BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

PETITION OF SOCKET TELECOM, LLC FOR COMPULSORY ARBITRATION OF INTERCONNECTION AGREEMENTS WITH CENTURYTEL OF MISSOURI, LLC AND SPECTRA COMMUNICATIONS GROUP, LLC PURSUANT TO SECTION 252(b)(1) OF THE TELECOMMUNICATIONS ACT OF 1996	**)** **)** **)** **)** **)** **)** **)**	**CASE NO. TO-2006-0299**

CENTURYTEL'S STATEMENT OF COMPLIANCE AND NONCOMPLIANCE OF CONFORMING INTERCONNECTION AGREEMENT

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COME NOW Spectra Communications Group, LLC, and CenturyTel of Missouri, LLC (collectively, "CenturyTel"), and pursuant to Commission Rules 4 CSR 240-36.050(1) and (4), file their Statement of Compliance and Noncompliance of Conforming Interconnection Agreement ("Statement") to the requirements of Sections 251 and 252 of the federal Telecommunications Act of 1996, as amended (the "FTA"), FCC rules, Missouri statutes, and the rules of the Missouri Public Service Commission, and respectfully state as follows:

I.
INTRODUCTION AND SUMMARY OF THE ARGUMENT

Concurrently with the filing of this Statement, the parties have filed interconnection agreements that (i) state the agreement of the parties as to issues and contract language not arbitrated, (ii) reach agreement and state terms on a number of issues arbitrated and determined against one or the other of the parties, and (iii) simply "conform" to the determinations of the Commission where the parties could not reach agreement after arbitration (discussed together herein as the "Conforming ICA").[1] Although the Conforming ICA represents the sum of the parties' agreements and the Commission's determinations, Commission Rule 4 CSR 240-36.050

[1] Spectra Communications Group, LLC, and CenturyTel of Missouri, LLC, will each have separate interconnection agreements with Socket.

recognizes that, after the conforming process, the parties may contend that the product does not meet the standards of either federal or state law such that the Commission may lawfully approve it under Section 252(e). CenturyTel respectfully submits that while the majority of the Conforming ICA does, indeed, meet the requirements of the law on the record presented, some terms or conditions expressed as conforming to the Final Commission Decision nevertheless fail to satisfy the requirements of Sections 251 and 252 of the FTA, FCC rules, Missouri statutes, or the rules of the Missouri Public Service Commission. CenturyTel, therefore, respectfully requests that the Commission reject the provisions of the Conforming ICA that do not comport with federal or state law and provide for modifications that would make the Conforming ICA lawful.

A. ARTICLE VIIA (RECURRING AND NON-RECURRING UNE PRICING) AND ARTICLE VI (RESALE DISCOUNT)

By failing to reflect CenturyTel's forward-looking costs of providing the UNEs at issue and failing to account for CenturyTel-specific factors impacting underlying costs and cost structure, the Commission's decisions on pricing are largely flawed. While it may be appropriate to utilize one ILEC as a proxy for another ILEC's costs/rates, the FTA and TELRIC demand demonstrating that the proxy is appropriate and, at a minimum, satisfies the statutory and regulatory rate-setting criteria. It is on that point, critically, that the Commission errs. Specifically:

(1) Article VIIA of the Conformed ICA unlawfully includes AT&T's non-recurring charges that, contrary to the FTA and TELRIC, do not reflect CenturyTel's costs and the adoption of which is manifestly inconsistent with TELRIC pricing methodology.

(2) Disregarding mandatory statutory and regulatory pricing principles, Article VIIA of the Conformed ICA includes recurring DS1 UNE loop rates that, because they are based on 1997 GTE costs for analog loops without any showing of comparability to CenturyTel's current, forward-looking costs of providing digital loops, are neither forward-looking nor otherwise consistent with mandatory TELRIC pricing methodology.

(3) Likewise, the recurring DS3 UNE loop rates in Article VIIA of the Conformed ICA, which are nothing more than AT&T's recurring DS3 UNE loop rates, do not comply with statutory and regulatory requirements because they, too, fail to reflect CenturyTel's costs of providing the UNE at issue.

(4) The same fatal defect afflicts the Commission-imposed resale discount included in Article VI of the Conformed ICA, which, contrary to the FTA, completely eschews CenturyTel's costs and cost structure in favor of a decade-old resale discount that was developed for a different ILEC and that is inapplicable to CenturyTel.

Accordingly, the Commission should reject the recurring and non-recurring rate provisions in Article VIIA and the resale discount contained in Article VI, instead adopting the resale discount and rates CenturyTel proposed (and the evidentiary record supports).

B. ARTICLE XV (PERFORMANCE MEASURES)

While Article XV—Conforming correctly presents the sum of the parties' agreements and the Commission's determinations, it does not meet the standards of either federal or state law such that the Commission may lawfully approve it under Section 252(e). While CenturyTel agrees that the Commission may approve performance measures and agreed liquidated damages provisions, it disagrees that these measures or remedies can be disconnected from the terms of the ICA they are intended to enforce or be self-executing. Article XV—Conforming fails to meet the requirements of Sections 251 and 252 of the FTA, FCC rules, Missouri statutes, or the rules of the Missouri Public Service Commission in at least the following respects:

(1) The particular, disputed, self-executing mechanism for the exaction of penalties contained in Article XV—Conforming is not authorized by the FTA and does not provide due process. In the absence of agreement on a liquidated damages provision, the Article XV that is ultimately approved must provide notice and an opportunity to be heard.

(2) The Performance Measures and many of the associated remedies fail to comply with Sections 251 or 252 in that they fail to effect—or in fact conflict with—the operative provisions of the Conforming ICA.

(3) The imposition of self-executing penalties fails to meet the requirements of the FTA because the parties were not required to—and in fact did not—negotiate such terms under Sections 251 and 252. Moreover, self-executing penalties fail to provide due process.

(4) The remedies set forth in the plan conflict with the provisions of Sections 251 and 252 in establishing a mechanical, yet capricious, "lottery," which has little or no relationship to the terms of the underlying contract or to the damages that might be realized as the result of a breach.

(5) The "remedies" provided in Article XV–Conforming are not lawful liquidated damages, but unlawful penalties under Missouri law.

CenturyTel has not opposed the adoption in this case of an agreed set of performance measures or a remedy plan. CenturyTel consistently resisted the plan Socket put forth and advocated its own plan it contends meets both the desires of Socket and the requirements of the law. It is not just CenturyTel that holds the belief that the performance measures and remedies set forth in Article XV—Conforming have palpable issues. Socket itself admitted as much, confessing in prefiled testimony and on the stand that: (1) its proposed measures had serious problems[2]; and (2) its proposed penalties were, indeed, penalties, and not an attempt at lawful liquidated damages.[3]

The Commission should, therefore, reject Article XV—Conforming and adopt the version of Article XV that CenturyTel proposed and, unlike Socket, supported with evidence. CenturyTel's Article XV is consistent in scope with Socket's requests for a set of performance measures and a remedy plan, but is also consistent with the underlying ICA it is intended to help enforce. In addition, CenturyTel's Article XV contains only remedies that CenturyTel agrees may substitute as liquidated damages for harms that may be difficult to measure, such as the consequences of certain potential breaches; and CenturyTel's plan provides due process for the invocation of remedies. CenturyTel's Article XV is both lawful and supported by the record in this case.

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[2] *See, e.g.*, Post-Hearing Brief of Socket Telecom, LLC ("Socket's Post-Hearing Brief") at 132; Exhibit 2 (Kohly Rebuttal) at 116.

[3] Socket's Post-Hearing Brief at 132 (acknowledging CenturyTel's concerns that Socket's remedy plan could "penalize" CenturyTel) *and* 138 ("The purposes of remedy plans is not to compensate CLECs for actual harm, but to incent ILECs to perform."); Exhibit 2 (Kohly Rebuttal) at 115:11-17; Tr. at 477:8-10 (Kohly).

II.
STANDARD OF REVIEW

When reviewing an arbitrated interconnection agreement for approval, the Commission may reject any portions of such agreement that do not meet the requirements of Section 251 of the Act, the FCC's rules and regulations, or the pricing standards set forth in Section 252(d) of the Act.[4] The Commission may also reject any portion of an arbitrated agreement that does not comply with Missouri law or the Commission's own rules and regulations.[5]

III.
SPECIFIC FAILURES TO COMPLY

A. COMMISSION-MANDATED RATE PROVISIONS CONTRAVENE THE FTA AND GOVERNING FCC REGULATIONS (ARTICLES VI AND VIIA)

The Conformed ICA unlawfully includes Commission-mandated rate provisions that do not adhere to FTA standards and were not developed in accordance with mandatory pricing methodologies. Under the FTA, CLECs like Socket may enter local markets in one of three ways: building their own facilities for interconnection, leasing portions of the ILEC's network, or reselling the ILEC's telecommunications services.[6] It is pricing for the latter two of these mechanisms that is at issue here. Recognizing that CenturyTel is obligated to lease certain portions of its telecommunications network (called "unbundled network elements" or "UNEs") to CLECs at cost-based, wholesale rates, the FCC's rules require state commissions to establish such rates—both recurring rates (monthly rental payments) and non-recurring charges (one-time costs associated with acquiring a UNE)—using a "forward-looking" pricing methodology allowing CenturyTel to recover its costs and a reasonable profit. Similarly, when a CLEC like Socket opts to resell CenturyTel's telecommunications services, the CLEC acquires those telecommunications services at a discount reflecting the percentage of its costs the ILEC would avoid offering those telecommunications services strictly on a wholesale—rather than retail—

4 47 U.S.C. § 252(e)(2)(B); 4 CSR 240-36.050(4).
5 47 U.S.C. § 252(e)(3); 4 CSR 240-36.050(4).
6 *See Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1662 (2002).

basis. Here, the Conformed ICA incorporates (a) recurring rates and non-recurring charges that are not consistent with mandatory statutory and regulatory requirements and (b) a resale discount that is inapplicable to CenturyTel and not even based on CenturyTel's costs or cost structure. The resulting rate provisions are, as a result, unlawful.

