

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

In the Matter of the Confirmation of)
Adoption of an Interconnection)
Agreement with CenturyTel of Missouri,)
LLC d/b/a CenturyTel and Spectra)
Communications Group, LLC d/b/a)
CenturyTel by Socket Telecom, LLC)

Case No. CO-2005-0066

**JOINT POST-HEARING BRIEF
OF
CENTURYTEL OF MISSOURI, LLC AND
SPECTRA COMMUNICATIONS GROUP, LLC D/B/A CENTURYTEL**

COME NOW CenturyTel of Missouri, LLC (“CenturyTel”) and Spectra Communications Group, LLC d/b/a CenturyTel (“Spectra”), pursuant to the Commission’s Notice Regarding Filing of Briefs entered in this matter on November 15, 2004, and respectfully submit their Joint Post-Hearing Brief for the Commission’s consideration herein.

I. Introduction

Since initiating this proceeding with a pleading titled “Confirmation of Adoption of Interconnection Agreement,” Socket Telecom, LLC (“Socket”) has presented this Commission and the parties with obfuscatory allegations and fluid theories of relief, to the point that much of the hearing in this matter was devoted to simply trying to discern what relief, and any legal basis therefor, that Socket is indeed seeking in this case. Is it the adoption of a previously approved interconnection agreement? Is it the “confirmation” of a prior adoption recognized and approved by this Commission? The Commission itself has appeared to struggle with the appropriate

parameters of this matter, from the issuance of its original Order¹ in this proceeding – “This order provides notice of a proposal to adopt an interconnection agreement and joins the other party to the agreement as a party to this proceeding” – to its assumption that Socket was possibly alleging a theory of equitable estoppel.² Adding to these difficulties, the Commission has approached this proceeding on the assumption that it is required to act within ninety (90) days (pursuant to 47 U.S.C. 252(e)(4)), although the Commission Staff, as well as CenturyTel and Spectra, advocate that no such time limitation applies since Socket has not submitted to the Commission an arbitrated, negotiated or adopted interconnection agreement with Spectra. Nevertheless, the Commission scheduled an expedited hearing for November 12, 2004, announcing that there would be no prefiled testimony and that all testimony and other evidence would be presented live at the hearing.³

During the hearing held on November 12, Counsel for Socket stated that “We’re asking relief under Section 252(i) . . .” (Tr. 17). The Commission’s Staff, CenturyTel and Spectra all have recommended that the Commission should reject Socket’s requested relief in this proceeding. Despite Socket’s confusing rhetoric, the relevant facts and legal authority in this matter are actually quite straightforward. In accordance with the Commission’s directive, Staff, CenturyTel and Spectra identified the following issue for determination by the Commission: **Is Spectra Communications Group, LLC d/b/a CenturyTel obligated to provide service to Socket Telecom, LLC under the terms of the GTE/AT&T Interconnection Agreement?** As fully discussed, *infra*, the record evidence in this matter and applicable law clearly support the Staff, CenturyTel and Spectra’s position that Spectra has no obligation under 47 U.S.C. 252(i) to provide interconnection to Socket in the manner requested.

¹ *Order Directing Notice and Making CenturyTel A Party*, September 17, 2004.

² *Order Denying Motion for Summary Determination on the Pleadings*, October 28, 2004, page 3.

II. Procedural History

On September 15, 2004, Socket filed a pleading with this Commission titled Confirmation of Adoption of Interconnection Agreement, which was assigned Case No. CO-2005-0066. The Commission issued its Order Directing Notice and Making CenturyTel a Party on September 17, 2004. On October 7, CenturyTel and Spectra filed their Motion to Reject Confirmation and/or Adoption of Interconnection Agreement By Summary Determination on the Pleadings and Alternative Request for Hearing. The Commission issued its Order Setting Prehearing Conference on October 8. On October 12, Socket filed its Request to Reschedule Prehearing Conference, which was granted by the Commission's Order Changing Date of Prehearing Conference issued on October 13. The Staff of the Commission filed its Staff Memorandum on October 15, and Socket filed its Response to CenturyTel's Motion to Reject and to Staff's Memorandum on October 15. The Prehearing Conference was held on October 20, 2004. On October 21, the Commission issued its Order Scheduling Hearing, setting this matter for hearing on November 12. On October 28, the Commission issued its Order Denying Motion for Summary Determination on the Pleadings, and on October 29 the Commission issued its Order Directing Parties to File Issues List, List of Witnesses, and Order of Cross-Examination. Socket filed its Motion for Protective Order on November 3, which was granted by the Commission's Order Establishing Protective Order issued on November 4. Staff, on behalf of itself, Spectra and CenturyTel, filed an Issues List, List of Witnesses, and Order of Cross Examination on November 9. On that same date, Socket Telecom's Issues List, List of Witnesses, and Order of Cross Examination was filed. The evidentiary hearing was held in this matter on November 12, 2004. On November 15, the Commission issued its Notice Regarding

³ *Order Scheduling Hearing*, October 21, 2004, page 2.

Filing of Briefs, confirming the presiding officer's earlier directive that briefs be filed on November 30, 2004.

