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 Agreement Between CenturyTel of Missouri, LLC And Charter Fiberlink-Missouri, LLC.	))))	**Case No. TO-2009-0037**

CENTURYTEL OF MISSOURI, LLC'S REPLY
IN SUPPORT OF MOTION TO STRIKE WRITTEN TESTIMONY OF
CHARTER FIBERLINK-MISSOURI, LLC'S WITNESS, TIMOTHY J. GATES

Pursuant to Commission Rules 4 C.S.R. 240-2.080 and 4 C.S.R. 240-2.130,[1] and in reply to Charter Fiberlink-Missouri, LLC's ("Charter") Response to CenturyTel of Missouri, LLC's ("CenturyTel") Motion to Strike Written Testimony of Charter Fiberlink-Missouri, LLC's Witnesses (the "Motion"), CenturyTel submits this Reply in support of the Motion. Charter's positions are contrary to the law governing this proceeding, namely the federal Telecommunications Act ("Act") and this Commission's rules, which require telephone companies to resolve their interconnection issues in the first instance by negotiation and strictly limit arbitration by this Commission to issues that both (1) remain open following negotiations, and (2) are identified for arbitration in the parties' pleadings. The Charter testimony that is the subject of the Motion meets neither requirement.

I.
Introduction

In accordance with the Arbitrator's Order Setting Procedural Schedule, on October 24, 2008 CenturyTel filed the Motion which, among other relief, requested that the Arbitrator enter an order striking pages 7:15 through 14:2 of the Rebuttal Testimony

[1] Commission Rule 4 C.S.R. 240-2.130(3) provides that "[t]he presiding officer shall rule on the admissibility of all evidence."

of Timothy J. Gates (the "Gates Rebuttal").[2] On October 28, 2008, at the beginning of the hearing of this matter, the Arbitrator advised the Parties that he would leave the Motion (as well as Charter's Motion to Strike) pending and would hear testimony subject to and without waiver of the positions set forth in the Motion. (Tr., 29:6-30:8) Pursuant to the agreement of counsel approved by the Arbitrator in an email dated November 6, 2008, on November 20, 2008 Charter filed its Response to CenturyTel's Motion (the "Response").[3] CenturyTel files this Reply setting forth its legal and factual positions in reply to the arguments set forth in the Response concerning the Gates Rebuttal as well as the broader issue of the rates for Charter's use of CenturyTel's Network Interface Devices ("NIDs") as Unbundled Network Elements ("UNEs").[4]

II.
Arguments & Authorities

A. A Party May Not Present an Issue for Arbitration That Was Not Raised During the Negotiation Process or in Its Arbitration Pleading

(1) Applicable Provisions of the Act and the Commission Rules

The procedures for negotiating, arbitrating and approving interconnection agreements between local exchange companies are set forth in the Act at 47 U.S.C. § 252. Section 252(a)(1) provides as follows:

(1) Voluntary negotiations.

[2] With regard to the matters addressed in the Motion in addition to the Gates Rebuttal, CenturyTel stands on the arguments and positions set forth in the Motion.

[3] Charter also included a section in its Proposed Order, Findings of Fact, and Conclusions of Law filed on November 20, 2008 that addresses CenturyTel's Motion. *See*, pages 47-52. CenturyTel objects to this action by Charter which is contrary to the Parties' agreement as approved by the Arbitrator. In an email from CenturyTel's counsel, Larry W. Dority to Arbitrator Pridgin dated November 6, 2008, Mr. Dority stated, with the agreement of Charter's counsel, Mr. Comley, that: "In addition, the parties will address the motions to strike ***in separate pleadings/briefs***." (Emphasis added)

[4] The timing of the filing of this Reply is in accordance with the Arbitrator's email to counsel for the Parties dated December 1, 2008.

> Upon receiving a request for interconnection, services, or network elements pursuant to section 251 of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251 of this title. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before February 8, 1996, shall be submitted to the State commission under subsection (e) of this section.

If the Parties have negotiated for at least 135 days without coming to a full agreement, then the Act allows a Party to ask the state commission to arbitrate the remaining unresolved issues. Section 252(b)(1) of the Act sets forth a detailed arbitration process and states:

> (1) Arbitration.
>
> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate *any open issues*. (Emphasis added).

