

NEWMAN, COMLEY & RUTH

PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS AT LAW
MONROE BLUFF EXECUTIVE CENTER
601 MONROE STREET, SUITE 301
P.O. BOX 537
JEFFERSON CITY, MISSOURI 65102-0537
www.ncrpc.com

TELEPHONE: (573) 634-2266
FACSIMILE: (573) 636-3306

ROBERT K. ANGSTEAD
ROBERT J. BRUNDAGE
MARK W. COMLEY
CATHLEEN A. MARTIN
STEPHEN G. NEWMAN
JOHN A. RUTH

November 12, 2004

FILED²
NOV 15 2004
Missouri Public
Service Commission

The Honorable Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102-0360

Re: FullTel, Inc.
Case No. TK-2005-0079

Dear Judge Roberts:

Enclosed for filing in the referenced matter please find the original and five copies of Fulltel's Response and Opposing Suggestions to Motion for Summary Determination.

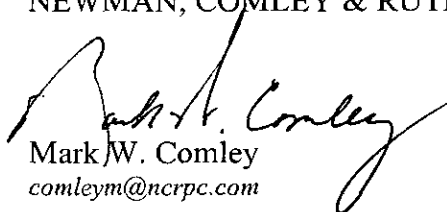
Would you please bring this filing to the attention of the appropriate Commission personnel.

Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


Mark W. Comley
comleym@ncrpc.com

MWC:kjh

Enclosure

cc: Office of Public Counsel
General Counsel's Office
Larry W. Dority
Roger Baresel
Andrew M. Klein

BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

FILED²
NOV 15 2004

Petition of FullTel, Inc. for Approval of)
an Interconnection Agreement Pursuant)
to Section 252 of the Communications Act)
of 1934, as Amended)

Case No. TK-2005-0079

Missouri Public
Service Commission

**FULLTEL'S RESPONSE AND OPPOSING SUGGESTIONS TO MOTION
FOR SUMMARY DETERMINATION**

FullTel, Inc., ("FullTel"), by and through the undersigned counsel, responds to the CenturyTel Motion for Summary Determination, in accordance with the Missouri Public Service Commission's Order Directing Response to Motion dated November 8, 2004. FullTel filed with this Commission, pursuant to Sections 251 and 252 of the Communications Act, as amended,¹ a Notice of adoption by FullTel of the Interconnection Agreement between CenturyTel of Missouri, LLC ("CenturyTel-MO") and Brooks Fiber Communications of Missouri, Inc., ("the Agreement"). Pursuant to Section 252(i) of the Act, FullTel selected the Brooks Fiber Agreement as the Agreement that will govern the relationship between FullTel and CenturyTel in the State of Missouri, and in accordance with the Act and prior orders of the Commission also adopted the Brooks Fiber Agreement as the Agreement that will govern the relationship between FullTel and Spectra Communications Group LLC d/b/a CenturyTel ("Spectra") in the State.²

Despite CenturyTel's attempts at obfuscation, this entire matter is actually quite straightforward. CenturyTel has an obligation under the Act to provide all competitors with

¹ 47 U.S.C. § 151, *et. seq.* (the "Act").

² Except as otherwise indicated, CenturyTel and Spectra d/b/a CenturyTel will be collectively referred to herein as "CenturyTel."

access to agreements on the same basis. When it acquired the service territories at issue from GTE/Verizon, CenturyTel became a successor in interest and also explicitly agreed to continue to offer the same interconnection agreement terms to competitors. Since CenturyTel is still operating with some carriers under the GTE/Verizon agreements, it must make those same terms available to carriers such as FullTel. To do otherwise would be discriminatory and therefore a violation of the Act and Missouri law. If summary disposition of the matter is to be considered at all, it is FullTel who should be granted such relief.

The federal Act requires that CenturyTel provide nondiscriminatory access to elements and interconnection.³ The Act also mandates that CenturyTel include such terms in interconnection agreements.⁴ Section 252(i) of the Act requires local exchange carriers to make those interconnection agreements available to requesting telecommunications carriers “upon the same terms and conditions as those provided in the agreement.”⁵

Since acquiring the GTE/Verizon service territory through two transactions, CenturyTel has been operating under the inherited Verizon agreements. It is, by any stretch, a party to those agreements that remain in effect. CenturyTel attempts to confuse the issue by throwing up timing issues. This is a red herring, and must be ignored for several reasons.

