

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

Eminent Network Technologies, Inc.
d/b/a Interlinc.net,

Complainant,

v.

CenturyTel of Missouri, LLC and
Spectra Communications Group, LLC
d/b/a CenturyTel,

Respondents.

Case No. IC-2007-0092

**JOINT MOTION TO DISMISS, ANSWER,
AFFIRMATIVE DEFENSES AND COUNTERCLAIM**

COME NOW CenturyTel of Missouri, LLC ("CenturyTel") and Spectra Communications Group, LLC d/b/a CenturyTel ("Spectra") (collectively "Respondents" or "CenturyTel Entities"), pursuant to Commission Rule 4 CSR 240-2.070, and respectfully submit their Joint Motion to Dismiss, Answer, Affirmative Defenses and Counterclaim to the Complaint filed by Eminent Network Technologies, Inc. d/b/a Interlinc.net ("Eminent").

INTRODUCTION

Eminent has four accounts with Respondents, and all four accounts remain in default. Two of the subject accounts are for interstate access services provided to Eminent by CenturyTel under the provisions of FCC tariffs; services that are neither regulated by this Commission nor subject to its jurisdiction. In addition, in the course of billing for all accounts Respondents received no disputes for any unpaid or partially paid invoices, as described below. As

referenced in the complaint, in the resolution of previous delinquent accounts Eminent and Respondents entered into a Settlement Agreement, which provided in part:

Eminent commits to pay its current and future monthly bills from CenturyTel and Spectra in a timely manner. Any disputes concerning future bills received by Eminent from CenturyTel Entities will be timely made in writing to the person(s) designated by CenturyTel Entities, specifying the product numbers or account numbers in dispute; the specific reason(s) for, and dollar amounts associated with, such dispute; and all undisputed portions of such bills will be timely paid. Eminent further agrees that all requests for additions and/or disconnection of services shall be in writing, and confirmation of receipt acknowledged by a firm order commitment from CenturyTel Entities must be obtained.¹

Since receiving confirmation from Eminent on July 2, 2005, regarding the designated contact for the CenturyTel Entities, that contact received no correspondence from Eminent concerning any billing disputes, disconnect requests, or questions on ordering or disconnection of any services. Accordingly, and pursuant to applicable tariffs, Respondents sent demand letters to Eminent for payment on delinquent balances on accounts totaling over \$115,000.00, requesting payment within thirty (30) days to avoid discontinuance of services. At the request of Eminent, Respondents extended the deadline for receiving payments an additional week.

In filing its complaint on the above-referenced due date, Eminent characterizes the subject of the instant complaint as a "billing dispute" between Eminent and Respondents.² However, as evidenced by the Complainant itself, "[t]his Complaint is filed to ask the Missouri Public Service Commission to

¹ Settlement Agreement executed June 17, 2005, resolving Case No. TC-2005-0356.

² Complaint, page 1.

immediately order CenturyTel of Missouri, LLC and/or Spectra Communications Group, LLC, d/b/a CenturyTel not to terminate or interrupt the provision of telecommunications services to Eminent pending the Commission's determination in the instant complaint."

For all of the reasons set forth herein, the Commission should not sanction Eminent's attempt to invoke the protections afforded by Commission Rule 4 CSR 240-33.110(5),³ and should reject and dismiss the Complaint forthwith.

MOTION TO DISMISS

Pursuant to Commission Rule 4 CSR 240-2.070(6), Respondents hereby move that the Commission dismiss the above-captioned matter for failure to state a claim upon which relief may be granted, and for lack of jurisdiction over portions of the subject matter now purportedly at issue. In support of their motion, Respondents respectfully state as follows:

1. As discussed above, Eminent has four accounts with Respondents, identified with amounts owing as of the date of July 21, 2006 demand letters, as follows:

- a. CenturyTel of Missouri, LLC Account 9787VEMIS3, in the amount of \$37,202.29;
- b. CenturyTel of Missouri, LLC Account 9787E611S3, in the amount of \$23,594.26;
- c. CenturyTel of Missouri, LLC Account 301650232, in the amount of \$23,666.85; and

³ "In accordance with 4 CSR 240-33.110(5), pending the resolution of this complaint, Respondents may not discontinue service to Complainant on the basis of the issues that are the subject matter of this complaint." Complaint, page 2.

