

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

CENTURYTEL OF MISSOURI, LLC,)	
)	
Complainant,)	CASE NO. IC-2008-0068, et al.
)	
v.)	
)	
SOCKET TELECOM, LLC,)	
)	
Respondent.)	

**CENTURYTEL’S JOINT LEGAL MEMORANDUM IN SUPPORT OF ITS RESPONSE
TO SOCKET TELECOM’S CROSS MOTION FOR SUMMARY DETERMINATION**

Complainants CenturyTel of Missouri, LLC (“CenturyTel”) and Spectra Communications Group, LLC, d/b/a CenturyTel (“Spectra”) (CenturyTel and Spectra are referred to collectively herein as “CenturyTel”), pursuant to Commission Rule 4 CSR 240-2.117(1)(C), jointly file this Legal Memorandum in Support of Their Response to Socket Telecom’s Cross Motion for Summary Determination,¹ and respectfully show the Commission the following:

**I.
ARGUMENTS & AUTHORITIES**

The parties agree that the primary dispute here pertains to the proper interpretation of the Agreement.² Specifically, do the provisions of the Agreement require the originating party to pay reciprocal compensation to the terminating party for the termination of Local Traffic

¹ This filing is made in accordance with CenturyTel and Spectra’s Joint Response to Order Directing Filing, submitted in this consolidated matter on January 18, 2008.

² Socket Telecom’s Response to CenturyTel’s Motion for Summary Determination and Socket Telecom’s Cross Motion for Summary Determination (“Socket’s Cross Motion”), at 3 (“It is the interpretation of the Agreement on which the parties disagree.”).

(including ISP Traffic)? This is a question of law for the Commission to determine, and if the Commission determines that the Agreement unambiguously requires the parties to exchange Local Traffic but does not require the parties to pay each other for the termination of that traffic, the Commission must grant CenturyTel's motion for summary determination. *See Goellner v. Goellner Printing*, 226 S.W.3d 176, 178 (Mo.App. E.D. 2007) (contract interpretation is a question of law); *Lupo v. Shelter Mutual Ins. Co.*, 70 S.W.3d 16, 18-19 (Mo.App. E.D. 2002) (summary judgment is particularly appropriate when the construction of an unambiguous contract is at issue).

CenturyTel has also moved in conjunction with its Response to Socket's Cross Motion to strike all or part of Socket's affidavits in support of its Cross Motion for Summary Determination ("CenturyTel Motion to Strike" or "Motion to Strike"). As we show in the Motion to Strike, all or part of the affidavits must be stricken because: (a) they offer extrinsic evidence of the meaning of an unambiguous contract in violation of the parole evidence rule; (b) they offer legal conclusions and arguments, rather than facts, in violation of Commission Rule 4 CSR 240-2.117 and Missouri Rule of Civil Procedure 74.04(e); (c) they offer incompetent expert testimony; (d) they invade the province of the Commission in interpreting both the contract and the law; and (e) they contain testimony that is conclusory, not based on personal knowledge, speculative or irrelevant.

A. The Agreement Is Intentionally "Silent" as to the Compensation Regime Applicable to Local Traffic, and the Practical Effect of that Silence Is an Agreement Providing No Compensation for the Termination of Such Traffic.

While the terms of Article V require the parties to exchange Local Traffic, they are intentionally *silent* as to whether the parties are required to mutually compensate each other for terminating such traffic. As set forth in CenturyTel's Motion for Summary Determination, the

practical effect of the omission of such a term is an agreement that provides for the mutual exchange of Local Traffic without requiring either party to pay compensation to the other (*i.e.*, in effect, a bill-and-keep arrangement for terminating Local Traffic, including ISP Traffic).

1. Socket's Remedy Is a Section 252(e)(6) Appeal.

Socket's core argument seems to be that, even if no provision of the Agreement expressly applies reciprocal compensation to Local Traffic, Sections 251(b)(5) and 252(d)(2) of the FTA require that such an obligation *be read into* the Agreement absent a specific term in the Agreement expressly waiving the payment of reciprocal compensation (*i.e.*, by adoption of an express bill-and-keep provision).³ Socket's assertion violates fundamental and well-established principles of contract construction and interpretation. The provisions of the FTA upon which Socket relies no more mandate "reciprocal compensation" than they do "bill-and-keep." Indeed, the FTA and its implementing rules authorize the implementation of either type of "arrangement" as an acceptable compensation regime for the exchange of Local Traffic. The Act neither requires express contractual language prescribing compensation, as Socket contends, nor gives either regime presumptive application over the other.⁴

CenturyTel has found no legal authority—and Socket has not cited any—supporting Socket's imaginative argument that a failure to codify an express bill-and-keep provision in an agreement renders an equally non-existent reciprocal compensation provision applicable by default. Rather than being afforded the special treatment Socket advocates, interconnection

³ Socket argues: "The case simply concerns the provisions of the Telecommunications Act, which require companies to pay each other reciprocal compensation absent an express waiver of the right to such compensation . . ." Socket Telecom's Legal Memorandum in Support of Its Response to CenturyTel's Motion for Summary Determination and Socket Telecom's Cross Motion for Summary Determination ("Socket's Legal Memorandum"), at 2.

