

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Petition of Charter Fiberlink-)	
Missouri, LLC for Arbitration of an Interconnection)	<u>Case No. TO-2009-0037</u>
Agreement Between CenturyTel of Missouri, LLC)	
And Charter Fiberlink-Missouri, LLC.)	

**CHARTER FIBERLINK-MISSOURI, LLC’S
MOTION TO STRIKE**

Pursuant to Missouri Public Service Commission (“Commission”) Rule 4 CSR 240-2.130 and the discovery deadlines set forth in the Commission’s *Order Setting Procedural Schedule* and *Amended Order Setting Procedural Schedule* issued herein on August 26 and 27, 2008, respectively, Charter Fiberlink-Missouri, LLC (“Charter”) hereby files its “Motion to Strike” certain portions of the direct and rebuttal testimonies pre-filed by CenturyTel of Missouri, LLC (“CenturyTel”) in the above captioned matter.

INTRODUCTION

On September 30, 2008, CenturyTel filed the direct testimony of Jeffrey W. Reynolds in this matter. Mr. Reynolds’s direct testimony includes an exhibit, Schedule JWR-1 Proprietary, which purports to be a cost study justifying the non-recurring charge CenturyTel seeks to assess Charter for porting telephone service. On October 21, 2008, CenturyTel filed the rebuttal testimony of M. Scott Schultheis in this matter, which testimony discussed in detail the study methodology CenturyTel personnel used to calculate a charge for processing LNP requests. Mr. Schultheis’s rebuttal testimony includes two exhibits, PROPRIETARY Schedules MSS-2 and MSS-3, which purport to be cost studies justifying the non-recurring charge CenturyTel seeks to assess Charter for processing LNP requests. Both Mr. Reynolds and Mr. Schultheis are outside consultants to CenturyTel.

On October 21, 2008, CenturyTel filed the rebuttal testimony of Guy F. Miller, III. Mr. Miller's rebuttal testimony includes a discussion of purported damages to CenturyTel's Network Interface Devices "(NIDs)" allegedly caused by Charter technicians. Mr. Miller's rebuttal testimony also includes three photographs in "Rebuttal Schedule GEM-1" which purport to show damages to CenturyTel's NIDs allegedly caused by Charter technicians. Mr. Miller is an employee of CenturyTel.

STANDARD OF LAW

A. Inadmissible Information Relied Upon by an Expert Witness But Offered as Independent Substantive Evidence Is Excluded as Hearsay.

The standard for the admission of expert testimony in administrative cases is that set forth in section 490.065 RSMo.¹ That section provides, in relevant part:

1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

* * *

3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

Relevant to the instant motion, section 490.065 recognizes the generally accepted principle that an "expert necessarily acquires his knowledge and expertise from many sources, some of which are inadmissible hearsay. Merely because an expert relied on information and opinions of others does not automatically disqualify his testimony. *As long as such sources*

¹ *St. Bd. of Reg. for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 149 (Mo. banc 2003).

serve only as a background for his opinion and *are not offered as independent substantive evidence* . . . he should not be precluded from testifying."²

B. Photographs Offered Without Adequate Foundation That Additionally Depend On The Veracity And Competency Of An Out-Of-Court Declarant For An Explanation Of The Condition or Event Depicted Are Inadmissible.

Under Missouri rules of evidence,

A photograph is admissible if “it is a true and faithful representation of the subject, place or condition it purports to represent, as it existed at the time pertinent to the inquiry.” *Weber v. Missouri K.T. R.R.*, 519 S.W.2d 307, 313 (Mo.App.1975) (quoting *Fox*, 343 S.W.2d at 201). The proponent of the photograph must lay a foundation by extrinsic evidence that the photograph is what it purports to be. *Id.* If a witness familiar with what it shows testifies the photograph accurately represents the scene it portrays, the photo is admissible. *Rust & Martin, Inc. v. Ashby*, 671 S.W.2d 4, 8 (Mo.App.1984).

Riley v. Union Pacific R.R. 904 S.W.2d 437, 441 (Mo.App. W.D. 1995).

Additionally, as a general rule, “[e]vidence which rests on part on the veracity and competency of an out-of-court assertion made by someone other than the witness is inadmissible to prove the truth of the matter asserted.” Mo. Evidence, §7.1 (MoBar 4th ed. 2001 Cum Supp.) *See also Viacom Outdoor, Inc. v. Taouil*, 254 S.W.3d 234, 237 (Mo.App. E.D. 2008). (Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted.)

DISCUSSION

A. CenturyTel’s Purported “Cost Studies” Constitute Inadmissible Independent Substantive Evidence and Should Be Stricken, As Should Related Testimony.

