

Traffic)? As this is a question of law, the Commission, without resort to affidavits or extrinsic evidence, should interpret and construe the Agreements. In doing so, the Commission will find that the Agreements are *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 and Legal Memorandum in Support of Its Response to Socket's Cross Motion ("CenturyTel's Legal Memorandum in Support of Response"), 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).³

Contrary to Socket's creative argument—that terms requiring the payment of reciprocal compensation must *be read into* the Agreements—interconnection agreements are governed by fundamental and well-established principles of contract construction and interpretation prohibiting such misadventure. The Agreements are what the Commission ordered them to be—Agreements providing for the exchange of Local Traffic without any provision applying a compensation regime for the termination of that traffic. The practical effect of that ruling is a conformed Agreement that provides for a bill-and-keep type arrangement for the exchange of Local Traffic. If Socket truly believes that Sections 251(b)(5) and 252(d)(2) of the FTA required the Commission to approve an agreement containing 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 Act.⁴

³ See CenturyTel's Legal Memorandum in Support of Response at 1-3.

⁴ See *id.* at 3-4.

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 Conclusively Demonstrates That the Parties Intended "Bill-and-Keep" to Apply to Local Traffic.

As set forth more fully in CenturyTel's Legal Memorandum in Support of Its Response, Socket attempts to support its Cross Motion with numerous extrinsic facts—many of them inaccurate or distorted—pertaining to the parties' negotiation history. As this matter is about contract interpretation, these extrinsic facts are only relevant to the extent that the Commission determines the Agreement to be ambiguous on the question of whether bill-and-keep or reciprocal compensation applies to Local Traffic. Moreover, the Affidavits of Matt Kohly and William ("Bill") Magness, which Socket used to support its Cross Motion, are wholly improper and objectionable.

For the reasons, CenturyTel has also moved in conjunction with this Response to strike all or part of Socket's affidavits in support of its Response and Cross Motion for Summary Determination (*See* CenturyTel's Motion to Strike the Affidavits of William L. Magness and R. Matthew Kohly ("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 and irrelevant.

Subject to CenturyTel's pending Motion to Strike, and as more fully set forth in CenturyTel's Legal Memorandum in Support of its Response to Socket's Cross Motion, many of

the extrinsic facts upon which Socket relies are anything but “undisputed.” Specifically, Socket asserts that CenturyTel rejected an express bill-and-keep provision for Local Traffic that was proposed by Socket during the conforming process. While CenturyTel did reject that provision, the rejection had nothing to do with its express application of bill-and-keep to Local Traffic (including ISP Traffic). Indeed, CenturyTel and Socket were in agreement on that aspect of the provision. Rather, CenturyTel rejected it because Socket insisted on including, among other things, Foreign Exchange (FX) Traffic in the same bill-and-keep provision.⁵ The Commission had just rejected Socket’s attempt during the arbitration to include FX Traffic in the Agreement because it was non-local traffic. Indeed, the bill-and-keep provision that Socket proposed in the conforming process was the very provision that the Commission had just rejected in the arbitration.⁶ Thus, as Socket well knows, CenturyTel rejected Socket’s proposed bill-and-keep provision not because it applied bill-and-keep to Local Traffic (including local ISP Traffic), but rather because of Socket’s insistence that any such provision also apply bill-and-keep to FX and other non-local traffic.⁷

Moreover, Socket essentially admits that the provisions on which it relies—Article V, Sections 9.7, 9.7.1, 9.7.2 and Article III, Sections 10.2 and 10.4—are provisions that were related to the out-of-balance provision in CenturyTel’s proposed bill-and-keep provision and were simply left in the Agreement.⁸ Their presence in the Agreement does not reflect any intention whatsoever to apply reciprocal compensation to Local Traffic. These inert provisions were

⁵ See Affidavit of Susan Smith (“Smith Aff.”) at ¶¶ 10-11.

⁶ *Id.* at ¶ 11.

⁷ See *id.*

⁸ See Socket’s Legal Memorandum in Support of Its Cross Motion at 10-11 (not disputing that these provisions were incorporated into the Agreements early in the negotiations as part of CenturyTel’s proposed bill-and-keep provision); Affidavit of William L. Magness (“Magness Aff.”) at ¶ 28 (admitting that the provisions remain in the Agreements today because there was the parties “never mentioned” them and there was “no effort” to remove them when preparing the conforming Agreements).

simply left in the Agreement when the Commission ordered the parties to delete from the conformed Agreement the only provision that could have made them operable—CenturyTel’s proposed bill-and-keep provision with an out-of-balance trigger.⁹ Notwithstanding the presence of these provisions in the Agreements, not a single one of them applies reciprocal compensation to Local Traffic (including ISP Traffic), or states that the parties will pay each other for the transport and termination of such traffic.¹⁰

