

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

**CENTURYTEL OF MISSOURI, LLC’S RESPONSE IN OPPOSITION TO  
CHARTER FIBERLINK-MISSOURI, LLC’S MOTION TO STRIKE**

Dated: November 20, 2008.

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## **I. INTRODUCTION**

The Commission should reject Charter Fiberlink-Missouri, LLC's ("Charter") attempt to strike ("Motion to Strike") certain CenturyTel of Missouri, LLC ("CenturyTel") testimony and exhibits. This is an arbitration proceeding conducted pursuant to Commission Rule 4 CSR 240-36.040, which governs arbitrations under Sections 251 and 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act"). As discussed below, the Commission previously has determined that such arbitrations are fundamentally different than a contested administrative proceeding. Thus, the standards for admission of expert testimony in contested case administrative proceedings, as advocated by Charter<sup>1</sup>, are simply not applicable to this arbitration proceeding. In addition, under Section 386.410, RSMo. 2000, the Commission is not bound by technical rules of evidence in investigations, inquiry or hearing. Additionally, it should be noted that even if Charter's erroneous standard is applied, much of the opinions, exhibits, and testimony attacked by Charter are admissible.

## **II. PROCEDURAL HISTORY**

On July 9, 2008, CenturyTel provided Charter with cost studies supporting the non-recurring service order charges it proposes to incorporate into the parties' final interconnection agreement ("Agreement"). Charter filed its petition for arbitration of the Agreement on July 31, 2008, and CenturyTel filed its response on August 25, 2008. On September 17, 2008, the parties served responses to discovery requests upon one another. On September 30, 2008, after the initiation of this proceeding, each party filed and served written direct testimony on the open issues, and written rebuttal testimony was filed on October 21, 2008.

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<sup>1</sup> Charter asserts that Missouri Revised Statute 490.065 is applicable to this proceeding and precludes some offered evidence pursuant to *Peterson v. National Carriers*, 972 S.W. 2d 349 (1998). See Motion to Strike at p.2-3.

On October 24, 2008, Charter filed its Motion to Strike requesting that various schedules and related portions of direct and/or rebuttal testimony be struck from three witnesses, including:

1. Jeffrey W. Reynolds: Schedule JWR-1 Proprietary and related passages<sup>2</sup> from his Direct Testimony.
2. M. Scott Schultheis: “Proprietary Schedule MSS-2,” “Proprietary Schedule MSS-3,” and related passages<sup>3</sup> from his Rebuttal Testimony.
3. Guy E. Miller, III: “Attachment GEM Rebuttal-1” and related passages<sup>4</sup> from his Rebuttal Testimony.

Charter seeks to strike a CenturyTel cost study, pictures of damaged network interface devices (“NIDs”), and related testimony on the basis of hearsay and foundation.

Pursuant to the Arbitrator’s request during the hearing in this case, this response is filed to Charter’s Motion to Strike.

### **III. ARGUMENT**

#### **A. The Evidentiary Standards Advocated By Charter Are Not Applicable To This Arbitration Proceeding.**

1. **Section 490.065, RSMo. does not apply to an interconnection arbitration proceeding.**

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<sup>2</sup> See Motion to Strike for full list of passages from the Reynolds Direct Testimony that Charter seeks to strike.

<sup>3</sup> See Motion to Strike for full list of passages from the Schultheis Rebuttal Testimony that Charter seeks to strike.

<sup>4</sup> See Motion to Strike for full list of passages from the Miller Rebuttal Testimony that Charter seeks to strike.

Charter incorrectly contends that Section 490.065<sup>5</sup>, RSMo. applies to preclude the testimony provided by Jeffry W. Reynolds and M. Scott Schultheis. First, as noted above, the technical rules of evidence are not applicable to this proceeding. Moreover, under the text of Section 490.065, the statute applies only to civil actions. While it is certainly true that the Missouri Supreme Court has held that § 490.065 applies to “contested administrative proceedings,”<sup>6</sup> this arbitration proceeding is not a contested administrative proceeding, as seems to have been assumed by Charter in its Motion to Strike. Rather, arbitrations conducted pursuant to the Act are fundamentally different than a contested administrative proceeding. Indeed, as far back as 1997, in *In the Matter of AT&T Communications of the Southwest, Inc.’s Petition for Second Compulsory Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Southwestern Bell Telephone Company*, this Commission stated that it was “not restricted in its use of information as a basis for its decision as it would be in a contested case, because this is an arbitration proceeding.”<sup>7</sup> Subsequently, the Commission again stated that contested case procedures do not apply to such arbitrations, and a Missouri district court affirmed that position in *AT&T Communications of the*

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<sup>5</sup> 490.065 provides as follows:

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.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
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.
4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

<sup>6</sup> *State Board of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146,154-55 (Mo. 2003) (en banc).

