

refunds of disputed amounts already paid. For the reasons set forth below, the Arbitrator concludes that Charter's proposed language seeking to apply interest to refunds pursuant to Article III, § 9.4.2 is unnecessary and unreasonable.

First, Charter states that its position "is that terms for bill payment, and refunds, should be equitable."⁹² However, Charter's proposal actually creates an inequitable result. As stated above, there is no language in the already-resolved terms of the Parties' proposed Agreement applying a commensurate interest rate to underpayments resolved in the billing Party's favor during a bill dispute process. Charter's proposal standing alone appears to apply interest only to refunds of overpayments to the billed Party, not to underpayments resolved in favor of the billing Party. Thus, Charter's assertion that its proposed language in Section 9.4.2 "is simply to make the [interest rate provision] *reciprocal* in nature" is unconvincing.⁹³

Second, the interplay between Charter's proposed language and the already-resolved language in Section 9.4.2 creates the potential for an even more inequitable result. Section 9 effectively gives the billed Party the option of either disputing charges by the bill due date and *withholding payment* (Section 9.4.1) or *paying all billed charges* and disputing *already-paid amounts* for up to one year from the date of the invoice (Section 9.4.2).

Combining the option afforded under Section 9.4.2 (which is not in dispute) with Charter's proposed interest language (which is in dispute) could result in: (1) Charter failing to timely review and dispute a bill; (2) Charter instead relying on Section 9.4.2 to dispute the charges paid under that bill up to one year later; and (3) Charter recovering a refund of

⁹² Ex. 11, p. 22, l. 12.

⁹³ See Ex. 12, p. 22, l. 10-11.

the disputed charges over a year later with interest accruing as of the date of the original bill. Such a result would be inequitable to CenturyTel. Further, such a result would be inefficient for both Parties and would not promote the public policy favoring the timely notification and resolution of billing disputes.

Charter testified that it is not its business practice to intentionally delay resolving billing disputes in the hopes of recovering large interest payments on refunded charges.⁹⁴ But the Arbitrator agrees with CenturyTel that the interest language proposed by Charter, when combined with Section 9.4.2, certainly provides for that possibility, as well as an incentive (in the form of a large interest payment) for Charter to delay disputing bills promptly.⁹⁵ Further, the Arbitrator also determines that Charter's proposed interest language in Section 9.4.2 is unreasonable because it seeks the recovery of interest back to the "bill date" and not to the date on which it puts CenturyTel on notice of the dispute.

For the foregoing reasons, the Arbitrator concludes that Charter's proposed language in Issue 8(a) (Article III, § 9.4.2) should be rejected on the grounds that it is commercially unreasonable, particularly read in conjunction with those portions of Article III, §§ 9.4.1 and 9.4.2 to which the Parties have already agreed.

Decision

The Arbitrator finds this issue in CenturyTel's favor.

⁹⁴ Ex. 11, p. 24, l. 29 - p. 27, l. 22.

⁹⁵ Ex. 14, p. 7, l. 14 - p. 8, l. 5.

8(b). 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 refused to pay “undisputed” charges?

Findings of Fact

25. It is commercially reasonable for the billing Party to be contractually permitted to suspend processing of orders and/or to discontinue service to the billed Party when the billed Party refuses or fails to pay *undisputed* charges.⁹⁶

26. In such cases, the billing Party has already provided the service, the billed Party has used the service, the billing Party has rendered a bill for the service expecting payment, and the bill is presumptively accurate since the billed Party did not dispute the bill.⁹⁷

27. Contractual remedies provide an appropriate incentive for the billed Party to pay undisputed charges.⁹⁸

28. Charter’s proposed language, which would require the billing Party to initiate a dispute resolution proceeding in order to recover undisputed charges, is unreasonable because it places unnecessary and unwarranted additional burden and expense on the billing Party to recover undisputed payments for services already rendered.⁹⁹

⁹⁶ Ex. 19, p. 17, l. 3-14.

⁹⁷ *Id.* at 17, l. 15-23.

⁹⁸ *Id.* at 19, l. 8-20.

⁹⁹ *Id.* at 18, l. 10-15.

