

BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED³

JUN 02 2003

Missouri Public
Service Commission

KMC Telecom V, Inc.)
)
Complainant,)
) Case No. CC-2003-0455
v.)
)
CenturyTel of Missouri, LLC,)
)
Respondent.)

**CENTURYTEL OF MISSOURI, LLC'S
MOTION TO DISMISS, ANSWER AND AFFIRMATIVE DEFENSES**

COMES NOW CenturyTel of Missouri, LLC ("CenturyTel"), pursuant to Commission Rule 4 CSR 240-2.070, and respectfully submits its Motion to Dismiss, Answer and Affirmative Defenses to the Complaint and Amendment by Interlineation to Complaint filed in this matter by KMC Telecom V, Inc., on April 25 and April 30, 2003, respectively. The Notice of Complaint was issued by the Commission on May 1, 2003.

INTRODUCTION

In describing the "Nature of the Complaint," Complainant KMC Telecom V, Inc. ("KMC") alleges that the instant complaint is brought to compel CenturyTel to comply with the terms of a purported interconnection agreement existing between KMC and CenturyTel. KMC further claims that CenturyTel, by such alleged "non-compliance," also has failed to comply with the Report and Order of this Commission entered in Case No. TM-2002-232¹, as well as the stipulation and agreement approved in that matter. As

¹ Re *In the Matter of the Joint Application of GTE Midwest Incorporated, d/b/a Verizon Midwest, and CenturyTel of Missouri, LLC, for 1) Authority to Transfer and Acquire Part of Verizon Midwest's Franchise, Facilities or System Located in the State of Missouri; 2) for Issuance of Certificate of Service*

fully described below, KMC's claim that CenturyTel has refused to honor the terms of an interconnection agreement is misleading and is not supported by the facts. To the contrary, the facts demonstrate that there is no interconnection agreement in effect between the parties. While KMC had previously opted into an interconnection agreement between GTE Midwest Incorporated d/b/a Verizon Midwest ("Verizon") and U.S. Dial Tone ("U.S. Dial Tone Agreement"), that agreement had terminated on April 15, 2002, more than four months prior to CenturyTel acquiring the service territory of Verizon. Pursuant to the stipulation and agreement entered in Case No. TM-2002-232, CenturyTel agreed to negotiate in good faith new interconnection agreements with all CLECs who currently have interconnection agreements with Verizon and who desire to have interconnection with CenturyTel. Further, CenturyTel agreed to honor, to the extent technically feasible, the same rates, terms, and conditions of service in those existing agreements with Verizon for a one-year period. CenturyTel did not, however, stipulate that it would extend or reinstate interconnection agreements that expired prior to the acquisition. For this reason, CenturyTel maintains that KMC's interconnection agreement expired on April 15, 2002, as KMC was well aware, and CenturyTel had no obligation to extend the terms of that expired agreement.

Nevertheless, CenturyTel has been and continues to remain ready and willing to negotiate an effective agreement with KMC for local interconnection. It was not until April 17, 2003, however – one week prior to filing the instant formal complaint – that KMC actually submitted to CenturyTel a request for interconnection. In response to

Authority to CenturyTel of Missouri, LLC; 3) to Designate CenturyTel of Missouri, LLC, as Subject to Regulation as a Price Cap Company; and 4) to Designate CenturyTel of Missouri, LLC, as a Telecommunications Carrier Eligible to Receive Federal Universal Service Support, Case No. TM-2003-232, May 21, 2002.

KMC's request, CenturyTel immediately sent KMC its template agreement as a starting point for the negotiations, and also referred KMC to two other agreements KMC could opt into, which CenturyTel had concluded with other carriers. Although CenturyTel has not yet received a response from KMC, CenturyTel is committed to negotiating the terms of an agreement with KMC for local interconnection in accordance with Section 252(a) of the Act.