Messrs. Reynolds and Schultheis are not CenturyTel employees. They are outside consultants hired by CenturyTel for the purpose of this arbitration. From their impressive

² *Peterson v. National Carriers*, 972 S.W.2d 349 (1998) (emphasis added).

backgrounds it is evident, and Charter hereby stipulates, that Messrs. Reynolds and Schultheis are experts in their respective fields. However, neither Mr. Reynolds nor Mr. Schultheis performed a cost study to support the non-recurring porting charge proposed by CenturyTel in this matter, including the purported “cost studies” referenced in their testimonies. Rather, both reference and rely on purported “cost studies” performed by CenturyTel personnel. Mr. Reynolds testified, “CenturyTel performed cost studies of its various non-recurring functions.”³ Mr. Schultheis testified that CenturyTel used “a forward-looking cost-based methodology in this proceeding to develop the NRCs applicable to Charter.”⁴ Appropriately, neither Mr. Reynolds nor Mr. Schultheis attempted to adopt CenturyTel’s purported “cost studies” as his own, for the obvious reason that neither actually performed such purported “cost studies.” Thus, the purported “cost studies” at issue are evidentiary orphans—no witness has sponsored them.

In this circumstance, it is without dispute that CenturyTel has offered its purported “cost studies” as *independent substantive evidence* and, as such, under the Missouri rules of evidence, the purported “cost studies” are inadmissible as hearsay. That is, the purported “cost studies” constitute out-of-court statements made by a person who is not subject to cross-examination. Neither the Commission nor Charter know who at CenturyTel performed the purported “cost studies,” whether such person was competent to perform a cost study, what precise methodology was used, or from what sources the data inputs to the methodology were drawn. The purported “cost studies” are thus fatally suspect and highly unreliable. They cannot be rehabilitated simply because outside expert witnesses—who had no hand in their creation—attach them to testimony.

³ Direct Testimony of Jeffrey W. Reynolds (“Reynolds Direct Testimony”) at 12, Case No. TO-2009-0037 (dated Sept. 29, 2008).

⁴ Rebuttal Testimony of M. Scott Schultheis (“Schultheis Rebuttal Testimony”) at 5, Case No. TO-2009-0037 (dated Oct. 21, 2008).

If the Commission agrees that CenturyTel's orphan studies are inadmissible, it follows that many passages from the testimonies of Messrs. Reynolds and Schultheis are also inadmissible, as they expressly and solely rely on those inadmissible orphan studies. It would make no sense to exclude the purported "cost studies" but admit substantive discussion of them or substantive discussion that relies on them. Similarly, to the extent Messrs. Reynolds and Schultheis reached conclusions based on their review of the inadmissible materials, those conclusions must be excluded from the record. In short, CenturyTel should not benefit directly or indirectly from its inadmissible evidence, which cannot be saved simply because an expert witness purports to rely upon it.

For all these reasons, Charter respectfully moves that the Commission strike the following passages from Mr. Reynolds's direct testimony:

- Page 3, lines 11-12, the sentence: "I will also provide support for the NRC rates that CenturyTel has included in the Agreement";
- Page 12, lines 11-15 in their entirety;
- Page 13, lines 2-3, the sentence: "The charges are based on the costs associated with the function at issue and event-specific";
- Page 13, lines 4-7 in their entirety; and
- Schedule JWR-1 Proprietary.

For all these reasons, too, Charter respectfully moves that the Commission strike the following passages from Mr. Schultheis's rebuttal testimony:

- Page 4, lines 10-11, the sentence: "A true and correct copy of this document is attached to this testimony as Schedule MSS-3 - Proprietary.";
- Page 4, lines 15-16, that portion of the question: **"AND CONTAINED IN THE NRC STUDY PROVIDED TO CHARTER"**;
- Page 4, line 17, the phrase: "and contained in the NRC Study";

- Page 5, lines 1-2, the sentence: “The charges are based on the non-recurring costs associated with the function at issue.”;
- Page 5, lines 18-25 in their entirety;
- Pages 6 and 7, lines 1-24 in their entirety;
- Page 8, lines 1-25 in their entirety;
- Page 9, lines 1-15 in their entirety;
- Page 10, lines 12-13, that portion of the question: **“ALONG WITH THE COST STUDY AND WORK PAPERS YOU MENTIONED?”**;
- Page 10, lines 15-27 in their entirety;
- Page 11, lines 1-6 in their entirety;
- Page 11, lines 10-14 in their entirety;
- Page 11, lines 20-24, including the following passage: “With that said, the Commission should not have concern with the pricing proposed based on the costing methodology that was used. The methodology is sound and the result of applying the methodology to the costs and demand amply supports the rates at issue in this proceeding. Therefore, the Commission should not hesitate to affirm CenturyTel’s NRC rates in this proceeding that I have identified above”;
- Page 12, lines 2-3 in their entirety;
- PROPRIETARY Schedule MSS-2; and
- PROPRIETARY Schedule MSS-3.

