BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

In the Matter of CenturyTel of Missouri, LLC's Request for Competitive Classification Pursuant to Section 392.245.5 RSMo (2005).	)))	Case No. IO-2006-0109

PRETRIAL BRIEF OF FIDELITY COMMUNICATION SERVICES II, INC.

COMES NOW Fidelity Communication Services II, Inc. ("Fidelity"), by and through its undersigned attorneys, and, pursuant to the Commission's September 12, 2005 Order, submits this Pretrial Brief to address CenturyTel's request for competitive classification of the Bourbon exchange:

I. INTRODUCTION

This matter comes before the Commission on an Application by CenturyTel of Missouri, LLC ("CenturyTel"), pursuant to recently enacted Senate Bill No. 237 ("S.B. 237"), to classify as competitive, on an expedited basis, its business and residential services in certain exchanges, including the following in which Fidelity operates: Cuba, St. James and Bourbon. Fidelity has opposed CenturyTel's requests with respect to the Bourbon exchange because Fidelity provides service to only a minimal number of customers and access lines in Bourbon, through use of a relatively limited local network leased from an unaffiliated third party. These facts are not in dispute; rather, the parties disagree as to the appropriate application of S.B. 237 to these facts.

CenturyTel advocates an almost mathematical equation for determining the outcome of this case: 1 wireless competitor + 1 wireline competitor = competitive classification. In its rush for judgment, however, CenturyTel asks the Commission to defy logic with a mechanical application of the law. Specifically, CenturyTel asks that the Commission find that one residential customer and two business customers are enough to satisfy the requirement for a wireline competitor under S.B. 237. Although S.B. 237 does limit the broad standard the Commission once used in determining whether "effective competition" exists, S.B. 237 does not require the Commission to abandon common sense in favor of "keeping it simple." Just as the legislature specifically carved out VOIP providers, prepaid services providers and resellers from the 30-day track, the Commission should also carve out marginal, yet more traditional, facility based providers by finding what we all know to be the case: *de minimus* competition is not competition at all. The Commission has the discretion to determine that providing services to only a few customers does not amount to providing service in the exchange within the meaning of S.B. 237. Accordingly, Fidelity asks that the Commission deny CenturyTel's request for competitive classification of its residential and business services in the Bourbon exchange.

II. FACTUAL BACKGROUND[1]

On November 30, 1999, Fidelity was granted a certificate to provide basic local telecommunications service in the areas now served by CenturyTel in Case No. TA-2000-229. Fidelity is an affiliate of Fidelity Telephone Company, an ILEC headquartered in Sullivan, Missouri; Fidelity Long Distance, Inc., an interexchange carrier; Fidelity Networks, Inc., an internet access service and long distance provider; and Fidelity Systems Plus, an equipment retailer. Fidelity currently provides residential service—on what is commonly considered a UNE-L basis—to only one individual, representing one access line, in the Bourbon exchange. This individual is an employee of a Fidelity affiliate and was initially connected to test the Company's ability to provide service in the Bourbon exchange, but, after the conclusion of the initial tests, this employee retained (and currently pays the Company for) such service. This employee may be used in the future to conduct further testing in the Bourbon exchange.

[1] These facts are taken from the Direct Testimony of David N. Beier, at 3:38 – 5:78, filed with the Commission on September 22, 2005.

Fidelity currently provides business services to a minimal number of business customers and business lines in the Bourbon exchange. Specifically, aside from affiliated entities using a few business lines for testing purposes (2 lines) and to transport ISP-traffic (6 lines), Fidelity currently provides business service to only 2 customers in the Bourbon exchange, representing a total of 17 voice lines and 2 data lines.

Fidelity is not a full facility based provider in the Bourbon exchange. In fact, Fidelity has no loop facilities located in the Bourbon exchange at all. Although Fidelity provides the switching functionality required to serve its few customers located in Bourbon—via an affiliate's switch located outside the exchange—the facilities (i.e., the local access lines) located in the exchange and used to serve such customers are owned wholly by a third-party, unaffiliated broadband provider and are part of an unaffiliated fiber network. Moreover, in order to serve additional customers in Bourbon, Fidelity would have to either (i) build its own facilities in Bourbon, or (ii) lease facilities either from CenturyTel, or, if any such exist, from another third party.

III. LEGAL STANDARD

The Missouri Supreme Court has stated that "[t]he law in this state as to the burden of proof is clear and designed to assure that hearings on contested matters provide the parties with predictable rules of procedure. The party asserting the positive of a proposition bears the burden of proving that proposition." Dycus v. Cross, 869 S.W. 2d 745, 749 (Mo. banc 1994). CenturyTel asserts that the requirements under S.B. 237 for competitive classification are satisfied in certain identified exchanges for certain services. Therefore, CenturyTel has the burden of proof in this case.

IV. ARGUMENT

A. Business Services in the Bourbon Exchange

1. Under the present facts, construing S.B. 237 to make Fidelity the wireline competitor required under the 30-day track leads to an unjust and absurd result.

