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

CHARTER FIBERLINK-MISSOURI, LLC'S RESPONSE TO CENTURYTEL OF MISSOURI, LLC'S MOTION TO STRIKE WRITTEN TESTIMONY OF CHARTER FIBERLINK OF MISSOURI, LLC'S WITNESSES

Pursuant to Missouri Public Service Commission ("Commission") Rule 4 CSR 240-2.130(3) and Judge Pridgin's ruling from the bench on October 28, 2008 during the hearing in the above-captioned matter,[1] Charter Fiberlink-Missouri, LLC ("Charter") hereby files its "Response to CenturyTel of Missouri, LLC's Motion to Strike Written Testimony of Charter Fiberlink of Missouri, LLC's Witnesses" ("Motion to Strike").

INTRODUCTION

On October 24, 2008 CenturyTel of Missouri, LLC ("CenturyTel") filed its Motion to Strike portions of the direct and rebuttal testimonies of Timothy J. Gates and Patti J. Lewis.[2] CenturyTel challenges Mr. Gates' rebuttal testimony under Issues 2 and 24 concerning CenturyTel's proposed Network Interface Device rate level, which CenturyTel alleges is not at issue in this proceeding. Next, CenturyTel challenges the rebuttal testimony of Ms. Lewis under Issue 28 concerning OSS monitoring and auditing, which CenturyTel claims ask the Commission to ignore Charter's proposed Agreement language. Finally, CenturyTel challenges Mr. Gates'

[1] Ruling of Judge Pridgin, Tr. at 30.

[2] Ms. Lewis has been substituted for Amy Hankins in this matter. Although CenturyTel's Motion to Strike names Peggy Giaminetti in the Table of Contents, it appears that CenturyTel meant to identify Ms. Hankins instead. Reserving all rights, Charter will respond to the text of CenturyTel's Motion to Strike which identifies Ms. Hankins (and thus now, Ms. Lewis).

direct and rebuttal testimonies under Issue 20 regarding interconnection costing methodologies, which CenturyTel argues goes beyond the scope of Issue 20.

None of CenturyTel's claims have merit, and the Commission should reject the company's Motion to Strike in its entirety.

DISCUSSION

A. Mr. Gates' Rebuttal Testimony Regarding CenturyTel's NID Rate Level is within the Scope of Issues 2 and 24.

The essence of CenturyTel's objection to Mr. Gates' rebuttal testimony questioning CenturyTel's proposed NID rate level is that "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."[3] CenturyTel's statement is wrong as a matter of fact and conclusion of law.

1. Charter Has Not Accepted CenturyTel's NID Rate Level.

CenturyTel's challenge to Mr. Gates' rebuttal testimony regarding the unreasonableness of CenturyTel's NID rate rests on a factual non sequitur: Since Charter opposed the imposition of *any* NID charge, Charter has accepted a particular NID rate *level*. CenturyTel's argument amounts to what one federal court called an unconvincing "subtle abstraction," as further discussed below. That is, if a party to interconnection negotiations raises a rate *application* issue, the party is not also raising a rate *level* issue. It is self evident from the facts in this matter that, in opposing *any* NID rate level, Charter opposes a *particular* rate level, such as the $1.91 proposed by CenturyTel.

A cardinal rule of contract interpretation is to ascertain the parties' intent.[4] The DPL confirms that Charter and CenturyTel failed to agree on the entire concept of NID compensation.

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[3] CenturyTel Motion to Strike at 2.

[4] *CenturyTel of Missouri, LLC v. Socket Telecom, LLC*, 2008 WL 4286648 (Mo. P.S.C. 2008) (citing *Vincent v. Schneider*, 194 S.W.3d 853, 859 (Mo. Banc 2006).

There simply was no meeting of the minds on any NID compensation issue. Given this divide, Charter's silence on a particular NID rate cannot be construed as any form of acceptance of that particular proposed NID rate.[5]

Charter's proposed language makes clear that it believes, under federal law, it is never obligated to compensate CenturyTel for the type of access Charter seeks. By contrast, CenturyTel's language makes clear that it expects to receive both an initial service order charge and recurring monthly revenue from Charter for "use" of the NID.[6] In this circumstance, the Parties obviously have failed to agree as to compensation, and thus Charter has not agreed to either the service order charge,[7] or the NID charge, or the NID rate, whatever its level. Thus, under the Telecommunications Act, it is the Commission's role to determine what rate *level*, if any, is appropriate for NID access.