B. Mr. Miller’s Rebuttal Testimony With Respect to Purported NID Damage Constitutes Inadmissible Hearsay and Should Be Stricken.

Mr. Miller, an employee of CenturyTel, references in his testimony “damage” that Charter allegedly has caused to CenturyTel NIDs. While Charter expressly reserves the right to challenge the relevance and probative value of this allegation, and does not concede that it is true, there can be no doubt that the three photographs and Mr. Miller’s comments about them are inadmissible. The photos lack the necessary foundation. Just as importantly, Mr. Miller’s testimony, which purports to interpret how the conditions on those photographs were caused, is

based on the statements of an out-of-court source. To the extent those statements and photographs are offered for the truth of a particular matter asserted, *i.e.*, that Charter caused the “damage” alleged, they are inadmissible.

Mr. Miller testified that Charter recently damaged NIDs in Wisconsin and supplied three (3) photographs to prove that assertion. The first photograph in Rebuttal Schedule GEM-1 contains the following caption, in relevant part:

Photograph shows damaged NID casing, CenturyTel drop wire cut, CenturyTel ground wire disconnected and Charter connections established in the NID. (The red and green wires using the blue-green plastic connectors are the Charter connections.)

The second photograph in Rebuttal Schedule GEM-1 contains the following caption, in relevant part:

Photograph shows CenturyTel ground wire and other internal NID connections ripped or pulled out. Charter connection (using the blue-green plastic connector) is just visible at the bottom of the picture.

The third photograph in Rebuttal Schedule GEM-1 contains the following caption, in relevant part:

Photograph taken on October 9, 2008. Photograph shows CenturyTel drop wire and ground wire cut by Charter before attachment to the NID.

As mentioned above, according to Mr. Miller, the allegedly damaged NIDs are in *Wisconsin*. Mr. Miller’s office is in *Louisiana*. Mr. Miller lacks the personal knowledge that would qualify him as a person familiar with the manner in which these photographs were taken and whether they truly and faithfully represent the subject, place or condition they purport to represent. Moreover, to the extent these photographs are offered to prove that Charter caused the alleged damage, they are hearsay. This is so because there is no assertion in Mr. Miller’s testimony or attachments that he personally observed Charter personnel at these *Wisconsin* NIDs

engaging in activities that damaged the NID casing or cut CenturyTel's drop wire, or even took the photographs. Thus, either Mr. Miller relied upon the statements of other CenturyTel personnel in Wisconsin to form his conclusions, or he simply has speculated that Charter caused the alleged damage. If the former, Mr. Miller's testimony and the photographs constitute inadmissible hearsay, as they constitute out-of-court statements made by a person who is not subject to cross-examination. If the latter, his speculation about the condition on the photographs is irrelevant and inadmissible.

Charter emphasizes that its objection to Mr. Miller's testimony is *not* based on his assertion that damage was done to CenturyTel's NIDs—although as noted above that assertion is likely irrelevant or lacks probative value for the issues Mr. Miller addresses. Rather, (and not forsaking the fact that no foundation has been laid for the photographs) Charter's central objection and motion to strike Mr. Miller's testimony and schedules are based upon the fact that the truth of the matter asserted by Mr. Miller is that Charter *caused* the alleged damage. Mr. Miller did not see Charter cause the damage. He is necessarily relying on an out-of-court declarant who took the photographs. His statements and the photographs therefore are classic and inadmissible hearsay and should be stricken from his testimony.

For all these reasons, Charter respectfully moves that the Commission strike the following passages from Mr. Miller's rebuttal testimony:

- Page 13, lines 3-7, the sentence: "Contrary to Mr. Blair's testimony, Charter's actions not only did not make it "easier" for CenturyTel to re-connect to the customer's wiring, but to the contrary, required additional expenditures to replace damaged facilities in order to make such connections. (See Rebuttal Schedule GEM-1)";
- Page 14, lines 4-7, the sentence: "I need only point to the recently damaged CenturyTel Wisconsin NIDs as an illustration of why CenturyTel must be allowed to perform and charge for such work without Charter's specific prior request. (*See*, Rebuttal Schedule GEM-1)"; and
- Rebuttal Schedule GEM-1 in its entirety.

CONCLUSION

For the reasons enumerated above, Charter respectfully requests that the Commission strike the testimony and schedules identified herein and otherwise grant the relief requested by Charter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 24th day of October, 2008, to General Counsel's Office at gencounsel@psc.mo.gov; Office of Public Counsel at opcservice@ded.mo.gov; and Larry Dority at lwdority@springmail.com.

/s/ Mark W. Comley

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