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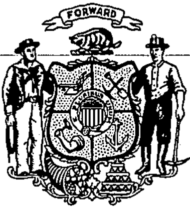

Public Service Commission of Wisconsin

Eric Callisto, Chairperson
Mark Meyer, Commissioner
Lauren Azar, Commissioner

610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

Public Service Commission of Wisconsin
RECEIVED: 10/23/08, 11:28:26 AM

October 23, 2008

Mr. K.C. Halm
Davis Wright Tremaine LLP
Suite 200
1919 Pennsylvania Ave. NW
Washington, DC 20006

Mr. Anthony Tomaselli
Quarles & Brady, LLP
One South Pinckney Street
Suite 600
Madison, WI 53703

Re: Petition for Arbitration of Interconnection Rates, Terms and Conditions Between Charter Fiberlink, LLC and Wood County Telephone Company d/b/a Solarus — 5-MA-147

Dear Sirs:

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

Sincerely,

Dennis J. Klaila
Chair
Arbitration Panel

NAL:DW:jrm\DL\5-MA-147\Correspondence\5-MA-147 cover letter.doc

enclosure

cc: Clifford K. Williams, Charter Fiberlink, LLC

Telephone: (608) 266-5481 Fax: (608) 266-3957 Home Page: http://psc.wi.gov
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BEFORE THE

PUBLIC SERVICE COMMISSION OF WISCONSIN

Petition for Arbitration of Interconnection Rates, Terms and Conditions Between Charter Fiberlink, LLC and Wood County Telephone Company d/b/a Solarus — 5-MA-147

ARBITRATION AWARD

This is the final decision and arbitration award in the arbitration proceeding between Charter Fiberlink, LLC (Charter) and Solarus f/k/a Wood County Telephone Company (Solarus).

Proceedings

On May 2, 2008, Charter petitioned the Commission for arbitration of an interconnection agreement with Solarus, pursuant to 47 U.S.C. § 252(b)(1).[1] Solarus filed its reply on May 22, 2008. On June 13, 2008, the Commission issued a Notice of Arbitration, appointing an arbitration panel consisting of Dennis Klaila (chair), Anne W. Waymouth and Duane Wilson. The Commission appointed Michael Varda to serve as legal advisor to the panel. The notice also provided that the Commission would apply the Commission's interim procedures.[2]

The arbitration hearing was held in Madison on September 3, 2008. The parties filed initial briefs on September 17, 2008, and reply briefs on September 24, 2008.

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

2 Interim Procedures, Investigation of the Implementation of the Telecommunications Act of 1996 in Wisconsin, docket 05-TI-140, May 23, 1996.

Parties

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

Solarus is a corporation organized and formed under the laws of Wisconsin. The principal office address for Solarus is P.O. Box 8045, Wisconsin Rapids, Wisconsin 54495-8045. Solarus provides local exchange, exchange access and other services as the incumbent telephone company within certain parts of Wisconsin. Under Wisconsin law, Solarus is a telecommunications utility, as defined in Wis. Stat. § 196.01(10). Under federal law, Solarus is a telecommunications carrier for purposes of § 153(49), and an Incumbent Local Exchange Carrier (ILEC) for purposes of § 251(h). Solarus also provides digital cable television services in Wisconsin Rapids, Wisconsin, the area where Charter provides telecommunications services in competition with Solarus.

Issues

The parties submitted four issues for arbitration. *See* Exhibit A, Solarus Response to the Charter Petition for Arbitration, dated May 22, 2008. On August 29, 2008, the parties informed the panel that they had settled Issue 3. The remaining three issues are discussed below.

Discussion of the Issues

Issue 1: Under what circumstances should either Party be able to terminate the Agreement?

Section 3 of the Agreement addresses termination of the agreement. The dispute in this issue concerns the process the parties will employ in the event of a default that provides cause to terminate the Agreement.