- d. Spectra Communications Group, LLC d/b/a CenturyTel Account 301796549, in the amount of \$31,378.24.

2. CenturyTel Accounts 9787VEMIS3 and 9787E611S3 represent interstate access services provided to Eminent pursuant to, and under the provisions of, interstate tariffs on file with the Federal Communications Commission. As a result, the Commission is without jurisdiction to hear any dispute regarding those particular services and accounts, as such services are interstate in nature, and neither regulated by this Commission nor subject to its jurisdiction.

3. In addition, to the extent the services which are the subject of the Complaint are intrastate in nature, Eminent has failed to state a claim upon which relief may be granted.

A review of the instant Complaint reveals no allegations regarding specific accounts, specific services, specific billed amounts actually in dispute or specific periods covered. Rather, what is provided is the blanket assertion that Eminent "believes the bills in question are in error, in whole or in part, and disputes them." The Complaint is so vague and deficient in articulation as not to constitute a cognizable cause of action.

In accordance with applicable tariff provisions, service to customers having undisputed delinquent amounts may be discontinued after providing the requisite written notice and Respondents fully complied with all such requirements. As fully set forth in the written notices, there were no unresolved disputes on file for any past due invoices.

4. Whereas prior alleged "disputes" preceding the initiation of Case No. TC-2005-0356 were based on allegations of purported billing contacts or requested disconnection of services having been initiated by Complainant, the above-referenced Settlement Agreement entered into by Respondents and Eminent specifically provided:

Eminent commits to pay its current and future monthly bills from CenturyTel and Spectra in a timely manner. Any disputes concerning future bills received by Eminent from CenturyTel Entities will be timely made in writing to the person(s) designated by CenturyTel Entities, specifying the product numbers or account numbers in dispute; the specific reason(s) for, and dollar amounts associated with, such dispute; and all undisputed portions of such bills will be timely paid. Eminent further agrees that all requests for additions and/or disconnection of services shall be in writing, and confirmation of receipt acknowledged by a firm order commitment from CenturyTel Entities must be obtained.

Again, the designated contact for the CenturyTel Entities received no correspondence from Eminent concerning any billing disputes, disconnect requests, or questions on ordering or disconnection of any services. Having ignored the clear prerequisites of the parties' agreement, Eminent cannot now be heard to complain regarding matters that were never properly addressed. The complaint should be dismissed.

ANSWER TO COMPLAINT

For their Answer, Respondents state:

1. Except as specifically admitted herein, Respondents deny each and every allegation, averment and statement in the Complaint.
2. Respondents deny all allegations contained in the narrative "Nature of the Complaint" paragraphs contained at pages 1 and 2 of the Complaint.

Respondents admit that they allege Eminent is delinquent in paying bills on certain accounts, and that they appropriately notified Eminent of their intent to terminate service to Eminent if full payment was not received by August 29, 2006. Respondents note that Eminent admits that Case No. TC-2005-0356 was ultimately resolved by stipulation and agreement between the parties.

3. Responding to the averments of Paragraphs 1 and 2 regarding "Jurisdiction," Respondents deny the jurisdiction of the Commission over portions of the instant proceeding, as the Commission's jurisdiction does not extend to interstate services provided under federal tariff, as set forth above. Accordingly, Respondents deny the allegations in Paragraphs 1 and 2.

4. Respondents admit that Eminent is a retail customer of CenturyTel and Spectra, but deny that Eminent is paying for such telecommunications services. Respondents are without sufficient information to admit or deny the remaining allegations contained in Paragraph 3 of the Complaint and therefore deny same.

5. Responding to the averments of Paragraphs 4 and 5, Respondents admit that CenturyTel of Missouri, LLC is a Louisiana Limited Liability Company that is duly authorized to do business in Missouri, and that Spectra Communications Group, LLC d/b/a CenturyTel is a Delaware Limited Liability Company that is duly authorized to do business in Missouri. Their principal place of business is 1151 CenturyTel Drive, Wentzville, Missouri 63885.