1. TELRIC, the FCC's Prevailing UNE Pricing Methodology, Governs Development of Recurring Rates and Non-recurring Charges.

The rate provisions in the Conformed ICA must be informed by the FTA, federal jurisprudence, and FCC guidance.[7] The starting point, naturally, is the statutory requirement that CenturyTel lease UNEs to Socket "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[8] "In particular, section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with '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 in accordance with . . . the requirements of this section and section 252.'"[9] Where a state commission establishes such UNE rates, the FTA requires those rates to be "just and reasonable," "nondiscriminatory" and based on "the cost . . . of providing the . . . network element," which "may include a reasonable profit."[10] Applying that statutory mandate, the FCC established a default pricing methodology that state commissions *must* follow to lawfully establish UNE rates.[11] Specifically, the FCC adopted a forward-looking economic cost methodology called Total Element Long Run Incremental Cost ("TELRIC"),[12] which is designed to establish prices for network elements that "replicate[], to the extent possible," what

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7 *See Verizon*, 122 S. Ct. at 1661; *Mpower Communications Corp. v. Illinois Bell Tel. Co., Inc.*, Cause Nos. 05-3552 & 05-3677, slip op. at 2 (7th Cir. Aug. 4, 2006).

8 *See* 47 U.S.C. § 251(c)(3).

9 *See Triennial Review Remand Order* ("*TRRO*") at ¶ 6.

10 47 U.S.C. § 252(d)(1). *See also* Notice of Proposed Rulemaking, Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers, WC Docket No. 03-173, FCC 03-224 (rel. Sept. 15, 2003) ("*TELRIC NPRM*") at ¶ 15.

11 *See Verizon*, 122 S. Ct. at 1661, 1663-64; *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 397 (1999) (upholding the FCC's jurisdiction to "design a pricing methodology" binding state ratemaking commissions). *See also* 47 C.F.R. § 51.503(b).

12 *First Report and Order* ¶ 29; 47 C.F.R. §§ 51.501-51.511.

the ILEC would be able to charge in a competitive market.[13] In all events, "[p]rices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs."[14]

Applying this mandatory pricing mechanism requires consideration of CenturyTel's network configuration and its current costs.[15] That is, the cost under TELRIC is equal to what it would cost this specific ILEC *today* to build a local network providing all the services its current network provides, to meet reasonably foreseeable demand, using the least-cost, most-efficient technology currently available[16] and assuming the ILEC's existing network design, at least in terms of wire center locations.[17] As the FCC concluded, "under a TELRIC methodology, incumbent LECs' prices for interconnection and unbundled network elements shall recover the forward-looking costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs."[18] And those forward-looking costs "must be based on the incumbent LEC's existing wire center locations."[19] Speaking to this determination, the United States Supreme Court recognized that "[m]ost important of all, the FCC decided that the TELRIC 'should be measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent['s] wire centers.'"[20] Indeed, while reaffirming its decision to base UNE prices on the forward-looking cost of providing UNEs,[21] the FCC tentatively concluded that TELRIC was too hypothetical in nature and that UNE prices "should more closely account

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13 *First Report and Order* ¶ 679.
14 *Id.* ¶ 620.
15 *See* 47 C.F.R. § 51.505(b)(1).
16 *First Report and Order* at ¶ 685; 47 C.F.R. § 51.505(b)(1).
17 *First Report and Order* ¶ 685.
18 *Id.* ¶ 682.
19 *Id.* ¶ 690.
20 *See Verizon*, 122 S. Ct. at 1664.
21 *See generally*, TELRIC NPRM.

for the real-world attributes of the routing and topography of an incumbent's network in the development of forward-looking costs."[22]

In all events, therefore, rates must be based on ILEC-specific inputs, including, most fundamentally, that particular ILEC's unique costs.[23] "To follow TELRIC the [Commission] must look at the current cost of providing UNEs."[24] TELRIC is, if nothing else, a cost-based pricing methodology.[25] Thus, TELRIC demands an ILEC-specific inquiry (which neither Socket nor the Commission engaged in here).

2. The Conformed ICA Includes Non-recurring Charges that Are Not Consistent with the FTA or TELRIC.

As ordered by the Final Commission Decision,[26] the parties' Conformed ICA, over CenturyTel's opposition, includes the AT&T non-recurring charges ("NRCs") from the M2A-successor arbitration (Case No. TO-2005-0336). The inclusion of those AT&T NRCs in this CenturyTel ICA, however, is inconsistent with the FTA and TELRIC. That the Commission may have approved those NRCs *as to AT&T* in Case No. TO-2005-0336 is of no moment. It is axiomatic that, at a minimum, the rates an ILEC charges a CLEC must necessarily be based on that ILEC's costs.[27] Here, the record is utterly devoid of any evidence or analysis suggesting that those AT&T NRCs are applicable to CenturyTel or that CenturyTel's underlying costs are comparable to the AT&T costs upon which the NRCs are presumably based.[28] Moreover, the record reveals a serious methodological deficiency in the adoption of those NRCs; independent of the evidentiary failings, neither Socket nor Commission Staff engaged in a critical

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22 *Id*. at ¶ 52.

23 *See, e.g., First Report and Order* at ¶ 29; *In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, CC Docket No. 00-218, Memorandum Opinion and Order, DA 03-2738 at ¶ 30 (rel. August 29, 2003) (*Verizon Virginia Cost Award*).

24 *See Mpower Communications*, Cause Nos. 05-3552 & 05-3677 at 2.

25 *See First Report and Order* at ¶¶ 619-20.

26 *See* Final Commission Decision, Case No. TO-2006-0299 at 52-53 (June 27,2006).

27 *See, e.g., First Report and Order* at ¶¶ 29, 682, 685.

28 Exhibit Q (T. Hankins Rebuttal) at 2-5; Tr. at 247:21-250:7 (Kohly), 250:12-255:3 (Turner).

examination of the comparability of those AT&T NRCs to CenturyTel.[29] In other words, not only is there no evidence in the record demonstrating that the adopted NRCs are TELRIC-compliant *as to CenturyTel*, but there is no indication that Socket or the Commission applied the statutorily mandated methodology in adopting the AT&T NRCs.

a. Adoption of the AT&T NRCs improperly deviated from TELRIC methodology.

From a methodological perspective, inclusion of the AT&T NRCs in the Conformed ICA is inconsistent with the FTA and TELRIC. In the first instance, remarkably, the Arbitrator's Final Report completely omits any decision, discussion or analysis pertaining to the disputed NRCs. The Commission explained this failure by commenting that "[i]t was not clear from the parties' discussions and testimony that non-recurring charges were still a disputed issue."[30] While CenturyTel contends that the Final DPL, pre-filed testimony, argument at the hearing on the merits, and post-hearing briefing all noted a significant remaining dispute on NRCs, the rationale for the initial failure to address NRCs is irrelevant. The fact remains that neither Staff nor the Arbitrator originally examined any of the evidence or applied any analysis, much less a TELRIC-compliant scrutiny, to the proposed NRCs. And, the Commission did not correct that fatal error in its Final Commission Decision, instead merely noting that "[t]he Commission reviewed and approved the rates in Case No. TO-2005-0336 as TELRIC-compliant rates."[31] That single *non sequitur* comprises the entirety of the analysis related to the adoption of the AT&T NRCs.[32] But the FTA and TELRIC, as noted above, require much more.

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[29] Exhibit C (Miller Direct) at 76-79; Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10; Tr. at 239:13-240:3 (CenturyTel Opening Statement).

[30] Final Commission Decision at 52.

[31] *Id*.

[32] Worthy of note, the Commission refrained from including any additional analysis in ruling on the parties' Article VIIA conforming language dispute, merely re-stating its adoption of AT&T NRCs. *See* Order Regarding Disputed Language in Interconnection Agreement, Case No. TO-2006-0299 at 5-6 (Sep. 12, 2006).

Separately, the Conformed ICA contravenes the FTA and TELRIC in its inclusion of a Commission-mandated zero rate NRC for Socket's orders of customer service records. CenturyTel specifically raised this issue in the context of the parties' dispute over the development of conforming language for Appendix: Resale Pricing to Article VI.[33] Attempting to resolve the parties' conforming language dispute, the Commission, remarkably, concluded that "no rate should be included in the conformed agreement for customer record searches, which defaults to $0."[34] On its face, this ruling is unlawful in violating fundamental—and mandatory—statutory and regulatory precepts (*i.e.*, CenturyTel is, at an absolute minimum, entitled to cost recovery) and raises the specter of constitutional infirmity in representing an unconstitutional "taking" of CenturyTel property in violation of the Fifth Amendment to the U.S. Constitution. The Commission cannot lawfully or constitutionally compel CenturyTel to turn over its property to Socket without due compensation. To the extent the Conformed ICA does just that, the Commission cannot adopt it.

In response to CenturyTel's critique of Socket's reliance on AT&T NRCs, it is not enough for the Commission to suggest that "the parties need only refer to the rates in that case."[35] Although where supported by evidence another carrier's costs and/or rates may serve as an adequate proxy for the costs/rates of the ILEC at issue, that neither the Commission nor the Arbitrator in this proceeding engaged in any analysis of CenturyTel-specific non-recurring costs or the possible comparability of AT&T non-recurring costs to CenturyTel is fatal.[36] *Prima facie*, inclusion of the Commission-mandated NRC provisions is methodologically unsound; under the FTA and TELRIC, a state commission cannot simply adopt another carrier's NRCs without any

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[33] *See* CenturyTel's Brief in Support of Proposed Conforming Language, Case No. TO-2006-0299 at 10 (Aug. 30, 2006).

[34] *See* Order Regarding Disputed Language in Interconnection Agreement, Case No. TO-2006-0299 at 5 (Sep. 12, 2006).