29. CenturyTel's proposed language contains similar remedies that this Commission has approved in other interconnection agreements, including an agreement to which Charter is a party.¹⁰⁰

Conclusions of Law and Discussion

The Arbitrator concludes that CenturyTel's proposed language in Article III, §§ 9.5.1 and 9.5.2 should be adopted, and Charter's proposed language for Section 9.5.1 should be rejected. The remedies contained in CenturyTel's proposed Sections 9.5.1 and 9.5.2 – the rights to discontinue processing orders and to terminate services – triggered by the billed Party's refusal or failure to pay undisputed charges are commercially reasonable. Indeed, this Commission has approved similar language containing such remedies in other interconnection arbitrations.

In the M2A proceeding, the Commission addressed the following issue: "What should the ICA provide with respect to non-payment and procedures for disconnection?"¹⁰¹ SBC's proposed language would permit it to "suspend order acceptance" for a CLEC's nonpayment of undisputed charges, and to "disconnect the CLEC's services" if the non-paying CLEC did not remedy after proper notice.¹⁰² The Commission stated: "SBC's language is reasonable and should be adopted. The necessary and ultimate sanction for nonpayment of undisputed amounts is disconnection."¹⁰³ Notably, this language was

¹⁰⁰ *Id.* at 19, l. 21 – p. 21, l. 19.

¹⁰¹ Final Arbitrator's Report, Docket No. TO-2005-0336, Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 49.

¹⁰² *Id.* at 49-50.

¹⁰³ *Id.* at 52 (emphasis added).

incorporated into the interconnection agreement entered into by Charter and SBC in Missouri.¹⁰⁴

Likewise, the Commission rejected language similar to Charter's proposal that CenturyTel not be permitted to suspend order processing or discontinue service "without the Commission's knowledge and permission."¹⁰⁵ Specifically, the Commission held that "SBC need not seek specific permission from the Commission before terminating service to a non-paying CLEC."¹⁰⁶

The Arbitrator sees no reason to decide this issue differently in this proceeding. Given that the language at issue pertains to the non-payment of *undisputed* charges, CenturyTel should have the right to suspend a CLEC's orders and/or terminate the CLEC's services if that CLEC fails or refuses to pay such charges. CenturyTel's proposed language in Issue 8(b) is consistent with this Commission's decisions in M2A, and, the principles underpinning SBC's language align with CenturyTel's language.

The Commission has stated that a CLEC should have "ample warning . . . before disconnection occurs."¹⁰⁷ CenturyTel's proposed language in Sections 9.5.1 and 9.5.2 provides the billed party with sufficiently advanced warning before discontinuing order processing or discontinuing service.

For instance, in Section 9.5.1, CenturyTel's language provides that the billing Party can only discontinue order processing if the billed Party has not paid undisputed charges

¹⁰⁴ Interconnection and/or Resale Agreement under Sections 251 and 252 of the Telecommunications Act of 1996 between SBC Missouri and Charter Fiberlink-Missouri, LLC, Docket No. TK-2006-0047, General Terms and Conditions, § 9.2.

¹⁰⁵ Ex. 12, p. 22, l. 24-26.

¹⁰⁶ Final Arbitrator's Report, Docket No. TO-2005-0336 , Section 1(A)-General Terms & Conditions (rel. June 21, 2005) at 52.

¹⁰⁷ *Id.*

ten (10) days after the bill due date, and then only after the billing Party has provided five (5) days' written notice. Similarly, in Section 9.5.2, CenturyTel's language provides that the billing Party can only discontinue service for such unpaid, undisputed charges upon seven (7) business days' written notice to the billed Party. Thus, under CenturyTel's proposed language, the billed Party has ample warning to cure unpaid, undisputed charges and to avoid any discontinuance of order processing or services due to such non-payment.

For all these reasons, the Arbitrator adopts and approves CenturyTel's proposed language to resolve Issue 8(b).

Decision

The Arbitrator finds this issue in CenturyTel's favor.

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

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

Charter's position more closely reflects industry standards. For example, Section 23.1 of AT&T's 13 State-CLEC ICA provides that in the circumstance Intervening Law, to which CenturyTel is a party in Missouri:

"the Parties shall have sixty (60) days from the Written Notice [of either Party] to attempt to reach agreement on appropriate conforming modifications".

While not dispositive of Issue 10, the general AT&T approach is sound and indicative of industry practice.

