

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

Petition by KMC Telecom V, Inc.,)
KMC Telecom III LLC and KMC Data,)
L.L.C., for Arbitration of an Interconnection)
Agreement with CenturyTel, Inc., CenturyTel of)
Missouri, LLC, and Spectra Communications,)
LLC, Pursuant to Section 252(b) of the)
Communications Act of 1934, as Amended, and)
Missouri Law)

Case No. _____

**VERIFIED PETITION FOR ARBITRATION
OF KMC TELECOM**

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February 16, 2005

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VERIFIED PETITION FOR ARBITRATION

Request for Negotiations Received:	September 10, 2004
135th Day Thereafter:	January 23, 2005
160th Day Thereafter:	February 17, 2005
9 Months Thereafter:	June 10, 2005

COME NOW KMC Telecom V, Inc. (“KMC V”), KMC Telecom III LLC (“KMC III”), and KMC Data, L.L.C. (“KMC Data”) (collectively, “KMC”), pursuant to Section 252(b) of the federal Communications Act of 1934, as amended (the “Act”), Rules of the Department of Economic Development/Public Service Commission, Division 240, Chapters 2 and 36 (4 CSR 240-2 and 4 CSR 240-36) and other applicable state and federal statutes, rules, regulations, and decisions, hereby file this Verified Petition for Arbitration (the “Petition”) seeking resolution of certain issues arising between KMC and CenturyTel, Inc., CenturyTel of Missouri, LLC (“CenturyTel Missouri”) and Spectra Communications, LLC (“Spectra”) (collectively, “CenturyTel” or the “CenturyTel Entities”) (KMC and the CenturyTel Entities may hereinafter

be collectively referred to as the “Parties”) in the negotiation of an interconnection agreement pursuant to Sections 251 and 252 of the Communications Act. In support of its Petition, KMC states as follows:

I. DESIGNATED CONTACTS

1. All communications and submissions in this proceeding, including but not limited to, correspondence, notices, inquiries, and orders, should be served upon the following designated contacts for the Petitioners:

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2. The CenturyTel Entities’ attorney in Missouri is:

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II. STATEMENT OF FACTS

3. KMC V is a Delaware corporation and KMC III and KMC Data are Delaware limited liability corporations having their principal place of business at 1755 North Brown Road, Lawrenceville, GA 30043. KMC V, KMC III and KMC Data are, collectively, nationwide facilities-based providers of next-generation telecommunications infrastructure and services, providing fiber-based, integrated data, voice, and Internet infrastructure communications services. KMC offers these services to business, government and institutional and end-users, Internet service providers, long distance carriers and wireless service providers. KMC is certified to provide telecommunications services in 49 states, the District of Columbia, and Puerto Rico. KMC V, KMC III and KMC Data are authorized to provide competitive local exchange and interexchange services in Missouri, including the territories served by the CenturyTel Entities.¹

4. KMC states, in accordance with 4 CSR 240-2.060(1)(K), that there are no pending actions or final unsatisfied judgments or decisions against it in any state or federal agency or court which involve customer service or rates for which action, judgment, or decision has occurred within three (3) years of the date of this Petition. Pursuant to 4 CSR 240-

¹ KMC Telecom V, Inc. was granted a Certificate of Service and authorized to provide intrastate interexchange telecommunications services and nonswitched local exchange services in the State of Missouri in Case No. TA-20000-785 (Effective August 29, 2000); KMC Telecom III, Inc. was authorized to provide intrastate interexchange and nonswitched local service as well as basic local exchange service in Missouri in Case Nos. TA-99-576 (July 13, 1999) and TA-99-577 (Aug. 30, 1999). The Commission issued an order recognizing the name change to KMC Telecom III LLC in Case No. TO-2002-386 (Apr. 13, 2002); KMC Data, L.L.C. was granted a Certificate of Service and authorized to provide intrastate interexchange telecommunications services and nonswitched local exchange services in the State of Missouri in Case No. TA-2001-595 (June 15, 2001); KMC Data, L.L.C. was granted a Certificate of Service and authorized to provide resold and facilities-based basic local telecommunications services in the State of Missouri in Case No. TA-2001-594 (June 16, 2001). KMC's certificates of authority from the Missouri Secretary of State are on file with the Commission and are incorporated herein by reference.

2.060(1)(L), KMC hereby states that it does not have any overdue annual reports or assessment fees owed to the Missouri Public Service Commission.

5. CenturyTel Missouri, is a Louisiana limited liability corporation that is duly authorized to do business in Missouri. CenturyTel Missouri's principal place of business is located at 100 CenturyTel Drive, Monroe, Louisiana, 71203, and local offices at 220 Monroe Street, 1st Floor, Jefferson City, Missouri, 65101. The Commission's Electronic Filing and Information System (EFIS) shows the Official Representative of CenturyTel of Missouri LLC in Jefferson City to be Becky Powell at the Monroe Street address above, and the Regulatory Representative to be Arthur P. Martinez at the same Monroe Street office address.

6. Spectra Communications Group, LLC, d/b/a CenturyTel (hereafter, "Spectra"), is a Delaware limited liability corporation that is duly authorized to do business in Missouri, with its principal offices at 100 Century Park Drive, Monroe, Louisiana (LA) 71203 and local offices at 220 Monroe Street, 1st Floor, Jefferson City, Missouri (MO) 65101. The Commission's Electronic Filing and Information System (EFIS) shows the Official Representative of Spectra in Jefferson City to be Becky Powell at the Monroe Street address above, and the Regulatory Representative to be Arthur P. Martinez at the same Monroe Street office address.

7. According to the Annual Report filed on behalf of Spectra Communications Group, LLC, d/b/a CenturyTel with the Missouri Public Service Commission for the year 2003, CenturyTel, Inc., with the same street address as both Spectra and CenturyTel of Missouri, LLC, owns 99.92104% the outstanding voting securities of Spectra Communications Group, LLC, d/b/a CenturyTel.