[35] *See id.*

[36] Exhibit C (Miller Direct) at 76-79; Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10; Tr. at 239:13-240:3 (CenturyTel Opening Statement).

showing that those NRCs actually reflect the costs of the ILEC at issue (and certainly not on this record).

b. Lacking any evidence of comparability, the record does not support a finding that the AT&T NRCs are TELRIC-compliant *as to CenturyTel*.

Independent of the methodological deficiency discussed above, inclusion of the AT&T NRCs in the Conformed ICA is unlawful because nothing in the evidentiary record justifies application of those AT&T NRCs to CenturyTel.[37] To that end, instructively, Socket never offered any evidence or sound analysis demonstrating that those AT&T NRCs are appropriate here, that the underlying costs upon which they are based reflect CenturyTel costs, or that they are in any way applicable to CenturyTel.[38] Socket did not, for example, file the AT&T cost studies upon which those NRCs were based, did not file its witness' "restatements" of those cost studies, and did not offer any CenturyTel-specific analysis of the NRCs.[39] Moreover, while Socket acknowledged that there are four critical components to evaluating non-recurring costs (tasks, probability of task occurrence, task time, and labor rate), it did not examine any of those four critical components with respect to CenturyTel.[40] Socket did not compare AT&T and CenturyTel non-recurring tasks, did not compare AT&T and CenturyTel task times, did not compare AT&T and CenturyTel probabilities of occurrence, and did not proffer anything beyond rank speculation and unsupported assumptions.[41] TELRIC, of course, requires that the resulting rates be based on the ILEC's costs, which is obviously not the case here (*i.e.*, the AT&T rates may be based on AT&T's costs, but not on CenturyTel's). There can be no doubt that the AT&T

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37 Exhibit Q (T. Hankins Rebuttal) at 2-5; Tr. at 247:21-250:7 (Kohly), 250:12-255:3 (Turner).

38 Exhibit Q (T. Hankins Rebuttal) at 2-5; Tr. at 247:21-250:7 (Kohly), 250:12-255:3 (Turner); CenturyTel's Post-Hearing Brief on Certain Disputed Arbitration Issues ("CenturyTel's Post-Hearing Brief") at 56-58.

39 Exhibit Q (T. Hankins Rebuttal) at 2-5; Tr. at 250:12-251:18 (Turner).

40 Exhibit Q (T. Hankins Rebuttal) at 2-5. *See also* Exhibit 3 (Turner Direct) at 56-57; Exhibit 4 (Turner Rebuttal) at 52-53.

41 Tr. at 250:12-255:3 (Turner).

NRCs *are not based on CenturyTel's costs*, blatantly violating the fundamental pricing principle underlying TELRIC and Section 252 of the FTA.

Adopting AT&T NRCs under these circumstances is inconsistent with TELRIC.[42] To be sure, the Commission found those NRCs to be TELRIC-compliant *as to AT&T*, but never arrived at any such finding *as to CenturyTel*. Indeed, Socket effectively admitted on cross-examination that it had not conducted a cost study or otherwise done *anything* to determine the applicability or comparability of the AT&T NRCs to CenturyTel.[43] As this Commission recognized in 1997, "TELRIC is a concept, not a defined algorithm, therefore different companies would be expected to produce different TELRIC costs if the total costs were identical."[44] Simply adopting AT&T NRCs, presumably based on AT&T's non-recurring costs, in the Conformed ICA fails to recognize CenturyTel's specific costs, fails to ensure CenturyTel's cost recovery, and fails to comply with TELRIC.[45] Inclusion of the AT&T NRCs in the Conformed ICA, thus, is unlawful.

c. The evidentiary record unequivocally establishes the inapplicability of AT&T NRCs to CenturyTel.

Juxtaposed against Socket's failure to proffer any evidence supporting its proposed use of AT&T NRCs, the record is replete with evidence demonstrating that those AT&T NRCs are *not* applicable to CenturyTel. Indeed, the evidentiary record permits no conclusion other than that the AT&T NRCs are not TELRIC-compliant *as to CenturyTel*.[46] This is manifest from the statutory and regulatory requirement that the Commission consider how differences between CenturyTel and AT&T impact costs and rates.[47] While the same law governs (*i.e.*, TELRIC drives UNE rates), the outcome necessarily differs because of differences between the two

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42 *Id.* at 240:3-24 (CenturyTel Opening Statement).

43 *Id.* at 247:21-261:4 (Kohly & Turner).

44 *See* Final Arbitration Order, Case No. TO-97-63 at Attachment C Missouri Public Service Commission Costing and Pricing Report at 4 (July 31, 1997).

45 Exhibit P (T. Hankins Direct) at 7-8.

46 *See* CenturyTel's Post-Hearing Brief at 59-61.

47 Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10.

companies.[48] Since CenturyTel differs markedly from AT&T in a number of cost-impacting ways, the AT&T NRCs do not serve as an adequate proxy for CenturyTel's non-recurring costs.[49] This is true, for example, with respect to service order charges, which are manifestly predicated on the costs associated with AT&T's processing of service orders with its fully electronic OSS, rather than CenturyTel's processing of service orders with its less-automated OSS (which necessarily entails additional costs). Notwithstanding this significant distinction, and its critical cost impact, the Commission continues to unlawfully insist that the parties utilize the inappropriate AT&T electronic service order NRCs.[50] The Commission's determinations in that regard are not consistent with the FTA and TELRIC. The AT&T NRCs, after all, are based on AT&T's costs (including AT&T labor rates, tasks, task times, OSS, and probabilities of occurrence) and AT&T's demand levels for non-recurring activity, all of which differ markedly from CenturyTel. The evidentiary record establishes that CenturyTel's non-recurring costs, as well as the underlying factors impacting those non-recurring costs, differ from those of AT&T. As a result, the AT&T NRCs do not reflect CenturyTel's costs,[51] and TELRIC demands their rejection here.[52]

d. Adhering to the FTA and TELRIC, the Commission should replace the AT&T NRCs currently in the Conformed ICA with CenturyTel's NRCs.

A faithful application of the FTA and the FCC's TELRIC pricing methodology demands that the Commission include the GTE-based NRCs contained in existing CenturyTel ICAs with other CLECs. The evidentiary record demonstrates that those GTE-based NRCs are an adequate

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48 Exhibit A (Avera Direct) at 4.
49 Exhibit P (T. Hankins Direct) at 7-9.
50 *See* Order Regarding Disputed Language in Interconnection Agreement, Case No. TO-2006-0299 at 5-6 (Sep. 12, 2006).
51 Exhibit Q (T. Hankins Rebuttal) at 4-5.
52 Exhibit P (T. Hankins Direct) at 8-9.

proxy for CenturyTel's non-recurring costs,[53] and that they are nondiscriminatory, reasonable, and consistent with the public interest.[54] Of equal importance, Socket never challenged them, methodologically or substantively.[55]

3. The Commission-Imposed Recurring DS1 and DS3 UNE Loop Rates Included in the Conformed ICA Contravene the FTA and Are Inconsistent with TELRIC.

Because the recurring DS1 and DS3 UNE loop rates adopted by the Commission disregard CenturyTel's costs in favor of demonstrably inapplicable costs and rates developed for GTE (*circa* 1997) and AT&T, those recurring loop rates are unlawful. That the recurring DS1 rate may be based on GTE's analog loop costs in 1997 and the recurring DS3 rate may have been deemed TELRIC-compliant as to AT&T, without more, is irrelevant here.[56] "UNEs must be provided at rates established in accordance with the TELRIC methodology. . . . The rules state that total recurring loop costs are those costs directly attributable to the loop, plus a reasonable allocation of the forward-looking common costs, and they require that an incumbent LEC recover its loop costs through flat-rated charges."[57] "To follow TELRIC the [Commission] must look at the current cost of providing UNEs"[58] and "[p]rices for unbundled elements under section 251 must be based on cost under the law, and that should be read as requiring that prices be based on forward-looking economic costs."[59] Therefore, CenturyTel's UNE rates must be based on CenturyTel's forward-looking costs today (not another carrier's very different costs from a decade ago) in light of CenturyTel's existing wire center locations.[60] Because the Commission-

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53 Exhibit P (T. Hankins Direct) at 5-7; Exhibit Q (T. Hankins Rebuttal) at 8; Exhibit R (GTE-based UNE NRCs).

54 Exhibit P (T. Hankins Direct) at 5-7, 15; Exhibit Q (T. Hankins Rebuttal) at 8.

55 *See* CenturyTel's Post-Hearing Brief at 54-55; Exhibit 3 (Turner Direct) at 47-59; Exhibit 4 (Turner Rebuttal) at 50-54.

56 Of note, contrary to the Commission's assumption, CenturyTel never agreed to use GTE's underlying analog loop costs to develop recurring DS1 UNE loop rates (*i.e.*, there are no "agreed upon" loop costs).

57 *See Verizon Virginia Cost Award* at ¶ 162.

58 *See Mpower Communications,* Cause Nos. 05-3552 & 05-3677 at 2.

59 *First Report and Order* ¶ 620.

60 *See, e.g., id.* ¶ 685.

imposed recurring DS1 and DS3 UNE loop rates contravene each of those requirements, inclusion of those rates in the Conformed Agreement is unlawful.

a. Since they are based on GTE's costs in 1997 without any showing of comparability to CenturyTel's costs today, the Commission-mandated recurring DS1 UNE loop rates do not satisfy mandatory statutory and regulatory requirements.

The recurring loop rates, as Socket concedes,[61] must adhere to TELRIC.[62] Among other things, that means, as explained above, that the resulting rates must necessarily be based on CenturyTel's forward-looking cost of providing the UNE at issue. By statute, UNE rates must be based on "the cost . . . of providing the . . . network element," which "may include a reasonable profit."[63] And the FCC's "TELRIC pricing rules equate the incumbent LEC's cost of providing network elements with the cost today of building a local network that can provide all the services its current network provides, using the least-cost, most-efficient technology currently available."[64] In short, TELRIC demands that CenturyTel's UNE rates be based on CenturyTel's current forward-looking costs.[65] On that point, the Commission-imposed recurring DS1 UNE loop rates critically fail.