Federal jurisprudence favors Charter's interpretation here. In *TCG v. PSC of Wisconsin*[8] the United State District Court for the Western District of Wisconsin rejected a similar argument to the one CenturyTel advances in its Motion to Strike. There on appeal from a Wisconsin PSC arbitration award petitioner TCG argued that because respondent Ameritech failed to dispute the character of TCG's switch (end office versus tandem), and because TCG characterized its switch as a tandem, the Wisconsin PSC could not have established anything other than a tandem switching rate *level* for TCG. That is, TCG argued that Ameritech had raised only the rate *application* issue, not the rate *level* issue. The federal court upheld the Wisconsin PSC's determination that it could address both the rate *application* and rate *level*. The court concluded

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5 *See, generally, Pride v. Lewis*, 179 S.W. 375 (Mo.App. W.D. 2005).

6 DPL at 89-90, CenturyTel proposed Section 3.5.1.

7 Charter separately opposes imposition of the service order charge when the company accesses a CenturyTel NID, for the simple reason that there is no service order activity to justify such a charge. Charter's opposition is memorialized in its Proposed Order filed on November 20, 2008 at Issues 27 and 40.

8 980 F.Supp. 992 (1997).

that TCG's argument depended on a "subtle abstraction" not supported by the Telecommunications Act:

> Although state commissions are limited to deciding issues set forth by the parties, competing provisions require them to resolve fundamental elements necessary to make an interconnection agreement a working document. For example, under the act's arbitration and pricing standards, state commissions "shall" establish rates for interconnection. 47 U.S.C. § 252(c). Thus, state commissions are accorded considerable latitude to resolve issues within the compass of the pricing and arbitration standards, even if these matters are not specifically identified by parties as open issues in their petitions for arbitration. An issue as broad and important to an interconnection agreement as what parties will charge one another necessarily will include sub-issues that must be addressed by the arbitration panel in order to decide the larger matter. This is a common sense notion. That state commissions possess wider discretion under the act to determine rates for interconnection-related services reflects an understanding that parties are least likely to resolve this issue without third-party assistance, that compulsory arbitration is reserved primarily for this purpose, and that the considerable public and private resources invested in arbitrating agreement provisions would be squandered if compensation-related issues were left unresolved.[9]

Similarly, in *BellSouth Telecomms., Inc. v. Cinergy Communs. Co.*,[10] the United States District Court for the Eastern District of Kentucky found no violation of Section 252(b) when the Kentucky PSC decided an matter "directly related" to an open issue, but not specifically identified in a petition for arbitration. In that case respondent BellSouth claimed that petitioner Cinergy had failed to raise BellSouth's obligation to continue to provide DSL service over UNE-P lines. Cinergy responded that the Telecommunications Act does not require precise pleadings and, once an issue is open, the PSC has the discretion to review related issues. The PSC determined that the DSL issue was "directly related" to a line-splitting issue that Cinergy raised in its original petition, and that both Parties had addressed this issue at later points in the

[9] *Id.* at 1000.
[10] 297 F. Supp. 2d 946 (2003).

proceeding. Therefore, the PSC determined that the issue of DSL over UNE-P was properly before the Commission. The federal court agreed and found no violation of Section 252(b).[11]

Finally, in *Universal Telecom, Inc. v. The Oregon Public Utility Commission*,[12] the federal court found that the Oregon PUC was entitled to reach the permissibility of offering the VNXX services that Universal was providing, even though neither Universal (a CLEC) nor Qwest (an ILEC) had raised that question in the arbitration petition or response thereto. (The parties had limited their pleadings to what intercarrier compensation rate, if any, should apply to VNXX traffic directed to ISPs.) The court found that the Oregon PUC properly reached the issue of the legality of VNXX services in the course of considering two issues identified by Universal in its response to the petition for arbitration: whether Universal must pay for facilities on Qwest's side of the POI, and whether each party shall receive reciprocal compensation on all traffic.[13] The court reasoned that a state commission can always reach an issue in arbitration that relates to the lawfulness of a service.