6. Respondents admit that the Commission approved Spectra's acquisition of certain GTE Midwest Incorporated's local exchanges and access

lines in Case No. TM-2000-182, and that the Commission approved CenturyTel's acquisition of GTE Midwest Incorporated d/b/a Verizon Midwest's remaining local exchanges and access lines in Missouri in Case No. TM-2002-232. For purposes of this proceeding, contact information for Respondents should be:

Arthur P. Martinez
Director Government Relations
CenturyTel
220 Madison Street
Jefferson City, Missouri 65101
(573) 634-8424
(573) 636-6826 (fax)
arthur.martinez@centurytel.com

All communications and pleadings in this case should be directed to:

Larry W. Dority
Fischer & Dority, P.C.
101 Madison, Suite 400
Jefferson City, MO 65101
(573) 636-6758
(573) 636-0383 (fax)
lwdority@sprintmail.com

7. Respondents admit that CenturyTel and Spectra are incumbent local exchange telecommunications companies and that both entities are a "telecommunications company" and "public utility" as those terms are defined by Section 386.020, RSMo. 2000 and are, therefore, subject to the jurisdiction and regulation of the Commission as provided by law. Respondents further admit that both CenturyTel and Spectra each provide regulated intrastate telecommunications services within their Missouri service area. Respondents deny the remaining allegations of Paragraph 7.

8. Respondents deny the allegations contained in Paragraph 8 of the Complaint.

9. Respondents admit that after sending the referenced demand letters/notices of disconnection of services, they were contacted by Complainant and by counsel acting on its behalf, and that they have refused to withdraw said notices to discontinue services to Complainant. Respondents deny all other averments contained in Paragraph 9 of the Complaint.

10. Paragraph 10 does not require affirmative response by Respondents.

11. Respondents deny the allegations contained in Paragraph 11 of the Complaint.

12. Respondents admit the allegations contained in Paragraph 12 of the Complaint, with the correction that the demand letters related to accounts for services provided to Eminent by both CenturyTel and Spectra, and that payment of the amounts set forth in each letter was demanded by August 22, 2006, in order to avoid discontinuance of such service from the respective entity on the next business day.

13. Respondents admit that they extended the deadline for receiving payment of the amounts set forth in the demand letters by one week, until August 29, 2006, at the request of Eminent. Respondents further admit that they have declined to withdraw their notices of termination of services to Eminent. Respondents deny all other allegations contained in Paragraph 13 of the Complaint.

14. Respondents deny the allegations of Paragraphs 14 through 19 of the Complaint.

AFFIRMATIVE DEFENSES

1. The Commission lacks jurisdiction to hear portions of the instant complaint, and Complainant fails to state a claim upon which relief can be granted. Respondents incorporate by reference the statements and allegations contained in their Motion to Dismiss, *supra*.

2. Complainant's claims are barred by laches, waiver and estoppel.

3. Complainant's claims are barred by state and federal law.

COUNTERCLAIM

As previously set forth herein, Respondents deny the jurisdiction of the Commission over interstate services constituting a portion of the instant dispute and, therefore, deny the necessity of seeking relief on those two accounts in the instant proceeding. Nevertheless, CenturyTel specifically pleads its cause of action relating to those accounts as a part of this Counterclaim, in the event jurisdiction is exercised by this Commission. For their Counterclaim, CenturyTel and Spectra respectfully state as follows:

1. Eminent, by bringing the underlying action, has asserted the jurisdiction of this Commission, and to the extent the Commission has jurisdiction over this matter, has subjected itself to the jurisdiction of this Commission for purposes of claims related to the underlying action.

2. Spectra is a Delaware Limited Liability Company authorized to do business in Missouri as evidenced by the certificate of authority issued by the

Missouri Secretary of State which was filed in Case No. TM-2000-182 and are incorporated herein by reference pursuant to Commission Rule 4 CSR 240-2.060(1)(G). Spectra operates in Missouri using the fictitious name of "CenturyTel," pursuant to the registration of fictitious name filed in Case No. TO-2001-437 and incorporated herein by reference. Spectra's principle place of business is 1151 CenturyTel Drive, Wentzville, Missouri 63885.