Further, the Commission should understand that in the past, KMC has attempted to order trunks under KMC's local interconnection agreement with CenturyTel's affiliate, Spectra Communications Group, LLC ("Spectra"), so traffic dialed in Mount Vernon can be terminated in Branson, which is located outside of the Mount Vernon local exchange and clearly not contemplated under the Spectra/KMC local interconnection agreement. CenturyTel of Missouri owns and operates the Branson switch and if KMC seeks to interconnect with a CenturyTel switch, it must do so pursuant to an agreement for local interconnection with CenturyTel – not Spectra. However, as noted above, it was not until April 17, 2003, that KMC finally submitted to CenturyTel a request for interconnection.

In summary, CenturyTel has fully complied with the Report and Order of the Commission issued in Case No. TM-2002-232 and the stipulation and agreement approved therein, and this Commission should reject KMC's allegations that CenturyTel has violated those provisions, state or federal law, or any purported interconnection agreement between the parties. CenturyTel remains open to entering into an interconnection agreement with KMC by negotiations or adoption, and will continue to work toward that resolution with KMC.

MOTION TO DISMISS

For its Motion to Dismiss, pursuant to Commission Rule 4 CSR 240-2.070(6), CenturyTel states:

1. Complainant KMC has failed to state a claim upon which relief may be granted, in that no interconnection agreement is in effect between the parties and, therefore, CenturyTel cannot be compelled to comply with its purported terms. As fully described herein, KMC's interconnection agreement with Verizon expired on April 15, 2002, over four months prior to CenturyTel's purchase of the subject exchanges. Accordingly, CenturyTel was under no obligation to extend the terms of that expired agreement.

2. Complainant KMC has failed to state a claim upon which relief may be granted, in that it requests this Commission to enter a judgment in its favor and against respondent "That CenturyTel shall be liable to Complainant KMC Telecom, pursuant to Section 392.470.1 RSMo, for just and reasonable compensation." As quoted by Complainant, Section 392.470.1, RSMo 2000, provides, *inter alia*, ". . . determining that any such company should provide just and reasonable compensation to one or more other certificated telecommunications companies operating in areas in which the compensating company is providing intrastate telecommunications service without commission authorization." (emphasis added). There is no allegation or basis to suggest that CenturyTel is providing intrastate telecommunications service without commission authorization, and KMC's claims should be summarily dismissed.

3. Complainant KMC has failed to state a claim upon which relief may be granted, in that CenturyTel has consistently complied with the terms and conditions of

the Stipulation and Agreement and the Commission's Report and Order entered in Case No. TM-2002-232. As fully set forth herein, the operative language of the Stipulation relating to Interconnection Agreements addresses existing agreements between Verizon and CLECs at the time of the closing of the transaction, and CenturyTel's responsibilities pursuant to the Stipulation extended to "carriers who currently have interconnection agreements with Verizon and who desire to interconnect with CenturyTel." (emphasis added). Complainant KMC did not have a current interconnection agreement with Verizon at the time of the closing of the transaction and, as a result, there was no obligation on CenturyTel, pursuant to the terms of the Stipulation or the Report and Order, to extend or reinstate such an interconnection agreement that had expired over four months prior to the time of the closing. Complainant KMC's claims regarding purported violations of the Stipulation and the Commission's Report and Order should be summarily dismissed.

4. Complainant KMC has failed to state a claim upon which relief may be granted, in that CenturyTel's acquisition of the franchise, facilities and/or systems of Verizon was authorized by this Commission pursuant to, and in conformance with, Section 392.300, RSMo 2000. Such sale was made in accordance with the Report and Order of the Commission authorizing the same, issued in Case No. TM-2002-232 on May 21, 2002, and CenturyTel has abided by the terms and conditions of both the Report and Order and the Stipulation approved therein. Complainant KMC's claims regarding purported violations of the terms and conditions of the Report and Order and Section 392.330, and its overreaching, extraordinary and outrageous requests that this

Commission determine the underlying transaction and CenturyTel's certificates of service authority to be void, should be summarily dismissed.

