. Stat. § 196.04 as authorizing this Commission to impose a limitation on indirect interconnection. Charter points to the guidance provided by this Commission in docket 05-TI-1068 that any decision whether to compel direct interconnection would likely be carried out on “a route-by-route basis or at least a limited bundle of similar routes.”⁵³ Charter accepts the use of a threshold based on a DS-1 volume, also known as twenty-four or more trunks, as a threshold above which it would agree to use direct end office trunking. Charter also equates that threshold to 240,000 minutes per use per month.

In evaluating whether that threshold has been met, Charter proposes to make a comparison to actual traffic volumes. Charter believes the use of projected volumes would be problematic as projections may prove incorrect and could thus require Charter to establish direct end office trunks that are not necessary. This could increase Charter’s cost unnecessarily. Use of forecasts could also lead to disputes. Charter believes the use of actual traffic measurements will better allow a CLEC to exercise its § 251(a) rights.

⁵³ Final Decision, *Investigation on the Commission’s Own Motion Into the Treatment of Transiting Traffic*, No. 05-TI-1068, at 15-16 (Wis. PSC Dec. 12, 2006).

Charter believes its proposal to use a mix of direct and indirect interconnection depending on the volume of traffic would be consistent with an approach where the Commission would further determine whether to require direct interconnection.

(b) CenturyTel

As discussed in Issue 19, CenturyTel believes its offering of indirect interconnection is voluntary. However, for market entry purposes CenturyTel offers a threshold for converting to direct end office trunking and to compare that threshold to forecasted traffic volumes. CenturyTel believes the parties should move to dedicated end office trunks in time to avoid overburdening common trunk facilities and avoid possible network degradation. CenturyTel believes Charter's proposal would only address the issue after problems arise, which would be contrary to service quality standards. CenturyTel notes that projections of traffic are commonplace in the telecommunications industry. CenturyTel believes that projections are the best information available to ensure quality service to the end users of both parties. While CenturyTel agrees to the DS-1 threshold, it believes that threshold equates to 200,000 minutes per use per month. In relation to the use of indirect interconnection, CenturyTel raises a concern that Charter should not be allowed to be abandon the existing trunking arrangements.

Proposed Contract Language

The Panel attempts to identify the specific language each party has proposed relative to the specific issue of whether there should be a limit on the use of indirect interconnection, and if so what such a limit should be. Both parties provide varying language in this regard for Article V, Interconnection, Transport and Termination, sections 3.3.1.2, 3.3.1.3, and 3.4.2.1.1. CenturyTel proposes section 3.3.2, which is omitted by Charter.

3.3.1.2 Unless otherwise agreed, the Parties shall exchange all Local Traffic and ISP-bound Traffic indirectly through one or more transiting carriers until the total volume of Local Traffic and ISP-bound Traffic being exchanged between the Parties' networks exceeds 240,000 minutes per month for three (3) consecutive months, at which time either Party may request the establishment of Direct Interconnection. Notwithstanding the foregoing, if either Party is unable to arrange for or maintain transit service for its originated Local Traffic upon commercially reasonable terms before the volume of Local Traffic and ISP-bound Traffic being exchanged between the Parties' networks exceeds 240,000 minutes per month, that Party may unilaterally, and at its sole expense, utilize one-way trunk(s) for the delivery of its originated Local Traffic to the other Party.

3.3.1.3 After the Parties have established Direct Interconnection between their networks, neither Party may continue to transmit its originated Local Traffic and ISP-bound Traffic indirectly except on an overflow basis to mitigate traffic blockage, equipment failure or emergency situations.

3.3.1.2 Indirect Network Connection shall be accomplished by CenturyTel and **CLEC each being responsible for delivering Local Traffic to and receiving Local Traffic at the Tandem Switch serving the CenturyTel end office. Each Party is responsible for the facilities

to its side of the tandem. Each Party is responsible for the appropriate sizing, operation, and maintenance of the transport facility to the tandem.

3.3.1.3 The Parties agree to enter into their own agreements with third-party providers. In the event that **CLEC sends traffic through CenturyTel's network to a third-party provider with whom **CLEC does not have a traffic interexchange agreement, then **CLEC agrees to indemnify CenturyTel for any termination charges rendered by a third-party provider for such traffic.

3.3.2. Direct Network Connection and Point of Interconnection (POI)

3.3.2.1 Unless the parties mutually agree otherwise, a Direct Network Connection and a POI shall be established upon occurrence of any of the triggers set forth in Section 3.3.2.4 of this Article.

3.3.2.2 A Direct Network Connection shall be established by connecting **CLEC's network to CenturyTel's network at a technically feasible point on CenturyTel's network within the CenturyTel local exchange. The connection can be established in any of the manners described in Section 2 of this Article.

3.3.2.3 The Direct Network Connection point established in Section 3.3.2.2 of this Article shall also be the Local POI. Each party shall be responsible for establishing and maintaining all facilities on its side of the Local POI. Each Party is responsible for the appropriate sizing, operation, and maintenance of the transport facility to the POI.

3.3.2.4 Unless the parties agree otherwise, a Direct Network Connection and Local POI shall be established upon the occurrence of either of the following:

3.3.2.4.1 **CLEC has begun serving end users within a CenturyTel local exchange, or has assigned to any end user numbers that are rated to a rate center that is within the local calling area of a CenturyTel exchange and the resulting Local Traffic that is to be exchanged between the Parties is equal to or greater than a DS-1 trunk equivalency as described in Section 3.3.2.5 of this Article.

3.3.2.4.2 Either Party is assessed transiting costs by a third party and such charges associated with a single traffic exchange route exceed \$200.00 for one month.

3.3.2.5 A DS-1 trunk equivalency is deemed established in any the following instances:

3.3.2.5.1 Traffic studies of peak busy CCS indicate that the number of trunks necessary to achieve a .001 Grade of Service based upon application of the Erlang B table is equal to or exceeds 24 for three consecutive months, or for three months of any consecutive five month period.

3.3.2.5.2 Combined two-way traffic between two single switches of each Party reaches 200,000 combined minutes of use per month for two consecutive months, or for any two months in a consecutive three-month period.

3.3.2.5.3 At any point where a traffic forecast prepared pursuant to requirements of Article III, Section 11 or Article V, Section 3.5 indicates that combined two-way traffic between two single switches of each Party will exceed 200,000 minutes of use per month.

3.3.2.5.4 In any instance where **CLEC has requested to port a number or numbers associated with an end user customer and it is known that local trunks previously associated with that customer and those numbers equaled or exceeded 24. In any other instance where it can be shown that a customer that **CLEC is about to serve previously had 24 or more local trunks associated with the service that the customer will disconnect or has disconnected in migrating its service to **CLEC.

3.3.2.5.5 In any instance where **CLEC is providing a tandem function then **CLEC must direct connect to CenturyTel pursuant to the terms of this section. Language should also require them to record and provide billing records for that traffic transiting their switch and terminating to CenturyTel.

3.3.2.6 The Parties may mutually agree to establish a Direct Network Interconnection even where none of the conditions set forth in Section 3.3.2.4 of this Article has occurred.

3.3.1.2 Each party shall be responsible for establishing and maintaining all facilities on its side of the POI. Each Party is responsible for the appropriate sizing, operation, and maintenance of the transport facility to the POI.

3.4 Trunk Groups

3.4.1 The following trunk groups shall be used to exchange local traffic between **CLEC and CenturyTel.

3.4.2 Local Interconnection Trunk Group(s) in Each Exchange

3.4.2.1 Direct End Office Trunking

3.4.2.1.1 **The Parties shall establish As described in 3.3.1.1, the Parties have established a direct End Office primary high usage Local Interconnection Trunk Groups for the exchange of Local Traffic, where actual or projected traffic volume reaches demand is or will be twenty four (24) or more trunks, for **three consecutive months** as described in Section 3.3.2.5 of this Article.**

Discussion

As the Panel determined in relation to Issue 19, Charter has a statutory right under § 251(a) to utilize indirect interconnection. There is no limit as to its use, such as for “start-up” market entry only. Accordingly, the Panel agrees with Charter that the ability of this Commission to require direct interconnection is based upon Wis. Stat. § 196.04. In order to establish a threshold the Panel considers the basis for selecting such a threshold. Under Wis. Stat. § 196.04 the Commission can evaluate whether the “public convenience and necessity require the use [of] physical connections.” If the Commission requires physical interconnections, it can further determine reasonable compensation and it would consider the factors in Wis. Stat. § 196.03(6).

On the record, witnesses for both parties agree that there is no absolute threshold that will result in the blocking of traffic. Per Charter’s witness it is a matter of preference as to how “hot”

to operate a network.⁵⁴ Per CenturyTel's witness, "It has to do with measuring busy hours and how many trunks may be in use during the busiest time of day, and it deals with an elaborate form of probabilities."⁵⁵ Further, the Charter witness clearly stated that Charter agreed to the application of a threshold and that Charter agreed to use end office trunking.⁵⁶ The CenturyTel witness did explain its proposed 200,000 is based on a "DS-1 traffic usage equivalency . . . related to the reality of network design and trunk deployment of telecommunications carriers."⁵⁷

In light of the record, the Panel does not find any particular set of facts in this case that would require end office trunking, although the factors discussed certainly could be taken into consideration. The Panel agrees with Charter that any decision whether to compel direct interconnection would be carried out on "a route-by-route basis or at least a limited bundle of similar routes." At that time, a record would be developed, and based on specific facts, the Commission would decide whether or not to require direct end office trunking. To the extent Charter would propose to abandon an existing direct end office trunk, such an issue could be taken up in that context of a specific case. In summary, the Panel views this award as an acceptance of a voluntary agreement to use a threshold. With that, the Panel chooses the least restrictive threshold as a threshold that has been mutually agreed upon by both parties.

Issue 22 Award

The Panel awards a threshold of 240,000 minutes per month to determine when to establish direct interconnection and when to limit indirect interconnection to an overflow basis. This threshold will be compared to three months of actual traffic volumes. The parties may seek

⁵⁴ Tr. 634-635, 894-895.

⁵⁵ Tr. 894.

⁵⁶ Tr. 636.

⁵⁷ Tr. 818.

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further determinations from the Commission regarding direct interconnection pursuant to Wis. Stat. § 196.03(6).

The Panel expects that given its award here and the awards on other related sections, the parties can reach their own agreement on redrafting the contract.

Issue 23: Addressed in Issue 20.

Issue 24: Charter version: Should Charter pay CenturyTel a tariffed access charge for transiting traffic in: (a) those instances where CenturyTel end office switches perform a transit functionality for unqueried calls that have been ported to another carrier; (b) those instances when CenturyTel transits Charter's traffic to a third-party carrier?

CenturyTel version: (a) Where Charter is the N-1 carrier for calls to ported numbers of third party carriers, should Charter be responsible for data base queries and the proper routing of its calls to third party carriers? (b) For calls that Charter fails to fulfill its N-1 carrier obligations and are routed improperly to a CenturyTel end office, what should Charter be required to pay to CenturyTel for the completion of such calls to third parties?

