

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

<b>CENTURYTEL OF MISSOURI, LLC,</b>	)	
	)	
<b>Complainant,</b>	)	<b>CASE NO. IC-2008-0068, et al.</b>
	)	
<b>v.</b>	)	
	)	
<b>SOCKET TELECOM, LLC,</b>	)	
	)	
<b>Respondent.</b>	)	

**ORDER GRANTING CENTURYTEL’S JOINT MOTION FOR SUMMARY  
DETERMINATION  
AND  
DENYING SOCKET TELECOM’S CROSS MOTION FOR SUMMARY  
DETERMINATION**

*Syllabus:* This Order grants the Joint Motion of CenturyTel of Missouri, LLC (“CenturyTel of Missouri”) and Spectra Communications Group, LLC, d/b/a CenturyTel (“Spectra”)<sup>1</sup> for Summary Determination on Interpretation of Compensation Arrangements Applicable to Local Traffic (CenturyTel’s “Joint Motion”) and denies Socket Telecom’s (“Socket”) Cross Motion for Summary Determination (Socket’s “Cross Motion”).

**I.  
BACKGROUND & PROCEDURAL HISTORY**

On September 5, 2007, CenturyTel of Missouri filed its Complaint Regarding Post-Interconnection Dispute Resolution against Socket Telecom, LLC (“Socket”) in Case No. IC-2008-0068. Socket filed its Answer and Counterclaim to the CenturyTel of Missouri complaint

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<sup>1</sup> Hereinafter, CenturyTel of Missouri and Spectra are collectively referred to as “CenturyTel” unless otherwise necessary for context.

on October 12, 2007. On October 26, 2007, Spectra filed a similar complaint against Socket in Case No. IC-2008-0127, as well as a Motion to Consolidate the two post-interconnection dispute proceedings. Socket filed its Consent to Consolidation on October 31, 2007, and its Answer and Counterclaim to the Spectra Complaint on November 5, 2007. Also on October 31, 2007, the Commission's Staff filed a Staff Response in Support of CenturyTel's Motion to Consolidate. By Order of the Commission dated November 6, 2007, the Commission consolidated the two cases, with Case No. IC-2008-0068 being designated as the lead case.

By their Complaints, CenturyTel of Missouri and Spectra (collectively, "CenturyTel") request that the Commission interpret the parties' interconnection agreements ("Agreement" or "Agreements")<sup>2</sup> and seek a determination by the Commission that such Agreements require that CenturyTel and Socket exchange Local Traffic (including Section 251(b)(5) Traffic and local ISP Traffic), as that term(s) is defined by the Agreements, but that the Agreements apply no charges to the parties' exchange of such Local Traffic.<sup>3</sup> CenturyTel further seeks a declaration that Socket is not entitled to reciprocal compensation payments from CenturyTel for terminating such Local Traffic originated by CenturyTel's customers.

By its Counterclaims, Socket similarly requests that the Commission interpret the parties' Agreements and seeks the Commission's determination that such Agreements require the party originating Local Traffic ("originating party") to pay "reciprocal compensation" to the party terminating such Local Traffic ("terminating party") on its network.

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<sup>2</sup> The interconnection agreements between CenturyTel and Socket, on the one hand, and Spectra and Socket, on the other hand, are substantially identical, including the provisions at issue in this dispute. Therefore, the Commission will refer to the parties' respective interconnection agreements as the "Agreement" or the "Agreements." Either way, this Order shall apply to the interpretation of both Agreements and to the resolution of the disputes arising under both Agreements.

<sup>3</sup> The parties do not dispute the content of definitions relevant to this dispute, including but not limited to Local Traffic, ISP Traffic, Section 251(b)(5) Traffic, and VNXX Traffic.

On December 13, 2007, CenturyTel filed a Joint Motion for Summary Determination on Interpretation of Compensation Arrangements Applicable to Local Traffic (CenturyTel's "Joint Motion") requesting that the Commission, as a matter of law, construe and interpret the provisions of the Agreements related to compensation for the exchange of Local Traffic. CenturyTel seeks the Commission's determination that the terms of the Agreements are unambiguous and that such terms do not require either party to pay the other party reciprocal compensation for the exchange of Local Traffic.

On January 14, 2008, Socket filed its Response to CenturyTel's Motion for Summary Determination and Cross Motion for Summary Determination ("Cross Motion") similarly requesting that the Commission construe and interpret the provisions of the Agreements related to compensation for the exchange of Local Traffic. Socket seeks a determination by the Commission that the terms of the Agreements require the parties to pay each other reciprocal compensation for the exchange of Local Traffic.

On February 13, 2008, CenturyTel filed its Response to Socket's Cross Motion, as well as a Motion to Strike the Affidavits of William L. Magness and R. Matthew Kohly, which affidavits Socket filed in support of its Cross Motion. Among other deficiencies, CenturyTel asserts that the Magness and Kohly Affidavits contain extrinsic evidence of the meaning of an unambiguous contract in violation of the parole evidence rule. CenturyTel asserts that the Commission should interpret the terms of the Agreements without resorting to any extrinsic evidence unless it first determines that the Agreements are ambiguous. If the Commission determines that the Agreements are ambiguous with respect to the compensation regime applicable to Local Traffic, CenturyTel asserts that only then may the Commission determine the intent of the parties by resorting to extrinsic evidence regarding the parties' negotiation history.