III. The Timetable of Relevant Events

During his Opening Statement, Staff Counsel noted that "the historical facts in this case do not appear to be in dispute." (Tr. 17-18). Indeed, there was general agreement that several significant events had occurred that directly related to the issue before the Commission. In the course of the evidentiary hearing, however, there appeared to be some confusion regarding the actual timetable or time line for these occurrences. (Tr. 113, 156). Those historical events and the record citations relating thereto are set forth below.

A. The Interconnection, Resale and Unbundling Agreement Between GTE Midwest Incorporated and AT&T Communications of the Southwest, Inc. ("the GTE/AT&T Interconnection Agreement")

By its Order effective August 4, 1998, the Commission approved the GTE/AT&T Interconnection Agreement. (Exhibit 5; Tr. 113, 116). *See* Case No. TO-97-63.

B. Case No. TM-2000-182 (the Spectra Acquisition)

By its Report and Order in Case No. TM-2000-182, effective April 14, 2000, the Commission, *inter alia*, granted Spectra Communications Group, LLC a certificate of service authority to provide basic local telecommunications service and authorized GTE Midwest Incorporated to transfer and sell 107 exchanges to Spectra. The Report and Order provided that the certificate of service authority shall become effective when the company's tariff becomes effective. (Exhibits 6, 7). Spectra's proposed tariffs were subsequently approved for services rendered on and after August 1, 2000. (Exhibit 35).

Spectra Communications Group, LLC, GTE Midwest Incorporated, the Staff, and the Office of the Public Counsel filed a nonunanimous Joint Recommendation in Case No. TM-

2000-182. (Exhibit 9). Section I of the Joint Recommendation, which discussed interconnection agreements, reads:

I. Interconnection agreements

Spectra agrees to make every effort to negotiate new interconnection agreements with all competitive local exchange companies ("CLECs") who currently have interconnection agreements with GTE and who desire to have interconnection with Spectra. Where it is feasible, Spectra will enter into agreements which have the same rates, terms and conditions as those agreements previously negotiated with GTE. There will, necessarily, be some differences in these agreements because of the different methods of interfacing between GTE and Spectra. If Spectra and any CLEC are unable to agree on the terms of these agreements, Spectra agrees to submit any disputes to the Commission for resolution. In those situations where the CLEC is already providing service in an exchange to be transferred, Spectra agrees to cooperate with the CLEC in requesting expedited approval of these new interconnection agreements from the Missouri Public Service Commission.

The Commission approved the Joint Recommendation in its Report and Order in Case No. TM-2000-182. (Attachment 1 to Report and Order).

C. Spectra Utilizes Fictitious Name CenturyTel

By its Order Recognizing Change of Name issued in Case No. TO-2001-437, effective March 11, 2001, the Commission acknowledged the fictitious name CenturyTel for Spectra Communications Group, LLC. (Exhibit 15).

D. Socket Certificated to Provide Basic Local Telecommunications Services, Case No. TA-2001-671

On June 8, 2001, Socket Telecom, LLC applied for a certificate of service to provide basic local telecommunications services in portions of the state of Missouri (those portions included the areas served by Southwestern Bell Telephone Company, Sprint, Verizon and Spectra). By its Order Granting Certificate to Provide Basic Local Telecommunications Services, Approving Tariff, and Closing Case issued in Case No. TA-2001-671, effective August 13, 2001, the certificate of service authority was granted. (Exhibit 3).

E. Socket Adopts GTE/AT&T Interconnection Agreement

By its Order Recognizing Adoption of Interconnection Agreement issued in Case No. TK-2002-1085, effective July 7, 2002, the Commission recognized Socket Telecom, LLC's adoption of the interconnection agreement between GTE Midwest Incorporated, d/b/a Verizon Midwest, and AT&T Communications of the Southwest, Inc. The Commission had made GTE Midwest Incorporated d/b/a Verizon Midwest a party to that case. Socket was not a party to that proceeding. (Exhibit 4; Tr. 157.)

F. Case No. TM-2002-232 (CenturyTel of Missouri Acquisition)

On September 1, 2002, pursuant to the Commission's Report and Order issued in Case No. TM-2002-232, CenturyTel of Missouri, LLC's certificate of service authority to provide basic local exchange telecommunications service in Missouri became effective, concurrent with the effective date of its tariffs. (Exhibit 12.) By its Report and Order issued in that proceeding, effective May 21, 2002, the Commission, *inter alia*, granted CenturyTel of Missouri, LLC a certificate of service authority to provide basic local exchange telecommunications service and authorized GTE Midwest, Inc., doing business as Verizon Midwest, to transfer and sell its remaining 96 exchanges to CenturyTel of Missouri, LLC.