Position of the Parties

(a) Charter

Charter agrees that when it is the N-1 carrier for a ported number, it has the responsibility to query the database and properly route calls that are to go to third-party carriers. Charter also acknowledges that, on rare occasions, calls can be misrouted so that CenturyTel receives a call from Charter that does not include the proper routing information. When this happens, CenturyTel will need to query a database to receive the routing information, then transit the call to the designated carrier. Charter further agrees that it will pay CenturyTel to complete the call, but that the amount it will pay should be based on the cost CenturyTel incurs because this service is part of CenturyTel's interconnection obligations under § 251(c). Charter suggests that a transiting charge of \$.005 would be appropriate because this rate has been negotiated between the parties in another jurisdiction.

Charter supports its position that transiting of an unqueried call is a § 251(c) obligation by pointing to FCC rule 47 C.F.R. § 52.26(b)(1), which states that a local exchange carrier can block an unqueried call only if performing the database query is likely to impair network reliability.⁵⁸ While Charter cannot point to a decision where the FCC directly declared that transiting is an interconnection service, Charter did provide a record to establish that the FCC has indirectly held transiting to be an interconnection service. In particular, Charter points out that Qwest was fined for not submitting its transiting service agreement to the Minnesota commission for approval after the FCC ruled that it was required to do so. The inference is that the FCC requires that § 251(c) rates in interconnection agreements be cost-based and must be submitted to a state commission for approval, so by requiring Qwest to submit its transiting rate for approval, the FCC had determined that transiting is an interconnection service.⁵⁹

(b) CenturyTel

CenturyTel's position is that it will complete unqueried calls to ported numbers subject to reasonableness and to being reimbursed for its costs, although it is not obligated to complete the calls. CenturyTel's primary distinction between the FCC rules on transiting and the completion of nonqueried calls to ported numbers is that transiting typically makes use of tandem switches that are designed to handle transit traffic in the normal course of operations. In contrast, the local switches operated by CenturyTel are not designed to handle transit traffic, so when these switches receive a call that should have been ported to a different switch, it requires an extraordinary effort on CenturyTel's part, above and beyond the normal transiting process, to complete this call. It is the extra processes undertaken in addition to normal transiting that

⁵⁸ Charter Reply Br. 55.

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CenturyTel believes are not §251(c) interconnection obligations that are subject to TELRIC pricing.

CenturyTel further states that Charter should not be permitted to dispute the application of intrastate access charges to recover its costs for handling nonqueried calls because Charter did not raise the issue of TELRIC-based rates for transiting in the issues list for this arbitration, as required by § 252(b)(2) of the 1996 Act.

Proposed Contract Language

Charter and CenturyTel propose varying language for Article V., Interconnection & Transport & Termination, section 4.6.5; Article XI, Pricing, III. Interconnection Pricing; B Transiting Charges; Article XI, Pricing, VI Other Pricing; D. Additional Services, NP Dip Charge.

- 4.6.5 When CenturyTel receives an unqueried call from **CLEC to a telephone number that has been ported to another local service provider, **CenturyTel will complete such calls to the new local service provider and Charter shall pay CenturyTel the applicable transit rate and NP query dip charge set forth in Article XI (Pricing).**

⁵⁹ Second Report and Order, *In the Matter of Telephone Number Portability*, 12 F.C.C.R. 12,281, 12,324-25, ¶ 76 (1997).

B. Transiting Charges:

CenturyTel of the Midwest-Wisconsin, LLC Intrastate Access Tariff #1
<http://www.centurytel.com/resources/pdf/applications/tariffs>

Tandem Switching:	Intrastate Switched Access Service Tariff rate set forth in Section 26.2.2(A)(3) of CenturyTel of the Midwest-Wisconsin, LLC Intrastate Access Tariff No. 1
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Tandem Switched Facility	Intrastate Switched Access Service Tariff rate set forth in Section 26.2.2(A)(3) of CenturyTel of the Midwest-Wisconsin, LLC Intrastate Access Tariff No. 1
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Transport Switched Termination	Intrastate Switched Access Service Tariff rate set forth in Section 26.2.2(A)(3) of CenturyTel of the Midwest-Wisconsin, LLC Intrastate Access Tariff No. 1
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CHARTER PROPOSED TRANSIT RATE

\$.005

D. Additional Services

NP Dip Charge

**Rates set forth in the National
Exchange Carrier Association
Interstate Access Tariff FCC
No. 5**

**[TBD. No NECA interstate
access rates defined for
CenturyTel of Central
Wisconsin, LLC]**

Discussion

The Panel is persuaded that under 47 C.F.R. § 52.26(b)(1), CenturyTel is required to complete calls ported from Charter even if Charter has failed to conduct the query function. The FCC does give Century the option to not complete the call if doing so would impair its network reliability. Charter agrees that it is responsible for conducting the query and insists that instances where a query has not been completed are quite rare. The only real concern the Panel has over the issue of obligations is that it is possible for the delivery of non-queried calls by Charter to CenturyTel to move from being rare to common, and the Panel believes that if these calls do become common, CenturyTel would be justified in blocking the calls because they would start to impair its network reliability.

The more contested dispute between the parties, as has been the case on a number of the issues in this arbitration, is over the pricing standard to be applied. In addressing this issue, the Panel determines that there are two sets of pricing standards involved. One is the pricing standard applicable to the query function itself and the second is the pricing standard applicable to rerouting the call once the query has been made.

In relation to the queries, the charges associated with number portability are not governed by § 251(c). The requirement to provide number portability stems from § 251(b)(2). Recovery of cost associated with number portability is governed by § 252(e)(2). The application of the number portability cost recovery standards to the obligations of N-1 carriers is captured in the following statement of the FCC:

We note further that if the N-1 carrier does not perform the query, but rather relies on some other entity to perform the query, that other entity may charge the N-1

carrier, in accordance with guidelines the Commission will establish to govern long-term number portability cost allocation and recovery.⁶⁰

While the FCC rule 47 C.F.R. § 52.26(b)(1) prohibits CenturyTel from blocking an unqueried call, it says nothing about the terms of an arrangement between CenturyTel and Charter for CenturyTel to perform queries for Charter's unqueried calls. To the extent Charter relies on some other entity such as CenturyTel to perform its queries, then that other entity may charge Charter. The Panel further notes that Charter does not dispute that it is required to compensate CenturyTel to perform such queries. The Panel determines that in relation to pricing standards, the standards for arbitration per § 252 only contain § 252(d) pricing standards that are applicable to obligations under § 251(c)(2) and (3) and § 251(b)(5). There are no standards for arbitration of pricing related to number portability required by § 251(b)(2). However, it is clear that the TELRIC standard stemming from 47 U.S.C. § 252(d), as proposed by Charter, is not applicable. Therefore, CenturyTel's proposal for its charges for queries is reasonable.

However, in relation to the routing of the call the Panel is persuaded, as argued by Charter, that the service provided is the transiting of a local call and the FCC requires transiting rates that are included in interconnection agreements to be cost-based. The FCC's standard for establishing cost-based rates for interconnection is TELRIC. The Panel also understands that access rates typically have not been developed using TELRIC or other incremental cost-based standards, so it is not inclined to accept CenturyTel's proposed rates for completing non-queried calls from Charter.

The Panel is concerned that Charter has not provided evidence that its proposed rate of \$.005 reflects the TELRIC costs that CenturyTel would incur to complete the calls. Charter

⁶⁰ *Id.*, at ¶ 75.

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asserts that this rate has been negotiated between the parties in another agreement, but there is no evidence that this negotiation included the cost of the extra activity CenturyTel must perform in addition to normal transiting functions. To resolve this dispute, the Panel has decided to accept the \$.005 rate proposed by Charter. Because there is minimal information on the record to support this rate, CenturyTel will have the right to elect either to negotiate an amendment to the transit rate using §251/252 procedures, or to file a complaint with the Commission to establish a just and reasonable rate for transit service. CenturyTel must make this request within one year after final Commission approval of this agreement and after giving 30 days advance notice to both Charter and the Commission. The Panel expects that if, as Charter maintains, the incidence of non-queried calls delivered by Charter to CenturyTel is indeed quite rare, then it may not be worth CenturyTel's time and expense to renegotiate this rate. This assumes that Charter does not increase its use of CenturyTel's transiting functions when using indirect interconnection.

Issue 24 Award

The Panel awards CenturyTel's proposed rate for performing queries of unqueried calls delivered to CenturyTel by Charter. The Panel awards the language proposed by Charter for the transiting of these calls. Within one year of the adoption of this award, CenturyTel has the option either to negotiate an amendment to the transit rate using §251/252 procedures, or to file a complaint with the Commission to establish a just and reasonable rate for transit service. Before exercising this option, CenturyTel must give 30 days advance notice to Charter and to the Commission. The Panel expects that given the above description of its award and its award on other related issues, the parties can reach their own agreement on redrafting the contract.

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Issue 25: Addressed in Issue 2.

Issue 26: Resolved.

Issue 27: Resolved.

Issue 28: Charter version: Should CenturyTel be allowed to assess a charge for administrative costs for porting telephone numbers from its network to Charter's network?

CenturyTel version: When Charter submits an LSR requesting a number port, should Charter be contractually required to pay the service order charge(s) applicable to such LSR?

Issue 41: Should the Pricing Article include Service Order rates and terms?

Century proposes to apply a service order charge each time Charter forwards a subscriber request to port a telephone number from CenturyTel's network to Charter's. The issue here is whether this service order charge is a prohibited charge under the FCC's orders in its proceeding on number portability. *See* First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability*, 11 F.C.C.R. 8352 (1996).

Position of the Parties

(a) Charter

The petitioner proposes the following language for Article IX, Section 1.2.3 of the Interconnection Agreement:

1.2.3 Notwithstanding any other provision of this Agreement, the Pricing Appendices, and any attachment or appendix incorporated herein, the Parties shall not assess charges on one another for porting telephone numbers, or for processing service orders associated with requests for porting numbers. Neither Party will bill the other Party any service order charge for a LSR, regardless of whether that LSR is later supplemented, clarified or cancelled. Notwithstanding the foregoing, neither Party will bill an additional service order charge for supplements to any LSR submitted to clarify, change or cancel a previously submitted LSR.

(b) CenturyTel

CenturyTel would instead word Section 1.2.3 as follows:

- 1.2.3 The Party receiving the LSR will bill the service order charges set forth in the Pricing Article XI for each LSR received. The Party receiving the LSR will bill an Initial Service Order Charge for each initial LSR submitted. A subsequent Service Order Charge applies to any modification to an existing LSR.

Discussion

The Act facilitates competitive entry into the local telecommunications exchange market by mandating local number portability pursuant to § 251(b)(2). An incumbent local exchange carrier may not recover carrier-specific costs directly related to providing number portability from the competitive carrier submitting the request. Instead, those costs are recovered through a surcharge on local telephone service authorized by 47 C.F.R. § 52.33. The FCC defines carrier-specific cost directly related to providing number portability as follows:

72. We conclude that carrier-specific costs directly related to providing number portability are limited to costs carriers incur specifically in the provision of number portability services, such as for the querying of calls and the porting of telephone numbers from one carrier to another. Costs that carriers incur as an incidental consequence of number portability, however, are not costs directly related to providing number portability.

Third Report and Order, *Telephone Number Portability*, 13 F.C.C.R. 11,701, 11,740 (1998)(*Third Report and Order*).

