

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
Establishing Just and Reasonable Rates for Local) WC Docket No. 07-135
Exchange Carriers)

COMMENTS OF CENTURYTEL, INC.

CenturyTel, Inc. (“CenturyTel”), on behalf of its incumbent local exchange carrier (“ILEC”) subsidiaries, hereby files comments in response to the Federal Communications Commission’s (“Commission’s” or “FCC’s”) Notice of Proposed Rulemaking in the above-captioned proceeding.¹ CenturyTel believes that the Commission should take strong action against carriers who intentionally manipulate the tariff rules to generate revenues far in excess of their authorized rates of return. However, based on its breadth of experience with all types of FCC regulation, the FCC should not throw out the baby with the bath water by enacting changes to the tariff rules that will punish everyone, including those who have never pursued such behavior. This is especially the case here, where the “traffic pumping” schemes were engaged in solely by carriers that utilized the procedures of Rule 61.39, a group of carriers that represents only a small subset of access services and revenues. The FCC should follow a more focused course by using its existing enforcement arsenal to address violations of the law.

I. INTRODUCTION

CenturyTel is an integrated communications carrier providing voice, broadband data, and video services in 25 states to rural and small urban markets. CenturyTel is the ILEC in 72 study

¹ *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice Of Proposed Rulemaking, WC Docket No. 07-135 (rel. Oct. 2, 2007)(“*Notice*”).

areas with close to 2.2 million access lines and also provides competitive LEC services in a number of markets. Its ILEC access services are provided pursuant to almost every type of regulation including rate of return, price caps, and average schedules. Some of its study areas are members of the National Exchange Carrier Association (“NECA”) switched access pool and others are providing switched access services under its own tariffs filed with the FCC.

CenturyTel of Central Wisconsin, LLC, Spectra Communications Group, LLC, and Telephone USA of Wisconsin, LLC, withdrew from NECA’s switched access pool and introduced unified traffic-sensitive rates together with CenturyTel of Wisconsin, LLC within the CenturyTel Operating Companies (“CTOC”) tariff pursuant to the Commission’s rules to take effect on July 1, 2007. CenturyTel took this action to reduce the rates of the former NECA companies and to correct underearnings at CenturyTel of Wisconsin, resulting in an overall savings to access customers.² Although this new tariff offering was a routine rate-of-return filing that complied with all the FCC rules, CenturyTel found itself in the unfortunate situation of withdrawing from the NECA pools at the same time as other companies that had been accused of traffic pumping and artificially inflating rates.³ The FCC suspended all tariffs associated with carriers withdrawing from the NECA pool for one day and instituted an investigation based on feared traffic pumping, even though CenturyTel has never engaged in such behavior and there were no indications that it ever would. In order to avoid spending hundreds of thousands of dollars to participate in a needless investigation, it was faced with the Hobson’s choice of participating in a full blown investigation or having to implement tariff language promising to

² By doing so, CenturyTel does not intend to imply that NECA’s pooled rates are unlawful or inappropriate as a general matter, only that the cost-benefit analysis concluded that it was economically efficient for CenturyTel to file its own traffic-sensitive rates for the withdrawn CenturyTel study areas.

³ See, e.g., Wireline Issues, Communications Daily (Aug. 20, 2007).

adjust rates if demand increased by a specified percentage.⁴ It took the latter route primarily for economic reasons so that it could resolve the matter in the short-term, while evaluating longer-term reforms that did not entail the significant legal issues outlined below.

II. THE FCC SHOULD TAKE ENFORCEMENT ACTION AGAINST TELEPHONE COMPANIES THAT ARE FOUND TO BE MANIPULATING TRAFFIC AND COST FIGURES IN ORDER TO EARN EXCESS PROFITS.

Notwithstanding any rules the Commission may adopt as a result of the *Notice*, the FCC should deal harshly and promptly with intentional manipulation of cost and demand expectations in the context of access tariff filings. The FCC's long-standing rules have required rate-of-return ILECs to make good faith estimates of projected revenues and traffic demand based on historical data and known and measurable changes expected in the future.⁵ Some smaller carriers pursuant to Rule 61.39 are permitted to base rates entirely on historical figures.⁶ Regardless of which rule is followed, a carrier which intentionally inflates costs or underestimates demand to increase revenues beyond a return of 11.25% would risk an FCC finding that it is in violation of Section 201's proscription of unreasonable rates.⁷

⁴ The third option, returning the properties to the NECA pool, was not a rational option because it would have been disadvantageous to customers.