8. The CenturyTel Entities are incumbent local exchange telecommunications companies (“ILECs”) in Missouri, as defined by the Communications Act² and are local exchange carriers subject to the jurisdiction of the Public Service Commission of Missouri pursuant to Sections 386.020, 386.040, 386.250, 386.320, 386.330, 392.200, 392.220, 392.240, 392.250, and 392.470 RSMo., and Sections 251 and 252 of the Act. The CenturyTel Entities are public utilities as defined in Section 386.020. The CenturyTel Entities each provide regulated intrastate telecommunications services within their Missouri service area, and upon information and belief, none of the CenturyTel Entities is an exempt “rural telephone company” under section 251(f)(1) of the Communications Act or “rural carrier” under section 251(f)(2) of the Communications Act. Both CenturyTel Missouri and Spectra are successors in interest to GTE Midwest, Inc., d/b/a Verizon Midwest.

9. Pursuant to the Communications Act, the CenturyTel Entities are required to provide to requesting telecommunications carriers interconnection, access to unbundled network elements (“UNEs”), collocation, number portability, dialing parity, access to rights-of-way, reciprocal compensation, and resale, among other things. *See, e.g.*, 47 U.S.C. §§ 251 (a)-(c). The terms and conditions of interconnection must comply with the provisions of Sections 251 and 252 of the Communications Act. *See* 47 U.S.C. § 251(c). Section 252(d) governs the pricing of UNEs, interconnection, reciprocal compensation and resale services.

10. KMC sent to CenturyTel a request for negotiation of an interconnection agreement on September 9, 2004, via overnight mail, which is attached hereto and incorporated herein by reference as ***Exhibit A***. Accordingly, pursuant to section 252(b)(1) of the

² *See* 47 U.S.C. § 251(h).

Communications Act, the arbitration window opened on January 23, 2004, and closes February 17, 2005 (160 days following receipt by CenturyTel of the request for negotiation).

11. KMC previously entered into an interconnection agreement with Verizon, CenturyTel Missouri's predecessor-in-interest in mid-2001. On November 28, 2001, CenturyTel Missouri and Verizon filed a joint application with the Missouri Public Service Commission ("Commission") seeking, *inter alia*, approval of the transfer of the Verizon assets in Missouri to CenturyTel Missouri.³ On March 21, 2002, a nonunanimous stipulation (the "Stipulation") was filed in Case TM-2002-232, which was signed by several parties, including CenturyTel Missouri, Verizon, the Staff of the Missouri Public Service Commission and Public Counsel. The Stipulation was subsequently ruled unanimous in accordance with Commission rules. The Stipulation, which was made part of the Commission's *Verizon-CenturyTel Report and Order*, contained numerous conditions, principal of which was the following:

CenturyTel shall use the same rates, terms and conditions of service as Verizon on the date of the closing of the transaction. CenturyTel shall, in good faith, negotiate interconnection agreements with all carriers who currently have interconnection agreements with Verizon and who desire to interconnect with CenturyTel. Where technically feasible, the new agreement will have the same rates, terms and conditions as did the agreement with Verizon. These agreements will differ from the Verizon agreements only with respect to technical differences to reflect the way CenturyTel interfaces with the interconnecting carrier. In cases in which services are being provided under these interconnection agreements, CenturyTel will cooperate with the interconnecting carriers to secure expeditious approval of a

³ See generally *In the Matter of Joint Application of GTE Midwest Incorporated, d/b/a Verizon Midwest, and CenturyTel of Missouri, LLC, for (1) Authority to Transfer and Acquire Part of Verizon Midwest's Franchise, Facilities or System Located in the State of Missouri; (2) for Issuance of Certificate of Service Authority to CenturyTel of Missouri, LLC; (3) to Designate CenturyTel of Missouri, LLC, as Subject to Regulation as a Price Cap Company; and (4) to Designate CenturyTel of Missouri, LLC as a Telecommunications Carrier Eligible to Receive Federal Universal Support*, Case No. TM-2002-232, Report and Order (effective May 31, 2002) (*Verizon-CenturyTel Report and Order*).

replacement interconnection agreement and to ensure continuity of service for their customers. CenturyTel shall provide local interconnection services as set out in the interconnection agreement between Verizon and Intervener AT&T, and adopted by Intervener Fidelity, for a period of one year following the closing of the proposed transaction. Any interconnection agreement not replaced within one year shall continue in full force on a month-to-month basis until replaced.⁴

12. On October 24, 2002, CenturyTel Missouri advised KMC that the transfer of Verizon's telephone operations and related assets was consummated on August 31, 2002, and that CenturyTel Missouri would honor the KMC-Verizon interconnection agreement until August 31, 2003.

13. KMC also has an interconnection agreement with Spectra Communications, following its acquisition of another Verizon territory in Missouri. As in the subsequent case, Verizon and Spectra filed a joint application with the Missouri Public Service Commission ("Commission") seeking, *inter alia*, approval of the transfer of the Verizon assets in Missouri to Spectra.

14. Although the Parties have exchanged oral and written communications, the Parties have not held extensive negotiations. KMC and the CenturyTel Entities have, however, been discussing (and to some extent litigating) the very same issues for the past few years, without reaching resolution. Consequently, KMC is filing the instant Petition pursuant to Section 252 of the Communications Act and other applicable federal and state law to address the issues that remain unresolved.

⁴ *Verizon-CenturyTel Report and Order*, at 6.