The FCC further prohibits additional charges that may shift recovery of number portability costs to other carriers in a competitively biased manner:

62. We agree with Comcast 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. To the extent necessary, we clarify our decision accordingly. The Third Report and Order allows incumbent LECs to assess number portability charges in limited circumstances and only where the incumbent LEC provides number portability functionality: (1) on resellers of the

incumbent LEC's local service; (2) on purchasers of switching ports as unbundled network elements under section 251; and, (3) on other carriers for whom the LEC provides query services. Allowing the incumbent LECs to assess an end-user charge on resellers and on purchasers of switching ports as unbundled network elements is competitively neutral because the reseller and the purchaser of the switch port will incur the charge in lieu of costs they would otherwise incur in obtaining long-term number portability functionality elsewhere. (Notes omitted).

Memorandum Opinion and Order on Reconsideration and Order on Application for Review, *Telephone Number Portability*, 17 F.C.C.R. 2578, 2608 (2002) (*2002 Cost Reconsideration Order*).

Finally, the FCC later clarified that standard fee charges that are common to a variety of service order situations should be recovered from the customer submitting the order rather than through an end-user charge:

n. 49. ... With respect to the transaction charges that BellSouth intends to assess on Verizon Wireless, ... BellSouth has stated that, to the extent it imposes such charges, they are standard fees assessed for various services provided to carriers, which are unrelated to the provision of number portability, and therefore are not recoverable through an end-user (or other portability) charge. ... [F]ees for non-LNP related services do not satisfy the Commission's cost recovery standards for portability-related charges. Were BellSouth to seek recovery of such costs through its intermodal tariff filing, they would be rejected. However, because BellSouth is not seeking to recover these costs from its own end-users, there is no danger of double recovery.

Order, *Telephone Number Portability; BellSouth Corporation Petition for Declaratory Ruling and/or Waiver*, 19 F.C.C.R. 6,800, 6806 n. 49 (2004) (*BellSouth Declaratory Ruling*).

For each number porting order, there are a set of administrative or record-keeping tasks necessary to enter and prepare the order and an additional set of tasks that Century believes are more central to the actual porting event.⁶¹ Century distinguishes these two sets of tasks in that the first set are common to a variety of service order situations, while the second set only occur

⁶¹ Tr. 714.

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in the event of a number porting request. Century would recover the cost of the first set of tasks with its service order charge, and recover the cost of the second set of tasks through its end-user Local Number Portability (LNP) charge.

Charter, following the language of the *2002 Cost Reconsideration Order*, asserts that the service order costs are a part of the number porting process, and would not be incurred but for the fact that Charter submitted the request. Thus Charter would describe the service order charge as an interconnection charge or add-on to an interconnection charge within the meaning of that earlier order.

The testimony on this point does not resolve this dispute. The Century witness testified that the service order charge at issue compensates the carrier for administrative activities undertaken prior to executing the porting function, and that these activities and the associated costs are incidental to the provision of number portability.⁶² However, from the witness' description of the tasks, it is simply not clear that the description matches the comment in footnote 49 of the *BellSouth Declaratory Ruling*.

The main problem with this issue is that the dispute turns on the meaning of a footnote in an order meant to clarify a point of policy dissimilar from the issue in dispute here. Century asserts on the basis of this footnote that it could not recover its service order costs of number porting through its end-user surcharge. However, it is not clear from the record whether Century's assertion is correct or not.

In this circumstance, it would seem prudent to steer closely to basic principles here, and allow the parties to pursue a clarification from the FCC if they wish to do so. At bottom, the Century is required by statute to port numbers. It is appropriate to recover the cost of porting a

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number through an end-user surcharge since charging a customer for each number porting request would create a financial impediment and frustrate the purpose of the underlying statute. Dividing the tasks necessary to port a number in two, and permitting an additional charge to recover the one set of costs would certainly cause at least some impediment to the competitive offering of telephone service. Whether that brake on competition would be outweighed by the risk of unrecovered costs under the FCC's several LNP orders cannot be answered from this record. Therefore it is appropriate to award the language proposed by Charter for these issues.

Issues 28 and 41 Award

The Panel awards the language proposed by Charter for Article IX, Section 1.2.3.

Issue 29: Does CenturyTel have the right to monitor and audit Charter's access to its OSS?

Issue 29 involves whether CenturyTel should be required to obtain Charter's consent before CenturyTel would engage in auditing or monitoring Charter's access to CenturyTel's Operations Support Systems. An example of a function the OSS provides is Charter's ability to electronically submit orders to CenturyTel, or Charter's access to a customer's records including the features to which a customer subscribes.

Positions of the Parties

(a) Charter

Charter raises concerns that the terms audit and monitor are undefined. Charter questions CenturyTel's intent in auditing or monitoring activity and whether the activity would be limited to checking for compliance with terms of the agreement and applicable law. Charter agrees that it is required to comply with these requirements. To allay its concerns, Charter proposes

⁶² Tr. 714.

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language that would require CenturyTel to obtain consent from Charter before engaging in this activity. Charter opposes CenturyTel's proposal which it believes would give CenturyTel unrestricted rights to monitor and audit Charter's use of the OSS. Charter believes this would provide CenturyTel "the potential to use such information in an anti-competitive manner to initiate marketing retention programs to retain customers."

(b) CenturyTel

CenturyTel believes that its proposed language would provide it the ability to engage in reasonable monitoring and auditing of Charter's access to CenturyTel's OSS to ensure compliance with the terms of the agreement and applicable law. CenturyTel objects to Charter's proposed language that it believes would provide Charter the ability to veto CenturyTel's legitimate rights to assure compliance. CenturyTel believes other sections of the agreement and CenturyTel's corporate policy regarding the use of customer proprietary information will sufficiently protect Charter from the anti-competitive concerns Charter raises. CenturyTel believes that requiring CenturyTel to obtain consent to these activities would defeat the purpose of the monitoring or auditing activity.

Proposed Contract Language

Charter and CenturyTel each propose certain language additions to Art. X, sections 8.3.1, 8.3.2, and 8.3.3.

- 8.3.1 CenturyTel shall have the right (but not the obligation) to audit **CLEC to ascertain whether **CLEC is complying with the requirements of Applicable Law and this Agreement with regard to **CLEC's access to, and use and disclosure of, CenturyTel OSS Information.
- 8.3.2 Without in any way limiting any other rights CenturyTel may have under the Agreement or Applicable Law, CenturyTel shall have the right (but not the obligation) to may, upon CLEC's consent, monitor **CLEC's access to and use of CenturyTel OSS Information which is made available by CenturyTel to **CLEC pursuant to this Agreement, to ascertain whether **CLEC is complying with the requirements of Applicable Law and this Agreement, with regard to **CLEC's access to, and use and disclosure of, such CenturyTel OSS Information. The foregoing right shall include, but not be limited to, the right (but not the obligation) to electronically monitor **CLEC's access to and use of CenturyTel OSS Information which is made available by CenturyTel to **CLEC through CenturyTel OSS Facilities.
- 8.3.3 Information obtained by CenturyTel pursuant to this Section 8.0 shall be treated by CenturyTel as Confidential Information of **CLEC pursuant to Section 14.0, Article III of the Agreement; provided that, CenturyTel shall have the right (but not the obligation) to may, upon CLEC's consent, use and disclose information obtained by CenturyTel pursuant to this Article to enforce CenturyTel's rights under the Agreement or Applicable Law.

Discussion

The Panel turns to 47 U.S.C. § 222(b) regarding the use of information obtained from another telecommunications carrier as follows:

(b) Confidentiality of carrier information

A telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts.

Also, as the parties have chosen to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199 to resolve their disagreement, which in turn, as indicated in the notice, allows consideration of other provisions

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of Wis. Stat. ch. 196 as may be pertinent hereto. Accordingly, the Panel also considers the factors listed in Wis. Stat. § 196.03(6), in particular, (a) the promotion and preservation of competition consistent with Wis. Stat. ch. 133 and Wis. Stat. § 196.219 and (b) the promotion of customer choice. The other factors in Wis. Stat. § 196.03(6) are not relevant to the issue at hand.

The Panel agrees with both Parties' concerns. CenturyTel's language does not provide reasonable limits on its proposed monitoring and auditing activity to assure such information is not used by CenturyTel for its marketing activity. However, Charter should not be able to reject monitoring or auditing for compliance or to use consent to defeat the purpose of monitoring and auditing activity.

The Panel agrees with Charter's concern that CenturyTel's corporate policy provides no protection that information gained from monitoring and auditing activity will not potentially be used for anti-competitive purposes. Such policies and procedures are under the sole control of CenturyTel and subject to change. Both the existence of § 222(b) and a recent determination by the FCC that Verizon violated this section⁶³ demonstrate that proper use of such information is important to promoting competition and customer choice. Charter provided reference to language in the AT&T/Charter interconnection agreement which limits AT&T's use of such information. The Panel disagrees with CenturyTel's assertion that Charter's concern regarding CenturyTel's possible anti-competitive use of auditing or monitoring has been addressed.

However, the Panel also agrees that Charter should not be able to reject being subject to monitoring and auditing, and that providing consent should not be able to defeat the purpose of such monitoring and auditing activity. The Panel believes it would be reasonable to clarify the purposes of the monitoring and auditing activity and to obtain enforceable limitations on the use

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of information gained in that context. Consent that is limited to these purposes would be reasonable. The Panel will add language that Charter's consent shall not be unreasonably withheld.

Issue 29 Award

The Panel awards the following language for Article X:

- 8.3.1 CenturyTel may, upon Charter consent, which consent shall not be unreasonable withheld, audit Charter to ascertain whether Charter is complying with the requirements of Applicable Law and this Agreement with regard to Charter's access to, and use and disclosure of, CenturyTel OSS Information.
- 8.3.2 Without in any way limiting any other rights CenturyTel may have under the Agreement or Applicable Law, CenturyTel may, upon Charter consent, which consent shall not be unreasonably withheld, monitor Charter's access to and use of CenturyTel OSS Information which is made available by CenturyTel to Charter pursuant to this Agreement, to ascertain whether Charter is complying with the requirements of Applicable Law and this Agreement, with regard to Charter's access to, and use and disclosure of, such CenturyTel OSS Information. The foregoing right shall include, but not be limited to, the right (but not the obligation) to electronically monitor Charter's access to and use of CenturyTel OSS Information which is made available by CenturyTel to Charter through CenturyTel OSS Facilities.
- 8.3.3 Information obtained by CenturyTel pursuant to this Section 8.0 shall be treated by CenturyTel as Confidential Information of Charter pursuant to Section 14.0 Article III of the Agreement; provided that, CenturyTel may, upon Charter's consent, which consent shall not be unreasonably withheld, use and disclose information obtained by CenturyTel pursuant to this Article to enforce CenturyTel's rights under the Agreement or Applicable Law.

Issue 30: Should the Agreement preserve CenturyTel's rights to recover from Charter certain [unspecified] costs of providing access to "new, upgraded, or enhanced" OSS? [bracketed word is Charter's wording]

This issue concerns whether there should be a provision in the interconnection agreement that would reserve CenturyTel a right to charge Charter for potential future upgrades or enhancements to its OSS.

⁶³ *In the Matter of Bright House Networks, LLC, et al., v. Verizon California, Inc., et al.*, 23 F.C.C.R. 10704 (2008).