⁵ The current version of those rules is located at 47 C.F.R. § 61.38.

⁶ *Id.*, § 61.39.

⁷ The mere fact, however, that actual costs or demand is different from projections is not by itself sufficient evidence that rates are unlawful or that carriers have violated the rules. By their very nature, projections are predictions of the future, and actual results could and do vary. This variation may raise implications about the accuracy of future projections, but does not necessarily prove that the original projection was not accurate and lawful when made.

III. THE FCC SHOULD NOT ALTER CURRENT TARIFF FILING REQUIREMENTS BECAUSE THESE RULES HAVE BEEN CRAFTED FROM YEARS OF EXPERIENCE AND HAVE PRODUCED ENORMOUS BENEFITS TO CARRIERS IN TERMS OF REDUCED COSTS AND EFFICIENT TARIFF ADMINISTRATION.

There has been no indication that any carriers other than those utilizing the procedures of Rule 61.39 ever engaged in improper access stimulation. Thus, there is no justification for the FCC to address the tariff practices of other carriers.⁸ Furthermore, existing procedures can adequately address any traffic pumping scheme that might arise.

The federal tariff filing requirements have been included in Title II of the Communications Act since 1934. Congress has amended that statute over the years in order to correct certain imbalances that had arisen in the tariff process.⁹ The FCC has modified its Part 61 rules which implement these statutory provisions a number of times over the years, refining them to create a balance between ensuring reasonable rates, terms, and conditions, and efficient tariff administration.¹⁰ As the cumulative result of all of these revisions, the FCC currently has in place all of the pre- and post-effective tools necessary for it to ensure that rates remain reasonable and that consumers are protected. Therefore, the measures proposed in the *Notice* are simply not necessary.

Commission rules require that a rate-of-return carrier file access tariffs with respect to their access charges on an annual basis. Smaller carriers are permitted to file every two years at

⁸ CenturyTel does not believe that the few carriers who may have engaged in traffic pumping schemes require any changes even to Section 61.39 of the rules. Since CenturyTel does not qualify for this rule because it is not a subset three carrier, it will leave arguments with respect to that specific section to subset three carriers.

⁹ See, e.g., Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 402(b)(1)(A)(iii).

¹⁰ See, e.g., *Tariff Filing Requirements for Nondominant Common Carriers*, CC Docket No. 93-36, 8 FCC Rcd 6752 (1993); *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, CC Docket No. 92-135, 8 FCC Rcd 4545 (1993); *Amendment Of Part 61 Of The Commission's Rules Relating To Tariffs And Part 1 Of The Commission's Rules Relating To Evidence*, Docket No. 18703, 25 FCC 2d 957 (1970).

their option. Subset three carriers are permitted to file under the optional method established in Section 61.39 of the rules based on their historical costs and demand. Pursuant to Section 204 of the Communications Act, all of these carrier filings are subject to investigation by the FCC's staff prior to the tariff revisions taking effect. The staff frequently utilizes Section 204 to begin investigations of tariff rates, terms, and conditions they believe raise questions of legality. In addition, an interested party may file a petition seeking rejection or modification of tariff changes before a tariff is allowed to go into effect.¹¹ The FCC frequently has required carriers to adjust rates pursuant to pre-effective tariff investigations to ensure that the rates, terms or conditions comply with the law.¹² Moreover, numerous informal jawboning sessions have led to voluntary carrier tariff revisions.

After tariff changes are in effect, an interested party may file a complaint asking the Commission to find an effective tariff unlawful pursuant to Sections 207 (in federal district court) or 208 (at the Commission) of the Act. The FCC has found that specific rates are unlawful in complaint proceedings,¹³ which resulted in adjusted rates to customers. The FCC may begin an investigation of existing tariff terms and conditions on its own motion, and prescribe lawful terms and conditions, pursuant to Section 205 of the Act. The FCC has

¹¹ 47 C.F.R. § 1.773.

