

conclusory, are not based on personal knowledge, evince speculation and conjecture, and are irrelevant.

I. ARGUMENT & AUTHORITIES

A. **The Kohly and Magness Affidavits Should Be Stricken Entirely Because They Impermissibly Offer Extrinsic Evidence of the Meaning of An Unambiguous Contract in Violation of the Parole Evidence Rule.**

The parties agree that this case should be resolved as a matter of contract interpretation,¹ and the interpretation of a contract is a question of law. *Robbins v. McDonnell Douglas Corp.*, 27 S.W.3d 491, 496 (Mo.App. E.D. 2000). The guiding principle of contract interpretation under Missouri law is that a court will seek to ascertain the intent of the parties and to give effect to that intent. *Butler v. Mitchell-Hugeback, Inc.*, 895 S.W.2d 15, 21 (Mo. en banc 1995). The intent of the parties to a contract is presumed to be expressed by the ordinary meaning of the contract's terms. *Triarch Industries, Inc. v. Crabtree*, 158 S.W.3d 772, 776 (Mo. en banc 2005). If the contract is unambiguous, it should be enforced according to its terms. *Id.* It also is well-established in Missouri that the parole evidence rule bars the admission of extrinsic evidence unless a contract is deemed ambiguous. *Whitehill v. Whitehill*, 218 S.W.3d 579, 584 (Mo.App. S.D. 2007). Whether a contract is ambiguous also is a question of law for the Commission to determine. *Id.* at 585.

In this case, the Commission has not determined that the Agreements (or the terms at issue here) are ambiguous, and Socket has made no such assertion. The Affidavits of R. Matthew Kohly and William L. Magness both purport to testify about the meaning of the parties'

¹ See CenturyTel's Motion for Summary Determination on Interpretation of Compensation Arrangements Applicable to Local Traffic at ¶ 1 ("... this is a dispute regarding the interpretation of the Parties' Interconnection Agreements[.]"); Socket Telecom's Response to CenturyTel's Motion for Summary Determination and Socket Telecom's Cross Motion for Summary Determination at 3 ("It is the interpretation of the Agreement on which the parties disagree.").

Agreements, the parties' intent, and their negotiation history. Such testimony constitutes impermissible extrinsic evidence under Missouri law. *See id.* ("Absent ambiguity the intent of the maker of a legal instrument is to be ascertained from the four corners of the instrument without resort to extrinsic evidence." (internal quotations and citations omitted)). Consequently, both affidavits should be stricken on the ground that they purport to provide inadmissible testimony.

B. Even If the Commission Determines That the Agreements Are Ambiguous and Considers Extrinsic Evidence, a Substantial Amount of the Kohly and Magness Affidavits Should Be Stricken as Improper and/or Inadmissible Testimony Evidence.

If the Commission determines that the Agreements are ambiguous as to the compensation regime applicable to Local Traffic and considers extrinsic evidence, a substantial portion of the Kohly and Magness Affidavits should nevertheless be stricken on the grounds that they contain improper and/or inadmissible summary determination evidence.

When moving for a summary determination, Missouri procedural rules require that supporting and opposing affidavits be made on *personal knowledge*, set forth such *facts* as would be *admissible* in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. *See* Missouri Rule of Civil Procedure 74.04(e); 4 CSR 240-2.117(1)(B) and (C) (requiring under both subsections that affidavits filed in support of motions for summary determination and responses thereto be directed to the *material facts*). Hearsay statements that would not be admissible at trial are not competent summary determination testimony. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 634-35 (Mo.App. E.D. 2005).

An affidavit's proper function is to state *facts*, not conclusions. *Scott*, 182 S.W.3d at 634-35. Legal conclusions are not admissible facts. *Id.* at 635. Indeed, any conclusory testimony, or testimony not based on the affiant's personal knowledge, is not competent

summary determination evidence. *Id.* at 635-36 (holding that the trial court, on summary judgment, erred by not striking from affidavits legal conclusions and statements not based on the affiants' personal knowledge).

The affidavits of R. Matthew Kohly and William L. Magness are riddled with impermissible testimony that is not competent summary determination evidence. The offending testimony should be stricken.