The recurring DS1 UNE loop rates included in the Conformed ICA fatally stray from statutory and regulatory requirements by adopting another carrier's antiquated costs for a different UNE with no evidence of comparability to CenturyTel's current cost of providing the UNE at issue. First, GTE's costs in 1997 of providing certain analog loops obviously do not reflect CenturyTel's current cost of providing DS1 UNE loops. Unlike CenturyTel's record evidence as to the comparability of certain GTE non-recurring costs, discussed above, no

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61 Tr. at 283:12-17 (Turner).

62 Exhibit J (Buchan Direct) at 5-7.

63 47 U.S.C. § 252(d)(1).

64 *TELRIC NPRM* at ¶¶ 17, 30. *See also First Report and Order* ¶ 620.

65 According to the FCC, "under a TELRIC methodology, incumbent LECs' prices for interconnection and unbundled network elements shall recover the forward-looking costs directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs." *First Report and Order* ¶ 682.

remotely similar effort was engaged in by Socket or the Commission to compare GTE analog loop costs in 1997 to CenturyTel digital loop costs in 2006. Second, those rates are similarly divorced from any consideration of CenturyTel's existing wire center locations, which is a critical requirement of TELRIC.[66] Third, based as they are on 1997 GTE analog loop costs, they certainly do not represent "the cost today" of DS1 loops "using the least-cost, most-efficient technology currently available." Nor, almost ten years later, can they be said to be forward-looking in the manner TELRIC requires. Thus, the Commission-imposed recurring DS1 UNE loop rates completely disregard CenturyTel-specific cost inputs, CenturyTel's network architecture, and current forward-looking costs and technology. This result violates the FCC's mandate that "states may not set prices lower than the forward-looking incremental costs directly attributable to provision of a given element."[67] Insightfully, the Seventh Circuit recently observed that "the assumptions of a decade ago no longer describe the state of competition in this business."[68] It is not enough to assume the identical inputs from a decade ago retain continuing vitality today; they do not.

The assumption that GTE analog loop costs circa 1997 apply to CenturyTel digital loops in 2006 is simply wrong. There is no evidence in the record demonstrating that those 2-wire and 4-wire analog loop costs are applicable in any way to CenturyTel or to digital loops, or that they otherwise comply with TELRIC.[69] This very issue arose on cross-examination of Socket at the hearing:

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[66] *Id.* ¶¶ 685, 690 ("We, therefore, conclude that the forward-looking pricing methodology for interconnection and unbundled network elements should be based on costs that assume that wire centers will be placed at the incumbent LEC's current wire center locations. . . . Costs must be based on the incumbent LEC's existing wire center locations.").

[67] *Id.* ¶ 620.

[68] *See Mpower Communications*, Cause Nos. 05-3552 & 05-3677 at 4.

[69] *See, e.g.*, CenturyTel's Post-Hearing Brief at 49-51; Exhibit B (Avera Rebuttal) at 10-12; Exhibit K (Buchan Rebuttal) at 3-5; Exhibit I (Davis Rebuttal) at 2-5l.

Q. Did you perform any study that would demonstrate the TELRIC compliance of the two-wire and four-wire agreed-to rates for CenturyTel in 2006?

A. No, I did not.[70]

Socket offered no evidence or analysis supporting those GTE costs as TELRIC-compliant *as to CenturyTel in 2006*. To the contrary, the evidence actually demonstrates that they are not.[71] On the other hand, the record is replete with evidence establishing that CenturyTel's proposed recurring DS1 UNE loop rates are based on CenturyTel-specific, TELRIC-compliant inputs (*e.g.*, network design, technology, and cost data inputs).[72] Socket offers virtually no substantive challenge to those inputs[73] and utterly fails to dispute much of the underlying design and assumptions.[74] Nonetheless, the recurring DS1 UNE loop rates included in the Conformed ICA do not incorporate those cost and data inputs that the record evidence conclusively demonstrates are consistent with TELRIC.[75] Instead, the Conformed ICA uses GTE's 2-wire and 4-wire analog loop costs from 1997, which not only fail to reflect CenturyTel's costs for digital loops in 2006, but also necessarily requires that the Commission disregard numerous data and cost inputs that the record unequivocally establishes are TELRIC-compliant.

That the Commission may have approved the GTE 2-wire and 4-wire analog loop rates as TELRIC-compliant *for GTE analog loops in 1997* says nothing about the propriety of using GTE's underlying 2-wire and 4-wire analog loop costs to develop DS1 rates *for CenturyTel digital loops in 2006*. If anything, developing present-day rates for CenturyTel based on decade-old GTE costs for a different UNE is a *prima facie* violation of TELRIC. In the end, the

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70 Tr. at 298:16-19 (Turner).

71 Exhibit K (Buchan Rebuttal) at 9.

72 Exhibit H (Davis Direct) at 4-12, 21-23; Exhibit I (Davis Rebuttal) at 2-5; Exhibit J (Buchan Direct) at 5-7, 12-15.

73 *See, e.g.*, Exhibit 3 (Turner Direct) at 47-59; Exhibit 4 (Turner Rebuttal) at 19-49.

74 Exhibit I (Davis Rebuttal) at 2-3; Exhibit K (Buchan Rebuttal) at 5-8.

75 For example, use of the recurring DS1 UNE loop rates included in the Conformed ICA requires rejection of CenturyTel's fill factors, which the evidence demonstrates are TELRIC-compliant, in favor of unproven, unknown ones from GTE circa 1997. *See* CenturyTel's Post-Hearing Brief at 42-43; Exhibit H (Davis Direct) at 18-21; Exhibit I (Davis Rebuttal) at 2-5; Exhibit J (Buchan Direct) at 15-18.

recurring DS1 UNE loop rates in the Conformed ICA, which cast aside TELRIC-compliant inputs in favor of unsupported and outdated ones, do not satisfy TELRIC. Their inclusion in the calculation of rates is unlawful.

b. Based on this record, imposing AT&T's recurring DS3 loop rates on CenturyTel contravenes the FTA and TELRIC pricing methodology.

Although the FTA and TELRIC require that UNE rates be based on the ILEC's cost of providing the network element, the Conformed ICA includes recurring DS3 UNE loop rates that are completely divorced from CenturyTel's costs of providing DS3 UNE loops. Instead, the Commission ordered "the parties to incorporate the DS3 rates from Case No. TO-2005-0336 as the only DS3 rates deemed TELRIC-compliant by this Commission."[76] In doing so, the Commission unlawfully strayed from the mandatory statutory and regulatory UNE rate-making path. For present purposes, it matters not that the Commission approved those rates for AT&T (they were, after all, based on AT&T's costs and there is no showing in the record of comparability to CenturyTel's costs). What matters is that those rates are not based on CenturyTel's costs, rendering their inclusion in the Conformed ICA improper.

Because the evidence overwhelmingly demonstrates that AT&T is not a suitable proxy for CenturyTel, the Commission cannot, consistent with TELRIC, substitute AT&T's costs and rates for those of CenturyTel. In developing TELRIC-compliant UNE rates, the Commission must consider CenturyTel's costs and how differences between CenturyTel and AT&T impact costs and rates.[77] Sound regulatory policy requires that CenturyTel's unique nature be considered in establishing rates.[78] The record, however, is devoid of any evidence or analysis even remotely suggesting that AT&T's operating expenses, fill factors, cost of capital, depreciation or any other underlying component of recurring rates are comparable to those of

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76 *See* Final Commission Decision at 52.

77 Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10.

78 Exhibit A (Avera Direct) at 4.

CenturyTel. TELRIC methodology precludes extending AT&T rates to CenturyTel where there is no showing that those specific underlying inputs and resulting rates are equally applicable to CenturyTel.[79] That is precisely the problem here; Socket never offered any evidence of comparability and the Commission did not—and obviously could not given the palpable absence of any supporting evidence in the record—render any such finding of comparability in the Final Commission Decision. To the contrary, the record overwhelmingly demonstrates the inapplicability of AT&T rates and cost inputs to CenturyTel.[80]

On this evidentiary record, it is inconsistent with the FTA and TELRIC to impose AT&T recurring DS3 UNE loop rates on CenturyTel. This is especially true in light of the Commission's counsel that "TELRIC is a concept, not a defined algorithm, therefore different companies would be expected to produce different TELRIC costs if the total costs were identical."[81] Including recurring DS3 UNE loop rates that are based on AT&T's costs and that disregard CenturyTel's costs of providing the UNE at issue, as the Conformed ICA currently does, is unlawful under the FTA and TELRIC.

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[79] Exhibit C (Miller Direct) at 76-79; Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10; Tr. at 239:13-240:3 (CenturyTel Opening Statement).

[80] *See, e.g.*, Exhibit A (Avera Direct) at 4-13; Exhibit B (Avera Rebuttal) at 2-10. For example, CenturyTel's primarily rural nature presents a fundamental difference from AT&T as that rural service territory which determines its unique cost structure and less populated activities, as compared to larger urban centers. Exhibit A (Avera Direct) at 3-4. Rural ILECs, for example, have different cost structures and do not attract the same level of reseller/CLEC activity as ILECs serving large urban centers such as AT&T. The rural focus of CenturyTel has a profound impact on its cost structure and the degree of activity from CLECs. Exhibit B (Avera Rebuttal) at 3-4. Rural areas incur far greater investment costs and expenses than typical telecom firms. Exhibit A (Avera Direct) at 5. The remote distance from the switch, reduced call volumes, topographical challenges, and customer density all increase such costs per line. *Id.* As such, CenturyTel has significantly higher net plant investment per line, as compared to AT&T. *Id.* at 6.

[81] *See* Final Arbitration Order, Case No. TO-97-63 at Attachment C Missouri Public Service Commission Costing and Pricing Report at 4 (July 31, 1997).

c. Adhering to Section 252 of the FTA and TELRIC pricing methodology, the Commission should include CenturyTel's proposed recurring DS1 and DS3 UNE loop rates in the ICA.

