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August 27, 2002

FILED

AUG 27 2002

Missouri Public
Service Commission

Mr. Dale Hardy Roberts
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102

Re: **TM-2002-232**

Dear Mr. Roberts:

Enclosed for filing on behalf of CenturyTel of Missouri, LLC ("CenturyTel"), please find an original and eight (8) copies of a Response of CenturyTel of Missouri, LLC in Opposition to Midwest Independent Coin Payphone Association's Motion to Suspend and Application to Intervene.

Would you please see that this filing is brought to the attention of the appropriate Commission personnel.

I thank you in advance for your cooperation in this matter.

Sincerely yours,

BRYDON, SWEARENGEN & ENGLAND P.C.

By:



Sondra B. Morgan

SBM/lar
Enclosure

cc: Mike Dandino
Marc Poston
James Fischer/Larry Dority
L. Steve Weber
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Sheldon K. Stock
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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

FILED

AUG 27 2002

Missouri Public
Service Commission

In the matter of the Joint Application of GTE)
Midwest Incorporated d/b/a Verizon Midwest)
and CenturyTel of Missouri, LLC for 1))
authority to transfer and acquire part of Verizon)
Midwest's franchise, facilities or system located)
in the State of Missouri; 2) for issuance of)
certificates of service authority to CenturyTel)
of Missouri, LLC ; 3) to designate CenturyTel)
of Missouri, LLC as subject to regulation as a)
price cap company; and (4) to designate)
CenturyTel of Missouri, LLC as a)
telecommunications carrier eligible to receive)
federal universal service support.)

Case No. TM-2002-232

**RESPONSE OF CENTURYTEL OF MISSOURI, LLC IN OPPOSITION
TO MIDWEST INDEPENDENT COIN PAYPHONE ASSOCIATION'S
MOTION TO SUSPEND AND APPLICATION TO INTERVENE**

Comes now CenturyTel of Missouri, LLC ("CenturyTel") and for its Response in Opposition to Midwest Independent Coin Payphone Association's ("MICPA") Motion to Suspend and Application to Intervene ("Motion") states to the Missouri Public Service Commission ("Commission") as follows:

Chronology

1. On November 28, 2001, CenturyTel and GTE Midwest Incorporated d/b/a Verizon Midwest ("Verizon") filed a Joint Application seeking authority to transfer and acquire certain Verizon assets in the state. In this Joint Application, CenturyTel stated that it proposed no immediate changes in the rates, terms and conditions of the service that Verizon currently provided to its customers. (Joint Application, ¶ 8)

2. On December 6, 2001, the Commission issued an Order and Notice in which it established an intervention deadline of January 4, 2002, and on January 14, 2002, issued its Order Granting Intervention to those parties who had requested intervention by the deadline.

3. On March 21, 2002, Verizon, CenturyTel and other parties filed a Nonunanimous Stipulation and Agreement with the Commission. Paragraph 1 of the Stipulation stated that, "CenturyTel proposes no immediate changes in the rates, terms and conditions of the telecommunications service currently provided to the customers in the enumerated exchanges."

4. On May 21, 2002, the Commission issued its Report and Order in Case No. TM-2002-232. In this Order the Commission approved the Nonunanimous Stipulation and Agreement and ordered CenturyTel to "file a tariff not less than 45 days prior to the closing that adopted in all material respects the tariffs of GTE Midwest, Inc. doing business as Verizon, as of the closing date of the transaction authorized in Ordered Paragraph 4, above."

5. On July 15, 2002, CenturyTel complied with the Commission's directive and filed P.S.C. Mo. Nos. 1-8. These tariffs consist of more than 900 tariff sheets and have a proposed effective date of September 1, 2002.

6. On August 16, 2002, the Commission Staff filed its Staff Recommendation in which it recommended approval of the tariff and found that the tariff had been filed in compliance with the Commission's directive and adopted, in substance, Verizon's existing tariffs, including rates, services and access rates.

7. On August 22, 2002, MICPA filed a Motion to Suspend and Application to Intervene alleging that the portion of CenturyTel's tariff dealing with proposed rates and charges for the network services available to payphone providers should be suspended because CenturyTel had

not set those rates in accordance with the "New Services Test" required by the Federal Communications Commission ("FCC").

8. On August 23, 2002, the Commission issued an Order Directing Filing in which it directed parties to respond to the Motion to Suspend and Application to Intervene no later than 4:00 p.m. on August 27, 2002. In its Order, the Commission posed three questions for the parties to answer.

Commission Questions

9. The following are CenturyTel's responses to these questions:

A. To what extent is a statutory provision, that by its express terms applies only to Bell operating companies, and the regulations and decisions of the F.C.C. thereunder, applicable to a LEC that is not a Bell operating company?