Positions of the Parties

(a) Charter

Charter believes that CenturyTel should not have the unilateral right to recover unspecified costs related to future upgrades or enhancements to CenturyTel's OSS. Charter believes the appropriate process in the event of CenturyTel wishes to seek recovery would be the contract amendment process. This would include an examination of existing rate elements; potential additions or changes to rate elements; the determination of pricing standards; and appropriate costs consistent with applicable laws and regulations. Accordingly, Charter omits section 15.2 of Article X, Access to Operations Support Systems, and believes parties should rely on Article III, section 4, Amendments, and Article III, section 12.1, Changes in law, with the added protection of the dispute resolution process of Article III, section 20. Charter objects to the inclusion of CenturyTel's proposed language as it believes the section would shift the burden to Charter to rebut any newly proposed OSS charges.

(b) CenturyTel

CenturyTel proposes to add section 15.2, of Article X, Access to Operations Support Systems, in order to preserve its right to recover costs associated with future upgrades and enhancements to its OSS. CenturyTel explains that its proposed language would require CenturyTel to obtain Commission approval and an order from the Commission that Charter is responsible for payment of the new charges, thus providing protections to Charter that the charges are reasonable. Without such a provision, CenturyTel is concerned that Charter will argue that the lack of such a provision in the interconnection agreement prohibits CenturyTel from assessing such a charge to Charter, per Article I, section 3, Scope of the Agreement.

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CenturyTel believes the existing provisions of Article III, sections 4, and 12, do not adequately protect CenturyTel as Charter could “simply say no to any proposed amendment,” and an enhancement may not be related to a change of law. CenturyTel believes this proposed provision is necessary to preserve its right to recover such costs.

Proposed Contract Language

CenturyTel proposes to add section 15.2 of Art. X, Access to Operations Support Systems (OSS). Charter intentionally omits this section.

- 15.2 CenturyTel is entitled to recover its unrecovered costs of providing access to new, upgraded or enhanced CenturyTel Operations Support Systems via the CenturyTel OSS Services, CenturyTel Pre-OSS Services, or CenturyTel OSS Facilities, or other means pursuant to rates or other charges (“OSS charges”) determined by or otherwise approved by the Commission upon CenturyTel’s submission in accordance with Applicable Law. Should CenturyTel incur the costs of providing access to new, upgraded or enhanced CenturyTel Operations Support Systems during the Term of this Agreement, **CLEC will be responsible for paying such OSS charges under this Agreement only if and to the extent determined by the Commission.

Discussion

The Panel views this issue as a question whether or not CenturyTel does have a right to recover costs associated future upgrades or enhancements to CenturyTel’s OSS in a separate charge. The Panel considers pertinent statutes, rules, and orders and in particular the following information. The FCC has defined OSS as an unbundled network element as follows:

§ 51.319 Specific unbundling requirements.

(g) *Operations support systems.* An incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to operations support systems on an unbundled basis, in accordance with section 251(c)(3) of the Act and this part. Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC’s databases and information. An incumbent LEC, as part of its duty to provide access to the pre-ordering function,

shall provide the requesting telecommunications carrier with nondiscriminatory access to the same detailed information about the loop that is available to the incumbent LEC.

FCC rules in pertinent parts related to the pricing of UNEs are as follows:

Subpart F—Pricing of Elements

§ 51.501 Scope.

(a) The rules in this subpart apply to the pricing of network elements, interconnection, and methods of obtaining access to unbundled elements, including physical collocation and virtual collocation.

(b) As used in this subpart, the term “element” includes network elements, interconnection, and methods of obtaining interconnection and access to unbundled elements. ...

§ 51.503 General pricing standard.

(a) An incumbent LEC shall offer elements to requesting telecommunications carriers at rates, terms, and conditions that are just, reasonable, and nondiscriminatory.

(b) An incumbent LEC’s rates for each element it offers shall comply with the rate structure rules set forth in §§ 51.507 and 51.509, and shall be established, at the election of the state commission—

§ 51.505 Forward-looking economic cost.

(a) In general. The forward-looking economic cost of an element equals the sum of:

(1) The total element long-run incremental cost of the element, as described in paragraph (b); and

(2) A reasonable allocation of forward- looking common costs, as described in paragraph (c).

§ 51.507 General rate structure standard.

(a) Element rates shall be structured consistently with the manner in which the costs of providing the elements are incurred.....

(e) Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.

The Panel also turns to the following prior Commission determination related to non-recurring charges associated with OSS functions in the Final Decision, *Investigation Into*

Ameritech Wisconsin's Unbundled Network Elements, No. 6720-TI-161 (Wis. PSC. March 22, 2002):

Nonrecurring costs are one-time costs for activities required to initiate or provide telecommunications services and UNEs. Such activities are accomplished through Ameritech's Operation Support Systems (OSS).

...

...Ameritech argued that NRCs [Non-recurring Charges] must be based on the systems that Ameritech has actually put in place with the degree of mechanization they plan to make in the near future. Ameritech further argued that forward-looking costs should be based on its systems or it will be denied recovery of costs it will actually incur. It argued that anything else is fantasizing about some imaginary, most efficient provider.

However, the Commission recognizes that CLECs do not have a choice to look to another provider to order loops, which were constructed and placed into service under decades of monopoly regulation. Ameritech lacks sufficient market incentive to control costs in the provision of UNEs to CLECs. If Ameritech designs and constructs inefficient or suboptimal systems and is allowed to pass on these costs to CLECs, it increases CLECs' cost of doing business. In addition, if Ameritech's own retail ordering and provisioning systems are designed to cost less to operate, it would give Ameritech an automatic price advantage over its competitors. However, the Commission balances this concern with the equal concern that if CLECs do not pay reasonable costs for NRCs, it will give CLECs an advantage over Ameritech and other facilities-based providers that perform their own activities associated with NRC.

Id., at 166-167.

...

One Time Computer Expense. Ameritech argued that additional costs should be added to NRCs to amortize past one time computer set up costs. The CLECs argued that these costs were already included in the mark-up for joint and common costs. The Commission accepts the CLECs' position that these costs are already included in the mark-up for joint and common costs.

Computer costs are included in the accounts that developed the joint and common costs. Developing mechanized systems for OSS is an ongoing process which is already recorded in these accounts. Ameritech has been and will continue to develop mechanized OSS systems. The Commission concludes it is reasonable to assume one-time computer expenses are included in the mark-up for joint and common costs.

Id., at 183.

Based on this information, the Panel determines that CenturyTel does not have an unqualified right to demand payment from Charter for recovery of costs for any upgrades or enhancements to its OSS. While the facts and circumstances associated with any particular upgrade should be taken into consideration, the initial assumption would seem to be that such costs are recovered in the joint and common mark-up that is applied in developing other UNE, interconnection, or non-recurring charges. Further supporting detail regarding all of CenturyTel's charges would be needed to determine whether cost recovery is handled in a different manner for CenturyTel than the Ameritech experience described above. Any new rates or reconsideration of rates established in this agreement would need to take into consideration factors Charter enumerated such as an examination of existing rate elements, potential additions or changes to rate elements, the determination of pricing standards, and appropriate costs consistent with applicable laws and regulations.

To the extent that CenturyTel argues that Charter could simply say no to any proposed amendment, CenturyTel may resort to dispute resolution process, which ultimately may bring a dispute to the Commission for determination. While CenturyTel expresses concern that Charter may argue that the lack of CenturyTel's sought after provision in the interconnection agreement may prohibit CenturyTel from assessing such a charge to Charter, this can be a legitimate argument based on the particular facts and circumstances involved. Charter should not be prohibited from making this argument.

Issue 30 Award

The Panel awards Charter's proposal to omit section 15.2 of Article X, Access to Operations Support Systems.

Issue 31: Resolved.

Issue 32: How should each Party's liability be limited with respect to information included, or not included, in Directories?

This issue involves indemnity between carriers and limitations on damages related to directory services.

Positions of the Parties

(a) Charter

Similar to Issue 15, Charter proposes the use of a comparative negligence approach to liabilities related to directory errors or omissions. Charter believes that neither party's indemnity obligation should be limited to the extent that the indemnified party has engaged in acts that are deemed negligent, or reckless, wanton or willful misconduct. The indemnified party may not demand indemnification to the extent that it was at fault. Charter believes damages should be measured by actual direct damages and does not believe damages should be limited to the amount paid by Charter to CenturyTel. Particular concern is raised regarding an error where a non-published number might be published.

(b) CenturyTel

CenturyTel believes Charter's approach is unreasonable as CenturyTel believes it would be subject to potentially unlimited liability for an error or omission relating to subscriber listings on the part of it or its publisher's ordinary negligence. CenturyTel believes liability for such an error should be limited to the amount paid by Charter to CenturyTel. CenturyTel characterizes its proposal as stipulated damages and believes the approach would provide reasonable limits on liability for directory listing errors or omissions to ensure customers are charged reasonable rates. CenturyTel believes Charter is responsible should a Charter customer request non-

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published status and the listing becomes included in the publication as Charter is contractually prohibited from providing to CenturyTel or a third party publisher the listings of any of its customers who do not wish to have published listings. CenturyTel ties Charter's insertion of the phrase "this agreement" in Article III, § 30.3.3.13 to the Panel's decision on this issue.

Charter and CenturyTel propose the following language for Article XII, Directory Services, sections 7.1, 7.2 and 7.3 and Article XI, Pricing, section V.

7.0 LIMITATION OF LIABILITY; INDEMNITY

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

CenturyTel's liability to **CLEC or any **CLEC End User Customer for any errors or omissions in Directories published by CenturyTel and/or Publisher (including, but not limited to, any error in any End User Customer or **CLEC listing), or for any default or breach of this Article, or for any other claim otherwise arising hereunder, shall be limited to actual damages , except to the extent that such errors or omissions, default, breach, or Claims arise from the CenturyTel's, or its Publisher's, negligence, reckless, wanton or willful misconduct. However, notwithstanding any other provision of this Agreement, CenturyTel's liability shall not be limited in any instance in which **CLEC accurately and timely conveys to CenturyTel or its Publisher that its End User Customers desire not to be published in a directory and CenturyTel, or its Publisher, causes the publication of such End User Customer data or listings. **CLEC shall fully indemnify CenturyTel in accordance with the provisions of Section 7.2 below as to any errors or omissions in a **CLEC End User Customer listing for which CenturyTel is not liable under this Section. CenturyTel shall fully indemnify **CLEC in accordance with the provisions of Section 7.2 below as to any errors or omissions in a **CLEC End User Customer listing for which CenturyTel is liable under this Section.

- 7.2 **CLEC agrees to indemnify, defend, and hold harmless CenturyTel, its directors, officers, employees, agents and their affiliates (collectively, the "Indemnified Parties") from all losses, claims, damages, expenses, suits, or other actions, or any liability whatsoever including, but not limited to, damages, liabilities, costs and attorneys' fees, made or asserted by any third party (including, but not limited to End User Customers) against the Indemnified Parties and arising out of CenturyTel's performance under the

terms of this Article, from **CLEC's or any third party's use of the information provided, or from **CLEC's performance.