III. JURISDICTION AND APPLICABLE LAW

15. Under the Communications Act, a carrier that has requested negotiation of an interconnection agreement has the right to petition the relevant state commission for arbitration of any open issue whenever negotiations between them fail to yield an agreement. *See* 47 U.S.C. § 252(b). Either party may seek arbitration during the period between the 135th day and the 160th day, inclusive, after the date the ILEC received the request for negotiation. *Id.*

16. Because the request for negotiation was received by CenturyTel Missouri on September 10, 2004, the statutory arbitration window opened on January 23, 2004, and closes February 17, 2005. Accordingly, this Petition is timely filed. Section 252(b)(4)(C) of the Communications Act requires that the Commission conclude the resolution of any unresolved issues within nine (9) months after the request for interconnection negotiation was initiated. 47 U.S.C. § 252(b)(4)(C). Consequently, unless the Parties waive the statutory deadline, the Commission must conclude this arbitration no later than June 10, 2005.

17. The Federal Communications Commission (the “FCC”) established the appropriate standard for arbitration under sections 251 and 252 of the Communications Act in *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. Aug. 8, 1996) (*Local Competition Order*). Pursuant to the Communications Act, the Commission must resolve by arbitration any open issues and impose conditions that (1) ensure that such resolution and conditions meet the requirements of Section 251 of the Communications Act, including regulations promulgated by the FCC, (2) establish rates for interconnection, services and access to UNEs in accordance with Section 252(d) of the Communications Act, and (3) provide a schedule for implementation by the Parties. 47 U.S.C. § 252(c)(2).

18. The Commission must make an affirmative determination that the rates, terms and conditions that it prescribes in this arbitration proceeding for interconnection are consistent with the requirements of Section 251 and Section 252(d) of the Communications Act. It must also ensure that its findings are consistent with prior Commission Orders, such as the Orders noted above that require CenturyTel to, *inter alia*, interconnect with and offer UNEs to competitors upon the same rates, terms and conditions as did Verizon prior to the sale of the service territories.

19. Section 251(a) of the Communications Act, 47 U.S.C. § 252(c)(2), states that each telecommunications carrier has the following duties:

- (1) **to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers;** and
- (2) not to install network, features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

20. Section 251(b) of the Communications Act, 47 U.S.C. § 251(b), states that each local exchange carrier has the following duties:

- (1) the duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications service;
- (2) the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the FCC;
- (3) the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays;
- (4) the duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with Section 224 of the Act; and

- (5) the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

21. Section 251(c) of the Communications Act states that each incumbent local exchange carrier, such as the CenturyTel Entities, has the following additional duties:

- (1) the duty to negotiate in good faith;
- (2) **the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access at any technically feasible point within the carrier's network** that is at least equal in quality to that provided by the local exchange carrier to itself, or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection on rates, terms and conditions that are just, reasonable and nondiscriminatory and that comply with Sections 251 and 252;
- (3) the duty to provide, to any requesting telecommunications carrier, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable and nondiscriminatory and in such a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service;
- (4) the duty to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers and not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on the resale of such services;
- (5) the duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks; and
- (6) the duty to provide, on rates, terms and conditions that are just, reasonable and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that virtual collocation may be provided if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

22. Section 252(d) of the Communications Act sets forth the applicable pricing standards for interconnection and network element charges as well as for transport and termination of traffic. Section 252(d)(1) of the Communications Act states, in pertinent part, that “determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment . . . and the just and reasonable rate for network elements . . . shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), (ii) nondiscriminatory, and [(iii)] may include a reasonable profit.” 47 U.S.C. § 252(d)(1). Section 252(d)(2) further states in pertinent part that “a State commission shall not consider the terms and conditions for reciprocal compensation [for transport and termination] to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier’s network facilities of calls that originate on the network facilities of another carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.” 47 U.S.C. § 252(d)(2). The Commission must therefore set rates, under the KMC/CenturyTel agreement, based on fully-considered, cost-based analysis.

IV. ARBITRATION ISSUES AND POSITIONS OF THE PARTIES

23. The unresolved issues between KMC and the CenturyTel Entities, and their respective positions as to each unresolved issue, are detailed below and in the Issue Matrix (attached hereto and incorporated herein by reference as *Exhibit B*). KMC is more than willing to engage in negotiations with a view toward resolving existing issues and agreeing to terms that are mutually acceptable to the Parties. Likewise, because the negotiations between the Parties have been very limited to date, the Parties have not exhaustively identified all the issues upon

which they disagree. With regard to the UNE issues, for example, the FCC's release just two weeks ago of the Triennial Review Remand Order⁵ means that the Parties should attempt to reach common ground on an updated UNE section (Article VII) and submit a joint UNE issues list to address items not resolvable bilaterally. Due to the imminent close of the statutorily prescribed arbitration window, however, KMC is compelled to seek arbitration of many issues critical to KMC's ability to deliver service to customers in Missouri.

24. KMC will continue negotiating with CenturyTel in good faith after this Petition is filed, pursuant to 4 CSR 240-36.040, with the objective of resolving many of these issues prior to any arbitration hearing. To facilitate such resolution, KMC will participate in Commission-led mediation sessions, to the extent the Commission believes that such sessions would be efficient and useful.

25. KMC respectfully requests a reasonable opportunity to supplement this Petition to provide or clarify information deemed necessary or appropriate by the Commission or Hearing Officer, reserving available rights to amend its Petition and include additional issues that may be identified.

26. One of the threshold issues that has been identified as problematic over a course of years relates to the obligation of the CenturyTel Entities to interconnect with KMC, and the terms under which they must do so. CenturyTel apparently believes that it may deny interconnection and has the right to exclude ISP-bound traffic from Section 251/252 interconnection agreements. There is no basis, under federal or state law, for the proposition that

⁵ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (Rel. Feb. 4, 2005) (“TRO Remand Order”).