3. CenturyTel is a Louisiana limited liability company that is duly authorized to do business in the state of Missouri. Copies of CenturyTel's Certificate of Authority to transact business in Missouri from the Missouri Secretary of State were filed in Case No. TM-2002-232, and are incorporated herein by reference pursuant to Commission Rule 4 CSR 240-2.060(1)(G). CenturyTel's principle place of business is 1151 CenturyTel Drive, Wentzville, Missouri 63885.

4. CenturyTel and Spectra are incumbent local exchange telecommunications companies and both entities are a "telecommunications company" and "public utility" as those terms are defined by Section 386.020, RSMo. 2000 and are, therefore, subject to the jurisdiction and regulation of the Commission as provided by law.

5. CenturyTel and Spectra have no pending actions or final, unsatisfied judgments or decisions against them which involve customer service or rates, which action, judgment or decision has occurred within the last three years from the date hereof. CenturyTel and Spectra have no annual reports or assessment fees overdue.

COUNT I – CLAIMS ON OPEN ACCOUNTS

6. CenturyTel and Spectra restate and incorporate the averments of paragraphs 1 through 5 of their Counterclaim, as if stated herein.

7. CenturyTel provides interstate access telecommunications services to Eminent, designated Account 9787E611S3, under the provisions of the CenturyTel Operating Companies Interstate Access Tariff FCC No. 3. The amount due and owing for CenturyTel's provision of such services at the tariffed rate is \$23,594.26.⁴ Demand for payment has been duly made to Eminent and Eminent has refused payment. CenturyTel is entitled to an Order of the Commission finding in favor of CenturyTel on its counterclaim against Eminent, and further finding that Eminent owes CenturyTel the amount of \$23,594.26 for services rendered.

8. CenturyTel provides interstate access telecommunications services to Eminent, designated Account 9787VEMIS3, under the provisions of the CenturyTel Operating Companies Interstate Access Tariff FCC No. 3 ("CTOC #3") and the CenturyTel Operating Companies Interstate Access Tariff FCC No. 4 ("CTOC #4"). The amount due and owing for CenturyTel's provision of such services at the tariffed rate is \$37,202.29.⁵ Demand for payment has been duly made to Eminent and Eminent has refused payment. CenturyTel is entitled to an Order of the Commission finding in favor of CenturyTel on its counterclaim

⁴This amount was due and owing at the date of the demand letters referenced herein. These amounts do not include charges that are currently due and owing from recent and continued billings, as Eminent continues to receive services from Respondents. Respondents will request leave to update the total amounts actually due and owing prior to judgment in counterclaim being entered herein.

⁵ *Id.*

against Eminent, and further finding that Eminent owes CenturyTel the amount of \$37,202.29 for services rendered.

9. CenturyTel provides telecommunications services to Eminent, designated Account 301650232, under the provisions of the CenturyTel Operating Companies Interstate Access Tariff FCC No. 3 ("CTOC #3") and CenturyTel of Missouri, LLC PSC MO. No. 1 General and Local Exchange Tariff. The amount due and owing for CenturyTel's provision of such services at the tariffed rate is \$23,666.85.⁶ Demand for payment has been duly made to Eminent and Eminent has refused payment. CenturyTel is entitled to an Order of the Commission finding in favor of CenturyTel on its counterclaim against Eminent, and further finding that Eminent owes CenturyTel the amount of \$23,666.85 for services rendered.

10. Spectra provides telecommunications services to Eminent, designated Account 301796549, under the provisions of the National Exchange Carrier Association ("NECA") Tariff F.C.C. No. 5 and the Spectra Communications Group, LLC PSC MO. No. 1 General and Local Exchange Tariff. The amount due and owing for Spectra's provision of such services at the tariffed rate is \$31,378.24.⁷ Demand for payment has been duly made to Eminent and Eminent has refused payment. Spectra is entitled to an Order of the Commission finding in favor of Spectra on its counterclaim against Eminent, and further finding that Eminent owes Spectra the amount of \$31,378.24 for services rendered.

⁶ *Id.*

⁷ *Id.*

COUNT II – SERVICE TERMINATION

11. CenturyTel and Spectra restate and incorporate the averments of paragraphs 1 through 10 of their Counterclaim, as if stated herein.