1. The Following Portions of Mr. Kohly's Affidavit Testimony Are Conclusory and/or Constitute Impermissible Legal Conclusion and, Therefore, Should Be Stricken.

Conclusory testimony is not proper affidavit testimony. *Scott*, 182 S.W.3d at 634-35. With respect to Mr. Kohly's purported legal conclusions, such testimony is inadmissible because it invades the exclusive province of the Commission to interpret contracts. *Robbins v. McDonnell Douglas Corp.*, 27 S.W.3d 491, 496 (Mo.App. E.D. 2000)(the interpretation of a contract is a question of law for the court to determine); *Scott*, 182 S.W.3d at 635 ("Legal conclusions are not admissible facts."). A substantial portion of Mr. Kohly's affidavit is devoted to testifying about how the Agreements and/or applicable laws and rules should be interpreted or construed. However, the meaning of contract terms and statutory provisions is a question of law for the Commission, and Mr. Kohly's legal-conclusion-testimony constitutes an encroachment into the province of the Commission.

To the extent Socket claims that Mr. Kohly is testifying as an expert, his conclusions are nevertheless inadmissible. The admissibility of expert testimony in Missouri is governed by V.A.M.S. § 490.065. That statute provides, in relevant part, that an expert's opinion testimony may be admissible "if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." V.A.M.S. § 490.065(1). This case is about contract interpretation, a question of law. As there are no factual disputes

preventing the interpretation of the unambiguous Agreements, there is no role for a “fact finder.” Therefore, any expert opinion is inadmissible at present.

Even if the Commission determines that the Agreements are ambiguous and considers extrinsic evidence, nothing in Mr. Kohly’s affidavit can be considered admissible expert testimony or opinion. Rather than opine as to issues requiring technical or specialized knowledge, the affidavit merely asserts legal conclusions based on Mr. Kohly’s purported interpretations of the Agreements and relevant statutes. This, of course, is the exclusive province of the Commission. *See State v. Kinder*, 942 S.W.2d 313, 334 (Mo. en banc 1996)(“Expert testimony is not admissible on issues of law.”), *cert. denied*, 522 U.S. 854 (1997). Moreover, Mr. Kohly’s testimony amounts to nothing more than improper and inadmissible “testimony” about what he thinks the Commission’s ultimate determination should be. *See Honsinger v. UMB Bank, N.A.*, -- F. Supp. 2d --, Case No. 06-0018-CV-W-ODS, 2007 WL 3256251, at *2 (W.D. Mo. Nov. 2, 2007)(“expert opinion testimony should be excluded if it is so couched in legal conclusions that it supplies the fact finder with no information other than what the witness believes the verdict should be” (internal quotations and citations omitted)).

To the extent the Commission declines to strike Mr. Kohly’s entire affidavit as it should, it should nevertheless, at a minimum, strike the following testimony on the grounds that it is conclusory and/or constitutes impermissible legal conclusion.

15.

If the parties’ intention was to operate under a bill-and-keep arrangement, this language was necessary to ensure that both parties were waiving their statutory right to reciprocal compensation pursuant to the Act. Without such language, the ICA includes no waiver of the parties’ rights to collect reciprocal compensation for the types of traffic the Commission did not rule are subject to a bill-and-keep arrangement.

17. CenturyTel was unwilling to agree to language establishing a bill-and-keep arrangement for Local Traffic, and there was no effort by CenturyTel to remove

the provisions of the agreement that I identify above which impose the rates in Article VIIA, including Local Switching, for the transport and termination of Local Traffic.

....

As discussed above, the absence of language authorizing a bill-and-keep arrangement, paired with (a) the inclusion of the rate used for billing transport and termination compensation in Article VIIA, and (b) CenturyTel's proposed language regarding transport and termination in Article V, Section 9.7 (stating that the rate for billing transport and termination is the rate in Article VIIA), made clear that the parties are authorized to bill each other for Local Traffic transport and termination compensation.