The facts and these federal court decisions demonstrate that CenturyTel's "subtle abstraction" is incorrect as a matter of fact and conclusion law. Charter never accepted CenturyTel's proposed rate level. Further, if a party raises a rate *application* issue in interconnection negotiations, it is also raising a rate *level* issue. Finally, to the extent that a party raises rate *application*, rate *level* – because it is "directly related" – is also before the state commission as an open issue. For all these reasons, the Commission must reject CenturyTel's Motion to Strike Mr. Gates' rebuttal testimony.

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11 *Id.* at 953.

12 Civ. No. 06-6222-HO (U.S. Dist. Ct. for the Dist. of Or.) (hereinafter *Universal*).

13 Order at 6 (Nov. 15, 2007).

2. CenturyTel Has An Independent Affirmative Duty to Prove Its NID Rate Level Comports with TELRIC Methodology.

NID access is a required unbundled network element ("UNE") under federal law.[14] "An incumbent LEC must establish a price for the network interface device when that unbundled network element is purchased on a stand-alone basis pursuant to Sec. 51.319(c)."[15] Pursuant to Federal Communications Commission rule 51.505(e), CenturyTel *must prove* to the Commission that its proposed rate for NID access does not exceed the forward-looking economic cost per unit of providing the element, using a TELRIC cost study:

> An incumbent LEC *must prove* to the state commission that the rates for each element it offers do not exceed the forward-looking economic cost per unit of providing the element, *using a cost study that complies with the methodology set forth in this section and Sec. 51.511*.[16]

CenturyTel's counsel stated at hearing the company has not conducted a cost study to support its proposed NID rate,[17] which by necessity means that the proposed NID rate is not based on a TELRIC cost study. Instead, CenturyTel witness Miller characterized the rate as an "interconnection agreement rate."[18] Mr. Miller further testified that, while CenturyTel's recurring NID costs "may have been studied," he has no knowledge of the specifics of such an examination.[19] Indeed, Mr. Miller, CenturyTel's only witness regarding NIDs, does not know the company's recurring NID cost.[20]

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14 47 C.F.R. § 51.319(c).
15 47 C.F.R. § 51.509(h).
16 47 C.F.R. § 51.505(e) (emphasis added).
17 Tr. at 538. *See also* Gates Rebuttal at Schedule TJG-4, Charter's Request 12 ("No cost study or other support information was provided because the parties have agreed on the amount of the NID use charges.")
18 Tr. at 584.
19 Tr. at 527.
20 *Id.*

These statements by CenturyTel counsel and witness show irrefutably that CenturyTel is in violation of 47 C.F.R. § 51.505(e). CenturyTel has proffered a NID access rate that, by the company's repeated admissions, does not comply with federal law. Charter maintains the opportunity after the submission of its petition to challenge or test CenturyTel's assertion that the NID rate comports with TELRIC, to examine and challenge the required cost study demonstrating TELRIC compliance, and even where as here Charter might not seek or use that NID UNE. Charter did successfully challenge the NID rate in discovery and at hearing, as CenturyTel's admissions show. Charter does not forfeit its right to challenge a proposed UNE rate because, *arguendo*, it did not specifically oppose that UNE rate in the petition or materials associated therewith. Indeed, it is nonsensical to require a CLEC to oppose a proffered UNE rate prior to discovery, testimony and cross examination, for the CLEC (and the Commission) will not have full knowledge of the ILEC's claimed costs until the proceeding matures.

Since CenturyTel's NID rate is not based on TELRIC, as Charter has shown, the Commission is legally required to reject it, irrespective of whether Charter opposes the rate (as the facts show Charter has done in any event). This is not the case of the ILEC proposing a rate for a service or facility other than a UNE, which the CLEC or a commission might accept independent of UNE costing and pricing principles. The price of NID access must be calculated according to TELRIC principles. Charter maintains its right throughout the arbitration to challenge any UNE rate, including a NID access rate, under 47 C.F.R. §§ 51.319(c), 505(e) and 509(h). CenturyTel concedes that its proposed NID rate does not comport with federal law. For these reasons, too, the Commission must reject CenturyTel's Motion to Strike.