⁴ See FTA, Section 252(d)(2)(B) ("This paragraph shall not be construed to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements) . . .").

agreements are construed and interpreted like any other contract or agreement under state law. *See Connect Communications Corp. v. Southwestern Bell Telephone, L.P.*, 467 F.3d 703, 708 (8th Cir. 2006) (stating that “the ultimate issue in this case—interpretation of the Interconnection Agreement—is a state law issue[,]” and applying principles of state contract law to construe and interpret the provisions of the agreement); *see also Southwestern Bell Telephone, L.P. v. PUC*, 467 F.3d 418, 422 (5th Cir. 2006) (“The interconnection agreement and state law principles govern the interpretation and enforcement of agreement provisions.”).

The Agreement is what the Commission ordered it to be—one providing for the exchange of Local Traffic without any provision applying a compensation regime for the termination of that traffic. The practical effect of the Commission’s ruling is a conformed Agreement that provides for each party to terminate the Local Traffic originated by the other party, but not to render a bill for reciprocal compensation. Each party must recover its costs from its own customers. This is a de facto bill-and-keep type “arrangement” for the exchange of Local Traffic, if not an express one. If Socket truly believes that Sections 251(b)(5) and 252(d)(2) of the FTA prohibited the Commission from approving an agreement that did not contain explicit contractual terms applying either bill-and-keep or reciprocal compensation to the exchange of Local Traffic, then Socket’s remedy is a Section 252(e)(6) appeal on the basis that the Agreement, as approved, does not meet the requirements of the FTA.

2. Article V, Sections 9.7 and 9.7.2 Do Not State that Reciprocal Compensation Shall Apply to the Exchange of Local Traffic, Nor Can They Be Interpreted As Such.

There is a certain irony to Socket’s rhetoric, particularly insofar as it states that CenturyTel is attempting to “divert” the Commission’s attention from the contents of the

Agreement.⁵ Indeed, CenturyTel and Spectra filed their complaints specifically requesting that the Commission review, construe, and enforce the specific provisions of Article V, which govern interconnection and intercarrier compensation. CenturyTel again respectfully urges the Commission to review and interpret the relevant provisions of the Agreement. In doing so, it will see that the provisions, contrary to Socket's assertion, do not "require" the parties to pay each other reciprocal compensation. Indeed, there is no provision in the Agreement whatsoever *applying* reciprocal compensation to either the exchange of Local Traffic or to the transport and termination of Local Traffic.

Socket selectively identifies various provisions of Article V and repeatedly and erroneously states that those provisions "*expressly* provide for payment for the transport and termination of Local Traffic."⁶ They do nothing of the sort. Defining the scope of the physical interconnection function of "transport," Section 9.7 simply states that "[t]ransport *includes* dedicated and common transport and any necessary Tandem Switching of Local Traffic"⁷ Similarly, Section 9.7.2 states the scope of the physical function of "termination," providing in part, that "[t]ermination *includes* the Tandem Switching of Local Traffic at the terminating carrier's End Office Switch"⁸ Thus, these provisions merely *define* what constitute the "transport" and "termination" components, respectively, of Local Traffic. Even Socket's prior counsel concedes as much when he "testifies," albeit improperly, that Sections 9.7 and 9.7.2 simply "*define[]* 'Transport' and 'Termination' as applying to 'Local Traffic.'"⁹ Importantly,

⁵ See Socket's Cross Motion at ¶ 28.

⁶ See, e.g., *id.* at ¶ 11 (emphasis added).

⁷ Agreement, Article V, Section 9.7 (emphasis added).

⁸ *Id.* at Section 9.7.2 (emphasis added).

⁹ Affidavit of William L. Magness ("Magness Aff.") at ¶ 9 (emphasis added). Similarly, while Section 9.7.2 also states that "[t]ermination rates are set forth in Article VIIA[.]" Mr. Magness can only say that the provision "points"

they do not state that the parties “will pay” each other for the transport and termination of that Local Traffic or that reciprocal compensation “shall apply” to the parties mutual exchange of that Local Traffic.¹⁰

The most that can be said about Article V is that its provisions are silent as to which compensation regime applies to Local Traffic. Socket’s misdirected argument that the reciprocal compensation pricing standard of the FTA should be read into the Agreement is, at least, a tacit acknowledgment that the unambiguous language of Article V, Sections 9.7 and 9.7.2 cannot be construed to apply reciprocal compensation to Local Traffic.

