

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

CenturyTel of Missouri, LLC, et al)
)
Complainants,) Case No. IC-2008-0068
)
vs.)
)
Socket Telecom, LLC)
)
Respondent.)

**SOCKET TELECOM’S RESPONSE TO CENTURYTEL’S MOTION TO STRIKE
AFFIDAVITS OF MAGNESS AND KOHLY**

Comes Now Socket Telecom, LLC (“Socket”) pursuant to 4 CSR 240-2.080(15) and for its Response to CenturyTel’s Motion to Strike the Affidavits of William L. Magness and R. Matthew Kohly states to the Commission:

1. There is no merit to CenturyTel’s motion. It is frivolous and a complete waste of the Commission’s time. Socket has submitted evidence in the same format that the Commission routinely weighs and reviews in its proceedings. CenturyTel routinely submits evidence in exactly the same format. (See, e.g., Case No. TC-2007-0341, and for that matter the affidavits CenturyTel has now filed in this case¹). The Commission is not a random jury. It is a panel of expert regulators that regularly reviews and relies on testimony presented in the same form as the affidavits submitted by Socket. Commission proceedings are not subject to technical rules of evidence (Section 386.410 RSMo.), as

¹ CenturyTel certainly did not take its “critique” of the affidavits submitted by Socket into account when it prepared Ms. Smith’s affidavit. Moreover, CenturyTel far exceeds the bounds of personal knowledge with Mr. Stewart’s affidavit, in which he struggles mightily to bolster CenturyTel’s arguments by stating he “was not aware the Agreements were intentionally silent” or that “CenturyTel has consistently interpreted the Agreement.” There is no basis for his testimony, as the Commission can tell from the face of the agreement and CenturyTel’s payment of reciprocal compensation. Socket is confident that the Commission can quickly sift through CenturyTel’s affidavits and give such unfounded statements no weight.

CenturyTel well knows. Thus, given the overall lack of merit to CenturyTel's motion, Socket will keep its response to CenturyTel's specific objections brief.

2. First, CenturyTel erroneously contends that the Commission should strike the affidavits entirely, citing the parole evidence rule. Socket wholeheartedly agrees that the Commission can examine the interconnection agreement and determine that on its face it in fact does provide that the parties are supposed to pay each other reciprocal compensation for the mutual exchange of "Local Traffic" as defined by the agreement (see, e.g., Socket's Legal Memorandum in Support of Summary Judgment, p. 3-9). Nonetheless, the other aspects of Socket's complete response to CenturyTel's summary judgment pleadings remain appropriate and should not be stricken. If CenturyTel wants to withdraw those portions of its prior pleadings that stray far beyond a discussion of the text of the contract, Socket certainly could take similar action concerning its response. Absent such a change in direction from CenturyTel, Socket is entitled to make a full and complete response to CenturyTel's pleadings and there is no basis for CenturyTel's motion to strike Socket's responsive materials.

3. Next, CenturyTel erroneously contends that portions of Mr. Kohly's affidavit should be stricken, based on its assertion that he "crosses the line" of admissible evidence. As is made clear from Mr. Kohly's affidavit, he was the chief negotiator for Socket on the interconnection agreement with CenturyTel and has extensive experience in the complex world of telecommunications regulation. As the Commission is well aware, no one can effectively conduct themselves in that technical arena without an understanding of the law and of interconnection agreement provisions. In response to CenturyTel's assertions about the parties' negotiations, Mr. Kohly discusses his own

involvement – and that discussion necessarily includes information about the legal and contractual bases for his actions.

4. CenturyTel demonstrates that there is no merit to its motion, as it switches from hyperbolic statements to the effect that “nothing in Mr. Kohly’s affidavit can be considered admissible expert testimony or opinion” (Motion, p. 5), to a specific request to strike only a little more than a page worth of isolated phrases and clauses from a nineteen page affidavit (Motion, p. 5-7). But as explained above, these isolated provisions are completely appropriate, as is the rest of the affidavit.

5. Similarly, with regard to the Magness affidavit, as is made clear therein (and as the Commission is well aware from other proceedings), Mr. Magness is an attorney that frequently negotiates interconnection agreements and handles related arbitration proceedings. He testifies to his involvement in the negotiations with CenturyTel and discusses the legal and contractual bases for his actions. The Commission routinely considers testimony that includes statements about the law and contract provisions that surround such a dispute. Further, as an attorney practicing telecommunications law, Mr. Magness has even greater expertise on such topics than the typical telecommunications case witness. There is no basis to strike any part of his affidavit.

6. CenturyTel even goes so far as to waste the Commission’s time by separately seeking to strike two paragraphs from the Magness affidavit that discuss the undisputed facts that: (i) Socket billed and CenturyTel paid reciprocal compensation invoices; and (ii) CenturyTel’s attorney admitted in another proceeding that reciprocal compensation applies. CenturyTel seems to think that the Commission has nothing better to do than

make sure that critical admissions against CenturyTel's interests are not mentioned too many times in the record.

7. CenturyTel also separately asks the Commission to strike certain portions of the affidavits, erroneously asserting that these portions are "speculative". To the contrary, in the identified sections these witnesses specifically provide their personal knowledge (i.e. Kohly para. 20 "I believed", Magness para. 31 "I am aware") and expert explanations of the parties' negotiations and the resulting operative contract language.

8. Finally, CenturyTel separately seeks to strike one paragraph of Mr. Kohly's testimony as "irrelevant" (so notwithstanding its other "objections", it ultimately concedes that the affidavits are otherwise relevant). In the paragraph in question, Mr. Kohly explains that Socket chose to exercise its rights under the interconnection agreement to bill CenturyTel reciprocal compensation to offset some of the many costs imposed on Socket by CenturyTel's illegal and incompetent actions. CenturyTel has contended that its payment of reciprocal compensation bills is not an admission on its part because somehow billing and payment of reciprocal compensation was the result of mistakes by the parties. In the paragraph in question, Mr. Kohly testifies that Socket did not issue bills by mistake, but rather in a thoughtful and business-like manner. Yet again, there is no basis for the motion to strike.

9. CenturyTel filed a motion for summary judgment that contends, among other things, that Socket is estopped from billing reciprocal compensation in accordance with the terms of the interconnection agreement because of its supposed conduct during the negotiations and arbitration of the agreement. Now that Socket has fully responded to contradict CenturyTel's contentions, CenturyTel wants to try to put the genie back into

the bottle. It does not want the Commission to examine testimony that explains how CenturyTel refused to agree to a bill and keep regime in the negotiations, how it has previously admitted that reciprocal compensation applies, and how it has repeatedly and intentionally harmed Socket and thereby motivated Socket to exercise its rights to bill reciprocal compensation. But the testimony is all relevant and admissible regarding points that CenturyTel raised in its initial summary judgment pleadings. Accordingly, the Commission should deny the motion to strike.

WHEREFORE, Socket Telecom asks the Commission to deny CenturyTel's Motion to Strike the Affidavits of William L. Magness and R. Matthew Kohly.

Respectfully submitted,

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 25th day of February, 2008, by email or by placing same in the U.S. Mail, postage paid.

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