Position of the Parties

a. Charter

Charter believes that the interconnection agreement should include language that ensures the Commission maintains authority and oversight over contract termination events that could impact either party's end user customers. Charter believes Solarus's termination clause should be rejected because it would provide Solarus unilateral termination rights.

Charter proposes the following language for Section 3.1 of the Agreement, including the text indicated in italicized font:

> *Subject to either Party invoking its rights under Section 13, Dispute Resolution,* either Party may terminate this Agreement in whole or in part in the event of a default by the other Party, as defined by this Section 3.1; provided however, that the non-defaulting Party notifies the defaulting Party in writing ("Default Notice") of the alleged default and the defaulting Party does not cure the alleged default within sixty (60) calendar days of receipt of the Default Notice. Default is defined as:
>
> 3.1.1 A Party's insolvency or the initiation of bankruptcy or receivership proceedings by or against the Party, consistent with any order, decision, or other binding action taken by the bankruptcy court, or other similar adjudicator of the parties' rights in the event of receivership or bankruptcy; or
>
> 3.1.2 A decision pursuant to the Formal Dispute Resolution provisions of Section 13.2 that a Party has materially breached any of the terms or conditions hereof, *except that in no event should termination occur unless so ordered by the Commission*; or
>
> 3.1.3 *Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9 Billing and Payment,*

subject to either Party invoking its rights under Section 13, Dispute Resolution, except that in no event should termination occur unless so ordered by the Commission; or

3.1.4A Party's assignment of any right, obligation, or duty, in whole or in part, or of any interest, under this Agreement without any consent required under Section 6 of this Attachment, *subject to either Party invoking its rights under Section 13, Dispute Resolution.*

b. Solarus

Solarus states that its proposed termination clause succinctly and clearly spells out the consequences for material breaches of terms of the agreement. Solarus proposes the same text as the Charter proposal above, except that Solarus proposes to delete the italicized text.

Discussion

The subject of termination of an interconnection agreement due to a default is not addressed directly by the Act or the implementing rules adopted by Federal Communications Commission (FCC). However, the Commission is a product of state law, and has those powers that the state legislature has conferred upon it. Thus, to the extent that the parties choose to submit a contract dispute to the Commission for adjudication, the parties are necessarily choosing to use Wis. Stat. § 196.199 to resolve their disagreement, which in turn, as indicated in the notice, permits application of Wis. Stat. § 196.04 and any other relevant provision of Wis. Stat. ch. 196.

The panel believes that existing provisions of Wis. Stat. ch. 196 and the dispute resolution procedures contained in Section 13 of the agreement are sufficient to address any concerns raised by either party. Accordingly, the panel does not award either Party's proposed language.

It is not clear to the panel that the contract language proposed by Solarus grants Solarus a unilateral right to terminate the agreement. In any event, the dispute resolution provisions in the agreement and complaint procedure in Wis. Stat. § 196.199 do not contemplate a party's unilateral right to repudiate an agreement where performance is arguably still due.

The concern with Charter's language is that it is duplicative. While the order that the Commission might issue under s. 196.199 could include instructions to terminate service to Charter, it is not clear that the statute would necessarily provide that remedy. In that sense, the Charter language could result in multiple proceedings or inconsistent orders.

On balance, the panel finds it is more reasonable to have the parties submit the dispute to the Commission under the terms of s. 196.199, and allow the Commission to issue such orders as it deems appropriate based upon the circumstances of the dispute. The panel therefore awards language below retaining the references to the contract's dispute resolution procedures and incorporating a reservation of the parties' rights under s. 196.199.