20. In reality, the ICA does not include a provision requiring a bill-and-keep arrangement for Local Traffic, but rather contemplates that each party will, pursuant to Section 251 of the Act, charge reciprocal compensation to recover its "costs associated with the transport and termination ... of calls that originate on the network facilities of the other carrier." Section 251(d)(2)(A).
21. As demonstrated in Socket's summary determination pleadings, including this affidavit, the Interconnection Agreement provides that the parties will pay each other reciprocal compensation for the mutual exchange of "Local Traffic" as that term is defined by the agreement. Copies of the pertinent provisions of the Interconnection Agreement are attached hereto and incorporated herein by reference.
25. In addition to the foregoing provisions that expressly provide for payment for the Transport and Termination of Local Traffic ...

....

- (c) Other traffic may not be aggregated with bill-and-keep traffic (Article V, Sec. 9.8).

26. Based upon the terms of the parties' Interconnection Agreement, each party has the right to collect reciprocal compensation for the Transport and Termination of Local Traffic
28. To the extent that Socket terminated more traffic originating from CenturyTel than it terminated to CenturyTel, Socket would rightfully receive compensation for the functions it performed.
29. Consistent with the provisions of the parties' Interconnection Agreement which authorize charges for reciprocal compensation for the exchange of Local Traffic

30. All of the traffic billed under Socket's invoices constitutes "Local Traffic" as defined in the parties' Interconnection Agreement that is subject to reciprocal compensation charges for termination by Socket
32. Consistent with Article V, Section 12.3 of Interconnection Agreement and 4 CSR 240-29.080
34. . . . This is consistent with industry standards for determining the jurisdiction of the call (i.e. local vs. toll)
35. Consistent with 4 CSR 240-29.080(2)
2. **The Following Portions of Mr. Magness' Affidavit Testimony Are Likewise Conclusory and/or Constitute Impermissible Legal Conclusion and, Therefore, Should Be Stricken.**

As with Mr. Kohly's affidavit, a substantial portion of Mr. Magness' affidavit is devoted to testifying about how the Agreements and/or applicable laws and rules should be interpreted or construed. Indeed, rather than a factual affidavit, Mr. Magness' affidavit reads like a legal brief, with conclusory legal arguments, not factual assertions. To the extent the Commission declines to strike Mr. Magness' entire affidavit as it should, it should nevertheless, at a minimum, strike the following testimony on the same grounds and for the same reasons identified above.

3. The ICA approved by the Commission in Case No. TO-2006-0299 incorporates provisions that implement Section 251(b)(5) of the federal Telecommunications Act of 1996 (the "Act"). Section 251(b)(5) provides that every local exchange company ("LEC") has "[t]he duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."
4. The Act further details the requirements for reciprocal compensation in Section 252(d)(2)(A), where Congress instructs State commissions that the "terms and conditions for reciprocal compensation" shall not be considered "just and reasonable" unless:

[S]uch 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 the other carrier.

Under the federal Act, when one telecommunications provider transports and terminates a call initiated by the customer of another provider, the provider incurring the transport and termination costs is entitled to receive compensation for those costs from the provider whose customer initiated the call.

5. The Act also makes clear that the requirement that carriers are entitled to receive compensation for transport and termination costs does not bar arrangements in which carriers waive mutual recovery of transport and termination costs. Section 252(d)(2)(B) provides that the provision of Section 252(d)(2)(A) quoted above:

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 Act authorizes State commissions to approve "bill-and-keep" arrangements in interconnection agreements, but at the same time makes clear that absent such contractual arrangements, carriers remain entitled to charge one another for the costs associated with transporting and terminating one another's traffic.

6. The ICA includes various provisions governing reciprocal compensation between Socket and CenturyTel. The reciprocal compensation provisions represent a mix of terms that were negotiated by the parties and terms that were determined by the Commission in its arbitration order in Case No. TO-2006-0299.

7. Specifically, the Interconnection Agreement provides:

- (a) MCA Traffic will be exchanged on a bill-and-keep basis consistent with prior Commission decisions (Article V, Sec. 9.2, 9.2.1, 9.2.2);
- (b) VNXX Traffic will be exchanged on a bill-and-keep basis (Article V, Sec. 9.2.3);
- (c) Other Local Traffic shall be subject to the termination rates set forth in Article VII.A (Article V, Section 9.7, 9.7.1, 9.7.2);
- (d) Other traffic may not be aggregated with bill-and-keep traffic (Article V, Sec. 9.8).
- (e) On request parties will supply Percentage Local Usage for amount of Local Interconnection Traffic minutes to be billed, but if adequate message recording technology is available then the terminating party may use such information to determine Local Interconnection Traffic usage compensation to be paid. (Article III, Sec. 10.2).
- (f) Annual audits can be conducted regarding billing for Local Traffic. (Article III, sec. 10.4).