The reason Article V is intentionally silent on this point is straight-forward. While lost in Socket’s Cross Motion, the following critical facts are undisputed: (1) in the arbitration, each party proffered a provision applying a form of bill-and-keep to Local Traffic¹¹; (2) the Commission rejected both parties’ proffered provisions¹²; (3) the Commission did not order the parties to incorporate a provision applying reciprocal compensation to Local Traffic; (4) with respect to intercarrier compensation, the parties conformed Article V precisely as directed by the Commission¹³; and (5) the conforming process did not result in any provisions being added by

to those rates. *Id.* Again, conspicuously absent from any Article V provision is language actually applying those rates to Local Traffic.

¹⁰ Sections 9.7 and 9.7.2 stand in stark contrast to other provisions that *do* specifically apply a billing regime to a certain type of traffic. For example, Section 9.2.3 expressly states that VNXX Traffic “*shall be* at Bill-and-Keep.” Agreement, Article V, Section 9.2.3 (emphasis added). With respect to Transit Traffic, Section 10.3.2 states that the “originating Party *will compensate* the transiting Party for each minute of non-MCA originated traffic that does not terminate to the Transit provider’s end user but terminates to a third party” *Id.*, Section 10.3.2 (emphasis added).

¹¹ CenturyTel’s proposed provision applied bill-and-keep to Local Traffic or Section 251(b)(5) Traffic, but included an “out-of-balance” provision. Notably, if Section 251(b)(5) Traffic became out-of-balance, ISP Traffic would have remained subject to bill-and-keep. Socket proposed provision applied bill-and-keep to Local Traffic or Section 251(b)(5) Traffic, as well as other non-local types of traffic such as FX Traffic. See Joint Final DPL, Article V, Issue 10. (Relevant excerpts of the Joint Final DPL, Article V are attached at Exhibit “A” to the Affidavit of Susan W. Smith.)

¹² Final Commission Decision at 26-27, 29.

¹³ See Affidavit of Susan W. Smith in Support of CenturyTel’s Response to Socket’s Cross Motion for Summary Determination (“Smith Aff.”) at ¶¶ 11-12.

the parties applying reciprocal compensation or bill-and-keep to Local Traffic.¹⁴ The net result is that the compensation regime applicable to Local Traffic was effectively left unaddressed in the express terms of the Agreement, as the Commission directed and presumably intended in the Final Commission Decision. As there is no provision in the Agreement applying reciprocal compensation to the termination of Local Traffic, the general and definitional provisions Socket cites, including Sections 9.7 and 9.7.2 of Article V, do not change this dispositive fact.

B. The History of the Parties' Negotiations Is Only Relevant to the Extent the Commission Determines That the Agreement Is Ambiguous, But If Anything, That Negotiation History Demonstrates That the Parties Intended "Bill-and-Keep" to Apply to Local Traffic.

Socket's Cross Motion, Legal Memorandum and supporting Affidavits assert numerous extrinsic facts—many of them inaccurate or distorted—pertaining to the parties' negotiation history. As this matter is about contract interpretation, these facts are only relevant to the extent that the Commission determines the Agreement to be ambiguous on the question of whether reciprocal compensation applies to Local Traffic. *See Eiman Brothers Roofing System*, 158 S.W.3d at 923 (whether a contract is ambiguous is a question of law).

While ambiguity arises when there is uncertainty in the meaning of words used in a contract, *id.*, the fact that parties disagree over the interpretation of a contract's terms does not render the language ambiguous, *Kyte v. American Family Mutual Ins. Co.*, 92 S.W.2d 295, 299 (Mo.App. W.D. 2002). As the primary rule of contract construction is to ascertain the intent of the parties and give it effect, the Commission may hear extrinsic evidence to determine that intent if the contract is deemed ambiguous. *See Eiman Brothers Roofing System, Inc.*, 158 S.W.3d at 923.

¹⁴ *See id.* at ¶ 12.

For this and other reasons, CenturyTel has moved to strike the Magness and Kohly affidavits filed by Socket in support of its Cross Motion. Until or unless the Commission determines that the contract is ambiguous, none of this so-called parole evidence may be admitted. This section of CenturyTel's briefing is offered, therefore, subject to its Motion to Strike. If, as it properly should, the Commission strikes the offending Magness and Kohly affidavits, the following discussion is mooted.

1. After Issuance of the Final Commission Decision, Socket Would Only Agree to "Conforming" Language that Applied Bill-and-Keep to "Local Traffic," As Well As "FX Traffic" and Other "Non-MCA Traffic" That Potentially Was Not Addressed by the Agreement.