Acting pursuant to its federally delegated authority, the Commission can only approve an arbitrated agreement if it complies with the FTA and the FCC's regulations thereunder.[82] Here, inclusion of (a) recurring DS1 UNE loop rates based on GTE's 1997 analog loop costs and (b) AT&T's recurring DS3 UNE loop rates in the Conformed ICA violates Section 252 and TELRIC. In neither case are the resulting rates based on CenturyTel's forward-looking costs of providing the UNE at issue. The Commission must, therefore, reject those provisions in the Conformed ICA. In their stead, the Commission should order the parties to include CenturyTel's proposed recurring DS1 and DS3 UNE loop rates, which are based on CenturyTel's costs and are consistent with TELRIC.[83]

Based on its CenturyTel-specific TELRIC analysis, considering forward-looking loop design and network assumptions, the FCC-prescribed default cost of capital, the FCC-prescribed asset lives for depreciation, and reasonable operating expenses, CenturyTel proposed TELRIC-compliant recurring rates for DS1 and DS3 UNE loops. The TELRIC-compliant recurring rate of a UNE is the sum of three components: (1) operating costs; (2) depreciation expense; and (3) risk-adjusted cost of capital.[84] At each stage of its development of recurring DS1 and DS3 UNE loop rates, CenturyTel adhered to TELRIC pricing methodology. First, CenturyTel developed operating expenses based on forward-looking network designs, technologies, and investment

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[82] 47 U.S.C. § 252(e).

[83] Exhibit A (Avera Direct) at 14-28; Exhibit B (Avera Rebuttal) at 10-12; Exhibit J (Buchan Direct) at 3-24; Exhibit K (Buchan Rebuttal) at 5-17; Exhibit H (Davis Direct) at 4-21; Exhibit I (Davis Rebuttal) at 2-5.

[84] *First Report and Order* at ¶ 703 (footnote omitted); *see also* 47 C.F.R. 51.505(b)(2)-(3). "Operating costs" are the annual costs associated with operating and maintaining a network that uses the most efficient technology currently available. *First Report and Order* at ¶ 685. "Depreciation expense" represents the ILEC investment in an element over time and, under TELRIC, should be based on "economic depreciation" that "reflects the true changes in economic value of an asset." *Id.* at ¶ 703. The "risk-adjusted cost of capital" reflects "the rate of return required to attract capital" or "the rate of return that investors expect to receive from alternative investments that have the same risk." *Triennial Review Order* at ¶ 671.

costs.[85] Second, CenturyTel developed depreciation expense utilizing asset lives within the FCC-prescribed range of lives determined to be reasonable.[86] And third, with respect to risk-adjusted cost of capital, CenturyTel conservatively utilized the FCC's authorized rate of return of 11.25%.[87] In the end, CenturyTel proposed recurring DS1 and DS3 UNE loop rates based on TELRIC-compliant inputs at each stage, and which this Commission should include in the parties' ICA. Indeed, on this record the only way for the Commission to adhere to its statutory mandate is to adopt CenturyTel's proposed recurring rates for DS1 and DS3 UNE loops.[88]

4. Including a Ten-Year Old Avoided Cost Discount Applicable to GTE, but Not Applicable to CenturyTel, in the Conformed ICA Is Inconsistent with the FTA.

Under the FTA, as an alternative to leasing UNEs, CLECs like Socket can obtain an ILEC's retail telecommunications services at a reduced rate to resell to end user customers.[89] To do so, the CLEC obtains the telecommunications services from the ILEC at a wholesale rate that is basically the ILEC's retail rate less an avoided cost discount ("resale discount").[90] Importantly, the resale discount is the percentage of the ILEC's costs that it would avoid if it only offered the telecommunications service on a wholesale basis.[91] It is axiomatic, therefore,

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85 Exhibit J (Buchan Direct) at 3, 12-15; Exhibit H (Davis Direct) at 4, 8-10; Exhibit I (Davis Rebuttal) at 2-5.

86 Exhibit J (Buchan Direct) at 21-23. Not only has CenturyTel used asset lives that should be presumptively reasonable as falling within the FCC-prescribed range for the assets at issue, but those lives, if anything, are conservative in light of the changes in the industry that would support much more aggressive (*i.e*., shorter) lives. *Id.* at 22-23. By using proposed FCC-prescribed lives, CenturyTel has taken a very conservative approach to depreciation, utilizing asset lives falling in the FCC-prescribed range. *Id.* at 21-23. Indeed, notably, Socket does not challenge CenturyTel's asset lives. Tr. at 265:4-6 (Turner).

87 Exhibit A (Avera Direct) at 14-18; Exhibit J (Buchan Direct) at 19-20, 23. Socket leaves cost of capital virtually unchallenged, which is just as well since this selection is presumptively reasonable and has been repeatedly sanctioned by the FCC for more than 20 years. Exhibit A (Avera Direct) at 16-18; Tr. at 341:4-9, 342:16-344:19 (Dr. Avera). Moreover, the substantial weight of evidence and Dr. Avera's detailed analysis supports that 11.25% cost of capital as a conservative measure of cost of capital. Exhibit A (Avera Direct) at 19-28; Tr. at 341:4-9, 342:16-344:19 (Dr. Avera).

88 Exhibit A (Avera Direct) at 14-28; Exhibit B (Avera Rebuttal) at 10-12; Exhibit J (Buchan Direct) at 3-24; Exhibit K (Buchan Rebuttal) at 5-17; Exhibit H (Davis Direct) at 4-21; Exhibit I (Davis Rebuttal) at 2-5. With respect to recurring rates, moreover, Socket fails to substantively challenge CenturyTel's operating costs, risk-adjusted cost of capital or depreciation rates, and fails to justify using the non-CenturyTel, non-TELRIC recurring rates it proposes.

89 *See* 47 U.S.C. § 251(b)(1).

90 Exhibit J (Buchan Direct) at 24.

91 *Id.*; *First Report and Order* ¶ 864; *Verizon Virginia Cost Award* ¶ 673.

that the resale discount is necessarily dependent on the ILEC's unique costs and cost structure, and that it necessarily varies, to a greater or lesser degree, by ILEC.[92] Indeed, as the Supreme Court put it, "[r]ates for wholesale purchases of telecommunications services . . . must be based on the incumbent's retail rates."[93] And "the costs that must be excluded are those that [the ILEC], due to its activities as a wholesaler, 'will actually avoid incurring in the future.'"[94] The inquiry is necessarily ILEC-specific.

The Conformed ICA, however, departs from any sound mooring in the FTA or FCC regulations by incorporating an antiquated GTE resale discount that is inapplicable to CenturyTel.[95] The undisputed record evidence demonstrates that CenturyTel's current costs, operations, and cost structures all differ from those of GTE in 1997.[96] GTE's costs and economies of scale ten years ago are no longer applicable to CenturyTel, and the revenues, operations, systems, retail offerings, and levels of competition, among other things, have changed significantly since 1997.[97] Thus, the "10-year old Missouri ratio" has necessarily changed and is inapplicable to CenturyTel in 2006.[98] Indeed, the Commission tacitly recognized its inapplicability:

> The Commission also recognizes that 'the 10-year old Missouri ratio' is not applicable to CenturyTel of Missouri or Spectra Communications Group, but the costs of GTE.[99]

That recognition should terminate the inquiry; the Commission cannot, consistent with the FTA, impose a resale discount on CenturyTel that "is not applicable to CenturyTel." The Conformed ICA improperly includes a resale discount that is not based on CenturyTel's costs or cost

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92 *First Report and Order* ¶ 872 (State commissions, incumbent LECs, and resellers can determine the services that an incumbent LEC must provide at wholesale rates by examining that LEC's retail tariffs.").

93 *Verizon*, 122 S. Ct. at 1663 n.15.

94 *Verizon Virginia Cost Award* ¶ 673 (quoting *Iowa Utilities II*, 219 F.3d at 755).

95 *See* Final Commission Decision at 47.

96 Exhibit K (Buchan Rebuttal) at 19.

97 *Id*.

98 *Id*. at 18-19.

99 *See, e.g.*, Final Commission Decision at 47.

structure, that is nearly a decade out of date, and that is specifically based on GTE's costs without any showing of comparability.[100] That result is irreconcilable with the FTA.

That the Commission may have approved the GTE resale discount in a different context for a different company almost a decade ago is no answer. The statutory mandate is clear:

> a State commission shall determine wholesale rates on the basis of retail rates charges to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoid by the local exchange carrier.[101]

But the resale discount included in the Conformed ICA makes no effort to comply with that mandate. To that end, instructively, Socket never offered any evidence or analysis suggesting that the old GTE resale discount is comparable or applicable to CenturyTel.[102] Nor did Socket ever conduct any CenturyTel-specific analysis or examination in support of its proposed resale discount.[103] The adopted resale rate, in short, is inconsistent with the FTA because it is not applicable to CenturyTel, it was not developed consistent with FCC-approved methodology, it does not account for CenturyTel's costs and cost structures, it does not reflect a difference in applicable rate between CenturyTel of Missouri and Spectra Communications Group, and, quite simply, it is not based on CenturyTel retail rates to subscribers or CenturyTel costs that would be avoided. It is in every statutory and regulatory respect fatally flawed.

The Commission should replace the antiquated and inapplicable GTE resale discount currently contained in the Conformed ICA with the resale discounts developed by CenturyTel. Unlike Socket, and contrary to the resale discount included in the Conformed ICA, CenturyTel

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[100] Nor does the included resale discount account for differences between CenturyTel of Missouri and Spectra Communications Group. As the undisputed record evidence plainly reveals, the companies have different cost structures and costs, demanding the application of separate resale discounts. Exhibit J (Buchan Direct) at 24-32 & Schedules KWB-1, KWB-3, Exhibit K (Buchan Rebuttal) at 17-22. The Parties' ICA must recognize these differences in separate Avoided Cost Discounts and the failure to do so in inconsistent with the FTA.