Award

The panel awards the following language in lieu of the language proposed by either of the two parties:

> Subject to either Party invoking its rights under Section 13, Dispute Resolution, either Party may terminate this Agreement in whole or in part in the event of a default by the other Party, as defined by this Section 3.1; provided however, that the non-defaulting Party notifies the defaulting Party in writing ("Default Notice") of the alleged default and the defaulting Party does not cure the alleged default within sixty (60) calendar days of receipt of the Default Notice. Default is defined as:
>
> 3.1.1 A Party's insolvency or the initiation of bankruptcy or receivership proceedings by or against the Party, consistent with any order, decision, or other binding action taken by the bankruptcy court, or other similar adjudicator of the parties' rights in the event of receivership or bankruptcy; or

3.1.2 A decision pursuant to the Formal Dispute Resolution provisions of Section 13.2 that a Party has materially breached any of the terms or conditions hereof; or

3.1.3 Failure of a Party to pay undisputed amounts or to properly dispute unpaid amounts in accordance with Section 9 Billing and Payment, subject to either Party invoking its rights under Section 13, Dispute Resolution; or

3.1.4A Party's assignment of any right, obligation, or duty, in whole or in part, or of any interest, under this Agreement without any consent required under Section 6 of this Attachment, subject to either Party invoking its rights under Section 13, Dispute Resolution.

Notwithstanding any other provision of this Section 3 and except as may be prohibited by applicable federal law, either party, as allowed by Wis. Stat. § 196.199, may seek relief from the other party's claims, assertions, actions, or inaction in breach of this Agreement.

Issue 2: How should the agreement define Internet Protocol (IP) traffic that may be exchanged by the Parties?

This issue concerns the appropriate definition for the traffic the parties will exchange. Much, if not all, of the traffic that will originate and terminate on Charter's side of the point of interconnection will be formatted and transmitted using the Internet Protocol (IP) rather than the alternative format of the public switched telephone network. The parties offer alternative definitions for this IP traffic.

Position of the Parties

a. Charter

The petitioner proposes a definition for the IP traffic that the parties may exchange that is drawn from a similar definition codified at 47 C.F.R. § 9.3:

22.2 INTERNCONNECTED VOICE OVER INTERNET PROTOCOL (VoIP) SERVICE

Interconnected VoIP Service is traffic that is provisioned via a service that:
(1) enables real-time, two-way voice communications;
(2) requires a broadband connection from the user's location;
(3) requires Internet protocol-compatible customer premises equipment (CPE);

and

(4) permits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network.

Traffic that meets these four criteria shall be defined, for purposes of this Agreement, as interconnected VoIP service traffic.

b. Solarus

Solarus proposes an alternative definition for the IP traffic that the parties may exchange:

22.2 IP-ENABLED VOICE TRAFFIC

IP-Enabled Voice Traffic means any IP-Enabled, real time, multidirectional voice call, including, but not limited to, service that mimics traditional telephony. IP-Enabled Voice Traffic includes:

(i) Voice traffic originating on the Public Switched Telephone Network (PSTN) which terminates on an Internet Protocol Connection (IPC) or voice traffic originating on the IPC which terminates on the PSTN; and

(ii) Voice traffic originating on the PSTN, which is transported through an IPC, and which ultimately, terminates on the PSTN.

Discussion

The classification of IP-Enabled Services is a matter of dispute in dockets pending before the Federal Communications Commission (FCC). *IP-Enabled Services*, WC Docket No. 04-36, 19 F.C.C.R. 4863 (Notice of Proposed Rulemaking)(2004)(*IP-Enabled Services NPRM*). This debate whether to classify VoIP service as a telecommunications or information service remains unresolved. *IP-Enabled Services*, WC Docket No. 04-36, *E911 Requirements for IP-Enabled Service Providers*, WC Docket No. 05-196, 20 F.C.C.R. 10,245, 10,258 (2005)(*E911 Order*).

The parties have elected to avoid much of this dispute by agreeing to treat the traffic they will exchange as a telecommunications service for purposes of their interconnection agreement. Charter Br. 12; Tr. 262-63. This means that the traffic at issue will be rated based upon the

originating and terminating endpoints of the call, despite the ongoing dispute regarding the appropriateness of this rating scheme at the federal level. *Id.*; Tr., 243.

The parties have also agreed to include in the interconnection agreement language often referred to as a "change in law" provision that permits either party to reopen the agreement in the event that the underlying administrative law is amended. Charter Br. 12; Tr. 261. Thus, in sum, the parties have reached agreement between themselves on a rating method for VoIP traffic for purposes of this agreement, but have also agreed to reopen the contract if Congress or the FCC resolves the classification dispute during the contract's term.

