

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

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| 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. |) | |

**CENTURYTEL OF MISSOURI, LLC’S MOTION TO STRIKE WRITTEN
TESTIMONY OF CHARTER FIBERLINK-MISSOURI, LLC’S WITNESSES**

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Pursuant to Commission Rules 4 C.S.R. 240-2.080 and 4 C.S.R. 240-2.130,¹ and the Arbitrator’s *Order Setting Procedural Schedule* issued on August 26, 2008, CenturyTel of Missouri, LLC (“CenturyTel”) hereby files its Motion to Strike Written Testimony of Charter Fiberlink-Missouri, LLC’s Witnesses (“Motion”). As more specifically set forth below, CenturyTel moves to strike such testimony on the grounds that it is improper, impermissible and/or irrelevant, or that it addresses issues that are not in dispute and that the Commission lacks the authority to resolve pursuant to 47 U.S.C. § 252.

**I.
Introduction**

On July 31, 2008, Charter Fiberlink-Missouri, LLC (“Charter”) filed its Petition for arbitration of an interconnection agreement between Charter and CenturyTel (the “Petition”). With the Petition, Charter also filed (1) its proposed Agreement between the parties (“Charter’s proposed Agreement”) and (2) its initial Decision Points List (the “Charter DPL”). Both Charter’s proposed Agreement and the Charter DPL reflected those terms that Charter believed to be in dispute between the parties and that constituted “open issues” for Commission resolution pursuant to 47 U.S.C. § 252(b).

On August 25, 2008, CenturyTel filed its Response to Charter's Petition (the "Response"). With the Response, CenturyTel also filed (1) its proposed Agreement between the parties ("CenturyTel's proposed Agreement") and (2) its responsive Decision Points List (the "CenturyTel DPL"). In both CenturyTel's proposed Agreement and the CenturyTel DPL, CenturyTel identified additional issues that it believed to be in dispute between the parties and that also constituted "open issues" for Commission resolution.

On September 2, 2008, the parties jointly filed their Joint DPL reflecting all open issues being submitted to the Commission for resolution pursuant to Section 252(b) of the Telecommunications Act ("FTA").

Thereafter, on September 30, 2008, each party filed and served written direct testimony supporting its respective positions on the open issues. The parties filed and served written rebuttal testimony on October 21, 2008.

II.

Arguments & Authorities

A. Rebuttal Testimony of Timothy J. Gates Related to NID Charges (7:15-14:2)

Charter's witness, Timothy J. Gates ("Mr. Gates"), filed improper and impermissible rebuttal testimony that is both beyond the scope of the issues being arbitrated in this proceeding and beyond the scope of rebuttal. Specifically, from page 7, line 15, to page 14, line 2, of his rebuttal testimony, Mr. Gates provides testimony related to whether CenturyTel's NID charges—as contained in the *undisputed* terms of the parties' Agreement—are appropriate or reasonable in amount. However, Charter *already agreed to CenturyTel's NID charges* in negotiations and did not place the amount of such charges in dispute in its arbitration petition. The Commission,

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

therefore, has no authority to determine this “new” issue proffered by Charter’s witness, and Mr. Gates’ testimony on the same must be stricken.

Section 252(b) of the FTA authorizes the Commission, upon a party’s petition, “to arbitrate any *open issues*” between the parties to an interconnection agreement negotiation. 47 U.S.C. § 252(b)(1) (emphasis added) The FTA also *requires* the petitioning party to “provide the [] [C]ommission all relevant documentation concerning . . . the *unresolved issues* . . . [and] the position of each of the parties with respect to those issues[.]” 47 U.S.C. § 252(b)(2)(A) (emphasis added) Relevant to this Motion, Section 252(b) mandates that the Commission limit its consideration “to the issues set forth *in the petition* and *in the response*, if any[.]” 47 U.S.C. § 252(b)(4) (emphasis added) Thus, the Commission only has authority and jurisdiction in this proceeding to determine open issues submitted to it for resolution by the parties through their respective pleadings—the petition and the response.

CenturyTel’s NID *charges are not* an open issue in this proceeding as Charter already agreed to them in negotiations and did not challenge them or otherwise place them in issue in its petition. There are only two NID-related “open issues.” Issue 2 asks the Commission how “NID” should be defined. *See* Joint DPL, Issue 2. It does not address or implicate NID charges at all. Issue 24 asks whether CenturyTel’s “NID charges” should *apply* to Charter if Charter uses CenturyTel’s NIDs in the manner contemplated by the contract language Charter proposes at Article VI, Sec. 3.5.1. *See* Joint DPL, Issue 24 (Article VI, Sec. 3.5.1). Critical to the Arbitrator’s consideration of this aspect of the Motion, no party has placed the actual amount of or rates for “NID charges” in dispute, in either their pleadings or in their DPLs. To the contrary, to the extent the Commission determines that CenturyTel’s NID charges should apply to

evidence.”