II. CENTURYTEL’S RESPONSE TO THE SOCKET’S PURPORTED LIST OF MATERIAL “UNDISPUTED” FACTS IN ITS CROSS MOTION

Commission rule 4 CRS 240-2.117(1)(C) requires CenturyTel to admit or deny, paragraph by paragraph, the material facts asserted to be undisputed in Socket’s Cross Motion. However, Socket combined its “Statement of Undisputed Material Facts” with its Cross Motion in such a way that it is impossible for CenturyTel to determine where the purported factual statement ends and the motion or argument begins. Indeed, under the banner of “undisputed facts,” Socket asserts facts it knows to be in dispute and further intermixes those facts—both disputed and undisputed—with argument. Consequently, given the manner in which Socket has improperly presented its Cross Motion, CenturyTel will, to the extent possible, admit or deny the facts asserted in each numbered paragraph in Socket’s Cross Motion. Regardless of factual assertions, CenturyTel disputes all of Socket’s arguments and/or legal conclusions.

1. CenturyTel admits the factual averments in this paragraph.
2. CenturyTel admits the factual averments in this paragraph.

⁹ See CenturyTel’s Legal Memorandum in Support of Its Response at 10-13; Smith Aff. at ¶¶ 6, 13.

¹⁰ See *id.*

3. CenturyTel admits the factual averments in this paragraph.
4. CenturyTel admits the factual averments in this paragraph.
5. CenturyTel admits the factual averments in this paragraph.
6. CenturyTel admits the factual averments in this paragraph.
7. CenturyTel denies that the Interconnection Agreement provides that the parties will pay each other reciprocal compensation for the mutual exchange of "Local Traffic" as that term is defined by the Agreement.¹¹ CenturyTel admits that some, but not all, of the Agreement provisions Socket cites in its Cross Motion are attached to its Cross Motion.
8. CenturyTel admits that Socket has accurately quoted the definitions of "Local Traffic" and "Section 251(b)(5) Traffic" as those terms are defined in the Agreement.
9. CenturyTel admits that "Local Traffic," as defined by the Agreement, includes local "ISP Traffic." CenturyTel admits that Socket has accurately quoted the definitions of "ISP (Internet Service Provider)" and "Enhanced Service Provider (ESP)" as those terms are defined in the Agreement.
10. CenturyTel admits that Socket has accurately quoted Article V, Section 9.0 as set forth in the Agreement. CenturyTel denies that Section 9.0, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹²

¹¹ See CenturyTel's Legal Memorandum in Support of Its Response at 1-7.

¹² See *id.*

10(a). CenturyTel admits that Socket has accurately quoted Article V, Section 9.7 as set forth in the Agreement. CenturyTel denies that Section 9.7, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹³ CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁴

10(b). CenturyTel admits that Socket has accurately quoted Article V, Section 9.7.1 as set forth in the Agreement. CenturyTel denies that Section 9.7.1, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁵ CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁶

10(c). CenturyTel admits that Socket has accurately quoted Article V, Section 9.7.2 as set forth in the Agreement. CenturyTel denies that Section 9.7.2, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁷ CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁸

¹³ *See id.*

¹⁴ *See id.* at 1-7; Smith Aff. at ¶¶ 6-8, 9 and 13.

¹⁵ *See id.*

¹⁶ *See id.*

¹⁷ *See id.*

¹⁸ *See id.*

10(d). CenturyTel admits that the rates identified by Socket are contained in Article VIIA of the Agreement. CenturyTel denies that the presence of any rate in Article VIIA, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.¹⁹ CenturyTel further denies that the presence of these rates in Article VIIA evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²⁰

10(e). CenturyTel admits that Socket has accurately quoted a portion of Article III, Section 10.2 as set forth in the Agreement. CenturyTel denies that Section 10.2 or the portion quoted by Socket, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²¹ CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²²

10(f). CenturyTel admits that the Agreement, at Article III, Section 10.4, contains a provision addressing annual audits of Local Traffic. CenturyTel denies that this provision, by itself or read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²³

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *See id.*

CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²⁴

11. CenturyTel denies that the foregoing provisions expressly provide for payment for the transport and termination of Local Traffic, and that the following bill-and-keep provisions constitute “exceptions” to any reciprocal compensation obligation.²⁵ CenturyTel denies that the foregoing provisions, quoted or characterized by Socket, each by itself or read in conjunction, require the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²⁶ CenturyTel further denies that the foregoing provisions evidence any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.²⁷

11(a). CenturyTel admits that the Agreement provides that compensation for the exchange of “MCA Traffic” between the parties will be consistent with the Commission’s decisions in Case No. TO-92-306 and Case No. TO-99-483. CenturyTel admits that such Commission decisions require “MCA Traffic” to be exchanged on a bill-and-keep basis.