ISP-bound traffic should be treated any differently from local traffic for purposes of *interconnection*. The FCC has, for example, unambiguously drawn the distinction between interconnection and compensation – which is the same distinction KMC and every other ILEC have utilized in their interconnection agreements. CenturyTel’s position represents a departure not only from common practice, but from all of the interconnection rules established under Sections 251 and 252 of the Communications Act and indeed the Communications Act itself.

27. As if to specifically prevent the CenturyTel Entities from even making this type of argument, the FCC explicitly clarified in its *Intercarrier Compensation Remand Order*⁶ that its decision “affects only the intercarrier *compensation* (*i.e.*, the rates) applicable to the delivery of ISP-bound traffic.” “It does not alter carriers’ other obligations under [the FCC’s] Part 51 rules, 47 C.F.R. Part 51, or existing interconnection agreements, such as obligations to transport traffic to points of interconnection.”⁷

28. Furthermore, the FCC has in just the last week adopted a Further Notice of Proposed Rulemaking on intercarrier compensation⁸ that begins a review and likely re-categorization of the various, historical categories of traffic exchanged between carriers, and determination as to what compensation is due under the new regime to be established.⁹ Until this

⁶ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, and *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 15 FCC Rcd 3953 (rel. April 27, 2001) (*Intercarrier Compensation Remand Order*), remanded *WorldCom, Inc. v. FCC*, No. 01-1218 (D.C. Cir. May 3, 2002).

⁷ *Id.* at n. 149 (*emphasis in original*).

⁸ *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *See also* “FCC Moves to Replace Outmoded Rules Governing Intercarrier Compensation,” FCC 05-33, FCC Press Release dated February 10, 2005. (“IC FNPRM”),

⁹ One of the options under consideration, for example, would treat all forms of traffic the same – regardless of whether it had been historically considered access or local/ISP.

re-examination (and potential overhaul) of the intercarrier compensation regime is complete, ILECs such as CenturyTel must continue to permit interconnection for the exchange of such traffic under interconnection agreements, and do so under the current legal structure that places Local Traffic and ISP-Bound Traffic under one set of rules distinct from those that govern Access Traffic.

29. With regard to this and the remainder of the issues, attached hereto and incorporated herein by reference as ***Exhibit C*** is the interconnection agreement prepared by KMC, that contains KMC's position on the currently identified unresolved issues, as well as potential areas of disagreement, between the Parties. KMC provides the following summary of the key issues in dispute, into which it has grouped the specific issues more fully set forth in ***Exhibit B*** hereto.

<p><u>ISSUE GROUP A - General Terms and Conditions (Agreement Sections I-IV):</u> <i>Should the Agreement contain fair, reciprocal and lawful terms to define the relationship between CenturyTel and the Competitor Group?</i></p>
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In framing the Parties' relationship and providing general contract terms, the Agreement must be balanced and contain essential terms. The Agreement may not force competitive carriers to be bound by terms outside of the terms, unless specifically agreed-to. Similarly, CenturyTel cannot impose terms that it may unilaterally change, by specifying that significant provisions in the agreement will be as stated in external documents that it may change at-will. Instead, all terms must be reasonable and only incorporate external terms by reference upon explicit agreement. Similarly, the Commission should not permit CenturyTel to unduly limit its obligations and liability through the tariff or other means.

The Definitions section, Article II, must contain terms that reflect applicable law. Given the time, expense and administrative burden of the section 252 arbitration process, the resultant Agreement must have the industry-standard three-year term. In order to prevent one of the most common disputes, appropriate billing terms must be included, and unreasonable backbilling must be prohibited right up front, in the Agreement. Likewise, the Parties must also establish reasonable and feasible capacity and forecasting arrangements. Where disputes do arise between the Parties, there must be a clear and efficient process, and each side must have the right to seek redress in whatever the appropriate forum might be – the Commission, FCC, or a court of competent jurisdiction. In light of the ever-changing legal environment, the Agreement must contain specific change-of-law terms for the incorporation of such changes.

CenturyTel's proposed terms are unreasonable in many respects, as they run directly counter to the principles described above. As the Commission will see from the item-by-item comparison in the attached Issues List (Exhibit B), KMC's language is infinitely more logical and reasonable, and tracks much closer to applicable law.

<p><u>ISSUE GROUP B - Interconnection Issues</u> <u>(Agreement Article V):</u> <i>Must the CenturyTel Entities interconnect with competing carriers for the lawful exchange of local, ISP-bound and interexchange traffic, pursuant to applicable law?</i></p>
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All carriers have an obligation to interconnect with other carriers for the exchange of traffic pursuant to Section 251(a) of the Communications Act. The CenturyTel Entities have the additional obligation, as Incumbent Local Exchange Carriers, to provide to any requesting carrier interconnection with their network for the transmission of traffic at any technically feasible

point. *See* 47 U.S.C. § 251(c)(2); 47 C.F.R. §51.305. In fact, the Act specifically states “each incumbent local exchange carrier” has “the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier’s network . . . for the transmission and routing of telephone exchange service and exchange access.”¹⁰

Furthermore, CenturyTel must provide such interconnection on rates, terms and conditions that are just, reasonable and nondiscriminatory, and that comply with Sections 251 and 252 of the Communications Act. *Id.* CenturyTel may not bar competitive entry, and cannot dictate the manner in which KMC – or any other competitor – provide competitive services in Missouri. To permit otherwise would be to permit CenturyTel to prevent competitive entry and thereby deprive Missouri telecom and broadband consumers of the benefits of competition. CenturyTel’s positions on the particular substantive issues constitute a denial of the right to interconnect so plainly established in the Act and Missouri Law. KMC respectfully request that the Commission prevent CenturyTel from unilaterally dictating how traffic is to be exchanged and under what terms, and instead order CenturyTel to comply with applicable law.