Charter's "use" of CenturyTel's NIDs, the parties have already agreed upon what those charges should be, *i.e.*, the monthly recurring charge ("MRC") of \$1.91. That agreement is clearly reflected in Charter's proposed Agreement as filed with the Commission on July 31, 2008, and in the Joint DPL filed with the Commission on September 2, 2008. *See* Joint DPL, Issue 24 (wherein "Charter's Language" column sets forth the *undisputed* language of Article VI, Sec. 3.3, which states: "Rates and charges applicable to NIDs are set forth in Article XI (Pricing), and such rates and charges shall apply.") *and* Charter's Petition, Exh. B (Charter's proposed Agreement) at Article XI: Pricing, Sec. II ("UNE Pricing") (wherein rates and charges applicable to NIDs, including the \$1.91 MRC, are identified as being *undisputed* in normalized text and font).² Article XI of both Charter's and CenturyTel's proposed Agreements reflect the NID charges as *undisputed*. Similarly, Charter did not contest CenturyTel's actual NID charges in any issue set forth in its initial DPL filed on July 31, 2008 or in the parties' Joint DPL filed on September 2, 2008. Consequently, Mr. Gates' belated attempt in his rebuttal testimony to challenge the NID charge itself—as opposed to just its applicability in the scenario contemplated by Charter's Article VI, Sec. 3.5.1—is improper and should be stricken.

Despite Charter having already agreed to CenturyTel's NID charges, Charter's witness, Mr. Gates, spends six and half pages in his rebuttal testimony discussing not the *applicability* of the \$1.91 MRC NID charge, but rather the appropriateness of the *amount* of the NID charge itself and whether CenturyTel is entitled to recover its costs as reflected by the charge. The following are excerpts from select portions of Mr. Gates' rebuttal testimony, but such language is pervasive throughout the six and half pages:

² The NID rates, including the MRC identified above and certain non-recurring charges, also were set forth as undisputed in CenturyTel's proposed Agreement. *See* CenturyTel's Response, Exh. 2 at Article XI: Pricing, Sec. II ("UNE Pricing") (filed on August 25, 2008).

....

- A. CenturyTel proposes to charge Charter for accessing the NID, even though CenturyTel admits that its alleged costs are already recovered by other charges. (p. 7, lines 15-17).

....

- A. In Article XI: Pricing, Section XI [sic] of the Agreement CenturyTel proposes a monthly rate of \$1.91 for NID access. . . . [T]he \$1.91 monthly recurring charge (“MRC”) is clearly not based on CenturyTel’s cost. More than likely, CenturyTel has picked a small enough nominal amount *hoping that it wouldn’t be challenged by Charter* or reviewed by the Commission. (emphasis added) (p. 10, lines 14-21).

....

- Q. Does \$1.91 seem like a reasonable estimate for the actual monthly cost of providing NID access? (p. 10, lines 22-23).
- A. No, it does not (p. 11, line 1).

....

- Q. If we assume, for discussion purposes, that a rate is appropriate, would CenturyTel’s proposed rate be acceptable? (p. 11, lines 16-18).
- A. No. First of all, as noted above, if any rate is appropriate, it would not be a monthly recurring charge, it would be a nonrecurring charge. But even a casual approximation of the monthly recurring cost for the *entire* NID suggests that CenturyTel’s proposed charge is wildly inflated. . . . (emphasis in original) (p. 11, lines 19-22).

....

- A. CenturyTel therefore has no foundation for the NID charges its asks the Commission to approve. Indeed, CenturyTel has admitted that there is “no cost study or other support information” for its proposed NID charges. (p. 13, lines 9-12).

....

- A. CenturyTel’s proposal should be rejected because it results in additional revenues for which there is no cost support and because it harms the efficient operation of the market. (p. 13, line 22, to p. 14, line 2).

CenturyTel does, of course, have responses to refute each of Mr. Gates' assertions. But because Charter first raised its challenges to the NID charges in Mr. Gates' rebuttal testimony, Charter's improper tactics leave CenturyTel little opportunity to respond under the rules governing this proceeding. For example, Mr. Gates surmises that CenturyTel is "hoping that [the NID charge] wouldn't be challenged by Charter." In reality, Charter never did challenge the NID charges. Indeed, it agreed to them. Also by way of example, the reason why CenturyTel has not provided Charter "cost support" for the NID charges is because Charter never requested "cost support" during negotiations or at any time during this proceeding.

