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July 16, 2008

VIA ELECTRONIC MAIL AND FEDERAL EXPRESS

Filing Center
Oregon Public Utility Commission
550 Capitol Street NE Ste 215
Salem, OR 97301-2551

Re: ARB 830 – Opening Brief of CenturyTel of Oregon, Inc.

Dear Sir/Madam:

Enclosed are the original and five copies of the Opening Brief of CenturyTel of Oregon, Inc. and Certificate of Service for the above-referenced matter.

Sincerely,

RICHARD A. FINNIGAN

RAF/km
Enclosures

cc: Service List (via e-mail or e-mail and Federal Express)
ALJ Wallace (via e-mail)
Paul Schudel (via e-mail)
Tom Moorman (via e-mail)
James Overcash (via e-mail)
Clients (via e-mail)

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

In the Matter of

DOCKET NO. ARB 830

SPRINT COMMUNICATIONS COMPANY L.P.

Petition For Arbitration of an Interconnection Agreement with CENTURYTEL OF OREGON, INC.

OPENING BRIEF OF

CENTURYTEL OF OREGON, INC.

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Date: July 16, 2008

TABLE OF CONTENTS

I. HISTORY OF PROCEEDINGS

Sprint Communications Company L.P. ("Sprint") filed a Petition for Arbitration ("Sprint Petition") with the Public Utility Commission of Oregon (the "Commission") on March 11, 2008. The Sprint Petition requested that the Commission arbitrate open interconnection issues with CenturyTel of Oregon, Inc. ("CenturyTel") pursuant to § 252(b) of the 1996 revisions to the Communications Act of 1934, as amended (the "Act"), 47 USC 151 *et seq.*, and OAR 860-016-0030. The Sprint Petition identified fifteen unresolved issues for arbitration.

In support of its Petition, Sprint filed the following:

1. Sprint and CenturyTel's mutual agreement regarding the beginning date for the running of the 135-day negotiation period (Exhibit A);

2. The draft of an interconnection agreement between Sprint and CenturyTel showing the parties' proposed language in areas in which they had not reached an agreement (Exhibit B); and

3. A table listing the parties' disputed points and respective positions (Exhibit C).

Sarah K. Wallace was assigned as the Administrative Law Judge for the arbitration proceedings. A Prehearing Conference Report was issued by Judge Wallace on April 22, 2008, establishing a procedural schedule for the arbitration.

On April 4, 2008, CenturyTel filed its Response to the Sprint Petition ("Response"). In support of its Response, CenturyTel included the following:

1. A Disputed Points List (Response Exhibit 1), which included CenturyTel's positions regarding each issue; and

2. CenturyTel's version of the parties' Interconnection Agreement showing each of the parties' proposed language in areas in which they had not reached an agreement (Response Exhibit 2).

CenturyTel's Response and supporting materials addressed each of the 15 issues contained in Sprint's Disputed Points List, and added a sixteenth issue.[1]

On May 5, 2008, Sprint filed the Direct Testimony of James R. Burt in support of the Sprint Petition. Also on May 5, 2008, CenturyTel filed the Opening Testimonies of Ted M. Hankins, Guy E. Miller, III and Steven E. Watkins. On June 4, 2008, Sprint filed the Rebuttal Testimonies of James R. Burt and Randy G. Farrar. Also on June 4, 2008, CenturyTel filed the Rebuttal Testimonies of Ted M. Hankins, Guy E. Miller, III and Steven E. Watkins.

On June 17, 2008, Judge Wallace conducted a prehearing conference during which counsel for the parties confirmed that the parties had agreed to waive cross-examination. Thus, the public hearing regarding this matter previously scheduled for June 24, 2008 was canceled. The parties were directed to submit motions to admit pre-filed testimonies on or before June 26, 2008, together with witness affidavits. On June 25, 2008, CenturyTel submitted its motion to admit pre-filed testimonies and witness affidavits, and on June 27, 2008, Sprint submitted its motion to admit pre-filed testimonies and witness affidavits (having requested a one-day extension within which to make such filings). On July 2, 2008, Judge Wallace entered an order admitting the testimonies and exhibits into the record, as well as a ruling granting a request for official notice of four interconnection agreements approved by the Commission in ARB 370, ARB 526, ARB 833 and ARB 653.

[1] CenturyTel anticipates that a further updated Disputed Points List ("DPL") may be either jointly submitted by the parties or may be submitted by CenturyTel contemporaneous with the filing of the Reply Briefs. Such updated DPL would reflect any additional issues that have been resolved by the parties through negotiations. Indicated below in this Brief are descriptions of the Issues that have been resolved and the terms of such resolutions.

II. LIST OF ISSUES

The parties' respective pleadings listed the disputed issues, which are summarized in the following table:

Issue No.	CenturyTel Issue Statement	Sprint Issue Statement
1	Should the dispute resolution procedures, including commercial arbitration, be included in the Agreement?	Should disputes under the Interconnection Agreement be submitted to the Commission or to commercial arbitration?
2	What are the appropriate terms for Indemnification?	What are the appropriate terms for indemnification and limitation of liability?
3	How should the Bill and Keep arrangement be incorporated in the Agreement or should it accurately reflect what is agreed to in Section 4.4.2 and 4.2.3?	How should the bill and keep arrangement be incorporated in the agreement?
4	What Direct Interconnection Terms should be included in the Interconnection Agreement?	What Direct Interconnection Terms should be included in the Interconnection Agreement?
5	Should Sprint and CenturyTel share the costs of the Interconnection Facility between their respective networks based on their respective percentages of originated traffic?	Should Sprint and CenturyTel share the cost of the Interconnection Facility between their networks based on their respective percentages of originated traffic?
6	What are the appropriate rates for direct Interconnection Facilities?	What are the appropriate rates for direct interconnection facilities?
7	Should the Interconnection Agreement contain provisions limiting Indirect Interconnection?	Should the Interconnection Agreement contain provisions limiting indirect interconnection?
8	Should Sprint be required to enter into traffic exchange agreements with a third-party Telecommunications Carriers for traffic that transits through CenturyTel's network to reach a third-party Telecommunications Carrier? Should CenturyTel be indemnified by Sprint, if Sprint does not have a traffic exchange agreement with the third-party for any actions or complaints, including any attorney's fees and expenses, against CenturyTel concerning the nonpayment of charges levied by such third party Telecommunications Carrier for Sprint's traffic?	Should Sprint be required to reimburse CenturyTel when CenturyTel is acting as a transit provider if CenturyTel compensates third parties for the termination of Sprint-originated traffic?
9	Should the Interconnection Agreement permit the Parties to combine traffic subject to reciprocal compensation charges and traffic subject to access charges on the interconnection trunks?	Should the Interconnection Agreement permit the Parties to combine traffic subject to reciprocal compensation charges and traffic subject to access charges on the interconnection trunks?

10	What terms for virtual NXX should be included in the Interconnection Agreement?	What terms for virtual NXX should be included in the Interconnection Agreement?
11	What are the appropriate terms for reciprocal compensation under the bill and keep arrangement agreed to by the parties?	What are the appropriate terms for reciprocal compensation under the bill and keep arrangement agreed to by the Parties?
12	Should the Performance Review terms include language for refunds and dispute resolution if appropriate remedies are not agreed to when performance is not adequate?	Should terms be included that provide for the opportunity of refunds and the ability to pursue dispute resolution if appropriate remedies are not agreed to when performance is not adequate?
13	What are the appropriate rates for Transit service?	What are the appropriate rates for transit service?
14	What are the appropriate rates for services provided in the Agreement including rates applicable to the processing of orders and number portability?	What are the appropriate rates for services provided in the Interconnection Agreement, including rates applicable to the processing of orders and number portability?
15	If CenturyTel sells, assigns or otherwise transfers its territory, or a portion of its territory, should CenturyTel be required to assign the Agreement to the purchasing entity or permitted to terminate the Agreement in those areas?	If CenturyTel sells, assigns or otherwise transfers its territory or certain exchanges, should CenturyTel be permitted to terminate the agreement in those areas?
16	Do terms need to be included when Sprint utilizes indirect interconnection, and CenturyTel is not provided detailed records, nor is CenturyTel able to identify and bill calls based upon their proper jurisdiction?	Do terms need to be included when Sprint utilizes indirect interconnection, and CenturyTel is not provided detailed records, nor is CenturyTel able to identify and bill calls based upon their proper jurisdiction?

III. RESOLVED ISSUES

Since the initiation of this arbitration by the filing of the Sprint Petition, the parties have continued their negotiations with regard to unresolved issues. The parties have resolved Issues 3, 9, 11 and 12 (the "Resolved Issues"). Consequently, this Brief will not address the Resolved Issues with the exception of setting forth the resolution of these issues achieved by the parties.

IV. ARGUMENT

Through its evidence and the legal positions set forth in this Brief, CenturyTel amply demonstrates that its positions are consistent with the applicable facts, law, rational public policy

and common sense. Accordingly, CenturyTel respectfully requests that the Administrative Law Judge adopt CenturyTel's position on each disputed issue in its entirety.[2]

Issue 1:

Issue 1. [Sprint's Formulation] Should disputes under the Interconnection Agreement be submitted to the Commission or to commercial arbitration?
Related Agreement Provisions: Article III, §§ 20.3, 20.4, and 20.5.

Issue 1. [CenturyTel's Formulation] Should the dispute resolution procedures, including commercial arbitration, be included in the Agreement?

Related Agreement Provisions: Article III, §§ 20.1, 20.1.1, 20.1.2, 20.2, 20.3, 20.3.1 and 20.3.2.

CenturyTel's Proposed Resolution: CenturyTel respectfully submits that where the Commission declines jurisdiction or does not have subject matter jurisdiction over a dispute, commercial arbitration should be required.

The parties are in agreement that disputes which arise under the Interconnection Agreement should be submitted to the Commission for decision.[3] (CenturyTel/1, Miller/9-10; Sprint/4, Burt/4.) The point on which the parties' current positions diverge is the dispute resolution procedure that is to be applied in the event that the Commission either declines

[2] As the record reflects, the instant proceeding is one of several companion arbitrations in various states involving Sprint and CenturyTel (Sprint/1, Burt/6) which address substantially the same issues raised in this proceeding for resolution. One of those states – Michigan – has already been resolved after a proposed resolution of the issues provided by the Arbitration Panel (which acted in much the same manner as the Administrative Law Judge in this proceeding) was acted upon by the Michigan Public Service Commission. *See In the Matter of the Petition of Sprint Communications Company L.P. for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with CenturyTel Midwest – Michigan, Inc.,* Case No. U-15534, Decision of the Arbitration Panel (June 10, 2008) (the "*Michigan Panel Decision*"); *In the matter of the Petition of Sprint Communications Company L.P. for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with CenturyTel Midwest – Michigan, Inc.,* Case No. U-15534, Order of the Commission (July 1, 2008) ("*Michigan Commission Decision*"). A copy of the *Michigan Panel Decision* is attached to this Brief as Exhibit A and a copy of the *Michigan Commission Decision* is attached to this Brief as Exhibit B. Since these decisions are between the same parties, raise substantially the same issues and evidence and are contemporaneous with this proceeding, CenturyTel respectfully submits that the Michigan resolution of many of the issues should be useful to the Administrative Law Judge.

[3] As a consequence of the narrowing of the scope of the parties' dispute regarding Issue 1, the following provisions of the Interconnection Agreement are no longer in dispute: (a) Section 20.1, including §§ 20.1.1 and 20.1.2; (b) Section 20.2; (c) Section 20.3.1; and (d) the deletion of previously proposed § 20.4. (Sprint/4, Burt/5-6.)

jurisdiction or it is determined that the Commission lacks subject matter jurisdiction over a particular dispute.[4]

In the event that the Commission either lacks or declines jurisdiction over a dispute, CenturyTel has demonstrated that all of the reasons that generally favor binding arbitration (*e.g.*, cost savings, ability to choose an expert arbitrator, timely dispute resolution), as opposed to litigation, apply. (CenturyTel/1, Miller/10-11.) While Sprint suggests that commercial arbitration is appropriate only if the parties mutually agree (Sprint/4, Burt/6), Sprint's position begs the issue. Sprint does not dispute that commercial arbitration would provide a convenient and appropriate dispute resolution forum. Moreover, the opportunity to select an expert arbitrator should minimize Sprint's concerns over potential misapplication of relevant precedent.

Further, Sprint has already agreed in substance to this result in an agreement it has reached with another carrier in Arkansas. Specifically, CenturyTel's proposed wording for the provisions of the Interconnection Agreement relating to dispute resolution mirrors the provisions in the interconnection agreement between Windstream and Sprint that were approved by the Arkansas Commission,[5] other than change of the name references and substitution of "shall" for "may" in Article III, § § 20.3.1 and 20.3.2 of the parties' Interconnection Agreement.

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[4] In his Reply Testimony, Mr. Burt also states that the wording of Article III, § 20.5 (relating to division of costs incurred by the parties regarding dispute resolution procedures) is in dispute. (Sprint/4, Burt/6.) While CenturyTel does not oppose the wording of § 20.5 as set forth on page 6 of Mr. Burt's Reply Testimony, CenturyTel requests the addition of the following sentence to such section: "The Parties shall equally split the fees of the arbitration and the arbitrator." *See,* Exhibit C to Sprint's Petition, p. 4. Mr. Burt does not present any basis for opposing the addition of the foregoing sentence to § 20.5. CenturyTel submits that this additional sentence is necessary to provide the parties and an arbitrator of any dispute between Sprint and CenturyTel with a clear understanding of the division of the fees incurred in an arbitration proceeding. CenturyTel also submits that the equal division of such fees is fair and reasonable and should be approved by the Administrative Law Judge.

[5] *In the Matter of the Application of Alltel Arkansas, Inc. for Approval of Interconnection Agreement with Sprint Communications Company L.P.,* Docket No. 04-157-U (Nov. 12, 2004).

(CenturyTel/1, Miller/8-9; Exhibits CenturyTel/2 and CenturyTel/3.)[6] CenturyTel should not be subjected to different dispute resolution terms than those which Sprint has previously accepted with regard to Windstream.

Thus, the record fully supports a finding by the Administrative Law Judge that it is reasonable to require commercial arbitration in the event that the Commission lacks or declines jurisdiction over a dispute. Moreover, the legal basis provided by Sprint for its position, 47 U.S.C. § 252(e)(5), should not dissuade the Administrative Law Judge from reaching this conclusion.

Sprint relies on § 252(e)(5) to support its position that if the Commission declines or lacks jurisdiction, the FCC would be the proper forum to resolve the dispute. (Sprint/4, Burt/6, 8-9.) However, many interconnection agreement disputes involve non-payment for services and other financial disputes. The FCC has made clear that it is not the appropriate forum for a collection action.[7] Thus, if the Commission lacks or declines jurisdiction over a payment dispute and commercial arbitration is not required, the FCC could also likely lack jurisdiction, leaving the parties to seek relief from courts which often lack expertise in telecommunication matters. The requirement to arbitrate the dispute before an expert arbitrator in these circumstances solves this problem.

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[6]CenturyTel notes that its position concerning the language of the Interconnection Agreement pertaining to dispute resolution was revised and updated subsequent to CenturyTel's filing of its Revised DPL on April 4, 2008. As noted in footnote 1 of the Opening Testimony of Guy E. Miller, III, CenturyTel intends that the positions on the issues set forth in Mr. Miller's Opening and Rebuttal Testimonies shall be controlling to the extent of any discrepancy with the Revised DPL.

[7] *In re Qwest Communications Corp v Farmers and Merchants Mutual Telephone Company*, FCC 07-175, 22 FCC Rcd 17,973; 2007 WL 28727554, ¶ 29 (rel'd October 2, 2007) ("*Farmers & Merchants*").

The FCC wrote in *Starpower* that "parties may be bound by dispute resolution clauses in their interconnection agreement to seek relief in a particular fashion . . ."[8] Based on this guidance, requiring the Interconnection Agreement arising from this proceeding to provide that commercial arbitration shall be utilized by the parties in the event that the Commission declines to accept or does not have jurisdiction over a dispute: (1) is within the Commission's authority under § 252(b)(4)(C); (2) avoids the gaps in the FCC's jurisdiction that exist as a result of the FCC's findings in *Farmers & Merchants*; and (3) brings to the dispute resolution process all of the benefits customarily associated with arbitration. These benefits have been thoroughly discussed by CenturyTel. (CenturyTel/1, Miller/12-10; CenturyTel/14, Miller/4-6.) The Michigan Arbitration Panel agreed with CenturyTel's arguments regarding Issue 1.[9] However, the Michigan Public Service Commission ("MPSC" or "Michigan Commission") interpreted 47 U.S.C. § 252(e)(5) to require the FCC to assume the state commission's duties under § 252 in the event that the state commission *fails to act.* On the other hand, the Michigan Commission found that if a state commission lacks jurisdiction "the ICA language providing for commercial arbitration is appropriate."[10] CenturyTel requests the Administrative Law Judge's approval of CenturyTel's proposed language for § 20.3, including §§ 20.3.1 and 20.3.2.

Issue 2:

Issue 2. [Sprint's Formulation] What are the appropriate terms for indemnification and limitation of liability?

Related Agreement Provisions: Article III, §§ 30.1 and 30.3.

Issue 2. [CenturyTel's Formulation] What are the appropriate terms for Indemnification?

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[8] *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*, CC Docket No. 00-52, Memorandum Opinion and Order, 15 FCC Rcd 11277, 11279–80, ¶ 6, fn. 14 (2000) ("*Starpower*").

[9] *Michigan Panel Decision* at 5-7.

[10] *Michigan Commission Decision* at 4-5.

Related Agreement Provisions: Article III, § 30.1.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the indemnification and limitation of liability provision, as proposed by CenturyTel, should cover claims arising out of content transmitted by the other party, its end users or the actual retail end users of a third party entity to which telecommunications services are provided on a wholesale basis.

The essence of Issue 2 is whether the parties should mutually indemnify one another "for claims arising out of content transmitted by the other Party, its end users or the actual retail end users of a third party entity to which telecommunications services are provided on a wholesale basis." (CenturyTel/1, Miller/13.) For its part, Sprint has provided no rational basis as to why the language should not be adopted. CenturyTel, however, submits that its language is reasonable and is willing to abide by this language as it is proposed as an obligation of either party. To that end, CenturyTel notes that the Michigan Arbitration Panel agreed with CenturyTel, concluding as follows with regard to Issue 2:

> The Panel finds that CenturyTel's proposed indemnification language is appropriate for inclusion in the interconnection agreement and is reasonable. . . . The Panel finds more significant CenturyTel's point that Sprint has the contractual relationship with the third parties and under the contractual relationship is in the better position to negotiate a similar indemnification provision from the third party wholesale customers.[11]

The MPSC affirmed the *Michigan Panel Decision* with regard to Issue 2 and adopted CenturyTel's language for the Interconnection Agreement.[12] Independently, however, and for the following reasons, CenturyTel requests the Administrative Law Judge to

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[11] *Michigan Panel Decision*, 9.

[12] *Michigan Commission Decision*, 5.

conclude that the scope of CenturyTel's proposed indemnification provision is appropriate for the Interconnection Agreement.

First, CenturyTel has cited a number of provisions in Sprint's tariffs and standard contractual terms that contain language similar to CenturyTel's proposed language, and indemnification provisions that are even broader than CenturyTel's proposed wording of § 30.1. (CenturyTel/1, Miller/13-16; Exhibit CenturyTel/4.) CenturyTel also has cited Sprint's 13-state interconnection agreement with the AT&T Affiliates, which, in Section 14.4.1, contains similar indemnification language to CenturyTel's proposal. (CenturyTel/1, Miller/15-16; and Exhibit CenturyTel/5.) Thus, Sprint has already effectively agreed to the appropriateness of the language at issue and actually uses it as part of the terms of its service offerings.

Second, CenturyTel has demonstrated that the scope of indemnification that it supports is particularly necessary in the context of Sprint's planned provision of wholesale telecommunications services to third parties whose end users' conduct could give rise to claims against CenturyTel. In light of Sprint's wholesale arrangement, it is entirely reasonable that CenturyTel is indemnified against losses caused by defamation, libel or 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 end users of Sprint's wholesale customer.

Third, there can be no question that end user traffic under Sprint's wholesale business model must be treated as Sprint's traffic, and Sprint is responsible for the exchange of traffic and compensation for such traffic. *See, In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under § 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, Memorandum Opinion and Order*, WC Docket No. 06-55, DA 07-

709, released March 1, 2007 ("*TWC Order*"). In light of this responsibility, CenturyTel submits that it is intellectually dishonest for Sprint to parse its acceptance of responsibility for end user traffic under the wholesale business model by objecting to including indemnification of CenturyTel against third party claims relating to the content of such end user traffic. Sprint unequivocally acknowledges that the traffic originated by its retail end users and its wholesale customers is Sprint's traffic for intercarrier compensation purposes in accordance with the *TWC Order*. (Sprint/4, Burt/44-45.) However, Sprint disavows any responsibility to indemnify CenturyTel against third party claims that may arise in connection with the content of this very same traffic. Sprint's position is, therefore, wholly inconsistent with *TWC Order* and should be rejected.

Fourth, CenturyTel's proposed language accomplishes one of the preeminent objectives of Section 252 of the Act. Section 252 provides a framework for a process to establish *all* the necessary terms and conditions for the business arrangements between the parties. Sprint cannot rationally claim that § 30.1(ix) of the indemnification provisions is an unnecessary term as it defines the parties' respective responsibility should one of the parties' end users act in a manner contrary to law. This is all the more important in the context of the wholesale business model that is used by Sprint since the end users will be one additional step detached from Sprint as they will be the end users of Sprint's wholesale customers. Sprint's position would provide Sprint a "free pass" to disassociate itself from the responsibility for the end user traffic that it exchanges with CenturyTel. In addition to the inherent conflict that adoption of Sprint's position establishes with the FCC's *TWC Order* directives, there is no sustainable basis public policy basis for allowing the party delivering traffic to escape any of aspect of the responsibility for it

nor to suggest (as Sprint suggests) that this responsibility *does not* include the indemnification to the receiving party of that traffic.

Finally, Sprint, and *not* CenturyTel, is the only party with the ability to redress the end user behavior in the traffic delivered by Sprint. CenturyTel *lacks* the contractual relationship with Sprint's wholesale customers that would be necessary to obtain contractual indemnity protection. Sprint, on the other hand, *has* the opportunity to negotiate with its wholesale customer to pass on any indemnification risk that Sprint undertakes relative to the content of end user traffic. CenturyTel's proposed indemnification language presents nothing extraordinary, and Sprint will only be subject to an additional contingent risk if it chooses not to seek indemnification from its wholesale customer.

In light of this record basis that supports adopting CenturyTel's position, Sprint's rebuttal amounts to nothing more than Sprint's statements that "it does not agree" with CenturyTel's proposed language, and that such language is "not acceptable to Sprint". (Sprint/4, Burt/10-11.) Such generalized and unsupported statements do not constitute a proper basis for the Administrative Law Judge to reject CenturyTel's proposed language. As such, CenturyTel requests the Administrative Law Judge to adopt CenturyTel's position on this Issue 2 and require the parties to include in the Interconnection Agreement CenturyTel's proposed language for Article III, § 30.1, sub-section (ix).

Issue 3:

Issue 3. [Resolved by agreement of the Parties] How should the Bill and Keep arrangement be incorporated in the Agreement or should it accurately reflect what is agreed to in Section 4.4.2 and 4.2.3?

Related Agreement Provisions: Article VII I.A.

This issue has been resolved by the Parties as follows:

I. INTERCONNECTION PRICING

A. Reciprocal Compensation (Transport and Termination)

Transport and Termination for Local Traffic excluding Local Traffic that is also ISP-Bound Traffic

TBD (If invoked pursuant to Article IV, Section 4.4.2)

Local Traffic that is also ISP-Bound Traffic (pursuant to Article IV, Section 4.2.3)

Bill and Keep

Issue 4

Issue 4. [The Parties Agreed Formulation] What Direct Interconnection Terms should be included in the Interconnection Agreement?

Related Agreement Provisions: Article IV, §§ 2.2.2, 2.2.3, 2.2.4, 2.3.2.1, 2.3.2.4, 3.3.2.1, 3.3.2.2, and 3.4.2.1.1.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the Interconnection Agreement should provide for: (1) multiple Points of Interconnection ("POIs") between the parties' respective networks under those circumstances outlined by CenturyTel as and when applicable; (2) that each POI must be within the CenturyTel network; and (3) that the concept of POI be applied in instances where Sprint elects to use indirect interconnection *as well as* in those instances where direct interconnection is used.

The essence of Issue 4 is whether, as Sprint proposes, the parties should have a single POI between their networks indefinitely, versus whether, as CenturyTel proposes, the Interconnection Agreement should provide for an interconnection arrangement that reflects the actual Incumbent Local Exchange Carrier ("ILEC") network. CenturyTel respectfully submits that the record supports CenturyTel's proposed language for the Interconnection Agreement.

Contrary to Sprint's argument, nothing within the Act precludes multiple POIs or multiple trunk groups for the exchange of local traffic with a non-Bell Operating Company ILEC such as CenturyTel, particularly in those instances in which such requirements are triggered by traffic volumes and other issues that address the continuing need for quality service to the end users of each party. As demonstrated herein, Sprint's position is based on a series of misleading statements and false premises. Sprint's proposed "single POI indefinitely" is not supported by the facts, law or rational public policy. The Administrative Law Judge and the Commission are well aware that the network of the BOC operating in the State of Oregon – Qwest – is significantly more ubiquitous as compared to the network operated by CenturyTel. Yet, it is the *existing* CenturyTel ILEC network that must be considered when determining its interconnection obligations to Sprint. Sprint's "single POI per LATA" concept, if applied to CenturyTel, would impose upon CenturyTel a "superior" interconnection obligation prohibited by *IUB I*[13] and *IUB II*.[14] Therefore, CenturyTel respectfully requests the Administrative Law Judge to reject Sprint's contentions regarding Issue 4 and to adopt CenturyTel's position in its entirety.

A. The Concept of POIs Applies to *Both* Direct and Indirect Forms of Interconnection.

The record and the law confirm that Sprint is wrong in its effort to limit the discussion concerning this issue to establishment of a POI for direct interconnection. The record demonstrates there is no distinction between direct and indirect interconnection with respect to POIs. (CenturyTel/12, Watkins/6, 48; CenturyTel/15, Watkins/8.) Section 251(c)(2) confirms this conclusion as well; Section 251(c)(2) provides no differentiation between "direct" and "indirect" interconnections. Rather, Section 251(c)(2)(B) states that the interconnection point

[13] *Iowa Utilities Bd. v. F.C.C.*, 120 F.3d 753, 813 (8th Cir. 1997) ("*IUB I*").

[14] *Iowa Utilities Board v. Federal Communications Commission*, 219 F.3d 744,758 (8th Cir. 2000) ("*IUB II*").

must be "within" the ILEC's network. This same concept is confirmed in the FCC's related rules defining reciprocal compensation. (47 C.F.R. § 51.701 (c); *see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Radio Service Providers, First Report and Order*, CC Docket Nos. 96-98 and 95-185, FCC 96-325, released August 8, 1996) ("*First Report and Order*") at ¶ 553; CenturyTel/12, Watkins/8-9, 25-26; CenturyTel/15, Watkins/8).

B. The Concept of a "Single POI Per LATA" has no Application to this Proceeding.

Sprint's position with regard to this Issue (Sprint/1, Burt/22-23; Sprint/4, Burt/13, 15-16) is based on a series of misguided premises suggesting that the concept that a "single POI per LATA" is appropriate.[15] First, Sprint's reliance on Local Access and Transport Area ("LATA") concepts is misplaced since: (1) the concept of a "LATA" was based on the specific network arrangements of the Bell Operating Companies ("BOCs") at the time of the break-up of the former AT&T, not the networks of the smaller independent Local Exchange Carriers ("LECs")

[15] Local access and transport areas ("LATAs") were first established by Judge Harold Green of the United States District Court for the District of Columbia with regard to the AT&T breakup in *United States v Western Electric Co,* 569 F Supp 990, 993-94 (D DC, 1983) (implementing the modified final judgment ("MFJ") entered in *United States v American Telephone and Telegraph Co*, Civ. A Nos. 74-1698, 82-0192, 552 F.Supp 131 (D. D.C., 1982)). *See also SBC Communications, Inc v FCC*, 154 F3d 226, 230 fn 3 (CA 5, 1998) ("In implementing the MFJ, the district court established numerous local access and transport areas or 'LATAs' within which the BOCs were permitted to operate and provide telephone service."). Additionally, in 47 U.S.C. §§ 153 (3) and (25), Congress expressly recognized Judge Green's creation of LATAs. Subsection (25) defines a LATA to be a geographic area that was "established before February 8, 1996, by a Bell operating company . . . except as expressly permitted under the AT&T Consent Decree." 47 U.S.C. § 153(25)(A). Subsection (3) defines "AT&T Consent Decree" to be "the order entered August 24, 1982, in the antitrust action styled *United States v Western Electric*, Civil Action No. 82–0192, in the United States District Court for the District of Columbia, and includes any judgment or order with respect to such action entered on or after August 24, 1982." 47 U.S.C. §153(3). Notably, Senate Report No. 104-230 recognized the impact the Modified Final Judgment had on various sections of the 1996 revisions to the 1934 Act. *See, e.g.*, S Rep No. 104-230, at 115 (1996) (stating that the terms "'[i]nformation service' and 'telecommunications,' are defined based on the definition used in the Modification of Final Judgment"); S Rep No. 104-230, at 116 (stating that the phrase "AT&T Consent Decree" had been substituted for "Modification of Final Judgment" in the definitions); S Rep No. 104-230, at 198 (detailing where the Communications Act has superseded the Modified Final Judgment).

such as CenturyTel; and (2) a "LATA" designation is relevant only to the BOCs' line of business restrictions (such as interLATA toll). (CenturyTel/12, Watkins/6-7, 12-14, 48; CenturyTel/15, Watkins/5-7.)

Second, the record amply demonstrates that the concept of a "single POI per LATA" when applied to CenturyTel has no basis in fact. Sprint's suggestion that a "single POI per LATA" is a *universally applicable general rule* ignores the fact that it actually evolved from the negotiations between Competitive Local Exchange Carriers ("CLECs") and the BOCs based on the BOCs' expansive and ubiquitously interconnected networks and the BOCs' efforts to obtain Section 271 relief from their then current line of business restrictions. (CenturyTel/12, Watkins/14.) Similarly, Sprint's reliance (Sprint/1, Burt/23) on the FCC's *Unified Intercarrier Compensation FNPRM* proceeding,[16] apparently to support the notion that a "single POI per LATA" is a general rule, fails to note that this FCC proceeding is only a notice of proposed rulemaking. As to the issue of POIs, no new rule has been promulgated by the FCC. (CenturyTel/12, Watkins/15; CenturyTel/15, Watkins/5-6), and the proposals under review, if adopted, may very well support CenturyTel's position here.

With respect to its theory of a universally applicable, general "single POI per LATA" rule, Sprint, in addition to the *Unified Carrier Compensation FNPRM*, also relies on the FCC's *Verizon Arbitration Decision.*[17] (Sprint/1, Burt/22; Sprint/4, Burt/16.) Neither of these decisions supports Sprint's contention.

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[16] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, FCC 05-33 (rel'd March 3, 2005) ("*Unified Carrier Compensation FNPRM*").

[17] *See In the Matter of Petitions of WorldCom, Inc., Cox Virginia Telcom, Inc., and AT&T Communications of Virginia, Inc. Pursuant to § 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc.*, CC Docket Nos. 00-218, 00-249, and 00-251, FCC 02-1731 (rel'd July 17, 2002) ("*Verizon Arbitration Order*").

In the *Unified Carrier Compensation FNPRM*, the FCC cited to the *SWBT 271 Order*.[18] In the *Verizon Arbitration Decision*, the FCC cited to the *Unified Carrier Compensation NPRM*[19] as well as *the SWBT Texas 271 Order* as support for the "single POI per LATA" proposition.[20] In the *Unified Carrier Compensation NPRM*, in turn, the FCC cited to the very same *SWBT Texas 271 Order* for this same proposition.[21] Thus, Sprint's reliance for its position on Issue 4 rests solely on the FCC's cited basis for the "single POI per LATA" concept arising from the *SWBT Texas 271 Order*. That reliance is misplaced.