****CLEC agrees to indemnify, defend, and hold harmless CenturyTel, its directors, officers, employees, agents and their affiliates (collectively, the "Indemnified Parties") from all losses, claims, damages, expenses, suits, or other actions, or any liability whatsoever including, but not limited to, damages, liabilities, costs and attorneys' fees, made or asserted by any third party (including, but not limited to End User Customers) against the Indemnified Parties and arising out of any error or omission for which CenturyTel is not liable pursuant to Section 7.1 above. CenturyTel agrees to indemnify, defend, and hold harmless **CLEC, its directors, officers, employees, agents and their affiliates (collectively, the "Indemnified Parties") from all losses, claims, damages, expenses, suits, or other actions, or any liability whatsoever including, but not limited to, damages, liabilities, costs and attorneys' fees, made or asserted by any third party (including, but not limited to End User Customers) against the Indemnified Parties and arising out of any error or omission for which CenturyTel is liable pursuant to Section 7.1 above.**

- 7.3 To the maximum extent permitted by the applicable law, in no event shall CenturyTel or **CLEC be liable for any special, incidental, indirect, or consequential damages whatsoever including, without limitation, damages for loss of profits or any other pecuniary loss arising out of or in connection with this Article, even if such Party has been advised of the possibility of such damages, except where such damages occur as the result of a breach of confidentiality, or relate to a CenturyTel an indemnity claim made against either Party that is covered by Section 7.2 above. **Notwithstanding the foregoing, or any other provision of this Agreement, neither Party's liability shall be limited in any instance in which such Party, or its Publisher, causes the publication of End User Customer data or listings, where such End User Customer requests that such data or listings not be published in a directory.**

V. DIRECTORY SERVICES RATES AND CHARGES

Preliminary Pages	No Charge
Directory Listings	
Primary Listings as Specified in Article XII	No Charge
Tariff Items requested by Charter (<i>e.g.</i> , additional listings, foreign listings, enhanced listings)	Rates set forth in CenturyTel of Central Wisconsin, LLC General Exchange Tariff P.S.C.
	of Wisconsin N. 1, Section 8, Subsection 6 - Rates
Order Fulfillment	No Charge
White Pages Galleys/Page Proofs/Corrections to Listings Supplied by	Cost determined by Publisher upon request by Charter
Copies of Directories	No Charge to Local End Users

Discussion

There is no testimony on this issue. There are specific federal and state statutes, rules and orders that relate to directories. The general federal statute, § 251(b)(3), includes the following duty for all local exchange carriers:

DIALING PARITY.-The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, without unreasonable dialing delays.

However, nothing in the FCC's implementing rules specifically identifies how indemnity should be handled in the case of directories.⁶⁴ The performance standard for directory services is "at least equal in quality" to that which a local exchange carrier provides to itself. To the extent that the parties choose to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199 to resolve their disagreement. The Panel refers to Wis. Admin. Code § PSC 165.055 regarding directories.

Directories. (1) Exchange alphabetical telephone directories shall be made available to customers without charge for each local switched access line service. The listings of customers in foreign exchanges to which extended-area service is provided shall also be made available without charge to all local customers. Where such listings are not actually furnished all customers, the utility shall state in the directory how such listings may be obtained. Inclusion of all listings for the calling area within a single volume is recommended.

In Wisconsin, local exchange carriers are required to provide directories and directory listings free of charge. As seen in the undisputed language of Article XI., Pricing, CenturyTel will provide Charter with directories and directory listings free of charge. This is one element of non-discriminatory access, as CenturyTel provides directory listings to its own customers free of charge. To the extent enhanced listings are requested, which would include non-published numbers, CenturyTel proposes to provide the service from its tariff for which there is a nominal charge. CenturyTel's tariffs for enhanced listings include a limitation on liability. Charter proposes to include the rates set forth in the tariff, but not the terms of the tariff. The Panel determines that because CenturyTel's prices for directories and directory listings are limited by

⁶⁴ 47 C.F.R. § 51.217(a)(2) Nondiscriminatory access. "Nondiscriminatory access" refers to access to telephone numbers, operator services, directory assistance and directory listings that is at least equal to the access that the providing local exchange carrier (LEC) itself receives. Nondiscriminatory access includes, but is not limited to: (i) Nondiscrimination between and among carriers in the rates, terms, and conditions of the access provided; and (ii) The ability of the competing provider to obtain access that is at least equal in quality to that of the providing LEC.

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regulation, it is reasonable to include the terms and conditions associated with the provision of the service at those rates. The Panel determines that it is reasonable for the liability limitations as enumerated in CenturyTel of Central Wisconsin, LLC, General Exchange Tariff as it applies to Directory Services to be applicable between carriers.

However, state commissions are also given the role to enforce provisions regarding interactions between carriers. Wis. Stat. § 196.199 includes specific authorization and procedures to handle disputes that arise between carriers with differing limits on Commission ordered forfeitures depending on whether a failure is willful or not. Further, Wis. Stat. § 196.219 provides additional enforcement powers in relation to protection of telecommunications consumers (which includes a telecommunications provider) and allows the commencement of civil actions. Wis. Stat. § 196.199(4m) allows the Commission to request the attorney general to bring an action “to compensate any person for any pecuniary loss caused by the failure of a utility or provider to comply with this section.”

In light of the foregoing, the Panel is also concerned that the indemnity section covering directory services should not expand, limit, or otherwise alter the duties between carriers or the Commission’s ability to supervise compliance those duties. The Panel will add a preamble to this section clarifying the overriding application of these requirements.

In relation to Charter’s concern that numbers with a non-published designation may indeed be published in error, the Panel does not intend for this award to prejudice any particular event that may occur. As noted above, CenturyTel is required to provide access to directory assistance and directory listings that are at least equal in quality to that which it provides to itself. In this particular proceeding, there have been no particular facts and circumstances presented on

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the record regarding CenturyTel's processes and care regarding non-published numbers. However, while CenturyTel states that Charter is contractually prohibited from providing to CenturyTel or a third party publisher the listings of any of its customers who do not wish to have published listings, at the same time CenturyTel contracted with a third party vendor to maintain different databases for directory assistance information and directory book publication. Charter should have no less protection against the directory publisher's errors than CenturyTel has secured for itself. CenturyTel cannot absolve itself of its responsibility to supervise the conduct of its selected third party vendor will be further covered in Issue 33.

Issue 32 Award

The Panel awards the liability limitation in CenturyTel tariffs as it applies to directory services. Thus, the reference to the tariff should cover all aspects of directory service. However, that limitation does not change the fact that CenturyTel is also subject to the further requirements of § 251(b)(3) and the implementing regulations currently contained in 47 C.F.R. § 51.217. The Panel expects, given this award and the awards on other issues, that the parties can reach their own agreement on redrafting the contract.

Issue 33: How should the Agreement define each Party's directory assistance obligations under Section 251(b)(3)?

This issue addresses CenturyTel's use of a third-party vendor for directory assistance information.

Positions of the Parties

(a) Charter

Charter seeks language in the agreement that will ensure that when CenturyTel subscribers dial directory assistance and request the phone number of a Charter subscriber, that

phone number, along with other relevant information, will be available. Charter seeks this language because it has had a prior experience with a third-party vendor selected by CenturyTel where CenturyTel's customers, upon requesting directory assistance to reach Charter's customers, were told the information was not available. In resolving the problem, it was determined that CenturyTel's third party vendor only queried a local database and did not query a national database where Charter's subscriber listings resided. Further when Charter alerted CenturyTel to the problem, CenturyTel took the position that the problem was Charter's problem and that Charter was responsible for dealing with CenturyTel's third-party vendor. Charter explains that its proposed language will obligate CenturyTel to ensure that it, or its vendor, always queries the appropriate directory assistance databases to ensure that Charter's end user subscriber directory listing information is made available to CenturyTel's subscribers when they call directory assistance. Further, Charter disputes an administrative charge which CenturyTel proposes in briefing as inconsistent with the requirement of 47 C.F.R. § 51.217(c)(3) that "[a] LEC shall accept the listing of those customers served by competing providers for inclusion in its directory assistance/operator services databases." Charter believes that the fact that CenturyTel sub-contracts out specific directory assistance functions does not relieve CenturyTel of the obligation to fulfill its responsibilities under U.S.C. § 251(b)(3).

(b) CenturyTel

CenturyTel asserts that it does not provide directory assistance itself, but rather contracts with a third party vendor. In its vendor selection process, CenturyTel has selected a vendor that will allow Charter to submit directory assistance listing data directly to the vendor without charge to Charter. Accordingly, it is CenturyTel's position that if Charter requests that

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CenturyTel process Charter's directory listing information, then Charter must pay the cost incurred by CenturyTel to perform that function. As Charter has not requested this service in the past, CenturyTel believes it should be provided the opportunity to set forth terms and a rate for providing such a service. CenturyTel requests that the Panel modify Charter's language in this manner in the event the Panel approves Charter's language.

Further, as CenturyTel believes that because it uses the same processes to submit its listings to its third-party vendor, it is providing directory assistance services to Charter on the same rates, terms, and conditions on which CenturyTel obtains such services. Thus CenturyTel asserts that its proposed language satisfies the requirements of § 251(b)(3) and 47 C.F.R. § 51.217. In CenturyTel's opinion, any information regarding past disputes is irrelevant as the record shows that Charter acknowledges CenturyTel is currently making directory assistance information relating to Charter customers available on a satisfactory basis.

Proposed Contract Language

Charter and CenturyTel each propose certain language for Art. XII, Directory Services, section 8.

8.0 DIRECTORY ASSISTANCE OBLIGATIONS

Neither Party is a Directory Assistance (DA)-provider, but rather obtains DA services from a third-party vendor(s) that uses or maintains a national DA database(s) ("national database"). Nevertheless, as each Party has the obligation to ensure that its End User Customers' DA listings are made available to the other Party's End User Customers, the Parties agree as follows:

- 8.1 Each Party will promptly, upon request by the other Party, provide the requesting Party with the name of its third-party DA-provider;
- 8.2 Each Party will be responsible for contracting with or otherwise making its own arrangements for services with any such third-party DA-provider, including but not limited to arrangements to provide its own End User Customers' DA listings to such third-party DA-provider for inclusion in a national database accessible to the other Party.
- 8.3 Neither Party shall be required to directly provide its End User Customers' DA listings to the other Party, nor shall either Party be required to accept directly from the other Party such other Party's End User Customers' DA listings, for the purpose of submitting the Parties' commingled, End User Customers' DA listings to any third-party DA-provider that maintains and/or uses a national database accessible to the other Party.

To ensure that each Party's subscribers have non-discriminatory access to directory assistance listings of the other Party's subscribers, the Parties' agree to provide each other all necessary End User subscriber listing information for inclusion in each Party's relevant directory assistance listing databases, as required by Section 251(b)(3) of the Act.

CenturyTel Obligations.

CenturyTel will accept, include, and maintain, in the same manner that Century Tel treats listings of its own End Users, CLEC subscriber listings in the directory assistance databases maintained by CenturyTel or its third-party vendors. To the extent that CenturyTel's directory assistance listings are maintained in a database administered by a third party vendor, CLEC shall cooperate with CenturyTel as needed to ensure that CLEC listings are promptly loaded into such database and accessible to CenturyTel's End Users, upon request. CenturyTel will not charge CLEC for including and maintaining CLEC subscriber listings in the directory assistance databases maintained by CenturyTel, or its vendors.

CLEC Obligations.