8. Consistent with the provisions of the Act cited above, the ICA identifies compensation rates for termination of certain types of traffic, and specifically delineates where a bill-and-keep arrangement applies instead. For example, the ICA provides that "MCA Traffic" and "VNXX Traffic" are subject to bill-and-keep. But the bill-and-keep provisions do not apply to "Local Traffic", including

local "ISP Traffic" (*i.e.*, traffic originating and terminating in the same local calling area that is bound for an Internet Service Provider) unless the traffic is MCA Traffic or VNXX Traffic.

9. The ICA defines "Transport" and "Termination" as applying to "Local Traffic." *See* Article V, Sections 9.7, 9.7.1, and 9.7.2. "Transport" and "Termination" are the specific terms used in the Act's provisions that require reciprocal compensation. The Act provides all carriers the statutory right to demand compensation for completing calls initiated by another carrier. The compensation rates for traffic termination are included in Article VIIA of the ICA, and the Article V reciprocal compensation provisions point directly to those rates. *See* ICA, Article V, Section 9.7.2. In contrast, the provisions regarding MCA and VNXX traffic specifically identify those types of traffic as being subject to bill-and-keep rather than a reciprocal compensation arrangement. *See* Article V, Sections 9.2, 9.2.1, 9.2.3.
10. CenturyTel's actions and statements demonstrate that, when the ICA was executed, CenturyTel understood that Local Traffic was not subject to bill-and-keep, but rather to a reciprocal compensation arrangement

. . . .

There would be no reason for CenturyTel to pay the invoices if the ICA did not call for reciprocal compensation for Local Traffic.

12. As CenturyTel has recognized previously, the ICA provides that Local Traffic is subject to reciprocal compensation. Both Socket and CenturyTel have a statutory right to charge one another compensation for terminating one another's calls. When that traffic is of a type not governed by the ICA (*e.g.*, access traffic or wireless traffic), the ICA itself makes clear that its terms do not affect compensation for those types of traffic. For those types of traffic subject to the ICA, a plain reading of the ICA demonstrates that certain specific types of traffic are subject to bill-and-keep (*e.g.*, VNXX and MCA), while other traffic is subject to payment of the traffic termination rate set in the ICA (*e.g.*, Local Traffic transport and termination, including local ISP Traffic). For traffic subject to bill-and-keep, reciprocal compensation is waived. For traffic not subject to bill-and-keep, the rates in the ICA apply and the parties are entitled to reciprocal compensation.
13. CenturyTel's refusal to continue to pay Socket for transport and termination of Local Traffic ignores the express language in Article V establishing the rates for reciprocal compensation ("Transport of Local Traffic" at Section 9.7 and "Termination" at Section 9.7.2) for the transport and termination of Local Traffic. In addition, even in the absence of such express language, CenturyTel's position would turn the Act on its head. CenturyTel asks the Commission to presume that Socket must transport and terminate its traffic for free. As explained above, the Act expressly establishes a statutory right to reciprocal compensation that can

only be waived if a bill-and-keep arrangement is affirmatively included in an ICA.

14. The language of the ICA demonstrates that CenturyTel must resume payment of reciprocal compensation owed to Socket. The Commission need not look beyond the terms of the contract to determine that the ICA does not apply a bill-and-keep arrangement to Local Traffic. CenturyTel's Motion for Summary Determination, however, urges the Commission to rely on statements made during the course of negotiation and arbitration of the ICA as it reviews the meaning of the ICA. *See* Joint Motion for Summary Determination, ¶¶ 8, 9, 14-16; Legal Memorandum in Support, ¶¶ 16-25. In the event the Commission looks to such extrinsic evidence as it makes its determination, the facts do not support CenturyTel's claims.