<sup>7</sup> Case No. TO-98-115 (Report and Order) (Dec. 23, 1997).

*Southwest, Inc. v. Southwestern Bell Telephone Co.*<sup>8</sup> Additionally, since that 1999 decision, numerous arbitration scheduling orders covering proceedings conducted under the Act recognized that such arbitrations do not constitute contested case hearings within the meaning of Chapter 536, RSMo 2000. Further, in 2004, the Commission adopted 4 CSR 240-36 to address filings made pursuant to the Act and established a uniform set of rules to govern arbitrations.<sup>9</sup> As discussed below, Chapter 36 continues to recognize that the strict rules of evidence do not apply to interconnection arbitration proceedings conducted under 47 U.S.C. § 252.

## **2. The Commission is not bound by technical rules of evidence.**

Section 386.410, RSMo. 2000 provides that the Commission is not to be bound by the technical rules of evidence in any investigation, inquiry, or hearing. In short, this specific statute underscores the Commission's broad latitude in determining what evidence to receive in this proceeding. Particularly in regards to formulating its decisions to meet the requirements of Sections 251 and 252 of the Act, such broad latitude is appropriate. The arbitrator and his staff have expert knowledge that allows them to evaluate evidence that is presented under less stringent rules and requirements. Indeed, in accordance with the procedures authorized under Chapter 36, the members of the Arbitrator's Advisory Staff addressed numerous questions to various witnesses during the limited evidentiary hearing.

With respect to the evidence at issue in Charter's Motion to Strike there can be no question that the evidence is relevant and should be admitted. CenturyTel has proposed rates for certain local service requests and the cost study supports those rates. Therefore the cost study is relevant to this issue. Moreover, the study is being sponsored by individuals who are experts in

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<sup>8</sup> 86 F.Supp.2d 932, 957-58 (W.D. Mo. 1999), *reversed on other grounds by Southwestern Bell Telephone Co. v. Mo. P.S.C.*, 236 F.3d 922 (8th Cir. 2001) (stating "the Court will defer to the PSC's interpretation that contested case procedures do not apply to arbitrations conducted pursuant to the Telecommunications Act").

<sup>9</sup> These rules were adopted in Case TX-2003-0487.

their field. Although the cost study was prepared by CenturyTel, Mr. Schultheis' testimony establishes that he completely reviewed and investigated the cost study, and he believes it to be in compliance with the requirements for pricing in this proceeding.<sup>10</sup> Mr. Schultheis details how the study was prepared and why it is reliable.

This clearly was not a situation of a random witness giving testimony about something he or she did not have the training or experience to understand or evaluate. Rather, this is a situation of two experienced and trained professionals evaluating a cost study that was performed by CenturyTel and providing their opinions on that study. Additionally, Charter had ample opportunity to address the cost study, as Mr. Schultheis was available for cross-examination by Charter during the hearings that took place on October 28 and 29, 2008, and Charter witness Timothy Gates addressed the cost study in his rebuttal testimony.<sup>11</sup> Therefore, CenturyTel respectfully requests that the Arbitrator find and conclude that both the cost study and Messrs. Reynolds' and Schultheis' statements regarding that cost study are relevant and admissible.

The same conclusion should be made with regard to the pictures of the damaged NIDs included with Mr. Miller's testimony. Charter's contentions that such pictures should be excluded for lack of foundation and for being the product of hearsay should be flatly rejected. Mr. Miller is the Director – Carrier Relations, Strategy, and Policy for CenturyTel Service Group. It is his responsibility to evaluate, develop, and implement CenturyTel policies and positions governing interactions between the CenturyTel regulated telephone companies and competitive carriers such as Charter.<sup>12</sup> As a result of holding such a position, Mr. Miller necessarily must be kept informed of problems that arise between CenturyTel and such a

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<sup>10</sup> Schultheis Rebuttal Testimony (5:18-11:6 (describing study and methodology used to determine rates) and 11:7-14 (stating that the rates provided by CenturyTel should be used in the Agreement and were compliant with the costing methodology standards required by 47 U.S.C. § 251)).

<sup>11</sup> Gates Rebuttal Testimony (94:14-96:6).

<sup>12</sup> Miller Direct Testimony (1:11-19).

competitive carrier so that he can develop and enforce appropriate policies as circumstances required.