A critical part of the "conforming negotiations" history is left untold by Socket, and that part explains why the parties were unable to agree to bill-and-keep conforming language. During that process, the parties discussed incorporating language into the Agreements to codify the applicability of bill-and-keep to Local Traffic.¹⁵ Indeed, from the time the parties filed their Joint Final DPL until after they filed the conforming Agreements, the parties never disagreed that Local Traffic (including local ISP Traffic) would be subject to bill-and-keep.¹⁶ At the arbitration, what continued to be in dispute was whether "other types" of traffic would be considered Local Traffic or subject to bill-and-keep—specifically, FX Traffic and VNXX Traffic—and about whether an "out-of-balance" provision should apply to Local Traffic. Ultimately, the Commission determined that FX Traffic was non-local and that VNXX Traffic, while not Local Traffic, should nevertheless be subjected to a bill-and-keep compensation regime.¹⁷

¹⁵ *Id.* at ¶ 10.

¹⁶ *Id.* at ¶¶ 4-8.

¹⁷ Final Commission Decision at 27-28, 29.

So, why were the parties unable to agree to conforming language? Socket repeatedly states that “CenturyTel steadfastly refused to include contract language calling for a bill-and-keep arrangement for Local Traffic.”¹⁸ However, there are equal measures of truth and obfuscation in that statement. The “bill-and-keep” provision that Socket proposed would have applied to more than just Local Traffic; it would have applied to “all non-MCA traffic,” *including FX Traffic*.¹⁹ That proposal read as follows:

The parties would agree that all traffic is Bill-and-Keep.

[Section] 9.3: All non-MCA Traffic, including Non-MCA Section 251(b)(5) Traffic, Non-MCA ISP Traffic, and Non-MCA *Foreign Exchange [FX] Traffic*, including VNXX Traffic, shall be exchanged on a Bill-and-Keep basis.

Indeed, Socket acknowledges that this was its proposal during the conforming process and even filed it with the Commission as Exhibit 14 to its Cross Motion.²⁰

While Socket mentions it nowhere in its Cross Motion, Legal Memorandum or supporting Affidavits, its proposed language codifying the applicability of bill-and-keep to Local Traffic came with a very large poison pill—also applying bill-and-keep to *FX Traffic* and potentially other Non-MCA Traffic not specifically addressed by the Agreement. Socket’s attempt to apply bill-and-keep to FX Traffic had just been rejected by the Commission in the arbitration.²¹ Attempting illegitimately to recapture ground it had properly lost, Socket’s proposed language was nothing more than the very same bill-and-keep provision that it had

¹⁸ Socket’s Cross Motion at ¶ 28.

¹⁹ See Smith Aff. at ¶¶ 10-11; *see also* Exhibit 14 to Socket’s Cross Motion, Socket Proposal, Article V (8/25/06).

²⁰ See Confidential Settlement Offer: Case No. TO-2006-0299, Article V—Interconnection and Transport and Termination of Traffic, attached as Exhibit 14 to Socket’s Cross Motion; *see also* Smith Aff. at ¶¶ 10-11.

²¹ See Arbitrator’s Final Report, Case No. TO-2006-0299, at 29 (ordering Socket to remove the reference to “terminating FX traffic” from the definition of Bill-and-Keep); Final Commission Decision, Case No. TO-2006-0299, at 29-30 (confirming same).

proffered in the arbitration and that the Commission specifically rejected.²² In effect, Socket was willing to expressly clarify that bill-and-keep applied to Local Traffic, but only if it could undo an adverse arbitration result and apply bill-and-keep to FX Traffic in the process. Of course CenturyTel rejected it.²³

Given the time constraints imposed for filing conforming agreements, and unable to reach agreement, the parties filed the “Intercarrier Compensation” terms (Sections 9.0 through 9.7.3) of Article V *precisely in conformance with* the Final Commission Decision—without any “conforming” provision expressly applying any form of reciprocal compensation to Local Traffic and without any deletions or additions the Commission did not specifically order.²⁴ The status of the Intercarrier Compensation terms after the conforming process was one of the key reasons why CenturyTel, when filing its “Statement of Compliance and Noncompliance of Conforming Interconnection Agreement,” stated that certain terms “simply ‘conform’ to the determinations of the Commission where the parties could not reach agreement after arbitration[.]”²⁵ As filed, the conformed Agreement—the Agreement before the Commission today—contains no provision applying reciprocal compensation to Local Traffic.

2. The Provisions Upon Which Socket Principally Relies Are, Even by Socket’s Admission, “Inert” Provisions.

Socket relies principally on the references to “transport” and “termination” in Article V, Sections 9.7 and 9.7.2, respectively, and to the switching rates contained in Article VIIA

²² See Joint Final DPL, Article V: Case No. TO-2006-0299, at 59 (wherein, as part of Article V, Issue 10, Socket proffered identical language in its proposed Section 9.4.1) and Final Commission Decision at 29 (rejecting Socket’s proposed Section 9.4.1, in part, because it contained “other traffic included in this section [*i.e.*, FX Traffic] has been deemed non-local traffic[.]”). (Relevant excerpts of the Joint Final DPL, Article V are attached at Exhibit “A” to the Affidavit of Susan W. Smith.)

²³ Smith Aff. at ¶ 11.