"[T]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to the intent if possible, and to consider the words in their plain and ordinary meaning." Lewis v. Gibbons, 80 S.W.3d 461, 465 (Mo. 2002) (citing Wolff Shoe Co. v. Dir. of Revenue, 762 S.W.2d 29, 31 (Mo. banc 1988)). "The construction of statutes is not to be hyper-technical, but instead is to be reasonable and logical and [to] give meaning to the statutes." Id. (citing State ex rel. Rhodes v. Crouch, 621 S.W.2d 47, 49 (Mo. banc 1981)). "[The court] will not construe [ ] statute[s] so as to work unreasonable, oppressive, or absurd results." Elrod v. Treasurer of Mo., 138 S.W.3d 714, 716 (Mo. 2004).

The Missouri Supreme Court has recognized that, where a literal reading of a statute would cause an unreasonable and absurd result, the statute will not be given such a restrictive legal effect. KSD/KSD-TV, Inc. v. Labor & Indus. Relations Comm'n, 562 S.W.2d 346, 348 (Mo. 1978). KSD involved the interpretation of the word "acquired" under § 288.110 of the Missouri Employment Security Act, which allowed organizations which had "acquired" substantially all of the business of another company and had continued such business without interruption, to succeed to that company's unemployment contribution tax rate, rather than being subject to a much higher "new employer" rate. In KSD, a company had spun-off a portion of its business into a wholly-owned subsidiary, and claimed that it should be entitled to the lower tax rate, because a literal interpretation of the word "acquired" was an "absurd statutory construction" that contravened the legislative intent and statutory scheme. The Missouri

Supreme Court agreed with the company, giving a practical as opposed to a mechanical interpretation of the statute:

> The word "acquired" should not be given such a restrictive legal effect. A statute should not be given a construction which would cause an unreasonable result…The fact that [the company] did not acquire the [subsidiary] from a third party … is, in our opinion, of minimal consequence. We hold that both should be given the [successor] rate. To hold otherwise would be to reach an unreasonable result.

Id. at 349.

Here, as in KSD, looking at the factual circumstances, and reading S.B. 237 and the rest of Chapter 392 RSMo in its entirety, it is clear that the General Assembly does not intend that an entity providing telecommunications service to only two customers within an exchange be deemed an ILEC's competitor, as such a construction would create an unreasonable and absurd result.

The Commission's grant of competitive classification in the Bourbon exchange could stifle competition and otherwise harm ratepayers. Specifically, a competitive designation of CenturyTel's business services in the Bourbon exchange would enable both CenturyTel and Fidelity to price any business service in such exchange on a customer-specific basis. § 392.200.8(3) RSMo (2005). This pricing flexibility would benefit CenturyTel, as the incumbent, much more than Fidelity, because it would enable CenturyTel to undercut Fidelity as to specific customers (i.e., Fidelity customers). Moreover, it would enable CenturyTel to increase its prices as to other customers (i.e., non-Fidelity customers), which would go unchecked by the market because Fidelity has only a limited local network leased from an unaffiliated third party. Put simply, on these facts, it would not be in the public interest to designate Bourbon as competitive with respect to business services.

2. The General Assembly intended to carve out marginal competitors from the 30-day track analysis.

Staff's recommendation that business services be deemed competitive in Bourbon is based on an erroneous reading of S.B. 237. Staff states that, because Fidelity uses the switch of an affiliated entity to serve its business customers in Bourbon, Fidelity provides service "in whole or in part over telecommunications facilities or other facilities in which it or one of its affiliates have an ownership interest" and, therefore, counts under § 392.245.5(2) as one of the two entities required for competitive classification under the 30-day track. Staff, however, ignores the General Assembly's intent to exclude from the 30-day track analysis those entities that serve only minimal lines through minimal facilities located in the exchange.

This legislative intent is manifest in several provisions of S.B. 237. First, § 392.245.5 speaks in terms of non-affiliated entities providing "services" to "customers." Although the statute no longer requires a finding by the Commission of "effective competition," it does not preclude the Commission from concluding that a company provides services to so few customers that it is not "providing" services to customers within the meaning of § 392.245.5. Secondly, § 392.245.5(2) expressly excludes providers that use a "third party, unaffiliated broadband network." Third, § 392.245.5(4) excludes telecommunications companies "only offering prepaid telecommunications service or only reselling telecommunications service as defined in subdivision (46) of section 386.020." Section 386.020(46) defines the "resale of telecommunications service" as "the offering or providing of telecommunications service *primarily* through the use of services or facilities owned or provided by a separate telecommunications company…." Clearly, then, the General Assembly recognized that a company's *de minimus* or marginal use of its own facilities for the provision of service does not rise to the level of competition sufficient for such company to count as one of the two entities required under the 30-day track.