To that end, CenturyTel also filed the Affidavits of Susan W. Smith and Charles Brent Stewart in support of its Response to Socket's Cross Motion; however, CenturyTel asserts these affidavits are offered subject to its Motion to Strike.

Socket and CenturyTel each filed a Reply on February 25, 2008 and March 6, 2008, respectively, and Socket filed a "Response to CenturyTel's Joint Reply" on March 12, 2008.

On April 9, 2008, the Commission held oral arguments on the parties' competing motions for summary determination. In addition to the parties' arguments in support of their respective motions, Commission Staff argued at the hearing that the Agreements are ambiguous with respect to the compensation regime applicable to Local Traffic, but that the record supports CenturyTel's position. *See* Oral Argument Transcript (Aug. 9, 2008) ("Tr.") at 19:8-10; 20:10-17.

On July 23, 2008, the Commission issued an Order Directing Parties to File Proposed Orders.

## **II. SUMMARY DISPOSITION**

### **A. Standard of Review for Summary Determination**

Commission Rule 4 CSR 240-117, which is entitled "Summary Disposition," authorizes the Commission to decide all or any part of a "contested case by disposition in the nature of summary judgment or judgment on the pleadings." 4 CSR 240-2.117.

One type of summary disposition permitted under this rule, called "summary determination," is authorized by Commission Rule 4 CSR 240-2.117(1), which provides in relevant part:

(A) Except in cases seeking a rate increase or which is subject to an operation of law date, any party may by motion, with or without supporting affidavits, seek disposition of all or any part of a case by summary determination at any time after the filing of a responsive pleading, if there is a respondent, or at any time after the close of the intervention period.

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(E) The commission may grant the motion for summary determination if the pleadings, testimony, discovery, affidavits, and memoranda on file show that there is *no genuine issue as to any material fact*, that any party is *entitled to relief as a matter of law* as to all or any part of the case, and the commission determines that it is in the public interest. An order granting summary determination shall include findings of fact and conclusions of law.

4 CSR 240-2.117(1) (emphasis added). The other type of summary disposition contemplated by the Rule is called “determination on the pleadings” and is authorized by Commission Rule 4 CSR 240-2.117(2), which states in its entirety:

Except in a case seeking a rate increase or which is subject to an operation of law date, the commission may, on its own motion or on the motion of any party, dispose of all or any part of a case on the pleadings whenever such disposition is not otherwise contrary to law or contrary to public interest.”

4 CSR 240-2.117(2).

While this case could be determined under either summary determination procedure, the Commission shall render its decision in this matter under the “summary determination” procedure pursuant to 4 CSR 240-2.117(1).

This is not a case seeking a rate increase, or a case subject to an operation of law date. Rather, this is a case in which both parties have requested that the Commission interpret, as a matter of law, certain provisions of their interconnection agreements to determine whether a party originating Local Traffic, as that term is defined by the Agreements, is required to pay the terminating party for such traffic termination. *See CenturyTel’s Joint Motion at ¶¶ 1, 10-13; Socket’s Cross Motion at 2-3, 15.* Summary judgment is particularly appropriate when the construction or interpretation of an unambiguous contract is at issue. *See Lupo v. Shelter Mutual*

*Ins. Co.*, 70 S.W.3d 16, 18-19 (Mo.App. E.D. 2002). That is so because contract interpretation is a question of law. *See Goellner v. Goellner Printing*, 226 S.W.3d 176, 178 (Mo.App. E.D. 2007). In addition, the public interest clearly favors the quick and efficient resolution of this matter by summary determination without an evidentiary hearing inasmuch as the parties already have filed extensive evidentiary material in connection with their respective motions, *see, e.g.*, Determination on the Pleadings, *The Staff of the Missouri Public Service Commission v. Taney County Utilities Corporation*, Case No. WC-2004-0342 (Oct. 19, 2004), and “[t]he time and cost to hold hearings on [a] matter when there is no genuine issue as to any material fact would be contrary to the public interest,” *see* Determination on the Pleadings, *In the Matter of the Application of Aquila Inc. for an Accounting Authority Order Concerning Fuel Purchases*, Case No. EU-2005-0041 (Oct. 7, 2004). Moreover, the public interest clearly favors the quick and efficient resolution of this matter insofar as this unresolved dispute between the parties has been ongoing for nearly two years, and the unresolved dispute regarding the interpretation of the parties’ Agreements could, unless resolved, cause further disputes with other carriers that have adopted or may adopt the terms of the Agreements at issue.

## **B. Relevant Rules of Contract Interpretation**

By the Agreements’ own terms, federal and Missouri law apply to the Agreements at issue here. *See* Agreement, Article III, Sec. 23 (“This Agreement, and the Parties’ performance hereunder, shall be governed by and construed in accordance with the Act, and applicable federal and Missouri law.”). More specifically, the issue of the Agreements’ construction and interpretation is governed by Missouri law. Interconnection agreements are subject to the same rules of contract construction and interpretation as any other contract under Missouri law. *See Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708 (8<sup>th</sup>

Cir. 2006)(stating that “the ultimate issue in this case—interpretation of the interconnection agreement—is a state law issue[,]” and applying principles of state contract law to construe and interpret the provisions of the agreement).