The Act thus sets forth the standard applicable to the Motion – a party may ask the Commission only to "arbitrate any *open issues*." 47 U.S.C. § 252(b)(1) (Emphasis added) Similarly, Commission Rule 4 C.S.R. 240-36.040(11) limits the issues that may be presented for arbitration, and provides:

> Limitation of Issues—Pursuant to sub-section 252(b)(4)(A) of the Act, ***the arbitrator shall limit the arbitration to the resolution of the unresolved issues raised in the petition, the response and the revised statement of unresolved issues*** (where applicable). However, in resolving these issues, the arbitrator shall ensure that such resolution meets the requirements of the Act. (Emphasis added)

(2) Applicable Judicial Precedents Regarding the Permissible Scope of Issues Included in Section 252 Arbitrations

If an issue regarding an interconnection agreement was not raised during negotiations, or was resolved during negotiations, then the issue is not an "open issue" and cannot be included in the arbitration proceeding. *Coserv. Ltd. Liability Corp. v. Southwestern Bell Tel. Co.*, 350 F.3d 482, 487-488 (5th Cir. 2003) ("The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations."); *MCI Telecomm. Corp. v. Bellsouth Telecomm., Inc.*, 298 F.3d 1269, 1274 (11th Cit. 2002) (rejecting a district court's conclusion that the compulsory arbitration provision was so broad as to include any issue raised by the petitioning party); *US West Comm. v. Minnesota Public Utilities Comm'n*, 55 F. Supp. 2d 968 (D. Minn. 1999) (holding that "open issues" are limited to those that were the subject of voluntary negotiations).

The federal district court decisions cited by Charter in the Response are factually distinguishable from the instant case. In *BellSouth Telecomms., Inc. v. Cinergy Communs. Co.*, 297 F. Supp.2d 946 (E.D. Ky. 2003), BellSouth challenged the Kentucky Commission's authority to address the issue of BellSouth's obligation to provide DSL service over CLEC UNE-P lines. The Court found that "[t]he issue of DSL over UNE-P was debated by the parties at the informal conference, again at the hearing, and once again in the briefs, *all without objection from BellSouth*." 946 F. Supp.2d at 951 (emphasis added). As evidenced by the Motion, and as confirmed by the Affidavit of Ms. Susan Smith (the "Smith Affidavit") discussed below, such is not the case with regard to the NID rates and costs that are the subject of the Gates Rebuttal.

In *TCG v. PSC of Wisconsin*, 980 F. Supp. 992 (W.D. WI. 1997), the Court found that "[a]t the outset of compulsory arbitration the *parties* determine what issues will be

resolved through arbitration, not the state commissions." 980 F. Supp. at 1001 (Court's emphasis). It was the nature of "subsequent events" to the filing of the petition and the response (*i.e.* submission of testimony and argument by the parties concerning the issue in question, again without objection from either party) that convinced the TCG Court that the issue in question was properly before the Wisconsin Commission for arbitration. Such is not the case in the instant proceeding with regard to the NID rates.

Universal Telecom, Inc. v. Oregon Public Utility Comm'n, Civ. No. 06-622-HO (D. OR. 2007) is an unreported decision in which Charter's legal counsel represented the plaintiff. Therein, the Court recognized the limitations of Section 252(b)(4)(A) but stated: "The court does not read this provision to require a state commission to approve prohibited arrangements." The decision does not include a statement consistent with the reasoning set forth in the Response, page 5. At best, this case provides little or no guidance to the Arbitrator.

The "open issue" requirement is explicit in the statute—and for good reason. The Act encourages parties to negotiate and resolve issues before bringing them to the Commission. Allowing parties to bring up new issues during the arbitration process would encourage parties to skirt the negotiation process. Public and private resources should not be wasted arbitrating issues that a party did not raise during the negotiation process.

(3) <u>The Applicable Facts Confirm that Charter Did Not Dispute CenturyTel's Proposed Rates for Charter's Use of CenturyTel's NIDs as a UNE</u>

There are only two NID-related "open issues." Issue 2 asks the Commission to determine the proper definition of Network Interface Device or "NID". *See* Revised Statement of Unresolved Issues dated September 2, 2008 (the "Revised Statement"),

pages 3-5. This issue does not address or implicate NID charges at all. Issue 24, as formulated by Charter, asks whether Charter is required to compensate CenturyTel for accessing the NIDs for the purpose of connecting Charter's facilities to the customer's inside wire within the NID.