CenturyTel of Missouri, LLC, the Staff, the Office of the Public Counsel, and other parties filed a Nonunanimous Stipulation and Agreement in Case No. TM-2002-232. Section 6. B of the Stipulation and Agreement, which discussed interconnection agreements, reads:

B. Interconnection agreements

CenturyTel agrees 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. Where it is not technically infeasible, CenturyTel will enter into agreements which have the same rates, terms and conditions as those agreements previously negotiated with Verizon. These agreements will be

substantially similar to the current agreements with Verizon with only technical differences to reflect the way CenturyTel interfaces with the CLEC. If CenturyTel and any CLEC are unable to agree on the terms of these agreements, CenturyTel agrees to submit any disputes to the Commission for resolution. In those situations where the CLEC is already providing service in an exchange to be transferred, CenturyTel agrees to cooperate with the CLEC in requesting expedited approval of these new interconnection agreements from the Commission. CenturyTel shall cooperate with CLECs to ensure continuity of service for all CLEC customers.

CenturyTel agrees to provide local interconnection services, as defined in Part 51 of the Rules of the Federal Communications Commission as set forth in the interconnection agreement between Verizon and AT&T Communications of the Southwest, Inc. and adopted by Fidelity Communications Services II, Inc., (hereinafter "CLECs") including, but not limited to interconnection trunking, number portability and 911-E911 service, for one year after the closing of the sale of the telephone properties referenced herein. If any particular interconnection agreement has not been replaced through negotiation or arbitration within one year, that agreement will continue in force on a month-to-month basis until so replaced. CenturyTel shall perform all obligations set forth in such interconnection agreement except for functions, service or elements that CenturyTel is technically incapable of providing. In any proceeding concerning the technical infeasibility or unreasonableness of a particular provision of the Interconnection Agreement, the burden is on CenturyTel to prove such assertion. Notwithstanding the forgoing, CLECs understand and agree that the method used by CenturyTel to process service orders will be different from the method currently utilized by Verizon. CenturyTel agrees to make available at the time of the transfer an Internet-based e-mail service ordering system, and CLECs may choose between placing orders by facsimile or e-mail.

The Commission approved the Stipulation and Agreement in the Report and Order in Case No. TM-2002-232. (Attachment 1 to Report and Order, pages 1-9).

IV. Argument

- A. Spectra Communications Group, LLC d/b/a CenturyTel is not obligated to provide service to Socket Telecom, LLC under the terms of the GTE/AT&T Interconnection Agreement.**
 - 1. Spectra has no obligation under 47 U.S.C. 252(i) to provide interconnection to Socket under the GTE/AT&T Interconnection Agreement.**

Federal Statute 47 U.S.C. 252 (i) requires:

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. (Emphasis added.)

Spectra Communications Group, LLC d/b/a CenturyTel was not a party to the GTE/AT&T Interconnection Agreement. CenturyTel of Missouri, LLC was not a party to the GTE/AT&T Interconnection Agreement. (Tr. 37.) Accordingly, Socket cannot adopt or “confirm the adoption” of an underlying interconnection agreement to which Spectra is not a party; such an action would be in plain contravention of 47 U.S.C. 252(i) and 47 CFR 51.809. (Tr. 255.) (*See* Staff Memorandum, pp. 3-4.) Spectra has thirty-six (36) agreements currently in effect, all of which were initiated subsequent to the purchase of the 107 GTE exchanges in Case No. TM-2000-182. (Tr. 235. 241.) There is no carrier that has an interconnection agreement that is being applied to both Spectra and CenturyTel exchanges, as they are all separate agreements. (Tr. 241.) Socket has never inquired as to other Spectra agreements to which they might opt into pursuant to Section 252 (i), nor has anyone within Spectra received a bona fide request to initiate negotiations regarding a new interconnection agreement. (Tr. 219.)

2. Socket has mischaracterized and misrepresented the terms of the Report and Order issued in the Spectra acquisition proceeding, Case No. TM-2000-182, and the nonunanimous Joint Recommendation adopted therein.

In its pleadings and during the course of this proceeding, Socket has claimed that, “In connection with obtaining that authorization [the Commission’s authorization for Spectra’s acquisition of the 107 exchanges from GTE Midwest, Incorporated, in Case No. TM-2000-182], Spectra agreed to abide by the terms of GTE’s existing interconnection agreements. One such existing agreement was the agreement between GTE and AT&T that the Commission had

approved in Case No. TO-97-63.”⁴ As Staff’s Memorandum correctly points out, “Socket’s argument is a mischaracterization of Spectra’s agreement in that case.”

As set forth, *supra*, Paragraph I of the Joint Recommendation filed on January 26, 2000 in that proceeding provided, *inter alia*, “Spectra agrees to make every effort to negotiate new interconnection agreements with all competitive local exchange companies (“CLECs”) who currently have interconnection agreements with GTE and who desire to have interconnection with Spectra.” (Emphasis added.)

Socket did not have an interconnection agreement with GTE in 2000 when Spectra acquired its exchanges from GTE. (Tr. 114.) Socket was not even certificated until approximately a year later. (Ex. 3.) Clearly, the obligations of Spectra, set forth in the Joint Recommendation adopted in Case No. TM-2000-182, were not applicable to Socket. (Tr. 213.)