Major Sub-Issues:

Does Applicable Law, including the Communications Act and FCC rules, require that Petitioners have the option to interconnect at one point of interconnection (“POI”) in each LATA for the exchange of traffic with CenturyTel, such that each Party is responsible for delivering calls originated by its subscribers to the POI designated by Petitioners?

¹⁰ 47 U.S.C. section 251(c).

Position of KMC: Yes. The Communications Act, FCC Rules and Orders and federal case law all specifically permit KMC to interconnect at any technically feasible point and to establish one point of interconnection for the exchange of traffic with CenturyTel.¹¹ Once the POI has been designated by KMC, the Parties are required to deliver traffic originating from their own end-users to the POI, and each Party is thus responsible for any costs associated with the delivery of that traffic to the POI. In other words, CenturyTel must deliver calls from its subscribers to the single network POI, and make arrangements for doing so. The principle of cost-causation dictates that, as the originating carrier, CenturyTel be financially responsible for the origination and transport of calls originated by its subscribers. The FCC has recently affirmed that principle, with specific reference to its Rules.¹²

This fundamental principle does not change if the traffic being originated is directed to a phone number homed to the local calling area, even if it travels outside of that area, since the POI obligation remains the same. In fact, several federal courts have addressed and resolved this issue, and have held that this traffic must not be treated differently. CenturyTel's attempt to shift to KMC a significant part of the financial responsibility CenturyTel has for transporting traffic originating from its customers runs directly contrary to FCC Rules as well as these governing federal court decisions.

¹¹ See, e.g., 47 U.S.C. § 251(c)(2); 47 C.F.R. §51.305; *Petitions of WorldCom, Inc., Cox Virginia Telecom, Inc., and AT&T Communications of Virginia, Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Arbitration*, [Consolidated] Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249 and 00-251, July 17, 2002 (*FCC Arbitration Order*).

¹² See, e.g., *FCC Arbitration Order*, at ¶¶ 51-54, 57, and 66-71; 47 C.F.R. §51.703(b).

FCC Rule 703(b) explicitly provides that a LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network.¹³ The United States Court of Appeals for the Fourth Circuit, reviewing an analogous dispute, held that "Rule 703(b) is unequivocal in prohibiting LECs from levying charges for traffic originating on their own networks, and, by its own terms, admits of no exceptions."¹⁴ The Circuit Court of Appeals duly noted the FCC's own acknowledgement, in a 2001 *Intercarrier Compensation NPRM*¹⁵ "that Rule 703(b), by its plain terms, prohibits the type of cost-shifting that BellSouth advocates here."¹⁶ Finally, the court went on to note that "the Fifth Circuit has described the *Virginia Arbitration Order* as "confirm[ing] that ... an [incumbent] is prohibited from imposing charges for delivering its local traffic to a POI outside the [incumbent's] local calling area."¹⁷

Position of the CenturyTel Entities: CenturyTel demands that KMC establish a POI at each central office to receive traffic originated by CenturyTel end users, or pay CenturyTel for the transport of those CenturyTel customer calls to a different POI. CenturyTel insists on shifting its costs to KMC, attempting to make KMC responsible for the facilities necessary to deliver CenturyTel-originated calls to the network POI.

¹³ 47 CFR § 51.703(b).

¹⁴ *MCImetro Access Transmission Services v. Bellsouth Telecommunications and North Carolina PUC*, 352 F.3d 872, 881 (2003).

¹⁵ *In re Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 9635 ¶ 72, 9650-51 ¶¶ 112-14 (2001).

¹⁶ *Id.* at 779 ("Our current reciprocal compensation rules preclude an [incumbent] from charging carriers for local traffic that originates on the [incumbent]'s network."). 16 FCC Rcd 9650 ¶ 112.

¹⁷ *Southwestern Bell Tel. Co. v. Publ. Utils. Comm'n of Tex.*, 348 F.3d 482, 484 (5th Cir.2003).

What is the proper compensation structure for the exchange of 251(b)(5) traffic and ISP-Bound Traffic?

Position of KMC: Until a new regime is established, intercarrier compensation must be determined in accordance with the terms of the FCC’s *Inter-carrier Compensation Remand Order*. In that Order, the FCC asserted jurisdiction over ISP-bound traffic pursuant to Section 201 of the Communications Act and established “an appropriate cost recovery mechanism for the exchange of such traffic.”¹⁸ The FCC-established regime presumes that traffic exchanged between LECs that is within a 3:1 ratio of terminating to originating is compensable pursuant to Section 251(b)(5) of the Communications Act, while traffic above that ratio is presumed to be ISP-bound traffic that is compensable at the FCC’s interim rate. The FCC’s recent decision on the *Core Communications Forbearance Petition* not only reaffirmed this structure, but also removed limits on the ability of competitors to expand into new markets to promote competition and create a unified compensation scheme.¹⁹

According to the FCC’s regime, ISP-bound calls should be treated as “local” and not subject to access charges. The FCC does not distinguish between “local” ISP-bound traffic and “non-local” ISP-bound traffic, and actually eliminated an earlier distinction between “local” and “non-local” for all traffic:

This analysis differs from our analysis in the *Local Competition Order*, in which we attempted to describe the universe of traffic that falls within subsection [251](b)(5) as all “local” traffic. We also refrain from

¹⁸ *Inter-carrier Compensation Remand Order* at ¶ 1.