First, the timing of the approval of the Brooks Fiber/Verizon Agreement and the acquisition of the service territory actually confirms that CenturyTel is bound by the Agreement. Consider the following facts:

³ See, e.g., 47 U.S.C. § 251(a)-(c).

⁴ See, e.g., 47 U.S.C. §251(c)

⁵ 47 U.S.C. §252(i).

- May 31, 2002 – PSC issues Report and Order approving CenturyTel’s acquisition of the Verizon Missouri service territory, with conditions, based upon CenturyTel’s filed stipulation.
- July 18, 2002 – Verizon and Brooks Fiber jointly file interconnection agreement for approval under the Act.
- August 15, 2002 – PSC approves Brooks Fiber/Verizon Agreement.
- September 1, 2002 – CenturyTel of Missouri formally begins to provide service in the service territory acquired from Verizon.

Thus, CenturyTel’s acquisition of the service territory encases the Commission’s approval of the interconnection agreement at issue. The Commission approved the transfer of the service territory, then approved an agreement for use in that territory, and then CenturyTel formally succeeded Verizon’s rights in that territory. As proof of that fact, CenturyTel continues to provide service under the Agreement. CenturyTel is undoubtedly a party to that Agreement, despite its self-serving protestations here.

Second, as noted above, CenturyTel has an obligation – that admits of no exceptions – to make terms and conditions available on a nondiscriminatory basis. The issue of whether FullTel did or did not itself have an agreement with Verizon when CenturyTel acquired the exchanges is irrelevant as long as CenturyTel continued and continues to operate under the terms of the adopted agreement today.

Finally, CenturyTel committed to, and was then ordered to, “use the same rates, terms and conditions of service as Verizon on the date of the closing of the [purchase] transaction.”⁶ CenturyTel’s mandates do not end there. CenturyTel committed to, and was then ordered to,

⁶ Report and Order, Case TM-2002-232, dated May 21, 2002, at page 6. (“Report and Order”)

enter into agreements that have “the same rates, terms and conditions of service” as the Verizon agreements.⁷ CenturyTel may not differentiate between carriers who had agreements in 2002 and those who did not, for such a distinction would be discriminatory and therefore illegal.⁸

Since CenturyTel and Spectra (d/b/a CenturyTel) are essentially the same company, and both are required to honor existing GTE agreement terms, FullTel and similarly situated carriers should be able to operate in the collective CenturyTel territory through the consistent terms of one agreement.⁹ In fact, the Commission has already properly noted that “CenturyTel [encompassing both CenturyTel of Missouri and Spectra] agreed to abide by the terms of GTE’s existing interconnection agreements . . . when *it* acquired GTE’s exchanges.”¹⁰ In fact, according to a recent, verified filing by Socket Telecom, LLC, CenturyTel has already permitted carriers to operate under one single agreement for the entire CenturyTel/Spectra territory, in apparent recognition that the two affiliates are truly part of one single company.¹¹ In further

⁷ *Id.* In the Commission Order approving CenturyTel’s acquisition of the GTE service territory, in Case TM-2002-232, the Commission recognized that CenturyTel had negotiated certain terms, embodied in a stipulation, obligating CenturyTel to, inter alia, honor the terms of and allow carriers such as FullTel to adopt Verizon interconnection agreements in Missouri. Report and Order at page 6. The one exception to that rule, technical infeasibility, has not been claimed by CenturyTel.

⁸ It is for this same reason that the Staff is, respectfully, incorrect when it asserts that the stipulation (and Commission Order incorporating it) are “not applicable” to FullTel. Staff Memorandum, filed November 5, 2004, at page 6. It would be impermissible for a Commission Order to be applied in such a discriminatory fashion, allowing one group of carriers superior rights vis-à-vis others. The Staff also leaves a logical gap in its assertion that “[b]ecause neither Spectra nor CenturyTel of Missouri was a party to the Interconnection Agreement between GTE and Brooks Fiber, neither has an obligation” under section 252(i) today. Regardless of whether Spectra and CenturyTel were in the past parties or not is irrelevant since the only material fact is that they are today parties to agreements and as a matter of law must make those same terms available to other carriers.