In Missouri, the guiding principle of contract interpretation is to seek to ascertain the intent of the parties and to give effect to that intent. *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. 2005) (en banc). The intent of the parties to a contract is presumed to be expressed by the ordinary meaning of the contract’s terms. *Id.* If the contract is unambiguous, it will be enforced according to its terms. *Id.* See also *Leggett v. Missouri State Life Ins. Co.*, 342 S.W.2d 833, 851 (Mo. 1961). The fact that parties disagree over the meaning of contractual terms does not render the language ambiguous. *Kyte v. American Family Mutual Ins. Co.*, 92 S.W.2d 295, 299 (Mo.App. W.D. 2002). However, if the Commission determines that the contract is ambiguous, it may ascertain the parties’ intent by looking beyond the four-corners of the contract to other relevant extrinsic evidence—*i.e.*, to the parties’ negotiation history. See *Goellner*, 226 S.W.3d at 178.

**C. Findings of Fact and Conclusion of Law Related to the Unambiguous Agreement.**

The parties agree that the primary dispute in this case pertains to the proper interpretation of the Agreements. See CenturyTel’s Joint Motion at ¶ 1 (“this is a dispute regarding the interpretation of the Parties’ Interconnection Agreements”) and Socket’s Cross Motion at 3 (“It is the interpretation of the Agreement on which the parties disagree.”). Specifically, do the provisions of the Agreements require the originating party to pay reciprocal compensation to the terminating party for the termination of Local Traffic, which, as defined under the Agreements, includes local ISP Traffic. CenturyTel’s Joint Motion at ¶ 1; Socket’s Cross Motion at ¶ 7. While ambiguity is a matter for the Commission’s determination, both parties assert that the

relevant provisions of the Agreements are unambiguous. *See* CenturyTel’s Joint Motion at ¶¶ 12-13 *and* Tr. 39:16-18 (where Socket’s counsel asserts that “[t]his contract, on its face, unambiguously requires the parties to pay each other compensation for terminating Local Traffic.”). However, each party requests that the Commission interpret such provisions in its favor. The Commission has reviewed the relevant terms of the Agreements and determines, as a matter of law, that they are unambiguously “silent” on the issue of compensation for the parties’ exchange of Local Traffic under the Agreements.

**(1) Findings of Fact Related to the Interpretation of the Intercarrier Compensation Provisions of the Agreements.**

1. CenturyTel of Missouri and Spectra are each parties to a separate Agreement with Socket, which Agreements were arbitrated before the Commission pursuant to § 252(b)(1) of the Act and the Commission’s rules in Case No. TO-2006-0299 (“underlying arbitration”). CenturyTel of Missouri Complaint ¶ 6; Spectra Complaint ¶ 6; Socket’s Answer to CenturyTel of Missouri Complaint ¶ 6; Socket’s Answer to Spectra Complaint ¶ 6.

2. On October 3, 2006, the Commission issued an order approving the Agreements arbitrated in Case No. TO-2006-0299, which order became effective on October 13, 2006. *Id.*

**(2) Conclusions of Law Related to the Interpretation of the Intercarrier Compensation Provisions of the Agreements.**

1. The relevant intercarrier compensation provisions are contained in Article V of the parties’ Agreements. While the term “reciprocal compensation” is nowhere mentioned in Article V, Socket principally relies on the following provisions in Article V to support its



position that the Agreements require the parties to pay each other reciprocal compensation for the termination of the other party's Local Traffic—Sections 9.7 and 9.7.2.<sup>4</sup>

Section 9.7 provides:

Transport includes dedicated and common transport and any necessary Tandem Switching of Local Traffic from the POI between the two carriers to the terminating carrier's End-Office Switch that directly serves the called end user.

Section 9.7.2 provides:

Termination includes the Tandem Switching of Local Traffic at the terminating carrier's End Office Switch. Termination rates are set forth in Article VIIA.

2. The Commission finds that Sections 9.7 and 9.7.2 define what constitutes “transport” and “termination” of Local Traffic, respectively. However, neither these two provisions nor any other provisions of Article V or the Agreements state that one party is required to pay the other party for such transport and termination. Rather, the Agreements are devoid of any operable language *requiring one party to pay the other for the transport and termination that is defined in these provisions*. Absent is any language stating that the parties “will pay” each other for such “transport” and “termination” of Local Traffic or that reciprocal compensation “shall apply” to the parties’ exchange of that Local Traffic. *Compare with* Article V, Section 9.2.3 (stating that VNXX Traffic “*shall be* at Bill-and-Keep” (emphasis added)) *and* Section 10.3.2 (stating, with respect to Transit Traffic, that the “originating Party *will compensate* the transiting Party for each minute of non-MCA originated traffic that does not terminate to the Transit provider’s end user but terminates to a third party . . . .” (emphasis added)). In other words, Sections 9.7 and 9.7.2 *reference* transport and termination of Local Traffic, and even termination rates in Article VIIA. However, neither these provisions nor any

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<sup>4</sup> Socket also relies, to some extent on Article V, Section 9.7.1, but that provision can only be interpreted as defining the parties’ respective responsibilities for the installation of “facilities.” It does not relate to whether reciprocal compensation may or may not be applicable. *See* Article V, Section 9.7.1 (“Each Party shall be responsible for facilities and transport of Local Traffic between a Party’s Central Office Switch and the POI.”).

other provisions in the Agreements actually *apply* the rates in Article VIIA to the parties' transport and termination of Local Traffic, or specifically provide that one party pay the other party the rates in Article VIIA when that other party transports and terminates the first party's Local Traffic.