As the record evidence reveals, Spectra fully complied with the above-stated terms of the Joint Recommendation. Indeed, prior to the closing of the transaction, both Spectra and GTE notified those affected CLECs that, in light of Spectra’s purchase of the assets of the GTE exchanges identified, their respective company’s existing GTE agreement would need to be replaced by an agreement with Spectra. CLECs who had agreements with GTE and who desired to interconnect with Spectra contacted Spectra and executed interconnection agreements directly with Spectra. (Tr. 206-211.) AT&T Communications of the Southwest, Inc., a formal party to that proceeding and participant in the evidentiary hearing, was sent such correspondence (Exhibits 41, 42 and 43), and never responded. No interconnection agreement between Spectra and AT&T was executed, and Spectra has never considered that it had an interconnection agreement with AT&T Communications of the Southwest, Inc. relative to the 107 exchanges in

⁴ Socket’s Confirmation of Adoption of Interconnection Agreement, Par. 3, page 2.

the state of Missouri. (Tr. 211.) Thereafter, GTE Midwest Incorporated continued to provide telecommunications services in some 96 Missouri exchanges.

3. Socket's adoption of the GTE/AT&T Agreement in June 2002 had no application to Spectra or any of its local exchanges.

By its *Order Recognizing Adoption of Interconnection Agreement* (Case No. TK-2002-1085, June 27, 2002), this Commission approved Socket Telecom, LLC's adoption of the AT&T/GTE Agreement, pursuant to an application that was filed on May 20, 2002. "Socket stated that it had notified GTE Midwest Incorporated d/b/a Verizon that it desired to adopt the terms of the interconnection agreement between Verizon and AT&T of the Southwest, Inc. This agreement was approved by the Commission in case number TO-97-63." (*Order*, Case No. TK-2002-1085, p. 1). At the time Socket adopted the AT&T/GTE Agreement, that agreement applied to the 96 exchanges still owned and operated by GTE Midwest Incorporated. That AT&T/GTE Agreement did not apply to service in the exchanges owned and operated by Spectra.

As Socket Witness Kohly testified:

Question (Chair Gaw): "So when that occurred, there was no – there couldn't have been any exchanges in that – in regard to that adoption that had anything to do with the Spectra exchanges, could it?"

Answer (Kohly): "At the time it was adopted, no. I mean, they were separate entities, functioned separately, so no. I mean --"

(Tr. 152.)

* * * *

Question (Mr. Dority): "... At that point in time [Socket's 2002 adoption of the GTE/AT&T Interconnection Agreement] Verizon, in fact owned the 96 exchanges that it still operated in Missouri. And that's what Socket was opting into; is that correct?"

Answer (Mr. Kohly): "Correct. The transaction with CenturyTel was pending."

Question: “Okay. But as far as the 107 Spectra exchanges, Socket wasn’t under the impression that it was also opting in to any agreement that would impact or affect those 107 Spectra exchanges at that point in time, were they?”

Answer: “I do not believe so.”

(Tr. 165.)

Nor did any other AT&T agreement apply to service in the exchanges owned and operated by Spectra.

4. CenturyTel of Missouri’s continued recognition of the above-referenced Socket adoption in accordance with the Report and Order and Nonunanimous Stipulation and Agreement entered in Case No. TM-2002-232, has no application to Spectra or any of the Spectra local exchanges.

As discussed, supra, on May 21, 2002, the Commission authorized CenturyTel of Missouri, LLC to acquire the remaining exchanges of GTE Midwest Incorporated d/b/a Verizon Midwest. (Report and Order, Case No. TM-2002-232, Issued May 21, 2002, Effective May 31, 2002). Section 6.B of the Nonunanimous Stipulation and Agreement filed in that proceeding addressed “Interconnection Agreements” and the respective responsibilities of both CenturyTel of Missouri, LLC, and CLECs who currently had interconnection agreements with Verizon.

Accordingly, CenturyTel of Missouri, LLC continues to recognize and honor Socket’s 2002 adoption of the underlying AT&T/GTE Agreement. (Tr. 158, 213.)

However, there is nothing in the Commission’s Report and Order or the Nonunanimous Stipulation and Agreement in that proceeding that would impact or affect Spectra’s obligations concerning interconnections with CLECs. Socket desires to place great emphasis on the fact that the Commission’s Order references a quality of service report to be filed by Spectra. However, while this certainly has no relevance to interconnection responsibilities of Spectra, it would

suggest that had the Commission or any of the parties desired to address such issues, they could have been raised.

B. The Red Herring: Ignore the separate legal status of Spectra and CenturyTel of Missouri and consider them as one legal entity.

To support its purported “confirmation of adoption” theory (which will be addressed, *infra*), Socket advocates that the Commission ignore the record evidence that Spectra and CenturyTel are, indeed, separate legal entities, and rather consider them as one entity for Socket’s purposes in this proceeding. There is no basis, in fact or law, for the Commission to support Socket’s misguided efforts in this regard.

Despite Spectra’s explicit acknowledgement that it is owned by CenturyTel, Inc. and that both it and CenturyTel of Missouri are subsidiaries of CenturyTel, Inc. and members of the CenturyTel, Inc. corporate family of various telecommunications companies (Tr. 68.), Socket insisted (over the continued objections of Spectra and CenturyTel) on burdening the record of this proceeding with irrelevant allegations and documents purporting to support its theory of relief. At the end of the day, however, there is nothing in the record of this proceeding that can negate the relevant facts that this Commission must consider.