A review of the FCC's reference to a "single POI per LATA" within the *SWBT Texas 271 Order* (¶ 78) reveals that such reference was *solely to a provision within an agreement* between SWBT and MCI. The full text of that FCC-provided citation contained in footnote 174 is as follows:

> *See* SWBT Texas II Application, App. 5, Tab 45, MCI (WorldCom) Agreement Attach. 4, § 1.2.2. Section 1.2.2 of the WorldCom Agreement states: 'MCI(WorldCom) and SWBT agree that MCI (WorldCom) may designate, at its option, a minimum of one point of interconnection within a single SWBT exchange where SWBT facilities are available, or multiple points of interconnection within the exchange, for the exchange of all traffic within that exchange. If WorldCom desires a single point for interconnection within a LATA, SWBT agrees to provide dedicated or common transport to any other exchange within a LATA requested by WorldCom, or WorldCom may self-provision, or use a third party's facilities.' SWBT Texas II Application, App. 5, Tab 45, WorldCom Agreement Attach. 4, § 1.2.2.[22]

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[18] *In the Matter of Application by SBC Communications, Inc., Southwestern Bell Telephone Company, And Southwestern Bell Communications, Inc. d/b/a Southwestern Bell Long Distance, Pursuant to § 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas, Memorandum Opinion and Order,* CC Docket No. 00-65, FCC 00-238 (rel'd June 30, 2000) ("*SWBT Texas 271 Order*"). Southwest Bell Telephone Company ("SWBT") is a Bell Operating Company. *See* 47 U.S.C. § 153(5).

[19] *See In the Matter of Developing a Unified Intercarrier Compensation Regime, Notice of Proposed Rulemaking,* CC Docket No. 01-92, FCC 01-132 (rel'd April 27, 2001) ("*Unified Carrier Compensation NPRM*").

[20] *See Verizon Arbitration Decision*, ¶ 52, fn 118.

[21] *See Unified Intercarrier Compensation NPRM*, ¶ 91, fn 91. While footnote 91 also cites to 47 C.F.R. § 51.321, that section addresses the interconnection requirements under Section 251(c)(2) of the Act and the provision of Unbundled Network Elements ("UNEs"). The provision of UNEs by CenturyTel is not an issue in this proceeding.

[22] *SWBT Texas 271 Order*, ¶ 78, fn 174.

Conspicuously absent from Sprint's testimony is any explanation as to how language set forth in an interconnection agreement applicable only to SWBT and MCI could possibly bind, or is even factually relevant to, CenturyTel. Similarly absent is any explanation of how a private agreement between two completely different competing companies operating in another state (neither of which has any interest or connection to this arbitration) creates a generalized regulatory rule. An agreement between SWBT and MCI cannot bind CenturyTel or Sprint (unless both parties agree to do so in writing – which is obviously not the case here), and no private agreement can create an agency rule of general application.[23]

Moreover, CenturyTel notes that the context of the FCC's discussion in that case was SWBT's request for § 271 relief. Section 271, and any resultant obligations or relief requirements associated with the same, applies only to Bell Operating Companies.[24] CenturyTel

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[23] Sprint's citations to the provisions in the proposed interconnection agreement ("ICA") that reference "LATAs" (Sprint/4, Burt/15) are general references to industry-accepted nomenclature related to geographic traffic types and do not change the genesis of the "single POI per LATA" concept applicable *solely* to a BOC as demonstrated herein. Non-BOC ILECs, like CenturyTel, are only "associated" with a LATA. (CenturyTel/12, Watkins/ 13.) As the FCC has stated:

> The LATAs did not cover territory served by independent telephone companies (ITCs). The [MFJ] Court, however, did classify some independent exchanges as "associated" with a particular LATA. Traffic between a LATA and an associated exchange was treated as intraLATA, and could be carried by the BOC, while traffic between a LATA and an unassociated exchange was treated as interLATA, and could not be carried by the BOC. The ITCs were not subject to the restrictions imposed by the Consent Decree, and could carry traffic regardless of whether that traffic crossed LATA boundaries.

In the Matter of Petitions for Limited Modification of LATA Boundaries to Provide Expanded Local Calling Service (ELCS) at Various Locations, Memorandum Opinion and Order, CC Docket No. 96-159, File Nos. NSD-LM-97-2 through NSD-LM-97-25, FCC 97-244, released July 15, 1997 at ¶ 4 (footnotes omitted).

[24] *See, e.g.*, 47 U.S.C. § 271(a) ("Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.").

is not a "Bell Operating Company" as that term is defined in the Act.[25] Accordingly, Sprint's reliance on the *Unified Carrier Compensation FNPRM* and thus, the *Verizon Arbitration Decision* and, ultimately, the *SWBT Texas 271 Order*, as precedent for a generalized "single POI per LATA" rule that is binding upon CenturyTel is clearly misplaced.

The FCC's references contained in the three decisions cited by Sprint cannot and do not create new rules or requirements that apply to CenturyTel. The Administrative Law Judge should reject Sprint's effort to selectively cite to FCC statements negotiated by two different parties based on specific facts applicable to SWBT in another state. Regardless of the gloss that Sprint attempts to place on the FCC's statements, the genesis of the "single POI per LATA" concept is the *SWBT Texas Section 271 Order* and the terms within a negotiated provision of an SWBT agreement. This factual basis cannot and should not be applied to CenturyTel.[26]

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[25] Section 153(4), 47 U.S.C. § 153(4), states as follows:

> The term "Bell operating company" -
>
> (A) means any of the following companies: Bell Telephone Company of Nevada, Illinois Bell Telephone Company, Indiana Bell Telephone Company, Incorporated, Michigan Bell Telephone Company, New England Telephone and Telegraph Company, New Jersey Bell Telephone Company, New York Telephone Company, U S West Communications Company, South Central Bell Telephone Company, Southern Bell Telephone and Telegraph Company, Southwestern Bell Telephone Company, The Bell Telephone Company of Pennsylvania, The Chesapeake and Potomac Telephone Company, The Chesapeake and Potomac Telephone Company of Maryland, The Chesapeake and Potomac Telephone Company of Virginia, The Chesapeake and Potomac Telephone Company of West Virginia, The Diamond State Telephone Company, The Ohio Bell Telephone Company, The Pacific Telephone and Telegraph Company, or Wisconsin Telephone Company; and
>
> (B) includes any successor or assign of any such company that provides wireline telephone exchange service; but
>
> (C) does not include an affiliate of any such company, other than an affiliate described in subparagraph (A) or (B).

[26] Sprint's lack of specificity with respect to its interconnection proposal makes Sprint's proposal even more questionable. (CenturyTel/15, Watkins/5.)

C. The Law, as Applied to the Facts in the Record, along with Rational Public Policy, Supports Adoption of CenturyTel's Proposal for Resolving this Issue 4.

The facts in the record demonstrate that the CenturyTel and BOC networks are different. A BOC's network is more ubiquitous. CenturyTel's network is geographically limited. (CenturyTel/12, Watkins/7-8, 12-13.) As a result, CenturyTel's trunking network that Sprint apparently suggests should be used is not designed and sized for traffic other than exchange access traffic. (*Id.*, 17-18.) Likewise, Sprint's request for a "single POI per LATA," if not properly conditioned, is, in actuality, a request for interconnection that is superior (*i.e.*, more than equal) to that which CenturyTel provides for its own local traffic or to other carriers. If Sprint's position were adopted without applying conditions as CenturyTel has set forth in its proposed interconnection terms, CenturyTel could be required to construct or create network trunking arrangements solely for the benefit of Sprint.

To be sure, there is no single point in any of the Oregon LATAs where CenturyTel has facilities linking all of the CenturyTel end offices in the LATA. Such a single point could *only* be created if CenturyTel were to build or purchase new trunking routes. CenturyTel has not built or purchased such routes for its own local calling needs or those of any other carrier. If the Commission were to require CenturyTel to undertake such building or purchasing of trunking routes as a result of Sprint's request, such result would be a form of superior interconnection that is contrary to 47 U.S.C. §251(c)(2) which only requires interconnection that is "at least equal in

quality" to that which CenturyTel provides to itself. (*Id.*, 9-11; CenturyTel/15, Watkins/9-10.)[27] CenturyTel notes, however, that even when the FCC discussed superior interconnection (although now rejected by *IUB II*), the FCC required the CLEC to pay for that superior interconnection. (CenturyTel/12, Watkins/11; CenturyTel/15, Watkins/10.)

There can be no question that Sprint is seeking to avoid this result by attempting to disassociate itself from the costs of its network design. Sprint's efforts are exemplified by the attempt to shift the transport cost burden to CenturyTel. Thus, Sprint should at least be required to pay for any new form of transport required to be implemented by CenturyTel as a result of Sprint's request, even assuming CenturyTel is willing to enter into this type of arrangement. (*Id.*, 17-18)[28] This is the rational legal result based on the ILEC network required to be examined under Section 251(c)(2), and, like before, both the Michigan Arbitration Panel and the MPSC agreed.[29] Moreover, it is the result best supported by the public interest.

Absent adoption of the POI-related and resulting trunking arrangement provisions of CenturyTel's agreement, the record also reflects the possibility that Sprint's proposal could

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[27] *IUB II*, 219 F.3d at 758 (8th Cir. 2000)("[T]he superior quality rules violate the plain language of the Act," and the "at least equal in quality" does not mean "superior quality" and "[n]othing in the statute requires the ILECs to provide superior quality interconnection to its competitors."); *see also IUB I* at 813 (Competitive carriers requesting interconnection should have access "only to an incumbent LEC's existing network -- not to a yet unbuilt superior one"; the nondiscrimination aspect of the Act "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; *it does not mandate that incumbent LECs cater to every desire of every requesting carrier.*") (emphasis added); *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, CC Docket Nos. 01-338, 96-98, and 98-147, released August 21, 2003 at ¶ 15 (The FCC acknowledges that the 8th Circuit concluded that incumbents are not required "to alter substantially their networks in order to provide superior quality interconnection and unbundled access.")

[28] The 8th Circuit Court of Appeals that addressed the original appeal of the FCC's *First Report and Order* concluded that competitive carriers requesting interconnection should have access "only to an incumbent LEC's *existing* network -- not to a yet unbuilt superior one." *IUB I*, 120 F.3d at 813 (emphasis in original). Additionally, in addressing the meaning of nondiscrimination in the context of the Act, this same Court concluded that this mandate "merely prevents an incumbent LEC from arbitrarily treating some of its competing carriers differently than others; *it does not mandate that incumbent LECs cater to every desire of every requesting carrier.*" *Id.* (emphasis added). Neither of these conclusions was affected by the U.S. Supreme Court's review of the *IUB I* decision.

[29] *Michigan Arbitration Panel*, 10-12; *Michigan Commission Decision*, 7-8.

overburden facilities as a result of unpredictable volumes of local traffic. (CenturyTel/12, Watkins/17-18.) Should this occur, end user service degradation could result. There can be no question that the public interest is advanced by avoiding this possibility.

Based on the foregoing, therefore, it is axiomatic that adoption of CenturyTel's language on Issue 4 in this proceeding is entirely appropriate.[30] This language would require the consideration of the relevant variables and factors that would determine the need to establish additional POIs within the CenturyTel network and/or new trunk groups for the exchange of local interconnection traffic. The need to establish additional POIs and trunk groups would be based on, among other things, existing facility capacity (*e.g.*, connecting trunks), traffic volumes, relative costs of different networking options, and projections of future capacity needs. Each of these conditions would be preserved by CenturyTel's proposed language. (CenturyTel/12, Watkins/18-19.) In addition, CenturyTel requests that the Commission adopt its fiber meet point language. The record demonstrates that fiber meet point connections necessarily entail network arrangements and technical discussions that should rationally occur before any facilities are constructed or installed. (*Id.*, 20-21.)[31]

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[30] To the extent that Sprint relies on decisions of other state commissions, that reliance is, at best, misguided. (Sprint/1, Burt/23-24.) CenturyTel respectfully submits that the inference from Sprint that those decisions should, in any way, bind this Commission or the Administrative Law Judge should be rejected. Moreover, and unlike those state decisions, the *Michigan Panel Decision* and the *Michigan Commission Decision* are entirely relevant since they involve *the same parties, at the same time as this proceeding, and substantially the same issues*. In any event, setting aside the fact that the Administrative Law Judge should not cede the Commission's proper role in establishing *Oregon-specific* rulings and requirements, the decision reached in this proceeding must be based on the record. While Sprint seeks to ignore the facts in the record regarding the existing CenturyTel ILEC network, there is no legally supportable basis for doing so.

[31] Mr. Burt suggests that Mr. Watkins' testimony regarding fiber meet point is in error because one of the sections, Section 2.3.2.4, was deleted from the CenturyTel DPL. (Sprint/4, Burt/14.) Mr. Burt's suggestion amounts to an overstatement that should be rejected. CenturyTel notes that Mr. Watkins never mentioned Section 2.3.2.4 in his testimony. (CenturyTel/14, Watkins/14). Moreover, Section 2.3.2 has several subsections that remain necessary to properly implement any need for fiber meet point arrangements. Thus, for the reasons provided by CenturyTel, Section 2.3.2 should remain as proposed by it.

CenturyTel also respectfully submits that its proposals are wholly consistent with rational public policy. Networks, like the traffic carried thereon, are not "static." Sprint's position erroneously assumes such as a fact, and exposes CenturyTel to potential network congestion which is detrimental to consumers.[32] Juxtaposed to Sprint's proposal, CenturyTel's proposal for resolving Issue 4 properly and adequately addresses the fact of an ever-evolving network and changing levels of traffic. Consequently, CenturyTel knows of no rational public policy basis for adopting Sprint's proposal (and Sprint has provided none). CenturyTel's proposal should be adopted, if for no other reason than to protect the end users of *both* Sprint and CenturyTel from service degradation as the record reflects could occur. CenturyTel's proposed language for the establishment of POIs, the resulting trunking arrangements, and the separate terms and conditions for the establishment of fiber meet point arrangements should be adopted.

D. Sprint's Remaining Claims are Without Basis.

Finally, Sprint's remaining claim that CenturyTel's position is unlawful is equally without merit. Sprint's suggestion that the only issue relevant in the establishment of a POI is "technical feasibility." (Sprint/1, Burt/22; Sprint/4, Burt/13-14.) Sprint fails to note that within Section 251(c)(2) of the Act, Congress references technical feasibility as *only one* of the relevant criteria. (CenturyTel/15, Watkins/9.) Thus, "technical feasibility" cannot be divorced from the companion concepts included in Section 251(c)(2), including the condition that the interconnection must be no more than "equal to" that provided by CenturyTel to itself or other

[32] As noted by CenturyTel witness Watkins (CenturyTel/12, Watkins/19-20), the Commission has already expressed concerns regarding network inefficiencies and arrangements that compromise network capabilities. *See* Order No. 97-003, Docket Nos. ARB 3 and ARB 6, entered January 6, 1997 at 4. The factors that CenturyTel's proposed language would provide with respect to considering when additional POIs are required between the networks of Sprint and CenturyTel are fully consistent with these expressions of Commission concerns.

carriers,[33] and that the interconnection point for the interconnection arrangement must be "within the [incumbent] carrier's network."[34]

These Section 251(c)(2) provisions demonstrate that the focus of interconnection is on the incumbent LEC's network and that the Act *does not* require any interconnection arrangement that is more than "equal in quality" to that which the ILEC provides itself or to other carriers.[35] Based on this record, no doubt can exist that Sprint is seeking to obtain forms of interconnection that would be superior to that which CenturyTel provides to itself or other carriers. In light of the scope of Sprint's request, CenturyTel would be required to provide to Sprint a form of transport for local service calls beyond that which is "equal in quality to" that which CenturyTel provides in any other instance. (CenturyTel/12, Watkins/10-12.)

Notwithstanding Sprint's myopic, yet convenient, view of the proper scope of the analysis required for resolution of Issue 4, the costs associated with any more-than-equal form of interconnection that Sprint may request would also be clearly relevant, even assuming that CenturyTel would voluntarily agree to provision Sprint's request for superior interconnection.[36] Thus, Sprint's effort to pigeon hole the issue as one solely of "technical feasibility" is fundamentally at odds with *both* the scope of what Sprint seeks and the actual requirements under the full set of interconnection criteria set forth in the Act.

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[33] 47 U.S.C. § 251(c)(2)(C) (The duty to provide interconnection must also be one "that is at least equal in quality to that provided by the local exchange carrier to itself. . . .").

[34] 47 U.S.C. § 251(c)(2)(B).

[35] *See,* footnote 27, *supra,* and accompanying text.

[36] Even when the FCC discussed superior interconnection (although now rescinded by *IUB II*), the FCC required the CLEC to pay for that superior interconnection, even if CenturyTel was willing to provide this form of interconnection to Sprint. (CenturyTel/12, Watkins/11; CenturyTel/15, Watkins/10.)

Further, Sprint's references to 47 U.S.C. § 251(f)(1)[37] and to 47 U.S.C. § 251 (f)(2)[38] are red herrings. (Sprint/4, Burt/14-15.) As the record demonstrates, neither of these sections is at issue in this proceeding. (CenturyTel/15, Watkins/10-11.) CenturyTel has demonstrated that its proposed form of interconnection satisfies Sprint's interconnection request and desire to exchange traffic with CenturyTel. This proposal is made without any consideration of the application of either § 251(f)(1) *or* § 251(f)(2). The evidence shows that CenturyTel's proposal would more than satisfy even the most onerous set of interconnection requirements while Sprint's proposals go well beyond those requirements. Likewise, if CenturyTel's position on Issue 4 is adopted in this proceeding, as it should be, no modification or suspension of the

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[37] Section 251(f)(1) of the Act exempts certain rural telephone companies from Section 251(c)interconnection obligations under the Act. The scope of that exemption is as follows:

> (A) Exemption
>
> Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 of this title (other than subsections (b)(7) and (c)(1)(D) thereof).

47 U.S.C. § 251(f)(1)(A).

[38] Section 251(f)(2) provides the ability to certain local exchange carriers to suspend or modify the interconnection obligations found in both Section 251(b) and Section 251(c) as follows:

> A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection b) or (c) of this section to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification -
>
> (A) is necessary -
>
> (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
>
> (ii) to avoid imposing a requirement that is unduly economically burdensome; or
>
> (iii) to avoid imposing a requirement that is technically infeasible; and
>
> (B) is consistent with the public interest, convenience, and necessity.

47 U.S.C. § 251(f)(2).

requirements found in Section 251(b) would be required.

Issue 5

Issue 5. [Sprint's Formulation] Should Sprint and CenturyTel share the cost of the Interconnection Facility between their networks based on their respective percentages of originated traffic?

Related Agreement Provisions: Article II, § 2.59; Article IV, §§ 2.2.2, 3.2.2, 3.2.5.1, 3.2.5.2, 3.2.5.3, 3.2.5.5, and Article VII, I.C.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that no separate facilities costs should be imposed upon CenturyTel as those costs are already recovered through the parties' agreed-to "bill and keep" arrangement.

Simply stated, Issue 5 is whether, notwithstanding the parties' agreed-to "bill and keep" arrangement, Sprint can require CenturyTel to pay an additional amount for the costs of the facilities that Sprint uses to terminate traffic from Sprint's side of the POI. Sprint engages in a series of claims that attempt to either double recover a portion of its transport costs (CenturyTel/12, Watkins/23-24, 26; CenturyTel/15, Watkins/12), or to *misapply* an FCC rule – 47 C.F.R. § 51.709 – in a manner inconsistent with the agreed-to "bill and keep" arrangement between the parties and the concept of "transport and termination" as defined in the FCC's rules. (CenturyTel/12, Watkins/30-31; CenturyTel/15, Watkins/13.) Sprint's attempt in this regard should be rejected and CenturyTel's position that no facility charges are appropriate in light of the agreed-to "bill and keep" arrangement should be approved by the Administrative Law Judge and the Commission. (CenturyTel/12, Watkins/23, 26, 29, 38-39.)

The Administrative Law Judge need only review the facts in the record, and apply the applicable law to them, to reach the conclusion that CenturyTel's position on Issue 5 should be adopted. To the extent that decisions elsewhere cannot be reconciled with the facts and the applicable law as set forth in this proceeding, then those decisions have no application here.

(CenturyTel/12, Watkins/36-38; CenturyTel/15, Watkins/14-15.) The facts in this case are the only basis for a sustainable decision, and are those that Sprint effectively seeks to obfuscate or to ignore.

The facts demonstrate that CenturyTel's network is of a limited nature; the FCC's rules require no facility-sharing beyond the scope of the defined transport function that the parties have agreed to under their "bill and keep" arrangement; and Sprint's proposals would require interconnection beyond that which the *IUB II* requires. (CenturyTel/12, Watkins/38-39.) Sprint's efforts to obtain a result that would unjustly reward it with additional compensation of its transport costs already captured by its agreement to use a "bill and keep" arrangement with CenturyTel for local traffic should be rejected.

A. The FCC's Rules Require a Party to Bring Facilities to Its Side of the POI.

The record reflects that Sprint's proposal (Sprint/1, Burt/25-26) is contrary to the FCC's rules. (CenturyTel/12, Watkins/25-26 *quoting* 47 C.F.R. § 51.701(c)-(e).) "Transport and termination" for reciprocal compensation purposes is focused on the POI. Each party, under the FCC's rules, is responsible to bring its facilities to the POI, with the facilities costs for transport and termination being recovered under Section 251(b)(5) reciprocal compensation. (*Id.*, 23, 26; CenturyTel/15, Watkins/12-13.) The parties have agreed to a "bill and keep" arrangement for these transport and termination functions.[39] Transport is defined in the FCC's rules as including the cost of the use of facilities from the POI to the terminating switch (or equivalent facility) that one party provides for the termination of the other party's originating traffic.[40] As a result, the use of "bill and keep" means that the total costs of transport and termination on the parties' respective sides of the POI are, effectively, equal as are the amounts of terminated local traffic.

[39] *See, e.g.*, 47 C.F.R. § 51.713.

[40] *See*, 47 C.F.R. § 51.701(c).

Consequently, and regardless of Sprint's contentions to the contrary (Sprint/4, Burt/17-18), requiring CenturyTel to make additional payments for facilities beyond its network, *i.e.*, on the Sprint side of the POI, is not only contrary to the Act, but also provides Sprint with double recovery of the costs of those transport facilities required by Sprint to reach its side of the POI.[41]

It is irrelevant that Sprint proffered a limitation on the distance associated with its "shared facilities" position. (Sprint/1, Burt/29; Sprint/4, Burt/26.) The responsibility of each party to provision facilities is limited to facilities on such party's side of the POI, and any geographic limitation proposed by Sprint cannot supplant that requirement. (CenturyTel/12, Watkins/22-23, 32.)[42] Likewise, Sprint's further reliance on the *Verizon Arbitration Order* (Sprint/1, Burt/28; Sprint/4, Burt/26) fails to recognize the differing networks at issue – the ubiquitous Verizon network versus CenturyTel's limited network – as well as the fact that the transport at issue in the Verizon proceeding was *within the Verizon network.* (CenturyTel/12, Watkins/38; CenturyTel/15, Watkins/13.) CenturyTel does not have any network transport responsibilities beyond its exchange boundaries. (CenturyTel/12, Watkins/30-32.) Sprint's proposal, however, would extend CenturyTel's transport requirements far beyond its current transport for local traffic. As a result, application of Sprint's proposal that CenturyTel transport and pay for facilities outside of the CenturyTel network exceeds any notion of "equivalency" and would

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[41] Mr. Burt's diagram (Sprint/4, Burt/24) further demonstrates Sprint's attempt with respect to Issue 5 to secure "double recovery" of certain of its transport costs. Mr. Burt's diagram suggests that it is proper to have *two POIs – one on the CLEC network and one on ILEC network.* That proposition is fundamentally at odds with Section 251(c)(2) of the Act that the POI (*i.e.*. the interconnection point) must be "within" the ILEC's network. 47 U.S.C. § 251(c)(2)(B).

[42] The distortion of the rules that Sprint attempts here is further demonstrated by the counter-intuitive result that its interpretation would require. According to Mr. Burt, for local traffic that would originate and terminate in a relatively confined local calling area in Oregon, Sprint would make CenturyTel responsible for transport of this traffic to Oroville, California, or literally to wherever Sprint locates its switch. (Sprint/1, Burt/29; Sprint/4, Burt/26.) This contention cannot be squared with any notion of "equivalent facility" in the rule defining transport or the statutory limit that incumbents' requirements to a requesting competitive LEC are no more than equal to what the incumbent does for itself or with other carriers. 47 U.S.C. § 251(c)(2)(C).

impose upon CenturyTel another form of "superior" interconnection that, as explained in Issue 4, cannot be required. (*Id.*, 34-35, 39; CenturyTel/15, Watkins/15.)

Further, there is no basis for any claim by Sprint (Sprint/1, Burt/27; Sprint/4, Burt/26, 33) that CenturyTel is attempting to charge Sprint for delivering CenturyTel traffic to the POI. (CenturyTel/12, Watkins/31-32; CenturyTel/15, Watkins/12-13.) The parties' agreement to use symmetrical rates for transport and termination fully satisfies the principles required under 47 C.F.R. § 51.709(a). Through offsetting charges, CenturyTel *is paying* Sprint for the transport and termination of CenturyTel's originated traffic. (CenturyTel/12, Watkins/32.) Sprint's proposal, coupled with the obligations established under the FCC's Section 51.701(c)-(e) rules and the *IUB II* decision require that Sprint's position be rejected.

B. Sprint Should be Held Responsible for its Network Design and Sprint's Efforts to Shift its Transport Costs to CenturyTel must be Rejected.

Sprint's transport costs are a direct result of the network design deployed by Sprint. While that design – relying on a much longer transport link to its switch and a reduced number of switches – was Sprint's choice, Sprint must bear the responsibility for the costs associated with that decision. (CenturyTel/12, Watkins/27-28.) Again, under a "bill and keep" arrangement, the parties have already agreed that their respective costs of *both* transport and termination are equivalent. Sprint should not be permitted to shift to CenturyTel the additional costs of transport to a point distant from CenturyTel's network that Sprint has decided to use within its network design. (*Id.*, 29, 39.) Otherwise, CenturyTel would be financing the relatively greater transport cost to serve fewer distant switches arising from Sprint's network design, but not receiving the benefits of the offsetting savings in per-unit switching costs within Sprint's network. Such result would undermine the agreement of the parties to use "bill and keep" for reciprocal compensation. (*Id.*, 29.)

Moreover, Sprint has not and cannot demonstrate why it should be permitted to disaggregate a bundled § 251(b)(5) transport and termination rate between the parties under the agreed to "bill and keep" arrangement, particularly when the result would effectively permit Sprint to double-recover a portion of the transport costs on its side of the POI. For example, Mr. Burt's reliance on the definition of "interconnection" along with Section 251(a) in an attempt to create a new recovery mechanism for the facilities required for transport (Sprint/4, Burt/19-22) distorts the parties' agreement in this proceeding. While Mr. Burt properly quotes the definition of "interconnection" under 47 C.F.R. § 51.5 as the "linking of two networks for the mutual exchange of traffic" (*Id.*, 20 *quoting* 47 C.F.R. § 51.5), the linking of two networks is the physical "interconnection point" where two networks meet. Thus, it is only logical that the "term does not included transport and termination" (47 C.F.R. § 51.5) because that recovery is afforded each party up to their side of the interconnection point, *i.e.*, the POI.

Sprint's attempts to distort the meaning of 47 C.F.R. § 51.709(b) fare no better. Notwithstanding the parties' agreed-to "bill and keep" arrangement, Sprint claims that the financial arrangements for transport under the FCC's reciprocal compensation rules and for facilities are distinct. (*Id.*, 17-18.) Sprint is wrong; the compensation associated with Section 251(b)(5) "transport" is for the facilities over which the local traffic is exchanged between the parties. (CenturyTel/15, Watkins/25-26.) Sprint can cite no rule or discussion by the FCC in the development of Section 51.709(b) that addresses something more than the rate development for transport and termination. Other than decisions in other states that are inconsistent with the controlling requirements, Sprint's invented separate "interconnection facility" is not supported

by any rule and is, as Mr. Burt confirms, part of the defined transport and the rate already addressed. (Sprint/4, Burt/21.)[43]

Likewise, and in light of the parties agreed-to "bill and keep" arrangement for Section 251(b)(5) reciprocal compensation purposes, each party is in compliance with the requirements of Section 51.709(b) as it relates to the transport of traffic subject to Section 251(b)(5) of the Act. Thus, in developing the rate for transport and termination, CenturyTel, under the assumption that the traffic would be in balance as contemplated by the "bill and keep" arrangement, has already included only fifty percent (50%) of the transport facilities costs on its side of the POI used to terminate the Sprint originated local traffic delivered through the POI. *And, Sprint has done the same!* (CenturyTel/12, Watkins/31; CenturyTel/15, Watkins/12.)

Other negotiating parties may want to consider some facility costs within the area in which they compete and exchange local calling area traffic, and may want to address those facility costs separate and apart from those considered under the defined § 251(b)(5) transport and termination elements and rate. In such situations, § 51.709(b) may also be applied to those separate facilities. However, that situation does not apply in this instance, and Sprint should not suggest that it does.

Moreover, in defining transport, the FCC uses the network of the incumbent LEC (*i.e.*, CenturyTel) as the basis for defining and determining the incumbent's transport obligations, and translates that concept into an "equivalent" obligation for non-incumbent LECs (*i.e.*, Sprint). (47

[43] In fact, when one examines Mr. Burt's Reply Testimony, one finds explicit support for CenturyTel's position. Mr. Burt properly recognizes that the definition of "transport" includes the cost of facilities from the interconnection point between the parties to the terminating carrier's end office (or an equivalent facility). (Sprint/4, Burt/21.) In quoting the rule § 51.709(b) (*Id.*, 22), the second word in his reference is "rate," as in developing the rate for transport and termination as the rule addresses. Sprint cannot escape the fact that § 51.709 is titled "Rate structure for transport and termination," not "Rate structure for separate facilities outside of transport and termination." Similarly, Sprint cannot escape the fact that the subsection (a) of § 51.709 explicitly states its purpose to be the establishment of rates for transport and termination, not separate facilities outside the scope of transport and termination.

C.F.R. § 51.701(c).) CenturyTel provides no transport facilities or transport outside of its local service area, let alone within any expanded local calling area. (CenturyTel/12, Watkins/32-33; CenturyTel/15, Watkins/16.)

Thus, whatever potential additional application of § 51.709(b) that Sprint's position suggests, such application does not address the parties' agreed-to "bill and keep" arrangement. Further application of § 51.709(b) beyond its explicit transport and termination rate implication simply does not apply in this instance. Rather, in this proceeding, the requirements of both subsections of § 51.709 are already fully satisfied through the total transport and termination *rate* embodied in the party's "bill and keep" agreement.

Regardless of its claims otherwise, Sprint wants to carve out an additional transport element - adding it to the one that is already addressed within the FCC's definition of transport and the "bill and keep" rate - and impose an additional charge on CenturyTel for this new category of transport for Sprint's sole benefit. Sprint's attempt to abandon or circumvent the agreed-to "bill and keep" arrangement by isolating one new element without the consideration of all of the elements for which the parties have already agreed to "bill and keep" is highly improper.

C. Sprint's Reliance on Other State Commission Decisions is Irrelevant.

The state commission decision cited by Sprint presumably had different network arrangements in place, as well as addressing a BOC network. (Sprint/4, Burt/38 (references to Michigan Public Service Commission proceeding involving Verizon).) The Verizon Michigan

proceeding is based on different facts, proposals, and negotiations.[44] Moreover, in this proceeding before the Commission, the definition of transport and termination coupled with the agreement to a "bill and keep" arrangement means that CenturyTel and Sprint are responsible for their own trunking costs up to the POI and have already agreed that the compensation for transport and termination is provided by each party to the other party in equal offsetting amounts.