3. The Commission notes that Article V, Section 9.8 references an entirely different form of compensation regime associated with Local Traffic. Article V, Section 9.8, in its entirety, provides as follows:

Nothing in this Section shall be interpreted to (i) change compensation as set forth in this Agreement for traffic or services other than traffic or services for which compensation is addressed in this Article V, including but not limited to Internetwork Facilities, access traffic or wireless traffic, or (ii) *allow either Party to aggregate traffic other than Local Traffic for the purpose of compensation under the Bill-and-Keep arrangement described in this Section. The Parties reserve the right to otherwise seek compensation for non-Local Traffic including the imposition of access charges where appropriate.*

(emphasis added). The Commission finds that Article V, Section 9.8 similarly references a "Bill-and-Keep" compensation regime in connection with the parties' exchange of Local Traffic. However, the Commission finds that, as with Section 9.7, nothing in Section 9.8 or any other provision of the Agreements actually applies the referenced "Bill-and-Keep" compensation regime to the parties' exchange of Local Traffic.

Commission Staff agrees that Sections 9.7 and 9.8 do not directly apply a compensation regime to the parties' exchange of Local Traffic. At the hearing, Commission Staff stated: "The Interconnection Agreement does not contain a definitive declaration that bill-and-keep applies to Local Traffic nor does it contain a definitive declaration that reciprocal compensation applies to Local Traffic. Instead, the Interconnection Agreement has conflicting *inferences.*" Tr. At 20:12-17 (emphasis added).

4. While Sections 9.7 and 9.7.2 reference components of a “reciprocal compensation” regime, and Section 9.8 clearly alludes to a “Bill-and-Keep” regime associated with the exchange of Local Traffic, the Commission finds the Agreements to be unambiguous insofar as none of these provisions or any other provision in the Agreements specifically applies a compensation regime—reciprocal compensation or Bill-and-Keep—to the parties’ exchange of Local Traffic. This is not a case where two provisions directly contradict each other causing ambiguity—namely, where one provision specifically applies reciprocal compensation to the exchange of Local Traffic and another specifically applies a Bill-and-Keep regime to the exchange of the same traffic, thus causing a direct conflict. Rather, this is a case where different provisions of the Agreements each “reference” or “infer” a different compensation regime, but neither goes so far as to actually apply the referenced compensation regime to the exchange of Local Traffic.

5. With respect to whether the terms of Article V or the Agreements specifically apply either a reciprocal compensation or Bill-and-Keep regime to Local Traffic, the terms of the Agreements are unambiguous. The Commission construes the terms as applying neither. The Commission interprets the absence a provision in the Agreements specifically applying a compensation regime to Local Traffic as reflecting the parties’ intent to leave the Agreements silent on the issue of compensation for the exchange of Local Traffic. As the Agreements apply no compensation regime to the parties’ exchange of Local Traffic, the Commission determines that the Agreements, as a matter of law, require the parties to exchange Local Traffic (including local ISP Traffic), but do not require either party to pay the other for the termination of such traffic. The Commission notes that this result is the functional equivalent of a bill-and-keep compensation regime for Local Traffic exchanged between the parties.

6. Socket seems to assert that, even if the terms of the Agreements cannot be interpreted as applying reciprocal compensation to the exchange of Local Traffic, the Commission should nevertheless read the obligation to pay reciprocal compensation into the Agreements.<sup>5</sup> More specifically, Socket asserts that if the Agreements do not incorporate an express bill-and-keep provision—which Socket asserts operates as an express waiver of the right to receive reciprocal compensation under the Act—the parties are entitled to charge each other reciprocal compensation for the termination of Local Traffic.<sup>6</sup>

The Commission interprets Socket’s Cross Motion as arguing that, absent a specific term in the Agreements expressly waiving the payment of reciprocal compensation (*i.e.*, by adoption of an express bill-and-keep provision), the Commission is required to read the obligation to pay reciprocal compensation into the Agreements. Such argument is, at least, a tacit acknowledgment by Socket that the language of Article V, Sections 9.7 and 9.7.2 cannot be construed to apply reciprocal compensation to Local Traffic. In any event, Socket’s assertion violates fundamental and well-established principles of contract construction and interpretation. The provisions of the Act upon which Socket relies no more mandate “reciprocal compensation” than they do “bill-and-keep.” Indeed, the Act and its implementing rules authorize the implementation of either type of “arrangement” as an acceptable compensation regime for the exchange of Local Traffic. The Act neither requires express contractual language prescribing compensation, as Socket contends, nor gives either regime presumptive application over the

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<sup>5</sup> See Socket’s Legal Memorandum in Support of Its Cross Motion (“Socket’s Legal Memo in Support of Cross Motion”), at 2 (“The case simply concerns the provisions of the Telecommunications Act, which require companies to pay each other reciprocal compensation *absent an express waiver of the right to such compensation . . . .* (emphasis added)"); Affidavit of William L. Magness at ¶¶ 3-9 (asserting that if the Agreement does not incorporate an express bill-and-keep provision operating as an express waiver of a party’s right to receive reciprocal compensation under the FTA, the parties are *entitled* to charge each other reciprocal compensation for the termination of Local Traffic).