Indeed, Charter agreed in negotiations to the NID charges and their amounts reflected in Article XI: Pricing, Sec. II ("UNE Pricing"), as reflected in Charter's proposed Agreement. Thus, there was never a reason to provide cost support. More to the point, however, since Charter never disputed the amounts or bases of the NID charges in negotiations or in the Petition, CenturyTel did not offer direct testimony in support of such charges as the amount of the NID charges had never been identified as an "open issue" subject to arbitration. Neither Guy Miller, the CenturyTel witness that addressed Issues 2 and 24, nor any other CenturyTel witness addressed the NID charges in direct testimony because they were not previously identified by Charter as in dispute. *See* Miller Direct, pp. 6-18 (addressing Issues 2 and 24). Thus, Mr. Gates' testimony attacking the appropriateness and amount of the NID charges is outside the scope of any permissible rebuttal testimony, which provides another independent basis supporting the Motion and warranting entry by the Arbitrator of an order striking Mr. Gates' testimony on this "new" issue.

Charter's attempt now, through the use of Mr. Gates' *rebuttal* testimony, to place the amount of the NID charges in dispute is improper and prejudicial to CenturyTel. The only NID-

related issues set forth in the parties' pleadings and the Joint DPL are Issues 2 and 24. As set forth above, Issue 2 pertains to the proper definition of "NID." Issue 24, as framed by Charter, merely asks: "Should Charter have access to the customer side of the Network Interface Device ('NID') without having to compensate CenturyTel for such access?" Issue 24 clearly is limited to whether Charter's "use" of CenturyTel's NIDs—in the manner described in Charter's Article VI, Sec. 3.5.1—constitutes "use of the NID" such that Charter should compensate CenturyTel. In other words, the issue is whether the NID charge should apply, *not* what the NID charge should be. As set forth above and in Charter's proposed Agreement, the NID charge, if it applies, has already been agreed upon by the parties. Because Charter (1) accepted CenturyTel's NID charges in negotiations (*see* Article XI: Pricing, Sec. II ("UNE Pricing") of Charter's proposed Agreement), and (2) did not submit the reasonableness and/or amount of CenturyTel's NID charges as an "open issue" for arbitration in the Petition and associated DPL, Mr. Gates' rebuttal testimony on this issue (p. 7, line 15 to p. 14, line 2) must be stricken. Regardless, this Commission has no authority to determine whether CenturyTel's NID charges are appropriate or reasonable in amount since the issue was not among the "open issues" submitted by in Charter's petition or CenturyTel's response. *See* 47 U.S.C. § 252(b)(4).

B. Rebuttal Testimony of Amy Hankins Regarding OSS Monitoring and Auditing (6:23-7:7)

In her rebuttal testimony regarding Issue 28, Ms. A. Hankins identifies provisions related to the monitoring and auditing of a party's use of OSS systems purportedly found in interconnection agreements between Charter and other ILECs. After identifying specific language found in the agreement between Charter and AT&T Missouri, Ms. Hankins states: "Those are the types of limitations and controls that we believe are appropriate for the OSS

auditing language of the Charter and CenturyTel agreement.” (A. Hankins Rebuttal, 6:23-25).

Ms. A. Hankins’ rebuttal testimony continues as follows:

Q. Do any other Charter interconnection agreements include similar language?

A. Yes. In Attachment AH-1, I have provided excerpts from OSS language that Charter has agreed to, or opted into, in interconnection agreements with other ILECs such as Verizon and AT&T in [sic] number of different states. Although Charter disagrees with Mr. Miller’s assertion that language entered into with other carriers is somehow binding upon the Commission, Charter does believe that this language can be instructive to demonstrate what is current practice in the industry.

Q. Do you think Charter’s stated concerns with CenturyTel’s open-ended OSS audit provision would be lessened if the Commission were to adopt the type of limitations in the Charter-AT&T Missouri Agreement that you quoted?

A. Yes.

A. Hankins Rebuttal, 6:26-7:7.

Ms. A. Hankins’ rebuttal testimony, as quoted above, not-so-tacitly requests that the Commission *ignore* Charter’s proposed Agreement language for Issue 28 and resolve the issue by adopting language from the other interconnection agreements that she cites. While Charter lauds what it perceives as certain “limitations” in the AT&T Missouri OSS language regarding auditing the use of OSS, Charter failed to offer any such “limitations” language in negotiations and failed to proffer any such language to this Commission in the Joint DPL or the Charter proposed Agreement. *See* Joint DPL, Issue 28 (Article X, Sections 8.3.1, 8.3.2 and 8.3.3). Effectively, Charter’s proposed resolution of this issue—adopting language from other interconnection agreements—is disconnected from the language it did propose in negotiations to CenturyTel.

