

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Confirmation of)
Adoption of)
an Interconnection Agreement with) Case No. CO-2005-0066
CenturyTel of Missouri, LLC d/b/a)
CenturyTel and Spectra Communications)
Group, LLC, d/b/a CenturyTel by)
Socket Telecom, LLC.)

SOCKET TELECOM, LLC'S APPLICATION FOR REHEARING

Comes Now Socket Telecom, LLC pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160 and for its Application for Rehearing states to the Commission:

The Commission issued its Report and Order herein on December 14, 2004, with an effective date of December 24, 2004. Socket Telecom hereby timely files its Application for Rehearing prior to that effective date. Socket Telecom will not restate the contents of its Brief, but incorporates its Brief herein by this reference in further support hereof.

Socket Telecom applies for rehearing because:

(1) Socket Telecom does not seek relief in equity, but rather seeks confirmation that Spectra dba CenturyTel in fact made the AT&T/GTE interconnection agreement available to Socket Telecom for adoption. Enforcing a contract implied in fact by the conduct of the parties is an available form of legal relief, not equitable relief. The Commission acted unlawfully, unjustly, and unreasonably in finding and concluding that Socket was seeking relief in equity that the Commission could not grant and in finding and concluding that the Commission could not lawfully confirm Socket Telecom's adoption of the agreement as to Spectra dba CenturyTel and its exchanges.

(2) Whether or not Spectra dba CenturyTel "had to" make the AT&T/GTE agreement available to Socket Telecom for adoption, nothing precluded it from making it available and, in fact, it did make it available to Socket Telecom for adoption. The Commission

acted unlawfully, unjustly, and unreasonably in finding and concluding that Spectra dba CenturyTel could not have made the agreement available to Socket Telecom for adoption based on the Commission's conclusion that Spectra dba CenturyTel did not have to make it available. Additionally, although not necessarily determinative, the Commission acted unlawfully, unjustly and unreasonably in finding and concluding that Spectra dba CenturyTel did not have to make the agreement available to Socket Telecom.

(3) The Commission did not address Socket Telecom's request for confirmation of adoption of the agreement as to CenturyTel. The Commission acted unlawfully, unjustly and unreasonably by failing to address Socket Telecom's request for formal confirmation that CenturyTel is bound to Socket Telecom by the AT&T/GTE interconnection agreement. Further, the Commission acted unlawfully, unjustly, and unreasonably, in failing to find and conclude that CenturyTel's obligations under the AT&T/GTE agreement extend to all the former GTE exchanges based on CenturyTel's reassembly of those exchanges under one operating enterprise. The agreement does not require an amendment to incorporate additional exchanges.

Argument

(1) Socket Telecom does not seek relief in equity, but rather seeks confirmation that Spectra dba CenturyTel in fact made the AT&T/GTE interconnection agreement available to Socket Telecom for adoption. Enforcing a contract implied in fact by the conduct of the parties is a form of legal relief, not equitable relief.

In its Report and Order, the Commission erroneously determined that it lacked the authority necessary to grant Socket Telecom relief in this proceeding. Specifically, the

Commission concluded: "the Commission does not have authority to grant equitable relief to Socket to imply the existence of an interconnection agreement where none exists at law. As a result, Socket's request that the Commission confirm its adoption of the GTE/AT&T interconnection agreement for application in the Spectra exchanges must be denied." (Report and Order, p. 17).

There was a critical disconnect between Socket Telecom and the Commission regarding the relief sought herein. As Socket Telecom tried to make clear at the commencement of the hearing (Tr. p. 38-39) and in its Brief (p. 11-12), it does not seek relief in equity, but rather seeks relief at law - **specifically the determination that the agreement of the parties to operate pursuant to the terms and conditions of the AT&T/GTE interconnection agreement should be implied in fact from their conduct.** To quote from one of the cases cited in Socket Telecom's Brief, the Missouri Supreme Court has held: "A true contract is said to be express or implied in fact, and differs from a quasi contract which it is said is no 'contract at all' but which is commonly called a contract implied in law. **There is no difference in legal effect between an express contract and one implied in fact.** The distinction lies merely in the manner of manifesting mutual assent." Bailer v. Interstate Automotive, 219 SW2d 333, 338 (Mo. 1949)(citing prior Missouri cases, Williston on Contracts, and the Restatement of the Law of Contracts). These are basic principles of contract law that have long been in effect. As more recently stated by the Missouri Court of Appeals, "A contractual relationship may arise without an oral or written offer and acceptance. It arises where the circumstances, acts and conduct of the parties support a reasonable inference of a mutual understanding and agreement that one party perform and the other party compensate for the performance." Marro v. Daniels, 914 SW2d 16, 19 (Mo App 1995)(finding that the circumstances established a meeting of the minds and an implied lease contract). Section 252(i) does not require that adoption of an

interconnection agreement occur by express writing and does not preclude adoption occurring by factual implication from the conduct of the parties, contrary to the Commission's conclusion that it has no statutory authority to act herein (Report and Order, p. 16). **As Socket Telecom proved, the conduct of the parties factually implies that they did in fact agree to the terms and conditions of the AT&T/GTE interconnection agreement and, therefore, Socket Telecom asked the Commission to confirm the contract in law, not in equity.**

Hence, the Commission's statement that "regardless of whether Socket chooses to call the relief it seeks "equity", the relief that it seeks is in fact equitable" (Report and Order, p. 16) is incorrect. The law allows a party to prove a contract by factual implication through the conduct of the parties, without the invocation of any principle of equity or equitable jurisdiction.