Charter claims that "[t]he DPL confirms that Charter and CenturyTel failed to agree on the entire concept of NID compensation." (Response, page 2). To the contrary, Article VI, § 3.3, as set forth in the column of the Revised Statement labeled "Charter's Language" (as well as in Exhibit B to the Petition) states: "Rates and charges applicable to NIDs are set forth in Article XI (Pricing), ***and such rates and charges shall apply***." (Emphasis added). As was clearly set forth in the Motion, Article XI (Pricing), § II sets forth all NID rates in *normalized text* the text style used by the Parties to indicate "resolved language (no disputes)". *See,* Agreement Cover Page, Petition Exhibit B.

Due to the post-hearing factual assertions made by Charter in the Response, pages 2-3, it is necessary to present the Arbitrator with the actual facts that bear on Charter's claim that "Charter has not accepted CenturyTel's NID rate level." (Response, page 2) Susan Smith is CenturyTel's lead negotiator regarding the Agreement. Her Affidavit submitted with this Reply demonstrates that Charter never questioned CenturyTel's proposed rates for Charter's use of NIDs as UNEs. The negotiations history shows that Charter's attorney K.C. Halm expressly agreed to CenturyTel's proposed NID rates. The only open issues reflected in Charter's submissions to CenturyTel during their negotiations were the definition of the NID and what constituted use of the NID to which the agreed upon rates apply. In language Charter proposed for Article IX, Section 3.5.1, Charter wanted an exception to paying for use of the NID "when Charter is connecting a

Charter provided loop to the inside wiring of a customer's premises through the customer side of the CenturyTel NID." As things stood at the time Charter filed the Petition in this proceeding, then, the Parties had agreed to terms and conditions, including rates, for Charter's use of CenturyTel's NIDs, but had not agreed only with regard to the definition of the term NID or whether Charter's interconnection with its customer "through the customer side of the NID" constituted use of the NID to which the agreed upon rates should be applied.

Charter claims in its Response that "in opposing *any* NID rate level, Charter opposes a *particular* rate level." Response, page 2 (Charter's emphasis). As demonstrated by the Smith Affidavit, this claim is false. Further, the Arbitrator need only review the presentation of Issues 27 and 29 in the Revised Statement to observe that when Charter intended to dispute rates proposed by CenturyTel, Charter did so by setting forth specific language regarding its position (*see*, Revised Statement, pages 94-95 regarding Issue 27 where Charter stated "the Parties shall not assess charges on one another for porting telephone numbers . . ."); or by stating that the section of the Agreement setting forth CenturyTel's proposal for charges be "Intentionally left blank" (*see*, Revised Statement, page 99 regarding Issue 29).

The foregoing practice and language stand in stark contrast to Charter's agreed upon language for Article VI, § 3.3 that "Rates and charges applicable to NIDs are set forth in Article XI (Pricing), and such rates and charges shall apply." ***Charter knew how to dispute CenturyTel's proposed rates when and if that was its intention, however, it did not do so with regard to NID rates***. In fact, Charter (a) did not negotiate NID rates; (b) as evidenced by the history of the Parties negotiations summarized in the Smith

Affidavit, NID rates were not an open issue when the Petition was filed; (c) Exhibit B to the Petition confirms that NID rates were not disputed; and (d) Charter's presentation of Issues 2 and 24 in the Revised Statement confirms that NID rates were not disputed.

Any remaining doubt that might exist as to whether Charter disputed NID rates is dispelled by the fact that while Charter submitted pre-filed direct testimony of *two witnesses* on Issues 2 and 24, neither witness mentions any dispute of CenturyTel's NID rates by Charter. (*See*, Blair Direct Testimony and Gates Direct Testimony, pages 4-10) (In fact, Gates reiterates the agreed upon language of Article VI, § 3.3 on page 5 of his Direct Testimony.) It was not until the filing of the Gates Rebuttal that Charter, for the first time, challenged CenturyTel NID rates and costs. (Gates Rebuttal, pages 7:15-14:2) Furthermore, the Gates Rebuttal Testimony ***is not in response to any pre-filed direct testimony of a CenturyTel witness***. Of course, this improper use of rebuttal testimony is another basis for CenturyTel's request to strike the Gates Rebuttal as set forth in the Motion. (*See*, Motion, pages 6-7)