As discussed by Staff, Spectra and CenturyTel, the record evidence establishes that Spectra Communications Company, LLC and CenturyTel of Missouri, LLC are separate legal entities, organized in different states; they possess separate certificates of service authority from this Commission; they serve different local exchanges in the state of Missouri; and they operate pursuant to separate tariffs approved and on file with this Commission. (Tr. 20.)

The record confirms that Socket acknowledges and agrees with the above facts. (Tr. 101-102.) In fact, suggesting that separate legal entities also exist within the Socket Holding Company corporate family, Socket Witness Coffman testified as follows:

Question (Mr. Dority): “Okay. Let me read a statement to you and I’d just like to see if you agree with it. One of Socket Telecom, LLC’s customers happens to be Socket Internet, Inc. These are separate, legal entities similar to CenturyTel and Spectra, SBC and ASI, etc. Would you agree with that?”

Answer (Mr. Coffman): “Legal entities, yes, I would.”

(Tr. 186.)

Socket Witness Kohly recognized the separate legal entity concept and its relevance to contracts as well.

Question (Mr. Dority): “Well, I mean, if I were to enter into a contract with Socket Internet, if I were to subscribe to service from Socket Internet, would I also be subscribing to service from Socket Telecom, LLC, the petitioner in this proceeding?”

Answer (Mr. Kohly): “Not necessarily.”

Question: “Not necessarily?”

Answer: “No. I guess, no, you wouldn’t. They’re separate entities.”

(Tr. 105.)

While Spectra did receive approval from this Commission to operate in Missouri doing business as CenturyTel, that branding and marketing decision did nothing to affect the separate legal status of Spectra and CenturyTel of Missouri. Indeed, as Staff Counsel pointed out in response to an inquiry from the bench, “Well, I would add that the use of the fictitious name did not constitute a merger. They remain separate entities. And factually I would add that Spectra adopted the CenturyTel fictitious name before CenturyTel of Missouri had become certificated here.” (Tr. 44.)

Again, the only reason that Socket insists on attempting to blur the legal status of these separate entities, is to support and further its attempt at securing an unlawful “confirmation of adoption” from this Commission.

- C. The purported “Confirmation” is an unlawful attempt to circumvent 47 U.S.C. 252(i) and Commission precedent and would, in the end, constitute equitable relief which this Commission cannot provide.**
 - 1. The record clearly establishes that Socket has not adopted an interconnection agreement to which Spectra is a party; therefore, there can be no “confirmation” of such adoption.**

As fully discussed above, Spectra was not a party to the GTE/AT&T Interconnection Agreement. “Ordinarily when there’s an adoption, the companies come forward at that time and it’s confirmed by the Commission. In this circumstance, that occurred but it occurred with a different party.” (Mr. Lumley, Tr. 39.)

- 2. Any Commission “confirmation” of a non-existent adoption would be in absolute contravention of 47 U.S.C. 252(i) and Commission precedent concerning the adoption of interconnection agreements in Missouri.**

The evidentiary record in this matter provides no legal foundation for the house of cards that Socket continues to try to construct. Socket appears to suggest that the Commission simply accept the premise that an adoption has already occurred, and retroactively rubber-stamp its existence by a “confirmation” pronouncement in this proceeding.

Socket Witness Kohly offers a simplistic approach: “We believe it is the AT&T/GTE agreement that we operate under throughout both CenturyTel subsidiaries.” (Tr. 149.) “We’re not asking that it be adopted. We’re asking for confirmation that we’re already using it. So that’s – I don’t know how material that is, but that’s what we’re asking.” (Kohly, Tr. 134.)

However, Socket’s “confirmation theory” is not lawful, and cannot withstand scrutiny as shown by the record herein.

In response to an inquiry from Chair Gaw as to the form of the purported adoption, Counsel for Socket responded “. . . But it’s by conduct. I’m not suggesting that there’s a piece of paper that says we’re making this available to you.” (Mr. Lumley, Tr. 42.) And in response to a question from Staff Counsel, “Do you have with you today the letters where Socket requested interconnection in the Spectra exchanges?,” Mr. Kohly responded, “I do not.” (Tr. 100.) Of course, no such letters exist because no request was ever made. (Tr. 219.)

The fluid nature of the theory of relief is captured in the following exchanges.

Question (Chair Gaw): “All right. And when do you believe that that was adopted?”

Answer (Mr. Kohly): “By ‘adopted’ if you mean did – was there a formal petition filed to adopt the agreement, no, there wasn’t. . . .”

Question: “Is it possible to adopt an interconnection agreement verbally and without some written adoption notice?”

Answer: Adoptions – I would – I don’t know. I think you would need Commission approval to adopt it and that’s what we’re seeking confirmation that it’s been adopted.”

Question: Who would the Commission have given its approval of that adoption in this case?

Answer: I don’t know that the Commission would have – that the Commission has given approval in this case. That’s what we’re seeking. . . . “

* * * *

Question: When do you believe the adoption occurred?

Answer: I would say the effective date of the adoption would have been when the parties began operating under it, which would have been when the forecasts were submitted and all that.”

(Tr. 149-150.)