12. Regarding CenturyTel Account 9787E611S3, as fully described in Paragraph 7 of this Counterclaim, CenturyTel is authorized by the applicable tariff to discontinue the provision of such service for nonpayment, subject to prior written notification. CenturyTel fully complied with the tariff requirements and provided such written notification to Eminent by overnight letter dated July 21, 2006, noting that CenturyTel had received no disputes for any unpaid or partially paid invoices. CenturyTel, therefore, is entitled to an Order from this Commission permitting it to discontinue such service to Eminent.

12. Regarding CenturyTel Account 9787VEMIS3, as fully described in Paragraph 8 of this Counterclaim, CenturyTel is authorized by the applicable tariffs to discontinue the provision of such service for nonpayment, subject to prior written notification. CenturyTel fully complied with the tariff requirements and provided such written notification to Eminent by overnight letter dated July 21, 2006, noting that CenturyTel had received no disputes for any unpaid invoices. CenturyTel, therefore, is entitled to an Order from this Commission permitting it to discontinue such service to Eminent.

13. Regarding CenturyTel Account 301650232, as fully described in Paragraph 9 of this Counterclaim, CenturyTel is authorized by the applicable tariffs to discontinue the provision of such service for nonpayment, subject to prior written notification. CenturyTel fully complied with the tariff requirements

and provided such written notification to Eminent by overnight letter dated July 21, 2006, noting that CenturyTel had received no disputes for any unpaid or partially paid invoices. CenturyTel, therefore, is entitled to an Order from this Commission permitting it to discontinue such service to Eminent.

14. Regarding Spectra Account 301796549, as fully described in Paragraph 10 of this Counterclaim, Spectra is authorized by the applicable tariffs to discontinue the provision of such service for nonpayment, subject to prior written notification. Spectra fully complied with the tariff requirements and provided such written notification to Eminent by overnight letter dated July 21, 2006, noting that Spectra had received no disputes for any unpaid invoices. Spectra, therefore, is entitled to an Order from this Commission permitting it to discontinue such service to Eminent.

OTHER RELIEF REQUESTED

1. Respondents formally move the Commission, pursuant to 4 CSR 240-2.090(4), to schedule an early prehearing conference as soon as possible, that the Commission order the parties and designated representatives of the Commission Staff to attend, and that the Commission further order the following procedural and substantive matters to aid in the expeditious disposition of the issues presented in the instant proceeding. (4 CSR 240-2.090(6)).

2. If the Respondents are not allowed to immediately terminate services to Complainant, the Complainant should be required and ordered to pay pending billed amounts and remain current on all future bills for services rendered. In addition, Complainant should immediately be required and ordered

to pay undisputed charges and establish appropriate escrow arrangements for purported disputed amounts. The requirement to escrow disputed charges will provide some protection to Respondents in that it provides assurances of payment if the dispute is resolved in their favor. It is wholly inappropriate to permit Eminent to continue to increase its debt to Respondents without making payment for undisputed and current amounts and immediate escrow arrangements for amounts that it disputes.

3. To the extent this matter, or portions thereof, are not dismissed forthwith, in accordance with Commission Rule 4 CSR 240-2.070(10), Respondents welcome the involvement and scrutiny of the Commission's Staff and are willing to fully cooperate in an expeditious investigation into the matters raised herein.

WHEREFORE, having fully answered, Respondents CenturyTel and Spectra respectfully request the Commission to enter an Order dismissing the Complaint or, in the alternative, adopt the procedural items requested herein and grant a decision against Eminent in favor of Respondents on their specially pleaded Counterclaim, and for such other further and additional relief as may be appropriate.

Respectfully submitted,

/s/ Larry W. Dority

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Attorneys for CenturyTel of Missouri, LLC and
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d/b/a CenturyTel

Certificate of Service

I hereby certify that the undersigned has caused a complete copy of the attached document to be electronically filed and served on the Commission's Office of General Counsel (at gencounsel@psc.mo.gov), the Office of Public Counsel (at opcservice@ded.mo.gov), Complainant (at rcr@interlinc.net) and counsel for Complainant (at wds@wdspsc.com), on this 28th day of September 2006.

/s/ Larry W. Dority

Larry W. Dority