

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

Application of CenturyTel Solutions, LLC and	)	
CenturyTel Fiber Company II, LLC d/b/a LightCore,	)	
for Adoption of an Approved Interconnection	)	
Agreement between Southwestern Bell Telephone,	)	Case No. LK-2006-0095
SBC Missouri, LP, and Xspedius Management Co.	)	
of Kansas City, LLC and Xspedius Management Co.	)	
Switched Services, LLC.	)	

**REPLY OF CENTURYTEL APPLICANTS TO SBC MISSOURI’S RESPONSE TO
APPLICATION FOR ADOPTION OF INTERCONNECTION AGREEMENT**

Come now CenturyTel Solutions, LLC, and CenturyTel Fiber Company II, LLC, d/b/a LightCore, a CenturyTel company (collectively, the “Applicants” or “the CenturyTel Applicants”), by their undersigned attorneys, and in reply to Southwestern Bell Telephone, L.P., d/b/a SBC Missouri’s (“SBC Missouri”) September 12, 2005 Response to the Century Applicants’ Application for Adoption of Interconnection Agreement, state as follows:

1. SBC Missouri’s Response concedes that the CenturyTel Applicants timely executed and delivered to SBC Missouri on August 19, 2005 short form agreements (using SBC Missouri’s own posted document on its CLEC Online website) to elect a successor interconnection agreement. Furthermore, SBC Missouri does not dispute that the CenturyTel Applicants are entitled to adopt the Xspedius/SBC Missouri interconnection agreement, and, as required by law, to have the same interconnection agreement terms and conditions as found in the Xspedius agreement. *See*, Application at 4, ¶6; *see also*, 47 U.S.C. § 252(i); 47 C.F.R. § 51.809(a) (2004).

2. According to SBC Missouri, on August 22, 2005, after the August 19, 2005 deadline for CLECs to elect a successor agreement, “SBC Missouri provided to the CenturyTel Applicants a proposed amendment to its short form agreement, which ‘makes it clear that this

MFN is subject to the outcome of the appeal of the underlying agreement in the same manner as the parties to that arbitrated agreement.” SBC Missouri Response at 2, ¶2. SBC Missouri is only partially right. It is correct that The CenturyTel Applicants’ MFN is subject to the outcome of the appeal of any challenged arbitrated terms of the underlying Xspedius agreement. However it is incorrect that SBC Missouri’s proposed amendment to its short form agreement would make The CenturyTel Applicants subject to the outcome of the appeal “in the same manner as” Xspedius. To the contrary, by unilaterally rewriting the Intervening Law (“Change of Law”) terms of the Xspedius agreement, SBC’s proposed amendment would deny The CenturyTel Applicants the Xspedius agreement “upon the same terms and conditions as those provided in the [Xspedius] agreement,” in violation of SBC Missouri’s obligations under the law governing adoption of interconnection agreements. See, 47 U.S.C. § 252(i); 47 C.F.R. § 51.809(a).

SBC Missouri’s Preliminary Injunction Order

3. SBC Missouri relies on a September 1, 2005 Preliminary Injunction Order entered by the U.S. District Court for the Eastern District of Missouri, on SBC Missouri’s motion and by joint stipulation of some of the parties to the appeal (including the Commission and the CLEC Defendants) in SBC Missouri’s appeal of the arbitrated interconnection agreements. See, Preliminary Injunction Order, attached as Exhibit B to SBC Missouri’s Response. As SBC Missouri observes in its Response, the Preliminary Injunction Order is limited to enjoining the CLEC Defendants from requiring SBC Missouri “to fill new orders for unbundled switching or UNE-P...with respect to the CLEC Defendants *or any other telecommunications carrier that adopts one of the interconnection agreements that are the subject of this injunction.*” *Id.* at 2, ¶1 (emphasis added).

4. SBC Missouri makes CenturyTel's argument. The Preliminary Injunction Order applies to "*any other telecommunications carrier that adopts one of the interconnection agreements that are the subject of this injunction.*" (Emphasis added). Therefore, SBC Missouri has no reason or justification, and certainly has no legal right, to force The CenturyTel Applicants, or any other telecommunications carrier --at the close of a very expedited Commission ten (10) day window to review and elect a successor interconnection agreement-- to agree to diminished "Change in Law" terms that do not exist in the Xspedius interconnection agreement. By the very terms of the consensual Preliminary Injunction Order, SBC Missouri is excused from filling new orders for UNE-P services irrespective of the terms of the Xspedius/SBC Missouri interconnection agreement or any of the other subject arbitrated interconnection agreements approved by the Commission.