CenturyTel's position directly contravenes its stance in Case No. LK-2006-0095.¹⁰⁸

There, CenturyTel sought to opt into a prior approved agreement between SBC and Xspedius specifically to take advantage of its change-of-law provision, which provided for notice and negotiation of amendments:

[Applicant CenturyTel] point[s] out that, under the terms of the SBC/Xspedius agreement, either party may seek on written notice to renegotiate and amend those provisions affected by any change of law resulting from SBC's appeal of the Commission's Arbitration Order. In the absence of this provision, the Applicants argue, they would be without recourse in the face of SBC's unilateral interpretation of the effects of any change of law -- the Applicants refer to "harsh, draconian and uneven results[.]"¹⁰⁹

Where a change of law requires an amendment, or modification, to the Agreement, any retroactive effect, or true-up of rates, should occur upon express direction by the authority whose actions precipitated the change of law event. However, if those 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. The Agreement should not give one Party the unilateral right to establish a retroactive right or obligation where the other Party does not agree, and where the Commission, court or the FCC has not specifically directed.

Decision

The Arbitrator finds this issue in favor of Charter.

¹⁰⁸ *In the Matter of the Application of CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC, doing business as LightCore, a CenturyTel Company, for Adoption of an Approved Interconnection Agreement between Southwestern Bell Telephone, LP, doing business as SBC Missouri, and Xspedius Management Company of Kansas City, LLC, and Xspedius Management Company Switched Services, LLC, 2005 Mo. PSC LEXIS 1449.*

¹⁰⁹ *Id.* at *6.

11. 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?¹¹⁰

Findings of Fact

30. The Service Guide is CenturyTel's internal document, and it describes and documents certain processes and procedures unique to CenturyTel.¹¹¹

31. The Service Guide operates as a handbook that contains CenturyTel's operating procedures for service ordering, provisioning, billing, maintenance, trouble reporting and repair for wholesale services.¹¹²

32. The Service Guide is subject to change without any oversight by the Commission or meaningful input from Charter.¹¹³

33. The Service Guide language changes frequently.¹¹⁴

34. CenturyTel notices regarding Service Guide changes are high level summaries that include the name of the section that was affected and the page numbers where such change was made.¹¹⁵

¹¹⁰ CenturyTel's phrasing of this issue is: "Should certain businesses and operational processes and procedures set forth in CenturyTel's 'Service Guide' be incorporated by reference into the Agreement?"

¹¹¹ Ex. 1, p. 16, l. 8-9.

¹¹² *Id.*, l. 10-13.

¹¹³ *Id.*, l. 15-17.

¹¹⁴ Tr. 100, l. 5-7.

¹¹⁵ Ex. 1, p. 19, l. 22-23; p. 20, l. 1.

Conclusions of Law and Discussion

The Service Guide is an internal document developed solely by CenturyTel to describe and document certain processes and procedures that are unique to CenturyTel.¹¹⁶ As Mr. Gates explained, the terms of the Service Guide “might change day to day, month to month, year to year . . .”.¹¹⁷ In fact, CenturyTel admitted that it frequently makes changes to its Service Guide.¹¹⁸

Although CenturyTel proposes to give Charter notice of all Service Guide changes,¹¹⁹ those notices do not offer sufficient detail to CLECs.¹²⁰ Indeed, Charter witness Gates testified that CenturyTel notices merely provide high level summaries that include the name of the section that was affected and the page numbers where such change was made.¹²¹

This format is not useful to CLECs that have no way of knowing what precise changes were made on the pages identified, since CenturyTel’s changes do not appear in redline, nor are they otherwise marked.¹²² Instead, CLECs must analyze and compare the new and old versions of the Service Guide line-by-line and word-by-word to identify the changes that were made.¹²³

¹¹⁶ *Id.* at 16, l. 8-9.

¹¹⁷ Tr. 100, l. 6-7.

¹¹⁸ Ex. 2, p. 29, l. 14-16 (citing CenturyTel Response to Charter Data Request No. 8, Attachment TJG-5).

¹¹⁹ Ex. 1, p. 17, l. 2-3.

¹²⁰ *Id.* at 19, l. 19-20.

¹²¹ *Id.* at 19, l. 22-23; 20, l. 1.

¹²² *Id.* at 20, l. 2-5.

¹²³ *Id.* at 20, l. 5-7.