In the instant situation, Mr. Miller testified that (1) a Wisconsin affiliate of CenturyTel found Charter using the CenturyTel affiliate's NIDs without ordering or paying for such usage and (2) by such access and use, Charter damaged the NIDs and loop facilities such that the CenturyTel affiliate was required to replace such NIDs and drops.<sup>13</sup> Additionally, each photograph caption in Rebuttal Schedule GEM-1 identifies the date on which the photo was taken, states what the photograph shows, and makes clear that the address of where the NID at issue was located was available. This testimony lays more than adequate foundation for these photographs.

Mr. Miller holds a position with CenturyTel that would necessitate him gaining knowledge of a situation where CenturyTel equipment is being damaged and improperly utilized. Mr. Miller's testimony apprises Charter and the arbitrator of when the photographs were taken and what they show. The photographs' captions emphasize that customer addresses and phone numbers are available to either Charter or the arbitrator. Moreover, the photographs included in Rebuttal Schedule GEM-1 are clear and demonstrate issues regarding usage of the NID. CenturyTel respectfully requests that the Arbitrator find and conclude that the photographs are relevant and admissible.

**3. Chapter 36 of the Code of State Regulations make clear that strict rules of evidence are not applicable to interconnection arbitration proceedings.**

The rules prescribed for arbitration proceedings indicate that the evidence considered by an arbitrator need not comply with the strict rules of evidence. Under 4 CSR 240-36.040(3)(E), a petition for arbitration must contain "all relevant documentation that supports the petitioner's

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<sup>13</sup> *Id.* (12:10-13:7).



position on each unresolved issue.” Likewise, under 4 CSR 240-36.040(7), a respondent to such a petition must “provide such additional information and evidence necessary for the commission’s review” and identify “all relevant documentation that supports the respondent’s position on each issue identified in the response that remains unresolved.” Moreover, under 4 CSR 240-36.040(10), the arbitration is to consist only of “markup conferences” and “limited evidentiary hearings.”

As the above regulations make clear, the arbitrator in these proceedings is to consider all relevant evidence, and the arbitration is to consist only of limited evidentiary hearings. Within the established rules, there is no indication that an arbitrator must evaluate evidence according to the Federal Rules of Evidence, the Missouri Rules of Evidence, or any other rules of evidence. Rather, the standard to be applied here as a result of the above quoted sections is that the arbitrator is to consider “all relevant evidence.” This standard makes sense since the same rules reflect that there is a need for only “limited evidentiary hearings.”

**B. Even If Charter’s Erroneous Standard Is Accepted, The Testimony At Issue With Regard To The Cost Study Would Still Be Admissible.**

All of the evidence challenged by Charter’s motion should be admitted under the standards applicable to this proceeding. However, the testimony and exhibits challenged by Charter in connection with the cost study are clearly admissible even if the Commission were to apply Charter’s erroneous, stringent standards. Charter has erroneously sought to exclude the opinions of Mr. Reynolds and Mr. Schultheis regarding the rates proposed by CenturyTel. Both of these men are experts and Charter has not raised any issue as to whether the testimony may help the arbitrator or his staff to understand the evidence at issue. Thus, even Charter’s

erroneous asserted standard of Section 490.065(1) <sup>14</sup> is satisfied and all of their opinion testimony should be admitted.

The opinions and testimony that have been attacked by Charter and are admissible even under Charter's erroneous standard are as follows:

Reynolds Direct Testimony

***Page 3, lines 11-12:***

"I will also provide support for the NRC rates that CenturyTel has included in the Agreement."

***Page 12, lines 11-15:***

Q. Does this statement [that the Commission's decision . . . should be based on cost causation principles] presume that the rates proposed by CenturyTel are cost based?

A. Yes.

Q. Are CenturyTel's NRC rates cost based?

A. Yes. CenturyTel performed cost studies of its various non-recurring functions. The rates identified in the Agreement and the Joint DPL are cost based.

***Page 13, lines 2-3:*** "The charges are based on the costs associated with the function at issue and event-specific."

***Page 13, lines 4-7:***

Q. Could you please explain the basis for the NRCs that CenturyTel is proposing?

A. CenturyTel has utilized a forward-looking cost methodology that is compliant with the FCC's TELRIC process. The costs developed are those which are necessary to provide the requested services and functions for the foreseeable future.

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<sup>14</sup> *Mo. Rev. Stat.* § 490.065 provides, in pertinent 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.