In the case at hand, the quantity of business customers served by Fidelity in the Bourbon exchange, and the facilities owned by Fidelity or an affiliate and located in the exchange (and used to provide such services) are so *de minimus* as to not constitute "providing" service over owned "facilities" within the meaning of § 392.245.5. Fidelity is providing business service to only 2 unaffiliated customers, and residential service to 1 employee, using no owned loop facilities located in the Bourbon exchange. Fidelity maintains that this marginal level of services falls within the general intent, if not the express language, of the exceptions for VOIP providers, prepaid service providers, "resellers" and other insubstantial competitors set forth in S.B. 237. As such, Fidelity objects to competitive classification of business services in the Bourbon exchange under the 30-day track. Fidelity submits that, at the very least, CenturyTel's request for competitive classification in the Bourbon exchange should be governed by the 60-day track in § 392.245.5(6) as opposed to the 30-day track under § 392.245.5, generally, and that the Commission should exercise its discretion to determine that such competitive classification is contrary to the public interest.

3. The Commission has the discretion to determine that Fidelity's *de minimus* customer-base and facilities do not meet the threshold requirements under S.B. 237 for Fidelity to be considered the wireline competitor needed for competitive classification.

Contrary to CenturyTel's assertion,[2] Fidelity is not asking the Commission to re-write S.B. 237 to include an exception that does not exist, but rather, is requesting the Commission to interpret, in light of the intent of the General Assembly, S.B. 237 as requiring a threshold showing that a wireline company is providing services in material (and not inconsequential)

[2] See Direct Testimony of Arthur P. Martinez at 15:12.

numbers over material (and not inconsequential) owned facilities located in the exchange before such company can be deemed a "basic local telecommunications service provider" under § 392.245.5(2) RSMo (2005). Pursuant to § 392.185, the Commission has the obligation to construe every provision in Chapter 392, whether ambiguous or not, with certain principles in mind including to, among other things, (i) "[e]nsure that customers pay only reasonable charges for telecommunications service," and (ii) "allow full and fair competition to function as a substitute for regulation when consistent with the protection of ratepayers and otherwise *consistent with the public interest*." § 392.185(4), (6) RSMo (2004) (emphasis added); See also In the Matter of BPS Telephone Company's Election to be Regulated under Price Cap Regulation as Provided in Section 392.245, RSMO 2000, Case No. IO-2003-0012 (Report and Order, issued November 13, 2003) at 8-10 (holding that, in light of the interpretative guidelines set forth in § 392.185, a prepaid reseller does not provide, in competition with the incumbent, the basic local telecommunications service necessary for such incumbent to elect price cap status). S.B. 237 does nothing to change this requirement that all provisions be interpreted in the public interest, but rather, reinforces it.

B. Residential Services in the Bourbon Exchange

1. Fidelity's presence in the residential market in the Bourbon exchange is (if even possible) more *de minimus* than its presence in the business market.

For the reasons set forth in Parts IV.A.1-3 *supra*, with respect to business services, CenturyTel's request for competitive classification of its residential services in Bourbon should likewise be denied. Fidelity is less of a competitor in the residential market than the business market in Bourbon. In fact, Fidelity has only one residential customer in Bourbon, who happens to be an employee of a Fidelity affiliate, and who receives service on a UNE-L basis, with

Fidelity leasing the local loop from CenturyTel. Fidelity's presence, both in terms of number of recipients of residential service and the quantity of facilities in the Bourbon exchange, is so *de minimus* that it should not be considered "providing" service over its own or affiliated facilities as required under the 30-day track contemplated by § 392.245.5 RSMo (2005).

2. Under any interpretation of S.B. 237, Fidelity does not provide service to the requisite number of residential customers to count as a competitor under the 30-day track.

In addition to the foregoing, Fidelity objects to competitive classification of residential services in the Bourbon exchange on the grounds that Fidelity does not currently provide service to "residential *customers* within the exchange" within any reading of § 392.245.5. Specifically, Fidelity currently provides residential service to only one individual in the Bourbon exchange. Under any interpretation, § 392.245.5 RSMo (2005), through the use of the term "customers," requires that service be provided to more than one customer. Moreover, this individual, as an employee of an affiliate of Fidelity, should not be considered a "customer" within the meaning of § 392.245.5 RSMo (2005).

CONCLUSION

For the foregoing reasons, Fidelity Communication Services II, Inc., respectfully requests that the Commission deny CenturyTel of Missouri, LLC's request to classify, as competitive, residential and business services in the Bourbon exchange, and grant such other and further relief as the Commission deems appropriate.

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Respectfully submitted,

GREENSFELDER, HEMKER & GALE, P.C.

By: /s/ Jason L. Ross
SHELDON K. STOCK #18581
JASON L. ROSS #51428
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
314-241-9090 (Telephone)
314-345-4792 (Facsimile)
sks@greensfelder.com
jlr@greensfelder.com

Attorneys for Fidelity Communication Services II, Inc.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on September 23, 2005.

/s/ Jason L. Ross

General Counsel
William Haas
Missouri Public Service Commission
PO Box 360
Jefferson City, MO 65102
william.haas@psc.mo.gov

Public Counsel
Michael F. Dandino
Office of The Public Counsel
PO Box 7800
Jefferson City, M) 65102
mike.dandino@ded.mo.gov

Larry W. Dority
Fischer & Dority, P.C.
101 Madison, Suite 400
Jefferson City, Missouri 65101
lwdority@sprintmail.com