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 MOTION TO STRIKE IMPROPER "EVIDENCE" ATTACHED TO SOCKET'S BRIEF ON DISPUTED ISSUES REGARDING CONFORMING INTERCONNECTION AGREEMENT

Pursuant to the Commission's August 24, 2006 "Order Extending Time to File Interconnection Agreement," CenturyTel of Missouri, LLC and Spectra Communications Group, LLC (collectively, "CenturyTel"), and Socket Telecom, LLC ("Socket") filed their respective briefs in support of their proposed conforming language on August 30, 2006. Unable to make its case based on the existing evidentiary record, Socket impermissibly attempted to supplement the record in this proceeding by offering improper "evidence" in the form of three "Exhibits" ("Exhibits 1-3") attached to its brief. For the reasons set forth herein and pursuant to Commission Rule 4 CSR 240-2.080, CenturyTel files this Motion To Strike and respectfully states that the Commission should strike each of those three exhibits, strike all references to those exhibits in Socket's brief, and strike all arguments based on that improper evidence.

I. DISCUSSION

A. The Commission should strike Socket's "Exhibits 1-3" as improper and inadmissible hearsay.

Temporarily setting aside the underlying procedural impropriety of Socket's attempt to belatedly supplement the evidentiary record, as well as the critical due process implications of Socket's endeavor, the exhibits Socket proffers are inadmissible hearsay. Stated simply, hearsay

is an out-of-court statement offered to prove the truth of the matter asserted.[1] Hearsay is suspect, among other reasons, because the opposing party lacks an adequate opportunity to challenge the veracity of the asserted statement. Here, Socket attached "Exhibits 1-3" to its brief purportedly to support its position that thirty (30) events is the proper minimum threshold for triggering a measurement of CenturyTel's performance against a Performance Measure (PM) benchmark.[2] Those exhibits, though, are a form AT&T 5-state agreement that is ostensibly the starting point for AT&T PM negotiations (Exhibit 1), an excerpt of a 1998 transcript of a Texas collaborative PM workshop that on its face does not even purport to be under oath (Exhibit 2), and an unsworn letter sent by SBC to the Texas PUC in 1998 (Exhibit 3). In each respect, the exhibit is rank hearsay (that is, an out-of-court statement Socket offers to prove the content's truth) and CenturyTel lacks any opportunity to cross-examine the declarant.[3] The Commission should not tolerate Socket's callous disregard for basic evidentiary principles designed, at their heart, to ensure fairness in the evaluation of meaningful evidence. Because Exhibits 1-3 constitute inadmissible hearsay under any reading of the Federal Rules of Evidence, the Commission should strike each of the three exhibits, all references to them, and all Socket arguments based on that hearsay.

B. Because of its procedurally inappropriate effort to supplement the record, the Commission should strike Socket's "Exhibits 1-3" and related portions of its brief.

Compounding the fact that it offers inadmissible hearsay as the only ostensible support for its "30 observations" proposal, Socket disregards proper procedure in doing so. The Parties were directed to develop language that "conforms" to the Commission determinations in the

[1] *See* Fed. R. Evid. 801-802.

[2] Ironically, as we explain below, Socket must have hoped that the mere attachment of the exhibits would be persuasive—never mind their content. In fact, the exhibits have precisely the opposite effect to that which Socket intends, showing Socket's confusion in the operation of the AT&T mechanism and its own.

[3] The exhibits also suffer other evidentiary deficiencies, such as Socket's failure to authenticate any of the three exhibits. *See* Fed. R. Ev. 901.

Final Commission Decision. Unable to arrive at complete agreement, the Parties agreed to brief the issues related to the disputed language in the conforming filing. Socket, however, has taken the opportunity to impermissibly supplement the closed record with "evidence" concerning its flawed position on statistical analysis. That effort is improper on its face.

By attaching Exhibits 1-3 to its conforming brief after the close of evidence, Socket effectively deprives CenturyTel of a meaningful opportunity to evaluate the so-called "evidence" and to respond to it. This effect is even more acute given Socket's prior refusal to produce the material contained in Exhibits 2 and 3, despite CenturyTel's repeated requests for any such "evidence" in the context of the Parties' conforming negotiations. Socket proposed its "30 observations" threshold during the Parties' conforming negotiations. CenturyTel dutifully considered Socket's proposal and made counteroffers, but, concerned that Socket's low threshold did not meet the Commission's requirement to negotiate a "statistically significant sample to be determined over a period of months,"[4] CenturyTel repeatedly asked Socket for documentation or material supporting its proposal. Indeed, spurred by Socket's claims in testimony that such statistical authority existed,[5] CenturyTel requested any such supporting material by email on not less than five separate occasions. In response, Socket indicated that it had no authority to share but would do so if and when found. Socket provided Exhibit 1 to CenturyTel (the AT&T 5-state PM starting point for negotiations) and said that it was reviewing additional SBC/AT&T information , but repeatedly insisted that it had no other supporting material.