Within this limited framework, the parties submit for arbitration two alternative definitions for the traffic at issue. Because the federal law on this point is unsettled and the parties have agreed to an interim rating methodology for purposes of their agreement, there is no controlling law or other precedent that governs this decision. Either definition would be consistent with federal statute in this circumstance. The panel therefore answers this issue based upon general principles of statutory construction and its understanding of the policies the FCC has pursued in recent proceedings.

Both the Solarus and Charter definitions come from the FCC's proceeding on IP-Enabled Services. The Solarus definition is related to footnote 7 in the *IP-Enabled Services NPRM*:

> FN7. While we adopt no formal definition of "VoIP," we use the term generally to include any IP-enabled services offering real-time, multidirectional voice functionality, including, but not limited to, services that mimic traditional telephony.

IP-Enabled Services NPRM, 19 F.C.C.R. at 4866.

The Charter proposal is based upon a rule adopted by the FCC related to enhanced 911 (E911) service. *E911 Order,* 19 F.C.C.R. at 10,257-58; 47 C.F.R. § 9.3.. While the larger

classification and rating questions were pending in the *IP-Enabled Services* proceeding, the FCC decided to investigate whether providers of interconnected VoIP service should furnish E911 capabilities to their customers. Finding that such a feature was necessary, the FCC adopted a definition for *Interconnected VoIP Service* to govern which providers of IP-enabled service were required to comply with the new requirements, codified at 47 C.F.R. § 9.3.

Section 9.3 generally includes IP-enabled services that mimic traditional telephony, but excludes services, such as text messaging or Internet gaming, that do not connect to the public switched telephone network (PSTN):

> FN78. ... The instant Order does not apply to providers of other IP-based services such as instant messaging or Internet gaming because although such services may contain a voice component, customers of these services cannot place calls to and receive calls from the PSTN. The rules we adopt today apply to interconnected VoIP services rather than the sale or use of IP-compatible CPE, such as an IP-PBX, that itself uses other telecommunications services or VoIP services to terminate traffic to and receive traffic from the PSTN. The rules we adopt in today's Order also apply only to providers that offer a single service that provides the functionality described above. But see infra para. 58 (tentatively concluding that separate service offerings that can be combined by the user should also be subject to our E911 requirements). Thus, the E911 requirements we impose in this Order apply to all VoIP services that are encompassed within the scope of the Vonage Order. In the Vonage Order, the Commission preempted certain state regulation of Vonage's "DigitalVoice" VoIP service, and indicated that the Commission would preempt similar state regulation of other types of IP-enabled services having basic characteristics similar to DigitalVoice. It is incumbent on this Commission to ensure that customers of these services are still able to obtain access to appropriate emergency services when dialing 911. We further note that imposing E911 regulation on interconnected VoIP service providers is consistent with the four criteria the Commission identified in the E911 Scope Order that have been used to determine whether particular entities should be subject to some form of 911/E911 regulation...

E911 Order, 19 F.C.C.R. at 10,258 and n. 78.

On its face, the definition in Section 9.3 is limited to E911 service. *See* 47 C.F.R. § 9.1. But, the FCC has used this definition in other dockets to extend specific programs to providers of

Interconnected VoIP Service. In four instances, the FCC has adopted an administrative rule incorporating section 9.3 by reference. *See* 47 C.F.R. §§ 6.3(e)(concerning Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities), 52.32(e)(concerning Local Number Portability), 54.5 (Interconnected VoIP Provider)(concerning Universal Service) and 64.2003(o)(concerning Customer Proprietary Network Information). By virtue of Section 9.3, these same requirements do not apply to those IP-enabled services that are dissimilar from traditional telephony, such as text messaging and Internet gaming. The FCC has also adopted an identically worded definition for Interconnected VoIP Service in 47 C.F.R. § 64.601(a)(10), a rule concerning Telecommunications Relay Services. In one other instance, the FCC found it necessary to extend a program to both interconnected VoIP service defined by section 9.3 and the additional IP-enabled services excluded by that definition. In its order on the Communications Assistance for Law Enforcement Act (CALEA), the FCC created a different definition that would cover all categories of IP-enabled service, including text messaging. *See* 47 C.F.R. § 64.2102(d)(3).