B. Ms. Lewis' Testimony Regarding OSS Monitoring and Auditing is within the Scope of Issue 28.

CenturyTel accuses Ms. Lewis of attempting to "abandon" Charter's proposed language regarding limitations on CenturyTel's opportunity to audit and monitor Charter's use of CenturyTel Operational Support System by virtue of her rebuttal testimony identifying other interconnection agreements containing OSS limitations.[21] For at least two reasons, CenturyTel's Motion to Strike in this regard should be rejected. First, it is evident from the face of Ms. Lewis' testimony that she is not "ignoring" or "abandoning" Charter's proposed contract language. It is instructive to recall the chronology of events here. CenturyTel proposed new language for Sections 8.3.1 and 8.3.2 which would give CenturyTel the unilateral right to "audit" and "monitor" Charter's use of CenturyTel's OSS.[22] Charter asked for definitions of the terms "audit" and "monitor," which CenturyTel refused to supply, which refusal led directly to the following Charter statement in the DPL:

> CenturyTel has refused to define how it would propose to "monitor" Charter. Nor has CenturyTel explained precisely what would be required of any audit of Charter's use of the OSS. For these reasons, Charter will only agree to CenturyTel's monitoring and auditing proposals if such action is conditioned upon mutual consent. Because CenturyTel has failed to provide a sufficient explanation of its intent with respect to monitoring and audits, the Commission should reject its proposals.[23]

As Ms. Lewis testified at hearing:

> We don't have an issue with them monitoring the use of the system, but the way the language is in the current -- proposed language, actually specify when, how, what, any kind of parameters around what that actually means. So we don't understand what that means to our business.[24]

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21 CenturyTel Motion to Strike at 8, 9.
22 DPL at 97.
23 DPL at 97-98.
24 Lewis, Tr. at 202, lines 13-18.

CenturyTel has consistently avoided answering exactly what an audit would entail. Indeed, at hearing during Mr. Miller's appearance on the stand, the following colloquy took place:

> Q. (Mr. Van Eschen) In regards to Issue No. 28, what will CenturyTel's audit entail if they want to monitor and audit Charter's use of the OSS system?
>
> A. (Mr. Miller) Mr. Van Eschen, I can only say that that's kind of an individual case basis question.[25]

Absent definitions of the terms "audit" and "monitor," Charter opposes CenturyTel's unilateral and unlimited right to audit and monitor Charter's use of OSS,[26] and Ms. Lewis' rebuttal testimony does not state or imply otherwise. It is specious and misleading for CenturyTel to allege that Ms. Lewis departs in any way from Charter's long-held position on OSS auditing and monitoring.

To CenturyTel's criticism of the inclusion of non-Missouri contract language, the facts are again clear that Ms. Lewis did so for illustrative purposes, not to change Charter's position. In her rebuttal testimony, responding specifically to Mr. Miller's assertion that a Charter/AT&T contract constitutes "existing precedent" for OSS auditing issues, Ms. Lewis testified that it is appropriate to examine that Charter/AT&T interconnection agreement for examples of limitations on the ILEC's right to audit or monitor OSS use.[27] (The Parties are in agreement that the Commission shall take official notice of the Charter/AT&T contract agreement.[28]) Next, and following directly on that testimony, Ms. Lewis supplied other examples of non-Missouri contracts to which Charter is a party and which address limitations on OSS monitoring.[29] Ms. Lewis specifically qualified the use of such language in this case:

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[25] Miller, Tr. at 609, lines 13-15. Mr. Miller went on to identify the concern that Charter not violate 47 U.S.C. § 222. *Id.* at 609-610. As Ms. Lewis pointed out in her rebuttal testimony, Charter separately agreed to Section 8.4 of Article X of the Interconnection Agreement, which governs Section 222 issues.

[26] DPL at 97-98.

[27] Lewis Rebuttal at 5, lines 15-19.

[28] Statement of Mr. Dority, Tr. at 24, lines 17-19.

[29] Lewis Rebuttal at 6, lines 29-31.