Accordingly, for the foregoing reasons, CenturyTel requests that the Administrative Law Judge reject Sprint's efforts to impose a separate facility charge as it is inconsistent with the parties' agreed-to "bill and keep" arrangement for the exchange of local traffic.

Issue 6

Issue 6. [The Parties Agreed Formulation] What are the appropriate rates for direct interconnection facilities?

Related Agreement Provisions: Article IV, §§ 2.3.1.1, 3.2.5.4 and Article VII, §§ I.D. and I.E.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that direct interconnection facilities should be charged at CenturyTel's intrastate access rates.

Issue 6 presents the question whether, in light of the FCC's decision *In the Matter of Unbundled Access to Network Elements, Order on Remand*, WC Docket 04-313, FCC 04-290, 20 FCC Rcd 2533 (2005) (the "*TRRO*"), the pricing of direct interconnection facilities is required to be based on FCC-prescribed Total Element Long Run Incremental Cost ("TELRIC")

[44] CenturyTel notes that the Michigan Arbitration Panel and the MPSC both determined that a separate facilities charge under Section 51.709(b) was appropriate. *Michigan Panel Decision*, 13-14; *Michigan Commission Decision*, 9. However, while CenturyTel believes that the foregoing conclusion is based upon an incorrect interpretation of Section 51.709(b) and the agreed-to bill and keep arrangement, CenturyTel accepted this resolution of Issue 5 based on the Michigan Arbitration Panel's and the MPSC's proper resolution of Issue 4 requiring the Sprint "point of presence" to be on the network of CenturyTel. Consistent with Sprint's position before this Commission, in the Michigan arbitration Sprint contended that its network in Michigan began at its "point of presence." Thus, based upon the MPSC's requirement that the point of presence be located on CenturyTel's network, all of the facilities at issue would be within the CenturyTel network.

principles as Sprint contends.[45] (Sprint/1, Burt/31-32; Sprint/4, Burt/34, 38-39.) Sprint's position should be rejected.[46]

In the *TRRO*, the FCC determined that entrance facilities are not impaired and thus are not subject to TELRIC pricing standards. *See TRRO* at ¶ 138. Sprint contends that "the FCC recognized in the Triennial Review Remand Order that the obligation to provide cost-based interconnection facilities was not affected by the FCC's ruling limiting the availability of UNE transport facilities." (Sprint Petition 19, n.18 quoting *TRRO* at ¶ 140) In *TRRO* ¶ 140, the FCC stated:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at *cost-based rates* to the extent they require them to interconnect with the incumbent LEC's network.

(emphasis added). Admittedly, there is a tension between the FCC's statements in paragraph 140 with its findings in paragraph 138 of the *TRRO*. That tension, however, can rationally and appropriately be resolved based on the record in this proceeding.

Thus, CenturyTel's position to have entrance facilities – which are, by definition, the interconnection facilities at issue – priced at its intrastate access rates is proper. The record and prior Commission actions demonstrate that such rates are based on cost, are nondiscriminatory, include a reasonable profit, and are otherwise consistent with existing Commission policy. Since

[45] The *TRRO* was addressing "entrance facilities" which are the same as direct interconnection facilities – "dedicated transmission facilities that connect ILEC and CLEC locations." *United States Telecom Ass'n v. FCC*, 359 F.3d 544, 589 (D.C. Cir. 2004); *see also* CenturyTel/12, Watkins/ 41.

[46] Whatever significance there may to other state commission decisions on pricing that did not involve both of the partiers and the record in this proceeding (Sprint/4, Burt/37-38), this proceeding addresses the parties here – Sprint and CenturyTel –and Oregon-specific pricing policies.

the access tariff prices are lawful (CenturyTel/12, Watkins/42), Sprint's demand for different interconnection rates is not appropriate.

The Commission's authority to determine the meaning of the FCC's reference to "cost-based rate" was recently affirmed. *See Illinois Bell Telephone Company v. Charles Box et al.*, Nos. 07-3557 and 07-3683 (*slip opinion*) (7th Cir. May 23, 2008) ("*Illinois Bell*") at 6 ("What the FCC said in ¶140 is that ILECs must allow use of entrance facilities for interconnection at 'cost-based rates.' TELRIC is a cost-based rate, *though not the only one.*") (emphasis added). Copy attached as Exhibit C. The United States Court of Appeals for the 8th Circuit cited with approval *Illinois Bell. See Southwestern Bell Telephone, L.P., doing business as SBC Missouri v. Missouri Public Service Commission, et al.*, No. 06-3701 (*slip opinion*) (8th Cir., June 20, 2008) ("*SBC Missouri*") at 12. Copy attached as Exhibit D. Thus, the Commission is free to establish the "cost-based" rate principles that should apply to CenturyTel.

In that regard, Sprint's proposed application of TELRIC pricing to entrance facilities would imply that the FCC's impairment analysis and conclusion meant nothing. CenturyTel submits that it is illogical to suggest that the FCC removed entrance facilities from impairment pricing treatment (*i.e.*, TELRIC) in one sentence, and then subsequently reinstated that treatment in a subsequent sentence. Any alternative view would render the FCC's conclusions in the *TRRO* meaningless. (CenturyTel/15, Watkins/18-19.)

In *Michigan Bell Telephone Company, d/b/a AT&T Michigan v. MPSC, et al.*, Case 2:06-cv-11982-JAC-RSW filed September 26, 2007 (E.D. Mich.) ("*Michigan Bell*") at pp. 12-14 (appeal pending) (20 WL 2868623 (2007)), the court agreed. In its review of a state commission decision that ruled entrance facilities should be provided at TELRIC when such facility is used

for Section 251(c)(2) purposes under one interpretation of paragraph 140 of the *TRRO*, the Michigan Federal District Court stated as follows:

> The Court agrees with AT&T Michigan and concludes that the September Order which pertains to this issue does not comply with the rules that were adopted by the FCC pursuant to Section 251. It is *not reasonable* to interpret an explanatory comment, such as the one found in ¶ 140 of the *TRRO*, in a manner that undermines the plain meaning of the rule. The meaning of ¶ 140 must be interpreted in light of the FCC rule, which provides that entrance facilities need not be provided by incumbent carriers to competing carriers on an unbundled basis. The *TRRO* conveys the finding by the FCC that entrance facilities should be offered competitively. A review of the ruling by the MPSC reveals that the September Order does not comply with this directive, and, accordingly, must be set aside.

Michigan Bell, 2007 WL 28868633 at 7-8 (emphasis added).[47]

Based on the reasoning provided in *Michigan Bell*[48] and the confirmation from *Illinois Bell* (as cited with approval in *SBC Missouri*) that the Commission is not mandated to use TELRIC as Sprint would suggest, utilization of intrastate access rates is not only consistent with the Commission's rate setting actions of the past, but also ensures that the underlying rationale used in the *TRRO* can be harmonized through the FCC's potentially conflicting statements and

[47] CenturyTel notes that UNEs are required to be priced at TELRIC. The fact that the parties agree that UNEs are not addressed in the interconnection agreement (Sprint/4, Burt/36-37) is irrelevant to the analysis required in Issue 6. Entrance facilities and the pricing treatment of them is the issue and, as to the pricing of entrance facilities, the *TRRO* states that TELRIC does not apply. Thus, CenturyTel respectfully submits that reliance on the reasoning provided in *Michigan Bell* is most appropriate, as well as the reasoning provided herein, for the resolution of Issue 6.

[48] Inexplicably, and contrary to the Michigan Arbitration Panel conclusion, the MPSC has refused to follow *Michigan Bell*. *Compare Michigan Panel Decision*, 16-17; *Michigan Commission Decision*, 10-11.

findings. Thus, any suggestion such as that made by Sprint that TELRIC must be used should be dismissed outright.[49]

Issue 7

Issue 7. [The Parties Agreed Formulation] Should the Interconnection Agreement contain provisions limiting indirect interconnection?

Related Agreement Provisions: Article IV, §§ 3.3.1.1, 3.3.2.1, 3.3.2.2, 3.3.2.4, 3.3.2.5 and 3.3.2.6.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that CenturyTel's provision of indirect interconnection should be limited to traffic levels that are less than a DS1 level.

Issue 7 addresses whether Sprint can transform the general duty under Section 251(a)(1) of all telecommunications carriers to be directly or indirectly interconnected with the facilities and equipment of other telecommunications carriers into an absolute right of Sprint to demand that CenturyTel provide a form of superior interconnection. Regardless of Sprint's likely protestations to the contrary, such result is the logical outgrowth of Sprint's contentions relating to this issue. Sprint's position should be rejected.

[49] Interestingly, Mr. Burt states that the Commission has followed FCC precedent and then asserts that the Commission "has stated that CLECs should pay TELRIC prices for interconnection in Order 07-098 in ARB 665." (Sprint/4, Burt/38-39.) Mr. Burt's assertion is not supported by reference to Order 07-098. In fact, in Order 07-098, the Commission rejected Level 3's contention that TELRIC rates should apply to transport of VNXX traffic. (Order No. 07-098, p. 6.) In addition, the Arbitrator's Decision in that case, which the Commission approved, goes even further. Level 3 had asserted that it should be able to purchase transport services at TELRIC rates. (Order 07-098, Appendix A, Issue 1d beginning at p. 42.) Qwest, in a manner very similar to Mr. Watkins' reasoning presented in this docket, argued that under the *TRRO*, there is no obligation to provide unbundled transport at TELRIC rates. The Arbitrator rejected Level 3's position. Thus, contrary to Mr. Burt's suggestion, the Commission's Order 07-098 can be read to strongly imply, if not explicitly rule, that transport such as that requested by Sprint in this case, is to be provided at tariffed rates, not TELRIC rates. Sprint is requesting that CenturyTel provide the equivalent of special access service at TELRIC rates. That request should be rejected.

A. Sprint cannot Demonstrate that Section 251(a) of the Act Establishes Specific Interconnection Standards, Let Alone Ones that can Indefinitely be Imposed Upon CenturyTel.

CenturyTel's evidence demonstrates that CenturyTel is willing voluntarily, beyond its Section 251 interconnection obligations, to allow Sprint to utilize a third party tandem arrangement, entailing transit charges, to reach CenturyTel's ILEC network for a "de minimis" level of traffic. This form of "start up" opportunity (CenturyTel/12, Watkins/62) addresses the concerns raised by CenturyTel about this arrangement and limits the burdens and potential harm for both parties because the traffic levels are small. (*Id.*, 44.) This de minimis level of traffic is defined as a "DS1" level of traffic. CenturyTel proposes that when traffic levels reach a DS1 level, the parties will establish either direct, dedicated trunking (*i.e.,* dedicated facilities to each party's side of the POI(s) within CenturyTel's ILEC network) or other mutually beneficial arrangements. (*Id.*, 45.) Moreover, CenturyTel makes clear that, even though Section 251(c)(2) requires the POI to be within the ILEC network (*Id.*, 46-48), it is willing to agree to this interim arrangement, provided that transit charges are inconsequential, *i.e.*, less than a DS1 volume of traffic. (*Id.*, 45.) Again, even after this threshold is reached, the parties may, by mutual agreement, continue to utilize the transit arrangement if circumstances benefit the parties. (*Id.*, 44.)

Sprint's reliance on Section 251(a) to assert an independent right for further standards and its form of indirect interconnection indefinitely (Sprint/1, Burt/35) cannot be reconciled with Section 251(b)(5) and the FCC's implementing Part H rules, or the FCC's pronouncements regarding the scope of Section 251(a).

The scope of Section 251(a) was addressed by the FCC in its *Atlas Decision.*[50] In the decision, the FCC stated that:

> We have previously held that the term "interconnection" refers solely to the physical linking of two networks, and not to the exchange of traffic between networks
> . . .
>
> We find nothing in the statutory scheme to suggest that the term "interconnection" has one meaning in section 251(a) and a different meaning in section 251(c)(2).
> . . .
>
> Thus, section 251 of the Act "create[s] a three-tiered hierarchy of escalating obligations based on the type of carrier involved."
> . . .
>
> Accordingly, it would not be logical to confer a broader meaning to this term as it appears in the less-burdensome section 251(a).
>
> Furthermore, among the subparts of this provision, *section 251(b)(5) establishes a duty for all local exchange carriers to "establish reciprocal compensation arrangements for the transport and termination of telecommunications."* Local exchange carriers, then, are subject to section 251(a)'s duty to interconnect *and* section 251(b)(5)'s duty to establish arrangements for the transport and termination of traffic. *Thus, the term interconnection, as used in section 251(a), cannot reasonably be interpreted to encompass a general requirement to transport and terminate traffic.*

(*Atlas Decision* at ¶¶ 23, 25 and 26 (emphasis added); *see also* CenturyTel/12, Watkins/49-50.)

Sprint's contention that Section 251(a) provides a choice to a CLEC like Sprint (Sprint/1, Burt/35) and the right to demand the particular method of interconnection is inconsistent with the FCC's discussion in the *Atlas Decision.* (CenturyTel/12, Watkins/49-50; CenturyTel/15, Watkins/21) Section 251(a) creates only a general duty to interconnect and provides no

[50] *In the Matter of Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corporation, Memorandum Opinion and Order*, File No. E-97-003, FCC 01-84, released March 13, 2001 ("*Atlas Decision*").

standards for such connection. Further, CenturyTel is already in compliance with that duty, so no issue exists. (CenturyTel/12, Watkins/53; CenturyTel/15, Watkins/21.)

Absent these conclusions, Sprint's position would result in an interpretation of Section 251(a) that is broader than Section 251(b)(5). Sprint's position would create an obligation to provide transport beyond the ILEC's network which would be broader than Section 251(b)(5) and Section 251(c)(2). (CenturyTel/15, Watkins/21-22.) As implemented by the FCC, Section 251(b)(5) establishes the transport and termination obligations from each carrier's side of the POI and the requirement of Section 251(c)(2) that the POI be within the ILEC network. (CenturyTel/12, Watkins/49-51.) As a result, there is no rational basis for Sprint's interpretation of Section 251(a) particularly when the concept of "transit" is not even a duty under Section 251 of the Act. (*Verizon Arbitration Decision*, ¶ 117 (With respect to transit arrangements that involve third party intermediary carriers, the FCC has not had "occasion to determine whether incumbent LECs have a duty to provide transit service under this [§ 251(c)(2)] provision of the statute, *nor do we find clear Commission precedent or rules declaring such a duty.*") (emphasis added)).[51]

In any event, CenturyTel notes that Section 251(a) is not even subject to negotiation under the Act, as reflected in the FCC's decision in *Z-Tel.*[52] (CenturyTel/12, Watkins/51-52.) Thus, Section 251(a) cannot be an issue here.

Sprint cannot explain away these legal precedents. Nor can Sprint argue that its position advances rational public policy. Sprint's position would turn CenturyTel's willingness to

[51] If this were not the case, there would have been no reason for the FCC to request comment regarding its authority to impose transiting obligations and, if so, the rules that should govern. *See Unified Intercarrier Compensation FNPRM* at ¶ 120, 127, 129, 130, and 131.

[52] *See In the Matter of CoreComm Communications, Inc., and Z-Tel Communications, Inc. v. SBC Communications, Inc. et al., Order on Reconsideration,* File No. EB-01-MD-017, FCC 04-106, released by the FCC on May 4, 2004 ("*Z-Tel*") at ¶ 18.

provide a "start-up" accommodation to Sprint into a mandatory requirement. Such a result simply cannot be rationally reconciled with the applicable law and therefore, Sprint's position with respect to Issue 7 should be rejected.

B. Sprint's Position on Issue 7 Cannot be Reconciled with Rational Public Policy or the Facts in the Record.

Setting aside the legal infirmities, Sprint's position also cannot be reconciled with rational public policy or the facts in the record upon which the resolution of this issue must be based. As to rational public policy, Sprint has not and cannot explain why it would be rational for the Commission to impose an arrangement indefinitely that: (a) results in an inferior form of interconnection for the terminating carrier; (b) forces upon the terminating carrier a reliance on a third-party tandem operator; (c) limits the ability of the terminating carrier in the transit arrangement to receive the proper traffic identification information necessary for rendering proper bills for the traffic; and (d) otherwise raises a host of competitive issues and requirements not otherwise imposed upon all companies equally. (CenturyTel/12, Watkins/54.) However, these are the types of results that Sprint's position would impose if applied to CenturyTel.

Sprint also cannot reconcile its position with the fact that CenturyTel's existing trunking with the tandem was not engineered for local traffic, thus leading to difficulties in sizing such trunking correctly and avoiding the potential for overload. (CenturyTel/12, Watkins/55-56.) Further, where proper traffic identification is not ensured, the ability to assess proper intercarrier compensation is undermined, thereby upsetting the underlying regulatory policies that spread cost recovery over the available sources for such recovery. (*Id.*, 57-60.)

Finally, the Commission's records make clear that Sprint has already voluntarily agreed to the DS1 level of traffic threshold with respect to moving from a transit third party tandem form of interconnection arrangements to a direct trunk form of interconnection. (CenturyTel/15,

Watkins/22; *see also* ARB 833 (Agreement between Pioneer Telephone Cooperative and Sprint).) In effect, therefore, Sprint seeks to have the Administrative Law Judge turn a blind eye to what Sprint has already voluntarily agreed to in Oregon with respect to migrating to a direct trunk form of interconnection. Moreover, Sprint would have the Administrative Law Judge look past the needs of all carriers, including CenturyTel, to exert management control over their networks for proper billing. Sprint's silence on this point in the Burt Reply Testimony confirms this conclusion. Management control by a carrier over its network is nothing new,[53] but Sprint wants to eliminate it through its position on Issue 7.

It is not surprising, therefore, that both the Michigan Arbitration Panel and the MPSC rejected Sprint's efforts to utilize an indirect, third party tandem form of interconnection indefinitely.[54] Specifically, as affirmed by the MPSC, the Michigan Arbitration Panel stated that it agreed "with CenturyTel that its position on issue 7 is the more reasonable one on this issue." (*Michigan Panel Decision*, 17.) The Panel further stated: "We find that some limitation on the indirect interconnection is warranted due to the concerns raised by CenturyTel including, but not limited to, proper traffic identification and traffic engineering." (*Id.*, 18.)

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[53] The concept of a carrier's control over its own traffic has been recognized by the FCC. *In the Matter of Allnet Communications Services, Inc. v. Public Service Telephone Company, Memorandum Opinion and Order,* File No. E-93-099, DA 96-1667 released October 8, 1996 at ¶ 17; *see also, TWC Order* at ¶ 17; CenturyTel/12, Watkins/60-61.

[54] *Michigan Panel Decision*, 17-18; *Michigan Commission Decision*, 13.

As a result, Sprint's position on Issue 7 simply makes no rational sense, let alone being contrary to the legal framework of the FCC's *Atlas Decision* and rules that must be applied.[55]

For CenturyTel, the trigger for instituting direct trunking is the DS1 level of traffic, and that is the proposal on the table for resolution of this Issue 7. Accordingly, CenturyTel's proposals in Article IV, §§ 3.3.1 and 3.3.2 of the Interconnection Agreement that set a threshold for migrating to a direct, dedicated interconnection arrangement at the DS1 level are entirely reasonable, are record-based, and are in compliance with the law. Moreover, CenturyTel's approach will avoid unnecessary disputes between the parties (CenturyTel/12, Watkins/57), and the potential burdens and network concerns cited by CenturyTel. (*Id.*, 61-62) Thus, CenturyTel's proposal for resolving Issue 7 should be adopted and Sprint's proposal rejected.

Issue 8. [Sprint's Formulation] Should Sprint be required to reimburse CenturyTel when CenturyTel is acting as a transit provider if CenturyTel compensates third parties for the termination of Sprint-originated traffic?

Related Agreement Provisions: Article IV, §§ 3.3.1.3 and 4.6.4.2.

Issue 8 [CenturyTel's Formulation] Should Sprint be required to enter into traffic exchange agreements with a third-party Telecommunications Carrier for traffic that transits through CenturyTel's network to reach a third-party Telecommunications Carrier? Should CenturyTel be indemnified by Sprint, if Sprint does not have a traffic exchange agreement with the third-party for any actions or complaints, including any attorney's fees and expenses, against CenturyTel concerning the non-payment of charges levied by such third-party Telecommunications Carrier for Sprint's traffic?

Related Agreement Provisions: Article IV, §§ 3.3.1.3 and 4.6.4.2.

[55] Mr. Burt attempts to cloud the record by introducing his financial analysis of what a direct trunked interconnection arrangement would cost Sprint. (Sprint/4, Burt/41-43.) Even assuming Mr. Burt's assumptions are correct (which he has assumed but not demonstrated), the cost associated with direct trunking is but one element of the overall issue that the Commission is being requested to address and that the Administrative Law Judge must resolve. However, even if direct trunked arrangements are deployed and Sprint incurred those charges, based on Mr. Burt's testimony, that cost still provides a 72% margin for Sprint and its wholesale customer to provide its wholesale customer's service. Mr. Burt is silent as to why this 72% margin is inadequate to provide to Sprint and its wholesale customer an opportunity to earn a reasonable level of return.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that Sprint should be required to enter into traffic exchange agreements with third-party telecommunications carriers for traffic that transits CenturyTel's network to reach a third-party telecommunications carrier and, if Sprint does not do so, Sprint should be required to indemnify CenturyTel for any actions or complaints, including any attorney's fees and expenses, incurred by CenturyTel concerning the non-payment levied by such third-party telecommunications carrier regarding Sprint's traffic.

Initially, CenturyTel submits that its formulation of this Issue 8 accurately presents the questions that the Administrative Law Judge should address to resolve this issue. Sprint's formulation of this issue is based on a presumption that CenturyTel would *voluntarily* compensate a third party carrier for termination of Sprint-originated traffic that transits CenturyTel's network. However, there is *absolutely* no fact in the record that establishes any past course of conduct or any statement of intention by CenturyTel to engage in this conduct. CenturyTel's witness, Mr. Miller, clearly stated that CenturyTel should not be placed in a position of having a third party carrier seek compensation from CenturyTel for non-CenturyTel-originated traffic, and does not want to be placed "in the middle of the intercarrier compensation dispute that would arise from Sprint's failure [to pay the third party carrier]." (CenturyTel/14, Miller/10.) Thus, there is simply no factual support for Mr. Burt's incorrect assumption that CenturyTel seeks to place itself "in the position of being an intermediate broker for such terminations charges." (Sprint/1, Burt/36-37.)

In contrast to the lack of evidence to support Sprint's professed concern that CenturyTel might voluntarily compensate a third party for termination of Sprint's traffic, the evidence is undisputed that Sprint bears the sole responsibility to properly compensate carriers for the

termination of its traffic. Mr. Burt testified that "Sprint understands and agrees with the principle that the originating carrier is responsible for compensating the terminating carrier." (Sprint/4, Burt/44.) With regard to the terminating traffic generated by end users of Sprint's wholesale customer, Mr. Burt continued:

> [T]raffic from an End User Customer under the wholesale business model is treated as Sprint traffic, and Sprint is responsible for the exchange of traffic and compensation for such traffic. . . . The fact of the matter as it pertains to this issue is intercarrier compensation only, and there should be no doubt that Sprint is responsible for all intercarrier compensation related to any traffic originated or terminated as a result of its relationship with Millennium [Sprint's wholesale customer in Oregon].

(*Id.*, 46.) Thus, there is no issue of fact as to Sprint's responsibility to pay intercarrier compensation for Sprint-originated traffic that transits CenturyTel's network and terminates to the network of a third party carrier.

Furthermore, there is no question that Sprint is legally obligated to compensate the incumbent LEC for termination of Sprint-originated traffic.[56] Sprint is obligated to make arrangements for appropriate compensation with all carriers to which it terminates Sprint-originated traffic. CenturyTel's proposed language in Article IV, § 4.6.4.2 of the Interconnection Agreement confirms this obligation.

What is at issue is CenturyTel's request to have language included in the Interconnection Agreement that assures CenturyTel that it will not experience adverse economic consequences relating to termination to third party carriers of Sprint-originated traffic. (CenturyTel/1,

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[56] In its *TWC Order*, the FCC recognized that payment to the incumbent LEC for the termination of traffic by the wholesale telecommunications carrier was an explicit obligation of the wholesale carrier and stated that:

> In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement *an explicit condition* to the section 251 rights provided herein.

TWC Order at ¶ 17 (emphasis added).

Miller/22-24.) Sprint's proposed resolution of this Issue – adding language to the Interconnection Agreement that states that CenturyTel has no obligation to pay third party charges for termination of Sprint-originated traffic – provides no protection to CenturyTel as such third parties are in no way bound by the terms of a bilateral contract between Sprint and CenturyTel. Rather, Sprint has, itself, stated that it has this obligation, and in the event that Sprint fails to fulfill it and such third party carrier seeks compensation from CenturyTel, then Sprint should provide indemnification to CenturyTel.

CenturyTel's concern regarding a claim by a third party carrier relating to termination of Sprint-originated traffic is not based on mere conjecture. (CenturyTel/1, Miller/22-23.) As the carrier delivering Sprint's transit traffic to the terminating carrier, CenturyTel is an obvious target for an intercarrier compensation claim in the event of a billing dispute between Sprint and the terminating carrier. If CenturyTel becomes involuntarily enmeshed in such a dispute, CenturyTel seeks assurance that it will not suffer adverse financial consequences arising from a dispute for which CenturyTel has no financial responsibility. CenturyTel's proposed language for Article IV, §§ 3.3.1.3 and 4.6.4.2 accomplishes this objective by providing for indemnification in such cases.

Moreover, the record confirms that Sprint has entered into interconnection agreements with other ILECs that contain provisions similar to those proposed by CenturyTel in connection with this Issue 8. (CenturyTel/1, Miller/24; Exhibits CenturyTel/6 and CenturyTel/7.) While Mr. Burt does not deny this fact, he does state that "Sprint is attempting to change it [the similar provisions in such interconnection agreements]." (Sprint/4, Burt/48.) Even taking this statement at face value, Mr. Burt's statement provides no valid reason why CenturyTel should be left holding the bag in the event of a claim against CenturyTel relating to Sprint-originated transit

traffic for which Sprint has undeniable financial responsibility. (*See, TWC Order* at ¶ 17; Sprint/4, Burt/44.) Sprint is willing to indemnify CenturyTel in a whole host of situations pursuant to other provisions of the Interconnection Agreement (see Article III, § 30.1). Indemnification should also be provided in this context.

To this end, CenturyTel notes that the Michigan Panel accepted CenturyTel's position on this Issue 8 and found that "CenturyTel's language addresses this problem and should be adopted by the [Michigan] Commission."[57] The Michigan Commission agreed with the Panel's conclusion and observed that absent the language that CenturyTel seeks to include in the Interconnection Agreement, "CenturyTel could be required under ICAs with other CLECs, to cover the costs of traffic originated by Sprint and transited by CenturyTel."[58]

As the facts in the record applied to the applicable law and common sense demonstrate, there is no reason why Sprint should be permitted to avoid the indemnification obligation CenturyTel seeks. To be sure, Sprint is obligated to make arrangements for appropriate compensation with third party carriers that terminate Sprint-originated traffic. CenturyTel's proposed language in Article IV, § 4.6.4.2 is consistent with and confirms this obligation. In the event that Sprint does not make such arrangements, since CenturyTel as the transiting carrier, not Sprint or its wholesale customer, will be identified to the third-party carrier to which the Sprint-originated traffic terminates, it is fair and reasonable that Sprint should indemnify CenturyTel against adverse financial consequences that might be experienced by CenturyTel in this circumstance. Accordingly, consistent with the foregoing decision, CenturyTel requests the Administrative Law Judge to direct the parties to incorporate into the Interconnection Agreement the language of Article IV, §§ 3.3.1.3 and 4.6.4.2 as proposed by CenturyTel.

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[57] *Michigan Panel Decision*, 19.

[58] *Michigan Commission Decision,* 16.

Issue 9:

Issue 9. [Resolved by agreement of the Parties] Should the Interconnection Agreement permit the Parties to combine traffic subject to reciprocal compensation charges and traffic subject to access charges on the interconnection trunks?

Related Agreement Provisions: Article IV, §§ 3.2.5.6, 3.3.1.4, 3.3.2.1, 3.3.2.8, 3.3.2.8.1, 3.3.2.8.3, 4.5.1.3, 4.5.2.2, and Article VII, I.D.

This issue has been resolved by the Parties as follows:

3.3.2.8 Sprint and CenturyTel shall, where applicable, make reciprocally available, the required trunk groups to handle different traffic types. Sprint and CenturyTel will support the provisioning of trunk groups that carry combined or separate Local Traffic. Notwithstanding the above, CenturyTel requires separate trunk groups from Sprint to originate and terminate Non-Local Traffic calls and to provide Switched Access Service to IXCs. To the extent Sprint desires to have any IXCs originate or terminate switched access traffic to or from Sprint, using jointly provided switched access facilities routed through a CenturyTel access tandem, it is the responsibility of Sprint to arrange for such IXC to issue an ASR to CenturyTel to direct CenturyTel to route the traffic. If CenturyTel does not receive an ASR from the IXC, CenturyTel will initially route the switched access traffic between the IXC and Sprint. If the IXC subsequently indicates that it does not want the traffic routed to or from Sprint, CenturyTel will not route the traffic.

3.3.2.8.1 Each Party agrees to route traffic only over the proper jurisdictional trunk.

3.3.2.8.3 Initially, Sprint will not use this interconnection arrangement to exchange traffic subject to access charges. If Sprint intends to use this interconnection arrangement to exchange traffic subject to access, the Parties will work cooperatively to develop mutually agreed upon processes and terms necessary to affect such exchange. Such processes shall address, but not be limited to, the identification and measurement of traffic that goes over each trunk, the use of factors, auditing provisions, the type of traffic, the jurisdiction of traffic, and the amount or volume of traffic. If the Parties are unable to agree upon such terms and processes, the Dispute Resolution Procedures under Section 20 of Article III will be invoked. Until such time, neither Party shall route Switched Access Service traffic over local connection trunks or Local Traffic over Switched Access Service trunks.

Sprint's proposed language in Article IV, §§ 3.2.5.6, 3.3.2.1 and 4.5.1.3 is deleted in its entirety. The wording of Article IV, §§ 3.3.1.4 and 4.5.2.2, and Article VII. C is addressed in the context of Issue 16 which is discussed below.

Issue 10

Issue 10. [The Parties' Agreed Formulation] What terms for virtual NXX should be included in the Interconnection Agreement?

Related Agreement Provisions: Article II, § 2.135, Article IV, § 4.2.2.2.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the clarification provisions regarding Virtual NXX service as proposed by CenturyTel should be adopted since neither party will be providing that service at the time the Interconnection Agreement is approved by the Commission.

It is undisputed that Sprint will not be utilizing virtual NXX when it deploys service in CenturyTel's service area. (Sprint/1, Burt/43; *see also*, undisputed portions of Article IV, § 4.2.2.5.) Furthermore, Sprint has declared that it "does not currently provide service to ISPs and has no plans to do so in the future." (Sprint/4, Burt/56.) Thus, at this point in time, there is no need to address the matter of virtual NXX other than to state the current status of the Commission's directives with respect to it. In fact, that is what CenturyTel's proposed language accomplishes. Sprint acknowledges that in ARB 665, Order No. 07-098,[59] the Commission determined that "virtual NXX traffic is not local traffic, originating access charges should apply and there should be no terminating compensation should apply at this time subject to true-up if and when the FCC determines a termination rate." (*Id.*, 54-55.) Mr. Burt's acknowledgement is otherwise consistent with CenturyTel's proposal to resolve this issue. Specifically, CenturyTel proposes the inclusion of the following language for § 4.2.2.2 of Interconnection Agreement:

> The Commission has historically prohibited VNXX arrangements in Oregon. In Order No. 07-098 the Commission created an exception in permitting assignment of VNXX numbers to ISP customers only upon certain conditions. Consistent

[59] *In the Matter of Level 3 Communications, LLC Petition for Arbitration of an Interconnection Agreement with Qwest Corporation pursuant to Section 252(b) of the Telecommunications Act,* ARB 665, Order No. 07-098 (Mar. 14, 2007) (the "*VNXX Order*").