(4) <u>The Commission Lacks Authority Pursuant to 47 U.S.C. § 252(b)(4)(A) and Commission Rule 4 C.S.R. 240-36.040(11) to Address Charter's Claim that CenturyTel's NID Rates are Not TELRIC-Based</u>

As stated in the Motion, Charter's decision not to dispute the NID rates set forth in Article XI, § II of the Agreement removes this subject from the Commission's authority in this arbitration proceeding. (Motion, pages 3 and 7) This lack of authority extends to Charter's claims regarding the lack of TELRIC pricing of the NID rates. (Response, pages 6 and 7) While CenturyTel disputes such claims, it is unnecessary to address such claims because they are moot as beyond the Commission's authority in this proceeding.

The Commission recognizes in Rule 4 C.S.R. 240-36.040(11) that its authority in Section 252 arbitrations is derivative from the delegation of authority provided by Congress. "The State commission *shall limit its consideration* of any petition under paragraph (1) (and any response thereto) *to the issues set forth in the petition and in the response,* if any, filed under paragraph (3)." 47 U.S.C. § 252(b)(4)(A) (emphasis added). Thus, Charter's contentions regarding the claimed absence of TELRIC pricing of CenturyTel's NID rates are moot.

B. The Gates Rebuttal Should Be Stricken

Charter's belated attempt through the Gates Rebuttal to challenge the NID rates—as opposed to the applicability of such rates in the specific interconnection scenario contemplated by Charter's Article VI, Sec. 3.5.1—is improper and should be stricken. Because Charter has improperly raised this subject in this arbitration and the Commission has no authority to rule on this "new issue", and because the Gates Rebuttal is beyond the scope of permissible rebuttal testimony, the Gates Rebuttal addressing CenturyTel's NID rates and costs (as opposed to their applicability) should be stricken from the record.

III.
Conclusion & Prayer

For the reasons set forth herein, CenturyTel respectfully requests that the Commission issue an Order directing that the direct and rebuttal testimony of Charter's witnesses, as specifically identified herein, be stricken.

DATED: December 4, 2008

Respectfully submitted,

/s/ Larry W. Dority

Larry W. Dority MBN 25617
Fischer & Dority, P.C.
101 Madison, Suite 400
Jefferson City, MO 65101
Tel: 573-636-6758 Ext. 2
Fax: 573-636-0383
Email: lwdority@sprintmail.com

and

Becky Owenson Kilpatrick MBN 42042
CenturyTel
220 Madison Street
Jefferson City, Missouri 65101
Tel: 573-636-4261
Fax: 573-636-6826
E-Mail: becky.kilpatrick@centurytel.com

and

Thomas J. Moorman, DC Bar No. 384790
WOODS & AITKEN LLP
2154 Wisconsin Avenue, N.W., Suite 200
Washington, D.C. 20007
Tel: (202) 944-9502
Fax: (202) 944-9501
Email: tmoorman@woodsaitken.com

and

Paul M. Schudel, NE Bar No. 13723
James A. Overcash, NE Bar No. 18627
WOODS & AITKEN LLP
301 South 13th Street, Suite 500
Lincoln, Nebraska 68508
Tel. (402) 437-8500
Fax: (402) 437-8558
Email: pschudel@woodsaitken.com
Email: jovercash@woodsaitken.com

Counsel for CenturyTel of Missouri, LLC

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply in Support of Motion to Strike was served by facsimile, hand-delivery, or electronic mail, on the 4th day of December, 2008, on the following:

K.C. Halm
Brian A. Nixon
John Dodge
Davis Wright Tremaine LLP
1919 Pennsylvania Avenue NW, Suite 200
Washington, D.C. 20006
(202) 273-4200
(202) 273-4499 - fax
Email: kchalm@dwt.com
Email: briannixon@dwt.com
Email: johndodge@dwt.com

Counsel for Charter

Mark W. Comley
Newman, Comley & Ruth, P.C.
601, Monroe, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
(537) 634-2266
(537) 634-3306
Email: comleym@ncrpc.com

Counsel for Charter

Carrie. L. Cox
Clifford K. Williams
Charter Fiberlink TX-CCO, LLC
12405 Powerscourt Drive
St. Louis, Missouri 63131
(314) 965-0555
(314) 965-6640 - fax

/s/ Larry W. Dority

Larry W. Dority