> 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*.[30]

Thus, Ms. Lewis' rebuttal testimony on Issue 28 concluded that Charter's stated concerns (*i.e.*, the lack of definitions for "audit" and "monitor") would be satisfied if language from the Charter/AT&T contract were included in a Charter/CenturyTel contract.[31]

It is inconceivable that anyone reviewing the history of negotiations between the Parties and the exchange of written testimonies could conclude that Ms. Lewis was attempting to "abandon" Charter's original position. That position remains the same today as the day the DPL was filed: If CenturyTel will not define "audit" or "monitor" in connection with OSS use, Charter opposes CenturyTel's unilateral ability to review Charter's OSS use. CenturyTel's Motion to Strike is unsupported by the very Charter testimony CenturyTel cites, and the Commission should reject CenturyTel's attempt to excise testimony clearly within the scope of rebuttal and Issue 28.

C. Mr. Gates' Testimonies are within the Scope of Issue 20.

In attempting to strike portions of Mr. Gates' direct and rebuttal testimonies regarding Issue 20 ("Should Charter be entitled to lease interconnection facilities from CenturyTel at cost-based rates pursuant to Section 251(c)(2) of the Act?"), CenturyTel alleges that "[t]he 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."[32] CenturyTel's limiting characterization of Issue 20 is reminiscent of the company's unilateral,

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30 *Id.*, lines 31-34.
31 *Id.* at 7, lines 1-7.
32 CenturyTel Motion to Strike at 10.

unsupported rejection of legitimate billing disputes recently criticized by the Commission.[33] Here is the statement Charter included in the DPL with respect to Issue 20: "The Parties clearly disagree as to the scope of unresolved issues."[34] Thus, the entire premise of CenturyTel's Motion to Strike here is false. The Parties disagree as to the scope of Issue 20, and despite its attempt to arrogate the language of Issue 20, CenturyTel is not entitled to dismiss Charter's characterization of that (or any) issue. Further, the Commission has not decided that Issue 20 should be characterized or limited in the manner proposed by CenturyTel. Thus, it is premature, at best, for CenturyTel to maintain that Mr. Gates' testimonies are beyond the scope of Issue 20. Mr. Gates' testimonies are clearly *within* the scope of Issue 20 as characterized by Charter, as described in the DPL.[35]

This issue is broader than as described by CenturyTel in its Motion. A brief review of the Parties' pleadings, and their respective statements in the record, reveals that the disputes involve several different questions, including whether TELRIC is the appropriate pricing standard to be applied to the facilities in question.[36] Notably, in its position statement CenturyTel objects to the assertions made by Charter that the TELRIC rate is the proper rate for such facilities. Moreover, during the hearing, CenturyTel's own witness, Mr. Watkins, acknowledged that CenturyTel's position statements in the jointly filed "DPL" revealed that there was clearly a dispute as to whether TELRIC should apply. Reading from the DPL, Mr. Watkins stated that "one of the subjects of discussion will be the determination of the standard referenced by the FCC in paragraph 140 …" Watkins, Tr. at 355, lines 17-20. The "pricing standard" to which

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[33] *Charter Fiberlink-Missouri, LLC Seeking Expedited Resolution and Enforcement of Interconnection Agreement Terms Between Charter Fiberlink-Missouri, LLC and CenturyTel of Missouri, LLC*, Case No. LC-2008-0049, Report and Order (MO PSC 2008).

[34] DPL at 78.

[35] DPL at 77-80.

[36] DPL at pp. 77-78.

Mr. Watkins replies is the TELRIC standard. Charter clearly advocates for its application to these facilities; and CenturyTel clearly objects to its application. That is, by definition, a dispute.

For these reasons, the Commission must reject CenturyTel's attempt to strike those portions of Mr. Gates' testimonies regarding costing methodologies under Issue 20.

CONCLUSION

For the reasons enumerated above, Charter respectfully requests that the Commission deny in its entirety CenturyTel's Motion to Strike.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 20th day of November, 2008, to General Counsel's Office at gencounsel@psc.mo.gov; Office of Public Counsel at opcservice@ded.mo.gov; and Larry Dority at lwdority@sprintmail.com.

/s/ Mark W. Comley
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