In its brief, Solarus raises two objections to the use of the Charter definition. First, Solarus asserts that Charter's definition is too restrictive, that there is some present or future product or service feature that is not captured by the Charter definition. Solarus Reply Br. 5-6. Second, Solarus points out that in Section 9.3 and elsewhere the FCC has defined the term Interconnected VoIP Service, while Solarus' preferred definition would define the traffic that would be carried by service providers. *Id.*, pp. 6-7

With respect to the first objection, the Charter definition captures all of the service features that Charter presently offers. Tr. 73-75, 251-53. In testimony, the Solarus witness

offered that one service Charter might offer in the future that is not addressed by the Charter definition is dialup access to interconnected VoIP services. Tr. 253. However, in its *E911 Order,* the FCC noted this possibility existed and deferred to a further rulemaking the question of whether to expand the scope of the *E911 Order*:

> FN76. ...While we recognize that some kinds of VoIP service can be supported over a dialup connection, we expect that most VoIP services will be used over a broadband connection. We seek comment in the NPRM on whether we should expand the scope of the present Order to include VoIP services that do not require a broadband connection. See infra Part IV.

E911 Order, 19 F.C.C.R. at 10,257 and n. 76.

It is possible to speculate that a future IP-enabled service feature or application would connect to the PSTN and perhaps require some amendment or revision of the interconnection agreement. Tr. 197, 257, 259. Other than the example of dialup access to interconnected VoIP services, the record contains very little specificity as to what these future services may be. The concern that IP-enabled services will exist that fall outside the definition of Interconnected VoIP service does not appear to be an immediate issue.

With respect to the second objection, the panel does not see any meaningful difference between the terms *traffic* and *service.* Services generate traffic. However, the panel agrees that, if in the future Solarus is required to terminate traffic for which it receives no compensation, it would be harmed. To this end, it would be appropriate to incorporate an explicit revision process should Solarus begin receiving traffic that falls outside the definition of Interconnected VoIP services traffic. Therefore, if Solarus so desires, the parties should include in an appropriate place in the agreement a provision that states that

> Except as prohibited by federal law, a party to this Agreement is entitled to good faith negotiation of an amendment of this agreement to secure from the other

party lawful compensation for traffic not falling within the definition of Interconnected VoIP but not expressly defined as an information service, if the party seeking amendment does the following:

1. The party seeking amendment demonstrates in a traffic study meeting telecommunications industry standards, that the other party is tendering for termination traffic that--
   a. Is not specifically classified as information service; and
   b. In quantity exceeds 5 percent of all of the tendering party's minutes of terminating access usage with the requesting party in a continuous six-month period.
2. The party invoking this provision serves the traffic study and a written demand for negotiation of an amendment under this provision upon the other party in accordance with Section 13 procedures for dispute resolution, which procedures shall also apply to the negotiations between the parties.

The panel therefore finds that the definition proposed by Charter is preferable to that proposed by Solarus. The language of the Charter definition has run the gauntlet of several rulemaking proceedings, and is now codified in at least six different administrative rules. The section 9.3 rule is both more specific and later decided than the tentative language of the notice of rulemaking. Thus, the definition proposed by Charter benefits from the evolution or growth in thinking on this matter that has occurred at the FCC. The fact that the section 9.3 rule has been used in other proceedings to define interconnected VoIP service may indicate that this rule is coming to have more general application than the specific circumstance of E911 service.