[101] 47 U.S.C. § 252(d)(3).

[102] *Id*. at 18. *See also* Exhibit 1 (Kohly Direct) at 95-99.

[103] Exhibit K (Buchan Rebuttal) at 18; Final DPL at Article VI: Resale, Issue No. 34, Socket Position Statement.

devoted substantial time and attention to separately determining the appropriate resale discounts for CenturyTel of Missouri and Spectra Communications Group.[104] Doing so, CenturyTel utilized CenturyTel-specific revenue, expense, and avoided cost ratios for indirect expenses as well as default ratios. Based on its company-specific analyses using a methodology previously approved by this Commission and prescribed by the FCC, CenturyTel of Missouri and Spectra proposed avoided costs discount rates of 14.2% and 17.5%, respectively.[105] CenturyTel's proposed resale discounts, unlike those currently contained in the Conformed ICA, are appropriate, reasonable, and comply with prevailing methodology.[106] Therefore, adhering to approved, sound methodology and Section 252(d)(3), the Commission should adopt CenturyTel's proposed avoided cost discounts.

5. The Commission Should Reform those ICA Provisions Setting Forth Recurring Rates, Non-recurring Charges, and the Avoided Cost Discount.

Uniformly, the pricing provisions in the Conformed ICA fail to reflect CenturyTel's cost characteristics, ignore important factors that distinguish CenturyTel from AT&T and GTE, and run counter to underlying economic principles and market trends that govern investment in the telecommunications industry and underlie the pricing of UNEs under TELRIC.[107] The record is utterly devoid of any evidence demonstrating that the included recurring rates, non-recurring charges or discount rate are consistent with the FTA, TELRIC or sound economic principles encompassed within the statute. Nor is there any supportable rationale for disregarding CenturyTel-specific data in favor of antiquated, inapplicable proxies. As Dr. Avera summarized, "CenturyTel's studies follow established TELRIC principles, are transparent, and contain verifiable assumptions. As a result, the cost studies submitted by CenturyTel are consistent with

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104 Exhibit J (Buchan Direct) at 24-31 & Schedules KWB-1, KWB-2, KWB-3; Exhibit K (Buchan Rebuttal) at 18, 21.

105 Exhibit J (Buchan Direct) at 25-31 & Schedule KWB-1; Exhibit K (Buchan Rebuttal) at 18, 21.

106 Exhibit J (Buchan Direct) at 25-26, 30-31.

107 Exhibit B (Avera Rebuttal) at 2-10.

regulatory guidance and are neither obscure nor unexpected."[108] Therefore, the Commission should order the parties to incorporate CenturyTel's pricing proposals rather than the unlawful ones currently included.

B. THE APPLICABLE LEGAL STANDARDS REQUIRE REJECTION OF THE CONFORMING ARTICLE XV

The conforming Article XV—Performance Measures and Remedies Plan ("Article XV—Conforming") contains the parties' agreements on (1) the terms of Appendix—Provisioning Intervals; and (2) the language necessary to put into words the determinations of the Commission both in the Final Commission Decision (the "FCD") and in the Commission's recent Order Regarding Disputed Language in Interconnection Agreement. The parties agree that the Article XV—Conforming contract submission conforms to the sum of the Commission's requirements; however, as provided in Commission Rule 4 CSR 240-36.050(1) and (4), CenturyTel avers that certain provisions of Article XV—Conforming fail to meet the requirements of Section 251 of the Act, the FCC's regulations, or state law. Accordingly, the Commission should reject Article XV—Conforming and replace it with the form of Article XV that CenturyTel has offered.

1. Federal Law Provides Requirements for the Adoption of a Lawful Set of Performance Measures and Remedies.

a. The Power to adopt performance measures and remedies is bounded by the FTA and state law.

As a general rule, state commissions, when acting pursuant to federal law, have limited jurisdiction. They may not adjudicate matters unless that right is expressly given to them by federal statute.[109] As one court has put it, "[A]n administrative body must act strictly within its statutory authority."[110] Thus, although state commissions have a significant role in carrying out the provisions of the FTA, "Congress 'unquestionably' took 'regulation of local

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[108] *Id*. at 12.

[109] *Southern New England Tel. Co. v. Dept. of Pub. Util. Control*, 803 A.2d 879, 893 (Conn. 2002); *Pentheny, Ltd. v. Virgin Islands*, 360 F.2d 786, 790 (3d Cir. 1966).

[110] *Southern New England Telephone Co.*, 803 A.2d at 893.

telecommunications competition away from the States' on all 'matters addressed by the 1996 Act,' and it requires that 'state commissions' participation in the administration of the new federal regime is to be guided by federal-agency regulations.'"[111] Therefore, state commissions generally do not have the jurisdiction to create new duties or expand upon existing duties in an area of law that is controlled by federal statute.[112]

While the FTA provides no express limitation on, or prohibition of, state commission implementation of a performance measures remedy plan, its discretion is bounded by the terms of the FTA itself—and by applicable and consistent provisions of state law.[113] Under Section 252(c)(1), for example, a state commission arbitrating disputed issues is charged with the obligation to "ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251."[114] A state commission may view adoption of performance measures and implementation of a remedy plan as a way of ensuring satisfaction of those conditions contained in Section 251 and effected in an interconnection agreement. Further, Section 251(c)(2)(C) requires an incumbent LEC to provide interconnection 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," and Section 251(c)(3) requires an incumbent to provide "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." Otherwise lawful performance measures and a remedy plan arguably assist in the enforcement of contract terms effectuating these requirements and may be approved.

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111 *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 494 (7th Cir. 2004) (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999)).

112 *Id*. at 497-98.

113 *See, e.g.*, 47 U.S.C. §§ 252(c)(1); 251(c)(1)-(3).

114 *Id*. § 252(c)(1).

The FTA provides that the Commission may exercise this authority to interpret and enforce interconnection agreements consistently with both federal and state law. First, Section 252(e)(3) provides that "nothing in this section [252] shall prohibit a State commission from *establishing or enforcing other requirements of State law in its review of an agreement*."[115] Second, Section 261(c) permits continuing state authority to take steps necessary to further competition, so long as such steps are not inconsistent with federal regulations:

> (c) ADDITIONAL STATE REQUIREMENTS- Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

Finally, Section 251(d)(3) limits the scope of FCC preemption of state authority to traditional bounds by providing that the FCC:

> shall not preclude the enforcement of any regulation, order, or policy of a State commission that—
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> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Taken together, these provisions authorize state commissions to incorporate in their review, approval, and enforcement activities the requirements of state law (including, for example, state law pertaining to the enforceability of contracts generally and "liquidated damages" or "penalties" clauses, in particular) so long as they are not employed inconsistently with the statute or FCC regulations.

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115 *Id*. (emphasis added).

b. The overall framework of the Article XV—Conforming mechanism must satisfy both the terms of the FTA and Due Process; self-executing penalties do not meet these standards.

Setting aside for the moment the separate question of the enforceability of "penalties" provisions in contracts under Missouri state law, the Commission should recognize in evaluating whether to reject Article XV—Conforming that self-executing penalties are not subject to negotiation or arbitration under the FTA. First, Sections 251(b) and (c) of the FTA do not require incumbent LECs to pay damages or fines in any form, and therefore do not require that such damages be negotiated or arbitrated. Performance measure remedies are analogous to damages available in carrier proceedings before the FCC, and the procedures in those cases provide guidelines to the appropriate process due in such proceedings. If a carrier files a complaint with the FCC complaining of "anything done or omitted" by another carrier,[116] the FCC must conduct a hearing before it can issue an order requiring that carrier to pay damages.[117] Rather than imposing automatic damages, the complaining carrier at such hearing must demonstrate through record evidence that it suffered specific damages as a result of the allegedly unlawful actions.[118] It is similarly improper in this proceeding to assume that missed performance measurements automatically result in damages, which is the very effect of adopting Socket's proposed remedies as provided in Article XV—Conforming. As in comparable FCC proceedings under the FTA, the existence and amount of damages must be proven in each instance.[119] Socket's remedies as adopted in Article XV–Conforming absolve Socket of its

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116 *See* 47 U.S.C. § 208

117 *Id.* § 209 ("If, *after hearing on a complaint*, the Commission shall determine that . . . [a] complainant is entitled to . . . damages . . ., the Commission shall make an order directing [payment]") (emphasis added); 47 C.F.R. §§ 1.711-1.736.

118 *See* 47 U.S.C. § 206 (recovery under the FTA is limited to "the full amount of damages sustained in consequence of [a] violation of the provisions" of the Act, "together with a reasonable counsel or attorney's fee"). Indeed, a party may only then recover the "amount of damages [they] *sustained* in consequence of any . . . violation [of the Act]." *Id.* (emphasis added).

119 *See, e.g.*, *AT&T Co. v. Northwestern Bell Tel. Co.*, 5 FCC Rcd 143, 146 (1989) (concluding that defendant had violated the Communications Act, and was liable to plaintiff "to the extent it can establish that it was damaged thereby"); *Teledial America, Inc. v. Michigan Bell Tel. Co.*, 8 FCC Rcd 1151, 1154 (1993) (by violating the

obligation to prove the existence and amount of alleged damages, if any, due to CenturyTel's alleged non-compliance with a contract provision or a performance measure. The imposition of such self-executing remedies, therefore, exceeds the Commission's jurisdiction in this proceeding and is inconsistent with the FTA.

Basic constitutional principles of due process also prohibit the Commission from imposing self-executing liquidated damages provisions like those adopted in Article XV–Conforming. Due process requires, at a minimum, that parties have an "opportunity to be heard at a meaningful time and in a meaningful manner" before being finally deprived of a property interest.[120] The "remedies" the Commission has adopted do not require any demonstration that a missed performance measurement caused Socket any damage whatsoever; do not require that Socket demonstrate the alleged amount of damages it may have suffered; and do not permit CenturyTel any opportunity to present exculpatory or mitigating evidence, or to demonstrate that any purported violation did not cause harm.[121] The Commission's approval of self-executing penalties—in which assessments would automatically be due—would violate fundamental constitutional principles.[122]

As the Fifth Circuit recognized, the FTA's "grant to state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it

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Communications Act, carrier rendered itself "liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation"); *cf.* 47 C.F.R. § 1.722(b) (setting forth procedures by which a complainant can seek damages through a supplemental complaint filed *after* a finding of liability by the FCC).