11(b). CenturyTel admits that the Agreement expressly provides that “VNXX Traffic” shall not be deemed “Local Traffic” and will be exchanged on a bill-and-keep basis. CenturyTel admits that, in footnote 13, Socket has accurately quoted the definition of “VNXX Traffic” as set forth in the Agreement.

²⁴ See *id.*

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*

11(c). CenturyTel denies that Socket has accurately quoted or characterized Article V, Section 9.8 of the Agreement. Indeed, Socket's characterization of Section 9.8 is incomplete, inaccurate and misleading.²⁸

12. CenturyTel admits that, on or about December 6, 2006, Socket began submitting invoices for reciprocal compensation to CenturyTel. CenturyTel admits that the amounts billed in those invoices total more than \$100,000.00. CenturyTel is without sufficient information or knowledge to admit or deny whether Socket sent such invoices by mistake or intentionally. CenturyTel denies all other factual averments in this paragraph. CenturyTel further disputes all argument in this paragraph.²⁹

13. CenturyTel admits that it paid the first two invoices identified by Socket in this paragraph. However, CenturyTel did so by mistake.³⁰ CenturyTel admits that upon discovering its mistake, it discontinued paying further Socket invoices billing CenturyTel for reciprocal compensation. CenturyTel denies all other factual averments in this paragraph. CenturyTel further disputes all argument in this paragraph.

14. CenturyTel presently is without sufficient knowledge or information to admit or deny whether all of the traffic billed under Socket's invoices constitutes "Local Traffic" as defined in the parties' Interconnection Agreement. CenturyTel also is without sufficient knowledge or information to admit or deny whether Socket "believed" CenturyTel would bill Socket for reciprocal compensation. CenturyTel denies all other factual averments in this paragraph. CenturyTel further disputes all argument in this paragraph.

²⁸ See CenturyTel's Legal Memorandum in Support of Its Response at 11-12 & n.29.

²⁹ See *id.* at 19-20; Smith Aff. at ¶ 14.

³⁰ See *id.*

15. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments contained in this paragraph. CenturyTel disputes all argument contained in this paragraph.

16. CenturyTel is without sufficient knowledge or information to admit or deny what considerations, if any, prompted Socket to attempt to bill CenturyTel for reciprocal compensation, and what justifications Socket developed internally for breaching the parties' Interconnection Agreement. CenturyTel further denies Socket's characterizations of CenturyTel's ordering systems, Customer Service Record (CSR) information, maintenance and repair procedures, practices with respect to Change Management Provisions, practices with respect to policies and procedures, position on number porting issues, and performance on meeting due dates. Regardless, all such factual assertions by Socket are irrelevant.³¹ CenturyTel disputes all argument contained in this paragraph.

17. CenturyTel is without sufficient knowledge or information to admit or deny what considerations Socket weighed and what justifications it developed to attempt to support its "business decision to move forward and begin billing CenturyTel for reciprocal compensation." CenturyTel disputes all argument contained in this paragraph.

18. CenturyTel is without sufficient knowledge or information to admit or deny whether Socket developed and now utilizes an "adequate message recording technology," as referenced by Article III, Section 10.2. CenturyTel further is without sufficient knowledge or information to admit or deny whether such message recording technology is "adequate" for the purposes of Section 10.2. That notwithstanding, CenturyTel denies that Section 10.2, by itself or

³¹ See CenturyTel's Motion to Strike at 15-16.

read in conjunction with other provisions of the Agreement, requires the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic. CenturyTel further denies that this provision evidences any intent by the parties to pay reciprocal compensation for the mutual exchange of Local Traffic, including ISP Traffic.³² CenturyTel disputes all argument in this paragraph.

19. CenturyTel admits that Socket has accurately quoted the definitions of “Local Traffic” and “Section 251(b)(5) Traffic” as those terms are defined in the Agreement. CenturyTel denies the last sentence of this paragraph insofar as it suggests that the parties agreed to, or that the Agreements require the parties to, pay reciprocal compensation on any traffic exchanged under the Agreement.³³

20. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket’s process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

21. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket’s process for identifying the traffic for which it bills CenturyTel reciprocal compensation, except that CenturyTel admits that it is not financially responsible for providing compensation to Socket for calls routed to Socket from interexchange carriers. CenturyTel disputes all argument in this paragraph.

³² See CenturyTel’s Legal Memorandum in Support of Its Response at 1-7; Smith Aff. at ¶¶ 6-8, 9 and 13.

³³ See *id.*

22. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket's process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

23. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket's process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

24. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket's process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

25. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket's process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

26. CenturyTel is without sufficient knowledge or information to admit or deny the factual averments used to describe Socket's process for identifying the traffic for which it bills CenturyTel reciprocal compensation. CenturyTel disputes all argument in this paragraph.