The record lacks specificity as to the future receipt of traffic that might cause Solarus to terminate traffic without compensation. This concern is founded upon speculation regarding future alternative service offerings and potential service providers that are not a part of this arbitration, and therefore cannot be answered from the record in this proceeding. The panel will address this concern with contract language permitting the parties to reopen the agreement if the circumstance should occur. This will permit the parties to address the matter of compensation

based upon an adequate record and full knowledge of the actual traffic or service arrangement at issue.

Award

The panel awards the language proposed by Charter for Section 22.2 of the agreement. If Solarus so desires, the parties should include in an appropriate place in the agreement a provision that states that, except as prohibited by federal law, a party to this Agreement is entitled to good faith negotiation of an amendment of this agreement to secure from the other party lawful compensation for traffic not falling within the definition of Interconnected VoIP but not expressly defined as an information service, if the party seeking amendment does the following:

1. The party seeking amendment demonstrates in a traffic study meeting telecommunications industry standards, that the other party is tendering for termination traffic that--
    a. Is not specifically classified as information service; and
    b. In quantity exceeds 5 percent of all of the tendering party's minutes of terminating access usage with the requesting party in a continuous six-month period.
2. The party invoking this provision serves the traffic study and a written demand for negotiation of an amendment under this provision upon the other party in accordance with Section 13 procedures for dispute resolution, which procedures shall also apply to the negotiations between the parties.

Issue 4: Should Charter be required to pay service order charges for requesting number porting, or the inclusion of listings within the Solarus directory?

This issue concerns whether Solarus may assess a charge upon Charter when Charter submits a Local Service Request (LSR) to port a telephone number from Solarus to Charter's network.

Position of the Parties

a. Charter

Charter proposes the following language for Sections 4.8 and 2.2.1 of the Agreement:

LNP Attachment
4.8 Both Parties shall recover their own costs of implementing and providing number portability, and shall not recover from the other Party any such costs. Accordingly, any porting requests delivered by one Party to the other via the LSR form (or any other form) shall not be subject to a "service order" charge, or any other charge by the other Party.

Ordering Attachment
2.2.1 CLEC shall place orders for services by submitting a local service request ("LSR") to ILEC. ILEC shall bill CLEC a service order charge as specified in this Attachment for each LSR submitted. However, pursuant to Section 4.8 of the LNP Attachment of the Agreement, the Parties agree that neither this service order charge, nor any other charge, shall be assessed upon requests by either Party to the other Party to port telephone numbers. Nor shall any service order apply where the CLEC submits a directory service request, ("DSR") or other similar request, for the purpose of including CLEC's end user subscriber listings in any directories published by ILEC, or its vendors. An individual order will be identified for billing purposes by its Purchase Order Number ("PON").

b. Solarus

Solarus proposes the following language for Sections 4.8 and 2.2.1 of the Agreement:

LNP Attachment
4.8 [Intentionally left blank]

Ordering Attachment
2.2.1 CLEC shall place orders for services by submitting a local service request ("LSR") to ILEC. ILEC shall bill CLEC a service order charge as

specified in this Attachment for each LSR submitted. An individual order will be identified for billing purposes by its Purchase Order Number ("PON").

Discussion

This issue consists of two parts, local number portability and directory listings.

a. Local Number Portability

Solarus proposes to apply a service order charge each time that Charter forwards a subscriber request to port a telephone number from Solarus' network to Charter's. The issue here is whether this service order charge is a prohibited charge under the FCC's orders in its proceeding on number portability. *See Telephone Number Portability,* First Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 95-116, 11 F.C.C.R. 8352 (1996).

An incumbent local exchange carrier may not recover carrier-specific costs directly related to providing number portability from the competitive carrier submitting the request. Instead, those costs are recovered through a surcharge on local telephone service authorized by 47 C.F.R. § 52.33. The FCC defines carrier-specific cost directly related to providing number portability as follows:

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

Telephone Number Portability, Third Report and Order, CC Docket No. 95-116, 13 F.C.C.R. 11,701, 11,740 (1998) (*Third Report and Order*).