CLEC authorizes CenturyTel, and its third party vendors, to include and use CLEC's directory assistance listing information in accordance with Applicable Law, and shall provide such information to CenturyTel, or its third-party vendors, at no charge. CLEC shall provide to CenturyTel the names, addresses and telephone numbers of all End Users who wish to be listed in the directory assistance

database but omitted from publication in white pages directories (i.e. non-published listings).

Discussion

The Panel agrees with Charter that when CenturyTel sub-contracts out specific directory assistance functions, it does not relieve CenturyTel of the obligation to fulfill its responsibilities under 47 U.S.C. § 251(b)(3). This is a well-established principle based on numerous court cases as cited by Charter.⁶⁵ Further the Panel determines that Charter's proposed language is reasonable in order to assure CenturyTel actually meets the following dialing parity duties required under § 251(b)(3).

DIALING PARITY-The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

This duty is not limited to CenturyTel establishing a process that it believes will meet these requirements, but in fact the requirements regarding dialing parity include the contract performance of these functions. To the extent CenturyTel chooses to use a third-party vendor, it is CenturyTel's responsibility to supervise that vendor to assure that it actually provides the required dialing parity. This is particularly important in light of the fact that, for some apparently unstated reason, Charter's subscriber listings are placed into a national database and not the same local database into which CenturyTel's subscriber listings are placed. This is a system that is set up in a manner that can lead to the kind of failures that Charter has already

⁶⁵ See *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp. 2d 768 (E.D. Mich. 1999) (finding that because an ILEC caused its listings to be published in a third party's directory, it owed the CLEC a duty to provide non-discriminatory access to the same directories); *U.S. West Comm., Inc. v. Hix*, 93 F. Supp. 2d 1115 (D. Colo. 2000) (rejecting an ILEC's attempt to relinquish its § 251(b)(3) responsibilities because it had subcontracted its directory listing functions to a third party).

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experienced. CenturyTel must take responsibility to assure that the results satisfy its duties under 47 U.S.C. § 251(b)(3).

In relation to CenturyTel's request for a reservation of the ability to impose an administrative charge on Charter, the Panel denies this request. Such a charge would be inconsistent with the requirement of 47 C.F.R. § 51.217(c)(3) that "A LEC shall accept the listing of those customers served by competing providers for inclusion in its directory assistance/operator services databases" (emphasis added). The rates, terms, and conditions upon which CenturyTel accepts listings from its own customers include no charges as required by Wis. Admin. Code § PSC 165.055 regarding directories and discussed in more detail in Issue 32. It would be discriminatory to impose a charge on Charter for CenturyTel to accept Charter's listings. If Charter believes that its rights to receive non-discriminatory directory assistance and directory listings will be better met by submitting its directory listing information directly to CenturyTel, it should be allowed to do so at no charge.

Issue 33 Award

The Panel awards Charter's proposed language for Art. XII, Directory Services, section 8.

Issues 34: Charter version: Should CenturyTel be required to make 911 facilities available to Charter at cost based rates pursuant to Section 251(c)?

CenturyTel version: Is Charter entitled to lease CenturyTel facilities for the purpose of connecting Charter's network to CenturyTel's 911 networks? If so, is Charter entitled to lease such facilities at TELRIC rates?

Issue 35: Charter version: Should CenturyTel be entitled to assess charges upon Charter for including Charter's End User Customer 911 records in the CenturyTel E911 database?

CenturyTel version: Should Charter and its customers be allowed to free ride on the 911 databases maintained by CenturyTel as part of its 911 system pursuant to Wis. Stat. § 256.35 and the county agreements?

The dispute in these issues is about the appropriate cost standard to apply to services and facilities that CenturyTel provides to Charter for purposes of providing 911 emergency calling for Charter's customers. Issue 34 covers the facilities to connect to 911 networks, and Issue 35 covers the maintenance of 911 databases. Because Issues 34 and 35 are interrelated they are reasonably analyzed together.

Positions of the Parties

(a) Charter

Charter believes that CenturyTel non-rural companies are required to provide unbundled access to 911 databases and interconnection to 911 facilities per 47 U.S.C. § 251(c) and such unbundled access is required to be provided at TELRIC-based rates. Charter refers to paragraph 38 and the associated footnote 128 of the FCC's 2005 *IP-Enabled 911 Order*, which describes the status of availability of 911 to CLECs at the time that order was issued to support its belief that TELRIC-based pricing applies to all these facilities:

We note that the Commission currently requires LECs to provide access to 911 databases and interconnection to 911 facilities to all telecommunications carriers, pursuant to sections 251(a) and (c) and section 271(c)(2)(B)(vii) of the Act. We expect that this would include all the elements necessary for telecommunications carriers to provide 911/E911 solutions that are consistent with the requirements of this Order, including NENA's I2 or wireless E911-like solutions.⁶⁶

Furthermore, Charter believes that it should not be subject to charges associated with the costs of maintaining the 911 databases. Charter believes CenturyTel already recovers these costs

⁶⁶ First Report and Order and Notice of Proposed Rulemaking, *In the Matters of IP-Enabled Services 911 Requirements for IP-Enabled Service Providers*, 20 F.C.C.R. 10,245, 10,267, ¶ 38 (2005) (*2005 IP-Enabled 911 Order*).

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through the cost recovery mechanisms provided in Wisconsin's countywide 911 system contracts as authorized by Wis. Stat. § 256.35, and any further charges imposed on Charter would result in double recovery of these costs.

(b) CenturyTel

CenturyTel believes the countywide 911 contracts provide the mechanism through which Charter should obtain 911 facilities and services from CenturyTel. CenturyTel claims that regardless of whether all LECs are parties to the county 911 agreement, all LECs are required to “jointly . . . determine the method by which each service supplier will be compensated for its costs in that county.” Wis. Stat. §256.35(3)(e). CenturyTel believes this means that all LECs must enter into agreements to cooperate with each other and those agreements, which are between LECs in some cases, can be separate from the county 911 agreement. CenturyTel's understanding of this arrangement is that all LECs in a county should charge the same 911 surcharge, and for those that have a surplus, the surplus must be provided back to the other 911 county agreement participants. For those that do not recover enough from the 911 surcharges, those LECs would be made whole by the other participants.

CenturyTel provides copies of data request responses that show that Charter does impose 911 surcharges. (CenturyTel In. Br., App. A, DR. No. 37; two examples: Green, \$0.12; Green Lake, \$0.47.) CenturyTel believes Charter is seeking a competitive advantage such that it would be able to charge its customers lower 911 surcharges than other LECs that participate in the countywide 911 contract. CenturyTel questions the basis for Charter's 911 surcharge as Charter does not participate in the countywide 911 contract.

CenturyTel does not believe Charter is entitled to lease the end-office trunks at TELRIC prices. CenturyTel believes that tariffed rates apply per Wis. Adm. Code § PSC 173.04(2).⁶⁷ CenturyTel proposes to charge Charter the tariff rate for the end office trunks. CenturyTel disputes Charter's assertion that it should not have to pay anything for access to any other part of CenturyTel's 911 systems. CenturyTel believes the facilities in question are not subject to the FCC rules implementing the interconnection requirements of 47 C.F.R § 251(c)(2) because the facilities are for one-way dedicated 911 traffic and not "for the transmission and routing of telephone exchange service and exchange access." The facilities are not subject to 47 C.F.R § 251(c)(3) as UNEs because the FCC has only designated the 911 databases as UNEs.

CenturyTel also proposes a 10-cent per record database charge, and a monthly fee of \$0.0022 for each record that is loaded in the selective router database based on CenturyTel's tariff. CenturyTel says these costs for maintaining and updating its ALI databases are the same 911 costs that are aggregated and collected through Commission approved county 911 surcharges. CenturyTel says these charges are generally the largest cost components associated with CenturyTel's 911 systems. CenturyTel asserts that it does not provide these services for free and that it will not recover these costs unless Charter is a party to the 911 agreements or the Commission orders Charter to pay these fees. CenturyTel does not propose any charges for accessing these databases.

⁶⁷ Wis. Admin. Code § PSC 173.04 Commission review. (1) Upon receipt of a contract for wireline 911 emergency telecommunications service, the commission shall issue a notice of investigation in accordance with s. PSC 2.09.
(2) Within 60 days of receipt of a contract for the provision of wireline 911 emergency telecommunications service, the commission may disapprove the contract if it finds any of the following:
(a) The contract is not compensatory.
(b) The contract is excessive.
(c) The contract does not comply with the utility's tariff specifying the rates and charges or terms and conditions for the offering of wireline 911 emergency telecommunications service.

While not its central argument, CenturyTel also states that the Panel has discretion to establish cost-based rates on a basis other than TELRIC for § 251(c)(2) interconnection.

CenturyTel asserts that 911 interconnection is an obligation that is only applicable to Bell Operating Companies under 47 U.S.C. § 271.

Proposed Contract Language

Charter proposes language for Art. VII, 911, Section 3.3.1, and 3.4.5 and intentionally omits Section 3.4.8. CenturyTel proposes language for Art. VII, 911, Section 3.3.1, 3.4.5 and 3.4.8.

3.3 Facilities and Trunking

3.3.1 CenturyTel shall provide and maintain sufficient dedicated E911 circuits/trunks from each applicable Selective Router to the PSAP(s) of the E911 PSAP Operator, according to provisions of the applicable State authority, applicable NENA standards and documented specifications of the E911 PSAP Operator. CenturyTel will permit **CLEC to lease 911 facilities from **CLEC's network to CenturyTel's Selective Router(s) at the rates set forth in Article XI (Pricing). **The rates for 911 facilities set forth in Section III.C, of Article XI (Pricing) are TELRIC-based rates as required by Section 251(c).** **CLEC has the option to secure alternative 911 facilities from another provider to provide its own facilities.

3.4.5 CenturyTel will update **CLEC's End User 911 Records in the E911 DBMS, **at no charge to **CLEC**, if **CLEC uses CenturyTel's E911 gateway to maintain **CLEC's End User records. Because Charter does not participate in the County contract for E911 service, such updates shall be subject to an applicable charge as set forth more fully in Section 3.4.8. CenturyTel will then provide **CLEC an error and status report. This report will be provided in a timely fashion and in accordance with the methods and procedures to be provided to **CLEC.

(3) The commission may act on the contract without hearing.

- 3.4.8 **Intentionally omitted.** CenturyTel will charge **CLEC for each **CLEC End User Customer record that CenturyTel maintains in the E911 database or DBMS. The applicable per record charge is set forth in Article XI (Pricing), Section IV(B) as the CenturyTel ALI Database charge.

Discussion

The Panel determines that there are complex legal underpinnings associated with the intercarrier charges for 911 facilities and services and neither party's testimony or arguments fully capture the applicable law and rules related to these issues. Issues 34 and 35 involve the interplay of federal and state statutes and rules. The FCC rules implementing the unbundling requirements of 47 U.S.C. § 251(c)(3) require incumbent local exchange carriers to provide unbundled access to 911 data bases.⁶⁸ The State of Wisconsin also has adopted the statewide emergency service number of "911" and has established wireline countywide 911 systems and a system for sharing the funding of these wireline countywide 911 systems through surcharges on service users in the county.⁶⁹ The state of Wisconsin has a separate funding mechanism for wireless 911.⁷⁰

The Panel notes that under federal law and rules, there are a number of possible bases for establishing these 911 charges depending on the type of carriers involved. For example, Commercial Mobile Radio Service providers (CMRS, commonly known as wireless providers)

⁶⁸ 47 C.F.R. § 51.319 (d)(4)(i)(B)(1). Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

⁶⁹ Wis. Stat. § 265.35(3), Funding for Countywide systems; Wis. Admin. Code ch. PSC 173, Subchapter II — Wireline 911 Emergency Telecommunications Service Contracts.