15. A review of the negotiation and arbitration history regarding the ICA's reciprocal compensation provisions demonstrates three critical facts: (a) CenturyTel was never willing to include language in the ICA that authorized a bill-and-keep arrangement for all Local Traffic; (b) the Commission's orders regarding the ICAs did not impose a bill-and-keep arrangement for Local Traffic; and (c) after the Commission issued its arbitration order, CenturyTel continued to refuse to include a bill-and-keep arrangement in the final ICA including when that agreement was presented to the Commission for approval.

16.

As the text above makes clear, the language contemplates both "Local Mutual Compensation" and "Bill and Keep" arrangements for Local Traffic. The "Local Mutual Compensation" provision contemplates reciprocal compensation for "Local Traffic." The "Bill and Keep" section makes clear that if either party can demonstrate that traffic is significantly out-of-balance, either party may require that "mutual compensation will commence ... and continue for the duration of the Term of this Agreement unless otherwise agreed."

23. The Commission's decision did not, however, adopt language requiring bill-and-keep for other types of Local Traffic.

24. In any event, there was no ruling by the Arbitrator or the Commission subjecting Local Traffic to a bill-and-keep arrangement.

26.

.... If the parties' intention was to operate under a bill-and-keep arrangement for Local Traffic, as CenturyTel contends, this language was necessary to ensure that both parties were waiving their statutory right to reciprocal compensation pursuant to the Act. Without such language, the ICA includes no waiver of the parties' rights to collect reciprocal compensation for transporting and terminating the types of traffic that the Commission had not ordered be subject to a bill-and-keep arrangement.

28. As discussed above, the absence of language authorizing a bill-and-keep arrangement, paired with (a) the inclusion of the rate used for billing transport and termination compensation in Article VIIA, and (b) CenturyTel's proposed language regarding transport and termination in Article V, Section 9.7 (stating that the rate for billing transport and termination is the rate in Article VIIA), made clear that the parties are authorized to bill each other for Local Traffic transport and termination compensation.
29. The final approved ICA authorizes CenturyTel and Socket to charge for the costs of transport and termination of the other party's Local Traffic.
30. It is ironic that CenturyTel now claims that the ICA includes an expansive bill-and-keep arrangement applicable to all Local Traffic.
31. If Socket and CenturyTel had indeed adopted language making the ICA a pure bill-and-keep contract, wireless carriers could, to CenturyTel's potential disadvantage, adopt the ICA and avoid paying reciprocal compensation to CenturyTel.
32. In reality, the ICA does not include a provision requiring a bill-and-keep arrangement for Local Traffic, but rather contemplates that each party will, pursuant to Section 251 of the Act, charge reciprocal compensation to recover its "costs associated with the transport and termination ... of calls that originate on the network facilities of the other carrier." Section 251(d)(2)(A).

C. Even If the Commission Determines That the Agreements Are Ambiguous and Considers Extrinsic Evidence, Certain Portions of Mr. Magness' Affidavit Should Be Stricken as Improper and/or Inadmissible On the Ground That They Are Not Based On His Personal Knowledge.

Missouri procedural rules require, when moving for summary determination, that supporting and opposing affidavits be made on *personal knowledge* and show affirmatively that the affiant is competent to testify to the matters stated therein. See Missouri Rule of Civil Procedure 74.04(e). In his affidavit, Mr. Magness purports to testify about two events, neither of which he has personal knowledge. Specifically, Mr. Magness testifies about Socket's submission of reciprocal compensation invoices to CenturyTel, as well as testimony *in another proceeding* (Case No. TO-2007-0341) before the Commission.

There has been no affirmative showing in the affidavit or otherwise that Mr. Magness participated, as a percipient witness, in Socket's billing activities after the Agreements became effective, or in the hearing in Case No. TO-2007-0341 to which he refers. On the contrary, Mr. Magness' affidavit expressly states that he was involved in the negotiation and arbitration of the Agreements and that his "involvement in the negotiation and arbitration of the ICA began in December 2005, and continued through the final approval of the ICA by the Missouri Public Service Commission [] in October 2006." Magness Aff. at ¶ 2. Thus, Mr. Magness' own testimony limits the scope of his personal knowledge. Both the billing activity and the hearing to which he refers occurred *after* the Agreements became effective in October 2006. Without testimony that Mr. Magness was personally involved in either, his knowledge of the billing activity and hearing must necessarily derive from others, and his testimony thereof thus constitutes inadmissible hearsay. *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 634-35 (Mo.App. E.D. 2005) (hearsay statements that would not be admissible at trial are not competent summary determination testimony).