²⁴ *Id.* at ¶ 12.

²⁵ See *id.* at ¶ 12 and Exhibit “C” (attaching CenturyTel’s Statement of Compliance and Noncompliance, Case No. TO-2006-0299); see also Socket’s Cross Motion, Exhibit 15 (attaching same).

(Pricing), claiming that the mere inclusion of these provisions in the Agreement should be interpreted as *requiring* the application of reciprocal compensation to the exchange of Local Traffic.²⁶ As set forth above, none of these provisions *applies* reciprocal compensation to Local Traffic. In addition, Socket relies on the presence in Article III of Sections 10.2 (addressing the exchange of a Percentage of Local Use (PLU)) and 10.4 (addressing the right to audit Local Traffic). As Socket well knows, and essentially admits, these provisions are in the Agreement only because they were related to *CenturyTel's* proposed bill-and-keep provision.²⁷ That proposed provision, which the Commission rejected in arbitration, contained an out-of-balance provision which, if Local Traffic became significantly out-of-balance between the parties, could have triggered reciprocal compensation. Only at that time might the provisions now relied upon by Socket—Article V, Sections 9.7 and 9.7.2, and Article III, Section 10.2 and 10.4—ever have become applicable.

Indeed, the provisions relied upon by Socket would no more demonstrate the parties' intent to apply reciprocal compensation to Local Traffic than Article V, Section 9.8 would demonstrate the parties' intent to adopt bill-and-keep to that traffic. Socket curiously refused to quote Section 9.8 along-side the other provisions of Article V.²⁸ When Socket did quote it in a footnote, it did so incorrectly.²⁹ That provision provides:

²⁶ Socket also relies, to some extent on Article V, Section 9.7.1, but that provision can only be interpreted as defining the parties' respective responsibilities for install "facilities." It does not relate to whether reciprocal compensation may or may not be applicable. See Article V, Section 9.7.1 ("Each Party shall be responsible for facilities and transport of Local Traffic between a Party's Central Office Switch and the POI.").

²⁷ Smith Aff. at ¶ 13. See also Magness Aff. at ¶¶ 16-17 (acknowledging that CenturyTel's proposal was a bill-and-keep provision with an "out-of-balance" provision) and ¶ 28 (admitting that the parties never discussed removing the reciprocal compensation-related provisions after the Commission rejected in arbitration both parties' proposed bill-and-keep provisions).

²⁸ See Socket's Cross Motion at ¶ 11(c); Socket's Legal Memorandum at 6 (in each instance, characterizing Section 9.8 but refusing to quote it).

²⁹ See Socket's Legal Memorandum at 8 n.13. Socket quoted Section 9.8 as follows:

Nothing in this Section [9.0 *et seq.*] shall be interpreted to (i) change compensation as set forth in this Agreement for traffic or services other than traffic or services for which compensation is addressed in this Article V, including but not limited to Internetwork Facilities, access traffic or wireless traffic, or (ii) allow either Party to aggregate traffic *other than Local Traffic* for the purpose of compensation under the *Bill-and-Keep arrangement* described in this Section. The Parties reserve the right to otherwise seek compensation for non-Local Traffic including the imposition of access charges where appropriate.³⁰

Socket grossly mischaracterizes this provision as merely stating that “[o]ther traffic may not be aggregated with bill-and-keep traffic.”³¹ An unbiased reading of the provision makes clear that the traffic intended to be aggregated under the referenced bill-and-keep arrangement is the very *Local Traffic* at the center of this dispute. Just as the provisions relied upon by Socket are vestiges of CenturyTel’s proposed bill-and-keep out-of-balance trigger, Section 9.8 is a vestige of what the parties assumed would be an adopted bill-and-keep provision (in one form or another) applied to Local Traffic. In the end, however, the Commission rejected both parties’ proposed bill-and-keep provisions, and the parties agreed to file the conformed Agreements without any provision expressly applying a compensation regime to Local Traffic.

There is no scenario in which the provisions Socket relies on would be made operative in conjunction with Socket’s species of “implied” reciprocal compensation. While these provisions were related to reciprocal compensation, the Commission rejected the only provision in the

“Nothing in this Section shall be interpreted to . . . change compensation as set forth in this Agreement for traffic or services other than traffic or services for which compensation is addressed in this Article V, including but not limited to Internetwork Facilities, access traffic or wireless traffic.”

As set forth above, the language of Article V, Section 9.8 *does not end where Socket’s quote indicates*. The second half of the provision (romanette (ii)), which is included in the complete text quoted by CenturyTel, is perhaps the most relevant provision to the instant dispute. Regardless of whether Socket’s misrepresentation of Section 9.8 is inadvertent or intentional, even Socket would agree that the Commission must presume that it has meaning. *See id.* at 10 (wherein Socket states that “it is well-established law that all provisions of a contract are presumed to have meaning.” (citation omitted)).