To do what Socket did here—claim to have no other supporting material and then disingenuously attempt to supplement the closed evidentiary record with Exhibits 2 and 3,

[4] Final Commission Decision ("FCD") at 65.

[5] *See* Exhibit 2 (Kohly Rebuttal) at 116, 118-19. Socket later claimed in an email and comments that its theory was supported by the texts referenced in AT&T Appendix 1, but of course Socket's brief does not cite or quote those texts, and Socket does not claim now even to have read them.

claiming it to be the very supporting material CenturyTel requested—is improper. CenturyTel would agree that, in the end, Socket found nothing to support its statistical theory. But Socket proclaims the opposite, and does so in a procedurally improper and substantively defective manner. Finally having an opportunity to review Socket's Exhibits 2-3, it is evident why Socket refused in negotiations to provide CenturyTel with its so-called "support."[6] Had Socket provided Exhibits 2-3 when requested (or, more to the point, prior to the evidentiary record being closed), CenturyTel would have demonstrated that this material does not, in fact, support Socket's position. Instead, it supports CenturyTel's.

First, Socket contends that it is "obvious" that its attachments support the idea that "30" is a really important number and a really big part of an analysis of performance. Socket claims that because the number "30" can be found within the various hearsay exhibits, its 30-observation "sample"-*qua*-population, while "not scientifically provable[, is, nevertheless] reasonable."[7] Socket also complains that if the CenturyTel language is adopted, CenturyTel may not suffer economic consequences for performing inadequately because Socket's volumes remain small. But, this statement is a *non-sequitur*: without a statistically valid test, the Performance Measures do not accurately test *anything*. They particularly do not test the question of whether CenturyTel's performance is "inadequate" or should be subject to penalties.

Rather than support Socket's claim that 30 is anything but a nice, round, small number, the exhibits actually show exactly what CenturyTel said about the AT&T Appendix 1 in its brief: 30 is a reasonable breakpoint for the selection and application of "small-sample" or "large-sample" statistically-valid tests of performance, but it is not a substitute for a reasonably-sized "population" from which to draw the small or large sample. As the discussion—not testimony—

[6] Socket's Exhibits 2 and 3, respectively, contain the transcript excerpts of the October 6, 1998 "Work Session Project No. 16251" and the "Letter from Christian A. Bourgeacq to ALJ Katherine D. Farroba, Attachment 1".

[7] Socket Brief at 23.

in the 1998 transcript shows, the mechanism that AT&T employed does *exactly the opposite* of what Socket advocates. AT&T proposed to take statistically significant, but relatively small samples of a larger population of transactions in order to avoid establishing a mechanism that would require review of every transaction. Socket proposes to have every transaction be part of the sample, and then, to apply high percentage or perfection measures to them—even though there is nothing to suggest that this methodology would identify a pattern of poor performance on CenturyTel's part. Contrary to its representations that it has produced "support," Socket's proposed language would establish a methodology tailor-made to punish a perfectly acceptable, non-discriminatory level of service.

Socket's gamesmanship is procedurally inappropriate and would operate to unduly prejudice CenturyTel on this issue. Socket cannot supplement the closed evidentiary record in this proceeding at this time in this manner. Over and above the baseline complaint that the exhibits are inadmissible hearsay, Socket cannot be permitted to refuse production of supporting materials during negotiations only to proffer them as "evidence" and argument at a time affording CenturyTel no meaningful opportunity to respond (and after the evidentiary record is closed). CenturyTel is mindful of the Commission's previous decision to reverse its own directive that would have required CenturyTel to file additional information, stating that: "Upon reconsideration, the Arbitrator realized that the offense to due process outweighed the necessity for additional information. . . . Otherwise, CenturyTel would be allowed to file evidence at this 'too-late-to-file-anything-else' date."[8] The Commission should order the exhibits and associated portions of Socket's brief stricken.

[8] Order Denying Motion To Strike, June 22, 2006.

III.
CONCLUSION AND PRAYER

For the foregoing reasons, the Commission should strike Exhibits 1, 2 and 3 attached to Socket's Brief on Disputed Issues Regarding Conforming Interconnection Agreement, strike all references in Socket's brief to the material contained in those exhibits, and strike all arguments based on that improper evidence.

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 5th day of September 2006.

/s/ Larry W. Dority
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