The statutory provision, 47 U.S.C. § 276, by its express language, does not apply to a local exchange company ("LEC") that is not a Bell operating company ("BOC"). In section 276, Congress directed the Commission to eliminate all discrimination between BOCs and independent payphones and all subsidies or cost recovery for BOC payphones. Additionally, the FCC, in the decision cited by MICPA, expressly states, "[b]ecause section 276 (a) and (b)(1)(C) apply only to BOCs, we do not find that Congress has expressed with the requisite clarity its intention that the Commission exercise jurisdiction over the intrastate payphone prices of non-BOC LECs."¹ The FCC did state that it "encouraged" states to apply the New Services Test to all LECs, but it recognized that it had no jurisdiction over non-BOC LEC line rates.

¹*In the Matter of Wisconsin Public Service Commission Order Directing Filings*, FCC 02-25; Bureau/CPD No. 00-01; para. 42. This case is currently on appeal to the United States Court of Appeals, D.C. Circuit, *New England Public Communications Council, Inc. v. FCC*, Case No. 02-1055 (D.C. Cir.).

Additionally, in a Common Carrier Bureau decision adopted March 4, 2002, the Bureau stated, "[a]s a matter of jurisdiction under section 276, the *Wisconsin Order* rulings do not extend to non-BOC LECs."²

CenturyTel is a non-BOC LEC with fewer than two percent of the nation's subscriber lines as defined in 47 U.S.C. § 251(f). And, even in cases where small companies have purchased the assets and adopted the rates of RBOCs, those companies have not been considered RBOCs after the purchase. Thus, the statute simply does not apply to a non-BOC such as CenturyTel, and the Commission should deny MICPA's Motion to Suspend and Application to Intervene.

B. By what authority can the F.C.C. require this Commission to apply that statutory provision, and its implementing and interpreting regulations and decisions, to CenturyTel?

As was explained above, CenturyTel does not believe that the FCC can require the Commission to apply the statutory provision to a non-BOC such as CenturyTel. The FCC stated in the *Wisconsin Order* that "we do not have a grant of jurisdiction over non-BOC LEC line rates."³ Additionally, it is not in the public interest for the tariffs to be held up and prevent CenturyTel from providing service in accordance with the Commission's prior approval of the transaction.

C. Are CenturyTel's tariff provisions relating to payphones different in any significant respect from those of Verizon?

Counsel for CenturyTel has confirmed with the company that there are no significant

²*In the Matter of North Carolina Payphone Association*, 17 FCC Rcd 4275, para. 5.

³*Wisconsin Order*, para. 2

differences between the CenturyTel payphone tariff provisions and those of the Verizon tariff.⁴ CenturyTel has complied with the Nonunanimous Stipulation and Agreement and the Commission's Report and Order and filed a tariff adopting Verizon's existing tariffs including rates, services and access rates.

Timeliness and Impermissible Collateral Attack

10. CenturyTel has complied with the Stipulation entered into in this case as well as the Commission's Report and Order and adopted Verizon's tariffs including the rates and charges for network services to payphone providers. MICPA should not be allowed now to enter this case at the eleventh hour and request suspension of the tariff filed according to the Commission's directive. MICPA had other opportunities to intervene in this proceeding and contest the approval of the payphone tariff. Additionally, 4 CSR 240-2.075(5) states that applications to intervene filed after the intervention date may be granted only upon a showing of good cause. MICPA has not stated any good cause as to why it chose to wait until now to file a Motion to Suspend the tariff and an Application to Intervene.

11. MICPA's Motion is an impermissible collateral attack on a Commission order. All orders of the Commission are *prima facie* lawful until found otherwise in a suit brought for that purpose.⁵ A Motion to Suspend a tariff filed in accordance with a Commission directive is a collateral attack on that Commission order. Findings by the Commission are considered *prima facie* correct, and the party challenging such an order of the Commission bears the burden of

⁴PSC Mo. No. 1, Section 8, Sheets 1-7.

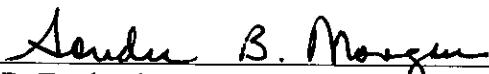
⁵Section 386.270, RSMo 2000.

showing such an order or findings are not reasonable or lawful.⁶ MICPA has not met this burden, nor has it shown good cause for intervention in this proceeding at this late date. Additionally, MICPA has not shown that the federal statute applies to CenturyTel.

12. Because the tariffs at issue in this Motion are CenturyTel's tariffs, Joint Applicant GTE Midwest Incorporated d/b/a Verizon Midwest will not be filing a separate response.

Wherefore CenturyTel respectfully requests that the Commission deny MICPA's Motion to Suspend and Application to Intervene and issue its Order Approving Tariff.

Respectfully submitted,



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⁶*State ex rel. Gulf Transport Company v. Public Service Commission*, 658 S.W.2d 448, 452 (Mo. App. 1983) citing *State ex rel. Inman Freight System, Inc. v. Public Service Commission*, 600 S.W.2d, 650, 654 (Mo. App. 1980).

Certificate of Service

I hereby certify that a true and correct copy of the above and foregoing document was hand-delivered or mailed, first-class U. S. postage prepaid, this 27th day of August, 2002 to:

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Office of the Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102

Mr. Marc Poston, Senior Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102

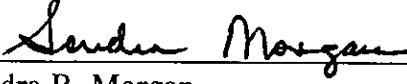
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