Moreover, CenturyTel has not demonstrated that changes to the Service Guide would be subject to meaningful input from Charter, or other CLECs, even though they would be contractually bound by these changes. Further, CenturyTel's changes would not be subject to oversight by the Commission.¹²⁴

It is reasonable for a CLEC to seek certainty and reliability in order to plan and manage its business affairs.¹²⁵ Charter's proposed language fulfills its need for certainty by effectively prohibiting CenturyTel from making unilateral changes to the Agreement by means of its Service Guide.

CenturyTel's approach will be rejected for several reasons. First, CenturyTel's proposal would effectively permit it to unilaterally modify the contractual obligations of either Party. Such a result would defeat the purpose of entering into the Agreement. Contracts are intended to bind parties to precise terms, but under CenturyTel's approach terms would remain unsettled.

CenturyTel's argument, that Article III, § 53 affords Charter adequate protections, is flawed. CenturyTel claims that Section 53 makes clear the Service Guide is intended to supplement the Agreement and should not be construed as contradicting or modifying the terms of the Agreement, and permits Charter to delay, for two months, the implementation of any change to the Service Guide that materially and adversely affects its business while the Parties negotiate in good faith to resolve the adverse impact. This argument ignores the fact that CenturyTel could still improperly impose obligations on Charter by adding terms in the Service Guide that impose processes, or restrictions, not otherwise set forth in the Agreement if it was silent on a particular subject. Charter encountered this exact

¹²⁴ *Id.* at 18, l. 20-21 (citing CenturyTel Response to Charter Data Request No. 13).

¹²⁵ Ex. 11, p. 36, l. 13-17.

problem under its current interconnection agreement with CenturyTel, which led to a dispute before the Commission.¹²⁶

Second, it is unfair and unreasonable to allow one Party to a contract to have the right to modify contractual obligations of a document that was unilaterally prepared by only one party. Third, CenturyTel's proposed language effectively circumvents the Commission approval process contemplated under Section 252 of the Act. Section 252 requires that all Interconnection Agreements, and amendments, be approved by a state commission.¹²⁷ CenturyTel's approach would effectively circumvent the formal amendment process designed to ensure that changes to the Agreements are subject to continued Commission oversight and approval.

Fourth, and finally, contrary to CenturyTel's position and as Mr. Gates testified, it is not common for documents like CenturyTel's Service Guide to bind CLECs via the agreements. Several state commissions have determined that the terms of a document similar to the Service Guide (sometimes referred to as a Change Management Process document ("CMP")) cannot take precedence over the Agreement.¹²⁸

For example, the Minnesota PUC ruled that

"[i]n cases of conflict between the changes implemented through the CMP and any CLEC interconnection agreement (whether based on the Qwest

¹²⁶ See, generally, *Report and Order*.

¹²⁷ 47 U.S.C. § 252(e).

¹²⁸ *In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration with Qwest Corporation*, ARB 775, Arbitrator's Decision at 6-7 (Ore. PUC 2006) (finding that the terms and conditions of an interconnection agreement may differ from changes implemented through the CMP); *In the Matter of Eschelon Telecom of Oregon, Inc. Petition for Arbitration with Qwest Corporation*, MPUC No. P-5340, 421/IC-06-768, Arbitrator's Report at 7 (MN PUC 2006) (*Eschelon Minnesota Arbitration*) (emphasizing that "Eschelon has provided convincing evidence that the CMP process does not always provide CLECs with adequate protection from Qwest making important unilateral changes in the terms and conditions of interconnection."); *Application of Eschelon Telecom of AZ, Inc. for approval of an ICA with Qwest Corp.*, T-01051B-06-0572, Opinion and Order (Ariz. Corp. Comm'n 2008) (finding that the Qwest CMP document could not be used to override the ICA).

SGAT or not), the rates, terms and conditions of such interconnection agreement shall prevail as between Qwest and the CLEC party to such interconnection agreement."¹²⁹

Decision

Accordingly, the Arbitrator declines to allow CenturyTel to unilaterally modify the terms of the Agreement through the use of its Service Guide. There is no need to incorporate external terms into the Agreement, and the Service Guide should be used as a reference only.

In the event that CenturyTel seeks to contractually bind Charter to certain terms therein, it may initiate the amendment process set forth in the Agreement, subject to Commission approval. This decision is intended to ensure that both Parties have certainty as to their contractual obligations under the terms of the Agreement. Charter's language with respect to Issue 11 will be adopted.