<sup>6</sup> *Id.*

other. *See* 47 U.S.C. § 252(d)(2)(B) (“This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements) . . .”).

The Commission has found no legal authority—and Socket has not cited any—supporting Socket’s argument that a failure to codify an express bill-and-keep provision in an agreement renders an equally non-existent reciprocal compensation provision applicable by default. Commission Staff concurs. *See* Tr. at 25:24-26:8 (wherein Commission Staff asserts: “Socket then argues that the statute makes clear that, absent bill-and-keep contractual arrangements, carriers remain entitled to charge one another for the costs associated with transporting and terminating one another’s calls. *This argument is not persuasive.* The statute does not set a default mechanism, and it can just as easily be argued that, absent arrangements for mutual recovery of costs, that carriers are then entitled to bill-and-keep.” (emphasis added)). Rather, interconnection agreements are construed and interpreted like any other contract or agreement under state law. *See Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708 (8<sup>th</sup> Cir. 2006) (stating that “the ultimate issue in this case—interpretation of the Interconnection Agreement—is a state law issue[,]” and applying principles of state contract law to construe and interpret the provisions of the agreement); *see also Southwestern Bell Telephone, L.P. v. PUC*, 467 F.3d 418, 422 (5<sup>th</sup> Cir. 2006) (“The interconnection agreement and state law principles govern the interpretation and enforcement of agreement provisions.”).

7. The Agreements, as approved by the Commission, contain no provision applying either a reciprocal compensation or a bill-and-keep regime to the parties’ exchange of Local

Traffic. Thus, the Agreements require the parties to exchange Local Traffic, but do not require either party to pay the other compensation for terminating such traffic.

8. If Socket believes that Sections 251(b)(5) and 252(d)(2) of the Act prohibited the Commission from approving agreements that do not contain explicit contractual terms applying either bill-and-keep or reciprocal compensation to the exchange of Local Traffic, then the Act provides Socket with a remedy. *See* 47 U.S.C. § 252(e)(6). Socket may not, however, obtain before this Commission relief that it failed to obtain in the Agreements.

**D. Even If the Commission Were to Determine that the Agreements Are Ambiguous as to the Compensation Regime Applicable to Local Traffic, the Undisputed Material Facts in the Record Clearly Demonstrate the Parties' Intent to Apply No Compensation to the Exchange of Local Traffic.**

Alternatively, even if the Commission were to determine the Agreements to be ambiguous and, therefore, look to extrinsic evidence of the parties' intent, the Commission's determination would be the same. As the primary rule of contract construction is to ascertain the intent of the parties and give it effect, the Commission may hear extrinsic evidence to determine that intent if the contract is deemed ambiguous. *See Eiman Brothers Roofing System, Inc. v. CNS Intern. Ministries, Inc.*, 158 S.W.3d 920, 923 (Mo.App. W.D. 2005); *Goellner*, 226 S.W.3d at 178 (if the contract is ambiguous, the Commission may ascertain the parties' intent by looking beyond the four-corners of the contract to other relevant extrinsic evidence—*i.e.*, to the parties' negotiation history). Certain additional material facts, undisputed in the record, clearly demonstrate that the parties did not intend to apply reciprocal compensation to their exchange of Local Traffic under the Agreements.

**(1) Additional Findings of Fact**

Thus, even if the Commission were to determine the Agreements to be ambiguous and limit its consideration of extrinsic evidence only to the undisputed material facts submitted by the parties in support of their respective motions, the Commission's determination would be the same as supported by the following additional Findings of Fact and Conclusions of Law:

3. In the underlying arbitration resulting in the Agreements at issue, each party proffered a provision applying a form of bill-and-keep to Local Traffic. *See* Affidavit of Susan W. Smith in Support of CenturyTel's Joint Response to Socket's Cross Motion ("Smith Aff.") at ¶¶ 4-5 (CenturyTel's proposal), 7 (Socket's proposal) *and* Joint Final DPL, Art. V at 57-59 (attached as Exhibit A to the Smith Aff.); Affidavit of R. Matthew Kohly in Support of Socket's Response to CenturyTel's Joint Motion ("Kohly Aff.") at ¶¶ 5 (CenturyTel's proposal) and 9 (Socket's proposal).

4. It is undisputed that, in the underlying arbitration, neither party proffered a provision applying reciprocal compensation as the primary compensation regime applicable to the exchange of Local Traffic, and neither party argued that unconditional reciprocal compensation should apply to such traffic. Smith Aff. at ¶ 7 ("In the negotiations leading up to the parties' filing of the Joint Final DPL, neither CenturyTel nor Socket proposed or argued in negotiations that reciprocal compensation should apply to Local Traffic or local ISP Traffic."). Socket does not dispute this factual assertion in the record. *See also* Joint Final DPL, Art. V at 57-59 (attached as Exhibit A to the Smith Aff.)(showing no proffered provision by either party advocating reciprocal compensation as the primary mechanism for compensation with respect to Local Traffic). Socket does not dispute this factual assertion. *See* Kohly Aff. at ¶ 9.