5. Therefore, SBC Missouri's argument that it "would be unlawful" to approve the CenturyTel Applicants' application because it might "require SBC Missouri to provide unbundled local switching or the UNE-P in contravention of the Preliminary Injunction Order" [SBC Response at 2, ¶2], simply ignores reality. As SBC Missouri well knows, the Preliminary Injunction Order, unless and until it is vacated, reversed, modified or stayed by a final decision on the merits of SBC's appeal, supersedes any conflicting terms of the Xspedius interconnection agreement and other arbitrated interconnection agreements that are a subject of the appeal, as well as any of the agreements adopted by other telecommunications carriers.

**SBC Missouri's Obligations Under The Telecommunications Act of 1996 To Make
Interconnection Agreements Approved By This Commission Available to Other
Telecommunications Carriers on the "Same Terms and Conditions."**

6. SBC Missouri argues after the Preliminary Injunction Order that it would be wrong to "give greater rights to the CenturyTel Applicants" than to Xspedius in the underlying agreement. *Id.* at 2-3. SBC Missouri confuses what and whose obligations are at issue here. It

is an incumbent LEC's obligation to comply with MFN requests as required by law. It is wrong for SBC Missouri to deny a telecommunications carrier's request to adopt a state commission-approved interconnection agreement under 47 U.S.C. Sec. 252(i) "upon the same terms and conditions" of the approved agreement. In any event, there is absolutely no question of the CenturyTel Applicants having greater rights than Xspedius. The Preliminary Injunction Order which SBC Missouri has itself filed confirms the absence of any greater rights for an adopting party over that of the underlying arbitrating party. The terms of that Order apply equally to Xspedius and to The CenturyTel Applicants. Furthermore, the CenturyTel Applicants have represented on the record in this proceeding that they seek no greater rights than Xspedius.¹

7. In stark contrast, SBC Missouri's objectionable amended "Clarification" language in its short form agreement would eviscerate any rights The CenturyTel Applicants have to renegotiate in good faith with SBC Missouri portions of the interconnection agreement that may be affected by a "Change in Law." This is an integral part of the General Terms and Conditions of the Xspedius interconnection agreement, as well as of the interconnection agreements of other CLECs with arbitrated interconnection agreements. In the event of any "Change in Law" as a result of SBC Missouri's federal district court appeal of any of the Commission's rulings in Case No. 4:05-cv-01264-CAS,² either party may seek on written notice to "renegotiate the affected provisions in this Agreement in good faith and amend this Agreement to reflect such Change in Law."³ What SBC Missouri fails to mention is that if the CenturyTel Applicants had agreed to

¹ "The CenturyTel Applicants emphasize that they are not seeking any terms other than those of the Xspedius agreement and its Intervening Law provisions." Application at 6, ¶10.

² Other than the UNE Platform access addressed by the Preliminary Injunction Order, the rulings challenged by SBC are numerous and varied, covering some fifteen (15) areas of the Commission's rulings. See, *Southwestern Bell Telephone, L.P. d/b/a SBC Missouri v. The Missouri Public Service Commission*, Case No. 4:05-cv-01264-CAS (E.D. Mo.), Complaint, Count Two ("Additional Violations of the 1996 Act and the FCC's Binding Regulations, and Arbitrary and Capricious Decision-Making"), at 13-15, ¶50, subsections a. - o.

³ Xspedius/SBC Missouri Interconnection Agreement, Sec. 23.1, Case No. TK-2006-0043.