What Charter did propose in negotiations and in the Joint DPL is language that would: (1) remove CenturyTel's "right to audit Charter's" use of OSS to ascertain whether Charter is in compliance with the requirements of the Agreement (*compare* Charter's proposed Article X, Sec. 8.3.1 *with* CenturyTel's proposed Article X, Sec. 8.3.1); (2) permit CenturyTel to "monitor" Charter's access to and use of CenturyTel's OSS information "only upon Charter's consent" (*compare* Charter's proposed Article X, Sec. 8.3.2 *with* CenturyTel's proposed Article X, Sec. 8.3.2); and (3) prohibit CenturyTel from using information obtained pursuant to any audit or monitoring activities to protect CenturyTel's rights *unless Charter consents to such use* (*compare* Charter's proposed Article X, Sec. 8.3.3 *with* CenturyTel's proposed Article X, Sec. 8.3.3).

Given the unreasonableness of Charter's proposed language, it is not surprising that Charter attempts to abandon it now. However, it is axiomatic that good faith negotiations—such as required by 47 U.S.C. § 251(c)(1)—mandate that Charter not be permitted to advocate contract language in this arbitration when it has failed to propose that language to CenturyTel in negotiations. A key purpose of good faith negotiations is to permit the parties to present their proposed contract language to each other, negotiate it to resolution if possible, and narrow what is actually in dispute for Commission resolution. Charter's tactic here has frustrated this essential purpose. It has effectively abandoned its proffered contract language as set forth in its petition and the Joint DPL, and asked the Commission to fashion contract language relying on terms it never presented to CenturyTel. For the foregoing reasons, the Commission should strike the offending testimony in A. Hankins' Rebuttal from page 6, line 23 through page 7, line 7.

C. Testimonies of Timothy J. Gates Related to Negotiation Time Period Associated with Facility Rates (Issue 20)

Charter witness Mr. Gates, filed improper and impermissible direct and rebuttal testimony beyond the scope of the issues being arbitrated in this proceeding. Specifically, the offending passages are:

Gates Direct Testimony: Page 56, lines 5-25; and Page 58, line 2 to page 60, line 16;

Gates Rebuttal Testimony: Page 66, line 6 through page 68, line 11; Page 69, lines 2-4, 10-17, 21-22; Page 70, lines 5-8, 22-23; Page 71, line 5-8. (Page and line numbers are based upon proprietary version of such testimony.)

In these passages, Mr. Gates discusses costing theories that are not ripe for Commission review at this time. The sole dispute regarding Issue 20 is the amount of time that the Parties will have with respect to their efforts to develop mutually agreeable cost-based rates for inclusion within Article V, § 2.3.1. Charter's efforts to argue the merits of its costing theories and its ultimate request to have the Commission determine the costing methodology application for the lease of facilities under the Agreement (Gates Rebuttal Testimony, page 71, lines 5-8) is beyond the scope of the issue that is pending, and would have the effect of eliminating the opportunity of the parties to engage in bilateral negotiations to resolve any disagreement concerning the rate. This is contrary to the policies of the Act. Accordingly, the cited testimony should be stricken in its entirety.³

In addition, Mr. Gates provides for the first time in his rebuttal testimony, a discussion of the purported underlying reasons why Charter has proposed a ninety (90) day period of negotiation. *See* Gates Rebuttal Testimony, page 68, line 17 to page 69, line 2. Charter knew

³ In the filing of the Revised DPL, Charter improperly included language in its position on Issue 20. *Compare* Charter Petition, Charter DPL at 41-42 and Revised DPL at 77-80. *See*, CenturyTel Witness Watkins Rebuttal Testimony at 50.

full well that the length of time required for the parties' discussion regarding facility pricing was before the Commission in Issue 20. Charter provided no explanation in support of its position regarding the assertion in its direct testimony that ninety (90) days is an appropriate negotiation period. Charter merely offered a restatement that the ninety (90) day period is correct. *See* Gates Direct Testimony, page 59, lines 6-9. As a result, CenturyTel was not provided the opportunity for its witnesses to respond to Charter's positions stated for the first time in Mr. Gates' Rebuttal Testimony. Charter should not be rewarded for such questionable testimonial tactics. Mr. Gates' Rebuttal Testimony regarding the ninety (90) day position should be stricken in its entirety.

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: October 24, 2008

Respectfully submitted,

/s/ Larry W. Dority

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion was served by facsimile, hand-delivery, or electronic mail, on the 24th day of October, 2008, on the following:

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