There is no doubt that this is an unusual case, but it is Spectra dba CenturyTel, not Socket Telecom, that is to blame. Ordinarily, the process of adopting an interconnection agreement is relatively straight-forward - the CLEC finds a desirable agreement and presents its adoption to the Commission before commencement of interconnection. Here, things were very different. Because CenturyTel was the successor of GTE/Verizon and also because it obligated itself to the existing agreement between Socket Telecom and GTE/Verizon in the Commission proceedings regarding its purchase of the GTE/Verizon exchanges, Socket Telecom did not have to file an adoption proceeding to establish an agreement with CenturyTel. Because CenturyTel conducted its operations in such a way as to make the operations of its subsidiaries CenturyTel of Missouri dba CenturyTel and Spectra dba CenturyTel indistinguishable and simply commenced interconnection with Socket Telecom in the Spectra dba CenturyTel exchanges pursuant to the same AT&T/GTE agreement, Socket Telecom did not initially file an adoption proceeding regarding the Spectra dba CenturyTel exchanges. Socket Telecom only filed this action because

CenturyTel recently turned about face and tried to deny the existence of the agreement in furtherance of its overall goal of obstructing competition.

Socket Telecom does not seek to apply equitable estoppel, but rather simply seeks a legal ruling that there is in fact an agreement between it and Spectra dba CenturyTel. Socket Telecom's evidence regarding the conduct of the CenturyTel entities and its reliance thereon was simply part of the evidence of the conduct of the parties that shows that there was mutual assent to the contract and that the contract should be implied in fact and enforced.

Socket Telecom requested and Spectra dba CenturyTel provided leased network facilities, and the parties continue to exchange traffic over these facilities, with express written reference to the AT&T/GTE interconnection agreement (see Ex. 31). These facilities include interoffice connections between the CenturyTel subsidiaries, which in particular underscored the fact that the CenturyTel subsidiaries did agree to use one agreement in all the exchanges in question. (Tr. 96). In such circumstances, the courts have no trouble recognizing that the conduct of the parties establishes mutual assent and a contract implied in fact. See, e.g., Marro v. Daniels, 914 SW2d 16, 19 (Mo App 1995)(finding that the circumstances established a meeting of the minds and an implied lease contract). Likewise, the Commission should grant rehearing and thereupon grant Socket Telecom the legal remedy which it seeks and to which it is entitled by law based upon the record, to wit: recognition and approval of the agreement as applicable to the Spectra dba CenturyTel exchanges.

(2) Whether or not Spectra dba CenturyTel "had to" make the AT&T/GTE agreement available to Socket Telecom for adoption, nothing precluded it from making it available and, in fact, it did make it available to Socket Telecom for adoption.

In its Report and Order, the Commission erroneously focused upon whether or not Spectra dba CenturyTel was required to make the AT&T/GTE interconnection agreement available to Socket

Telecom for adoption. (Report and Order, p. 11-13). Specifically, the Commission erred when it stated: "If carrier C wants to interconnect with carrier A, it can **only** adopt an interconnection agreement to which carrier A is a party. It cannot interconnect on the basis of an agreement between carriers X and Y, to which A is not a party." (Report and Order, p. 11)(emphasis added). There is no such restriction in the law. The law may say that carrier C cannot force such an adoption on carrier A, but it does not say that carrier A cannot consent to such an adoption.

The Commission should recognize that it does not matter whether or not Spectra dba CenturyTel was required to make the agreement available to Socket Telecom for adoption. Regardless, nothing precluded Spectra dba CenturyTel from making the agreement available to Socket Telecom for adoption. Section 252(i) does not prohibit companies from agreeing to apply the terms and conditions of another agreement; it simply mandates certain circumstances in which the ILEC must do so. Likewise rule 45 CFR 51.809(a) contains no prohibition against ILECs making other agreements available. **Moreover, not only was Spectra dba CenturyTel free to allow Socket Telecom to adopt the AT&T/GTE agreement, as discussed above Spectra dba CenturyTel did in fact make the agreement available to Socket Telecom for adoption.**

While it is not necessary, based on the foregoing, for the Commission to change its ruling regarding whether or not Spectra dba CenturyTel was required to make the AT&T/GTE agreement available to Socket Telecom, the Commission should nonetheless reconsider that part of its decision as well. The Commission correctly held that Spectra dba CenturyTel was a successor of GTE for purposes of the AT&T/GTE agreement, although it also made the potentially contradictory statement that Spectra dba CenturyTel was not a party to the agreement. (Report and Order, p.12, 17).