27. CenturyTel admits that statements it quoted at paragraphs 8 and 9 of CenturyTel's Motion for Summary Determination are accurate. CenturyTel disputes that such quotes are irrelevant to the instant dispute or in the least bit misleading. CenturyTel disputes all argument in this paragraph.

28. CenturyTel disputes that it seeks to divert the Commission's attention from the contents of the Agreement. Indeed, CenturyTel specifically requested that the Commission

review the provisions identified by the parties and interpret them as a matter of law.³⁴ CenturyTel agrees that Matt Kohly and Socket's counsel, Bill Magness, represented Socket in the negotiation and arbitration process that resulted in the approved Agreements. CenturyTel admits that it did not agree to incorporate into the conformed agreement the specific bill-and-keep provision proposed by Socket during the conforming process. However, the reason CenturyTel could not agree had nothing to do with provision's intent to expressly apply bill-and-keep to Local Traffic, including ISP Traffic. Rather, CenturyTel would not agree to incorporate the provision proposed by Socket because, in addition to Local Traffic, it sought to apply bill-and-keep to Foreign Exchange (FX) Traffic and potentially other "Non-MCA Traffic" not specifically addressed by the Agreement.³⁵ CenturyTel admits that it agreed to submit the intercarrier compensation provisions in the Agreements precisely as conformed to the Final Commission Decision, and that the Final Commission Decision did not require the parties to incorporate a provision applying reciprocal compensation to Local Traffic, including local ISP Traffic. CenturyTel denies all other factual averments in this paragraph including those contained in footnote 15. With respect to footnote 15, CenturyTel denies that, in its "Statement of Compliance and Non-compliance of Conforming Interconnection Agreement," the acknowledgment cited by Socket applies to the intercarrier compensation provisions set forth in the Agreement. On the contrary, CenturyTel specifically stated in that filing that certain terms "simply 'conform' to the determinations of the Commission where the parties could not reach agreement after arbitration[.]"³⁶ This statement was specifically included due to the

³⁴ See CenturyTel's Motion for Summary Determination at ¶ 12.

³⁵ See CenturyTel's Legal Memorandum in Support of Response at 7-10; Smith Aff. at ¶¶ 9-11.

³⁶ See Smith Aff. at ¶ 12 and Exhibit "C" thereto (attaching excerpts of CenturyTel's Statement of Compliance and Noncompliance, Case No. TO-2006-0299); see also Socket's Cross Motion, Exhibit 15 (attaching same).

Commission's rulings on the intercarrier compensation provisions and the status of those terms in the conformed Agreement.³⁷ CenturyTel further disputes all argument in this paragraph.

29. CenturyTel admits that the portion of the transcript in Case No. TO-2007-0341 cited by Socket is accurately quoted. However, Mr. Stewart's statement constitutes an inaccurate legal conclusion that can in nowise be considered an admission binding on CenturyTel.³⁸

30. CenturyTel admits that it paid the first two reciprocal compensation invoices sent by Socket; however, such payments were made inadvertently.³⁹ CenturyTel denies all other factual averments and disputes all other argument contained in this paragraph.

31. CenturyTel admits that Socket seeks the determinations set forth in subparagraphs (a) and (b) of this paragraph. However, CenturyTel disputes that Socket is entitled to any such determinations by the Commission.

WHEREFORE, CenturyTel respectfully requests that the Commission:

- (a) grant its Motion for Summary Determination and declare that the Interconnection Agreements, as a matter of law, require the exchange of Local Traffic, including Section 251(b)(5) Traffic and local ISP Traffic, without the payment of compensation;

³⁷ Smith Aff. at ¶ 12.

³⁸ CenturyTel's Legal Memorandum in Support of Its Response at 17-19; Smith Aff. at ¶ 15; Affidavit of Charles Brent Stewart ("Stewart Aff.") at ¶¶ 2-4.

³⁹ CenturyTel's Legal Memorandum in Support of Its Response at 19-20; Smith Aff. at 14.

- (b) grant its Motion for Summary Determination on the additional bases that Socket is collaterally or judicially estopped from asserting that reciprocal compensation applies to such traffic; and
- (c) deny Socket's Cross Motion for Summary Determination.

IN THE ALTERNATIVE, subject to CenturyTel's Motion to Strike, and to the extent the Commission determines that the Agreements are ambiguous as to the compensation regime that applies to Local Traffic, including Section 251(b)(5) Traffic and local ISP Traffic, CenturyTel respectfully requests that the Commission:

- (a) grant CenturyTel's Motion for Summary Determination on the grounds that the extrinsic evidence in this case demonstrates the parties' intent to exchange Local Traffic, including local ISP Traffic, on a bill-and-keep basis; and
- (b) deny Socket's Cross Motion for Summary Determination on the same grounds.

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