¹² *See, e.g., Annual 1990 Access Tariff Filings*, CC Docket No. 90-320, 5 FCC Rcd 4177 (1990) (“1990 Annual Access Investigation”); *1993 Annual Access Tariff Filings, 1994 Annual Access Tariff Filings*, CC Docket No. 94-65, 19 FCC Rcd 14949 (2004).

¹³ *See, e.g., Communications Vending Corporation of Arizona, Inc., v. Citizens Communications Company*, 17 FCC Rcd 24201 (2002); *AT&T Corp., v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001).

concluded in the past that such procedures are sufficient to protect customers.¹⁴ Although rare, the FCC has also used its Section 205 prescription power to reform carrier rates.¹⁵

Therefore, the above-cited procedures are wholly adequate to address any potential access stimulation schemes, and, thus, no further burdensome tariff filing, tariff review, potential tariff refiling, or certification procedures need to be added. This traffic pumping matter can be readily addressed through existing FCC enforcement procedures.

IV. SECTION 204(A)(3) OF THE COMMUNICATIONS ACT PROHIBITS THE COMMISSION FROM REQUIRING THAT AN ILEC INCLUDE LANGUAGE IN ITS TARIFF OBLIGATING IT TO CHANGE RATES UPON THE OCCURRENCE OF CHANGED DEMAND.

The FCC proposed in the *Notice* that tariff language be inserted by ILECs which obligates a carrier to reduce rates if demand grows by a specified percentage, such as 100 percent, during the tariff period.¹⁶ This requirement is not only inconsistent with the statute, it violates the long-standing principles that rate changes should be carrier-initiated, reviewed only in the context of the two-year monitoring period, and afford a carrier due process rights.

First, Section 204(a)(3) of the Communications Act conclusively designates tariff changes made pursuant to the terms of the statute as “deemed lawful.” Therefore, rates remain lawful until and unless the Commission finds that the rates are unlawful pursuant to its other statutory processes, such as through a decision based on proceedings conducted pursuant to

¹⁴ *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, 12 FCC Rcd 2170, 2182-84, ¶¶ 20-23 (1997) (“*Streamlined Tariffing Order*”), *recon. denied*, 17 FCC Rcd 17040, 17043, ¶ 6 (2002).

¹⁵ *See, e.g., New England Telephone Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *cert. denied*, 109 S. Ct. 1942 (1989).

¹⁶ As stated previously, CenturyTel in fact included such language in its CTOC tariff in order to avoid the needless expense associated with a tariff investigation simply because certain of its study areas withdrew from NECA and introduced traffic-sensitive access rates. Letter from Robert N. Brown, CenturyTel to Secretary, FCC, Transmittal No. 57 (Sept. 7, 2007). Although there was absolutely no evidence that CenturyTel was setting its rates in an attempt to exceed its lawful rate of return, it was forced to adopt a solution that was unnecessary and illegal.

Sections 205 or 208 of the Act.¹⁷ Forcing a carrier to include language in a tariff that would automatically require it to make a change based on a single numerical trigger is inconsistent with this statutory “deemed lawful” status. Simply put, since the tariffs are “deemed lawful,” they cannot automatically become unlawful until government action is taken or the carrier makes another tariff filing.

Second, ever since the time that carriers have filed tariffs, government regulation has been based on the principle that tariffs are carrier-initiated.¹⁸ This means that it is the carrier’s responsibility to file tariffs that recover its costs, and the tariff may remain in effect until an appropriate government action requires the carrier to change it. If the carrier is underearning, it is the carrier’s responsibility to file a rate change, and the prohibition on retroactive ratemaking prohibits a carrier from recovering past undercharges.¹⁹ Thus, the automatic revision language proposed by the FCC does violence to the maxim that the telecommunications tariffs are to be carrier-initiated, subject of course to a finding of unlawfulness on a going forward basis through use of appropriate due process procedures.

Third, an automatic revision requirement violates the Commission’s two-year rate-of-return monitoring period. Section 65.701 of the FCC rules provides that the Commission will evaluate whether a carrier is earning in excess of its authorized rate-of-return prescription only upon a review of the carrier’s actual costs and demand as reflected in a final two-year rate-of-return monitoring report. The FCC selected the two-year period in order to provide flexibility to

¹⁷ *Streamlined Tariffing Order*, at 2184, ¶ 23.

¹⁸ *AT&T Co. v. FCC*, 572 F.2d 17, 20 (2d Cir. 1978).