The Arbitrator finds this issue in favor of Charter.

12. Should the Agreement allow one party to force the other Party into commercial arbitration under certain circumstances?¹³⁰

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

¹²⁹ *Echelon Minnesota Arbitration* at 7.

¹³⁰ CenturyTel's phrasing of this issue is: "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?"

Conclusions of Law and Discussion

A review of relevant case law leads to the conclusion that, under the Act, the Commission is obliged to hear any legitimate unresolved dispute regarding interpretation or enforcement of the terms and conditions of an approved the Agreement. As the Court of Appeals for the Eleventh Circuit noted, the FCC "decided that interpretation and enforcement of the Agreements were responsibilities of the states under section 252."¹³¹

The Arbitrator disagrees with CenturyTel's limited reading of the FCC's decision in *Starpower*. While the FCC indicated that parties are bound by any *existing* dispute resolution provisions of interconnection contracts, the key finding by the FCC relevant to Issue 12 is as follows:

In applying Section 252(e)(5), we must first determine whether a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' "responsibility" under section 252. We conclude that it is.¹³²

CenturyTel would ignore the FCC's clear discussion regarding the role of dispute resolution provisions:

We note that, *in other circumstances*, parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion, and, therefore, the state commission would have no responsibility under section 252 to interpret and enforce an existing agreement. In this case, however, *the relevant interconnection agreements do not expressly specify how the disputes shall be resolved*.¹³³

The FCC in *Starpower* thus acknowledged that where an interconnection agreement includes dispute resolution provisions (including binding arbitration requirements), a state

¹³¹ *BellSouth Telecomms. v. MCI Metro Access Transmission Servs.*, 317 F.3d 1270, 1275 (11th Cir. 2003), citing *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, 15 FCC Rcd 11277, 11279 (2000) (hereinafter *Starpower*).

¹³² *Id.*

¹³³ *Id.* at 11281 (emphases added).

commission might not become involved in resolving a dispute. But the Arbitrator is not asked to decide Issue 12 on the basis of an existing arbitration requirement. Rather, the Parties disagree as to whether a binding arbitration requirement should be included in the first instance.

Decision

Because case law instructs that it is the responsibility of a state commission to interpret and enforce the terms of an approved interconnection agreement, the Arbitrator declines to mandate that either Party submit to binding arbitration at the whim of the other. If a Party is unhappy with the decision, or if the Commission declines to hear the dispute, that Party may proceed to the FCC or state or federal court as is appropriate. CenturyTel's position would undercut a Party's federal law right to a hearing before the Commission or FCC or a court of competent jurisdiction, and thus that position is rejected.

The Arbitrator finds this issue in favor of Charter.

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 proving 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"?¹³⁴

Findings of Fact

35. The language CenturyTel proposes for Article III, §§ 9.4 and 20.4 is intended to address issues relating to past and ongoing billing disputes with Charter.¹³⁵

36. After CenturyTel has received the notice of dispute from Charter, CenturyTel would be obligated to investigate such disputes in good faith and report its findings to Charter. Charter may then either accept such findings or to escalate the dispute to the Commission for resolution.¹³⁶

37. If the billing dispute cannot be resolved within 180 days after Charter's notice of dispute, Charter could petition for formal dispute resolution pursuant to Article III, § 20.3. If Charter did not initiate formal dispute resolution within twelve (12) months following the notice of dispute, Charter would waive its right to withhold payment of the disputed amount.¹³⁷

38. When CenturyTel receives Charter's reasons for the dispute, CenturyTel evaluates such reasons and either accepts or rejects such disputes. Only Charter knows whether it has a reasonable basis for disputing the billing. Thus, consistent with common

¹³⁴ Charter's phrasing of this issue is: "Should the parties agree to a reasonable limitation as to the period of time by which claims arising under the agreement can be brought?"

¹³⁵ Ex. 21, p. 47, l. 16 – p. 48, l. 5.

¹³⁶ *Id.*

¹³⁷ *Id.* at 49, l. 1-7.

commercial practices, Charter should make the decision whether to escalate the dispute to the Commission.¹³⁸

Conclusions of Law and Discussion

The Parties have devoted a considerable amount of time and effort to billing and payment issues that have arisen in the past. These past experiences have caused the Parties to advocate distinctly different approaches to the process for resolving disputed billing amounts that will be provided in the Agreement.

