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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

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<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup> 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.

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<sup>18</sup> TR 1220

<sup>19</sup> 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.<sup>20</sup> Charter did not rebut any of these points.<sup>21</sup>

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.

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<sup>20</sup> Tr. 1157-1158.

<sup>21</sup> Tr. 68-70.

**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*,<sup>22</sup> a landmark decision involving a change in law concerning

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<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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

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<sup>23</sup> 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

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<sup>24</sup> *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