5. In the underlying arbitration, the Commission rejected both parties' proffered bill-and-keep provisions. The Final Commission Decision, therefore, did not order that the

Agreements provide for the payment of compensation for Local Traffic. *See* Final Commission Decision at 26-27 (rejecting CenturyTel’s proposed Article V, Sections 9.2.1 and 9.2.2) *and* 29 (rejecting Socket’s proposed Article V, Section 9.4.1). With respect to CenturyTel’s proposed bill-and-keep provision, Section 9.2.2, the Commission acknowledged that “*CenturyTel’s language addresses bill and keep generally,*” but then stated that it “*corresponds more closely with Socket’s [bill-and-keep] language at Sections 9.4.1 and 9.4.2.* (emphasis added).” The Commission then refused to rule on CenturyTel’s language, thereby refusing to adopt it. With respect to Socket’s proposed bill-and-keep provision, the Commission then rejected Socket’s proposed Section 9.4.1, stating: “*CenturyTel’s language at Section 9.2.3, addressing the appropriate application of bill and keep, is appropriate.* (emphasis added).” By rejecting CenturyTel’s proposed Section 9.2.2 and Socket’s proposed Section 9.4.1, the Commission effectively rejected the only two provisions purporting to apply bill-and-keep to Local Traffic and ISP Traffic, leaving the Agreements silent as to the compensation regime applicable to such traffic. *See also* Smith Aff. at ¶ 8.

6. In the underlying arbitration, the Commission did not order that reciprocal compensation should apply to the parties’ exchange of Local Traffic. Tr. at 26:12-15 (wherein Commission Staff states: “neither party proposed reciprocal compensation as the primary compensation arrangement for Local Traffic; and . . . the Commission did not state its was adopting reciprocal compensation”).

7. In the process of conforming the Agreements in the underlying arbitration, the parties recognized that conforming the Agreements in strict conformity with the Final Commission Decision would have the effect of leaving the compensation regime applicable to Local Traffic unaddressed in the Agreements. Indeed, in recognition of this fact, the parties



attempted to negotiate a bill-and-keep provision to incorporate into the Agreements; however, the parties could not reach agreement on the express language of that provision. Smith Aff. at ¶¶ 10-12; Affidavit of William L. Magness in Support of Socket’s Cross Motion (“Magness Aff.”) at ¶¶ 25-27 (explaining that, post-arbitration, “[t]he continued contract negotiations included several issues in Article V, including the issue of reciprocal compensation for Local Traffic.”). While the parties dispute the reason(s) why they were unable to agree on such an express bill-and-keep provision, the material issue—that the parties could not agree on the language of an express bill-and-keep provision during the conforming process—is undisputed.

8. Because the parties were unable to reach agreement on an express bill-and-keep provision to incorporate into the conformed Agreements, the parties filed the intercarrier compensation provisions in the conformed Article V precisely as directed by the Final Commission Decision, with no provision expressly addressing the compensation regime applicable to Local Traffic. *See* Smith Aff. at ¶¶ 11-12 (“the parties filed the “Intercarrier Compensation terms (Sections 9.0 through 9.7.3) of Article V exactly as directed by the Final Commission Decision”). Socket has not disputed this factual assertion in the record. *See also*, Magness Aff. at 27 (addressing the absence of specific bill-and-keep provisions for Local Traffic in the conformed Article V and stating “Socket agreed to the omission of the language for purposes of finalizing the ICA for signature and Commission approval.”).

9. The conforming process did not result in any provisions being added by the parties expressly applying “reciprocal compensation” or “bill-and-keep” to the parties’ exchange of Local Traffic. Smith Aff. at ¶ 12. Socket does not dispute this factual assertion in the record.

10. The provisions of the Agreements upon which Socket principally relies—Article III, Sections 10.2 (addressing the exchange of a Percentage of Local Use (PLU)) and 10.4

(addressing the right to audit Local Traffic); Article V, Sections 9.7 and 9.7.2; and transport and termination rates in Article VIIA—are provisions that were proposed in conjunction with CenturyTel’s initially-proposed bill-and-keep provision, which provision contained an “out-of-balance” provision should the exchange of Local Traffic between the parties become significantly out-of-balance. Smith Aff. at ¶ 13. See also Magness Aff. at ¶¶ 16-17 (acknowledging that CenturyTel’s proposal was a bill-and-keep provision with an “out-of-balance” provision) and ¶ 28 (admitting that the parties never discussed removing the reciprocal compensation-related provisions after the Commission rejected in arbitration both parties’ proposed bill-and-keep provisions). See also, Tr. at 25:7-10 (wherein Commission Staff states: “the Commission should reject the reciprocal compensation contract language as surplusage that was left over from CenturyTel’s out-of-balance proposal”).