> with Commission Order 07-098 the Parties agree that Sprint will be permitted to assign VNXX numbers to ISP customers only to facilitate the exchange of dial-up internet traffic and only to the extent that Sprint pays the applicable tariff rate for interexchange/interstate trunks used to transport VNXX-routed ISP-bound traffic from the Oregon local calling areas where ISP calls originate to Sprint's media gateway.

Notwithstanding Sprint's express acknowledgment that the terms of the *VNXX Order* are dispositive with regard to the treatment of VNXX traffic in Oregon, it opposes inclusion of the foregoing provision in the Interconnection Agreement. The sum and substance of the "basis" for such opposition is that "Sprint *does not think* the newly proposed Section 4.2.2.2 is necessary and *does not want* it included in the agreement." (*Id.*, 56 (emphasis added).)

What a party does or does not "think" and does or does not "want" is not dispositive of this issue. Rather, as the record confirms, the Administrative Law Judge should look to the law, the facts, and rational public policy (along with common sense). Using these factors, CenturyTel's position is amply justified and should be adopted.

In his Rebuttal Testimony, Mr. Miller explained that § 4.2.2.2 was offered by CenturyTel in an effort to resolve this issue and, at the same time, provided the fact of the necessity of the language of such section in light of CenturyTel's legitimate concerns that the Interconnection Agreement should (a) expressly reflect the limitation of the use of VNXX consistent with the *VNXX Order,* and (b) clearly set forth the applicable limitations on the use of VNXX for ISP traffic in the event that a third party carrier seeks to adopt the terms thereof pursuant to 47 U.S.C. § 252(i). (CenturyTel/14, Miller/14-15.)[60] Moreover, including terms within interconnection

[60] CenturyTel notes that it now appears that Sprint has abandoned its attempt to equate VNXX and FX services as was advocated in the Burt Direct Testimony, p.44, since Mr. Burt states in his Reply Testimony that "[m]y Opening Testimony did not reflect the correct status of this issue," and Mr. Burt make no mention of FX services in his discussion of Issue 10 in his Reply Testimony. (Sprint/4, Burt/54-56.) However, in order to be clear on this point, CenturyTel's position is that VNXX and FX are two very different services, and the Commission acted twenty-five years ago to prohibit the offering of FX services to new customers or adding FX lines for existing customers. (CenturyTel/14, Miller/16-17.) Thus, it is inappropriate to include any reference to FX services in the Interconnection Agreement.

agreements that address the subject of VNXX traffic is a practice that is consistent with at least two other interconnection agreements between Sprint and incumbent LECs that have been approved by the Commission. Mr. Miller identified these agreements between Sprint and United Telephone Company of the Northwest and Sprint and Pioneer Telephone Cooperative in his direct and rebuttal testimonies. (CenturyTel/1, Miller/38-39; CenturyTel/14, Miller/18.)

Thus, CenturyTel's position should be adopted in this proceeding because it consistent with the law (*i.e.*, the *VNXX Order*), the facts (*i.e.*, the need to ensure that CenturyTel's proper concerns regarding Section 251(i) are addressed) and rational public policy/common sense (*i.e.*, requiring of Sprint in its relationship with CenturyTel effectively the same result that Sprint has agreed to with other carriers in Oregon). Accordingly, CenturyTel submits that the Administrative Law Judge should resolve Issue 10 in accordance with CenturyTel's proposal described above and as set forth in Mr. Miller's Rebuttal Testimony, pages 14-18, particularly since Sprint has stated no credible argument in opposition to CenturyTel's proposal.

Issue 11:

Issue 11. [Resolved by agreement of the Parties] What are the appropriate terms for reciprocal compensation under the bill and keep arrangement agreed to by the Parties?

Related Agreement Provisions: Article IV, Sections 4.4.3.1; Article VII, Sections I.A and I.B.

This issue has been resolved by the Parties as follows:

> 4.4.3 Transport and Termination Rate
>
> 4.4.3.1 The Transport and Termination rate(s) apply to Local Traffic that is delivered to the other Party for termination. This includes direct-routed Local Traffic that terminates directly to the End Office as well as Local Traffic that has combined Tandem Office Switch, transport and End Office Switch functions.

Issue 12:

Issue 12. [Resolved by agreement of the Parties.] Should terms be included that provide for the opportunity of refunds and the ability to pursue dispute resolution if appropriate remedies are not agreed to when performance is not adequate?

Related Agreement Provisions: Article VI, § 5.0.

This issue has been resolved by the Parties as follows:

Article III, 9.4 Disputed Amounts. If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, including disputes related to Section 1.2 of Article VI, the billed Party shall give written notice to the billing Party of the amounts it disputes ("Disputed Amounts") and shall include in such notice the specific details and reasons for disputing each item.

Article VI, Section 5.0 Agreement Performance Review

Upon the request of either Party, the Parties, agree to meet once a month during the Term of this Agreement, at mutually agreed upon day and time, to discuss the performance of the Parties under this Agreement. The requesting Party should provide a proposed agenda in advance of the meeting. At each such monthly session the Parties may discuss: (i) the administration and maintenance of the interconnections and trunk groups provisioned under this Agreement; (ii) the Parties' provisioning of the services and ancillary functions provided under this Agreement, including the handling of CSRs, LSRs and any other processes related to porting of numbers; (iii) and any areas in which such performance may be improved; (iv) any problems that were encountered during the preceding month or anticipated in the upcoming month; (v) the reason underlying any such problem and the effect, if any, that such problem had, has or may have on the performance of the Parties; and (vi) the specific steps taken or proposed to be taken to remedy such problem. In addition to the foregoing, the Parties may meet to discuss any matters that relate to the performance of this Agreement, as may be requested from time to time by either of the Parties. This meeting is in addition to the normal day-to-day business to business discussions, including those with the respective account teams.

Issue 13:

Issue 13. [The Parties Agreed Formulation] What are the appropriate rates for transit service?

Related Agreement Provisions: Article VII, § I.B.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the rates for transit services should be its intrastate access rates.

Although CenturyTel has no obligation to do so, CenturyTel has offered to provide so-called transit service to Sprint under which Sprint can exchange specifically defined traffic with third party carriers that are connected to CenturyTel's tandem switch.[61] CenturyTel's willingness to provide transit service to Sprint is based on the condition that such services would be provided at the prevailing tariffed rates under which these services would be available to other carriers. (CenturyTel/12, Watkins/64.) In contrast, Sprint seeks to have this transit service treated as an interconnection service and to be priced on a so-called "TELRIC" basis (a method of estimating forward-looking, economic costs). (Sprint/1, Burt/49-50; Sprint/6, Farrar/9-12.)

The FCC has explicitly confirmed that it has not established whether transit service is an interconnection requirement under the Act, and it found no clear indication that transit service should be an obligation under the Act. (*Verizon Arbitration Decision*, ¶ 117.) Therefore, under whatever interconnection requirements that may apply to an ILEC, those requirements do not include the duty to provide transit services and do not include a requirement to provide transit under interconnection forms of pricing (*i.e.*, TELRIC pricing). (CenturyTel/12, Watkins/64.)

Outside of the requirements of interconnection, however, CenturyTel has offered to provide Sprint with transit, in such instances that it can be provided on a technically feasible basis, in order to permit Sprint to use the CenturyTel network to exchange Sprint's traffic to and from third party carriers that may be connected to that network. Because transit service is not an interconnection service, CenturyTel proposes to provide transit service pursuant to the rates that CenturyTel provides these services to other carriers, namely, under the terms of its intrastate tariffs. (CenturyTel/12, Watkins/64-65.)

[61] It should be noted that CenturyTel has one tandem in Oregon. It is not a LATA-wide tandem, such as Qwest deploys. Instead it serves a very limited area. *See,* NECA Tariff No.4, Section 49, Page 27 listing the Lebanon switch as a tandem with CLLI LBBNORXB01T. The NECA 4 tariff does not show any rate center subtending this tandem. However, and for the Commission's benefit, CenturyTel notes that CenturyTel's Sweet Home rate center is the only rate center that subtends the Lebanon tandem.

Sprint has provided no justification for the treatment of transit as an interconnection service and with pricing based on TELRIC methods. CenturyTel's rates for the switching and transport elements associated with transit functions, as set forth in its intrastate access tariffs, are the generally available terms under which CenturyTel offers and provides these services in Oregon, and these are the terms that should apply in this instance. Sprint efforts to suggest otherwise should be rejected.

Although Sprint's witness acknowledges that TELRIC pricing is not mandatory (Sprint/1, Burt/50-51), Sprint suggests that TELRIC pricing is the only method that encourages competitive results. Sprint's position, however, is both legally and factually suspect.

Sprint's purported legal justification for its position is based on its theories that Section 251(a) provides standards under which the Commission should act (Sprint/6, Farrar/9), other state commission decisions (Sprint/1, Burt/49-50; Sprint/1, Farrar/10-11), and the FCC's *Unified Intercarrier Compensation FNPRM.* (Sprint/6, Farrar/10.) These legal positions have no merit.

Any suggestion by Sprint that Section 251(a) provides standards for transit services (Sprint/1, Burt/49; Sprint/6, Farrar/9) is without basis. In fact, as demonstrated in Issue 7, Section 251(a) provides no standards for interconnection and, in any event, CenturyTel is in compliance with its Section 251(a) duties. *See* pp. 38-41, *supra.*

Likewise, Sprint's references to other state commission decisions misses the mark regarding what the proper pricing and public policy implications arising from such pricing should be for smaller ILECs here in Oregon. As the record reflects, these policy ramifications include: (1) whether it is proper to require one set of carriers to act as transit providers while others are not required to do so; (2) particularly for smaller LECs, what the result of requiring low priced transit will have on the cost burdens for those LECs versus the market based rates that

competition would establish; and (3) what are the practical ramifications upon tandem switch capacity as well as the potential stranded tandem investment if low-priced transit services remain voluntarily arrangements can be unilaterally ended by CLECs. (CenturyTel/15, Watkins/28-29.) Sprint's legal position fails to acknowledge what needs to be done to properly address these legitimate issues. As such, Sprint's "sound bites" regarding other state commission decisions are, at best, too simplistic.

Similarly, Sprint's citation to the FCC's *Unified Intercarrier Compensation FNPRM* (Sprint/6, Farrar/10) fails to mention that no decision on transit obligations has been made in that proceeding by the FCC. The *Verizon Arbitration Decision* remains the governing statement of law by the FCC which concludes that transit services are not within the requirements of interconnection.

Factually, Sprint's position misses the mark as well. While Mr. Burt asserts that intrastate access charges are "subsidy laden" (Sprint/1, Burt/49), he provides no fact to support his bald assertion. At the same time, however, what the record does reflect is the fact that the joint use of facilities among different telecommunications services (in this case, for example, trunk facilities carrying intraexchange service and interexchange traffic) make any conclusion regarding subsidy "very difficult to make, and then only after careful analysis." (CenturyTel/15, Watkins/28.)

So too, Mr. Farrar's purported factual/policy contentions that it would be unfair to deny Sprint any efficiency that may be present for CenturyTel with respect to its internal routing and, effectively, that use of Commission-approved intrastate access rates would be anti-competitive (Sprint/6, Farrar/9,10) have not been demonstrated. The rates proposed by CenturyTel – its

intrastate access rates -- properly balance the need by Sprint for transit services and CenturyTel's proper expectation for reasonable and appropriate cost recovery.

Consequently, Sprint has provided no justification for the treatment of transit as an interconnection service and with pricing based upon TELRIC methods nor how such proposal can be reconciled with the fact that transit is not an interconnection service as confirmed by the FCC in the *Verizon Arbitration Decision*, let alone the policy ramifications (and the lack of record basis for justifying such policy decision) arising from the adoption of Sprint's position. Accordingly, Sprint's position should be rejected and CenturyTel's switching and transport rates associated with transit functions, as set forth in its intrastate access tariffs, should be approved by the Administrative Law Judge.

Issue 14

Issue 14. [The Parties Agreed Formulation] What are the appropriate rates for services provided in the Interconnection Agreement, including rates applicable to the processing of orders and number portability?

Related Agreement Provisions: Article VII, § II.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the Non-Recurring Charge ("NRC") rates it has proposed should be adopted and that the application thereof is appropriate in all instances.

There are two aspects of this issue presented for the Administrative Law Judge and the Commission's resolution. The first aspect is whether certain of the classes of NRCs proposed by CenturyTel (CLEC Account Establishment, Customer Record Search, and Service Order charge (Simple, Complex, and Subsequent)) should be assessed. (CenturyTel/9, Hankins/10-11 (description of these charges).) The second aspect is the determination of rates for these NRCs under the Interconnection Agreement.

A. The NRCs Proposed by CenturyTel are Proper.

As to the first aspect of Issue 14, Sprint's claim that NRCs for porting requirements are improper is without merit. The FCC has confirmed that these costs should not be included within the tariffed end user charges associated with Local Number Portability ("LNP") and, if so included, that the costs would be rejected. As these costs are non-recoverable from another source, Sprint's position defies the time-honored principle of "cost causation" (*i.e.*, the entity requiring the costs to be incurred should pay for those costs) and should be rejected. Moreover, the alternative rates that Sprint proposes – the FCC default Primary Interexchange Carrier ("PIC") charges – have been shown to relate to functions that are different than those incurred for porting. (CenturyTel/15, Watkins/31-32.)

Any time an entity is involved in completion of a service order, the party processing that service order incurs costs. Thus, any time one of the parties (CenturyTel) is providing this function to the other party (Sprint), the party completing the service order (CenturyTel), should be permitted to assess a charge to the other (Sprint) and vice versa. (CenturyTel/12, Watkins/66-67.) While this principle seems unobjectionable to Sprint in general, Sprint does object to it in the context of porting requests. (Sprint/1, Burt/52-53; Sprint/6, Farrar/31, 37, 38.) As noted by CenturyTel, however, porting requests are not immune from an intercarrier charge to recover the costs associated with processing the order. Absent that approach, a party's general customer base would need to bear those costs. (CenturyTel/12, Watkins/67.)

With respect to LNP service orders, the record reflects that the costs associated with the NRC are not part of the current overall cost recovery by CenturyTel. These costs are associated with activities that are not and will not be incurred absent a request from a competitor. (CenturyTel/12, Watkins/67.) Since the activities are for the benefit of the requesting party,

CenturyTel knows of no rational basis to suggest that the party receiving those benefits should not bear the associated costs. (*Id.*) Moreover, any suggestion by Sprint to the contrary has been affirmatively rejected by the FCC.

Unquestionably, the FCC has enacted regulations that require certain specific LNP costs to be included in end user surcharges. Those surcharges must comply with the standard of "carrier-specific costs directly related to providing long-term number portability" included in Section 52.33(a) of the FCC's rules. *See* 47 C.F.R. § 52.33(a). However, if CenturyTel had attempted to include its NRC service order charges in its LNP end user surcharge (as Sprint's position effectively suggests), the FCC would have rejected those costs, as it is has done in an analogous context of addressing a LNP cost recovery request by BellSouth Corporation:

> With respect to the transaction charges that BellSouth intends to assess on Verizon Wireless, *see* Verizon Wireless Comments at 1-2, 5-6, BellSouth has stated that, to the extent it imposes such charges, they are standard fees assessed for various services provided to carriers, which are unrelated to the provision of number portability, and therefore are not recoverable through an end-user (or other portability) charge. *See* BellSouth Reply at 6-9. Because this Order only concerns end-user charges, this is not the appropriate proceeding to evaluate charges assessed against other carriers. As BellSouth observes, fees for non-LNP related services do not satisfy the Commission's cost recovery standards for portability-related charges. *See id.* at 7. *Were BellSouth to seek recovery of such costs through its intermodal tariff filing, they would be rejected.* However, because BellSouth is not seeking to recover these costs from its own end-users, there is no danger of double recovery.

In the Matter of Telephone Number Portability, BellSouth Corporation Petition for Declaratory Ruling and/or Waiver, Order, CC Docket 95-116, FCC 94-01, released April 13, 2004 at n.49 (emphasis added). Thus, the costs identified in this proceeding by CenturyTel could *not* be recovered through a federal end user surcharge, and Sprint should not be subsidized by

CenturyTel's general rate payers with respect to these costs.[62]

Because these NRC service order charges relate to the process involved prior to the port and arise in the context of one party's request for a port, Sprint's general reliance on the FCC's LNP cost recovery policies is in error. Accordingly, CenturyTel respectfully submits that, contrary to Sprint's contention, there is no basis to suggest that the FCC's LNP cost recovery policies bar the recovery that CenturyTel is seeking through its NRCs when incurred for LNP orders.

Sprint's contention (Sprint/1, Burt/53; Sprint/6, Farrar/26-27) that number porting is similar to disconnection and thus the costs have been recovered should also be rejected. Unlike simple disconnection, CenturyTel more than adequately demonstrated number portability involves additional and more complicated processes; the porting process also involves interactions with the entity requesting that the number be ported to it. (CenturyTel/16, Hankins/5.) Mr. Farrar's suggestion of a different conclusion (Sprint/6, Farrar/33-34) should be rejected outright. Moreover, due to the importance of this process and the care that must be exercised, there is time and effort involved for the party undertaking the porting out of the number. (CenturyTel/12, Watkins/31.)

Sprint's additional contention that the FCC's PIC change default pricing levels should apply (Sprint/1, Burt/54) must also be rejected. Sprint's assumption that the processes and costs associated with a PIC change are the same as those for porting a number is unsupported.

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[62] The Administrative Law Judge should reject Mr. Burt's suggestion (Sprint/1, Burt/53) that, in essence, charges to recover the costs of performing service order activity associated with number port requests should be disallowed so as to provide an incentive to CenturyTel to automate these processes. Mr. Burt fails to explain why, for the limited number of port requests that CenturyTel encounters at this point in time, it makes economic sense for CenturyTel to invest in a new and costly automated system. (CenturyTel/15, Watkins/30.) As Mr. Watkins stated: "Ironically, the logical outgrowth of Sprint's suggestion would likely be a greater per-unit cost given the small number of units over which the new and substantially additional costs would be recovered." (*Id.*)

Because Sprint has failed to demonstrate any connection between the two distinct processes, Sprint's position has no basis. (CenturyTel/15, Watkins/31-32.) Regardless, the two processes are different.

Finally, Mr. Farrar suggests that the parties have agreed to waive "subsequent service ordering charges" in all instances. (Sprint/6, Farrar/35-36.) Mr. Farrar makes this claim based on Article VI, Section 1.2.4. What Mr. Farrar fails to note, however, is that Section 1.2.4 applies *only* to *subsequent* requests for supplements to any porting Local Service Request ("LSR") submitted to clarify, correct, change or cancel a previously submitted LSR.. (Response, Exhibit 2, 91-92) Consequently, the parties have *not* agreed to waive this charge in other instances.

Accordingly, the record, applicable FCC decisions and rational public policy confirm that the NRCs proposed by CenturyTel should be adopted.[63] Sprint has not demonstrated, nor could it, that the traditional "cost-causer" analysis should be rejected in this case. Far from it; "cost causation" principles do apply. This common sense conclusion is amply demonstrated in the record. The proposed NRC rates only recover costs that would not be incurred but for the specific request being examined. Thus, there is ample basis to conclude that these are new costs that must be recovered under the Interconnection Agreement, and that the NRCs proposed by CenturyTel are appropriate for inclusion.

B. The NRC Rates as Proposed by CenturyTel should be Approved.

With respect to the rates for the NRCs, Sprint has maligned the efforts of CenturyTel to develop a rational approach to establish rates that are forward-looking in nature. Like CenturyTel (CenturyTel/9, Hankins/7), Sprint agrees that the NRCs should be based on a

[63] Mr. Farrar questions the rate associated with the subsequent service order charge. (Sprint/6, Farrar/35.) Mr. Farrar's position is based on an example of modifying the due date (*id.*) that has not been demonstrated by him to be the only time that a subsequent service charge would be applied.

"forward-looking cost study." (Sprint/6, Farrar/18.) Thus, while Sprint questions these rates, such attack is an insufficient basis for the Commission to ignore CenturyTel's proposed rates. Accordingly, for all of these reasons, the NRCs proposed by CenturyTel should be adopted in this proceeding.

CenturyTel's four classes of NRC rates – CLEC Account Establishment, Customer Record Search, Customer Handing – Service Order Expedite and Service Order charge (Simple, Complex, and Subsequent) should also be adopted. These rates are as follows:

Non-Recurring Charge	**Rate**
CLEC Account Establishment	$254.68
Customer Record Search	$8.58
Service Order Charge - Simple	$13.76
Service Order Charge - Complex	$64.48
Service Order Charge - Subsequent	$13.76

(CenturyTel/9, Hankins/10.)

The NRCs at issue are associated with "event-specific" activities, the costs of which are incurred on a "one-time" basis. (*Id.*, 6.) The CenturyTel-proposed NRCs are based on a "forward looking cost-based methodology" (*Id.*, 7) associated with the system costs involved, the fully loaded labor rates of the individuals involved along with the forward-looking order volumes (*i.e.*, demand) for such activities. (*Id.*, 7-9.)

While Sprint suggests that CenturyTel has failed to justify its costs and methodology (Sprint/6, Farrar/7), Sprint's claim that it was provided insufficient information (*Id.*, 14) is misleading. Even though Sprint makes light of the fact (*Id.*, 18-19), Sprint was provided ample information in discovery that demonstrates that the NRC rates proposed by CenturyTel should be adopted. CenturyTel provided that information for the record. (CenturyTel/16, Hankins/3; CenturyTel/17 (Confidential).

Sprint could have asked for more information and could have sought more time for this proceeding, which it has already shown to be willing to do in this proceeding.[64] Additionally, Sprint's apparent reliance on a Michigan labor rate or to a non-CenturyTel-specific hourly rate (Sprint/6, Farrar/22-23) has not been shown to be applicable to Oregon. Likewise Mr. Farrar's statement about a "growing number of transactions" was never specifically tied either to CenturyTel or the demand it relied upon. (*Id.*, 16.) Thus, Mr. Farrar's opinion is just that – opinion – with no Oregon-specific fact tied to it.[65]

While Sprint makes unsupported assertions and raises questions concerning the NRC rates, Sprint's assertions and questions are an insufficient basis for the Administrative Law Judge to disapprove those rates.[66] CenturyTel has provided sufficient information to justify its NRC charges, and those rates should be approved herein.

Issue 15:

Issue 15. [Sprint's Formulation] If CenturyTel sells, assigns or otherwise transfers its territory or certain exchanges should CenturyTel be permitted to terminate the agreement in those areas?

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[64] *See Prehearing Conference Report,* ARB 830, issued April 22, 2008 at 1 ("It was not possible, however, to establish a schedule that would allow for a Commission decision by that date due to scheduling conflicts with witnesses and party representatives. The parties therefore agreed to extend this date to September 5, 2008.").

[65] Mr. Farrar's suggestion that the "Account Establishment Fee" be waived because both parties will be establishing an account for the other (Sprint/6, Farrar/29-30) should be rejected. Costs will be incurred and they should be recoverable. Mr. Farrar has not and cannot demonstrate why cost causation principles should be suspended with respect to this NRC.

[66] Mr. Farrar suggests an overhead loading of 10.4% derived from the FCC's decision regarding forwarded looking costs for universal service purposes apparently based on his presumption that the overheads supplied by CenturyTel were, according to his testimony, "grossly overstated." (Sprint/6, Farrar/24-25.) Setting aside the characterization of the overhead information supplied by CenturyTel, Mr. Farrar has failed to explain why a TELRIC forward looking cost study should exclude all potential costs that are known and measurable or why his percentage derived for another use – the federal universal service fund – is applicable here. Mr. Farrar also suggests that CenturyTel's "ezLocal" ® system eliminates the need for the time associated with Customer Service Representatives handling orders. (Sprint/6, Farrar/30-31.) As the letter he attaches indicates, CenturyTel's ezLocal ® system is "an on-line, real-time order entry, processing and reporting system *for customers* submitting LSRs." (Sprint/9, Farrar/77)(emphasis added).) Thus, it is the customer of CenturyTel that uses the ezLocal ® system for the input of its LSR. The CenturyTel Customer Service Representatives and their time are still required to process such orders.

Related Agreement Provisions: Article III, § 2.7.

Issue 15. [CenturyTel's Formulation] If CenturyTel sells, assigns or otherwise transfers its territory, or a portion of its territory, should CenturyTel be required to assign the Agreement to the purchasing entity or permitted to terminate the Agreement in those areas?

Related Agreement Provisions: Article III, § 2.7.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that a purchaser of all or a portion of CenturyTel's operating territory should not be required to assume the Interconnection Agreement. In the event of a sale of all or a part of CenturyTel's service territory to a third party, CenturyTel should be permitted to terminate the Interconnection Agreement with regard to such territory.

CenturyTel opposes Sprint's addition to Article III, § 2.7 in order to preserve CenturyTel's right to terminate its obligations under the Interconnection Agreement in the event of sale of an exchange or portion thereof. CenturyTel's position is by no means intended to interfere with Sprint's efforts to obtain an interconnection agreement with an acquiring entity. (CenturyTel/1, Miller/44.)

CenturyTel objects to Sprint's proposed addition to Article III, § 2.7 on six grounds:

(1) It interferes with CenturyTel's right to enter into a market-based asset sale by requiring any transferee to assume CenturyTel's obligations under the Interconnection Agreement.

(2) It would require a currently unidentified third party to assume CenturyTel's obligations under the Interconnection Agreement, including those that are specific to CenturyTel (*e.g.*, the location of the point of interconnection) which a transferee may not be capable of implementing.

(3) It would materially devalue CenturyTel assets – without compensation, by the way – by encumbering a potential sale with the obligations of CenturyTel's Interconnection Agreement with Sprint.

(4) It creates a potential conflict with other interconnection agreements in that an acquirer of a CenturyTel exchange or portion thereof might have an existing interconnection agreement with Sprint applicable to Oregon that contains a provision such as Article III, § 48.0 of the Interconnection Agreement. If an acquirer has an interconnection agreement with Sprint with a similar provision, and Sprint's proposed language were included in Article III, § 2.7, two interconnection agreements would apply and Sprint might be in a "pick and choose" situation.

(5) It is unnecessary because Sprint may exercise its legal and administrative remedies pursuant to Article III, §§ 32.0 and 40.0. Undisputed provisions of Article III, § 43.0, already provide that the Interconnection Agreement is binding on successors and assigns; and the acquirer will likely need to obtain approvals from the Commission in connection with an acquisition and Sprint could thus use the approval process as a means to protect its interests relative to the acquisition.

(6) It is unnecessary because the Commission can require any acquirer to provide service continuity under an interim arrangement required by 47 C.F.R. § 51.715.

(CenturyTel/1, Miller/46-49.)

CenturyTel respectfully submits that these objections more than adequately demonstrate why Sprint's contentions regarding Section 2.7 should be rejected. Moreover, CenturyTel's position regarding Issue 15 is reflective of Sprint's practice and is not contrary to the public interest. For example, the record is clear that Sprint has agreed to similar language in its 13-state

interconnection agreement with the AT&T Affiliates, including Southwestern Bell Telephone Company, in which § 29.3 provides that upon a sale, Southwestern Bell would not have further obligations and that Sprint would need to establish a new interconnection agreement with the successor. *See,* Case No. 02-247-U. (CenturyTel/1, Miller/50-51 and Exhibit CenturyTel/8.) Likewise, in the *Master Interconnection Agreement for the State of Oregon* between Sprint Communications Company, LP and United Telephone Company of the Northwest, dated February 1, 2005 (Docket ARB 240) (the "*Sprint/United Agreement*"), the termination terms read in part:

> 5.5. Notwithstanding the above, should Sprint sell or trade substantially all the assets in an exchange or group of exchanges that Sprint uses to provide Telecommunications Services, then Sprint may terminate this Agreement in whole or in part as to that particular exchange or group of exchanges upon sixty (60) Days prior written notice.

Sprint has not explained and cannot explain away why its agreement with other carriers, in particular the rights it has under the *Sprint/United Agreement*, should not similarly be provided to CenturyTel.

In any event, Sprint has means available to it to address whatever continuity of service concerns it may have regarding its end users or end users of Sprint's wholesale customers. The FCC's procedures in 47 CFR § 51.715 provide the means by which any telecommunications carrier without an existing interconnection arrangement with an incumbent LEC may request such an arrangement:

> . . . the incumbent LEC *shall provide* transport and termination of telecommunications traffic *immediately* under an interim arrangement, pending resolution of negotiation or arbitration regarding transport and termination rates and approval of such rates by a state commission under Sections 251 and 252 of the Act. [Emphasis added.]

Consequently, Mr. Burt's contention that, without Sprint's proposed language "[t]here is considerable risk to Sprint being left without an Interconnection Agreement," is not supportable. (Sprint/1, Burt/57.)

Equally unfounded is Sprint's additional concern that a sale of a portion of CenturyTel's service area and the consequent termination of the Interconnection Agreement could prevent Sprint from serving end users. Entering into an interim arrangement will not prejudice Sprint from a financial standpoint since 47 C.F.R. § 51.715(d) provides that if final negotiated or arbitrated rates for transport and termination differ from interim arrangements, the Commission "shall require carriers to make adjustments to past compensation."

Further, the language of Article III, § 2.7 as it exists without Sprint's proposed addition requires that in the event of a sale or transfer of a service area or portion thereof, CenturyTel "shall provide the other Party with at least ninety (90) days' prior written notice of such termination." This prior notice will provide Sprint with adequate time to request an interim arrangement with the acquirer.

Mr. Burt agrees with CenturyTel's position that an acquirer of a CenturyTel exchange or portion thereof would have the obligation to interconnect with Sprint and to negotiate and/or arbitrate the terms of an interconnection agreement with Sprint. (Sprint/4, Burt/59.) At bottom, Sprint objects to the amount of time and resources that are needed to complete such negotiation and/or arbitration. (*Id.*, 59.) Neither of these concerns supports Sprint's original rationale for opposing CenturyTel's position on this Issue. Sprint's original rationale for its objection was that Section 2.7 was "considerable risk to Sprint being left without an interconnection agreement," (Sprint/1, Burt/57) and "[t]he lack of an interconnection agreement could prevent Sprint from providing service to End-Users." (*Id.*, 58.) Those concerns, as Sprint must

acknowledge, are grossly exaggerated and are addressed through its option provided under 47 C.F.R. § 51.715.[67]

CenturyTel has enunciated legitimate concerns that requiring assignment of the Interconnection Agreement to an acquirer would unnecessarily interfere with CenturyTel's right to enter into market-based asset sales, and could devalue CenturyTel's assets. Accordingly, the Administrative Law Judge should approve CenturyTel's proposed language for Article III, § 2.7.

Issue 16

Issue 16. [Sprint's Formulation] Not Contained in Sprint's Testimony.

Related Agreement Provisions: **Not Contained in Sprint's Testimony.**

Issue 16. [CenturyTel's Formulation] Do terms need to be included when Sprint utilizes indirect interconnection, and CenturyTel is not provided detailed records, nor is CenturyTel able to identify and bill calls based upon proper jurisdiction?

Related Agreement Provisions: Article IV, §§ 3.3.1.4, 4.5.2.2.

CenturyTel's Proposed Resolution: For the reasons stated herein, CenturyTel respectfully submits that the terms and conditions regarding the obligation of Sprint to provide an auditable Percent Local Use ("PLU") factor is appropriate in those instances where Sprint uses indirect interconnection and CenturyTel is either not provided detailed billing records or is unable to identify and bill calls based upon the proper jurisdiction.

This issue revolves around the responsibility of Sprint to provide appropriate billing factors when CenturyTel cannot properly identify terminating traffic delivered to it by Sprint through a third party tandem arrangement over facilities that mix different jurisdictional traffic

[67] Although the Michigan Arbitration Panel agreed with CenturyTel (*Michigan Panel Decision*, 27-28), the net result of the Michigan Commission's reversal was effectively that it saw (and called) the ball differently than the Panel. (*Michigan Commission Decision*, 26-27.) Thus, CenturyTel respectfully suggests that the Administrative Law Judge should review each of the justifications provided by CenturyTel and, based on that objective review, conclude that Sprint's opposition to CenturyTel's position is not justified.

types (*e.g.*, traffic subject to access charges and local traffic). In such instances, CenturyTel's proposed language would require Sprint to provide an auditable Percent Local Use ("PLU") factor. Sprint disagrees with this approach.