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

> 62. We agree with Comcast that incumbent LECs may not recover any number

> portability costs through interconnection charges or add-ons to interconnection charges to their carrier "customers," nor may they recover carrier-specific costs through interconnection charges to other carriers where no number portability functionality is provided. To the extent necessary, we clarify our decision accordingly. The *Third Report and Order* allows incumbent LECs to assess number portability charges in limited circumstances and only where the incumbent LEC provides number portability functionality: (1) on resellers of the incumbent LEC's local service; (2) on purchasers of switching ports as unbundled network elements under section 251; and, (3) on other carriers for whom the LEC provides query services. Allowing the incumbent LECs to assess an end-user charge on resellers and on purchasers of switching ports as unbundled network elements is competitively neutral because the reseller and the purchaser of the switch port will incur the charge in lieu of costs they would otherwise incur in obtaining long-term number portability functionality elsewhere. (Notes omitted).

Telephone Number Portability, Memorandum Opinion and Order on Reconsideration and Order on Application for Review, CC Docket No. 95-116, 17 F.C.C.R. 2578, 2608 (2002)(*2002 Cost Reconsideration Order*).

Finally, in a related context, the FCC has assigned to the incumbent local exchange carrier the burden of demonstrating that its service delivery charges are reasonable:

> 21. We recognize that some administrative and personnel-type costs will be incurred to provision number portability. However, we question U S WEST's high overall costs for service delivery, which represent a significant portion of its total end-user surcharge expense. Based on our review of the data submitted, we conclude that U S WEST has not met its burden of proving that its service delivery costs would not have been incurred but for the provision of number portability. We cannot find these costs to be reasonable.

Long-Term Number Portability Tariff Filings, Memorandum Opinion and Order, CC Docket No. 99-35, 14 F.C.C.R. 11,983, 11,994 (1999).

Solarus proposes to assess a service order charge for every Local Service Request (LSR) submitted by Charter, including those requesting Local Number Portability. Tr. 205, 215. The amount of the Solarus service order charge is not at issue in this proceeding. Nonetheless, it is apparent that the composition of that charge is a question that bears on the issue in dispute. Solarus advances a vague explanation for the account activities that charge is intended to compensate. Tr. 123-24. It is likely that the $20.00 charge was settled upon without careful

attention to the actual cost of the component activities, and is applied uniformly to a variety of service ordering circumstances.

This lack of detail is not a problem in itself. The dispute at issue here arises because the service order charge is applied to requests from Solarus for porting telephone numbers. Solarus asserts that it can apply its service order charge to porting requests because the service order charge is not specific to local number portability. Solarus Br. 20. In other words, because the service order charge recovers several cost elements and is applied to a variety of service orders, it avoids the prohibition in the *Third Report and Order.*

This does not save the Solarus charge, however. In testimony, the Solarus witness stated that the service order charge compensates Solarus for number porting, directory listings and 911 service. Tr., 281. However, the ongoing costs of number porting are assigned to the subscriber charge under 47 C.F.R. § 52.33. *Third Report and Order,* 13 F.C.C.R. at 11,725. The costs of 911 service may be recovered through a separate end user surcharge authorized by Wis. Stat. § 256.35(3) as well. In sum, the service order charge is an interconnection charge or an add-on to an interconnection charge within the meaning of ¶ 62 of the *2002 Cost Reconsideration Order.* It is therefore prohibited by that order as an unreasonable burden upon Charter's right to submit requests for number porting in a competitively neutral manner.

b. Directory Listings

The issue here is whether Solarus is required to include Charter's customer listings in the Wood County Telephone Company directory at no charge. Solarus asserts that it is entitled to a non-recurring charge to establish a directory listing for a Charter customer.

Section 251(b)(3) provides as follows:

> (3) Dialing parity
> The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

47 U.S.C. § 251(b)(3).

Also, the state has adopted the following administrative rule regarding telephone directories:

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

Wis. Admin. Code, § PSC 165.055(1). This provision may be imposed upon the parties to an interconnection agreement under section 261 of the Act:

> b) Existing State regulations.
> Nothing in this part shall be construed to prohibit any State commission from enforcing regulations prescribed prior to February 8, 1996, or from prescribing regulations after February 8, 1996, in fulfilling the requirements of this part, if such regulations are not inconsistent with the provisions of this part.