[120] *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (internal quotation marks omitted). It is similarly well established that a party must have "an opportunity to present every available defense" before it can be deprived of its property. *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932).

[121] While Article XV—Conforming does provide the opportunity to change certain benchmarks based upon a demonstration of statistical "parity," in no case does it explicitly afford CenturyTel an opportunity to show in appropriate cases that no harm occurred from a breach or that the damages levied are disproportionate to the harm experiences. Article XV—Conforming, therefore, is unenforceable as a matter of law.

[122] *Cf. Bell Atlantic-GTE Merger Order*, 15 FCC Rcd 14032, 14337, Appendix D, Attachment A, ¶ 14 (providing a *force majeure* exception to voluntary payment scheme); *SBC/GTE Merger Order*, 14 FCC Rcd at 15046, Appendix C, Attachment A, ¶ 14 (same); *see also Heckler v. Campbell*, 461 U.S. 458, 467 & n.11 (1983) (requiring an opportunity for private party to show that general guidelines are inapplicable in a specific case); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205-06 (1956); *Association of Oil Pipelines v. FERC*, 83 F.3d 1424, 1439 (D.C. Cir. 1996).

the authority to interpret and enforce the provisions of agreements that state commissions have approved."[123] Performance measures and remedies are one means the Commission may choose to enforce the underlying ICA. However, while the Commission may have substantial authority under federal law to approve a performance measures and remedies plan,[124] it does not follow that the Commission may *impose* any enforcement mechanism it desires. The Commission has no source of authority to impose or approve a self-executing performance measures plan or penalties against an unwilling party for the purpose of enforcement of the underlying interconnection agreement.[125]

2. Article XV—Conforming Does Not Meet the Requirements of the FTA in Many Respects.

To be subject to Commission approval, Article XV—Conforming must meet the requirements of the FTA itself (as well as applicable and consistent provisions of state law).[126] Article XV—Conforming must, therefore, be consistent with the underlying interconnection agreement adopted under and in conformity with Sections 251 and 252. In this case, however, many provisions of Article XV—Conforming either have no connection to the standards set forth in the rest of the conforming interconnection agreement among the parties, or worse, directly conflict with it. Article XV—Conforming is, therefore, unlawful.

Although almost every PM has one or more provisions that conflict with the operative provisions of the Conforming ICA or are otherwise not compliant with the FTA, and each is potentially ambiguous and may be read differently, the following examples are illustrative:

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123 *Southwestern Bell Tel. v. Public Util. Comm'n*, 208 F.3d 475, 479-80 (5th Cir. 2000). *See also BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1276-77 (11th Cir. 2003); *Southwestern Bell Tel. Co. v. Brooks Fiber Communications of Okla., Inc*., 235 F.3d 493, 497 (10th Cir. 2000); *Southwestern Bell Tel. Co. v. Connect Communications Corp*., 225 F.3d 942, 946 (8th Cir. 2000); *MCI Telecomms. v. Illinois Bell Tel. Co*., 222 F.3d 323, 337-38 (7th Cir. 2000).

124 *See MCI Telecommunications Corporation v. BellSouth Telecommunications, Inc*., 298 F.3d 1269, 1274 (11th Cir. 2002).

125 CenturyTel has offered an plan that could be approved. To date, the Arbitrator and the Commission have rejected it in lieu of Article XV—Conforming.

126 *See, e.g.*, 47 U.S.C. §§ 252(c)(1); 251(c)(1)-(3).

(a) *Pre-Ordering/Ordering PM No. 1*. The agreed Appendix—Provisioning Intervals to Article XV—Conforming provides for the return of Socket's requests for "Customer Service Records" within *six (6)* Business Hours of Socket's request. The benchmark for this PM, however, requires that CSRs be returned in *four (4)* Business Hours. Accordingly, even CSRs that are returned almost *two (2) Business Hours early* are considered to be misses under the PM and subject to penalty.

(b) *Pre-Ordering/Ordering PM No. 4*. Article XV—Conformed requires that any rejection of a Socket "manual" order be completed within nine (9) Business Hours of receipt. This provision is inconsistent with Article VI (Resale), §10.2.3, and Article VIII (Ordering and Provisioning), §3.4 of the Conforming ICA. As a result, the proper and timely rejection of an order could nevertheless trigger the payment of a penalty.

(c) *Pre-Ordering/Ordering PM No. 5*. Article XV—Conformed requires that more than 85% of "Firm Order Commitments" ("FOCs") be returned to Socket within 24 hours of receipt of the underlying order. At least in the case of resale orders and orders requiring number porting, this provision is inconsistent with the provisions of the Conforming ICA. *See* Article VI (Resale), §10.2.1; Article XII (Number Portability), §4.6 (both of which required the return of FOCs within 48 hours). As a result, the timely return of an FOC could nevertheless trigger the payment of a penalty.

(d) *Pre-Ordering/Ordering PM No. 6*. The Benchmark for this PM in Article XV—Conformed requires perfection in handling and rejection of "Access Service Requests" ("ASRs") and "Local Service Requests" ("LSRs") (zero percent erroneous rejection). However, the applicable penalty is a Standard Daily Payment for each erroneously rejected "*CSR*". The penalty, therefore, has nothing to do with the benchmark.

(e) *Pre-Ordering/Ordering PM No. 7*. The Conformed ICA provides that if CenturyTel will not complete a Socket order by its due date, CenturyTel will provide a "jeopardy notice"—a notice that an order will not be completed. The Conforming ICA does not provide a specific time for performance, although the Article XV—Provisioning Intervals provide specific times for completion of orders of different types.

The benchmark for this PM in Article XV—Conformed, however, requires that a Jeopardy Notice be given not less than six (6) Business Hours before the Due Date of an order that will not be installed by the Due Date at least 97% of the time. The applicable benchmark, therefore, has nothing to do with either the underlying Conforming ICA's terms or the Article XV—Provisioning Intervals, and in fact interferes with their performance by requiring CenturyTel to predict, crystal-ball style, at least six (6) Business Hours before a Due Date whether the work will be completed.

(f) *Pre-Ordering/Ordering PM No. 8*. The Conformed ICA, Article VI, §§2.5 and 10.5, provides that CenturyTel will send Socket a line-loss notification upon a Socket customer's change of providers. The

Conforming ICA does not provide a specific time for performance. The benchmark for this PM in Article XV—Conformed, however, requires that a "line loss notification" be given within not more than one (1) Business Day of completion of the work at least 95% of the time. Any failure to meet the applicable benchmark, when applicable, has nothing to do with the underlying Conforming ICA's terms—instead, the PM purports to enforce a deadline that does not exist in the terms of the Conforming ICA.

(g) *Pre-Ordering/Ordering PM Nos. 4, 5, 7, and 8; Provisioning—Resale Circuits PM Nos. 3, 4, and 5; Maintenance PM Nos. 1, 2, 3, and 4; Interconnection PM No. 1.* Article XV—Conforming also fails to promote the requirements of Sections 252(c)(1), 251(c)(2) or (3) or 251(d) in preordering, ordering, provisioning, maintenance, repair, and the like, by penalizing even performance that is equal to or better than the service CenturyTel provides itself (under the default percentages or as demonstrated to the Commission).

That is, under the mechanics of these PMs, CenturyTel will not only be penalized by the amount of the "Standard Daily Payment" (or other applicable measure) for transactions the performance of which falls below the service CenturyTel provides itself, *CenturyTel will also be penalized for the transactions that are in parity (or meet the Socket-chosen default percentage representing parity).*

For instance, under the mechanics of these PMs, where there is a percentage threshold (say, 94% or better in a given benchmark), CenturyTel will not only be penalized by the "Standard Payment" or other applicable remedy for performance for performance below 94%, but also for all events or transactions making up the 6% threshold (*i.e.*, if there were 100 transactions and 8 misses in a PM with a benchmark of 94%, CenturyTel would not only be required to pay the applicable penalty on the two (2) excess misses, *it would also be required to pay on the six (6) "in-bounds" misses* (that Socket presumably contends approximate "parity").

(h) *Provisioning—Retail Circuits PM Nos. 1, 3 ,4, 8; Maintenance PM Nos. 1, 2, 3, 4, and others.* These PMs provide for the imposition of potentially large penalties (*e.g.*, the "Standard Payment," which is the average monthly recurring charge for all services or UNEs to which Socket subscribes, could range to as much as several hundred dollars (depending upon Socket's mix of services), and the Gap Closure Plan penalties can reach $15,000).

Still worse, given the "high-percentage" defaults for "parity" (*e.g.*, 100%, 98%, 97%, 96.5%, 94%, etc.),[127] even one or two events of error could result in a large penalty. For instance, setting aside the other infirmities in the PMs themselves, Provisioning—Retail Circuits PM No. 3 requires 94% performance; Provisioning—Retail Circuits PM No. 4 requires

[127] Perfection is required for many measures, and all require very high percentages of accuracy as a proxy for "parity" with CenturyTel's operations.

> greater than 96.5% performance; and Provisioning—Retail Circuits PM No. 8 requires better than 98% performance; Maintenance PM No. 1 requires better than 94% performance.
>
> Each of these benchmarks may be breached by the occurrence of as few as one or two events if the population of events is merely 30.[128] Other examples of high percentages or perfection abound in the Conforming ICA, and many are addressable by the Standard Payment or a monthly recurring charge. The imposition of such large penalties for small deviations from perfection—even deviations that Socket sets up as "parity" by proxy—does not serve to enforce the terms of the Conforming ICA consistently with Sections 251 or 252.
>
> On some PMs, even where perfection is not required, these very large penalties are applied even to events that are entirely consistent with the defined "parity" percentage, not just the excessive shortcomings. *See* discussion above. Instead, they simply punish a failure to be perfect (or near perfect), something the FTA does not provide or permit.