³⁰ Agreement, Article V, Section 9.8 (emphasis added).

³¹ Socket’s Cross Motion at ¶ 11(c).

proposed Agreement that could have triggered them (CenturyTel's proposed bill-and-keep with an out-of-balance provision). CenturyTel's proposed bill-and-keep language, like Socket's, was stricken from the conforming Agreement by the parties as the Commission required in the Final Commission Decision. These provisions, therefore, became inert in the Agreement as conformed. Socket has inconsistently argued that, during the conforming process, CenturyTel "refused"³² to remove these provisions from the Agreement, implying that CenturyTel somehow insisted on their continuing presence in and applicability to the Agreement. However, the reality is, as Socket's own witness, Mr. Magness, testifies, the parties never even addressed these vestigial provisions in the conforming process.³³

C. Socket Is Attempting to Manipulate What May Be An Inadvertent Drafting Error In the Final Commission Decision.

There is a broader context to this dispute that CenturyTel believes should be addressed. In the immediate post-arbitration period, there is no question that both parties interpreted the Final Commission Decision as approving no provision for the payment of compensation for the termination of Local Traffic. Socket admitted its interpretation of the effect of the deletion of all language pertaining to compensation for Local Traffic in its Comments on the Arbitrator's Final Report: "The Arbitrator[] determine[ed] that bill-and-keep applies to the transport and termination of ISP-Bound Traffic."³⁴ Attempting now to avail itself of the very arbitrage opportunity (*i.e.*, one-way reciprocal compensation payments for terminating ISP Traffic) that it

³² See Socket's Legal Memorandum at 11.

³³ See Magness Aff. at ¶ 28 ("there was no effort by CenturyTel to remove the provisions CenturyTel never mentioned the need to delete the reciprocal compensation rates from the ICA, and they remain in the ICA today."). See also Smith Aff. at ¶ 13.

³⁴ Comments of Socket Telecom, LLC on the Arbitrator's Final Report, Case No. TO-2006-0299, at 28. While Mr. Magness now purports to distance himself from that statement, his claims that he really did not mean to say "ISP-Bound Traffic" and that the term is quoted out of context ring hollow. The statement is there for the Commission to review and the context does nothing to change its plain meaning.

purported to eschew at the arbitration, Socket now disingenuously asserts that “there was no ruling by the Arbitrator or the Commission subjecting Local Traffic [which includes ISP Traffic] to a bill-and-keep arrangement.”³⁵

To the extent the Commission believes that it did adopt a express bill-and-keep arrangement for Local Traffic (including ISP Traffic), CenturyTel respectfully suggests that such ruling may have been obscured by an inadvertent drafting error in the Final Commission Decision. The Final Commission Decision effectively rejected both parties’ proposed bill-and-keep provisions leaving no term in Article V applying *any* compensation regime to Local Traffic. Indeed, the parties presumed this to be the Commission’s intent and reflected it in the conformed Agreement. As set forth above, the net result is the same—an Agreement that does not require the parties to pay each other for terminating Local Traffic, in practical effect, establishes a bill-and-keep arrangement.

At the arbitration, both parties urged the Commission to adopt a form of bill-and-keep arrangement applicable to Local Traffic. In its Post-Hearing Brief, Socket urged the Commission

to adopt a bill-and-keep approach that: (a) eliminates disputes over which rate applies; (b) prevents potential schemes by either party to generate ‘arbitrage’ through intercarrier compensation; (c) is consistent with the direction identified by the FCC in the *ISP Remand Order*; [and] (d) is consistent with the approach taken by the Commission in MCA areas, and with negotiated and approved provisions of the M2A successor agreements.

CenturyTel believes that the Commission may have intended to do precisely that by ruling that Local Traffic (including local ISP Traffic) should not be subject to payment of reciprocal compensation. However, to the extent that is true, Socket is now attempting to exploit what may

³⁵ Magness Aff. at ¶ 24. See also Socket Telecom’s Legal Memorandum in Support of Its Response to CenturyTel’s Motion for Summary Determination and Socket Telecom’s Cross Motion for Summary Determination (“Socket’s Legal Memorandum”) at 13 & n.20.

be an inadvertent drafting error in the decision in order to grasp at the ISP Traffic revenue stream.

The pertinent issue presented to the Commission in arbitration was broad: “What language should the ICA include regarding intercarrier compensation for transport and termination of traffic?”³⁶ With that as the stated issue, the parties proposed their dueling bill-and-keep provisions. Because the parties vigorously contested the specific compensation terms for “FX Traffic” (and “VNXX Traffic” insofar as Socket’s POI obligations had not yet been determined), this “sub-issue” became a primary focus of the arbitration hearing. The Commission addressed the parties’ proposals in Article V section-by-section. With respect to CenturyTel’s proposed bill-and-keep provision, Section 9.2.2, the Commission acknowledged that “*CenturyTel’s language addresses bill and keep generally,*” but then stated that it “*corresponds more closely with Socket’s [bill-and-keep] language at Sections 9.4.1 and 9.4.2.*”³⁷ The Commission then refused to rule on CenturyTel’s language and, by that, effectively refused to adopt it.