Notwithstanding Sprint's disagreement, it is contrary to common sense to allow a party to shirk its responsibility to provide proper billing factors for the traffic it delivers over the PSTN where the terminating carrier cannot identify and/or properly measure such traffic. But, that is what Sprint's position on Issue 16, in effect, states. Such position flies in the face of Sprint's purported reliance on "Calling Party Number Pays" (Sprint/4, Burt/18) (since no payment could be assessed). Further, Sprint's request that the Commission ameliorate Sprint's deficiency by requiring CenturyTel to incur the cost of installing a new or expanded SS7-based billing system (*Id.*, 60), even though that "fix" arises *solely* by virtue of Sprint's decision as to how to deliver traffic to CenturyTel, is, at best, irrational. Thus, it is entirely consistent with rational public policy, existing industry conduct and common sense for the Administrative Law Judge to reject Sprint's effort to disassociate itself with the compensation responsibility (in this case "access") that would be identified through the application of the PLU.

A. Although Related to Issue 7, the Necessity for Proper Resolution of Issue 16 cannot be Understated – Issue 16 Ensures Proper Billing and thus Proper Intercarrier Compensation Between the Parties.

To avoid any doubt, while Issue 16 and the application of Article IV, §§ 3.3.1.4 and 4.5.2.2 are limited in application to indirect interconnection arrangements between the parties, an improper resolution of Issue 16 would fundamentally disrupt intercarrier compensation between the parties where proper billing information is not available to the terminating carrier. The Interconnection Agreement provisions at issue regarding Issue 16 are directly related to Issue 7, the outcome of which will determine the extent that indirect interconnection will be permitted to

be used. Although CenturyTel's "DS1 threshold" level of traffic has been demonstrated by CenturyTel to be the only proper method of resolving Issue 7, in the unlikely event that Sprint were to succeed in its efforts to convince the Administrative Law Judge and the Commission that Sprint's "gloss" of the applicable requirements permits Sprint to utilize indirect interconnection arrangements indefinitely, the magnitude and impact of the need for the proper resolution of Issue 16 becomes that much greater. Thus, CenturyTel seeks to ensure that the scope of Issue 16 is properly reflected in the record.

As CenturyTel has indicated, if the tandem owner does not provide CenturyTel with adequate call detail records, the PLU factor is the only mechanism available to segregate traffic delivered over mixed used (*i.e.* toll and local) trunks. (CenturyTel/12, Watkins/62-63; CenturyTel/15, Watkins/23-24.) Even for the smaller volumes of traffic under the CenturyTel proposal for Issue 7, accurate and complete records are needed from the transiting tandem provider, and Sections 3.3.1.4 and 4.5.2.2 address when this need is not met. (CenturyTel/12, Watkins/62; CenturyTel/15, Watkins/23.)

The Michigan Panel Decision that adopted CenturyTel's position on this Issue 16 is consistent with this principle.[68] The Michigan Commission agreed with the Panel's reasoning and adopted the Panel's recommendation that CenturyTel's language regarding Issue 16 be included in the Interconnection Agreement.[69]

Including the provisions at issue will help avoid future disputes by requiring auditable factors of call types where the underlying call detail is not being provided by the tandem provider, as well as provide sufficient information to measure jointly provided exchange access

[68] *Michigan Panel Decision*, 28.

[69] *Michigan Commission Decision*, 27-28.

traffic between the parties (§ 3.3.1.4) or intrastate toll (§ 4.5.2.2) for which toll access charges would apply.

Accordingly, for all of these reasons, Sprint's position on Issue 16 should be rejected in its entirety by the Administrative Law Judge.

B. CenturyTel's Proposal is Rational, Consistent with Industry Practice and Should be Adopted for the Resolution of Issue 16.

It cannot be disputed that proper intercarrier compensation requires proper billing information.[70] The party delivering traffic to the PSTN is responsible for ensuring that it delivers that information, and, consistent with existing industry-standard tariff practices, is required to develop factors for use by the terminating/billing company. *See, e.g.,* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, § 2.3.11. CenturyTel's proposal meets these objectives and should, therefore, be adopted.

Apparently, however, Sprint would rather have the Commission bless a process that results in either CenturyTel incurring significant additional costs, the parties being exposed to additional and unnecessary disputes, and/or the terminating carrier being presented with the situation of someone using its network free of charge. Sprint's position should be rejected for the following reasons.

First, Sprint improperly attempts to shift its responsibility for the PLU by suggesting that the availability for purchase by CenturyTel of some form of SS7-based measurement and billing

[70] CenturyTel respectfully requests that the Administrative Law Judge reject Sprint's efforts to twist the language in Sections 4.5.2.1 and 4.5.2.2 in an effort to allow Sprint to shirk its responsibility to provide the proper billing information and PLU factor. (Sprint/4, Burt/62-63.) From a practical perspective, the two sections reflect the hierarchy associated with the proper billing of traffic delivered via a tandem transit arrangement. First, as reflected in Section 4.5.2.1, the parties agree to use their own respective records or those from the tandem for billing. Second, and if those records are not available, as Mr. Watkins has noted (CenturyTel/12, Watkins/62-63), the PLU required under Section 4.5.2.2 applies for access and will be used in the absence of those records. Thus, CenturyTel is not attempting to "undo" (Sprint/4, Burt/62) Section 4.5.2.1 with Section 4.5.2.2.

system in order for CenturyTel to bill Sprint. (Sprint/1, Burt/60.) Sprint's position is without merit.

The record is clear that CenturyTel's existing system cannot implement SS7-based billing for multi-jurisdictional trunks. (CenturyTel/14, Miller/23-24.) Assuming *arguendo* that CenturyTel possessed an ability to implement SS7-based billing at this time, requiring CenturyTel to purchase and implement an SS7-based billing system to accommodate Sprint's requested form of interconnection would be tantamount to providing a superior form of interconnection. Likewise, and conveniently absent from Sprint's assertions on this issue, is that the need for the PLU factor arises: (1) from Sprint's unilateral decision to utilize a tandem transit service; and (2) from the need to bill for access traffic, not local traffic, that Sprint may commingle with its local traffic routed via the transit carrier tandem. Sprint's silence on these aspects is deafening, confirming the stretch that it wants the Administrative Law Judge to take on this issue.

Second, Sprint's position is tantamount to requesting the Commission to permit Sprint to implement a traffic delivery arrangement that encourages the delivery of traffic that cannot be billed because proper billing information (*e.g.*, calling party and called party numbers) has not been provided. This result runs contrary to the FCC's *TWC Order* directive that "wholesale" carriers (like Sprint) are explicitly required to be responsible for proper intercarrier compensation. (*TWC Order*, ¶ 17.) The record is clear that the PLU is required for this purpose. (CenturyTel/12, Watkins/62-63; CenturyTel/15, Watkins/24.) Thus, Sprint should not be permitted to end run the requirements of the *TWC Order*.

Third, Sprint's reliance (Sprint/1, Burt/60, 61) on various FCC's statements in from its *First Report and Order* misses the mark. By referencing the FCC's statements at paragraph

1045 relating to the measurement of local traffic, Mr. Burt fails to recognize that the measurement concern relates to measurement for access charge purposes. (CenturyTel/15, Watkins/26-27.) In any event, the real time measurement of local traffic is not required, only the development of an auditable PLU factor.

Mr. Burt's reliance on paragraph 201 of the *First Report and Order* (Sprint/1, Burt/61) is inapposite to the substance of Issue 16. Section 251(c)(3) UNEs are not an issue in this proceeding, and, as explained above with respect to Issue 4, Section 251(c)(2) includes requirements in addition to technical feasibility. The other requirements of "no more than equal" and a POI within the incumbent LEC network are not rendered inapplicable by the technical feasibility provision. Likewise, paragraph 201 of the *First Report and Order* from which Sprint quotes was written at a time when the FCC's rules would have required superior interconnection arrangements under which Sprint would have to pay for the extraordinary costs (as evidenced by the FCC's language throughout the section referenced by Mr. Burt). Those rules, however, were subsequently reversed by the courts. (CenturyTel/15, Watkins/27.)

Fourth, Sprint's refusal to provide a PLU is contrary to industry standards. The PLU factors are akin to the PIU factors, and under the applicable terms and conditions of the access tariff of CenturyTel, the carrier using CenturyTel's network is required to provide these factors. *See, e.g.,* National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, § 2.3.11. Moreover, Sprint has experience in doing the study necessary to develop a PIU based on its extensive long distance operations. (CenturyTel/15, Watkins/25) In any event, Sprint can avoid any burden by interconnecting directly with CenturyTel, thus eliminating the transit arrangement and contaminated delivery of traffic that such arrangements entail.

Finally, Sprint states that it provides Calling Party Number ("CPN") in its SS7 signaling. (Sprint/4, Burt/61-62.) Accordingly, Sprint should be capable of capturing the data necessary to develop the PLU factor as there can be no question that Sprint has access to the information necessary to develop it. If there was any doubt, therefore, it has been resolved -- Sprint simply wants to escape the financial responsibility for its traffic.

In summary, CenturyTel's position on Issue 16 ensures proper intercarrier compensation and billing. Sprint's "cat and mouse" game regarding Issue 16 and its efforts to shift its responsibilities for provision of proper billing information to CenturyTel must be rejected outright. Sprint has provided no basis, let alone a rational basis, that should permit it to shirk its responsibility to provide the necessary billing information to CenturyTel, particularly if Sprint is not providing billing information because of its refusal to establish a proper interconnection arrangement with CenturyTel. For the billing of access traffic, such factors are a commonplace tariff requirement. In effect, Sprint's suggestion is to have CenturyTel either deploy such system at CenturyTel's expense, or resign itself to the recognition that Sprint will be routing access traffic to CenturyTel that is unidentified and thus will not be billed. Sprint's position is without merit, is contrary to sound public policy, and must be rejected.

V. CONCLUSION

For the reasons set forth with regard to each of the foregoing issues that have not yet been resolved by agreement of the parties, CenturyTel respectfully requests that the Administrative

Law Judge adopt and approve the language that CenturyTel proposes to resolve all such open issues.

Dated this 16th day of July, 2008.

Respectfully submitted,

CenturyTel of Oregon, Inc.

By: _____

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CERTIFICATE OF SERVICE

I certify that I have this day sent the attached Opening Brief of CenturyTel of Oregon, Inc. by electronic mail and Federal Express to the following:

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I further certify that I have this day sent the attached Opening Brief of CenturyTel of Oregon, Inc. by the delivery methods indicated below and electronic mail pursuant to OAR 860-013-0070, to the following parties or attorneys of parties:

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Dated at Olympia, Washington, this 16th day of July, 2008.

Richard A. Finnigan, OSB #965357
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EXHIBIT A

STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the Petition of **Sprint Communications Company L.P.** for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with **CenturyTel Midwest – Michigan, Inc.**	)	Case No. U-15534

NOTICE OF DECISION OF ARBITRATION PANEL

The attached Decision of the Arbitration Panel (DAP) is being issued and served on both parties of record in the above matter on June 10, 2008.

Written objections to the DAP, if any, must be filed with the Michigan Public Service Commission, P.O. Box 30221, 6545 Mercantile Way, Lansing, Michigan 48909, and served on the other party of record on or before June 20, 2008. To be seasonably filed, objections must reach the Commission on or before the date they are due. **The**

Commission has selected this case for participation in its Paperless Electronic Filings Program. No paper documents will be required to be filed in this case.

THE ARBITRATION PANEL

Daniel E. Nickerson, Jr.

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Issued and Served: June 10, 2008

STATE OF MICHIGAN

STATE OFFICE OF ADMINISTRATIVE HEARINGS AND RULES

FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the Petition of **Sprint Communications Company L.P.** for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with **CenturyTel Midwest – Michigan, Inc.**	)	Case No. U-15534

DECISION OF ARBITRATION PANEL

Issued and Served: June 10, 2008

TABLE OF CONTENTS

STATE OF MICHIGAN

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FOR THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the Petition of **Sprint Communications Company L.P.** for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an Interconnection Agreement with **CenturyTel Midwest – Michigan, Inc.**	)	Case No. U-15534

DECISION OF THE ARBITRATION PANEL

HISTORY OF PROCEEDINGS

On March 27, 2008, Sprint Communications Company L.P. (Sprint) filed a Petition for Arbitration. The Petition seeks the resolution by the Michigan Public Service Commission (Commission) to certain terms and conditions of a proposed Interconnection Agreement with CenturyTel Midwest – Michigan, Inc. (CenturyTel). Sprint identified fifteen items in its Petition for Arbitration.

By letter dated March 31, 2008, an arbitration panel was identified. The Arbitration Panel in this case consists of Rodney P. Gregg, Daniel E. Nickerson, Jr. (chair) and Paul D. Negin.

On April 21, 2008 CenturyTel filed its Response. In its Response, CenturyTel identified one additional item for resolution bringing the total number of items for resolution to sixteen. Also, a Protective Order, the terms agreed to by the parties, was entered and filed in this case.

On April 24, 2008, the Panel set the schedule for the arbitration and provided information governing the filing dates for the Parties' filing of their Proposed Decisions of the Arbitration Panel (PDAP) and their responses.

On April 29, 2008, Sprint requested, by letter, an opportunity to make an oral presentation to the Panel. On May 5, 2008, the Panel, by letter, denied Sprint's request for an oral presentation.

On May 1, 2008, Sprint filed reply testimony of James R. Burt. On May 5, 2008, the Panel advised Sprint, by letter, that since the filing of the reply testimony of James R. Burt was not established in the Panel's filing schedule and was not requested by the Panel, the Panel would not consider the information contained in the filing in its discussion and findings in its DAP.

On May 12, 2008, Sprint and CenturyTel, pursuant to the established filing dates, filed their respective PDAPs. Also, on May 12, 2008, Sprint filed an Application for Leave to Appeal the decisions of the Panel rejecting Sprint's request for oral presentation and rejecting the filing of the reply testimony of Mr. Burt.

On May 19, 2008, Sprint and CenturyTel filed a response to the PDAPs.

On May 22, 2008, CenturyTel filed attachments to its response to Sprint's PDAP. On May 23, 2008, Sprint filed a request for the Panel to not consider CenturyTel's filing of its attachments.[1]

On May 27, 2008, CenturyTel filed a response to Sprint's Petition for Leave to Appeal.

[1] Sprint's request is discussed starting at page 3 of this DAP.

Discussion and Findings

The Panel resolved the issues presented by the Parties under the Standards provided in the Commission's rules and orders, including MPSC Cases Nos. U-11134 and U-13774; Sections 251 and 252 of the Federal Telecommunications Act (FTA); rules and orders adopted and issued by the Federal Communications Commission (FCC) and the provisions of the Michigan Telecommunications Act (MTA).

The Panel has reviewed and considered the issues presented in the Petition and Response according to the standards identified above. Pursuant to the Commission's Arbitration Procedure Orders, the Parties will have ten days to file objections to the Panel's decision, after which the Commission will issue its order approving or rejecting the DAP findings.

Sprint's Request for the Panel to Reject CenturyTel's May 22, 2008 Filing

As stated above, on May 22, 2008, CenturyTel filed its Attachments to its Response to Sprint's PDAP. On May 23, 2008, Sprint filed a request that the Panel should not consider CenturyTel's filing of its attachments since the filing was not consistent with the filing procedures and deadlines provided by the Panel.

The Panel rejects CenturyTel's attachment filing. CenturyTel, in its late fling of its attachments, only notes that the filing is late due to technical problems. Since CenturyTel was not specific concerning the nature of the specific technical problem, the Panel was left to surmise the nature of the technical problems. One exonerating possibility considered by the Panel was whether the source of the technical problem was the Commission's e-filing system. However, this source of the technical problem was ruled out for several reasons. First, apparently the Commission was not

experiencing any technical problems on May 19th which would have prevented the filing of the 139 page attachment along with CenturyTel's response. Second, the Commission has in place emergency filing procedures if a technical problem occurs with the Commission's e-filing system.[2] These emergency filing procedures include emailing the filing to a Staffer in the Commission Executive Secretary office or hand delivering an electronic version. These emergency procedures were not followed by CenturyTel.

In addition, CenturyTel did not request from the Panel an extension to late file its attachments. While the Panel is certainly aware that technical problems occur, there are measures to take when unforeseen technical problems do occur. Since no such measures were taken by CenturyTel, the Panel rejects the filing as inconsistent with the Panel's request for the filing of documents.

Issue 1: Should disputes under the Interconnection Agreement be submitted to the Commission or to commercial arbitration?

The Panel finds in favor of CenturyTel's position on this issue and rejects Sprint's proposed provision. The Panel views Sprint's acceptance of CenturyTel's Article III, §20.1.2 and §20.2 language as a mutual resolution by the parties resolving those issues. The issue which the Panel reviews for resolution involves the terms and provisions of commercial arbitration in the event that the Commission determines it does not have jurisdiction or declines jurisdiction.

Sprint proposes terms and conditions permitting commercial arbitration only if the parties agree to such alternative dispute resolution. Sprint proposes that all other disputes be submitted to the Commission for resolution or if the Commission does not have jurisdiction or declines jurisdiction to the FCC for resolution.

[2] The Commission's Electronic Docket Filings Manual, p. 30.

CenturyTel proposes commercial arbitration where the Commission lacks or declines jurisdiction over a dispute. CenturyTel further proposes certain terms and conditions to govern the dispute resolution either before the Commission or a commercial arbitrator.

Sprint cites Section 252 (e)(5) as statutory authority for jurisdiction of the FCC where the Commission either does not have jurisdiction or declines to exercise jurisdiction. Section 252(e)(5) states in relevant part:

> If a state commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter . . . .

Sprint further relies on language from the FCC decision in *Starpower*[3] which states:

> 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. In reaching this conclusion, we find federal court precedent to be instructive. Specifically, at least two federal courts of appeals have held that inherent in state commission's express authority to mediate, arbitrate, and approve interconnection agreements under section 252 is the authority to interpret and enforce previously approved agreements. These court opinions implicitly recognize that, due to its role in the approval process, a state commission is well-suited to address disputes arising from interconnection agreements. Thus, we conclude that a state commission's "to act carry out its responsibility" under section 252 can in some circumstances include the failure to interpret and enforce existing interconnection agreements.

CenturyTel states that neither section 252 nor *Starpower,* supra require the adoption of Sprint's proposal at section 20.3. The Panel agrees. Under section 252 jurisdiction by the FCC is triggered not by an interconnection agreement dispute, rather

[3] *In re Starpower Communications, LLC.,* 15 FCCR 11277.

section 252 jurisdiction is triggered when the Commission lacks or declines to exercise jurisdiction over that dispute. The provisioning of dispute resolution by commercial arbitration does not serve the same purpose under section 252 as the Commission having a lack of jurisdiction or declining to act. There are instances, as pointed out by CenturyTel, where interconnection agreement disputes may fall outside of the jurisdiction of the FCC, i.e., a payment dispute. By provisioning in the interconnection agreement for commercial arbitration these gaps in the FCC's jurisdiction are in part addressed. Moreover, the benefits of arbitration which are discussed below are significant factors to consider.

Sprint states that it does not wish to waive its right to seek resolution of disputes from the FCC as "an absolute matter of course." The Panel finds that there is not such a right conferred upon a party under section 252 or under the FCC's decision in *Starpower,* supra. The FCC's jurisdiction under section 252 is only triggered by a lack of jurisdiction or the Commission declining jurisdiction. The Panel finds that *Starpower,* id., does not preclude an interconnection agreement requiring arbitration of disputes in the absence of an agreement by the parties that there should be such a provision. Stated more succinctly, the Panel finds that the Commission may approve an interconnection agreement containing a provision for arbitration of disputes absent an agreement by both parties. Under the decision by the FCC in *Starpower,* id., the parties are bound by the dispute resolution provisions contained in their interconnection agreement.

The Panel further finds that where there is an interconnection agreement dispute the reasons and purposes of arbitration including cost savings, more timely resolution

and the party's ability to select an expert arbitrator lend themselves to the broader purposes of the adoption of interconnection agreements in principle.

The Panel finds it is reasonable to require commercial arbitration where the Commission lacks jurisdiction or declines jurisdiction.

CenturyTel asserts that in addition to providing for arbitration, there should reasonably be sufficient terms and conditions specifying the arbitration process. The Panel finds such reasonably sufficient terms and conditions contained in CenturyTel's proposal at section 20.3.2 The arbitration procedure at section 20.3.2 provides timely resort to arbitration by a party; the appointment of an arbitrator under established rules;[4] discovery generally controlled by the arbitrator with ultimate scope of discovery through agreement by the parties; written submissions by the parties; arbitration hearing in the State of Michigan; a written ruling by the arbitrator within 30 days of the hearing; and specifically limiting the arbitrator's authority to order punitive or consequential damages. The arbitration process outlined at section 20.3.2 also permits the extension of arbitration deadlines upon mutual consent of the parties or by the arbitrator upon a showing of good cause. The Panel finds these terms and conditions sound and reasonable.

Issue 2: What are the appropriate terms for indemnification and limitation of liability?

The dispute regarding indemnification concerns whether Sprint should be required to indemnify CenturyTel for libel, slander or defamation by third parties that arise as a result of content transmitted by Sprint's end-users. Sprint recognizes that its tariff provisions contain indemnification language similar to that proposed by

[4] The rules governing are found in the Commercial Arbitration Rules of the American Arbitration Association.

CenturyTel. However, Sprint asserts that an interconnection agreement poses significantly different instances than those posed in its tariffs and as such it is not appropriate to provide such indemnification in the interconnection agreement.

Sprint points out that in this case the service that CenturyTel provides to Sprint under the terms and conditions of the interconnection agreement only involve interconnection and limited related services. Sprint also notes that although it has, in the past, agreed to similar language, times change and as competition has evolved all carriers continue to negotiate appropriate terms for interconnection agreements. Sprint explains it is attempting to modify its agreements to be more specific with circumstances for carrier-to-carrier interconnections.

CenturyTel notes that Sprint has, in fact, used similar indemnification language in its tariff and has, in fact, agreed to similar language in Sprint's interconnection agreement with AT&T affiliates[5]. CenturyTel asserts that its proposed language is particularly necessary since Sprint plans to offer wholesale telecommunications services to third parties whose end-user's conduct could give rise to claims against CenturyTel. CenturyTel also notes that Sprint, unlike CenturyTel, has the contractual relationship with Sprint's wholesale customers and is therefore in the position of negotiating a similar scope of indemnity from its wholesale customers.

The relevant interconnection proposal offered by CenturyTel provides indemnification for:

> (ix) defamation, libel, or 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 Users, and, with respect to Sprint as Indemnifying Party, content transmitted by any Sprint Third Party Provider; Article III § 30.1, (ix).

[5] MPSC Case No. U-13580, dated September 30, 2003.

The Panel finds that CenturyTel's proposed indemnification language is appropriate for inclusion in the interconnection agreement and is reasonable. While, Sprint makes a valid point that just because it has agreed to similar indemnification language in prior interconnection agreements that does not prevent it from presenting appropriate other terms to meet other competitive conditions. However, the Panel finds that Sprint did not follow-up this point with any valid explanation of the dissimilar competitive nature of this interconnection agreement as opposed to prior interconnection agreements. The Panel finds more significant CenturyTel's point that Sprint has the contractual relationship with the third parties and under the contractual relationship is in the better position to negotiate a similar indemnification provision from the third party wholesale customers. The Panel finds CenturyTel's proposed language is not overly broad or unreasonable.

Issue 4: **What Direct Interconnection Terms should be included in the Interconnection Agreement?**

Sprint proposes that it only be required to establish one (1) point of interconnection (POI) per LATA. Sprint says that under the FCC's rules this one location may be "at any technically feasible point within the incumbent LEC's network." Sprint states that since it is only required to establish one POI per LATA, CenturyTel cannot force Sprint to establish direct end office trunks (DEOTs). Sprint further states that the FCC rules and orders prohibit Sprint from the requirement of having to establish additional POIs.

CenturyTel asserts that the POI discussion should not be limited to direct connections since there is no distinction between direct and indirect connections as it

relates to the establishment of POIs. CenturyTel states that the LATA concept is misplaced in the context of this case in as much as the LATA concept was based specifically on the break-up of the former AT&T and the specific network arrangements of the Bell Operating Companies (BOC). CenturyTel states that the network of smaller independent LECs, such as itself, is not properly designated a LATA in which to operate. CenturyTel points out that the FCC's *Unified Intercarrier Compensation* proceeding is only a notice of proposed rulemaking and that no new rules have yet been promulgated. CenturyTel concludes that Sprint seeks interconnection which is superior to that which CenturyTel provides its own traffic and requiring a superior connection is contrary to 47 USC 251(c)(2).

Under the FTA, each telecommunication carrier has a duty to interconnect. The Act describes the duty in relevant part. It states each incumbent local exchange carrier has the duty to:

> . . . provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—
>
> (A) for the transmission and routing of telephone exchange service and exchange access;
>
> (B) at any technically feasible point within the carrier's network;
>
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and
>
> (D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. 47 USC §251(c)(2).

CenturyTel states that these statutory provisions are cumulative and the incumbent carrier must meet all of the provisions set forth. The Panel agrees. The language of section 251 makes it clear that not only is technical feasibility a provision

but likewise the quality of interconnection, and rates, terms and conditions are also provisions which must be satisfied as well.

Sprint relies on a FCC rule for further clarification of 47 USC §251. It states:

> An incumbent LEC shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both; (2) At any technically feasible point within the incumbent LEC's network. 47 CFR §51.305.

Sprint next relies on further FCC interpretation in an order[6]. Sprint states that the FCC rules and order provides for interconnection at any technically feasible point including the right to request a single point of interconnection in a LATA. Sprint asserts that the application of the concept of a LATA has not been limited to BOC. Since CenturyTel has not received a bona fide exemption as a rural provider, it is thus governed by the LATA concept. CenturyTel would in essence require Sprint to establish DEOT and multiple POIs contrary to the statute and FCC rules and orders.

CenturyTel disagrees with Sprint's assessment that the LATA concept applies to CenturyTel or the dispute at issue. CenturyTel points out that it is a smaller independent LEC and that the specific network arrangements for a BOC based on the BOC's expansive and ubiquitous interconnection networks were factors for the LATA concept. CenturyTel notes that its network is geographically limited and dispersed across a wide area. As a result, CenturyTel does not own transport networks between all of its exchanges as do the BOCs. CenturyTel states that its networks are not designed and sized for traffic other than exchange access traffic.

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[6] Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249, and 00-251, FCC 02-1731, released July 17, 2002 (*"Virginia Arbitration Decision"*).

The Panel agrees with CenturyTel. The Panel is convinced that the LATA concept is not applicable to the issue at hand and does not apply to CenturyTel. The Panel recognizes that CenturyTel's network is structured significantly different in a pragmatic way than the BOCs and thus to apply the LATA concept is untenable and not at all required under the Act or FCC rules or orders.

The Panel further agrees with CenturyTel concerning the superior nature of the interconnection requested by Sprint. Sprint's request would require CenturyTel to construct or create network trunking arrangements solely for Sprint's benefit. Such a result would be contrary to 47 USC section 251(c)(2). CenturyTel points out that the Commission reaffirmed a similar result in *MPSC Case No. U-11203,* dated January 15, 1997 and in the Telnet case *MPSC Case No. U-13931*, dated October 14, 2004. The Panel agrees. The Commission found that "Sprint may either establish its own trunking between tandems or, if capacity is available for that use, Sprint may pay Ameritech Michigan to provide the connections with each tandem". CenturyTel explains that this means that if there is no capacity available, then Sprint has no right to demand trunking be provided. The Panel agrees.

Further, CenturyTel contends that based on the Commission decision, id., since its separate operations are not connected by its network then Sprint should be directed to make interconnection arrangements to those separate areas with technical considerations which would require separate trunking by Sprint. The Panel agrees.

Issue 5: **Should Sprint and CenturyTel share the costs of the interconnection facility between their networks based on their respective percentages of originated traffic?**

Sprint proposes that both parties are responsible for the costs of the facilities used for direct interconnection between their respective networks. Sprint argues that the costs for these facilities should be shared proportionally based on each carrier's usage of the facilities and that this cost is separate from the reciprocal compensation arrangements already agreed to. Sprint cites FCC rules and past Commission policy in support of this position. Sprint also states that it would designate a "point of presence" in the LATA where CenturyTel can hand off traffic instead of having to deliver traffic all the way to Sprint's switch.

CenturyTel contends that Sprint erred in its interpretation of federal rules. CenturyTel claims that the "bill and keep" arrangements already agreed to by both parties include the costs of transport for the purposes of direct interconnection. CenturyTel also argues that Sprint is required to pay for the facilities to bring its traffic to CenturyTel's network and that it would be unreasonable for CenturyTel to pay to extend the connection to facilities not on its network.

This issue has previously been argued before the Commission. As noted by Sprint, in a prior arbitration proceeding the Commission found in *MPSC Case No. U-13931*, October 14, 2004, as follows:

> The Commission finds that 47 CFR 51.709(b) requires that interconnecting parties compensate each other for dedicated transmission facilities between networks, in addition to reciprocal compensation for transport and termination of the traffic once it is delivered to the other party's network. The interconnection facilities built between the two networks do not comprise a part of either network, although they may be owned by one party or the other, or both. Reciprocal compensation rates, therefore, apply to traffic once it has been delivered to the other carrier's

> network. The cost to deliver the traffic to the network of the other party is to be paid by the originating carrier, in addition to the transport and termination charges known as reciprocal compensation. Once the traffic is delivered to the other party's network, the only appropriate charge is the reciprocal compensation charge.

This finding by the Commission clearly indicates that the direct interconnection facilities between the parties' respective networks are not a part of either carrier's network and therefore the costs of these facilities are separate from reciprocal compensation. Since each party is responsible for the costs of delivering the traffic that it originates to the other party's network, the costs of the dedicated transmission facilities at issue here should be borne by both parties, in proportion to the amount of originating traffic each party transports on these facilities. Although CenturyTel argues that this Commission decision should not apply to it based on the differences between its network and Verizon's, neither the order, nor the FCC rule cited in the order make a distinction based on network characteristics. Therefore, the Commission's findings apply to this proceeding.

The Panel finds for Sprint on this issue, based on the prior Commission decision in *MPSC Case No. U-13931,* id. However, Sprint's proposal to designate a point of presence in the LATA for the hand off of traffic from CenturyTel has already been addressed by the Panel in its discussion of Issue 4. As decided by the Panel on that issue, and consistent with FCC rules, Sprint's point of interconnection must be on CenturyTel's network. Sprint is not permitted to establish a point of presence at any place in the LATA, it must be on CenturyTel's network. The Panel recommends that the parties be directed to amend their proposed language to be consistent with the Panel's recommendations on this issue and on Issue 4. Therefore, any requirement that

CenturyTel deliver traffic to a point of presence not on their network should be removed from the parties' agreement.

Issue 6: What are the appropriate rates for direct interconnection facilities?

This issue concerns the rates CenturyTel will charge Sprint for direct interconnection facilities and whether or not CenturyTel must provide these facilities at rates based on the Total Element Long Run Incremental Cost ("TELRIC").

CenturyTel has proposed using the entrance facility rates from its intrastate access tariff. CenturyTel states that the facilities at issue are entrance facilities and that the rates proposed are cost based and are consistent with existing Commission policy. In addition, CenturyTel argues that in the Triennial Review Remand Order ("TRRO") the FCC found that incumbent providers are no longer required to provide entrance facilities at TELRIC based rates.

Sprint contends that CenturyTel is required to provide the disputed interconnection facilities at TELRIC rates. In support of this position, Sprint cites Section 252(d)(1) of the FTA and Section 352 of the MTA, both of which address the rates a carrier charges for interconnection. Sprint also cites paragraph 140 of the TRRO in support of its position.