⁷⁰ Wis. Stat. § 256.35(3m) WIRELESS PROVIDERS; Wis. Admin. Code ch. PSC 173, Subchapter III — Wireless 911 Fund.

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do not receive interconnection under 47 U.S.C. § 251(c) and thus the TELRIC pricing standard is not applicable to CMRS providers. CMRS providers receive interconnection under 47 U.S.C. § 251(a). The FCC provided interconnected VoIP providers with the same access to 911 services and facilities as is available to wireless providers. While Charter asserts otherwise, the Panel looks to the specific FCC rules, as well as the language contained in the *2005 IP-Enabled 911 Order* referenced by Charter, and determines that the TELRIC standard applicable under 47 U.S.C. § 251(c)(3) appears to be only specifically applicable to the database access and does not address facilities connecting to those databases outside of sections applicable only to Bell Operating Companies under 47 U.S.C. § 271. Indeed, the reference to 47 U.S.C. § 251(a) supports not making 911 end office trunks available at TELRIC rates, as will be described in more detail below. Further, the Panel determines that the FCC has allowed states a degree of latitude so as not to disrupt 911 mechanisms in place as will be described in further detail below.

The Panel turns to a portion of paragraph 52 of the FCC's *2005 IP-Enabled 911 Order* that provides greater detail in regard to the latitude allowed state commissions for funding mechanisms.

“52. ... For example, we have explained that interconnected VoIP providers often enlist a competitive LEC partner in order to obtain interconnection to the Wireline E911 Network, and we believe that as a result of this Order, many more will do so. In that situation, states may impose 911 funding obligations on the competitive LEC partners of interconnected VoIP providers, regardless of whether the VoIP providers themselves are under any obligation to contribute. Similarly, states may be able to impose funding obligations on systems service providers, such as incumbent LECs, that provide direct interconnection to interconnected VoIP providers. We believe that the ability to assess 911 funds on interconnected VoIP providers indirectly should narrow any gap in 911 funding attributable to consumers switching to interconnected VoIP service.

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The FCC provided further information about the applicable cost standards associated with 911 services and facilities in its 2008 *NET 911 Order*,⁷¹ paragraph 31 and associated footnote 90. Clearly, TELRIC pricing for access for CMRS providers under 47 U.S.C. § 251(a) is rejected.

Para. 31. Contrary to the approach advocated by some commenters, we find no indication that Congress intended the Commission to issue detailed regulations regarding the pricing methodology under which E911 capabilities must be made available.⁹⁰

Fn. 90 We therefore reject the request of certain commenters that we establish a specific pricing standard for access to E911 capabilities, such as requiring that such access must be based on forward-looking costs under the Commission's total element long run incremental cost (TELRIC) standard.

As further evidence of the flexibility regarding cost recovery, the Panel looks to para. 4 of the FCC's Second Memorandum Opinion and Order in CC Docket No. 94-102. In this Order, the FCC eliminated the obligation of wireless carriers to have cost recovery mechanisms, as formerly contained in 47 C.F.R. § 20.18(h). The FCC expressed concerns about not disrupting the actions of states in relation to 911.

4. ... However, in removing the condition that a cost recovery mechanism for carriers' costs be in place before the carrier is obligated to provide E911 service, we do not intend to disturb the actions of States or localities that already have adopted such mechanisms or to discourage them from deciding that cost recovery or sharing mechanisms that cover carrier costs are an effective way of expediting wireless E911 for their citizens, especially in rural areas.⁷²

The Panel interprets Charter's reference to 47 U.S.C. § 251(c) as Charter seeking access to 911 as an unbundled network element. The Panel concludes that the TELRIC standard of 47

⁷¹ *Implementation of the NET 911 Improvement Act of 2008*, WC Docket 08-171, FCC 08-249, 2008 WL 4659843, ¶ 31 (Oct. 21, 2008).

⁷² , Second Memorandum Opinion and Order, *In the Matter of Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, CC Docket No. 94-102, FCC 09-352 (Rel. Dec. 8, 1999).

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U.S.C. § 251(c) is only applicable to access to the databases and does not apply to maintenance of the databases or to the facilities to connect to the databases. Nothing in the following rule mentions end office trunks.

47 C.F.R. § 51.319 (d)(4)(i)(B)(1). Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

To the extent access is sought pursuant to 47 U.S.C. § 251(a), the TELRIC standard is not applicable. The Panel determines that in order to not disrupt existing funding mechanisms for 911 systems and to promote a competitive marketplace, the Panel will apply the pricing methods applicable to the Wisconsin's wireline countywide 911 systems. The Panel determines that CenturyTel's proposed terms for the interconnection agreement are consistent with the pricing methods applicable to the wireline countywide funding mechanisms. Using these costs to determine CenturyTel's charges to Charter should result in Charter having a similar surcharge for its 911 services as other wireline carrier's surcharges.

As discussed in Issue 20, the Panel does not agree with CenturyTel's assertion that even if the facilities must be unbundled under 47 U.S.C. § 251(c)(2), and at "cost-based" rates, that those rates are not necessarily TELRIC rates. The Panel limits the application of TELRIC to charges for access to the databases for this issue. CenturyTel does not assert any costs or any charges for access to 911 databases and thus the access to 911 databases is consistent with TELRIC.

CenturyTel's proposal to determine costs based on tariffed rates for the connection to 911 databases is consistent with the Wisconsin wireline county contracts. CenturyTel's proposal

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to charge for maintenance of databases based on the amounts applicable to participants in the Wisconsin wireline county contracts is reasonable as those contracts are approved by the Commission. Obtaining revenue to cover costs of maintaining the databases will limit the potential burden on counties for costs in excess of the maximum surcharge and will not provide double recovery to CenturyTel.

Issues 34 and 35 Award

The Panel awards access tariff rates to be applicable to dedicated E911 trunks. The Panel awards CenturyTel's proposed charges for updating and maintaining Charter's end user 911 records in the 911 database and CenturyTel's proposal to have no charges for querying the 911 database. The Panel expects that given the above description of its award and its award on other related issues, the parties can reach their own agreement on redrafting the contract.

Issue 36: Resolved

Issue 37: Charter version: Should CenturyTel's liability for errors in its 911 system be limited by contract, even where CenturyTel's conduct constitutes reckless, wanton, or willful, misconduct?

CenturyTel version: Should CenturyTel's liability for 911 system errors be limited to the reasonable cost of replacement services?

Issue 38: Charter version: Should Charter be required to indemnify and hold harmless CenturyTel where CenturyTel has engaged in acts that constitute reckless, wanton, or willfull misconduct in connection with E911 serve where applicable law establishes limits on CenturyTel's liability?

CenturyTel version: Should CenturyTel be protected from 3rd party liability related to 911 System errors caused by Charter?

Issue 39: Charter version: Should the Agreement limit CenturyTel's liability related to the release of information, including nonpublished and nonlisted information, in response to a 911 call where applicable Wisconsin law establishes limits on CenturyTel's liability?

CenturyTel version: Should CenturyTel be protected from 3rd party liability related to Charter's errors in providing subscriber information to CenturyTel?

These issues concern whether Charter's decision not to participate in the countywide 911 funding agreements exposes CenturyTel to any different liability than if Charter participated in that funding arrangement. Further, Charter seeks to apply the comparative negligence approach to indemnification that it proposed for general liabilities in Issue 15. CenturyTel seeks a limitation of liability similar to its limitation of liability to the county for interruption of service related to 911 services.

Positions of the Parties

(a) Charter

Charter equates the liability issues raised in these three issues to the general issues associated liability covered in Issue 15. Charter does not believe there should be indemnity provisions specific to 911 but instead prefers all indemnification and limitation of liability issues to be contained in the comprehensive indemnification provisions set forth in Art. III, Section 30. Charter does not believe CenturyTel should be allowed to limit its liability where its actions constitute reckless, wanton, or willful conduct. Charter believes that CenturyTel should be held liable, to the fullest extent possible for such actions. Charter does not believe it should be required to indemnify CenturyTel as CenturyTel's liability is already limited by state law and statutes which CenturyTel should rely upon in those circumstances. Charter believes it cannot and should not be required contractually to limit CenturyTel's liability to third parties. Charter believes that its decision not to participate in the county 911 agreements is irrelevant to these issues.

In relation to service interruptions Charter believes that 911 service disruptions should be treated like any other service disruption as discussed in Issue 15.

(b) CenturyTel

CenturyTel's main point appears to be that if Charter participated in the countywide 911 contract, all the liability issues would be moot. CenturyTel believes that Charter's non-participation in the countywide 911 contract could expose CenturyTel to liability. CenturyTel expresses concern that CenturyTel could be liable to a county for costs that result from Charter's acts or omissions. CenturyTel expresses concern that Charter may provide CenturyTel with inaccurate subscriber information, and if CenturyTel releases that inaccurate information to the county, CenturyTel could face potential liability to the county or subscribers for Charter's acts or omissions. CenturyTel believes Wis. Stat. § 256.35(7) would only protect CenturyTel from liability from users of the 911 systems, which CenturyTel interprets to mean the end users that place a call to 911. Therefore, CenturyTel believes that Charter's non-participation in the countywide contract could expose CenturyTel to liability from the county or non-users of the systems. CenturyTel gives an example of a non-user as an emergency response agency that might receive inaccurate information. CenturyTel provides another example that it might accidentally release a non-listed number to an emergency response agency, based on information received from Charter. CenturyTel also raises a concern about possible liability to nomadic VoIP providers that offer 911 services and whose 911 calls might pass to CenturyTel through Charter. CenturyTel believes Charter's non-participation in the countywide contract could expose CenturyTel to liability and CenturyTel should be indemnified by Charter should such liability occur.

CenturyTel is also concerned about potential liability if there should be interruptions in the service it provides to Charter, which in turn, Charter uses to provide 911 service. CenturyTel states that its proposed liability limitation language essentially mirrors the liability language in the county 911 agreements, which Charter refuses to adopt. CenturyTel proposes that liability for any loss or damages arising out of errors, interruptions, defects, failures or malfunctions of the 911 system should not exceed the greater of \$50 or an amount equal to the pro rata charges for the 911 service during the period that the 911 service was fully or partially inoperative. This liability limitation mirrors CenturyTel's limitation of liability under the county contract.

Proposed Contract Language

For Issue 37, Charter and CenturyTel proposes edited language for Art. VII., 911/E911, §§ 9.3 and 9.6.

For Issue 38, Charter proposes that § 9.4 should not be added to the agreement, whereas, CenturyTel proposes to add a new section § 9.4.

For Issue 39, Charter proposes that § 9.7 should not be added to the agreement, whereas, CenturyTel proposes to add a new section § 9.7.