* * * *

Question: So what I'm asking you – going back to my earlier question is, at what point in time was there some adoption of the agreement by Socket in regard to those Spectra exchanges? When did that occur?

Answer: I guess the adoption would have occurred at the time both transactions were completed, the companies operate – began operating as one entity throughout all exchanges, held themselves out as one company.”

(Tr. 152-153.)

However, this suggested retroactive “confirmation” of an informal “we’ll know it when we see it” adoption that was never presented to the Commission for approval, just doesn’t square with the requirements of the federal Act and this Commission’s precedent related thereto. One has to look no further than what Socket advocated in its pleading recently filed with this Commission in a separate proceeding, regarding the necessity of formal Commission approval of adopted agreements:

Questions were raised in the past regarding the necessity of Commission approval of adopted agreements, but the Commission has consistently taken the position that such approval is necessary under 252(e). [Footnote 2: The Commission is currently working on promulgating a rule concerning such matters in Case No. TX-2003-0565.] For example, in its Order Denying Motion to Reject and Approving Interconnection Agreement issued in In the Matter of the Adoption of the GTE/Communications Cable-Laying Co dba Dial US Interconnection Agreement by Teleport Communications Group, Case No. TO-99-94 (Nov. 25, 1998), the Commission rejected GTE’s argument that an agreement adopted pursuant to rights granted in Section 252(i) did not have to be submitted for approval under Section 252(e). The Commission stated: “Nothing in 252(i) would override Section 252(e)(1) of the Act, which requires that interconnection agreements be submitted for approval to the state commission. . . .

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⁵ Socket Telecom, LLC’s Brief Regarding Rehearings In Federal Telecommunications Act Cases, ¶ 9, pp. 3-4, Case No. CO-2005-0039, November 18, 2004.

3. **Despite its representations to the contrary, Socket's proposed relief would, in fact, require this Commission to provide an equitable remedy to which Socket is not entitled; in addition, this Commission cannot grant equitable relief.**

As previously referenced, *supra*, page 2, the Commission itself posed the possibility of an equitable remedy in this proceeding in its Order Denying Motion for Summary Determination on the Pleadings, wherein it suggested that the facts alleged by Socket constitute the elements of equitable estoppel. Counsel for Staff cautioned the Commission that estoppels are not favorites of the law and will not be invoked lightly, citing Thompson v. Chase Manhattan Mortgage Corporation at 90 S.W. 3d 194 (Mo. App. S.D.). (Tr. 19.) Counsel further discussed the various elements of estoppel and the burden of proof associated therewith, noting that "Every fact essential to create it must be established by clear and satisfactory evidence. One cannot set up another's act or conduct as the ground of an estoppel unless the one claiming it be misled or deceived by such act or conduct nor can he set it up where he knew or had the same means of knowledge as the other to the truth." (Tr. 20.) Reviewing the Commission's records regarding the many ways in which Spectra and CenturyTel are separate entities, Counsel reminded the Commission that ". . . Socket knew or had the means to know these truths." (*Id.*) Indeed, the record herein confirms that Socket was aware of those facts. (*supra*, page 12.) Thus, in summarizing Staff's position on this issue, Counsel stated: "In summary, Spectra's and CenturyTel of Missouri's cases before this Commission as well as the Commission's actions on those cases make it clear that Spectra and CenturyTel of Missouri are two separate entities. Accordingly, the doctrine of equitable estoppel does not apply and does not prevent Spectra from asserting its separate identity from CenturyTel of Missouri." (Tr. 21.)

Counsel for Spectra and CenturyTel also addressed this issue during Opening Statements. In addition to agreeing with Staff's analysis of the issue, Counsel reminded the Commission that

Missouri case law, and this Commission's previous orders, consistently have held that the Missouri Public Service Commission does not have the authority to award equitable relief. Missouri courts have recognized that certain actions would constitute species of equitable relief, and that this Commission cannot do equity. *See Soars v. Soars-Lovelace, Inc.*, 142 S.W.2d 866, 871 (Mo. 1940); also, Order Denying Reconsideration, Case No. EC-99-553, August 19, 1999. (Tr. 29-30.) Agreeing with Staff's conclusion that Socket could not prove the necessary elements of estoppel in any event, Counsel submitted, and the record evidence supports, that there was no pattern of conduct by Spectra but rather simple mistakes that occurred in August 2004 (and evidently just prior to the hearing) involving the erroneous provisioning of trunks in four out of 107 exchanges. (Tr. 30, 213-219.) Furthermore, Spectra has stated on the record that it will not disconnect those facilities and that it has offered to negotiate an interim arrangement with Socket addressing those particular exchanges. (Tr. 30-31, 218-219.) Thus, there is no harm to Socket, its customers or the public interest.