47 U.S.C. § 261(b).

The panel finds that the state rule requiring that the listings of customers in foreign exchanges to which extended-area service is provided shall be made available at no charge to all local customers applies to the listings of customers of competitive local exchange carriers providing local telephone service in the incumbent carrier's telephone exchange. This regulation is not inconsistent with any provision of § 251 and the FCC's implementing rules.

Even if this rule did not exist, the panel would agree with Charter that Solarus should provide the directory listings on the same terms that it provides to its own customers. By applying a charge to Charter that Solarus does not apply to its own customers, Solarus would be creating a barrier to competitive entry, in violation of 47 U.S.C. § 251(b)(3).

Award

The panel awards the language proposed by Charter for Sections 2.2.1 and 4.8 of the Agreement.

Conclusion of Law

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

Concurring Statement of Anne Waymouth

Issue 2: How should the agreement define Internet Protocol (IP) traffic that may be exchanged by the Parties?

While I concur in the panel's award to provide Solarus the opportunity for good faith negotiation of an amendment of the agreement should it receive traffic that falls outside the definition of Interconnected VoIP services traffic, I find the discussion of Solarus' position to be so deficient as to warrant an added statement on my part.

First a statement is needed regarding the issue the award characterizes as Solarus' second objection. Solarus did not itself raise a distinction as to *services* versus *traffic* in its reply brief. Solarus responded to an issue raised by Charter in its initial brief. Charter Initial Br. 12-13 . When read it this context, Solarus' point is that all the traffic it receives from Charter (regardless

of the regulatory classification of the service that generates that traffic) should be covered under the interconnection agreement. Solarus Reply Br. 7

Secondly, there is an important issue that Solarus raises in its initial brief that the arbitration award fails to discuss. Solarus raises the concern that the definition of the term for IP traffic in the agreement will determine which set or sets of IP traffic are expressly governed under the agreement. Solarus Initial Br. 14. If Solarus receives traffic that is not expressly covered by the interconnection agreement, this could lead to unnecessary and entirely avoidable enforcement disputes. Solarus Initial Br. 12. The potential for such disputes exists because the FCC has only defined the bookends for telecommunications and information services, leaving even Interconnected VoIP services unclassified for compensation purposes. As the award describes, even the term Interconnected VoIP service was first codified in 2005. In light of a regulatory lag of this magnitude, it is a very legitimate concern on Solarus' part that there can be further types of traffic that it will receive that are not classified as either telecommunications or information services. It is for this reason that I support providing Solarus with the opportunity for a good faith negotiation of compensation for unclassified traffic at such time it receives such traffic from Charter (or any other provider that may adopt this agreement). In light of this history, Solarus' concern it may receive such unclassified traffic is beyond the realm of a speculative event.

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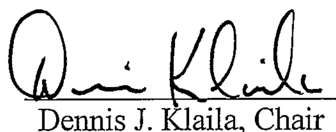
Award

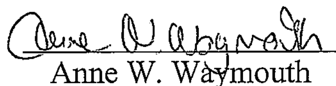
1. For each issue discussed in the Opinion above, the Panel awards the contract language specified for that issue. Where the Panel has adopted specific contract language, the parties shall incorporate that language into the Interconnection Agreements. Where the Panel has adopted a position on an issue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

2. The parties shall jointly a final Interconnection Agreement to the Panel by noon, November 25, 2008. If the parties are unable to conclude a final agreement by that date, the parties should submit alternative proposed contract language for any disputed provision, and the Panel will decide which alternative best implements the terms of this Arbitration Award.

By the Panel,

Signed this 23rd day of October, 2008.


Dennis J. Klaila, Chair


Anne W. Waymouth

Duane Wilson