SBC Missouri's demand to execute its revised August 22, 2005 version of the SBC Missouri short form, the CenturyTel Applicants would not enjoy the same interconnection terms and conditions as Xspedius, with SBC Missouri being excused from any contractual obligation --in connection with its pending appeal on the merits of its legal claims-- to negotiate good faith amendments to affected provisions of the interconnection agreement triggered by Changes in Law. The results of SBC Missouri's appeal on the merits (particularly on the merits of its other points on appeal under Count 2 of its Complaint) will likely not be as clear and immediate in their effect upon the interconnection agreement as were the terms of the Preliminary Injunction Order on the sole issue of future UNE-P orders. Furthermore, if the Commission is not affirmed in its rulings on the merits of SBC Missouri's appeal, then conforming amendments to the interconnection agreement would need to be negotiated by the CLEC Defendants and by telecommunications carriers adopting those agreements. SBC Missouri's proposed short form language could lead to harsh, draconian, and uneven results by giving SBC Missouri a completely free hand to "immediately invalidat[e], modif[y], or stay..." affected provisions of the interconnection agreements of adopting CLECs according to SBC's unilateral interpretation of any Change in Law, without the required check of good faith negotiation of a conforming amendment that is subject to Commission review and approval. The CLEC Defendants such as Xspedius enjoy such Intervening Law protections, and any telecommunications carrier adopting the Xspedius or other CLEC Defendant interconnection agreement is equally entitled by law to the receive these same contractual terms and conditions. In fact, this provision provides a benefit to SBC Missouri should any Change in Law that benefits CLECs.⁴

⁴ Indeed, it is The CenturyTel Applicants' understanding that the Intervening Law provision was not an arbitrated term of any of the CLEC Coalition interconnection agreements, but was negotiated language agreed to by SBC Missouri. Neither has the Intervening Law provision been challenged by SBC Missouri in its pending appeal.

8. Contrary to SBC Missouri's argument, its twelfth hour attempt to modify the terms of a Commission-approved interconnection agreement being adopted by a telecommunications carrier, in the context of a short form process intended to streamline, simplify and expedite the MFN process, is a violation of Section 252(i) of the Telecommunications Act of 1996 and of FCC Rules implementing Section 252(i). By insisting that adopting telecommunications carriers consent to SBC Missouri language that would invalidate the Intervening Law provisions of underlying interconnection agreements requiring good faith negotiation of conforming amendments upon any Change of Law (and by limiting the amendment only to the results of SBC Missouri's appeal in the Eastern District of Missouri), SBC Missouri's actions violate Section 252(i) of the Telecommunications Act of 1996 and FCC Rules governing the adoption of interconnection agreements. 47 U.S.C. § 51.809 ("**Availability of agreements to other telecommunications carriers under section 252(i) of the Act**") of the FCC's Rules, as revised by the FCC in July, 2004 following an FCC rulemaking on the pick-and-choose rule, provides:

An incumbent LEC shall make available *without unreasonable delay* to any requesting telecommunications carrier any agreement *in its entirety* to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, *upon the same rates, terms, and conditions as those provided in the agreement.*⁵

The objectionable SBC-Missouri language in its August 22, 2005 revised short form agreement, by seeking to amend the terms and conditions of the Intervening Law provision of the Xspedius and other CLEC Coalition interconnection agreements and attempting to eliminate SBC Missouri's obligation to negotiate in good faith any amendments to conform to a Change in Law as a result of SBC Missouri's pending appeal of the Commission's arbitration rulings, is a

⁵ 47 C.F.R. §51.809(a) (2004). (Emphasis added).

violation of Section 252(i) and the FCC Rules governing Sec. 252(i) adoptions of Commission-approved interconnection agreements.⁶

Wherefore, the CenturyTel Applicants requests that the Commission grant The CenturyTel Applicants' application for approval of the adoption of the SBC Missouri - Xspedius interconnection agreement by the CenturyTel Applicants, without any of the improper conditions demanded by SBC Missouri.

Respectfully submitted,

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COMPANY

⁶ Nor does SBC Missouri's reliance on the fact that other telecommunications carriers have consented to SBC Missouri's unlawful and improper restrictions on the adoption of Commission-approved interconnection agreements excuse its failure to comply with established rules governing the adoption of Commission-approved interconnection agreements. *See*, SBC Response at 3-4, ¶5. Other entities may have acceded to SBC Missouri's demands, perhaps reluctantly doing so in many cases out of grave concern about the consequences of not agreeing to SBC Missouri's revised twelfth hour language. However the 1996 Act and the FCC rules governing the adoption of interconnection agreements require SBC Missouri to make MFN adoptions of state commission-approved agreements available "upon the same terms and conditions," a standard which it has clearly not met in this case.

CERTIFICATE OF SERVICE

I hereby certify that a true and final copy of the foregoing was served this 21st day of September, 2005, by electronic mail on the following:

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