¹⁹ *Petition of Core Communication, Inc, for Forbearance Under 47 USC 160(c) from Application of the ISP Remand Order*, WC Docket 03-171 (rel. Oct. 18, 2004).

generally describing traffic as “local” traffic because the term “local,” not being a statutorily defined category, is particularly susceptible to varying meanings, and significantly, is not a term used in section 251(b)(5) or section 251(g).²⁰

The FCC, in the *ISP Remand Order*, clarified that the regime applies to all ISP-bound traffic, by stating its conclusion “that this definition of ‘information access’ was meant to include *all access traffic* that was routed by a LEC ‘to or from’ providers of information services, of which ISPs are a subset.”²¹ Nowhere does the FCC limit its regime to “local” ISP-bound traffic.²²

Several state commissions have recognized that the *ISP Remand Order* addressed all ISP-bound traffic, including traffic to ISPs that do not have a modem bank in the LATA and use FX-like arrangements.²³ A Texas Public Utility Commission arbitration panel considered and rejected a position similar to the one taken here by CenturyTel (that “the *ISP Remand Order*

²⁰ *ISP Remand Order*, at ¶ 34.

²¹ *ISP Remand Order*, at ¶ 44 (emphasis added).

²² This is true even though the FCC was aware that CLECs were using foreign exchange-like arrangements to serve ISPs before the *ISP Remand Order* was adopted.

²³ See, e.g., *Essex Telecom, Inc v Gallatin River Comm, L.L.C.*, Docket No. 01-0427, Order, at 8 (Ill. C.C. July 24, 2002) (“the Commission has been divested of jurisdiction to determine compensation issues as they relate to ISP bound calls.”); *Level 3 Communications, LLC Petition for Arbitration Pursuant to 47 USC Section 252 of Interconnection Rates, Terms, and Conditions*, Docket No. 05-MA-130, Order Approving an Interconnection Agreement (Wisc. P.S.C. February 13, 2003); *Petition for Arbitration of an Interconnection Agreement Between Level 3 Communications, LLC and CenturyTel of Washington, Inc*, Docket No. UT-023043, Seventh Supplemental Order (WUTC February 27, 2003); *Investigation into the Use of Virtual NPA/NXX Calling Patterns*, UM 1058, Order (Oregon. PUC May 27, 2003); *Allegiance Telecom of Ohio, Inc.’s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 01-724-TP-ARB, Arbitration Award (PUCO October 4, 2001) (“The Commission agrees . . . that all calls to FX/virtual NXX [numbers] that are also ISP-bound are subject to the inter-carrier compensation regime set forth in the *ISP Remand Order*.”); *Petition of Global NAPs, Inc. for Arbitration of Interconnection Rates, Terms, and Conditions and Related Arrangements with United Telephone Company of Ohio d/b/a Sprint*, Case Nos. 01-2811-TP-ARB, 01-3096-TP-ARB (PUCO, May 9, 2002); *DPUC Investigation of the Payment of Mutual Compensation for Local Calls Carried Over Foreign Exchange Service Facilities*, Dkt. No. 01-01-29, at 41-2 (Conn. DPUC Jan 30, 2002).

does not apply to all types of ISP-bound traffic, but only to ISP traffic that originates and terminates in the same local calling area.”).²⁴ The Texas PUC decision determined that, since the FCC had said ISP-bound traffic was subject to Section 251(g) rather than Section 251(b)(5), all compensation was to be determined by the FCC’s rules adopted under its Section 201 authority.²⁵ The Michigan Commission found that the *ISP Remand Order* “takes care of all ISP traffic,” and was “not moved to reverse its prior orders” regarding intercarrier compensation for non-ISP FX-like traffic.²⁶

Several commissions have also recognized that the *ISP Remand Order* has effectively preempted Commission jurisdiction to address compensation issues for ISP bound traffic. The Florida Public Service Commission, for example, determined that “[t]he FCC’s intent to preempt a state commission’s authority to address reciprocal compensation for ISP bound traffic is clear.”²⁷ Since the FCC has exclusive jurisdiction over locally dialed calls to ISPs, regardless of whether the ISP has equipment in the LATA and is served through an FX-like arrangement, the Commission should adopt KMC’s position and apply the FCC’s interim compensation regime to all locally dialed ISP-bound traffic.

The FCC and federal courts have also recently addressed the specific question of jurisdiction over IP-Enabled Services, including what intercarrier compensation may be due for

²⁴ *Consolidated Complaints and Requests for Post-Interconnection Dispute Resolution Regarding Intercarrier Compensation for “FX-Type” Traffic Against Southwestern Bell Telephone Company*, TX PUC Docket No. 241015, Revised Arbitration Award, August 28, 2002.

²⁵ *Id.*

²⁶ *In the Matter of the Petition for Arbitration to Establish an Interconnection Agreement Between TDS Metrocom, Inc and Ameritech Michigan*, MPSC Case No. U-12952, Opinion and Order, Sept 7, 2001.

²⁷ *Investigation into appropriate methods to compensate carriers for exchange of traffic subject to Section 251 of the Telecommunication’s Act of 1996*, Docket No. 000075-TP, Order Approving Stipulation, Phase I, Order No. PSC-02-0634-AS-TP (Florida PSC May 7, 2002).

such traffic. In an appeal of a Minnesota Public Utilities Commission order asserting jurisdiction over IP-Enabled Services, a U.S. District Court determined that the service is an information service, and therefore not subject to regulation by the states.²⁸ The FCC also issued an Order on November 12, 2004,²⁹ in which it preempted the Minnesota PUC from exercising jurisdiction over a particular form of VoIP service, based on the nature of the service.³⁰

The FCC has, however, expressed its intent to determine how such services will be regulated, and as noted above is conducting a comprehensive evaluation of the entire intercarrier compensation regime. The FCC now concludes that an end-to-end analysis for determination of whether a service is interstate or intrastate (the FCC's traditional test for circuit-switched services) cannot be applied to "IP-based services" since the origination point of the communication is impossible to determine.³¹ Significantly, the FCC also addressed termination, finding as follows:

The geographic location of the "termination" of the communication is the other clue; yet this is similarly difficult or impossible to pinpoint. This "impossibility" results from the inherent capability of IP-based services to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communication session and to

²⁸ "VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated." *Vonage Holding Corp. v. Minnesota Pub. Util. Comm'n*, 290 F. Supp 2d 993, 1002 (D. Minn. 2003), *appeal pending*, *Vonage Holdings Corp. v. Minnesota Pub. Util. Comm'n*, No. 04-1434 (8th Cir. 2004).

