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November 29, 2004

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

FILED⁴
NOV 29 2004
Missouri Public
Service Commission

Dear Judge Roberts:

Enclosed for filing in the referenced matter please find the original and five copies of the Response of FullTel to Order Directing Filing.

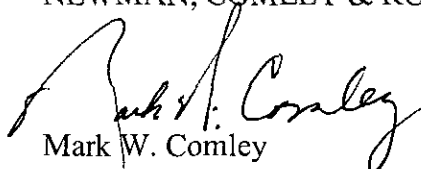
Would you please bring this filing to the attention of the appropriate Commission personnel.

Thank you.

Very truly yours,

NEWMAN, COMLEY & RUTH P.C.

By:


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MWC:ab

Enclosure

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

FILED⁴

NOV 29 2004

BEFORE THE PUBLIC SERVICE COMMISSION OF
THE STATE OF MISSOURI

Missouri Public
Service Commission

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

RESPONSE OF FULLTEL TO ORDER DIRECTING FILING

FullTel, Inc. ("FullTel"), by and through the undersigned counsel, in accordance with the Missouri Public Service Commission's Order Directing Filing dated November 18, 2004, hereby addresses the applicability (or lack thereof) of the FCC's Interim Order.¹ FullTel filed with this Commission on September 30, 2004, pursuant to Sections 251 and 252 of the Communications Act, as amended,² 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

¹ In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 69 Fed. Reg. 55,111, 55.112 (effective September 13, 2004) (to be codified at 47 C.F.R. pt. 51) ("Interim Order").

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

("Spectra") in the State.³ For the reasons set forth herein, the FCC's Interim Order has no bearing on FullTel's adoption of the Agreement.

First and foremost, the Communications Act, passed by Congress and signed into law, remains valid. That law still governs this issue, and trumps any Order of a federal agency or commission, such as the FCC. Federal law requires approval of FullTel's adoption of the Agreement.

The Act requires that CenturyTel provide nondiscriminatory access to elements and interconnection.⁴ The Act also mandates that CenturyTel include such terms in interconnection agreements.⁵ Most relevant for present purposes, however, is the fact that 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."⁶ This has not changed. With all due respect to the FCC, it does not have the authority to eliminate this statutory obligation.

Even if one were to assume that the FCC could somehow infringe upon the right of carriers to nondiscriminatory access, protected by federal law, that assumption does not alter the conclusion that FullTel's adoption must be confirmed. FullTel adopted the Agreement by notification to CenturyTel dated June 18, 2004. Since that date precedes the effective date of the FCC's Interim Order (September 13, 2004) by several months, the subsequent FCC action cannot – in any way – modify or limit that right already legally exercised. While the FCC may attempt to freeze, in September, carrier rights going forward, it could not even pretend to do so

³ Except as otherwise indicated, CenturyTel and Spectra d/b/a CenturyTel will be collectively referred to herein as "CenturyTel."

⁴ See, e.g., 47 U.S.C. § 251(a)-(c).

⁵ See, e.g., 47 U.S.C. § 251(c)

⁶ 47 U.S.C. § 252(i).

for a right that existed and was exercised in June, prior to the effective date of its order. Apparently aware of this limitation, the FCC did in fact only attempt to limit carriers' rights going forward, "during the interim period"⁷ (the six month period beginning September 13, 2004).⁸ Thus, while the FCC's Interim Order may be read to limit opt-in rights after September 13th, it did not intend to (nor could it under any stretch) be read to limit opt-in rights prior to the effective date of the Order (September 13, 2004).⁹

As noted in prior pleadings in this proceeding, this entire matter is very straightforward. CenturyTel has an obligation under the Act to provide all competitors with 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 is a party to those agreements and 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.

CenturyTel's clear, statutory obligation should not be confounded with irrelevant timing issues. In addition to the clear federal obligation, CenturyTel committed to, and was then ordered to by this Commission, "use the same rates, terms and conditions of service as Verizon on the date of the closing of the [purchase] transaction."¹⁰ Neither CenturyTel nor this Commission may differentiate between carriers who had agreements in 2002 and those who did

⁷ *Interim Order* at para 22.

⁸ *Id.* at para 21.

⁹ FullTel additionally notes that its interest is in obtaining interconnection with CenturyTel, not in obtaining access to UNE provisions assertedly frozen during the interim period. FullTel is not seeking, *inter alia*, access to UNE-P.

¹⁰ Report and Order, Case TM-2002-232, dated May 21, 2002, at page 6. ("Report and Order")

not, for such a distinction would be discriminatory and therefore illegal.¹¹ Both federal and state law prohibit discriminatory behavior by ILECs such as CenturyTel,¹² meaning that CenturyTel's attempt to discriminate against certain carriers by offering terms to some but not others is contrary to law and not in the public interest.

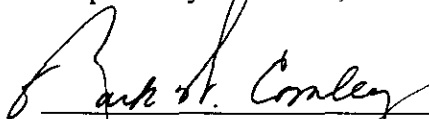
Section 252(e) of the Act permits a Commission to reject an agreement only if it discriminates against a carrier not a party to the agreement, or if its implementation is not consistent with the public interest, convenience and necessity. Since FullTel is adopting an agreement already in use, it cannot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

¹¹ As explained in its November 12, 2004 pleading, FullTel respectfully disagrees with Staff's assertion on this point, since 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.

¹² See, e.g., 47 U.S.C. §§251(c), 252(d), (e) and (i).

WHEREFORE, in light of the foregoing, FullTel, Inc. respectfully requests that the Commission find that the FCC's Interim Rules Order has no bearing on this matter, 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,



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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 29th 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.

