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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.

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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 251. 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.**

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**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 Indemnitee 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.<sup>25</sup> 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

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<sup>25</sup> 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).

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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.<sup>26</sup> To the extent parties further

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<sup>26</sup> See Final Decision (Phase I), *Investigation Into Ameritech Wisconsin Operational Support System*, 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

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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 51.335<sup>27</sup> 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?**

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##### <sup>27</sup> § 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