The Parties agree to the provisions of Article III, § 9.4 which specify that if a Party disputes, in good faith, any amount billed under the Agreement, the Parties will expeditiously investigate the disputed amount, will exchange documentation reasonably requested, and will “work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating formal dispute resolution.”¹³⁹ Where informal efforts do not resolve a pending dispute, the Parties propose contrasting approaches to the initiation and waiver of formal dispute rights.

Charter’s formulation of Article III, § 20.4 would establish a contractual limitation of action period of 24 months from the date of the occurrence which gives rise to the dispute. In contrast, CenturyTel’s proposed additional language for Article III, § 9.4, would require Charter to petition for formal dispute resolution pursuant to Section 20.3 “within 180 days of the billed Party providing written notice of the Disputed Amounts to the billing Party.” Further, if the billed Party did not seek formal dispute resolution within one year of such

¹³⁸ *Id.* at 35, l. 5-20.

¹³⁹ Joint Statement at 42.

written notice, the billed Party would waive its right to withhold payment of the Disputed Amount.

The Arbitrator concludes that it is commercially reasonable to require the Parties to expeditiously resolve billing disputes that may arise. CenturyTel's proposed language better accomplishes this goal by requiring the billed Party to decide whether to initiate formal dispute resolution within 180 days following the date of the billed Party's notice that it is disputing a billed amount. Further, adopting CenturyTel's procedures places the obligation to proceed with formal dispute resolution on the Party in possession of the facts supporting non-payment of the Disputed Amount – the billed Party.

Decision

The Arbitrator concludes that CenturyTel's proposed language for Article III, §§ 9.4 and 20.4 is fair and reasonable, and finds that such language should be and hereby is approved.

The Arbitrator finds this issue in favor of CenturyTel.

14. Should CenturyTel be allowed to assess charges upon Charter for as yet unidentified, and undefined, potential "expenses" that CenturyTel may incur at some point in the future?¹⁴⁰

¹⁴⁰ CenturyTel's phrasing of this issue is: "(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 preapproved 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?"

Findings of Fact

39. The Parties spent more than six months negotiating the terms of this agreement.¹⁴¹

40. The Parties have had ample time to identify those terms in the draft Agreement which they believe would require some form of compensation from the other Party. CenturyTel has been on notice that Charter expected all necessary pricing terms to be included in the agreement (and the Pricing Article specifically).¹⁴²

41. The Commission recently determined that CenturyTel has improperly assessed charges upon Charter for functions required by the Parties interconnection agreement, but for which no charges apply.¹⁴³

Conclusions of Law and Discussion

In arbitrating the disputed issues here, the Arbitrator is seeking to clarify each Party's respective obligations now, and for the term of the contract. For that reason, the Arbitrator is hesitant to grant CenturyTel the discretion to impose charges upon Charter which are not specifically enumerated in the Agreement.

CenturyTel asks to approve its right to seek reimbursement from Charter for all "reasonable" costs.¹⁴⁴ But CenturyTel cannot, or will not, identify such costs at this time.

¹⁴¹ Ex. 14, p. 27, l. 27-28.

¹⁴² *Id.* at 28, l. 1-4.

¹⁴³ See *Report and Order* at 11.

¹⁴⁴ Ex. 21, p. 20, l. 3-4.

Instead, CenturyTel seeks the right to recover these unidentified, or ill-defined, "expenses" by assessing non-recurring charges upon Charter.¹⁴⁵

CenturyTel's proposal is problematic for several reasons, not the least of which is that it creates uncertainty as to Charter's obligations on a going-forward basis. That type of ambiguity has already lead these two Parties into prior disputes, one of which this Commission recently decided.

CenturyTel's proposed language increases the potential for future disputes. Most significantly, CenturyTel's proposal would allow it to charge Charter to perform functions that are not currently provided for in the Agreement.