By offering to negotiate an interim arrangement, Spectra in no way admits the erroneous allegations contained in Socket's pleadings or its testimony. In its initial pleading, Socket falsely asserts that "Since June 27, 2002 [which was the date of Socket's adoption of the GTE/AT&T Agreement] CenturyTel has conducted business with Socket in its exchanges pursuant to the adopted GTE/AT&T agreement without regard to whether an exchange was acquired in the Spectra transaction or in the CenturyTel transaction." (Par. 4, page 3.) However, Socket's own testimony suggests that "we started operationally working on local interconnection in the spring of 2003;" its first contacts with CenturyTel of Missouri representatives "occurred during that time (no exchanges in the Spectra region were discussed during that time);" "its first facilities in Columbia were turned up in the fall of 2003" (CenturyTel of Missouri); and any purported

forecast for facilities (“The forecast itself does not reference, you know, what agreement it’s done under.” Tr. 132) that may have included Spectra exchanges was first sent to Monroe, Louisiana in February of 2004. (Tr. 191, 193-195.) Spectra Witness Susan Smith rebuts the implications regarding purported knowledge of Spectra exchanges based upon forecasts; recites that the trunks were ordered, and actually turned up erroneously by Spectra, in August 2004 (the bulk of the facilities were provisioned in August – Kohly, Tr. 94); and that upon learning of that situation in a telephone call with Mr. Kohly in September 2004, she advised Mr. Kohly that Socket had no interconnection agreement with Spectra. (Tr. 213-219.) Mr. Kohly admitted in response to questions from the bench that “at best, you’re operating under a month-to-month agreement, and at worst you don’t have any agreement.” (Tr. 127.)

Most telling in terms of fabricating the purported “harm” that supposedly exists, is the fact that Socket’s tariffs for local service in Missouri only referenced a few CenturyTel of Missouri exchanges – and no Spectra exchanges – during all of the relevant times at issue. To shore up their story and create a perceived need for Commission action, tariffs were filed on October 4, 2004 (effective November 3, 2004) – weeks after the filing of their verified pleading initiating this matter -- adding for the first time Spectra local exchanges to the Socket local tariff! (See, Exhibit 38.)

Question (Mr. Dority): “So just so I’m clear, after the date of September 9th when you allege that Ms. Smith informed you that Spectra Communications Group, LLC did not have an interconnection agreement with Socket and would dispute the provisioning of service to Socket in the state of Missouri, you filed a tariff with this Commission for service rendered effective November 3rd that would effectuate such service in those exchanges; is that right?”

Answer (Mr. Kohly): “Those exchanges as well as others.”
(Tr. 111.)

Needless to say, it is certainly understandable why Socket's Counsel would want to distance the company from any request for equitable relief. "The transcript will reflect, and perhaps you will recall, that during my opening statement I never once referred to that principal [equitable estoppel legal theory]. We are not asserting that." (Tr. 38.)

However, an examination of the proposed theory(s) for relief, *supra*, evidenced by Mr. Kohly's statement of "We believe they've extended the agreement to us in the Spectra exchanges through their actions of at least creating an implied contract" (Tr. 124, emphasis supplied), leads to no other conclusion than Socket is, indeed, seeking equitable relief from this Commission.

D. Response to Commissioner Inquiry

During the course of the evidentiary hearing in this matter, Commissioner Murray requested "the attorneys to brief why it is that this language [Section 23.4 of the GTE/AT&T Interconnection Agreement] did not bind Spectra as a successor." (Tr. 246-247.) At the request of Commissioner Murray, Spectra Witness Smith read Section 23.4 out loud, as follows: "Binding effect. This agreement shall be binding on or enure to the benefit of the respected (sic) [respective] successors and permitted assigns of the parties." (Tr. 243-244.)

Ms. Smith correctly responded to Commissioner Murray that Spectra would not be considered a successor to GTE in this instance. Ms. Smith's complete response can be found at pages 244-247 of the Transcript.

As noted by Spectra's witness and as fully discussed herein, Case No. TM-2000-182, *In the Matter of the Joint Application of GTE Midwest Incorporated and Spectra Communications Group, LLC for Authority to Transfer and Acquire Part of GTE Midwest Incorporated's Franchise, Facilities or System located in the State of Missouri and for Issuance of Certificates of Service Authority to Spectra Communications Group LLC and for Authority for Spectra*

Communications Group LLC to Borrow and Amount not to Exceed \$250,000,000 from CenturyTel, Inc., and in Connection Therewith to Execute a Telephone Loan Contract, Promissory Notes, and a Mortgage, Security Agreement and Financing Statement, Report and Order issued April 4, 2000, Effective April 14, 2000, involved the authorization for GTE Midwest Incorporated to transfer and sell, pursuant to the Asset Purchase Agreement, all of its telecommunications facilities, assets and equipment located in 107 identified exchanges, as well as the certification of Spectra Communications Group LLC as a new provider of basic local exchange telecommunications services in the state of Missouri. Additionally, GTE requested that it be authorized to discontinue providing service in those exchanges. This transaction was an asset sale, not a merger or assumption of interests, and GTE Midwest Incorporated continued to own facilities and properties (96 exchanges) in Missouri after the sale of these assets. Accordingly, as Ms. Smith testified, “GTE of the Midwest continued to operate, so they still needed these contractual arrangements.” (Tr. 244.)