5. Complainant KMC has failed to state a claim upon which relief may be granted, in that CenturyTel and its officers, agents and employees have obeyed, observed and complied with every applicable order, direction or requirement made by the Commission under authority of Chapter 392, RSMo, and in conformance with Section 392.360, RSMo 2000. Complainant KMC's claims regarding purported violations of Section 392.360 and suggested penalties should be summarily dismissed.

For its Answer and Affirmative Defenses, pursuant to Commission Rule 4 CSR 240-2.070(8), CenturyTel states as follows:

ANSWER

NATURE OF THE COMPLAINT

CenturyTel denies all allegations contained in the narrative "Nature of the Complaint."

THE PARTIES

1. CenturyTel is without sufficient information or knowledge to admit or deny the allegations contained in paragraph 1 of the Complaint and therefore denies the same.

2. CenturyTel denies the allegations contained in paragraph 2 of the Complaint.

3. CenturyTel admits the allegations contained in paragraph 3, except for the allegation that CenturyTel also provides telecommunications services to end users in

competition with the Complainant KMC Telecom, as CenturyTel is without sufficient information or knowledge to admit or deny such allegation and therefore denies the same. By way of further answer, CenturyTel states that it is a Louisiana limited liability company.

4. CenturyTel admits that it has been contacted by Complainant and attorneys acting on its behalf, but denies the remaining allegations contained in paragraph 4 of the Complaint. Further answering, CenturyTel states that it has addressed, on numerous occasions, the issues and underlying facts surrounding this matter and has conveyed its position to Complainant.

MISSOURI STATUTES

5. CenturyTel states that the Missouri statute referenced in paragraph 5 of the Complaint speaks for itself, and therefore no response is required.

6. CenturyTel states that the Missouri statute referenced in paragraph 6 of the Complaint speaks for itself, and therefore no response is required.

7. CenturyTel states that the Missouri statute referenced in paragraph 7 of the Complaint speaks for itself, and therefore no response is required.

8. CenturyTel states that the Missouri statute referenced in paragraph 8 of the Complaint speaks for itself, and therefore no response is required.

9. CenturyTel states that the Missouri statute referenced in paragraph 9 of the Complaint speaks for itself, and therefore no response is required.

FEDERAL LAW

10. CenturyTel admits that it is a telecommunications carrier, and for further response states that Section 251(a) of the Act speaks for itself, and CenturyTel denies other allegations contained in paragraph 10 of the Complaint.

11. CenturyTel admits that it is an incumbent local exchange carrier, and for further response states that Section 251(c) of the Act speaks for itself, and CenturyTel denies other allegations contained in paragraph 11 of the Complaint.

12. CenturyTel states that the FCC Rule, 47 C.F.R. §51.305(a)(2), speaks for itself, and CenturyTel denies other allegations contained in paragraph 12 of the Complaint.

CONDITIONS OF APPROVAL OF THE SERVICE TERRITORY TRANSFER

13. CenturyTel states that the Joint Application, Stipulation and Agreement and Report and Order issued in Case No. TM-2002-232, referenced in paragraph 13 of the Complaint, speak for themselves.

14. CenturyTel states that the Stipulation and language from the Commission's Report and Order in Case No. TM-2002-232, referenced in paragraph 14 of the Complaint, speak for themselves. Further answering, CenturyTel states that the language quoted in paragraph 14 of the Complaint clearly addresses and contemplates actions and responsibilities relating to existing interconnection agreements with Verizon. As the facts demonstrate, KMC's interconnection agreement with Verizon expired on April 15, 2002, pursuant to the agreement's terms and with due written notice provided, said expiration occurring over four months prior to CenturyTel's purchase of the subject

exchanges. CenturyTel further states that it has fully complied with the terms of the Stipulation referenced in paragraph 14 of the Complaint.

15. CenturyTel states that the portion of the Commission's Report and Order referenced in paragraph 15 of the Complaint speaks for itself.

16. CenturyTel states that the portion of the Commission's Report and Order referenced in paragraph 16 of the Complaint speaks for itself.

17. CenturyTel states that the portion of the Commission's Report and Order referenced in paragraph 17 of the Complaint speaks for itself.