The FCC addressed the issue of entrance facilities in the TRRO. In that order, an impairment analysis was conducted and it was determined that competitors are not impaired without access to entrance facilities. Therefore, according to the FCC incumbent providers are not required to price entrance facilities at TELRIC based rates. However, as argued by Sprint, paragraph 140 of the TRRO would seem to contradict this finding, stating that:

> We note in addition that our finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to section 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service. Thus, competitive LECs will have access to these facilities at cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network.[7]

This potential contradiction was recently ruled on by the U.S. District Court for the Eastern District of Michigan. In an appeal of a Commission Order in *MPSC Case No. U-14447*, dated September 20, 2005, the court ruled that Paragraph 140 must be interpreted in a way that is consistent with the plain meaning of the rule and that under the TRRO, entrance facilities should be offered competitively, and not at TELRIC based rates.[8] The court also defined entrance facilities as being "dedicated transmission facilities that connect ILEC and CLEC locations."[9]

The Panel is aware that this issue has been recently interpreted differently by the U.S. Seventh Circuit Court of Appeals. However, since this Commission and the U.S. District Court that issued the "Michigan Bell" decision are under the jurisdiction of the Sixth Circuit and not the Seventh, the decision of the Seventh circuit does not affect the District Court's decision. In addition, while it is true that this issue is currently on appeal to the Sixth Circuit Court, until that Court issues a decision, the District Court order is controlling.

As far as the argument that Section 352 of the MTA requires TELRIC pricing for entrance facilities, this section must be interpreted in compliance with appropriate

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[7] FCC Order released February 4, 2005 WC Docket 04-313, FCC 04-290 paragraph 140.
[8] Michigan Bell Telephone Company, d/b/a AT&T Michigan v. MPSC, et al. Case 2:06-11982. pp. 12-14.
[9] Id. at footnote 14. In this footnote, the court was quoting the definition used by the DC Circuit Court of Appeals.

federal laws and FCC rules. Section 352 of the MTA cannot be used to reach a different conclusion than the plain meaning of the Federal District Court order.

In light of recent court decisions, the Panel finds for CenturyTel on this issue and recommends that the Commission direct the parties to include CenturyTel's proposed rates for direct interconnection facilities in their agreement.

Issue 7: Should the Interconnection Agreement contain provisions limiting indirect interconnection?

This issue deals with Sprint's proposal that CenturyTel has the duty to provide interconnection either directly or indirectly and that the indirect connection should not be qualified with a volume threshold as proposed by CenturyTel.

The Panel recommends the Commission adopt the position advocated by CenturyTel on this issue. After a review of the timely submissions in this arbitration, the Panel agrees with CenturyTel that its position on issue 7 is the more reasonable one on this issue. Our reading of the FCC's Atlas decision leads us to conclude Sprint's interpretation of Section 251(a) requiring the CLEC's unrestricted choice of either indirect or direct interconnection is not the proper reading of the FCC rules. Sprint has not given solid support that CenturyTel is required by any federal or state authority to provide its choice of indirect or direct interconnection without qualification. As we understand it, the requirement is that telecommunications carriers have the duty to make one of these options available. CenturyTel has met that duty.

We agree with CenturyTel and find it difficult to reconcile Sprint's position that it can require CenturyTel to provide the indirect interconnection indefinitely. Curiously, in footnote 64 of Sprint's proposed DAP, it referenced the Illinois Commerce Commission

arbitration decision that runs counter to its argument. In that decision, the Illinois Commission concluded on page 28 that it recognizes the merits of allowing indirect interconnection when traffic volume is low. Later on in the decision it states that the Commission understands Sprint to be in general agreement with this proposal but there were some concerns about the level of traffic that warrants direct interconnection. We find that some limitation on the indirect interconnection is warranted due to the concerns raised by CenturyTel including, but not limited to, proper traffic identification and traffic engineering.

Issue 8: Should Sprint be required to reimburse CenturyTel when CenturyTel is acting as a transit provider if CenturyTel compensates third parties for the termination of Sprint-originated traffic?

This issue involves Sprint's position that the payment of termination charges is between the originator of the traffic and the terminating carrier and CenturyTel's request that it be financially covered for its responsibility of terminating Sprint's traffic on a third party carrier's network.

The Panel recommends the Commission adopt the position advocated by CenturyTel on this issue. It is undisputed that the originating carrier is responsible for the traffic it sends throughout the telecommunications network. The Panel finds that the order in *MPSC Case No. U-14905*, dated December 21, 2006, is controlling in this instance. In this case, the Commission found that billing Verizon (the intermediate carrier) for calls for which it failed to provide identifying information that can be used by the rural ILECs to identify the carrier is consistent with applicable law and Commission policy, id., p. 18. CenturyTel (acting as an intermediate carrier) could be found liable for the calls sent from Sprint through CenturyTel to a rural carrier in like manner. The

Panel disagrees with Sprint's assertion that payment of reciprocal compensation for traffic termination is between the carrier that originates the traffic and the terminating carrier if that contradicts the findings in *MPSC Case No. U-14905*, supra. In most cases, Sprint's statement is true but when, as in this case, indirect interconnection is used, the possibility of unidentified traffic increases and therefore CenturyTel should be protected from the possibility of being charged to terminate Sprint's unidentified traffic. The potential problems identified by Sprint would only occur with unidentified traffic and Sprint should be able to correct the problem with adequate record keeping. The problem is that if the traffic cannot be identified and the third party charges CenturyTel, Sprint's bill and keep agreement will not cover unidentified minutes. The Panel finds CenturyTel's language addresses this problem and should be adopted by the Commission.

Issue 10: What terms for virtual NXX should be included in the Interconnection Agreement?

This issue involves whether placeholder language for VNXX should be added to the ICA and whether the agreement should specify that VNXX and FX traffic should be compensated under the bill and keep provisions consistent with local traffic.

The Panel adopts the position of CenturyTel on issue 10. It is agreed by both parties that Sprint will not initially be using VNXX. However, Sprint would like to include "placeholder" language in the ICA for the treatment of such traffic in the event Sprint elects to use VNXX in the future. The problem the Panel sees with the proposed language is that it states that VNXX and FX traffic should be compensated under the bill and keep provisions consistent with local traffic. The Commission order in *MPSC Case*

No. U-15280, dated April 24, 2007 dealt with the jurisdiction of VNXX calls per the MTA and not all calls are to be treated as local as Sprint proposes. Since Sprint is not immediately using VNXX and more information on this issue was not timely submitted by the parties on this issue, the Panel agrees with CenturyTel.

The Panel therefore adopts the Reserved for future use language in 2.135 and the language in 4.2.2.2, 4.2.2.3, 4.2.2.4 and 4.2.2.5 should be deleted.

Issue 12: Should terms be included that provide for the opportunity of refunds and the ability to pursue dispute resolution if appropriate remedies are not agreed to when performance is not adequate?

Sprint argues that there should be language in Article VI, Section 5, concerning performance reviews, which includes the possibility of refunds for poor performance and explicitly states that either party may invoke the dispute resolution procedures in the agreement to resolve performance disputes. Sprint believes that this provision is necessary to ensure adequate service levels. CenturyTel states that Sprint's proposed language is repetitive since there are already procedures in the agreement for disputing billed amounts and dispute resolution.

The Panel recommends that the Commission adopt Sprint's position on this issue. While there may already be a procedure in the agreement regarding refunds of billed amounts, this procedure is for billing disputes and not performance review. The proposed terms explicitly make refunds a possibility in cases of inadequate service, which is reasonable in the Panel's opinion and may act as an incentive to provide adequate levels of service. However, Sprint's proposal would not require refunds in all cases. Either party may invoke the dispute resolution process if they cannot resolve a performance related issue. In addition, Sprint's proposed language in this section

regarding the dispute resolution procedure merely clarifies that either party reserves the right to invoke dispute resolution and in the Panel's opinion, is not repetitive as CenturyTel contends.

Issue 14: What are the appropriate rates for services provided in the Interconnection Agreement, including rates applicable to the processing of orders and number portability?

Since this issue comprises several smaller issues, the panel has chosen to treat them individually. The first issue concerns various non-recurring charges ("NRC") and what are the appropriate rates for those NRCs. The second issue concerns whether or not service order charges should apply to local number portability ("LNP") orders. Finally, the third issue involves whether or not a subsequent service order charge is permissible under the agreed upon language.

Sprint argues that the rates for services provided under the agreement must be consistent with federal TELRIC rules and state total service long run incremental cost ("TSLRIC") principles. In addition, Sprint states that any cost study used for setting rates must be subject to independent review and approved by the Commission. Sprint contends that the basis for CenturyTel's rates was only presented in response to its petition in this case, was not subject to any review or approval process, and is overly simplistic and unsupported. Sprint believes that the rates in dispute as part of this issue should be set at zero until CenturyTel files an appropriate TSLRIC study for Commission approval. Once a cost study and appropriate rates have been approved Sprint would agree to a retroactive true-up.

Sprint also believes that there should be no service order charges associated with LNP. Sprint states that such charges are anti-competitive and that the FCC

specified that these charges are only recoverable through an end-user surcharge. In addition, Sprint argues that even if a service order charge on LNP is appropriate, CenturyTel's proposed rates are not properly supported by a cost study.

Finally, Sprint argues that there should be no subsequent service order charges under the agreement. In support of this, Sprint states that the parties have already agreed to this stipulation in Article VI, section 1.2.4 of the agreement.

CenturyTel has proposed the following rates for various NRCs that will apply to services under the agreement:

Non-Recurring Charge	**Rate**
CLEC Account Establishment	$258.33
Customer Record Search	$8.69
Custom Handling	
– Service Order Expedite	$13.96
Service Order Charge - Simple	$13.96
Service Order Charge - Complex	$65.51
Service Order Charge - Subsequent	$13.96

CenturyTel states that these rates are not directly based on its most recently approved TSLRIC study (this study was approved by Commission Order in *MPSC Case No. U-11448*, dated January 28, 1998) due to the fact that at the time that study was approved, costs for these items were not developed. However, CenturyTel claims that these rates have been developed using a "TSLRIC approach" that it believes is compliant with state and federal law.[10]

Concerning LNP, CenturyTel contends that service order charges are appropriate for LNP orders since these charges are related to the processing of the order and not the number port itself. CenturyTel states that the underlying costs would

[10] Hankins Testimony p. 7-8.

not arise absent an order from another carrier, and therefore are not recoverable through an end-user charge, and that this position is consistent with FCC rules.

CenturyTel states that Sprint is incorrect in their interpretation and although subsequent service order charges do not apply to porting requests, they do apply to other service orders.

Section 252(d) of the FTA establishes the pricing standard for interconnection and in implementing this section the FCC has determined that TELRIC shall be the methodology used to determine the rates for interconnection, including the rates that are at issue here. The FCC also directed that ILECs are required to prove to a state commission that its rates are in compliance with TELRIC.[11] In addition, section 352 of the MTA requires that the rates for interconnection be set at a provider's TSLRIC of providing the service.[12] Michigan's TSLRIC methodology has been found to be compliant with TELRIC by the FCC.[13]

CenturyTel currently has an approved cost study on file with the Commission. Therefore, if CenturyTel had relied on that cost study to develop the NRC rates in dispute, Sprint's challenge of the cost basis of these rates lacks merit. However, as noted above, CenturyTel did not rely on its last approved cost study in developing the rates in dispute and instead used an approach it claims is compliant with TSLRIC/TELRIC. These rates have not been approved by the Commission, and have not been developed using CenturyTel's Commission-approved TSLRIC study. The Panel finds that CenturyTel's argument that its current cost study does not contain cost information for the rates at issue here is not justification for its approach. Instead the

[11] 47 CFR § 51.505
[12] MCL 484.22352
[13] January 13, 2003 Report of the Commission, Case No. U-12320 p. 49.

Panel finds that a new TSLRIC study that includes this cost information would be appropriate. In *MPSC Case No. U-14678*, dated February 21, 2006, pp. 4-8. The Arbitration Panel found that changes in Commission policy since the previous cost study of the rural ILECs in that case warranted a new TSLRIC study. That same conclusion can be reached here.

Therefore, the Panel finds for Sprint on this part of Issue 14 and recommends that the Commission direct CenturyTel to file an updated TSLRIC study for Commission review. However, in the Panel's opinion, it would not be reasonable for CenturyTel's rates to be set at zero until a new cost study is approved. Commission TSLRIC policy allows small carriers to proxy the rates of one of the two major carriers in this state (AT&T Michigan or Verizon North) in lieu of developing costs of their own. The Panel finds that it would be reasonable for CenturyTel to adopt Verizon's rates for the NRCs at issue here until CenturyTel completes its own cost study. However, CenturyTel demonstrates in its response to Sprint's petition that its proposed rates are below those of Verizon. Therefore, in the Panel's opinion, CenturyTel's proposed NRC rates are reasonable as interim rates until a new cost study can be approved. Concerning true-up, as the Commission determined in *MPSC Case No. U-14678*, id., p. 9, a true-up would not be appropriate since CenturyTel's proposed rates are considered approved for interim usage. Therefore, the Panel also recommends that the Commission direct the parties to file an agreement incorporating CenturyTel's proposed rates in the interim until a new TSLRIC study is approved.

Regarding the charges on LNP orders, the FCC has found that carriers may charge fees on LNP orders if they are standard fees charged for services not related to

the actual provision of number portability.[14] To the extent that the charge CenturyTel proposes is a standard service order charge that applies to all CLEC service orders including LNP and that the underlying cost would not arise absent a CLEC order, the charge is permissible under FCC rules. Once a new TSLRIC study is approved for CenturyTel, there will exist proper support to determine the appropriate service order charge and how it should apply to LNP. However, as noted above, the Panel does not believe it would be reasonable for CenturyTel to potentially provide a service for free until a new cost study is approved. Therefore, the Panel recommends that CenturyTel be permitted to assess the proposed service order charge on LNP orders in the interim.

Finally, as to subsequent service order charges, the Panel finds that the section of the proposed agreement cited by Sprint clearly applies to LNP only. The Panel recommends that CenturyTel be allowed to include charges for subsequent service orders on non-LNP orders in the agreement as warranted.

Issue 15: If CenturyTel sells, assigns or otherwise transfers its territory or certain exchanges, should CenturyTel be permitted to terminate the agreement in those areas?

Sprint proposes that CenturyTel should not be permitted to terminate the interconnection agreement concerning any exchanges that are sold or otherwise transferred to another company. Sprint contends that it requires assurance that a new agreement would be put in place which would allow continuation of service. Sprint calls the proposal by CenturyTel a one-sided provision which is patently unfair. CenturyTel should not have the absolute right to terminate the interconnection agreement without assigning the agreement to its successor. Sprint is concerned that it could be placed at

[14] FCC Order released April 13, 2004, CC Docket 95-116, FCC 94-01 Footnote 49.

a severe competitive disadvantage in attempting to quickly replace the interconnection agreement where it would already be offering services. Further, Sprint asserts that it could be in jeopardy of losing its ability to obtain numbers from the North American Numbering Plan Administrator (NANPA).

CenturyTel cites six reasons why it believes it should be allowed to preserve its right to terminate obligations in the event of a sale or transfer. CenturyTel's six points are:

(1) It interferes with a market-based asset sale by encumbering obligations on the sale or transfer.

(2) It may require a party to assume obligations which the party may not be capable of implementing.

(3) It would materially devalue its assets through the encumbering of the obligation.

(4) It would create a potential conflict with other interconnection agreements with an acquirer holding interconnection agreements with Sprint.

(5) It is unnecessary because there are legal and administrative remedies at Article III, Sections 32.0 and 40.0 and Section 43.0 which already provide for binding effect upon successors and assigns.

(6) It is unnecessary because the Commission can require continuity of service under 47 CFR 51.175.

The Panel is persuaded by CenturyTel's point's number 1, 5 and 6. CenturyTel's proposed language at section 2.7 states:

> Termination Upon Sale. Notwithstanding anything to the contrary contained herein, a Party may terminate this Agreement as to a specific

> operation area or portion thereof if such Party sells or otherwise transfers the areas or portion thereof to a non-affiliate. The selling or transferring Party shall provide the other Party with at least ninety (90) calendar days' prior written notice of such termination, which shall be effective on the date specified in the notice. Notwithstanding termination of this Agreement as to a specific operating area, this Agreement shall remain in full force and effect in the remaining operating areas. The parties agree to abide by any applicable Commission Order regarding such sale or transfer.

Sprint's proposed language would add near the end of the above quoted portion of section 2.7:

> Except, should CenturyTel sell or trade substantially all the assets in an exchange or group of exchanges that CenturyTel uses to provide services under this Agreement, then CenturyTel will assign this Agreement to the purchasing or acquiring entity for those exchanges/markets where Sprint is actually interconnecting and providing services.

The Panel is persuaded that CenturyTel has demonstrated sufficient safeguards in place without Sprint's proposed language to assuage the concerns of Sprint. First, Section 43.0 already provides that the interconnection agreement is binding on legal successors and permitted assigns. It succinctly states:

> This agreement shall be binding on and inure to the benefit of the Parties and their respective legal successors and permitted assigns.

In light of this language, Sprint has failed to sufficiently explain away the protections afforded here as it relates to its stated concerns. Further, the Panel finds that the 90 days notice provided by CenturyTel's proposed provision at section 2.7 does again afford safeguards against the concerns expressed by Sprint.

Finally, the Panel finds that the language proposed by Sprint, in light of the above mentioned, safeguards, could present a concern to a potential purchaser which is unwarranted. There is no reason presented why CenturyTel should not be in a

position of obtaining maximum possible value in the event of a potential sale. The Panel agrees that Sprint's proposed language could negatively impact such value.

Issue 16: Do terms need to be included when Sprint utilizes indirect interconnection, and CenturyTel is not provided detailed records, nor is CenturyTel able to identify and bill calls based upon proper jurisdiction?

This issue involves the proper amount or type of billing information necessary for Sprint and CenturyTel to exchange traffic.

The Panel adopts the position of CenturyTel on Issue 16. Sprint explained that under Article IV, Section 3.4.4, it will provide all SS7 signaling information, other billing information where available and conform industry standard billing formats. That information may not provide enough billing data for the local exchange company to use. In a prior Commission case[15] it became evident that local exchange companies need specific types of reports in order to determine the proper jurisdiction and responsibility for compensation for calls over common trunks versus dedicated trunks. The information available through SS7 equipment provided by Sprint in this matter does not persuade the Panel that the information Sprint is proposing to send is adequate. The Panel agrees that CenturyTel's language is necessary for the benefit of both parties due to Sprint's choice of using indirect interconnection and therefore having multiple carriers' traffic over the same trunks.

[15] In *MPSC Case No. U-14905*, there are several commission orders. However, the Panel relies on the collaborative efforts which resulted in the determination that SS7 signaling information, by itself, was insufficient for billing purposes.

CONCLUSION

Having fully considered the submissions of the parties, the Panel recommends that the Commission approve the decisions contained in this DAP. The Panel further recommends that the Commission issue an order requiring Sprint and CenturyTel to submit for Commission approval an interconnection agreement which conforms to the above findings.

THE ARBITRATION PANEL

Daniel E. Nickerson, Jr.

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Daniel E. Nickerson, Jr.

Rodney P. Gregg

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Paul D. Negin

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Paul D. Negin

Issued and Served: June 10, 2008

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

STATE OF MICHIGAN)
) SS.
County of Ingham)

Case No. U-15534

PROOF OF SERVICE

Dawn M. Prawdzik being duly sworn, deposes and says that on June 10, 2008 A.D. she served a copy of the attached Decision of the Arbitration Panel via E-Mail, to the persons as shown on the attached service list.

Dawn Prawdzik

Digitally signed by Dawn Prawdzik
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Dawn M. Prawdzik

Subscribed and sworn to before me
this 10th day of June 2008.

Lisa Felice

Digitally signed by Lisa Felice
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Date: 2008.06.10 14:49:11 -04'00'

Lisa Felice
Notary Public, Eaton County
acting in Ingham County, MI
My Commission Expires April 15, 2014

ATTACHMENT A

Haran C. Rashes, Esq.
Hrashes@clarkhill.com

Michael C. Rampe, Esq.
rampe@millercanfield.com

EXHIBIT B

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the petition of **SPRINT COMMUNICATIONS COMPANY L.P.** for arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 to establish an interconnection agreement with CenturyTel Midwest – Michigan, Inc.	Case No. U-15534

At the July 1, 2008 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

ORDER

Procedural History

On March 27, 2008, Sprint Communications Company L.P. (Sprint) filed a petition requesting arbitration with CenturyTel Midwest – Michigan, Inc. (CenturyTel) to establish an interconnection agreement (ICA). *See,* 47 USC 251, 252; MCL 484.2201; May 18, 2004 order in Case No. U-13774, and July 16, 1996 order in Case No. U-11134.[1] The petition identified 15 issues to be arbitrated. On March 31, 2008, Daniel E. Nickerson, Jr., Rodney P. Gregg, and Paul D. Negin were selected for the arbitration panel (panel).

On April 21, 2008, CenturyTel filed a response, identifying an additional issue. Also on that date, a protective order was issued.

[1]The parties stipulated that the request for negotiations was received by CenturyTel on October 20, 2007.

On April 24, 2008, the panel issued a schedule for the arbitration, which provided filing dates for Proposed Decisions of the Arbitration Panel (PDAP) and responses to PDAPs. These were the only filings requested by the panel.

On April 29, 2008, Sprint filed a letter requesting an oral presentation. By letter dated May 2, 2008, the panel denied the request. On May 1, 2008, Sprint filed reply testimony and a set of discovery requests. By letter dated May 5, 2008, the panel advised Sprint that, because the schedule set by the panel contained no provision for these filings and the panel was in need of no reply evidence, these filings would not be considered. On May 12, 2008, Sprint filed an application for leave to appeal these two procedural decisions of the panel. On May 27, 2008, CenturyTel filed a response to the application for leave to appeal.

On May 12, 2008, Sprint and CenturyTel filed PDAPs, and on May 19, 2008, both parties filed responses. On May 22, 2008, CenturyTel filed attachments to its response. On May 23, 2008, Sprint filed a request that the panel disregard the late-filed attachments.

On June 10, 2008, the panel issued a Decision of the Arbitration Panel (DAP). On June 20, 2008, both parties filed objections to the DAP.

The DAP

The DAP begins with the panel's decision to reject CenturyTel's late-filed attachments. The panel notes that CenturyTel had indicated that the filing was late due to "technical problems," without making any attempt to describe the nature of the technical problems or to request an extension of time from the panel. After ascertaining that the problems were not associated with the Commission's e-filing system, the panel rejected the attachments as untimely. The Commission agrees and adopts this finding.

Of the 16 issues identified in the petition and response, the DAP discusses 12. Issues 3, 9, 11, and 13 had been settled. The parties later informed the Commission that Issue 12 was also settled. The DAP retains the original numbering of the issues, and so does this order. The Commission makes its findings of fact and conclusions of law with respect to each issue seriatim.

Issue 1: Arbitration Terms

Issue 1 involves whether commercial arbitration should be provided for in the ICA in cases where the Commission either lacks or declines jurisdiction over the dispute. Sprint advocated terms in the ICA that would require all disputes to be submitted to the Commission or to the Federal Communications Commission (FCC) (when the Commission lacks or declines jurisdiction), unless the parties mutually agree to commercial arbitration. CenturyTel advocated terms that would allow for commercial arbitration whenever the Commission lacks or declines jurisdiction.

The panel found in favor of CenturyTel. The panel found that neither 47 USC 252(e)(5) nor the cases cited by Sprint require that all disputes be submitted to the FCC if the Commission lacks or declines jurisdiction. The panel found that there is no "absolute" right to seek dispute resolution from the FCC. Moreover, the panel pointed out, some ICA disputes fall outside the jurisdiction of the FCC. The panel noted that arbitration confers the benefits of flexibility to select an expert arbitrator, cost savings, and more timely resolution of disputes. The panel recommends adoption of CenturyTel's proposed Article III, Section 20.3.2, which provides for commercial arbitration where the Commission lacks or declines jurisdiction, and further provides for reasonable terms and conditions for arbitration.

In its objections, Sprint indicates that the parties agree that most disputes should come before the Commission, and "both parties seem willing to agree to commercial arbitration in certain

circumstances." Sprint's objections, p. 7. Sprint argues, however, that it should not be forced into commercial arbitration in all disputes that do not come before the Commission, citing its statutory rights to seek resolution by the FCC or through appeal. Sprint contends that, under Section 252(e)(5) of the federal Telecommunications Act of 1996 (FTA), if the Commission declines jurisdiction then either party may seek resolution of the dispute before the FCC. 47 USC 252(e)(5). Sprint argues that it may not be forced to waive statutory rights.

CenturyTel also indicates in its objections that "The parties generally agree that disputes arising under the Interconnection Agreement should be submitted to this Commission for resolution." CenturyTel's objections, p. 2. CenturyTel points out that the FCC does not have jurisdiction over all interconnection related disputes. CenturyTel argues that commercial arbitration should fill the gap.

The Commission agrees with the panel that arbitration has many benefits. However, Section 252(e)(5) of the FTA states "If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [FCC] shall issue an order preempting the State commission's jurisdiction of that proceeding . . . and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 USC 252(e)(5). This section requires that, where a state commission fails to act on an arbitration petition, the FCC "shall" act. This section does not apply to matters where the Commission lacks jurisdiction. In that situation, the ICA language providing for commercial arbitration is appropriate. However, should it ever occur that the Commission declines or simply fails to act in a case where the disputed issue is one that is appropriate for arbitration, Section 252(e)(5) mandates that the FCC has jurisdiction, and must act on it. The Commission finds that the language proposed for Section 20.3.2 of the ICA should be amended to

indicate this, and to provide for commercial arbitration in situations where the Commission and the FCC lack jurisdiction, or situations where the parties mutually agree.

Issue 2: Indemnification Terms

Issue 2 involves whether Sprint should be required to indemnify CenturyTel against claims of libel, slander, or defamation that arise from content transmitted by Sprint's end-users. CenturyTel pointed out that Sprint requires similar language in its tariffs and its ICAs with AT&T affiliates. CenturyTel also argued that the language is necessitated by the fact that Sprint plans to offer wholesale services to third parties, and Sprint will have the contractual relationship with its wholesale customers that will allow Sprint to negotiate its own indemnities from those customers. Sprint argued that the language was inappropriate for the ICA.

The panel found in favor of CenturyTel. While the panel did not find that Sprint is obligated to accept the same language that Sprint itself has required in other ICAs, the panel found that the language was reasonable and that Sprint had not provided any valid explanation for why this ICA should be treated differently from others. The panel also noted that Sprint is in a better position to obtain indemnities from its customers than CenturyTel is.

Sprint objects, stating, "this situation is significantly different." Sprint's objections, p. 12.

CenturyTel's objections point out that, in general, the indemnification provisions of the ICA are mutual, and the only language that pertains exclusively to Sprint addresses that company's provision of service to wholesale customers, with whom CenturyTel will have no contractual relationship.

The Commission agrees with the panel and adopts the language proposed by CenturyTel.

Issue 4: Points of Interconnection

Issue 4 involves whether Sprint may be allowed to establish only one point of interconnection (POI) per local access transport area (LATA) at any technically feasible point within the incumbent local exchange carrier's (ILEC) network. Sprint asserted that CenturyTel cannot force Sprint to establish direct end office trunks (DEOT) or multiple POIs. Sprint asserted that the LATA concept applies to CenturyTel, because CenturyTel has not received an exemption as a rural provider.

CenturyTel argued that the LATA concept does not apply to this case because that concept was based on the network arrangements of the Bell Operating Companies (BOC), and the network of a small ILEC like itself is not properly designated a LATA. CenturyTel contended that Sprint is seeking a connection that is superior to the connection CenturyTel provides to its own traffic, contrary to 47 USC 251(c)(2). CenturyTel asserted that its network is geographically limited and dispersed across a wide area, it does not own transport networks between all of its exchanges, and its networks are not designed and sized for traffic other than exchange access traffic.

The panel agreed with CenturyTel and found that the LATA concept does not apply to interconnection with CenturyTel in this matter. The panel found that Sprint is demanding interconnection that is superior to CenturyTel's, and that would require CenturyTel to construct network trunking arrangements solely for Sprint's benefit, contrary to the requirements of 47 USC 251(c)(2). Consistent with prior Commission orders, the panel found that Sprint may either "establish its own trunking between tandems or, if capacity is available for that use, Sprint may pay [the ILEC] to provide the connections with each tandem." DAP, p. 12, citing the January 15, 1997 order in Case No. U-11203, and the October 14, 2004 order in Case No. U-13931. The panel found that, if no capacity is available, then Sprint has no right to demand trunking be provided,

and that Sprint must make interconnection arrangements with separate areas where technical considerations require separate trunking.

In its objections, Sprint argues that it is only required to establish one POI per LATA, because 47 CFR 51.305(a)(2) requires an incumbent LEC to provide interconnection "at any technically feasible point within the incumbent LEC's network." Further, Sprint again points out that CenturyTel has not applied for a rural exemption from Section 251 of the FTA. Sprint avers that the panel's decision conflicts with decisions from the Iowa and Indiana commissions on similar issues. Sprint contends that the FCC has made no distinctions between rural carriers and regional BOCs, and it is inappropriate for the Commission to do so. Sprint maintains that it is not requiring a network superior to CenturyTel's, because the law only established a floor below which the quality of the interconnection may not go, not a ceiling.

In its objections, CenturyTel argues that, because it has separate operations rather than a single, ubiquitous network, Sprint should be required to interconnect to CenturyTel's separate areas. CenturyTel again points out that, unlike a BOC's expansive and market dominant network, it has a geographically limited network dispersed over a wide area, and does not own transport networks between all of its exchanges. CenturyTel points out that it provides local calling transport only within its ILEC network and, in some required expanded local calling arrangements, to the edge of its service area. CenturyTel contends that nothing in the FTA precludes multiple POIs or multiple trunk groups for the exchange of local traffic with a non-BOC ILEC like itself.

The Commission agrees with the panel and finds in favor of CenturyTel on this issue. Neither 47 CFR 51.305(a) nor 47 USC 251(c)(2) require only one POI; they require the provision of interconnection at any technically feasible point in the ILEC's network, "that is at a level of quality that is equal to that which the incumbent LEC provides itself." 47 CFR 51.305(a)(3). That

language does not preclude multiple POIs. As CenturyTel states, it does not own transport networks between all of its exchanges; so, for CenturyTel to carry out Sprint's request, it would be required to provide Sprint with local calling transport superior to the level of quality it provides for itself. While Sprint may wish to argue that the federal regulation does not preclude an ILEC from offering service to a competitive local exchange carrier (CLEC) that is superior to its own service, the ILEC is certainly not obligated to do so.

Issue 5: Shared Costs of Interconnection Facilities

Issue 5 involves whether the parties should share the costs of the interconnection facilities between their networks based on their respective percentages of originated traffic. Sprint argued that both parties are responsible for the costs of the facilities used for direct interconnection between their networks, and they should share the costs proportionally based on each carrier's usage. Sprint further argued that this cost is separate from the reciprocal compensation arrangements already agreed to. Sprint asserted that it could designate a "point of presence" in the LATA where CenturyTel can hand off traffic instead of having to deliver traffic all the way to Sprint's switch.

CenturyTel argued that the bill and keep arrangements already agreed to by the parties include the costs of transport for the purpose of direct interconnection, and that Sprint is required to pay for the facilities necessary to bring its traffic all the way to CenturyTel's network.

The panel agreed with Sprint on this issue. The panel found that, because the direct interconnection facilities are not a part of either carrier's network, interconnecting parties must compensate each other for dedicated transmission facilities between networks (in addition to reciprocal compensation); and the cost to deliver the traffic to the network of the other party is to be paid by the originating carrier (also in addition to reciprocal compensation). After delivery of

the traffic to the other party's network the only charge is the reciprocal compensation charge. The panel found that the cost of the dedicated transmission facilities should be borne by both parties in proportion to the amount of originating traffic each party transports. However, the panel found that (as discussed above) Sprint's POI must be on CenturyTel's network.

In its objections, CenturyTel indicates that, in light of the panel's decision on Issue 4, "CenturyTel is willing to regard [its] concern[s] as being addressed based on the practical effects of the resolution of Issue 5 by the Panel as that resolution is currently stated." CenturyTel's objections, p. 14.

The Commission agrees with the panel and adopts the finding of the panel in favor of Sprint, with any modification necessitated by the Commission's holding on Issue 4 regarding Sprint's obligation to establish more than one POI.