Accordingly, just as CenturyTel of Missouri was bound to GTE's agreements (Report and Order, p. 12), so was Spectra dba CenturyTel.¹

While there was no GTE/Socket agreement at the time Spectra succeeded to GTE obligations, the AT&T/GTE agreement was then in effect. Further, the evidence showed that the AT&T/GTE agreement remained in effect as between Spectra dba CenturyTel and AT&T, regardless of whether AT&T was making use of it. Mr. Kohly testified that throughout his tenure at AT&T (to July 2004), the agreement was still in effect. (Tr. 138-47). CenturyTel may have sent a letter to AT&T indicating that it wanted to discuss a replacement agreement (Tr. 207-08, Ex. 41), but the Commission correctly determined that Spectra dba CenturyTel was bound by the agreement which confirms that a replacement agreement was not required.² Contrary to the Report and Order (p. 5), Spectra dba CenturyTel did not notify AT&T that it was purporting to terminate the agreement in violation of its obligations as a successor-in interest - it merely indicated a decision to discuss a replacement agreement. (See Ex. 41, and note that Exhibits 42 and 43 were not from CenturyTel).³ The evidence shows that the AT&T/GTE agreement remained in effect in the Spectra d/b/a CenturyTel exchanges in July 2004, so in fact Spectra dba CenturyTel was required by law (under section 252(i) and related rules) to make it available to Socket Telecom.

Thus, the Commission ignored the evidence and misapplied the law to the extent that it seemed to implicitly hold that AT&T had somehow allowed the agreement to lapse in the Spectra d/b/a CenturyTel exchanges, stated that Spectra dba CenturyTel had somehow terminated the

¹ See also Order Approving Price Cap Regulation, Case No. IO-2003-0132 (Dec. 17, 2002)(allowing Spectra dba CenturyTel to become subject to price cap regulation under 392.245 RSMo. as successor-in interest to GTE/Verizon); Order Recognizing Adoption of Interconnection Agreement, Case No. TK-2005-0079 (December 21, 2004)(CenturyTel entity that succeeded to GTE/Verizon's interests is bound by interconnection agreements).

² Likewise, Spectra dba CenturyTel's commitment to the Commission that it would make agreements on the same rates, terms and conditions as the existing GTE agreements also demonstrates that a replacement agreement was not necessary. (Report and Order, p. 5).

³ The Agreement had an initial term of three years starting in 1998. (Ex. 5). GTE/Verizon had no right to terminate the Agreement in 1999, nor do its letters (Ex. 42 and 43) give notice of termination. The letters give notice of the sale and simply say Spectra will contact AT&T regarding "renegotiation". Moreover, as to GTE/Verizon the Agreement remained in effect in the other exchanges. It was still in effect when Socket adopted it.

agreement, and ruled that Spectra dba CenturyTel was not required to make the agreement available to Socket Telecom. (Report and Order, p. 12-13, 17). But again, whether or not it had to do so, Spectra dba CenturyTel in fact did make the agreement available to Socket Telecom.

(3) The Commission did not address Socket Telecom's request for confirmation of adoption of the agreement as to CenturyTel. The Commission acted unlawfully, unjustly and unreasonably by failing to address Socket Telecom's request for formal confirmation that CenturyTel is bound to Socket Telecom by the AT&T/GTE interconnection agreement. CenturyTel admitted that it is bound, and the Commission found and concluded that CenturyTel was bound (Report and Order, p. 8), but despite the issue not being contested the Commission did not actually grant the requested relief. Further, the Commission acted unlawfully, unjustly, and unreasonably, in failing to find and conclude that CenturyTel's obligations under the AT&T/GTE agreement extend to all the former GTE exchanges based on CenturyTel's reassembly of those exchanges under one operating enterprise, even though the Commission correctly recognized that there is in fact only a single enterprise (Report and Order, p. 17). The agreement does not require an amendment to incorporate additional exchanges. Contrary to the Commission's finding and conclusion (Report and Order, p. 13), there is no prohibition against multiple subsidiaries of a national ILEC being subject to a single interconnection agreement and in fact such agreements are commonplace. (Tr. 166-67).

Conclusion

For all the foregoing reasons, the Commission's Report and Order herein is unlawful, unjust and unreasonable. Socket Telecom has provided sufficient reason for the Commission to grant and hold rehearing pursuant to Section 386.500 RSMo. and 4 CSR 240-2.160. The Report and Order is unjust, unwarranted and should be changed. The Commission should grant Socket Telecom the relief it has requested herein and issue an order recognizing that the AT&T/GTE interconnection

agreement applies between Socket Telecom and both CenturyTel subsidiaries in all their Missouri exchanges.

WHEREFORE, Socket Telecom respectfully requests the Commission to grant and hold rehearing and thereupon confirm the applicability of the AT&T/GTE interconnection agreement between Socket Telecom and the CenturyTel subsidiaries in all their Missouri exchanges.

Respectfully submitted,

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Certificate of Service

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