The key to understanding how the Agreement may have ended up with a “silent” compensation term is the Commission’s ruling on CenturyTel’s proposed Section 9.2.3, a separate provision specifically addressing the treatment of VNXX Traffic. The Commission adopted CenturyTel’s language on VNXX Traffic, which applied straight bill-and-keep to VNXX Traffic (with no out-of-balance provision). In so doing, the Commission stated: “*The*

³⁶ Joint Final DPL, Article V, Issue 10 in Case No. TO-2006-0299 (relevant excerpts of which are attached at Exhibit “A” to the Affidavit of Susan W. Smith).

³⁷ Final Commission Decision, Case No. TO-2006-0299, at 27 (emphasis added).

Commission finds that CenturyTel's language is consistent with the ISP Remand Order and there is nothing prohibiting a bill and keep arrangement in that order."³⁸

The Commission then rejected Socket's proposed bill-and-keep provision, Section 9.4.1, stating: "*CenturyTel's language at Section 9.2.3, addressing the appropriate application of bill and keep, is appropriate.*"³⁹ This is where Socket's artifice appears: In adopting CenturyTel's Section 9.2.3, CenturyTel believes the Commission may have intended to adopt a bill-and-keep provision applicable to Local Traffic and local ISP Traffic, in addition to VNXX Traffic. However, the Commission may have mistakenly assumed that the adopted Section 9.2.3 addressed Local Traffic and ISP Traffic when, in fact, it *only* addressed VNXX traffic.

When the Commission rejected Socket's bill-and-keep proposal, Section 9.4.1—which addressed VNXX traffic in addition to a variety of other types of traffic, including FX, VNXX, Section 251(b)(5) (or Local Traffic) and local ISP Traffic—the Commission stated: "*Other traffic included in this section has been deemed non-local traffic through other determinations.*"⁴⁰ CenturyTel respectfully asserts that this statement suggests that the Commission may have mistakenly thought it already had dealt with the treatment of "local" traffic types—Local Traffic and local ISP Traffic—when it adopted Section 9.2.3, and was disposing of the provision's remaining non-local traffic types—FX Traffic—with its additional statement. That belief is further supported by the Commission's statement, when adopting Section 9.2.3, referencing the *ISP Remand Order*. That reference suggests that the Commission intended for the adopted bill-and-keep arrangement to apply to Local Traffic and local ISP

³⁸ *Id.* at 28 (emphasis added).

³⁹ *Id.* at 29 (emphasis added).

⁴⁰ *Id.*

Traffic in addition to VNXX Traffic, particularly since the *ISP Remand Order* specifically pertains to Local Traffic and “local” ISP Traffic.

By rejecting CenturyTel’s proposed Section 9.2.2 and Socket’s proposed Section 9.4.1, the Commission effectively rejected the only two provisions purporting to apply bill-and-keep to Local Traffic and ISP Traffic, possibly under the mistaken impression that the approved Section 9.2.3 that applied bill-and-keep to VNXX traffic also applied it to Local Traffic and ISP Traffic. Unless the Commission intended the parties to strike from the Agreement all provisions applying a compensation regime to Local Traffic—which intention was presumed and codified in the conformed Agreements—there is no other way to interpret the Commission’s ruling. Both parties proposed to apply a version of bill-and-keep to Local Traffic, neither party advocated the application of outright reciprocal compensation to such traffic, and the Commission never discussed—much less ordered—the adoption of reciprocal compensation.

The existing Agreements were conformed to the Final Commission Decision which directed the parties not to incorporate any provision expressly applying a compensation regime to Local Traffic (including local ISP Traffic). As stated herein, the practical effect of that decision is to impose a compensation regime similar to bill-and-keep, obligating the parties to exchange Local Traffic and local ISP Traffic, but obligating neither party to pay the other for terminating such traffic. To the extent the Commission intended to expressly adopt a provision applying bill-and-keep to such traffic, such intention appears to have been obscured by an inadvertent drafting error, an error that Socket now is trying to exploit.

D. Mr. Stewart’s Statement In Case No. TO-2007-0341 Was In Error And, In Any Event, Does Not Constitute A Binding Judicial Admission.