Issue 6: Rates for Direct Interconnection

Issue 6 involves the pricing method for direct interconnection facilities. Sprint argued that a forward-looking pricing method is appropriate for determining a reasonable rate for pricing the interconnection facilities provided to Sprint by CenturyTel. According to Sprint, to be consistent with Section 252(d)(1)(A)(i) of the FTA, and to prevent ILECs from inefficiently raising costs to deter competition, the FCC concluded that ILEC rates for interconnection must be based on efficient, forward-looking costs. Moreover, Sprint argued that the FCC recognized in ¶ 140 of the Triennial Review Remand Order (TRRO)[2] that the obligation to provide cost-based interconnection facilities was not affected by the FCC's ruling limiting the availability of unbundled network element (UNE) transport facilities. Sprint concluded therefore that CenturyTel

[2] *Order on Remand, In re Unbundled Access to Network Elements,* 20 FCCR 2533 (2005) (TRRO).

is required to provide interconnection facilities at a rate derived from using the total element long run incremental cost (TELRIC) method. Sprint also contended that the Commission has not approved a total service long run incremental pricing (TSLRIC) study required under state law. Thus, Sprint requested that the Commission adopt its language that would require CenturyTel to price interconnection facilities based on the FCC's guidelines for forward-looking costs.

CenturyTel argued that it should price any direct interconnection facilities at its intrastate access tariffs, at rates that are based on cost, are nondiscriminatory, include a reasonable profit, and are otherwise consistent with existing Commission policy.

The panel found that the FCC addressed this issue in the TRRO and found that incumbent providers are not required to price entrance facilities at TELRIC based rates. However, ¶ 140 of the TRRO seems to contradict that finding. The apparent contradiction in the TRRO was addressed by U.S. District Court for the Eastern District of Michigan in *Michigan Bell Telephone Co d/b/a AT&T Michigan v Lark*, ___ F Supp 2d ___; 2007 WL 2868633 (ED Mich, Sep 26, 2007). The court ruled that ¶ 140, which it characterized as an explanatory comment, must be interpreted so that it is consistent with the plain meaning of the rule. Therefore, entrance facilities need not be provided by incumbent carriers to competing carriers at cost-based rates. The panel noted that it was aware that *Michigan Bell* is before the Court of Appeals for the Sixth Circuit and that the Court of Appeals for the Seventh Circuit had interpreted the issue differently. The panel recommended that the Commission direct the parties to include CenturyTel's proposed rates for interconnection.

In its objections, Sprint argues that the panel erred in recommending market-based rates for interconnection. According to Sprint, the panel improperly applied the *Michigan Bell* decision, despite the fact that this decision has been appealed and that *Michigan Bell* is contrary to Section

352 of the Michigan Telecommunications Act, MCL 484.2102 *et seq.*, (MTA). Sprint also argues that, in light of recent decisions in the Seventh and Eighth Circuits, *Michigan Bell* is likely to be overturned by the Sixth Circuit. Sprint further contends that *Michigan Bell* is inapplicable because it concerns an ILEC that operates in areas where there is significant telecommunications competition. In contrast, CenturyTel provides service in rural areas where there is little, if any, competition. Thus, Sprint asserts that entrance facilities and interconnection services are not competitively available in CenturyTel's area and that these facilities should therefore be provided at TELRIC rates.

The Commission agrees with Sprint and finds that the rates for entrance facilities should be based at TELRIC/TSLRIC rates in the interconnection agreement, with any modifications necessitated by the Commission's holding on Issue 14. The Commission is aware that the decision in *Michigan Bell* has been appealed and that the circuit courts that have considered this issue have tended to support Sprint's interpretation of Section 252 of the FTA. The Commission further agrees that CenturyTel's interpretation is contrary to MCL 484.2352. Accordingly, the Commission requires that entrance facilities should be provided as part of a Section 251(c)(2) obligation.

Issue 7: Indirect Interconnection Terms

Issue 7 involves whether the ICA should contain provisions limiting indirect interconnection. Sprint argued that the plain language of Section 251(a) establishes that all telecommunications carriers have an independent and ongoing obligation to interconnect directly or indirectly with other telecommunications carriers. 47 USC 251(a). According to Sprint, CenturyTel cannot dictate that Sprint interconnect with it directly, including the requirement to directly interconnect at a specific volume threshold or when transit charges reach a certain amount. Sprint noted that other state commissions have recognized the right of a CLEC to choose indirect interconnection

without the imposition of thresholds on that right. Sprint argued that there are numerous factors that affect whether direct or indirect interconnection is most appropriate including the estimated volume of traffic, the distances between Sprint's point of presence and the tandem, the distance between Sprint's point of presence and the end office located in the rate center being served, whether the ILEC in whose territory Sprint wishes to compete has a tandem, host office, or remote office, the availability of facilities, the nonrecurring and recurring rates for facilities, and the cost of transiting through a tandem.

CenturyTel argued that the issue here is the level of traffic exchanged between the parties at which the parties should migrate to direct dedicated trunking interconnection. CenturyTel proposed that when traffic levels reach a DS1 level, Sprint will directly interconnect or establish other mutually beneficial arrangements. CenturyTel argued that this approach is reasonable because it will allow Sprint a "start-up" opportunity without having to incur the expense of direct trunking and that this approach cannot reasonably be viewed as dictating interconnection methods, as Sprint claims. CenturyTel further argued that Section 251(a) creates only a general duty to interconnect and provides no standards for such connection. CenturyTel asserted that it has complied with this duty. In support of its position, CenturyTel cited the FCC's *Atlas* decision (*In the Matter of Total Telecommunications Services, In, and Atlas Telephone Company, Inc v AT&T Corp*, Memorandum Opinion and Order, File No. E-97-003, FCC 01-84, released March 13, 2001).

CenturyTel also argued that indirect interconnection is an inferior form of interconnection because it requires reliance on a tandem operator and because it limits the ability of the terminating carrier in the transit arrangement to receive the proper traffic identification information necessary for rendering bills for the traffic. CenturyTel noted that the existence of a tandem

arrangement undermines the usefulness of the investment in measurement capability made by CenturyTel.

The panel found that the position advocated by CenturyTel was more reasonable. The panel observed that its reading of Section 251(a) and *Atlas* indicates that CenturyTel is not required to provide unrestricted choice of either direct or indirect interconnection. The panel further agreed with CenturyTel that while indirect interconnection is reasonable when traffic volumes are low, higher volumes of traffic warrant direct interconnection because of the concerns raised by CenturyTel.

In its objections, Sprint argues that the plain language of Section 251(a) provides that CenturyTel has a duty to interconnect directly or indirectly with other telecommunications carriers and that the language does not permit CenturyTel to require that Sprint interconnect directly at some specified volume of traffic. Sprint points out that other state commissions recognize the right of a CLEC to choose indirect interconnection without the imposition of limits. Sprint further notes that the FCC found that the choice of interconnection can only be limited by technical or economic factors. Sprint asserts that a variety of factors influence whether direct or indirect interconnection should be used, thus, it is not possible to identify a particular volume of traffic that should require direct interconnection.

The Commission agrees with the panel's determination on this issue and adopts the language proposed by CenturyTel.

Issue 8: Compensation for Transited Traffic

Issue 8 involves language that would require Sprint to indemnify CenturyTel when CenturyTel is acting as a transit provider, if CenturyTel compensates third parties for the termination of Sprint-originated traffic. Sprint argued that it should not be required to reimburse

CenturyTel if CenturyTel pays a third party carrier for traffic that is originated by Sprint. Sprint claimed that payment of reciprocal compensation for traffic termination is between the carrier that originates the traffic and the terminating carrier, and CenturyTel, as a transit provider, cannot place itself in the position of being an intermediate broker for these charges.

Sprint asserted that it indirectly interconnects to carriers on a regular basis, and the traffic exchanged between Sprint and these carriers is generally subject to a bill and keep arrangement, which is an acceptable compensation arrangement. According to Sprint, CenturyTel would have no incentive to challenge the rates and accuracy of the bills for such traffic termination since its intent is to seek reimbursement from Sprint for these charges. Sprint asserted that the arrangement that CenturyTel proposes could result in Sprint paying termination charges for traffic that otherwise may be subject to a bill and keep arrangement; or Sprint may pay a termination rate that is not cost-based. Sprint also argued that CenturyTel's proposed reimbursement requirement could result in a compensation arrangement that is not "reciprocal" – CenturyTel would collect compensation for Sprint's originated traffic from Sprint and would not collect compensation from the originating third party for traffic that Sprint terminates.

CenturyTel argued that it seeks language in the ICA that assures CenturyTel that it will not experience adverse economic consequences relating to termination to third party carriers of Sprint-originated traffic. CenturyTel asserted that Sprint's proposal – to add language to the ICA that states that CenturyTel has no obligation to pay third party charges for termination of Sprint-originated traffic – provides no protection to CenturyTel because third parties are not bound by the terms of a contract between Sprint and CenturyTel. CenturyTel claimed that the language that it proposes merely confirms Sprint's obligation to pay third party charges for termination of Sprint

originated traffic and requires that Sprint should provide indemnification to CenturyTel in the event that a third party seeks compensation from CenturyTel.

The panel recommended that the Commission adopt CenturyTel's position on this issue. The panel observed that it is undisputed that the originating carrier is responsible for the traffic that it sends through the telecommunications network and that the Commission's December 21, 2006 order in Case No. U-14905 was controlling on this issue. The panel noted that, like Verizon in Case No. U-14905, CenturyTel (acting as an intermediate carrier) could be found liable for the calls sent from Sprint through CenturyTel to a rural carrier. The panel noted that because indirect interconnection is used, the possibility of unidentified traffic increases and therefore CenturyTel should be protected from the possibility of being charged to terminate Sprint's unidentified traffic. The panel further observed that the potential problems identified by Sprint would only occur with unidentified traffic and Sprint should be able to correct the problems with adequate record keeping. The panel found that a more significant problem would arise if the traffic cannot be identified and the third party charges CenturyTel, when Sprint's bill and keep agreement will not cover unidentified minutes. The panel therefore recommended that the Commission adopt CenturyTel's language.

In its objections, Sprint argues that the panel improperly applied the Commission's decision in Case No. U-14905. According to Sprint, Case No. U-14905 concerned toll traffic and not local traffic. Sprint further argues that because CenturyTel has no obligation to pay a third party for termination of Sprint local traffic, Sprint should not be put in the position of having to reimburse CenturyTel if CenturyTel chooses to pay charges that it is not required to pay. Sprint maintains that because the terminating ILEC has the responsibility to establish reciprocal compensation

arrangements with the originating carrier, the transiting carrier has no threat of liability for which it needs to be indemnified.

The Commission agrees with the panel and observes that, absent this language, CenturyTel could be required under ICAs with other CLECs, to cover the costs of traffic originated by Sprint and transited by CenturyTel. Therefore, the Commission finds that the language proposed by CenturyTel should be adopted.

Issue 10: Virtual NXX

This issue involves the terms for virtual NXX (VNXX) that should be included in the ICA. Sprint proposed including "placeholder" language for treatment of VNXX in the event Sprint elects to use VNXX in the future. Sprint's proposed language states that Sprint is not currently using VNXX, but, if Sprint offers VNXX services in the future, Sprint will notify CenturyTel and the parties will negotiate appropriate terms and rates. Sprint observed that in prior decisions, the Commission has found that VNXX (FX service) is subject to reciprocal compensation and has required the parties to include language consistent with those decisions in the ICA. Sprint contended that the removal of all VNXX language from the proposed ICA would have the potential to create ambiguity. To address this concern, Sprint proposed that the ICA should specify that VNXX and FX traffic should be compensated under bill and keep, consistent with local traffic.

CenturyTel did not dispute that Sprint will not be using utilizing VNXX when it deploys service in CenturyTel's area and CenturyTel indicated that it agreed with Sprint's proposal to remove all references to VNXX from the ICA. CenturyTel further noted that MCL 484.2304 provides ILECs with a statutory option to address VNXX traffic on a retail pricing basis. Because

CenturyTel has the option to choose how it addresses VNXX traffic pursuant to that statute, CenturyTel does not believe it is necessary to include VNXX terms in the ICA.

The panel agreed with CenturyTel on this issue and noted that Sprint's proposed language, which states that VNXX and FX traffic should be compensated under the bill and keep provisions consistent with local traffic, was not consistent with MCL 484.2304. The panel observed that the April 24, 2007 order in Case No. U-15280 addressed the jurisdiction of VNXX calls under the MTA and found that not all calls are to be treated as local as Sprint proposes. The panel therefore recommended that "Reserved for future use" language should be adopted in Article III, Section 2.135 of the ICA and the language in 4.2.2.2, 4.2.2.3, 4.2.2.4 and 4.2.2.5 should be deleted.

In its objections, Sprint again argues that removal of all language concerning VNXX will create ambiguity and that therefore its proposed language should be included. In its response, CenturyTel stated that it had viewed this issue as resolved but that Sprint later changed its position in reply testimony that was rejected by the panel. CenturyTel asserts that Sprint's revised language was not discussed between the parties, and Sprint did not provide the language to CenturyTel during the negotiation process. Thus, CenturyTel maintains that Sprint's position was improperly raised, and should be rejected for this reason as well.

The Commission agrees with the panel and adopts its recommendation on this issue. The previous Commission orders on which Sprint relies were issued before MCL 484.2304(9) was amended to remove the presumption that all VNXX calls are local. The April 24, 2007 order in Case No. U-15280 reflects that Section 304(9) of the MTA does not presume that VNXX calls are local calls. Rather, it permits the originating carrier to determine whether VNXX calls are local or toll in its end user tariffs.

Issue 14: Proposed Rates

a. Non-Recurring Charges (NRCs)

Issue 14 involves proposed rates for services provided under the ICA. The arbitration panel determined that it would break the main issue into its constituent subissues for resolution, beginning with the NRC rates.

Sprint took the position that CenturyTel's rates must be based on TSLRIC and TELRIC. In its view, any cost study used to support the rates must be approved by the Commission rather than presented in response to a petition for arbitration, as CenturyTel did in this case. Sprint argued that the rates at issue should be set at zero until CenturyTel files an appropriate TSLRIC study for Commission approval. Sprint stated that it would agree to a retroactive true-up after such a cost study is approved.

For its part, CenturyTel admitted that it had no approved cost study for its proposed charges, but explains that its most recent Commission approved cost study did not develop costs for these items. However, CenturyTel claimed that its proposed rates were developed "using a TSLRIC approach" that complies with federal and state law.

The arbitration panel reasoned that, generally, a carrier should not be permitted to implement rates for items under 47 USC 251 that are not based on an approved cost study. Rather, the panel concluded a new cost study that includes the missing items would be the appropriate next step, as the Commission found in its February 21, 2006 order in Case No. U-14678. However, the panel found that Sprint's proposal to set CenturyTel's NRC rates at zero pending a final order in a new cost case would not be reasonable. Rather, the panel recommended that the Commission approve the rates proposed by CenturyTel. The panel reasoned that CenturyTel could adopt the approved cost study for AT&T Michigan or Verizon North Incorporated as its own, as permitted by

MCL 484.2304(14). If it did so, the non-recurring rates would be higher than CenturyTel's proposed rates in this case. Therefore, the panel concluded that CenturyTel's proposed rates were reasonable.

The panel determined that no true-up should be necessary. It reasoned that the Commission's decision in Case No. U-14678 dictated that rates employed in the interim should treated as permanent for the period ending when the Commission issues a decision in the new cost case, because the Commission would be approving the rates for interim use in this order. Therefore, the rates charged would be approved when they are charged.

Sprint objects and argues that the panel recommended adoption of rates that do not comply with the FTA. It argues that rates for 47 USC 251-related services should be priced consistent with the pricing method set out in 47 USC 252(d). Those rates must be just and reasonable, based on cost, and non-discriminatory. They may include a reasonable profit. Sprint noted that the panel determined that CenturyTel's proposed rates were not compliant with the FTA, which requires TELRIC-based rates, or state law, which requires TSLRIC-based rates. Yet, Sprint argues, the panel adopted those non compliant rates on an interim basis, without providing for a true-up once a cost case has been filed and resolved.

Sprint goes on to say that CenturyTel has not met its burden to demonstrate that its NRCs meet the standards of federal or state law. Sprint points out that the Commission has declined to approve new cost studies that provide only a partial picture, and has required cost study applicants to submit comprehensive costs. Moreover, Sprint argues, there has been no record developed relative to the proposed rates, and no opportunity to challenge the calculations or methods used to determine these rates. Sprint argues here, as it did before the panel, that because no approved cost

study supports these non-recurring charges, they must be set at zero pending a Commission order establishing the relevant costs.

Sprint goes on to state that if the Commission adopts the panel's recommendation, it should require a cost case filing and provide for a true-up at the conclusion of the cost case. This would make the rates interim and compliant with the FCC's rule, 47 CFR 51.715(d).

Sprint argues that, contrary to the panel's discussion, the test for lawful rates is not reasonableness; rather the question to be answered is whether the rates are set at TELRIC/TSLRIC, as demonstrated by an approved cost study. As to a true-up, Sprint argues that there is a crucial difference between Case No. U-14678 and the present one. It argues that in Case No. U-14678, there was an approved cost study upon which the proposed rates had been set. The cost study was merely outdated. In the present case, there is no cost study supporting the rates proposed by CenturyTel.

The Commission is persuaded that the panel's determination must be modified. The Commission has consistently determined that ILECs may not impose charges for items under 47 USC 251 for which no approved cost study exists. Consistent with that position, the Commission finds that CenturyTel may not be permitted to charge its proposed rates as permanent rates not supported by an approved cost study. The fact that the proposed rates are lower than those that CenturyTel could use if it adopted another carrier's cost study is irrelevant. There is no approved cost study for these elements at this time. Moreover, there is no indication that all of CenturyTel's rates would be higher if it adopted another company's cost study. A carrier is not permitted to do cost studies in piecemeal fashion, and the Commission will not permit rates that presume adoption of only a portion of another company's cost study.

That being said, the Commission finds that the proposed rates may be charged as interim rates, with a true-up after the Commission approves a new cost study for CenturyTel. CenturyTel has the statutory option of either filing a new cost study or adopting the whole cost study of either carrier that provides basic local exchange service to more than 250,000 end-users in this state. MCL 484.2304(14). The Commission finds that CenturyTel should have 30 days from the date of this order to determine which of these two options it desires and to notify the Commission of its choice. If it determines to adopt the cost study of another carrier, it shall file its notice to do so in this case, along with the rates that will be implemented in its interconnection agreements. If CenturyTel determines that it will file a cost study of its own, it must do so within 90 days of the date of this order in a new docket. In either event, CenturyTel will implement its disputed proposed NRC rates as interim rates, with a true-up to be concluded within 90 days of a final Commission order approving its cost study, whether that study is adopted from the approved study of another carrier or approved after completion of a cost case.

b. Local Number Portability (LNP) Charges

Sprint argued that there should be no service order charges associated with LNP. Rather, Sprint asserted, CenturyTel should recover its costs for LNP through an end-user surcharge as required by the FCC. Even if a service order charge is found appropriate, Sprint argued, it has the same problem as the proposed rates for non-recurring charges; there is no supporting cost study for the amount proposed by CenturyTel.

Concerning proposed rates for LNP, CenturyTel argued that service order charges are appropriate to recover the costs of processing the order and not the porting of the number. It asserted that these costs would not arise absent an order from another carrier, which renders them unrecoverable through an end-user surcharge, which it asserted is consistent with FCC rules.

The panel reasoned that the FCC has found that carriers may charge fees on LNP orders if they are standard fees charged for services not related to the provision of number portability. It went on to say that to the extent that CenturyTel proposed to implement a standard service order charge that applies to all CLEC service orders, including LNP, and the underlying cost would not arise absent a CLEC order, the charge is permissible under the FCC's rules. Despite there being no cost study supporting this charge, the panel reasoned that CenturyTel should be permitted to charge its proposed rate because it would not be appropriate for the company to receive nothing for its service until a rate is set.

Sprint objects and argues that carrier costs directly related to the provision of number portability are to be charged to the end-user. Those costs include: "querying of calls and the porting of telephone numbers from one carrier to another."

The Commission finds that without an approved cost study to support these charges, it is not possible to assess whether they are permissible under the FCC's rules. At this juncture, the Commission finds that CenturyTel should not be permitted to impose the proposed charges pending completion of the cost case referenced above. The Commission finds that the interim rate should be set at zero. At the conclusion of the cost case, the true-up proceeding may include these charges.

c. Subsequent Service Order Charge

Sprint argued that there should be no subsequent service order charges. CenturyTel argued that Sprint is incorrect in its interpretation. It argued that subsequent service order charges do not apply to porting requests, but, rather, other service orders.

The panel found that the portion of the agreement cited by Sprint applies to LNP only. The panel recommended that CenturyTel be permitted to include charges for subsequent service orders on non-LNP orders in the agreement as warranted.

Sprint objects and states that it is willing to accept forward-looking TELRIC/TSLRIC compliant rates, but argues that subsequent service orders on non-LNP orders are not permitted under FCC rules and should not be imposed by the Commission.

Sprint's objection to the charges as being unsupported by a cost study remains. That portion of the objection is addressed by the Commission's earlier determination that CenturyTel must seek approval of a new cost study before it may implement, on a permanent basis, the charges it seeks to impose here.

Sprint states that "subsequent service order charges on non-LNP orders are not permitted under FCC rules and should not be imposed by the Commission." It cites no authority for that position. Therefore, the Commission concludes that CenturyTel should be permitted to implement its proposed charges, pending a true-up proceeding within 90 days of a Commission order approving a new cost study.

Issue 15: Territory Sales and Contract Termination

Issue 15 involves terms relating to the sale or transfer of CenturyTel exchanges. Sprint proposed that CenturyTel should be prohibited from terminating the ICA for any exchange that it might sell or otherwise transfer to another company. Sprint argued that it should be assured that a new agreement would be in place to allow continuation of service. Sprint further argued that CenturyTel should not have the right to terminate the ICA without assigning the agreement to its successor. Otherwise, Sprint argued, it could be at a severe disadvantage in quickly replacing the

ICA if CenturyTel sold a portion of the company that operates in an area in which Sprint offers service.

CenturyTel argued that it should be permitted to preserve the right to terminate obligations under the agreement in the event of a sale or transfer for the following reasons: (1) restriction would impair a market-based asset sale with obligations on sale or transfer; (2) a purchasing party may not be capable of implementing obligations that it is forced to assume; (3) restriction would lower the value of the assets; (4) restriction would potentially create a conflict with other ICAs in which an acquirer holds interconnection agreements with Sprint; (5) other sections of the ICA provide for binding effect on successors and assigns; and (6) the Commission can require continuity of service under 47 CFR 51.175.

The panel found CenturyTel's reasons 1, 5, and 6 persuasive, and recommended that the Commission adopt CenturyTel's position on this issue. In the panel's view, the agreement provides sufficient safeguards without Sprint's proposed language. The panel noted that Section 43.0 provides that the ICA is binding on legal successors and permitted assigns. Based on that language, the panel found that Sprint failed to explain how its concerns would not be met with the protections afforded in Section 43. Moreover, the panel determined that the 90-day notice required by Section 2.7 for any sale of a portion of an area to a non affiliate would be sufficient to meet Sprint's concerns. The panel found that adding Sprint's proposed language would be unnecessary given the other safeguards in place.

Sprint objects and argues that 90 days would not be sufficient for it to negotiate an interconnection agreement with a different carrier. In fact, Sprint argues, it would not even be enough time for Sprint to file an arbitration proceeding to obtain an interconnection agreement. Sprint argues that its proposed language would protect the continuation of service to existing end

user customers. It argues that in a bilateral contract, one party should not be permitted an absolute right to terminate without the agreement allowing for it to be assigned to a successor.

Sprint further argues that CenturyTel overreaches in its argument that the assignment language proposed by Sprint will hamper future transactions. It argues that having the acquiring party in an asset sale also acquire responsibility for contracts entered into by the acquired party is common. In Sprint's view, all customers are advantaged by having no interruptions in service. Sprint states that CenturyTel's assets will not be devalued by the language sought by Sprint.

Sprint argues that the language of Section 43 works in tandem with Section 2.7, but does not replace it. It argues that CenturyTel's language would disqualify the purchasing company as an assign because the agreement would be terminated in CenturyTel's proposed language. Sprint asserts that legal uncertainties arise that are unnecessary if the agreement is clear on assignment.

Sprint further argues that a purchasing party's obligation to comply with applicable law does not remedy the assignment issue. It says that there is no guarantee that the service-affecting issues will not arise during the time it takes to negotiate an arbitration agreement with a new carrier.

Finally, Sprint argues, there is no good reason to force Sprint to accept interim arrangements ordered by the Commission upon a sale, when Sprint already has an interconnection agreement in place that is approved by the Commission. Further, Sprint argues, the interim arrangement requirement does not apply if there is an existing interconnection arrangement.

A review of the arguments that the panel found persuasive leads the Commission to conclude that the panel's recommendation should not be adopted. The panel relied upon CenturyTel's arguments that adopting Sprint's proposed language: (1) would interfere with a market-based asset sale by encumbering obligations on the sale or transfer; (5) would conflict with Article III, Sections 32.0, 40.0, and 43.0, which already provide for binding effect upon successors and

assigns; and (6) is unnecessary because the Commission can require continuity of service under 47 CFR 51.715.

Section 43.0 provides, "This agreement shall be binding on and inure to the benefit of the Parties and their respective legal successors and permitted assigns." The fact that there is a provision for "legal successors and permitted assigns" does not really address the issues raised by Sprint. If CenturyTel sells off an area in which Sprint provides service, the purchaser is not necessarily a successor or assign, since Section 2.7 provides that the ICA is terminated as to those areas sold. There would be no contract to assign at that point. This also may affect the Commission's ability to order continuation of service under 47 CFR 51.715. In the Commission's view, 90 days' notice is not sufficient to ensure that Sprint can negotiate a new ICA with the purchasing carrier for the affected area.

The Commission is not persuaded by the argued effect on the price for which CenturyTel may be able to sell pieces of its company. The panel noted that it believed that Sprint's proposed language "could negatively impact" the price. In the Commission's view, it is common for a purchasing entity to take on the responsibilities of providing service under existing contracts. The effect on a potential sale should not be significant in view of the substantial benefits accruing to CenturyTel by virtue of the ICA. Moreover, the Commission is not persuaded that a contract, which, by its terms, is in effect for two years will have a significant impact on the value of CenturyTel's assets.

The Commission is more persuaded by Sprint's arguments that the time provided by the 90 days' notice will not be sufficient for Sprint to negotiate an agreement with a carrier that has no duty to move any more swiftly than the federal act requires. A petition for arbitration cannot be

filed until at least 135 days after the first request for negotiation with the carrier. 47 USC 252. The Commission therefore adopts the language proposed by Sprint for Article III, Section 2.7.

Issue 16: Billing Records

Issue 16 involves ICA terms relating to billing for indirect interconnection. Sprint proposed language that would permit it to provide SS7 signaling information, other billing information when available, and conform to industry standard billing formats. CenturyTel took the position that the information proposed by Sprint might not be sufficient to permit billing. The panel adopted CenturyTel's position on this issue, relying on the collaborative results in Case No. U-14905, in which the parties determined that SS7 information, by itself, is insufficient for billing purposes, particularly when there are many carriers using a single trunk or when Sprint connects indirectly with CenturyTel.

Sprint objects and argues that the panel erred in requiring Sprint to provide percentage local usage (PLU) factors for the exchange of traffic delivered over an indirect interconnection where a third party provides transit service. Sprint notes that CenturyTel claimed it would be unable to identify and bill Sprint originated traffic in such an arrangement. Sprint cites Article IV, Section 3.3.1.4 and 4.5.2.2 and Article VII D (pricing) as the disputed provisions for this issue.

The Commission is not persuaded that the panel's determination must be reversed. It has been apparent to the Commission that, particularly with small ILECs, there is a problem identifying traffic for billing that is transited by a third party. The result is "phantom traffic" that is not identifiable and is therefore not billable. CenturyTel is a small company and represents that it currently does not have the ability to identify traffic with SS7 signaling alone. CenturyTel argued that to require it to purchase a new program and a billing system to go along with it would be

tantamount to requiring it to build a better network and provide service to Sprint superior to that which it provides itself. The panel's recommendation is adopted.

Application for Leave to Appeal

Sprint requests leave to appeal the panel's decisions to deny the company's request for live presentations and discovery, and to reject Sprint's filing of reply evidence. Sprint argues that both requests were prompted by CenturyTel's raising of a new issue in its response (Issue 16), and the fact that the response contained CenturyTel's first proposal for pricing of various interconnection elements. Sprint asserts that the panel's decisions violate Sprint's due process rights and Section 72(3) of the Administrative Procedures Act (APA), MCL 24.272(3), which governs the opportunity for argument in contested cases. Sprint argues that 47 USC 252(d)(1) and 47 CFR 51.505(e)(2) require that Sprint be given an opportunity to comment on CenturyTel's response. Sprint contends, further, that MCR 3.602(D) requires that a hearing be held in an arbitration. Sprint argues that the Commission will be in violation of 47 USC 252(d)(2) and 47 CFR 51.705, and will have failed in its statutory duty to establish rates for transport and termination of traffic, if the Commission decides this case without a hearing and consideration of rebuttal evidence. Sprint emphasizes the complex nature of the issues in this proceeding, and the need for expert testimony in order to ensure that the "panel understands the key points." Application, p. 6.

Sprint points out that, under federal law, if a state commission establishes rates in accordance with a cost study under 47 CFR 51.505 and 51.511, then the ILEC has the burden of proving to the commission that its proposed rates are forward-looking and meet the requirements of the FCC's pricing rules. 47 USC 252(d)(1); 47 CFR 51.505(e). FCC rules require that a cost study be made part of the factual record in a proceeding where rates are disputed, and notice and opportunity for comment on the cost study must be provided. 47 CFR 51.505(e)(2). Sprint asserts that, because

CenturyTel only provided the cost study as part of its responsive testimony, there has been no opportunity for appropriate development of the factual record on the proposed rates. Sprint argues that the panel's failure to allow Sprint to test the information in the cost study through rebuttal evidence, discovery, and live presentations will result in a violation of these requirements.

Sprint urges the Commission to consider its arbitration procedures on a case-by-case basis. Sprint further contends that judicial review of the Commission's decision to allow discovery in arbitration proceedings at the discretion of the arbitration panel would probably result in invalidation of the Commission's arbitration procedures, because the procedures should have been promulgated through rulemaking.

In response, CenturyTel argues that the Commission has adopted general arbitration procedures that grant discretion to the arbitration panel to establish what information is necessary for resolution of the arbitration. May 18, 2004 order in Case No. U-13774, and July 16, 1996 order in Case No. U-11134. In this proceeding the panel made no provision for discovery, rebuttal testimony, or live presentations.

CenturyTel contends that Sprint's application for leave to appeal is in essence a request to turn this arbitration into a contested case – a position that the Commission has repeatedly rejected. CenturyTel points out that each legal authority cited by Sprint is inapplicable to the arbitration process. CenturyTel further points out that Sprint's objection to the way in which the Commission adopted its arbitration procedures is untimely and inappropriate to the instant proceeding.

CenturyTel argues that Sprint apparently desires to perform a cost study analysis, in order to turn this case into a cost proceeding. CenturyTel points out that this is not a cost proceeding, but rather an interconnection arbitration. CenturyTel notes that the Commission has previously held that it will not review cost studies in an arbitration proceeding. February 21, 2006 order in Case

Nos. U-14678/14781, p. 18. CenturyTel notes that the Commission's use of baseball-style arbitration focuses the panel's attention on the relative merits of the contractual language presented by the parties, not on fact-finding or credibility issues.

Finally, CenturyTel argues that the application for leave to appeal does not meet the standards required for approval.

Sprint reiterated its arguments in its June 20 objections.

Section 252 of the FTA sets out the procedures for negotiation, arbitration, and approval of ICAs. 47 USC 252. It delegates to state commissions the authority to arbitrate ICAs Section 252(b)(4) provides that state commissions, in deciding interconnection arbitrations, shall consider the issues contained "in the petition and in the response." 47 USC 252(b)(4)(A). The entire proceeding (including time for negotiations) must be completed in nine months. 47 USC 252(b)(4)(C). The state commission may set its own procedures, may rely on any information necessary for resolving the issues presented in the petition and the response, and "may proceed on the basis of the best information available to it from whatever source derived." 47 USC 252(b)(4)(B).