Schultheis Rebuttal Testimony

**Page 4, lines 15-16:** “and contained in the NRC study provided to Charter?”

**Page 4, line 7:** ““and contained in the NRC study.”

**Page 5, lines 1-2:** “The charges are based on the non-recurring costs associated with the function at issue.”

**Page 5, lines 18-25 and Page 6, lines 1-8:**

Q. Could you please explain the basis for the NRCs that CenturyTel is proposing?

A. Recognizing that CLECs typically claim the need for rates to be based on something other than historical costs, CenturyTel was willing to use a forward-looking cost-based methodology in this proceeding to develop the NRCs applicable to Charter. Thus, the NRCs proposed by CenturyTel employ a forward-looking cost-based methodology to reflect the underlying costs for the foreseeable future. The requested NRCs are based on forward-looking costs, as compared to other costing methodologies used in the telecommunications industry, by virtue of the nature of the cost components of labor cost and CenturyTel’s back office systems being examined.

**Page 10, lines 12-13:** “along with the cost study and work papers you mentioned”

**Page 11, lines 10-14:**

Q. Are the rates provided in schedule MSS-2 compliant with the costing methodology standards applicable to the rates contained in an interconnection agreement as required by 47 U.S.C. § 251?

A. Yes.

**Page 11, lines 20-24:**

A. . . .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:**

A. . . . CenturyTel is undeniably allowed to recover these reasonable costs, and the rates reflect CenturyTel’s cost of completing Charter’s request.

All of the above statements are expert opinion or other testimony that is admissible under Charter's erroneous standard and should be admitted in this proceeding.

**C. The NID Photographs Are Properly Admitted Even Under Charter's Erroneous Standard Because Of The "Business Records" Exception To The Hearsay Rule.**

All of the evidence challenged by Charter's motion should be admitted under the standards applicable to this proceeding. However, the exhibit challenged by Charter in connection with the pictures showing the damaged NIDs is admissible even if the Commission were to apply Charter's erroneous standard.

Charter asserts that the three photographs contained in "Rebuttal Schedule GEM-1" to the Rebuttal Testimony of Guy E. Miller, III, and related testimony, should be stricken on the grounds that the photographs and testimony "are classic and inadmissible hearsay."<sup>15</sup> Charter also argues that foundation is lacking for the photographs because there is no evidence that Mr. Miller "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."<sup>16</sup> However, these contentions are incorrect and should be rejected.

As discussed above in Part III.A, these photographs constitute relevant evidence and they should be admitted on that ground. However, as an independent basis, these photographs also constitute a business record under Section 490.680 and are, therefore, excepted from the rule against hearsay.

In this case, Mr. Miller testified that he is CenturyTel's Director – Carrier Relations, Strategy, and Policy.<sup>17</sup> It is his responsibility to evaluate, develop, and implement CenturyTel policies and positions governing interactions between the CenturyTel regulated telephone

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<sup>15</sup> Charter Motion to Strike, at 8.

<sup>16</sup> *Id.* at 7.

<sup>17</sup> Miller Direct Testimony (1:12-13).

companies and competitive carriers such as Charter.<sup>18</sup> Moreover, Mr. Miller testified that (1) a Wisconsin affiliate of CenturyTel had “recently” discovered that Charter was using the CenturyTel affiliate’s NIDs without ordering or paying for such usage and (2) by such access and use, Charter damaged the NIDs and loop facilities such that the CenturyTel affiliate was required to replace such NIDs and drops.<sup>19</sup> Additionally, each photograph caption in Rebuttal Schedule GEM-1 identifies the date on which the photo was taken, states what the photograph shows, and makes clear that the address and phone number of the customer on whose property the NID at issue is located is available to Charter and the arbitrator if requested. From this testimony, it is clear that Mr. Miller is a qualified witness to testify to the photographs’ identity and method of preparation.

A reasonable inference from Mr. Miller’s testimony is that the “regular course of business” for CenturyTel would be for the Wisconsin affiliate to send a photograph to Mr. Miller, who is located in Louisiana, of the types of problems the CenturyTel affiliate had discovered. Indeed, common sense states that almost every business would take a photograph of equipment that it believed had been damaged and that an employee would give those pictures to those in positions of authority such as Mr. Miller. Additionally, Mr. Miller testified that these damaged NIDs were discovered as a result of CenturyTel winning back its customers.<sup>20</sup> Given the information in Mr. Miller’s testimony regarding the photographs, the nature of Mr. Miller’s position and the nature of this dispute as an arbitration proceeding, admission of the photographs as a business record is justified.

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<sup>18</sup> *Id.* at 1:11-19.

<sup>19</sup> Miller Rebuttal Testimony (12:10-13:7).

<sup>20</sup> Miller Rebuttal Testimony (12:10 – 13:7).

#### **IV. CONCLUSION**

For the reasons set forth herein, the Commission should deny Charter's Motion to Strike.

DATED: November 20, 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 Response in Opposition to Charter Fiberlink-Missouri, LLC's Motion to Strike was served by facsimile, hand-delivery, or electronic mail, on the 20<sup>th</sup> day of November, 2008, on the following:

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