⁹ The Commission approved, on April 14, 2000, Spectra’s acquisition of another GTE Midwest service territory, in Case No. TM-2000-182. In that instance, Spectra agreed to provide service in accordance with the terms of the GTE/CLEC interconnection agreements.

¹⁰ *Id.* at page 1.

¹¹ In the Matter of the Confirmation of Adoption of the Confirmation of Adoption of the Interconnection Agreement with CenturyTel of Missouri and Spectra Communications d/b/a CenturyTel by Socket

recognition of this fact, CenturyTel Inc. has, in response to the FullTel request for negotiation of a new interconnection agreement, responded on behalf of both of its subsidiaries – CenturyTel of Missouri and Spectra. Both entities are wholly owned by CenturyTel Inc.

CenturyTel's October 25th filing is long on rhetoric but lacking in proof. CenturyTel asserts, for example, that "the relief requested in FullTel's pleading is far beyond that authorized by 47 U.S.C. 252(i) and 47 CFR 51.809"¹² – and then demands dismissal. Precisely how the adoption of an agreement currently in use by another carrier, pursuant to a statutory provision whose sole purpose is to authorize such adoptions, can be even remotely considered to be beyond the statute is never explained. The sole argument that CenturyTel puts forth – that should not be considered a "party" – was addressed above.

While CenturyTel also asserts that its request for summary disposition "is not otherwise contrary to law or contrary to the public interest,"¹³ it never backs up that assertion with any law or facts. Nor could it. The fact of the matter is that both federal and state law prohibit discriminatory behavior by ILECs such as CenturyTel,¹⁴ meaning that CenturyTel's attempt to discriminate against certain carriers by offering terms to some but not others *is* contrary to law *and* the public interest.

Section 252(e) of the Act permits a Commission to reject an agreement only if it discriminates against a carrier not a party to the agreement, or if its implementation is not consistent with the public interest, convenience and necessity. Since FullTel is adopting an agreement already in use, it cannot be discriminatory. Nor can the Commission reasonably reject

Telecom LLC, Case No. CO-2005-0066, Confirmation of Adoption of the Interconnection Agreement, dated September 15, 2004.

¹² CenturyTel Motion at page 2.

¹³ *Id.* See also, CenturyTel Motion at page 7.

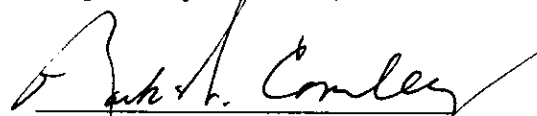
¹⁴ See, e.g., 47 U.S.C. §§251(c), 252(d), (e) and (i).

the Agreement on public interest grounds, since approval of the Agreement will permit FullTel to provide competitive service to Missouri consumers, delivering with it all the attendant benefits of lower cost, improved quality and innovation, and would simply permit FullTel to do so on the same terms as other competitive carriers. It is in the public interest to permit additional competitive service providers, and to permit them to compete on a level playing field.

Since CenturyTel has failed to demonstrate that it is entitled to summary determination, nor that it has any likelihood of success on the merits, the Commission must deny the motion.

WHEREFORE, in light of the foregoing, FullTel, Inc. respectfully requests that the Commission deny CenturyTel's motion and act to expeditiously approve FullTel's adoption of the Agreement and deem such adoption effective June 18, 2004 for both CenturyTel entities.

Respectfully submitted,



Mark W. Comley MBE# 28847
Newman, Comley & Ruth, P.C.
601 Monroe Street, Suite 301
P.O. Box 537
Jefferson City, MO 65102-0537
Tel. (573) 634-2266
Fax (573) 636-3306
comleym@ncrpc.com

Attorneys for FullTel, Inc.

DATED: November 12, 2004

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was sent via e-mail on this 12th day of November, 2004, to General Counsel's Office at gencounsel@psc.state.mo.us; Office of Public Counsel at opcservice@ded.state.mo.us.; and to Larry W. Dority at lwdority@sprintmail.com.