In the July 16, 1996 order in Case No. U-11134, the Commission set arbitration procedures. These procedures require the parties to include all information upon which they intend to rely in the petition and the response. There is no right to conduct discovery, although parties may request that the panel order the production of additional information. *Id.*, p. 2. Questioning is done by the panel. The proceeding is not a contested case, but is "designed to inform the panel." *Id.* This procedure was reaffirmed in, *inter alia,* the September 23, 1996 order in Case No. U-11134, the May 18, 2004 order in Case No. U-13774, and the February 21, 2006 order in Case

Nos. U-14678/14781. Thus, the contested case procedures requested by Sprint have been rejected by the Commission several times.

The Commission is required by Section 252 to consider issues presented in the response. 47 USC 252(b)(4)(A). The Commission's approved arbitration procedures grant discretion to the panel to determine whether live presentations and discovery are warranted. In this matter, the panel determined that there was sufficient information in the record to allow the panel to reach a resolution, and the panel so informed Sprint.

The Commission has determined that an arbitration is not a contested case within the meaning of the APA, and there is no right to discovery, evidentiary hearings, or cross-examination. September 23, 1996 order in Case No. U-11134, p. 3. Arbitration procedures set by the Commission are designed to ensure that the arbitration panel has sufficient information to reach a reasoned decision. The panel is in the best position to determine what information it needs. *Id.*, pp. 4-5. The Commission has noted the extremely short time period allowed by Section 252 for the conclusion of interconnection arbitrations, thus making contested case procedures such as discovery and cross-examination unworkable. February 21, 2006 order in Case Nos.U-14678/14781, p. 17. The Commission has also held that interconnection arbitrations are not cost cases, and are not the appropriate forum for analysis of the cost study. *Id.*, p. 18. *See,* Issue 14 discussion, *supra.*

CenturyTel is correct that each legal authority cited by Sprint in support of its application is inapposite. Section 72 of the APA, MCL 24.272, applies to contested cases. MCR 3.602(D) applies to state court arbitration (under MCL 600.5001-600.5035). Section 252 of the FTA contains no right to discovery, live presentations, or rebuttal evidence. Finally, 47 CFR 51.705 and 51.501 *et seq.* are rules governing cost based pricing of network elements, that are applicable to cost cases, not interconnection arbitrations.

Rule 337(2) of the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17337, establishes the standards for reviewing applications for leave to appeal. Not every application merits immediate review. An appellant must establish one of the following conditions before the Commission will grant review:

1. A decision on the ruling before submission of the full case to the Commission for final decision will materially advance a timely resolution of the proceeding.

2. A decision on the ruling before submission of the full case to the Commission for final decision will prevent substantial harm to the appellant or the public-at-large.

The Commission finds that Sprint's application does not meet the standards of Rule 337(2). The arguments contained in the application directly conflict with a significant amount of Commission precedent, and rely on inapplicable legal authority. The application has no merit, and therefore a decision on the application will not materially advance this proceeding or prevent substantial harm to anyone. The Commission denies Sprint's application for leave to appeal.

THEREFORE, IT IS ORDERED that:

A. Within 30 days of the date of this order, CenturyTel Midwest – Michigan, Inc., shall notify the Commission as to whether it will adopt another carrier's approved cost study under MCL 484.2304(14) or will submit a cost study of its own for approval. If CenturyTel Midwest – Michigan, Inc., determines that it will adopt an approved cost study of another carrier, it shall file in this docket the required notice along with the rates that will be implemented in its interconnection agreements. If CenturyTel Midwest – Michigan, Inc., determines that it will submit a cost study of its own for approval, it shall file its cost study in a new docket within 90 days of the date of this order.

B. Within 90 days of a Commission order approving a cost study for CenturyTel Midwest – Michigan, Inc., there shall be a true-up of interim prices established in this order with the prices resulting from the new cost study. Should either party dispute the correctness of the true-up, that party may file an application in a separate docket requesting Commission resolution of the differences.

C. Sprint Communications Company L.P. and CenturyTel Midwest – Michigan, Inc. shall, within 30 days of the date of this order, submit to the Commission an executed interconnection agreement that conforms to this order.

D. The application for leave to appeal filed by Sprint Communications Company L.P. is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party aggrieved by this order may file an action in the appropriate federal District Court pursuant to 47 USC 252(e)(6).

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

By its action of July 1, 2008.

Monica Martinez, Commissioner

Mary Jo Kunkle, Executive Secretary

Steven A. Transeth, Commissioner

EXHIBIT C

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 07-3557 & 07-3683

ILLINOIS BELL TELEPHONE COMPANY,

Plaintiff-Appellant,
Cross-Appellee,

v.

CHARLES E. BOX, *et al.*, Commissioners of the Illinois Commerce Commission,

Defendants-Appellees,
Cross-Appellants,

and

ACCESS ONE, INC., *et al.*,

Intervening Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 06 C 3550—**Virginia M. Kendall**, *Judge.*

ARGUED MAY 6, 2008—DECIDED MAY 23, 2008

Before EASTERBROOK, *Chief Judge*, and WOOD and TINDER, *Circuit Judges.*

EASTERBROOK, *Chief Judge*. The Telecommunications Act of 1996 directs established local phone companies—successors to the Bell Operating Companies that were subsidiaries of AT&T before its breakup in 1983—to lease parts of their networks to rivals on an à la carte basis. 47 U.S.C. §251(c)(3). Particular circuits or services, called unbundled network elements, must be furnished at a price, and under conditions, specified by the Federal Communications Commission. Its method of setting the price, called TELRIC (for total element long-run incremental cost), was approved by *Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002). That decision disapproved some of the FCC's views about which elements must be made available, however, and many questions remained open until the FCC's regulations in the wake of its third Triennial Review were approved by the D.C. Circuit. *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

Today's case poses two questions about incumbents' obligations under the FCC's regulations. The first is whether these firms, called ILECs (for incumbent local exchange carriers), must allow their rivals, called CLECs (for competitive local exchange carriers), to use "entrance facilities" at TELRIC prices for interconnection (that is, transferring voice and data traffic from a CLEC's network to the ILEC's, and the reverse). The second is whether ILECs must lease fiber-optic circuits to deliver voice and data services to the CLECs' business customers. The 1996 Act provides that, when phone companies cannot agree on the answer to questions such as these, state public-utility commissions may decide. 47 U.S.C. §252(b). The statute misleadingly calls this process "arbitration," but it bears none of the features—such as voluntary consent,

a privately chosen adjudicator, and finality—that marks normal arbitration. See generally *AT&T Communications of Illinois, Inc. v. Illinois Bell Telephone Co.*, 349 F.3d 402 (7th Cir. 2003); *Mpower Communications Corp. v. Illinois Bell Telephone Co.*, 457 F.3d 625 (7th Cir. 2006). The state commission's decisions don't implement private agreements; they subject unwilling ILECs to public commands.

The Illinois Commerce Commission concluded that Illinois Bell, the ILEC in northern Illinois—which does business as AT&T following a series of corporate transactions that need not be recounted—must allow CLECs to use entrance facilities at TELRIC prices. It also concluded that AT&T must allow the CLECs to use its fiber-optic loops, except for service to "mass-market customers." The 1996 Act allows such decisions by state agencies to be reviewed by federal courts. See *Verizon Maryland Inc. v. Public Service Commission of Maryland*, 535 U.S. 635 (2002). The district judge concluded that the state commission was right about entrance facilities and wrong about fiber-optic loops. See 2007 U.S. Dist. LEXIS 70551 (N.D. Ill. Sept. 21, 2007). AT&T has appealed on the entrance-facility issue; the commission has appealed on the local-loops issue.

An "entrance facility" is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. In other words, it is a means of transferring traffic from one carrier's network to another. The connection may be by copper cable, fiber-optic cable, or radio-frequency link. The connection may be long or short; multiple carriers' switches may even be in the same building (this is known as co-location). ILECs built entrance facilities to comply with their obligation to interchange traffic among networks. 47 U.S.C. §251(c)(2). Once

the links between ILECs and CLECs networks existed, CLECs began to use them to transport traffic from the customers of one CLEC to the customers of another, using the ILEC's circuits as intermediaries. A given CLEC also might route traffic among its own customers over the ILEC's network. Using an entrance facility to move voice or data traffic among CLEC customers has come to be known as "backhauling," though again the nomenclature is misleading: intra-CLEC traffic is related only loosely to loading freight on a truck, train, or boat at its destination for delivery to the vehicle's point of origin.

In the third Triennial Review Remand Order, the FCC concluded that CLECs do not need entrance facilities for backhauling and should build their own equipment for handling CLEC–to–CLEC traffic. ILECs need not provide unbundled network elements to CLECs that can serve customers without "impairment" through their own network elements. 47 U.S.C. §251(d)(2)(B). ("Impairment" is a complex concept that need not be explicated here.) No one contests the FCC's conclusion in this litigation.

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

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

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

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

Section 251(c)(2) allows a CLEC to interconnect at any technologically feasible place. An entrance facility, designed for the very purpose of linking two carriers' networks, meets the requirement of feasibility, so a CLEC is entitled to hand off traffic to an ILEC at any entrance facility. The real dispute is not whether entrance facilities will be used for interconnection, but how much the ILEC can charge. Apparently AT&T has filed tariffs for the use of entrance facilities as interconnection gateways, and the tariffs specify prices exceeding the fee calculated according to TELRIC. AT&T wants to be able to charge the tariff price. Whether it can do so is not related to

the scope of an ILEC's obligations under §251(c)(3) to furnish unbundled network elements.

What the FCC said in ¶140 is that ILECs must allow use of entrance facilities for interconnection at "cost-based rates". TELRIC is a cost-based rate, though not the only one. We asked at oral argument whether anything in the 1996 Act or the FCC's regulations prohibits a state commission from using TELRIC to tell ILECs what they may charge for interconnection. Counsel for AT&T allowed that the state commission could do this. Well, that is effectively what the state commission *has* done. Instead of suspending AT&T's tariff for interconnection services and ordering a rate reduction, the state commission has reached the same result by an "arbitration" under the 1996 Act. If there is any objection to this procedure, it must rest on state rather than federal law. Whether the state commission has followed the requirements that Illinois imposes for overriding a utility's published tariff is of no consequence in this federal suit. It is enough for us to conclude that federal law permits a state agency to use the TELRIC method to regulate the price for the interconnection services that an ILEC must furnish under §251(c)(2).

On to optical fiber. The CLECs want, and the state commission ordered AT&T to provide, local loops that include optical fiber. A "local loop" is the set of wires and routing facilities needed to transmit a signal between a switch and a customer's premises. New entrants find local loops the most valuable unbundled network elements, because the switch-to-customer connection is the most costly to build from scratch. (A belief that the local loop was a natural monopoly was a principal reason for regulating the Bell Operating Companies in the

first place.) Regulations implementing the 1996 Act require ILECs such as AT&T to supply CLECs with local loops based on copper wire. More recently both ILECs and CLECs have added circuits based on optical fiber, which is cheaper than copper wire and can carry more traffic. Telecom firms may build new loops entirely from fiber; these are called "fiber to the home" or FTTH (whether "home" is a residence or an office). More commonly optical fiber is used to connect a switch to a junction near a home or office, and wire installed long ago carries the signal into the customer's premises; these loops are called "fiber to the curb" or FTTC. Finally, there are hybrid loops "composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable". 47 C.F.R. §51.319(a)(2).

Federal regulations provide that ILECs need not provide optical loops to rival carriers, and, although hybrid loops must be supplied as unbundled network elements, the incumbents are entitled to restrict the use to which these may be put. 47 C.F.R. §51.319(a)(2), (3). The FCC found that CLECs' access to ILECs' loops based on traditional copper wire means that they are not "impaired" by lack of access to ILECs' loops based on optical fiber. Carriers are building new circuits using optical fiber; the FCC concluded that CLECs, no less than the ILECs, can and should do this for themselves. As long as CLECs rely on network elements supplied by ILECs, real competition is hampered; the ILECs' facilities continue to be monopolies and require regulation. See Graeme Guthrie, *Regulating Infrastructure: The Impact on Risk and Investment*, 44 J. Econ. Literature 925 (2006). One goal of the 1996 Acts' "impairment" clauses is to wean CLECs from reliance on unbundled network elements so that fully

competitive landline networks will be built, now that there is widespread agreement that local service is no longer a natural monopoly.

The state commission understood the FCC's regulation as limited to "mass-market customers" (which the state commission defined as those that use fewer than 4 phone circuits) and directed AT&T to furnish optical and hybrid local loops between central offices and all other customers to its rivals as unbundled network elements. The district court set this portion of the state commission's order aside, and sensibly.

Although the parties spend a good deal of time debating what the FCC "intended" by its regulation, it is enough to implement what the FCC said. The regulation as written is unqualified. It says that ILECs need not furnish optical-fiber local loops as unbundled network elements and may restrict the use to which CLECs put hybrid loops. Nothing turns on the customer's identity or the number of phone lines a given customer uses. Access to copper-based loops is available for all customers; that's why the FCC concluded that access to optical loops is not required to avoid impairment.

Commentary in the Triennial Review Order shows that the regulations mean what they say. The FCC wrote that, "in light of a competitive landscape in which [CLECs] are leading the deployment of [fiber to the home], removing unbundling obligations on [fiber to the home] loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market." Order at ¶278. It added: "though our loop unbundling analysis focuses upon the customer classes most likely to be served by a specific type of loop, the unbundling rules we adopt apply with equal force to

every customer served by that loop type." *Id.* at ¶197 n.623. And it drove the point home at ¶210: "while we adopt loop unbundling rules specific to each loop type, our unbundling obligations and limitations for such loops do not vary based on the customer to be served." The state commission's order, which does make the obligation "vary based on the customer to be served", is preempted by the FCC's rules.

One final issue requires brief treatment. The district court implemented its decision by issuing an injunction. The state commission does not dispute the order's adequacy under Fed. R. Civ. P. 65(d) but does say that the district court should have used a kinder, gentler, remedy, such as a declaratory judgment. Perhaps this would be right—if this suit were an action for review of administrative action after the fashion of the Administrative Procedure Act. The 1996 Act authorizes judicial review of state agencies' decisions along the APA's lines. 47 U.S.C. §252(e)(6). But state agencies objected, saying that direct review would impinge on their sovereignty. The Supreme Court finessed that question in *Verizon Maryland* by holding that, whether or not §252(e)(6) properly authorizes suits against states or state agencies in their own names, state commissions' decisions may be reviewed indirectly in suits against commissioners, in their official capacity.

In other words, the Court concluded, *Ex parte Young*, 209 U.S. 123 (1908), comes to much the same end as §252(e)(6). Two things distinguish suits under *Ex parte Young* from direct review. First, the state and its agency are not named parties to the suit. Second, to ensure that the state is nonetheless bound by the decision, an injunction issues against state actors in their official capacities.

Verizon Maryland treated injunctions as the normal outcome of such proceedings, and declaratory judgments as permissible (but not required) supplements. 535 U.S. at 645–48. The state commission's members do not tell us why the court should proceed otherwise today; indeed, their brief does not even cite *Verizon Maryland*.

Illinois is free to waive its sovereign immunity and consent to litigation under §252(e)(6). If it does so, and the state (or its agency) becomes a formal party, then a district court should enter the same sort of judgment that would be appropriate in cases against federal agencies under the APA. As long as a state insists that the approach of *Ex parte Young* be used, however, an injunction is the normal remedy.

AFFIRMED

EXHIBIT D

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 06-3701

Southwestern Bell Telephone, L.P., doing business as SBC Missouri, Plaintiff - Appellee, v. Missouri Public Service Commission; Jeff Davis; Connie Murray; Steve Gaw; Robert M. Clayton III; Linward Appling, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals, Defendants, Big River Telephone Company, LLC, Defendant - Appellant, Birch Telecom of Missouri, Inc.; Ionex Communications, Inc., Defendants, NuVox Communications of Missouri, Inc.; Socket Telecom, LLC; XO Communications Services, Inc.; XO Missouri, Inc.; Xspedius Management Co. of Kansas City, LLC; Xspedius	*	Appeals from the United States District Court for the Eastern District of Missouri.

Management Co. Switched Services, LLC,

Defendants - Appellants,

Charter Fiberlink–Missouri, LLC; Navigator Telecommunications, LLC; WilTel Local Network, LLC; MCI Communications Services, Inc.; MCImetro, LLC,

Defendants,

Sprint Communications Company, L.P.,

Defendant - Appellee.

Verizon New England, Incorporated; Verizon New York, Incorporated; Verizon Pennsylvania, Incorporated; Verizon Maryland, Incorporated; Verizon Washington, Incorporated; Verizon Virginia, Incorporated,

Amici on Behalf of Appellee Southwestern Bell Telephone, L.P., doing business as SBC Missouri.

No. 06-3726

Southwestern Bell Telephone, L.P., doing business as SBC Missouri,

Plaintiff - Appellee,

v. *

Missouri Public Service Commission; Jeff Davis; Connie Murray; Steve Gaw; Robert M. Clayton III; Linward Appling, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals, *

Defendants - Appellants, *

Big River Telephone Company, LLC; Birch Telecom of Missouri, Inc.; Ionex Communications, Inc.; NuVox Communications of Missouri, Inc.; Socket Telecom, LLC; XO Communications Services, Inc.; XO Missouri, Inc.; Xspedius Management Co. of Kansas City, LLC; Xspedius Management Co. Switched Serices, LLC; Charter Fiberlink–Missouri, LLC; Navigator Telecommunications, LLC; Sprint Communications Company, L.P.; WilTel Local Network, LLC; MCI Communications Services, Inc.; MCImetro, LLC, *

Defendants. *

No. 06-3727

Southwestern Bell Telephone, L.P., doing business as SBC Missouri, *

Plaintiff - Appellant, *

v. *

Missouri Public Service Commission; Jeff Davis; Connie Murray; Steve Gaw; Robert M. Clayton III; Linward Appling, in their official capacities as commissioners of the Missouri Public Service Commission and not as individuals; Big River Telephone Company, LLC, *

Defendants - Appellees, *

NuVox Communications of Missouri, Inc.; Socket Telecom, LLC; XO Communications Services, Inc.; XO Missouri, Inc.; Xspedius Management Co. of Kansas City, LLC; Xspedius Management Co. Switched Services, LLC, *

Defendants - Appellees, *

Sprint Communications Company, L.P., *

Defendant - Appellee, *

Birch Telecom of Missouri, Inc; Ionex Communications, Inc., *

Defendants, *

Charter Fiberlink–Missouri, LLC; Navigator Telecommunications, LLC, *

Defendants, *

	*
WilTel Local Network, LLC; MCI	*
Communications Services, Inc.;	*
MCImetro, LLC,	*
	*
Defendants.	*

Submitted: June 14, 2007
Filed: June 20, 2008

Before BYE, RILEY, and BENTON,[1] Circuit Judges.

BYE, Circuit Judge.

Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC), attempted to negotiate interconnection agreements with several competitors (Competing Local Exchange Carriers (CLEC)) as required by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.). When those negotiations failed, the dispute was submitted to arbitration as provided for under the Act and the resulting arbitrator's decision was adopted by the Missouri Public Service Commission (MPSC). SBC petitioned the district court[2] for review, arguing the MPSC exceeded its authority by ordering SBC to allow CLECs broader access to its facilities network than mandated by the Act. SBC also argued the MPSC erred in ordering it to provide CLECs access to entrance facilities at cost. The district court found the MPSC exceeded its authority when it decided issues relating to which network facilities SBC was required to make available to CLECs. The district court

[1]Judge Duane Benton recused himself from further participation in this case following oral argument and did not participate in the decision. Pursuant to 8th Cir. R. 47E, the two remaining judges on the panel have decided the case.

[2]The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

affirmed the MPSC's decision setting the rate SBC could charge CLECs for entrance facilities needed for interconnection. On appeal, the MPSC and various CLECs argue the district court erred in concluding the MPSC exceeded its authority. In its cross-appeal, SBC argues the district court erred in setting the rate it could charge for access to entrance facilities. We affirm.

I

For years, local telephone service was provided by companies holding monopolies which were subject to regulation by local governments. In passing the Telecommunications Act of 1996, Congress chose to encourage competition among telephone service providers and to impose greater federal regulation. The Act requires existing telephone companies, which previously held monopolies (Incumbent Local Exchange Carriers (ILEC)), to make their local facilities or networks available to newcomers – CLECs – for a fee, if the CLEC's ability to provide service was "impaired" without access. This appeal focuses on two sections of the Act which implemented these requirements – 47 U.S.C. §§ 251 and 271.

Under § 251, all ILECs are required to negotiate interconnection agreements with impaired CLECs and to lease certain of their network facilities at cost-based rates known as "total element long-run incremental cost" (TELRIC). If an agreement cannot be negotiated, the Act requires unresolved § 251 disputes be submitted to arbitration. Section 251 compliance, including the arbitration process, is subject to oversight by state public service commissions.

Prior to 2005, the Federal Communications Commission (FCC) took the position ILECs were required under § 251 to make all basic elements of their local networks (Unbundled Network Elements-Platform (UNE or UNE-Platform)) available to CLECs at TELRIC rates. Courts reviewing the FCC's orders, however, disagreed when the practice caused the competition pendulum to swing too far in favor of CLECs. See, e.g., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 390 (1999) ("[I]f

Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with . . . . It would simply have said . . . whatever requested element can be provided must be provided."); U.S. Telecom Ass'n v. FCC, 290 F.3d 415, 424 (D.C. Cir. 2002) ("If parties who have not shared the risks are able to come in as equal partners on the successes, and avoid payment for the losers, the incentive to invest plainly declines."); Verizon New England, Inc. v. Maine Pub. Utils. Comm'n, 509 F.3d 1, 9 (1st Cir. 2007) ("[M]aking a monopolist share . . . 'essential facilities' can promote competition; but it can also retard investment, handicap competition detrimentally, and discourage alternative means of achieving the same result that could conceivably enhance competition . . . ."). In 2005, the FCC issued its Triennial Review Remand Order (TRRO), which no longer required ILECs to make all elements of their local networks available under § 251 at TELRIC rates. See Order on Remand, In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 20 F.C.C.R. 2533 (2005).

The TRRO also concluded CLECs were no longer impaired with respect to "entrance facilities" and ILECs were not required to provide such facilities as UNEs at TELRIC rates. An entrance facility is a connection between a switch maintained by an ILEC and a switch maintained by a CLEC. It is a means of transferring traffic from one carrier's network to another's, and facilitates an ILEC's obligation under the Act to interchange traffic among networks. CLECs also use entrance facilities to route customer traffic between a CLEC's customer and the CLEC's switch – a practice known as "backhauling." When used to transfer traffic from one network to another, entrance facilities are used for interconnection purposes. When used for backhauling, they are not used for interconnection. The TRRO found CLECs did not need entrance facilities for backhauling CLEC to CLEC traffic. Conversely, the TRRO reiterated that ILECs are required to provide entrance facilities at TELRIC rates under § 251(c)(2) if necessary for interconnection purposes.

In addition to § 251, which applies to all ILECs, § 271 imposes additional requirements on ILECs previously part of the Bell network (Bell Operating Companies (BOC)). Under § 271, BOCs wishing to enter the long-distance market must demonstrate they have, in addition to complying with § 251, made additional network facilities listed in a "competitive checklist" available to CLECs. Unlike § 251, the language of § 271 expressly states § 271 compliance is determined by the FCC.

Prior to 2005, § 271 compliance was not a contentious issue because the FCC's interpretation of § 251 required ILECs to provide § 271 network facilities as part of the § 251 agreements. It did not matter whether states had authority to force ILECs to comply with § 271, because they could order the same level of compliance by enforcing § 251. After the FCC issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available, states and CLECs began exploring whether ILECs could be required to provide the same network facilities, i.e., the UNE-Platform, by enforcing the competitive checklist requirements of § 271. That brings us to the primary issue in this case – the authority of states to enforce § 271.

After the Act was passed, SBC negotiated § 251 agreements with various CLECs and complied with the additional requirements of § 271. As SBC and the CLECs were in the process of renegotiating their § 251 agreements, the FCC issued its 2005 TRRO reducing the number of network facilities ILECs were required to make available. As a result, SBC refused to offer its UNE-Platform, leading to an impasse in § 251 negotiations. SBC took the position it no longer had to offer the full UNE-Platform at TELRIC rates. The CLECs contended, even though the § 251 requirements had changed, SBC could be required to make the same network facilities available under § 271.

SBC and the CLECs were unable to reach an agreement and the dispute was submitted to arbitration. The arbitrator, while recognizing he had no authority under

§ 251 to order SBC to make the disputed network facilities available, ordered them to be provided under § 271. Despite language in § 271 granting the FCC exclusive authority over § 271 disputes, the arbitrator held the states have implied authority to ensure ILECs comply with § 271. The arbitrator also held SBC was required to make its entrance facilities available to CLECs for interconnection purposes at TELRIC rates. The MPSC adopted the arbitrator's order. SBC appealed to the district court arguing the MPSC exceeded its authority when it ordered SBC to provide the disputed network facilities under § 271.

The district court affirmed in part, and reversed in part. It held the MPSC exceeded its authority by ordering the disputed network facilities provided under § 271, but affirmed the MPSC's decision setting the rate SBC could charge for entrance facilities needed for interconnection. On appeal, the MPSC and CLECs argue the structure of the Act implies Congress granted the states implicit authority to enforce § 271. SBC argues the FCC – not the states – has sole authority to enforce § 271. In its cross-appeal, SBC argues the Act no longer requires it to make entrance facilities available at TELRIC rates. Alternatively, assuming it must provide access for interconnection purposes, SBC argues the MPSC erred in finding the CLECs were using the entrance facilities for interconnection, and not backhauling.

II

We review the MPSC's interpretation and application of federal law de novo and will set aside its findings of fact only if they are arbitrary and capricious. WWC License, L.L.C. v. Boyle, 459 F.3d 880, 889-90 (8th Cir. 2006). The parties agree this appeal involves the interpretation and application of federal law and de novo review applies.

The MPSC and CLECs concede the states have no authority to enforce § 271. Nonetheless, they contend Congress granted implicit authority by virtue of how the Act is structured. They argue the Act requires ILECs to enter into § 251 agreements

with CLECs and those agreements are subject to mandatory state approval. They further argue ILECs seeking § 271 approval must, as a precondition, demonstrate they have obtained state approval of their § 251 agreements. Thus, a state can defeat an ILEC's attempt to win § 271 approval by withholding § 251 approval. They contend this ability to hamstring an ILEC's attempt to obtain § 271 approval means Congress intended to grant the states implicit authority to enforce § 271.

> Sections 251-52 provide for a dual federal-state regime: the FCC determines what UNE elements must be provided and sets pricing policy; state commissions oversee the adoption of agreements . . . providing such UNEs to competitors at prices based on those principles. 47 U.S.C. § 252(a), (b), (e), (f). Disputes as to the adoption of the agreements submitted to state commissions go to federal, rather than state, court for review, id. § 252(e), although implementation issues may arise in state proceedings. In short, the states have a major role under these sections.

Verizon New England, Inc., 509 F.3d at 7.

Conversely, the plain language of § 271 makes clear states have no authority to interpret or enforce the obligations of § 271. Section 271 contemplates two administrative determinations and Congress assigned both to the FCC. First, a BOC seeking § 271 approval must "apply to the Commission" – the FCC – and "the Commission" "shall issue a written determination approving or denying the authorization requested" after "[t]he Commission" determines whether the specified criteria, including the competitive checklist, are satisfied. § 271(d)(1), (3); 271(c)(2)(B).

Second, the FCC must address any enforcement issues. "The Commission shall establish procedures for the review of complaints" alleging a BOC is not complying with § 271; "the Commission shall act on such [a] complaint within 90 days"; and "the Commission may" take action to enforce the requirements of § 271 if "the

Commission determines" a BOC is not in compliance with its obligations under § 271. § 271(d)(6).

Unlike the authority granted states under § 251, Congress only gave states an advisory role at the application stage of the § 271 process. The FCC is to "consult with the State commission of any State that is the subject of" a § 271 application before the FCC rules on the application. § 271(d)(2)(B). The FCC need not "give the State commissions' views any particular weight." SBC Commc'ns Inc. v. FCC, 138 F.3d 410, 416 (D.C. Cir. 1998). Moreover, Congress did not grant states even an advisory role in addressing post-approval compliance issues. § 271(d)(6). "[A]ny complaint by [a CLEC] that [a BOC's] failure to provide [a certain form of network access] will violate § 271 is an issue for the FCC, not for [a state commission]." Dieca Commc'ns, Inc. v. Florida Pub. Serv. Comm'n, 447 F. Supp. 2d 1281, 1286 (N.D. Fla. 2006); see BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005). A state's role under § 271 is "limited" to "issuing a recommendation" regarding a § 271 application, and a state commission may not "parlay [its] limited role" into the authority to impose substantive requirements exclusively the prerogative of the FCC. Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n, 359 F.3d 493, 497 (7th Cir. 2004).

"The contrast [between the language in §§ 251, 252, and 271] confirms that when Congress envisaged state commission power to implement the statute, it knew how to provide for it." Verizon New England, Inc., 509 F.3d at 7. Accordingly, we join those federal courts which have concluded the FCC has exclusive jurisdiction over § 271. See, e.g., Id. at 7-8 (noting the majority of federal courts and state public service commissions treat § 271 as within the exclusive authority of the FCC); Indiana Bell Tel. Co., 359 F.3d at 495 ("The Act reserves to the FCC the authority to decide whether to grant a section 271 application.").

III

In its cross-appeal, SBC argues the district court erred in affirming the MPSC's order holding CLECs are entitled to access SBC's entrance facilities for interconnection purposes at TELRIC rates. SBC argues the order conflicts with FCC rulings holding CLECs are no longer impaired with respect to entrance facilities and not entitled to them as UNEs.

The MPSC acknowledged the FCC's ruling stating CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access pursuant to § 251(c)(2), which requires ILECs to provide interconnection to CLECs. The District Court concluded the MPSC's order correctly implemented the FCC's rulings. Further, it rejected SBC's argument the FCC only requires an ILEC to allow CLECs to interconnect with its network but does not require it to lease the interconnection facilities themselves.

The FCC has held CLECs are not impaired without access to entrance facilities and are not entitled to entrance facilities as UNEs under § 251(c)(3). The FCC's finding of non-impairment does not, however, alter the right of CLECs to obtain interconnection facilities pursuant to § 251(c)(2) for transmission and routing of telephone exchange service and exchange access service, i.e., CLEC to ILEC and ILEC to CLEC traffic. The FCC determined when a CLEC uses entrance facilities to carry traffic to and from its own end users, i.e., backhauling or CLEC to CLEC, the CLEC is not entitled to obtain entrance facilities as UNEs at TELRIC rates. If a CLEC needs entrance facilities to interconnect with an ILEC's network, it has the right to obtain such facilities from the ILEC. Thus, CLECs must be provided access at TELRIC rates if necessary to interconnect with the ILEC's network. See Illinois Bell Tel. Co. v. Box, Nos. 07-3557, 07-3683, 2008 WL 2151573, at 2-3 (7th Cir. May 23, 2008).

Additionally, "interconnection" means the physical linking of two networks for the mutual exchange of traffic. The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." AT&T Corp. v. FCC, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (interpreting the term interconnect in § 251(a)(1)); see Competitive Telecomms Ass'n v. FCC, 117 F.3d 1068, 1072 (8th Cir. 1997) (stating interconnection as used in § 251(c)(2) means "a physical link between the equipment of the carrier seeking interconnection and the LEC's network.").

The MPSC found, and the district court agreed, the entrance facilities requested by the CLECs would be used solely for interconnection purposes within the meaning of § 251(c)(2). Nothing in the record suggests the finding was arbitrary or capricious. Further, the district court correctly concluded SBC was required to provide a physical link to CLECs for access to its entrance facilities as necessary for interconnection at TELRIC rates.

IV

The judgment of the district court is affirmed.