18. CenturyTel states that the portion of the Commission's Report and Order referenced in paragraph 18 of the Complaint speaks for itself.

19. CenturyTel states that the Stipulation and the Commission's Report and Order, referenced in paragraph 19 of the Complaint, speak for themselves.

20. CenturyTel states that the Stipulation, as referenced in paragraph 20 of the Complaint, speaks for itself. Further answering, CenturyTel denies that the referenced language is "of particular relevance here," as the language addresses CLECs "who currently have interconnection agreements with Verizon." As stated herein, *supra*, Paragraph 14, Complainant KMC's interconnection agreement with Verizon had previously terminated on April 15, 2002.

21. CenturyTel denies the allegations contained in paragraph 21 of the Complaint.

THE INTERCONNECTION AGREEMENT

22. CenturyTel admits that in 2001, Complainant KMC opted into an interconnection agreement between Verizon and U.S. Dial Tone ("U.S. Dial Tone

Agreement"). CenturyTel denies the remaining allegations contained in paragraph 22 of the Complaint, and specifically states that the interconnection agreement between Complainant KMC and Verizon terminated on April 15, 2002.

23. CenturyTel denies the allegations contained in paragraph 23 of the Complaint.

24. CenturyTel denies the allegations contained in paragraph 24 of the Complaint.

25. CenturyTel denies the allegations contained in paragraph 25 of the Complaint.

26. CenturyTel denies the allegations contained in paragraph 26 of the Complaint.

27. CenturyTel denies the allegations contained in paragraph 27 of the Complaint.

RESPONDENT'S FAILURE TO INTERCONNECT

28. CenturyTel denies the allegations contained in paragraph 28 of the Complaint.

29. CenturyTel denies the allegations contained in paragraph 29 of the Complaint.

30. CenturyTel denies the allegations contained in paragraph 30 of the Complaint.

KMC'S INABILITY TO PROVIDE SERVICE TO ITS CUSTOMERS

31. CenturyTel denies the allegations contained in paragraph 31 of the Complaint.

32. CenturyTel is without sufficient information or knowledge to admit or deny the allegations contained in the first sentence of paragraph 32, and therefore denies the same. CenturyTel denies the remaining allegations contained in paragraph 32 of the Complaint.

33. CenturyTel is without sufficient information or knowledge to admit or deny the allegations contained in paragraph 33 of the Complaint, and therefore denies the same.

34. CenturyTel states that the Stipulation referenced in paragraph 34 of the Complaint speaks for itself.

35. CenturyTel denies the allegations contained in paragraph 35 of the Complaint.

COUNT I

36. In response to paragraph 36, CenturyTel incorporates by reference all of its Answers to paragraphs 1 through 35 of the Complaint.

37. CenturyTel denies the allegations contained in paragraph 37 of the Complaint.

38. CenturyTel denies the allegations contained in paragraph 38 of the Complaint.

COUNT II

39. In response to paragraph 39, CenturyTel incorporates by reference all of its Answers to paragraphs 1 through 38 of the Complaint.

40. CenturyTel denies the allegations contained in paragraph 40 of the Complaint.

41. CenturyTel denies the allegations contained in paragraph 41 of the Complaint.

42. CenturyTel denies the allegations contained in paragraph 42 of the Complaint.

43. CenturyTel denies the allegations contained in paragraph 43 of the Complaint.

44. CenturyTel denies the allegations contained in paragraph 44 of the Complaint.

COUNT III

45. In response to paragraph 45, CenturyTel incorporates by reference all of its Answers to paragraphs 1 through 44 of the Complaint.

COUNT IV

46. In response to paragraph 46, CenturyTel incorporates by reference all of its Answers to paragraphs 1 through 45 of the Complaint.

COUNT V

47. In response to paragraph 47, CenturyTel incorporates by reference all of its Answers to paragraphs 1 through 46 of the Complaint.