11. During the conforming process in the underlying arbitration, the parties negotiated conforming language on numerous issues to give effect to the rulings in the Final Commission Decision. As part of that effort, the parties removed from the Agreements, in conformity with the Final Commission Decision, both parties’ competing bill-and-keep provisions. However, the parties did not specifically address the removal of Article III, Sections 10.2 and 10.4; Article V, Sections 9.7 and 9.7.2; and the transport and termination rates set forth in Article VIIA. The parties made no attempt to remove these provisions, and the Commission did not order them removed; rather, they were essentially ignored and, therefore, remained in the final Agreements that the Commission approved. See *id.*

12. Some months after the Agreements became effective on or about October 13, 2006, Socket began billing CenturyTel of Missouri “reciprocal compensation” for terminating what Socket alleges to be CenturyTel-originated Local Traffic. CenturyTel of Missouri

Complaint ¶ 11; Spectra Complaint ¶ 11; Socket Answer to CenturyTel of Missouri Complaint ¶ 11; Socket Answer to Spectra Complaint ¶ 11. The “Local Traffic” for which Socket is billing CenturyTel includes “ISP Traffic,” or traffic destined to Internet Service Providers. CenturyTel of Missouri Complaint ¶ 13; Spectra Complaint ¶ 12; Socket Answer to CenturyTel of Missouri Complaint ¶ 13; Socket Answer to Spectra Complaint ¶ 12. When Socket submitted its first two invoices, covering the three-month period from October 2006 to December 2006—Invoice No. 129 dated December 7, 2006, and Invoice No. 131 dated January 11, 2007—CenturyTel of Missouri paid them. CenturyTel of Missouri Complaint ¶ 12; Socket Answer to CenturyTel of Missouri Complaint ¶ 12. Invoice No. 129 was paid in the amount of \$7,232.33 and Invoice No. 129 was paid in the amount of \$3,619.08. *Id.* While Socket has continued to submit such invoices to CenturyTel of Missouri and Spectra on a monthly basis, CenturyTel has disputed and refused to pay them. CenturyTel of Missouri Complaint ¶¶ 11-12; Spectra Complaint ¶ 11; Socket Answer to CenturyTel of Missouri Complaint ¶¶ 11-12; Socket Answer to Spectra Complaint ¶ 11.

13. CenturyTel has not submitted a single invoice to Socket claiming entitlement to reciprocal compensation under the Agreements. CenturyTel of Missouri Complaint ¶ 11; Spectra Complaint ¶ 11; Socket Answer to CenturyTel of Missouri Complaint ¶ 11; Socket Answer to Spectra Complaint ¶ 11.

14. In a separate proceeding, counsel for CenturyTel made a statement that Socket asserts is an admission by CenturyTel that reciprocal compensation applies to the parties’ exchange of Local Traffic under the Agreements (“alleged Stewart admission”). That separate proceeding, Case No. TO-2007-0341, addressed a dispute between CenturyTel and Socket relative to the issue of number portability. CenturyTel’s counsel in that separate proceeding, Mr.

Brent Stewart, did not represent CenturyTel in either the underlying arbitration or in the instant post-interconnection dispute, nor was he as familiar with the treatment of Local Traffic under the terms of the Agreements as those terms were not at issue in Case No. TO-2007-0341. Smith Aff. at ¶ 15; Affidavit of Charles Brent Stewart in Support of CenturyTel's Joint Response to Socket's Cross Motion ("Stewart Aff.") at ¶¶ 2-4. During a hearing in Case No. TO-2007-0341 relative to the number portability issue, Mr. Stewart agreed with a characterization by Socket's counsel, Mr. Lumley, that Local Traffic under the Agreements is subject to reciprocal compensation. CenturyTel asserts, as supported by Mr. Stewart's affidavit, that he made a mistake in agreeing with Mr. Lumley's characterization. Stewart Aff. at ¶¶ 3-4.

**(b) Additional Conclusions of Law**

9. The Agreements were conformed to the Final Commission Decision, which rejected both parties' proposed bill-and-keep provisions, leaving the issue of what compensation regime applied to the parties' exchange of Local Traffic effectively unaddressed. The practical and legal effect of the parties' conforming process was to produce Agreements that obligate the parties to exchange Local Traffic and local ISP Traffic, but obligates neither party to pay the other for terminating such traffic. The findings of fact listed above demonstrate that the parties never intended to apply reciprocal compensation to Local Traffic. It is undisputed that neither party advocated the adoption of unconditional reciprocal compensation in the underlying arbitration; rather each party advocated that the Commission adopt a form of bill-and-keep, and the Commission rejected both parties' proposed bill-and-keep provisions as they applied to Local Traffic. It is undisputed that the Commission never ordered the parties to adopt reciprocal compensation. It is undisputed that the parties removed from the conformed Agreements both parties' proffered bill-and-keep provisions as both had been rejected by the Commission. It is

undisputed that the parties did not agree during the conforming process to incorporate any provision into the Agreements specifically applying reciprocal compensation or bill-and-keep to the parties' exchange of Local Traffic under the Agreements. Thus, the parties filed the conformed intercarrier compensation provisions in Article V of the Agreements in strict conformity with the Final Commission Decision, which left the issue of compensation for Local Traffic unaddressed. The Commission concludes that the conformed Agreements, therefore, are silent on the compensation regime applicable to Local Traffic, and that the parties intended the Agreements to be so. The Commission further concludes that the parties did not intend to require the payment of reciprocal compensation for the exchange of Local Traffic under the Agreements.

10. The provisions principally relied upon by Socket—Article V, Sections 9.7 and 9.7.2—no more demonstrate the parties' intent to apply reciprocal compensation to Local Traffic than Article V, Section 9.8 would demonstrate the parties' intent to adopt a bill-and-keep regime applicable to that traffic. As set forth above, the Agreements apply neither, demonstrating the parties' intent to leave the Agreements without a compensation regime for Local Traffic. As the Agreements apply no compensation regime to the parties' exchange of Local Traffic, the Commission interprets the Agreements, as a matter of law, as requiring the parties to exchange Local Traffic (including local ISP Traffic), but not requiring either party to pay the other for the termination of such traffic.