²⁹ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning Order of the Minnesota Public Utilities Commission*, FCC 04-267, Memorandum Opinion and Order (rel. Nov. 12, 2004) (hereafter referred to as the "*Vonage Order*").

³⁰ *See, Vonage Order*, ¶ 1.

³¹ *Id.*

perform different types of communications simultaneously, none of which the provider has a means to track or record.³²

The FCC noted that the NPA-NXX of originating and terminating parties is divorced from geography when dealing with IP-based services. The FCC is now addressing these issues comprehensively in its ongoing proceedings.

Position of the CenturyTel Entities: The CenturyTel Entities assert that they should be able to assess switched access charges on such traffic.

*Is it reasonable and appropriate for
interconnecting carriers to exchange traffic
over consolidated trunk groups?*

Position of KMC: Yes. Since competitors do not have the extensive ratepayer-financed ILEC network, they generally interconnect with ILECs utilizing facilities capable of carrying all forms of traffic (*i.e.* interLATA, Local, and IntraLATA).³³ KMC requests that the Commission confirm that it has the right, if it so chooses, to pass all forms of traffic over this network, as is common practice in other ILEC territories, without having to construct an additional network for each type of call. In fact, in the M2A this Commission approved in MoPSC Case No. TO-99-227, the terms expressly mandate that the ILEC (SBC) allow the CLEC

³² *Id.*, ¶ 25. (Footnotes omitted). Indeed, one of the features or functionalities cited by the FCC is that “although the service uses North American Numbering Plan (NANP) numbers as the identification mechanism for the user’s IP address, the NANP number is not necessarily tied to the user’s physical location for either assignment or use, in contrast to most wireline circuit-switched calls.” *Vonage Order*, ¶¶ 5-9.

³³ Carriers generally utilize percentage allocations to determine billing responsibility. The proposed Agreement contains provisions for the Parties to provide one another with records to verify these traffic percentages.

to combine intraLATA, interLATA traffic over a single trunk group. Section 1.4 of the Appendix ITR of the M2A reads as follows:

1.4 SWBT will allow CLEC to use the same physical facilities (*e.g.*, dedicated transport access facilities, dedicated transport UNE facilities) to provision trunk groups that carry Local, intraLATA and interLATA traffic, provided such combination of traffic is not for the purpose of avoiding access charges, and facility charges associated with dedicated transport used to carry interLATA and intraLATA traffic originated by or terminated to a customer who is not [a] CLEC local exchange service customer. SWBT and CLEC may establish a single two way trunk group provisioned to carry intraLATA (including local) and interLATA traffic where technically feasible. CLEC may have administrative control (*e.g.*, determination of trunk size) of this combined two way trunk group to the extent that it does not require SWBT to redesign its network configuration. When traffic is not segregated according to a traffic type the Parties will provide a percentage of jurisdictional use factors or an actual measurement of jurisdictional traffic.³⁴

Splitting consolidated trunk groups into multiple trunk groups to carry the same traffic actually results in a far less efficient network – and increased cost. Such an architecture burdens both Parties’ networks, requiring duplicative trunk groups connecting to each and every POI, and thereby contributing to tandem exhaust.

Position of the CenturyTel Entities: CenturyTel’s position on this issue has not been made clear.

<u>ISSUE GROUP D - RESALE (Agreement Article VI):</u>
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³⁴ See Appendix D to this Petition for a copy of the M2A ITR Appendix in its entirety.

CenturyTel may not unduly limit, through bilateral agreement, its statutorily-mandated resale obligations. The Agreement language should also take account of Missouri law, which the CenturyTel draft fails to do.

<p><u>ISSUE GROUP E - UNE Issues (Agreement</u> <u>Article VII):</u> <i>May KMC continue to access UNEs pursuant to the Communications Act and FCC rules and regulations, and state law?</i></p>
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The Commission must ensure the availability of UNEs pursuant to state law, and with regard to federal law should implement the newly-revised FCC Rules that are scheduled to take effect March 11, 2005. In light of the most recent FCC Order, the language in CenturyTel's proposed agreement is outdated and now superseded, and must therefore be rejected.

Considering the recent federal developments, KMC suggests that CenturyTel respond to KMC's proposed Article VII, and that the parties work jointly to develop new UNE language to take account of the FCC's TRO Remand Order and identify through that process any additional issues in need of resolution.

Concurrent with identification of issues under federal law, KMC proposes that each Party submit its view as to the applicability of state law to the unbundling issue, since the Act protects the rights of states to order unbundling, and prevents the FCC from interfering with the exercise of such rights.

In fact, the Act explicitly preserves such independent state authority. Section 252(e)(3) of the Act, entitled "Preservation of authority" states unequivocally that:

[N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

Likewise, section 251(d)(3) of the Act, entitled “Preservation of State access regulations” clearly provides that:

In prescribing and enforcing regulations to implement the requirements of this section, the [Federal Communications] Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that – (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

The above language shows a clear Congressional intent to preserve independent state authority to establish access and interconnection obligations in order to facilitate and sustain telephone competition. Accordingly, the Act preserves Missouri’s independent authority to require the continued unbundling at TELRIC rates.

The UNE rates that CenturyTel has proposed are unsupported – and unsupportable. CenturyTel’s proposed rates are significantly higher than SBC’s, and than the GTE/Verizon rates they purport to replace. CenturyTel may not, of course, demand rates higher than those set for Verizon since the Verizon rates were reviewed and set by the Commission, and CenturyTel committed to this Commission (and others) to utilize those same rates going-forward.