Therefore, to the extent the Commission declines to strike Mr. Magness' entire affidavit as it should, it should nevertheless strike the following paragraphs of that affidavit on the ground that they constitute testimony about which Mr. Magness does not have personal knowledge.

10. Socket began billing CenturyTel for reciprocal compensation after the ICA went into effect in October 2006. CenturyTel paid the first two reciprocal compensation invoices sent by Socket, 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).
11. In addition, CenturyTel's attorney told the Commission that, under the ICA, a local call between Socket and CenturyTel is subject to a reciprocal compensation rather than a bill-and-keep arrangement. In the hearing before the Commission in Case No. TC-2007-0341, which involves the interpretation of other provisions of the ICA, counsel for CenturyTel (Mr. Stewart) and Socket (Mr. Lumley) discussed with Commissioner Clayton the reciprocal compensation treatment of various types of traffic. Commissioner Clayton asked how a purely local (as in,

non-VNXX) call would be treated under the ICA, and CenturyTel's counsel, Mr. Stewart, responded as follows:

Q. COMMISSIONER CLAYTON: So physically the call -- if the Socket customer stays within the exchange, does the call have to go to the point of interconnection? So it goes to Branson and then back?

A. MR. STEWART: It goes to Branson and back.

A. MR. LUMLEY: CenturyTel calls a Socket customer or vice-versa, right, that's where the traffic is exchanged today.

Q. COMMISSIONER [sic] CLAYTON: And that's recip comp. It's not bill and keep.

A. MR. LUMLEY: In that circumstance.

A. MR. STEWART: Yeah, I'd agree with that.

See, Case No. TC-2007-0341, Hearing Transcript at 45-46 (July 11, 2007)(copy attached).

D. Even If the Commission Determines That the Agreements Are Ambiguous and Considers Extrinsic Evidence, Certain Portions of Mr. Kohly and Mr. Magness' Affidavits Should Be Stricken as Improper and/or Inadmissible Speculation.

In Missouri, an affidavit must assert "specific facts." "An affidavit which relies upon . . . speculation fails to create a genuine issue of material fact[.]" *Vista Rail, Inc. v. Branson Scenic Railway, Inc.*, 945 S.W.2d 82, 84-85 (Mo.App. W.D. 1997) (citations omitted) (holding that conclusory affidavit testimony lacking a specific factual basis and other statements by the affiant about what "may have" happened or what he "believed" to have happened are inadmissible).

Several statements in each of Mr. Kohly and Mr. Magness' affidavits provide nothing other than the affiant's conclusory speculation and conjecture, without a specific factual basis. To the extent the Commission declines to strike these affidavits in their entirety as it should, the Commission should nevertheless strike the following paragraphs of the identified affidavits on the ground that they constitute inadmissible speculation and conjecture.

[Kohly Affidavit]

17.

Since CenturyTel was no longer required to offer switching as an unbundled network element ("UNE"), the only purpose for the inclusion of the Local Switching rate in the ICA was its use as the rate for billing reciprocal compensation for transport and termination of Local Traffic.

[Magness Affidavit]

28.

Since CenturyTel was no longer required to offer switching as an unbundled network element ("UNE"), the only purpose for the inclusion of the Local Switching rate in the ICA was its use as the rate for billing reciprocal compensation for transport and termination of Local Traffic.

[Kohly Affidavit]

19.

With an agreement calling for reciprocal compensation, this imbalance would result in significant reciprocal compensation revenues for CenturyTel as it terminated more traffic than it originated. Under a pure bill-and-keep arrangement, CenturyTel would not be able to collect those revenues and would, instead, incur the expense of terminating more traffic for the other carrier than it sent to the other carrier. CenturyTel's refusal to adopt straightforward bill-and-keep provisions combined with their concern about other carriers opting into the agreement showed that CenturyTel did not want a bill-and-keep agreement but rather sought to have an agreement calling for reciprocal compensation.