Socket also relies on a statement by CenturyTel’s counsel in another proceeding, Mr. Stewart, arguing that such statement constitutes an admission that reciprocal compensation

applies to Local Traffic under the Agreement. However, the compensation regime applicable to Local Traffic under the Agreement was not even an issue in that other proceeding—Case No. TO-2007-0341.⁴¹ Rather, that proceeding dealt with a dispute over number portability. Frankly, Mr. Stewart appears simply to have agreed with a characterization of Mr. Lumley, and did so without knowing about the Agreement’s silence on the compensation regime applicable to Local Traffic.⁴² Indeed, there was no reason for Mr. Stewart to have known about the “silent” term—or the compensation regime applicable to Local Traffic—as that issue was not pertinent to the issues on which he was representing CenturyTel.⁴³ Mr. Stewart simply made a mistake about the interpretation of the Agreement,⁴⁴ and that mistake is not binding on CenturyTel. See *Klinkerfuss v. Cronin*, 199 S.W.3d 831, 843 (“Improvident or erroneous statements or admissions resulting from unguarded expressions or mistake should not be binding on the client.” (internal quotations and citation omitted)).

Furthermore, Mr. Stewart’s alleged “admission” is in no wise binding on CenturyTel under the doctrine of judicial admissions because it was a legal conclusion uttered in a separate proceeding. In Missouri, a judicial admission can only bind a party if the statement or alleged admission is *factual* and made in the *same proceeding*. See *Mitchell Engineering Co. v. Summit Realty Co., Inc.*, 647 S.W.2d 130, 140-41 (Mo.App. W.D. 1982)(“A true judicial admission is an admission made in court or preparatory to trial, by a party or his attorney, which concedes *for purposes of that particular trial* the truth of *some alleged fact*[.]” (emphasis added)); *Silver Dollar City, Inc. v. Kitsmiller Constr. Co., Inc.*, 931 S.W.2d 909, 917 (Mo.App. S.D.

⁴¹ Smith Aff. at ¶ 15; Affidavit of Charles Brent Stewart (“Stewart Aff.”) at ¶ 2.

⁴² Stewart Aff. at ¶¶ 3-4.

⁴³ *Id.*

⁴⁴ *Id.* at ¶ 4.

1996)(“Admissions arising from a proceeding other than the instant one cannot be considered judicial admissions in the sense of their being binding concessions of the truth of some *material fact*[.]” (emphasis added)). Mr. Stewart’s statement on the record, made in a separate proceeding, is a purported interpretation of the Agreement’s intercarrier compensation terms. As such, Mr. Stewart’s statement constitutes a legal conclusion that is not binding on CenturyTel. *Metal Exchange Corp. v. J.W. Terrill, Inc.*, 173 S.W.3d 672, 679 n2 (Mo.App. E.D. 2005)(“The admission, to be binding, must be one of fact and not a conclusion of law.”); *Silver Dollar City*, 199 S.W.3d at 843 (“neither the client nor the court is bound by the attorney’s statements or admission as to matters of law or legal conclusions” (internal quotations and citation omitted)).

E. CenturyTel’s Inadvertent Payment of Socket’s Initial Reciprocal Compensation Invoices Have No Bearing on Whether the Agreements Require the Payment of Reciprocal Compensation.

While CenturyTel did pay the first two reciprocal compensation invoices submitted by Socket, those payments were inadvertent and quickly rectified.⁴⁵ CenturyTel’s payment of two invoices can hardly be considered a “course of performance” for purposes of construing the Agreements. Even if so considered, “[a] course of performance by the parties to a contract which tends to show an interpretation by either one or both parties contrary to the plain terms of the contract does not control, but rather the contract is construed as written.” *Acetylene Gas Co. v. Oliver*, 939 S.W.2d 404, 409 (Mo.App. E.D. 1996). Moreover, to the extent Socket asserts that CenturyTel’s payment of these two initial invoices evidences its intent to pay, or its interpretation of the Agreement as requiring payment of, reciprocal compensation, such assertion

⁴⁵ Smith Aff. at ¶ 14.

cannot seriously be credited in the face of the undisputed fact that CenturyTel never submitted a single reciprocal compensation invoice to Socket.⁴⁶

II. CONCLUSION & PRAYER

For the foregoing reasons, the Commission should determine that the terms of the Agreement are unambiguous and that the terms of the Agreement do not require a party originating Local Traffic (including ISP Traffic) to pay reciprocal compensation to the terminating party.

To the extent the Commission determines that the Agreement is ambiguous, the Commission, upon review of the undisputed and admissible extrinsic evidence, should determine that the parties intended to apply a bill-and-keep regime to Local Traffic (including ISP Traffic).

Wherefore, CenturyTel respectfully requests that the Commission:

- (a) grant CenturyTel's Motion for Summary Determination;
- (b) deny Socket's Cross Motion for Summary Determination; and
- (c) grant CenturyTel all other relief to which it is rightfully and justifiably entitled.

⁴⁶ *Id.*

Respectfully submitted,

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**ATTORNEYS FOR CENTURYTEL OF
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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), Socket Telecom, LLC (at rmkohly@sockettelecom.com) and counsel for Socket Telecom, LLC (at clumley@lawfirmemail.com; lcurtis@lawfirmemail.com) on this 13th day of February, 2008.

/s/ Larry W. Dority

Larry W. Dority