11. The Commission concludes that the provisions on which Socket relies—Article III, Sections 10.2 and 10.4; Article V, Sections 9.7 and 9.7.2; and the transport and termination rates set forth in Article VIIA—were proposed by CenturyTel and incorporated into the parties' draft Agreements as part of CenturyTel's proposed bill-and-keep provision (with an out-of-

balance trigger) and were intended to apply only to the extent a party triggered reciprocal compensation under CenturyTel's proposed out-of-balance provision. Smith Aff. at ¶ 13. *See also* Magness Aff. at ¶¶ 16-17 (acknowledging that CenturyTel's proposal was a bill-and-keep provision with an "out-of-balance" provision) and ¶ 28 (admitting that the parties never discussed removing the reciprocal compensation-related provisions after the Commission rejected in arbitration both parties' proposed bill-and-keep provisions). After the Commission ordered the removal of CenturyTel's proposed bill-and-keep provision from the Agreements, the parties ignored the continuing presence of these provisions and they were included in the final Agreements submitted by the parties for Commission approval. *See id.*

12. Just as the provisions relied upon by Socket are vestiges of CenturyTel's proposed bill-and-keep provision with an out-of-balance trigger, Section 9.8 is a vestige of what the parties assumed would be an adopted bill-and-keep provision (in one form or another) applied to Local Traffic. In the end, however, the Commission rejected both parties' proposed bill-and-keep provisions, and the parties agreed to file the conformed Agreements without any provision expressly applying a compensation regime to Local Traffic.

13. With respect to the "alleged Stewart admission," Mr. Stewart's alleged admission amounts to a legal conclusion regarding the interpretation of the terms of the Agreements. Such alleged admission is not binding on CenturyTel under the doctrine of judicial admissions because it was a legal conclusion uttered in a separate proceeding. In Missouri, a judicial admission can only bind a party if the statement or alleged admission is *factual* and made in the *same proceeding*. *See Mitchell Engineering Co. v. Summit Realty Co., Inc.*, 647 S.W.2d 130, 140-41 (Mo.App. W.D. 1982) ("A true judicial admission is an admission made in court or preparatory to trial, by a party or his attorney, which concedes *for purposes of that particular trial* the truth of

*some alleged fact[.]*” (emphasis added)); *Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc.*, 931 S.W.2d 909, 917 (Mo.App. S.D. 1996)(“Admissions arising from a proceeding other than the instant one cannot be considered judicial admissions in the sense of their being binding concessions of the truth of some *material fact[.]*” (emphasis added)). Moreover, Mr. Stewart’s statement on the record, made in a separate proceeding, is a purported interpretation of the Agreements’ intercarrier compensation terms. As such, Mr. Stewart’s statement constitutes a legal conclusion that is not binding on CenturyTel. *Metal Exchange Corp. v. J.W. Terrill, Inc.*, 173 S.W.3d 672, 679 n2 (Mo.App. E.D. 2005)(“The admission, to be binding, must be one of fact and not a conclusion of law.”); *Silver Dollar City*, 199 S.W.3d at 843 (“neither the client nor the court is bound by the attorney’s statements or admission as to matters of law or legal conclusions” (internal quotations and citation omitted)).

14. With respect to the two Socket invoices paid by CenturyTel, the Commission concludes that they should not be considered a “course of performance” for purposes of construing the Agreements. Even if so considered, “[a] course of performance by the parties to a contract which tends to show an interpretation by either one or both parties contrary to the plain terms of the contract does not control, but rather the contract is construed as written.” *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 409 (Mo.App. E.D. 1996). Moreover, to the extent Socket asserts that CenturyTel’s payment of these two initial invoices evidences its intent to pay, or its interpretation of the Agreements as requiring payment of, reciprocal compensation, such assertion cannot seriously be credited in the face of the undisputed fact that CenturyTel never submitted a single reciprocal compensation invoice to Socket. Smith Aff. at ¶ 14.

15. CenturyTel asserts that Socket is “collaterally estopped” and “judicially estopped” from asserting that reciprocal compensation applies to the parties’ exchange of Local Traffic.

See CenturyTel's Joint Motion at ¶¶ 14-16; CenturyTel's Joint Legal Memorandum in Support of Joint Motion at 7-13. Given the Commission's determinations in this Order, these bases for CenturyTel's Joint Motion are moot, and the Commission will not address them further.

**III.  
COMMISSION'S ORDER**

Therefore, the Commission will GRANT CenturyTel's Joint Motion for Summary Determination, and DENY Socket's Cross-Motion for Summary Determination.

**IT IS ORDERED THAT:**

1. CenturyTel's Joint Motion for Summary Determination on Interpretation of Compensation Arrangements Applicable to Local Traffic ("Motion") is granted on the grounds set forth in this Order.

2. The Commission declares that the parties' Agreements require the parties to exchange Local Traffic (including local ISP Traffic), as that term is defined by the Agreements, but that neither party is required to pay compensation to the other party for terminating such traffic.

3. Socket Telecom's Cross-Motion for Summary Determination is denied.

4. This Order shall become effective on \_\_\_\_\_.

**BY THE COMMISSION**