That is not to say that CenturyTel may not be entitled to compensation for performing those functions. Charter does not dispute that notion.¹⁴⁶ If CenturyTel performs such functions, the contract amendment process set forth in Sections 4 and 12 of the Agreement would provide a means by which CenturyTel can propose an amendment to the Agreement. That amendment can specifically detail the costs and expenses CenturyTel seeks to recover, as well as the basis for requiring Charter to compensate CenturyTel.¹⁴⁷

Decision

Under Charter's proposal, CenturyTel will have sufficient opportunity to propose an amendment to ensure that Charter compensates CenturyTel for performing any functions not currently contemplated by the Parties, or set forth in the Agreement.¹⁴⁸ If the terms of that amendment are reasonable, the Arbitrator would expect the Parties to agree on such

¹⁴⁵ DPL at 45 (CenturyTel proposed § 22.1).

¹⁴⁶ Ex. 3, p. 22, l. 27-32.

¹⁴⁷ Ex. 4, p. 26, l. 15-18; p. 27, l. 12-17.

¹⁴⁸ Ex. 3, p. 23, l. 8-9.

terms. Indeed, the Commission routinely approves interconnection agreement amendments. Furthermore, to the extent that any dispute did arise between the parties, CenturyTel would have the right to use the dispute resolution process to resolve any disputed terms.

The Arbitrator finds this issue in favor of Charter.

Indemnity, Warranties and Limitation of Liability Issues

15(a). Should Charter be required to indemnify CenturyTel even where CenturyTel's actions are deemed to constitute negligence, gross negligence, intentional or willful misconduct; or if CenturyTel otherwise contributes to the harm that is the subject of the cause of action?¹⁴⁹

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

The dispute centers on the scope of the indemnity provisions of the Agreement. Generally, both Parties have agreed to indemnify one another against third-party claims. However, Charter proposes language which would limit either Party's indemnity obligations *to the extent that* the indemnified Party engages in certain acts that give rise to the potential third-party claims. Specifically, Charter asserts that if the indemnified Party has engaged in

¹⁴⁹ CenturyTel's phrasing of this issue is: (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 identified where the claimant is that Party's customer?

acts that are deemed negligent, grossly negligent or which constitute intentional or willful misconduct, then that Party (the indemnified party) may not demand indemnification to the extent that it was at fault.¹⁵⁰

If Charter's proposed language were adopted, the Arbitrator would expect any third-party claims to be defended in the following manner. First, after the plaintiff filed its claims, CenturyTel might invoke the indemnity provisions and require Charter to defend the claims. Second, Charter would assume the defense of the claims, and (likely) implead CenturyTel into the dispute. Then, each Party's respective liabilities to the third party would be addressed in the litigation. In this way, Charter would, technically, continue to indemnify CenturyTel against the claims, but CenturyTel would be liable for the proportion of damages, in a manner commensurate with the level of harm caused by its acts or omissions. In other words, Charter would be required to indemnify CenturyTel, but only *to the extent that* the indemnified party is not at fault.

This approach is, of course, consistent with the concept of contributory or "comparative fault," which the Missouri Supreme Court adopted as the liability standard for tort claims.¹⁵¹ Under this fault standard, courts weigh the relative liability of each party to an action based upon the comparative fault of each party involved in the transaction.

In practice, as the Court has explained, "joining all parties to a transaction in a single lawsuit" allows "for the comparison of the fault of all concerned."¹⁵² Thus, Charter's proposal is consistent with the governing fault standard in Missouri. It therefore ensures

¹⁵⁰ DPL at 48.

¹⁵¹ See *Gramex Corp. v. Green Supply, Inc.*, 89 S.W.3d 432, 439 (Mo. 2002) (citing *Gustafson v. Benda*, 661 S.W.2d 11, 13 (Mo. banc 1983)).

¹⁵² *Id.* (citing Prosser).

that indemnity obligations are limited where the indemnified Party has contributed to the alleged harm.

CenturyTel opposes Charter's proposal and argues that Charter's approach would be unworkable in terms of designating potential liability between the two Parties, for purposes of defending the claim. But CenturyTel offers no reasoned explanation as to why Charter should in fact assume indemnity obligations (in their entirety) when CenturyTel acts in a manner that gives substantial rise to the harms.

Further, Missouri courts' repeated affirmation of comparative fault, and the mechanism by which liability is established when there is more than one defendant, sufficiently answers any CenturyTel claim that Charter's proposal is unworkable. That claim simply does not reflect the fact that the Missouri courts have expressly adopted these very principles.