Socket admitted in its rebuttal case that many of CenturyTel's concerns and criticisms of what has become Article XV—Conforming "ha[d] merit"[129] and were "legitimate."[130] Socket also abandoned any meaningful support for its proposal and urged the Arbitrators to require an extracurricular, Commission-supervised, post-arbitration, "collaborative" dispute resolution proceeding in which to further negotiate and, if necessary, arbitrate a set of PMs.[131] Nevertheless, the Commission adopted nearly without modification Socket's admittedly deficient Article XV—Performance Measures and Provisioning Intervals. Accordingly, Article XV—Conforming is not only unsupported in the record, even Socket's testimony and briefing acknowledge that the performance measures adopted in Article XV—Conforming have

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[128] The Commission has required a three-month, rolling, 30-event threshold in its Order Regarding Disputed Language in Interconnection Agreement.

[129] Exhibit 1 (Kohly Direct) at 116; *see also* Socket's Post-Hearing Brief at 132 ("CenturyTel's criticism that Socket's proposal has the potential to penalize CenturyTel for even small deviations from the performance objectives has merit . . . .").

[130] Exhibit 1 (Kohly Direct) at 116.

[131] *Id.* at 113-120; Socket's Post-Hearing Brief at 130 ("Socket urges the Commission to establish a collaborative process in which the parties will be given a specific period of time to resolve the details of the measures and the remedy plan. . . . Except for certain threshold issues . . . the vast majority of the individual PM issues identified in the DPL would be best resolved through further negotiation.") *and* 134-35.

substantial practical and legal issues.[132] The Commission should reject Article XV—Conforming because it fails to comport with the requirements of the FTA.

3. The Imposition of Penalties Through Article XV—Conforming Is Unlawful Under Both Federal and State Law.

a. It is unlawful under federal and state law to impose the penalties in Article XV–Conforming on CenturyTel.

Article XV—Conforming imposes on CenturyTel self-executing penalties—*e.g.*, "remedies"—that would automatically require that Socket be compensated in the event CenturyTel does not satisfy the benchmark for certain performance measures. The imposition of self-executing remedies for alleged PM violations is not lawful, and the Commission does not have jurisdiction to impose them on CenturyTel in this arbitration because (i) the parties were not required to, and in fact did not, negotiate self-executing liquidated damages for alleged PM violations under (or as part of) a Section 251 interconnection agreement, and (ii) in accordance with basic contract principles and due process guarantees, self-executing liquidated damages cannot be imposed on a party.[133]

b. The penalties in Article XV–Conforming are capricious and unreasonable in that they bear no relationship to the ICA they purport to assist to enforce.

Article XV—Conforming's proposed "remedies" do not serve to enforce the obligations of the ICA. First, many of the remedies are defined in terms of a "Standard Payment" (based upon "one month's flat rate average recurring charge" and "calculated by dividing the total monthly recurring charges billed by CenturyTel to Socket in a contract month by the number of UNEs, UNE Combinations and Resold Services that are included on the bill for which there is a flat, monthly rate") or a "Standard Daily Payment" ("The Standard Daily Payment shall be Standard Payment divided by thirty (30)."). The monthly variability in "average recurring charges" presents a problem in the predictability of the remedy's application, but more, because

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132 Socket's Post-Hearing Brief at 132; Exhibit 2 (Kohly Rebuttal) at 116.

133 *See infra*, Section B(3)(c).

the remedy is not tied to the service actually affected by a failure, it tends to make the potential payment something of a "lottery." If the service or UNE affected by the failure is a higher-than-average item, the payment will tend to be lower than the recurring charge for the service or UNE. However, this formula also presents the prospect that where the service or UNE subject to a failure to perform is a lower-priced item, the failure of a minor service could result in an "average," and therefore disproportionate, penalty. This "lottery" structure is capricious, has no relationship to the contractual duties to be enforced, and should be rejected.

Second, the penalties, including payments associated with various aspects of the development and implementation of a "Gap Closure Plan," bear no economic relationship to any harm Socket could realize through any failure on the part of CenturyTel, and are not, therefore, compensatory. For example, Article XV—Conforming requires up to a $15,000 penalty if CenturyTel is unable to implement a Gap Closure Plan on time. Today, Socket submits only a handful of orders each month and subscribes to few wholesale services. The penalty in Article XV—Conforming for this failure alone is several times the monthly billing amount from CenturyTel.

There is nothing in the record to suggest that the "performance incentives" or "remedies" in Article XV—Conforming for breach of a PM benchmark bear any relationship at all to any anticipated harm that Socket might realize from the breach of the ICA.[134] Instead, they mechanically impose conditions upon CenturyTel that are comparable to—but more arbitrary, capricious, and punitive than—those placed upon SBC Missouri (now AT&T Missouri) in its ICAs. The proper framework under Sections 251 and 252 is not retribution, but making Socket

[134] As Mr. Kohly testified, "The purpose of remedy plans is not to compensate CLECs for actual harm, but to incent ILECs to perform." When asked if Socket's proposed remedies, those found in Article XV of the Conforming ICA, were "connected to however much [Socket] might be out in the way of damages," Mr. Kohly testified that "[n]o, [they] are not." Tr. at 477.

whole within the terms of the approved ICA. CenturyTel's Article XV accomplishes this legitimate policy goal, while Article XV—Conforming does not.

c. The penalties are unlawful under Missouri law and should be rejected.

The penalties contained in Article XV—Conforming are unlawful under Missouri state law and should be rejected. As an initial matter, by their very nature and definition, liquidated damages must be *negotiated and agreed to* by the parties.[135] More importantly, the proposed remedies in Article XV—Conforming fail to satisfy the basic requirements of Missouri law for an agreement providing for liquidated damages. Under Missouri law, liquidated damages may be enforceable; penalty clauses are not.[136] A liquidated damages provision is only enforceable if (i) the amount fixed as damages is a reasonable forecast for the harm caused by the breach; and (ii) the harm that is caused by the breach is of a kind difficult to accurately estimate.[137] If there is no reasonable relationship between the "agreed upon" liquidated damages and those expected to result from the breach, the agreed-upon liquidated damages are deemed a penalty and are, therefore, unenforceable.[138]

Indeed, Missouri law requires that a claimant "must show at least some actual harm or damage caused by the breach before liquidated damages clauses can be triggered."[139] In this case, Socket admitted that its proposed PM "remedies" are "not [intended] to compensate [Socket] for actual harm, but to incent [CenturyTel's] performance."[140] Socket even goes so far as to admit on the record that its proposed remedies are "not connected" or otherwise intended to

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135 *See* Black's Law Dictionary, Sixth Edition (defining "liquidated damages" as "the sum which [a] party to [a] contract *agrees to pay* if he breaks some promise and, which having been *arrived at by good faith effort to estimate actual damage* that will probably ensue from breach, is recoverable as *agreed damages* if breach occurs.")(emphasis added). Liquidated damages agreements cannot be considered "agreed to" if they are unilaterally imposed upon one party by the other through an adversarial proceeding.

136 *Information Systems and Networks Corp. v. City of Kansas City*, 147 F.3d 711, 714 (8th Cir. 1998) (citing *Taos Constr. Co. v. Penzel Constr. Co.*, 750 S.W.2d 522, 525 (Mo. App. 1988)).

137 *Id*.

138 *Grand Bissell Towers v. Joan Gagnon Ent.,* 657 S.W.2d 378, 379 (Mo. App. 1983).

139 *Id.*

140 Exhibit 2 (Kohly Rebuttal) at 115:11-17; Socket's Post-Hearing Brief at 138.

be related to Socket's purported damages occasioned by CenturyTel's alleged breaches of PMs.[141] Courts have often invalidated even *agreed-upon* liquidated damages clauses that attempt to set a measure of damages that is not related to the gravity of a breach.[142] As the self-executing penalties in Article XV—Conforming are not the product of an effort to estimate the actual harm, if any, that would result from CenturyTel missing PMs, they constitute unenforceable penalties. Article XV—Conforming must be rejected.

IV.
CONCLUSION

CenturyTel respectfully requests that the Commission: (a) determine that the inclusion of the AT&T NRCs and the DS1 and DS3 loop rates in the current Article VIIA, and the inclusion of the resale discounts in the current Article VI, fail to meet the requirements of federal law; (b) reject the AT&T NRCs and the DS1 and DS3 loop rates in the current Article VIIA, and the resale discounts in the current Article VI; and (c) replace the same with the NRCs, DS1 and DS3 loop rates, and resale discounts offered by CenturyTel in this case.

CenturyTel further respectfully requests that the Commission: (a) determine that much of Article XV—Conforming fails to meet the requirements of federal or state law; (b) reject Article XV—Conforming; and (c) replace Article XV—Conforming with the Article XV that CenturyTel offered in this case.

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141 Tr. at 477:8-10 (Kohly); *see also* Socket's Post-Hearing Brief at 138 ("The purpose of remedy plans is not to compensate CLECs for actual harm, but to incent ILECs to perform.").

142 *See, e.g., Kothe v. Taylor Trust*, 280 U.S. 224 (1930) ("agreements to pay fixed sums without reasonable relation to any probable damage which may follow a breach will not be enforced"); *Raffel v. Medallion Kitchens*, 139 F.3d 1142, 1146 (7th Cir. 1998); *Davy v. Crawford*, 147 F.2d 574, 575 (D.C. Cir. 1945); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 1066, at 379 (1998).

Respectfully submitted,

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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), and counsel for Socket Telecom, LLC at (clumley@lawfirmemail.com; lcurtis@lawfirmemail.com; and b.magness@phonelaw.com) on this 15th day of September 2006.

/s/ Larry W. Dority
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