48. CenturyTel states that the Report and Order referenced in paragraph 48 of the Complaint speaks for itself.

49. CenturyTel states that the Report and Order referenced in paragraph 49 of the Complaint speaks for itself.

50. To the extent that CenturyTel has neither specifically admitted nor denied any allegations contained in the Complaint, CenturyTel specifically denies those allegations.

AFFIRMATIVE DEFENSES

1. Complainant KMC has failed to state a claim upon which relief can be granted.

2. Complainant KMC's claims are barred by laches, waiver and estoppel. Since November 2002, CenturyTel has been ready and willing to negotiate an agreement with KMC for local interconnection and has repeatedly offered to do so, but KMC has refused to negotiate or even opt into other agreements which CenturyTel had concluded with other Missouri carriers.

3. The relief sought by Complainant is barred by the Commission's lack of authority to award money damages.

4. Complainant KMC's claims are barred by State and Federal law.

5. Complainant KMC is not entitled to any relief because it has "unclean hands" in that it obtained its purported "CenturyTel/KMC Agreement" (Exhibit 1 to the Complaint) by misrepresentation.

As stated previously, *supra*, in 2001, pursuant to Section 252(i) of the Act, KMC opted into an interconnection agreement between Verizon and U.S. Dial Tone ("U.S. Dial Tone Agreement"). On May 15, 2001, Verizon gave KMC 11 months' notice that, in accordance with the terms of the agreement, the U.S. Dial Tone Agreement would terminate on April 15, 2002, and thus the adoption made by KMC would terminate on

that date as well. KMC did not renew that agreement or negotiate an extension with Verizon. Consequently, pursuant to its terms, KMC's interconnection agreement expired prior to CenturyTel's acquisition of Verizon's Missouri service territory. As evidence that KMC knew its agreement with Verizon had expired, KMC provided Verizon notice on June 28, 2002 of its intent to opt into a new agreement, one that had been entered into by Verizon and Sprint. It would have made no sense for KMC to ask to opt into another carrier's agreement if KMC and Verizon already had an agreement in force at that time.

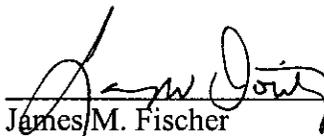
In response to KMC's June 28 notice of intent, Verizon representatives apparently informed KMC in July of 2002 that KMC should negotiate the terms of a new interconnection agreement directly with CenturyTel, in light of the impending acquisition, which closed on August 31, 2002². On October 24, 2002, CenturyTel, in good faith reliance on KMC's representation that it had an effective interconnection agreement with Verizon, agreed to extend KMC's interconnection agreement with Verizon until August 31, 2003, pursuant to the Stipulation that CenturyTel entered to honor Verizon's interconnection agreements that were effective on August 31, 2002. (Exhibit 1 to the Complaint). At the time that CenturyTel agreed to extend KMC's interconnection agreement, CenturyTel did not yet have all of the relevant Verizon interconnection agreement documentation in its possession. CenturyTel subsequently learned in November 2002 that, contrary to KMC's previous representations, its interconnection agreement with Verizon had terminated more than four months prior to CenturyTel acquiring the service territory. While it is true that CenturyTel stipulated that it would use, to the extent technically feasible, the same rates, terms, and conditions of

² KMC made no attempt, however, to contact CenturyTel between July and mid-October 2002 to negotiate the terms of an interconnection agreement for the acquired properties.

service as Verizon for a one-year period, CenturyTel did not stipulate that it would extend or reinstate interconnection agreements that expired prior to the acquisition. For this reason, CenturyTel maintains that KMC's interconnection agreement expired on April 15, 2002, as KMC was well aware, and that CenturyTel had no obligation or intent to extend the terms of the expired agreement.

WHEREFORE, having fully answered, CenturyTel of Missouri, LLC requests the Commission to enter an Order dismissing Complainant KMC Telecom V, Inc.'s Complaint.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by e-mail or mailed, First Class, postage prepaid, this 2nd day of June, 2003, to:

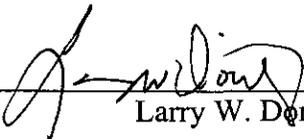
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