26. Given these factors, when the Agreements were submitted for Commission approval I believed that CenturyTel would immediately begin billing Socket for reciprocal compensation or, at the very least, begin billing Socket for reciprocal compensation if and when traffic flowed in CenturyTel's favor, meaning that CenturyTel terminated more traffic than Socket and received more revenues than they paid.

[Magness Affidavit]

31. For example, I am aware that ILECs are frequently wary of entering bill-and-keep agreements with wireless carriers, because ILECs often transport and terminate much more traffic for the wireless carrier than the wireless carrier terminates for the ILEC. That results in a traffic imbalance that would run in the ILEC's favor, resulting in significant reciprocal compensation revenues for the ILEC. If Socket and CenturyTel had indeed adopted language making the ICA a

pure bill-and-keep contract, wireless carriers could, to CenturyTel's potential disadvantage, adopt the ICA and avoid paying reciprocal compensation to CenturyTel.

E. Even If the Commission Determines That the Agreements Are Ambiguous and Considers Extrinsic Evidence, Paragraph 28 of Mr. Kohly's Affidavit Should Be Stricken as Irrelevant Testimony.

To be admissible in Missouri, "evidence must have logical relevancy and probative value." *Gerow v. Mitch Crawford Holiday Motors*, 987 S.W.2d 359, 364 (Mo.App. W.D. 1999)(citations and internal quotations omitted). The issue in this case is whether the terms of the parties' Interconnection Agreement require that a particular type of compensation arrangement be applied to Local Traffic exchanged by the parties. Even if true—and they are not—the assertions in Paragraph 28 of Mr. Kohly's Affidavit have absolutely no bearing on the interpretation of the Agreement. To the extent the parties have other disputes arising under the Agreements, they are not related, nor do they have probative value, to the interpretation of the intercarrier compensation terms at issue here. Obviously, Mr. Kohly's self-serving and inaccurate testimony is injected into this proceeding only in an attempt to cloud the instant dispute. Such testimony is improper and inadmissible in Missouri. *Id.* at 364 ("The sole fact that evidence is logically relevant does not require its admission; the evidence must also have some probative force over and above logical relevancy. If evidence pertaining to collateral matters brings into a case new controversial matters which would result in confusion of issues[,] it should be excluded.") (citation omitted).

To the extent the Commission declines to strike Mr. Kohly's entire affidavit as it should, the Commission should nevertheless strike the following paragraph on the ground that it is not relevant, nor does it have any probative value, to the issue in this matter.

28. To the extent those revenues exceed costs, those revenues could be used to offset many of the increased costs and inefficiencies Socket experiences when

competing against CenturyTel as compared to other incumbent LECs. These increased costs are driven by the inefficiencies of ordering systems that are largely manual and cumbersome, lack of access to electronic Customer Service Record information, inaccurate or inadequate Customer Service Record information when it is obtained manually, manual maintenance and repair procedures, failure of CenturyTel to follow Change Management Provisions, the frequent and customer-affecting nature of CenturyTel's abrupt changes in policies and procedures, disputes over LNP obligations and CenturyTel's unlawful "certification" required on all of Socket's orders to port numbers, and constant failure of CenturyTel to meet due dates, among others. These and other factors increase Socket's operating costs in CenturyTel's territories. Revenues from Reciprocal Compensation have the potential to offset some of these costs.

II. PRAYER

WHEREFORE, based on the foregoing, CenturyTel respectfully requests that the Commission:

- (a) issue an Order striking the Affidavits of R. Matthew Kohly and William L. Magness in their entirety;
- (b) to the extent the Commission denies CenturyTel's request to strike the affidavits entirely, grant CenturyTel's alternative request to strike those portions of the affidavits identified herein as being objectionable and not competent summary determination evidence; and
- (c) grant CenturyTel such other relief to which it is rightly and justifiably entitled.

Respectfully submitted,

FISCHER & DORITY, P.C.

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**ATTORNEYS FOR CENTURYTEL OF
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CENTURYTEL**

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 the Public Counsel (at opcservice@ded.mo.gov), Socket Telecom, LLC (at rmkohly@sockettelecom.com) and counsel for Socket Telecom, LLC (at clumley@lawfirmemail.com; lcurtis@lawfirmemail.com) on this 13th day of February, 2008.

/s/ **Larry W. Dority**

Larry W. Dority