The rates attached to the KMC-proposed interconnection agreement (Exhibit C hereto) represent the rates that were set by the Commission for GTE/Verizon, as memorialized in the AT&T Southwest/GTE interconnection agreement. Those rates were deemed by the Commission to be cost-based, for the specific service territories now served by CenturyTel. As a result, those rates should now be reaffirmed by the Commission. In fact, the GTE/Verizon rates are the only legal rates. As noted earlier, section 252(d)(1) of the Communications Act requires that “determinations by a State commission of the just and reasonable rate for . . . network elements . . . shall be (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is

applicable), and (ii) nondiscriminatory[.]”³⁵ Thus, CenturyTel’s non-cost based rates cannot be lawfully accepted by the Commission.

This rate issue, to the extent it may be contested by CenturyTel, should not be an issue at all. As the Commission is well aware, CenturyTel committed to “use the same rates, terms and conditions of service as Verizon” following its acquisition of the service territory.³⁶ Since the rates attached to the KMC agreement are those “same rates,” while those proposed by CenturyTel are not, CenturyTel must be ordered by the Commission to utilize those rates. As to one particular rate – DS1 loops – not set by the Commission for Verizon, the PSC should instead set a rate equal to the SBC Missouri rate until such time as a DS1 rate is set by the Commission, utilizing a lawful and appropriate process.³⁷

³⁵ 47 U.S.C. § 252(d)(1).

³⁶ *Verizon-CenturyTel Transfer Order*, at page 6. In that Order, the Commission noted that “CenturyTel desires to acquire those 96 exchanges [from Verizon] and to assume the service obligations previously imposed upon Verizon,” and also provides that any new agreements must, where technically feasible, “have the same terms and conditions as did the Agreement with Verizon.” *Id.*

³⁷ The Commission may want to, for example, use the rate inputs already established for the territory in the GTE ratemaking.

<u>ISSUE GROUP F – ANCILLARY SERVICES</u> <u>(Agreement Article VIII):</u>

As noted above, CenturyTel may not attempt to meet its obligations to negotiate interconnection agreements by simply incorporating tariff terms, in the absence of explicit agreement, and may not unreasonably limit its liability. The Agreement must contain adequate terms for the provision of the ancillary services, including the provision of access to 911 and provisions for the trunking and routing of 911 traffic.

V. PROCEDURAL MATTERS

33. Section 252(b)(4)(c) of the Communications Act requires that, unless waived by the parties, the Commission should render a decision in this proceeding not later than nine (9) months after the date on which interconnection negotiations formally commenced which, in this case, is June 10, 2005. In order to allow the most expeditious conduct of this arbitration, KMC respectfully requests that the Commission issue a procedural order as promptly as possible, establishing a schedule and Initial Arbitration Meeting and the timing and conduct of the hearing in this matter, as well as the filing of a decision point list, discovery requests, prefiled testimony, and other required documents. KMC is fully aware that, as a matter of practice and procedure, the Commission will issue a “Notice of Petition for Arbitration”³⁸ and “Order Setting Initial

³⁸ See, e.g., *In the Matter of the Petition of Sprint Communications Company, L.P., for Arbitration of Unresolved Interconnection Issues regarding xDSL with Southwestern Bell Telephone Company*, Case No. TO-99-461, Notice of Petition for Arbitration (effective April 27, 1999).

Arbitration Meeting”³⁹ following the filing of this Petition. KMC will therefore address any and all additional procedural issues at that time.

VI. CONCLUSION

34. While KMC and the CenturyTel Entities have attempted to reach mutually acceptable interconnection terms, many significant issues remain unresolved. Accordingly, KMC calls upon the Commission to arbitrate the unresolved issues that have been identified by the Parties, as well as those issues that may be identified in the course of the arbitration.

³⁹ See, e.g., *In the Matter of the Application of AT&T Communications of the Southwest, Inc., TCG St. Louis and TCG Kansas City, Inc., for Compulsory Arbitration of Unresolved Issues with Southwestern Bell Telephone Company Pursuant to Section 252 (b) of the Telecommunications Act of 1996*, Case No. TO-2001-455, Order Setting Prehearing, Conference and Directing Filing (effective April 16, 2001).

WHEREFORE, KMC respectfully request that the Commission resolve the issues between the Parties as set forth in this Petition, as well as other issues that the Parties may identify following the filing of this Petition; resolve each such issue in favor of KMC, and grant any other relief as the Commission may deem just and proper.

Respectfully submitted,

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KMC Telecom III LLC
KMC Data, LLC

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Dated: February 16, 2005

VERIFICATION

I, _____, being first duly sworn, state that I am _____, KMC Telecom V, Inc., KMC Telecom III LLC and KMC Data, LLC; that I am authorized to make this Verification on their behalf; that I have read the foregoing Petition for Arbitration, and that the statements in the foregoing Petition for Arbitration, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

Marva Brown Johnson
Vice President, KMC Telecom V, Inc., KMC
Telecom III LLC and KMC Data, LLC

Subscribed and sworn to before me this 16th day of February, 2005.

Notary Public

My Commission expires:_____

CERTIFICATE OF SERVICE

I hereby certify that the undersigned has caused a complete copy of the attached document to be electronically filed and served on the Commission's Office of General Counsel (at gencounsel@psc.mo.gov), the Office of Public Counsel (at opcservice@ded.mo.gov) and counsel for CenturyTel (at lwdority@sprintmail.com), on this 16th day of February 2005.

/s/ Mark W. Comley

EXHIBIT A

INTERCONNECTION REQUEST

EXHIBIT B

ISSUES MATRIX

EXHIBIT C
INTERCONNECTION AGREEMENT
PROPOSED BY KMC