Recognizing this situation, Spectra Communications Group, LLC, GTE Midwest Incorporated, the Staff, and the Office of the Public Counsel included a specific section discussing interconnection agreements in their nonunanimous Joint Recommendation filed on January 16, 2000 in the proceeding. (Exhibit 9). As set forth, *supra*, Section I of the Joint Recommendation, reads:

I. Interconnection agreements

Spectra agrees to make every effort to negotiate new interconnection agreements with all competitive local exchange companies (“CLECs”) who currently have interconnection agreements with GTE and who desire to have interconnection with Spectra. Where it is feasible, Spectra will enter into agreements which have the same rates, terms and conditions as those agreements previously negotiated with GTE. There will, necessarily, be some differences in these agreements because of the different methods of interfacing between GTE and Spectra. If Spectra and any CLEC are unable to agree on the terms of these agreements,

Spectra agrees to submit any disputes to the Commission for resolution. In those situations where the CLEC is already providing service in an exchange to be transferred, Spectra agrees to cooperate with the CLEC in requesting expedited approval of these new interconnection agreements from the Missouri Public Service Commission.

In their Report and Order, discussing the sale of assets from GTE to Spectra, the Commission addresses the specific conditions to be adopted as part of a grant of authority to transfer assets (noting that both Staff and Public Counsel condition their support of the joint application on the explicit adoption of such conditions) which include: “. . . and that Spectra will negotiate interconnection agreements with CLECs to replace GTE’s existing interconnection agreements, using the same terms where feasible.” (Discussing Issue 1 of the list of issues submitted by the parties for determination by the Commission.) (Exhibit 6.) Accordingly, the Commission approves Spectra’s acquisition of GTE’s exchanges subject to the conditions contained in the Joint Recommendation filed on January 26, 2000 and, indeed, “Spectra Communications Group is ordered to comply with these conditions.” (Ordered Paragraph 2.)

As the record evidence reveals, Spectra fully complied with the above-stated terms of the Joint Recommendation. Indeed, prior to the closing of the transaction, both Spectra and GTE notified those affected CLECs that in light of Spectra’s purchase of the assets of the GTE exchanges identified, their respective company’s existing GTE agreement would need to be replaced by an agreement with Spectra. CLECs who had agreements with GTE and who desired to interconnect with Spectra contacted Spectra and executed interconnection agreements directly with Spectra. (Tr. 206-211.) AT&T Communications of the Southwest, Inc., a formal party to that proceeding and participant in the evidentiary hearing, was sent such correspondence (Exhibits 41, 42 and 43), and never responded. No interconnection agreement between Spectra and AT&T was executed, and Spectra has never considered that it had an interconnection

agreement with AT&T Communications of the Southwest, Inc. relative to the 107 exchanges in the state of Missouri. (Tr. 211, 244-245.)

Ms. Smith testified that AT&T had no services with Spectra or within those 107 exchanges. (Tr. 244.) In responding to questions from the bench, Mr. Kohly testified that he didn't know if AT&T received any notice in regard to the sale. "Do you know whether or not AT&T was doing any business in any of those exchanges during the time before or right after the sale?" "My understanding is that – well, I don't know one way or the other." (Tr. 143.) In response to further questions from the bench regarding the sale of properties to Spectra and what did the interconnection agreement require GTE to do, Mr. Kohly responded: "In looking at the termination of the agreement, transitional support, I don't see anything that specifically addresses that situation." (Tr. 146.)

Clearly, both GTE and Spectra acted in compliance with, and as required by, the Commission's Report and Order issued in that proceeding. To suggest that such actions are now subject to question or somehow invalid would be an unlawful collateral attack on the Commission's 4-0-1 voted Report and Order issued over four years ago in that proceeding.

Section 23.8 of the GTE/AT&T Interconnection Agreement states as follows:

This Agreement shall at all times be subject to changes, modifications, order, and rulings by the FCC and/or the applicable state utility regulatory commission to the extent the substance of this Agreement is or becomes subject to the jurisdiction of such agency. This Agreement is subject to the approval of the Commission in accordance with Section 252 of the Act. This Agreement shall not become effective until five (5) Business Days after receipt by the Parties of written notice of such approval. "Business Day" shall mean Monday through Friday, except for holidays on which the U.S. Mail is not delivered. (Emphasis added). (Exhibit 5, Page 000032.)

Attachment 11, Definitions, page 000297, provides:

"Commission" means the Public Service Commission of the State of Missouri.

Clearly, the terms of the Report and Order issued by the Missouri Public Service Commission in Case No. TM-2002-182 contemplate the necessity of a new interconnection agreement with each CLEC wishing to provide service in the Spectra exchanges, and the conditions of this Report and Order must be recognized when construing the GTE/AT&T Interconnection Agreement

V. Conclusion

For all of the reasons set forth herein, the Commission must find and conclude that Spectra Communications Group, LLC d/b/a CenturyTel is not obligated to provide service to Socket Telecom, LLC under the terms of the GTE/AT&T Interconnection Agreement. To do otherwise would be unlawful, unjust and unreasonable.

WHEREFORE, Spectra Communications Group, LLC d/b/a CenturyTel and CenturyTel of Missouri, LLC again move that the Commission reject the relief that Socket Telecom, LLC requests herein.

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 30th day of November, 2004, to:

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