In addition, CenturyTel has already agreed, in Section 9.4 of Article VII, that Charter's indemnity obligations should be limited when claims arising from the provision of 911 service are caused by CenturyTel "acts of negligence, gross negligence or wanton or willful misconduct . . ." ¹⁵³ In other words, CenturyTel has agreed, in the 911 indemnity provisions, to the very concept that Charter proposes for the general indemnity provisions of the Agreement.

CenturyTel can not oppose these principles in the context of the general indemnity provisions of the Agreement, but at the same time accept the same limiting principles elsewhere. That internal inconsistency fundamentally undermines its position on this issue.

¹⁵³ DPL at 115.

The Arbitrator therefore discounts CenturyTel's assertions concerning potential problems with administering this standard.

Finally, the Commission has previously ruled that "as a matter of public policy," parties to interconnection agreements should not be permitted to escape liability for "intentional, willful or gross negligent conduct."¹⁵⁴ CenturyTel's language is inequitable because it fails to recognize the principle of contributory fault. In other words, if the indemnified party is partly liable for the harm to a third party, CenturyTel's proposal would require the indemnifying party to pay for the entire claim. Charter's language properly recognizes the principle of contributory fault by only requiring the indemnifying party to reimburse the indemnified party up to the extent that the indemnified party is not at fault.

Decision

The Arbitrator finds this issue in favor of Charter.

15(b). 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?¹⁵⁵

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

¹⁵⁴ *SBC Arbitration-Commission Decision*, at 56.

¹⁵⁵ CenturyTel's phrasing of this issue is: Should the disclaimer of warranties be limited to product-based language or extend to the information and services that are the subject of the Parties' Agreement?

Conclusions of Law and Discussion

There is no need for the additional disclaimer of warranties language that CenturyTel seeks here. Specifically, CenturyTel asserts that it must be permitted to limit any implied warranties of "reasonable care, workmanlike effort, results, lack of negligence, accuracy or completeness of responses."¹⁵⁶

Although CenturyTel stated that the source of its additional language is the disclaimer of implied warranties created by UCITA, UCITA is a *draft*, proposed "uniform" code which has been adopted by only two states: Maryland and Virginia. It is intended to provide a set of rules and contract principles governing software licensing and online contracting.

Neither of those activities is contemplated under this draft Agreement. Moreover, UCITA is not applicable to network interconnection under Section 251 of the Act.¹⁵⁷ Further, there is no evidence that this language has ever been explicitly, or expressly, applied to interconnection agreements.

This language is in addition to other standard warranties language to which the Parties have agreed. Specifically, the Parties have agreed to disclaim any implied warranties "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, [and] fitness for a particular purposes."¹⁵⁸ Thus, it is clear that the Parties agree as to the standard disclaimer, or limitations, of implied warranties that are in most interconnection agreements. This language sufficiently protects both Parties.

¹⁵⁶ DPL at 53 (CenturyTel proposed language for Art. III, § 30.2).

¹⁵⁷ 47 U.S.C. § 251.

¹⁵⁸ DPL at 53 (Charter proposed language at Art. III, § 30.2).

Decision

The Arbitrator finds this issue in favor of Charter.

15(c). 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?¹⁵⁹

Findings of Fact

The Parties agreed to address this issue in briefing only; accordingly, no testimony was filed by either Party, and the Arbitrator makes no findings of fact.

Conclusions of Law and Discussion

This provision deals with liability for damages when the parties harm each other. This provision does not limit the parties' indemnification obligation to a third party.

Under CenturyTel's proposal, any damages that it may be liable to Charter for will be strictly limited by a formula that is equivalent to the amount of charges assessed by CenturyTel under the Agreement for any particular month, or where liability is for a full year, total charges for such year.¹⁶⁰ The Parties' competing proposed language for Section 30.3.3.7 differs in two significant ways.

First, the Parties disagree as to whether damages should be capped at a predetermined level. CenturyTel argues that damages should be capped at monthly charges. Charter responds that damages should be limited to actual, direct damages.

¹⁵⁹ CenturyTel's phrasing of this issue is: Should the Agreement limit damages in a manner that is consistent with telecommunications industry practice and Charter's own customer agreements and tariffs?

¹⁶⁰ DPL at 54 (CenturyTel proposed language for Art III, § 30.3).