- 9.3 CenturyTel shall not be liable for civil damages, whether in contract, tort or otherwise, to ****CLEC any person, corporation, or other entity** for any loss or damage caused by any act or omission of CenturyTel or its employees, agents or contractors, in the design, development, installation, maintenance, or provision of any aspect of E911 other than an act or omission constituting **gross negligence or reckless, wanton or willful misconduct**. **However, in no event shall CenturyTel's liability to any person, corporation, or other entity for any loss or damage exceed an amount equal to the prorated allowance of the applicable rate set forth in Article XI (Pricing) for the service or facilities provided to **CLEC for the time such interruption to service or facilities continues, after notice by **CLEC to CenturyTel.** No allowance shall be made to the extent that the interruption is due to the negligence or willful act of ****CLEC**. In no event shall CenturyTel be held liable or responsible for any indirect, incidental, consequential, punitive, special, or exemplary damages associated with the provision of E911, **unless caused by a CenturyTel act or omission constituting reckless, wanton or willful misconduct.**
- 9.4 **Intentionally omitted. **CLEC shall indemnify and hold harmless CenturyTel from any damages, claims, causes of action, or other injuries whether in contract, tort, or otherwise which may be asserted by any person, business, governmental agency, or other entity against CenturyTel as a result of any act or omission of **CLEC or any of its employees, directors, officers, contractors or agents, except for acts of negligence, gross negligence or reckless, wanton or willful misconduct in connection with designing, developing, adopting, implementing, maintaining, or operating any aspect of E911 or for releasing subscriber information, including nonpublished or unlisted information in connection with the provision of E911 Service.**

- 9.6 CenturyTel shall not be liable or responsible for any indirect, incidental, consequential, punitive, special, or exemplary damages associated with the provision of any aspect of E911 when there is a failure of or interruption E911 due to the attachment of any equipment by **CLEC to CenturyTel facilities, **except to the extent caused by a CenturyTel act or omission constituting reckless, wanton or willful misconduct.** **CLEC may, with the prior written consent of CenturyTel, which consent shall not be unreasonably withheld, attach features, devices, or equipment of other vendors to the equipment or network facilities provided by CenturyTel. Said attachments, devices, or equipment must meet all applicable federal and state registration or certification standards. CenturyTel reserves the right to refuse attachments if CenturyTel determines that said attachments will degrade E911 ordered by **CLEC, CenturyTel facilities, or otherwise affect its telephone operations.
- 9.7 **Intentionally omitted. CenturyTel shall not be liable for any civil damages, whether in contract, tort, or otherwise, caused by an act or omission of CenturyTel in the good faith release of information not in the public record, including nonpublished or nonlisted subscriber information to Emergency Response Agencies responding to calls placed to an E911service using such information to provide an E911 Service.**

Discussion

There is no testimony on these issues. The parties stated their intention to limit their arguments to briefs.⁷³ However, there is some information related to 911 in the testimony on issues 34 and 35. The issues 37, 38, 39 involve an interplay of federal and state statutes and rules. The issues are so interrelated that a single analysis of the three issues combined is a reasonable approach.

The FCC rules implementing the unbundling requirements of 47 C.F.R § 251(c) require incumbent local exchange carriers to provide unbundled access to 911 data bases.⁷⁴ The State of

⁷³ The Parties agreed that Issues 37, 38, and 39 would be “briefing only.” Letter from the Parties to Dennis Klaila Arbitrator, No. 05-MA 148, (Wis. PSC. Nov. 7, 2008) (PSC REF#:103924). Issues 37, 38, and 39 apply to only CenturyTel Wisconsin Non-Rural Affiliates.

⁷⁴ 47 C.F.R. § 51.319 (d)(4)(i)(B)(1).

(1) Call-related databases include, but are not limited to, the calling name database, 911 database, E911 database, line information database, toll free calling database, advanced intelligent network databases, and downstream

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Wisconsin has adopted the statewide emergency service number of “911” and has established Countywide 911 Systems and a system for sharing the funding of these Countywide 911 Systems through surcharges on service users in the county.⁷⁵ Participation in the funding of the Countywide Systems is optional. Wis. Stat. § 256.35(3)(g) provides:

(g) No service supplier may bill any service user for a charge levied by a county under par. (b) unless the service supplier is actually participating in the countywide operation of a basic or sophisticated system in that county.

The record establishes that Charter does not participate in the Countywide 911 Services contract. These three issues are associated with potential liability in the provision of 911 services. Wis. Stat. § 256.35(7) provides the following exemption from liability:

(7) LIABILITY EXEMPTION. A telecommunications utility, wireless provider, as defined in sub. (3m)(a)6., or a local government, as defined in sub. (3m)(a)4., shall not be liable to any person who uses an emergency number system created under this section or makes an emergency telephone call initially routed to a wireless public safety answering point, as defined in sub. (3m)(a)7.

The following are the definitions of the various terms referred to in these two provisions.

“Service supplier” means a telecommunications utility which provides exchange telephone service within a county.

“Service user” means any person who is provided telephone service by a service supplier which includes access to a basic or sophisticated system.⁷⁶

A separate definition of telecommunications utility is not provided in Wis. Stat. § 256.35. Wis. Stat. § 196.01(8p) defines “telecommunications provider” as any person who provides telecommunications services.

The Panel determines that liability as it relates to the provision of 911 services is different from the general concepts of liability as covered in Issue 15 in light of the specific liability

number portability databases by means of physical access at the signaling transfer point linked to the unbundled databases.

⁷⁵ Wis. Stat. § 265.35

exemptions provided in Wis. Stat. § 256.35(7). A key legal issue is whether Charter's decision not to participate in the countywide contracts exposes CenturyTel to any liabilities that would be different from Charter's participation in the 911 countywide contracts.

The liability exemption provisions of Wis. Stat. § 256.35 applies to all telecommunications utilities regardless of their status as a service supplier that bills other participants in the countywide 911 contracts. The Panel does not see any additional liability that CenturyTel would be exposed to as a result of Charter's decision not to participate in the countywide cost sharing contracts. In regard to all the scenarios of liability to the county or to non-users that CenturyTel enumerates, the Panel sees nothing in the liability exemption provisions of Wis. Stat. § 256.35 that creates the separate categories enumerated by CenturyTel. In any case, a factual record would be needed to evaluate whether there was any liability in relation to a non-listed number that was released accidentally in the provision of a 911 service. There is no such record in this case.

However, the Panel does agree that it is reasonable to limit CenturyTel's liability for interruptions of service. For public policy reasons, the Commission has determined such a limitation of liability is reasonable, as it has approved a similar liability limitation in the countrywide contract. It is reasonable to provide CenturyTel the same limitation of liability associated with 911 services when CenturyTel provides wholesale facilities that are used for 911 purposes as the limitation of liability when it provides services to county in its provision of 911 service.

⁷⁶ Wis. Stat. § 256.35(3) Funding for Countywide systems.

Issues 37, 38, and 39 Award

The Panel awards no additional liability limitation stemming from Charter's decision not to participate in the countywide 911 agreement. The Panel awards CenturyTel's limitation on liability for interruptions of service when CenturyTel provides wholesale facilities that are used for 911 purposes. The Panel expects given this award and the awards on other issues, the parties can reach their own agreement on redrafting the contract.

Issue 40: Charter version: Should CenturyTel be permitted to limit its liability for so-called "non-regulated" telephone services in connection with 911 services even where that term is not defined under the Agreement?

CenturyTel version: Should CenturyTel be liable for incorrectly routed 911 service, when such incorrect routing is not CenturyTel's fault?

In this issue, CenturyTel seeks language to address its concern that a nonregulated telephone service, such as nomadic VoIP service, may lead to misrouting of 911 calls.

Positions of the Parties

(a) Charter

Charter believes that CenturyTel's proposed language is ambiguous and ill-conceived. Charter states that the record reflects that Charter is a provider of residential voice services to end user customers and it does not sell its services to nomadic VoIP providers. Charter believes there is no record evidence to support CenturyTel's speculative concerns regarding potential misrouting of 911 calls.

(b) CenturyTel

CenturyTel states that Charter's proposed language does not address CenturyTel's concern and only restates part of Charter's obligation under the agreement.

Proposed Contract Language

Charter and CenturyTel propose language for Art. VII, 911, Section 9.8:

- 9.8 CenturyTel shall have no liability whatsoever to any person arising from its provision of, or failure to provide, E911 to any subscriber to a nonregulated telephone service (e.g., shared tenant service). It is the obligation of **CLEC to answer, and transmit to the appropriate Selective Router respond to, transfer, terminate, dispatch, or arrange to dispatch emergency services, or otherwise handle all E911 telephone calls that originate from telephones within **CLEC's End User customers service area. Neither **CLEC nor CenturyTel shall have any responsibility for E911 calls that carry foreign dial tone, whether they originate within or outside of **CLEC's service area.

Discussion

There is no testimony on this issue. In practical effect, the difference the Panel sees between Charter's proposed language and CenturyTel's proposed language is that CenturyTel's language asserts that Charter would be responsible to dispatch, or arrange dispatch for, emergency service for E911 calls. CenturyTel describes possible misrouting that may occur for certain types of new services, but CenturyTel does not provide any legal basis for its claim that Charter has a responsibility to dispatch any emergency services for 911 calls. The Panel finds Charter's language properly describes duties of a CLEC in relation to emergency services, that E911 calls be delivered to the CenturyTel Selective Router.⁷⁷ Any other matters as they relate to 911 liabilities are addressed in Issues 37, 38, and 39.

⁷⁷ 2005 IP-Enabled Services 911 Order, 20 F.C.C.R.10,245, ¶ 15 (2005):

15. In a typical implementation, the Wireline E911 Network includes the Selective Router, which receives 911 calls from competitive and incumbent LEC central offices over dedicated trunks. [footnote omitted] The Selective Router, after querying an incumbent LEC-maintained Selective Router Database (SRDB) to determine which PSAP serves the caller's geographic area, forwards the calls to the PSAP that has been designated to serve the caller's area, along with the caller's phone number (ANI). The PSAP then forwards the caller's ANI to an incumbent LEC-maintained Automatic Location Information database (ALI Database), which returns the caller's physical address (that has previously been verified by comparison to a separate database known as the Master Street Address Guide (MSAG)). The Wireline E911 Network thus consists of: the

Award

The Panel award Charter's language for Art. VII, 911, Section 9.8.

Issue 41: Addressed in Issue 28.

Issue 42: Resolved.

Issue 43: Addressed in Issue 3.

Conclusions of Law

The Panel has jurisdiction under Wis. Stat. §§ 196.02, 196.04, 196.199(2)(a), 196.219(2m), (3)(a) and (4)(a), Wis. Admin. Code ch. PSC 160 and 47 U.S.C. §§ 251, 252, 253(b), and 261(b) and (c) to issue the following arbitration award.

Award

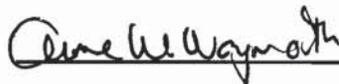
For each issue discussed in the Opinion above, the Panel awards the contract language specified for that issue. Where the Panel has adopted specific contract language, the parties shall incorporate that language into the Interconnection Agreement. Where the Panel has adopted a position on an issue and provided drafting instructions for the parties, the parties shall compose contract language to implement the Panel's award.

By the Panel,

Signed this 28th day of July, 2009.



Dennis J. Klaila, Chair



Anne W. Waymouth



Duane Wilson

Selective Router; the trunk line(s) between the Selective Router and the PSAP; the ALI Database; the SRDB; the trunk line(s) between the ALI database and the PSAP; and the MSAG. [footnotes omitted.]