¹⁹ *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981)(followed by *Investigation of Special Access Tariffs of Local Exchange Carriers*, CC Docket No. 85-166, 12 FCC Rcd 7026, ¶¶ 224-25 (1997)); *Public Service Commission of New Hampshire v. FERC*, 600 F.2d 944, 961 (D.C. Cir.), *cert. denied*, 444 U.S. 990 (1979).

carriers and to recognize that costs and demand fluctuate over time. Therefore, the FCC concluded that only the entire two-year period is a reasonable time period within which to review performance.²⁰ Requiring carriers to adjust rates based on the occurrence of one event, a demand change, at a specific point in time during this period, completely upsets the careful balance achieved by the two-year tariff period. It fails to take into account any other changes, such as costs changes, or changes which may occur during a later time in the monitoring period.²¹

Finally, the automatic revision requirement violates the carrier's due process rights. A carrier is entitled to make its own decision on whether a tariff change should be proposed. If a government agency believes that a change is warranted, it is entitled under the law to require it; however, the agency must afford a carrier due process rights. Due process requires that the company have an opportunity to provide its own facts and position prior to the government reaching a decision. Such due process rights are contemplated in both the Section 208 complaint process, as well as the Section 205 prescription process. The proposed procedures do not protect due process rights, because there is no opportunity to present one's case to the government. For all of these reasons, the *Notice's* suggestion that carriers be required to include an automatic rate adjustment clause in their tariffs should be rejected as unlawful.²²

²⁰ *Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes*, CC Docket No. 92-133, 10 FCC Rcd 6788, ¶ 144 (1995).

²¹ In fact, the Commission's attempt to circumvent the two-year period has been reversed in court in the past. *See, e.g., Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1238-40 (D.C. Cir. 1993)(a finding of unlawfulness based on a six-month period found to violate the FCC's two-year rate-of-return monitoring period).

²² The FCC should also not forbear from applying Section 204(a)(3) of the Act because it would be legally highly questionable. Forbearance was meant to permit the FCC to deregulate, not to impose regulation beyond the careful balance that Congress sought to achieve through enacting changes to the tariff process. *See Comments of the Verizon Telephone Companies, AT&T Corp. Petition Pursuant to 47 U.S.C. Section 160(c) of the Communications Act For Forbearance from Enforcement of Section 204(a)(3) of the Communications Act, As Amended*, WC Docket No. 03-256 (filed Jan. 30, 2004).

V. THE PROPOSED RULES PRODUCE HARM TO CARRIERS THAT OUTWEIGHS ANY ADVANTAGE THAT MIGHT BE GAINED FROM ADOPTION OF A NEW RULE.

ILECs are already heavily regulated. They must file voluminous amounts of data every time they make annual tariff filings that detail their historical and projected costs, and historical and projected demand. This information is required to be filed in a Tariff Review Plan (“TRP”), some of which must be filed approximately 60 days prior to the actual tariff effective date. In addition, the FCC often asks for additional information to clarify or supplement the TRP information after the tariff is filed. Neither customers nor the FCC need additional information, over and above that already provided, to evaluate carrier rates. Such additional requirements would be burdensome and therefore should not be adopted.

Additional procedures, such as automatic tariff revision language, would harm carriers by skewing the rate-setting process to ensure that carriers would earn less than their authorized rates of return. At the current time, carriers are obligated to retarget their rates annually or biennially to earn the allowed rate of return. Carriers are not guaranteed they will actually be able to earn the authorized rate of return, particularly in light of the declining number of long distance minutes subject to access charges. Although carriers are entitled to make a mid-course correction, they often do not because of the burdens associated with making a rate change filing and the FCC’s strong preference for limiting rate increases to annual review periods. Requiring an automatic adjustment skews the process since it operates only in one direction: it will push rates down if triggered, but there is no corresponding trigger that would permit increased rates.

Although the prejudice to rate-of return carriers is clear, it is even clearer for price cap carriers. Price cap carriers are permitted to keep earnings if they exceed initially projected levels by reducing costs or gaining minutes. To automatically deprive a price cap carrier of this governmental promise that it can keep gains associated with improved efficiency would severely

undermine the incentive nature of price cap regulation. The FCC has noted this negative impact in justifying the elimination of such features as sharing requirements.²³ Therefore, imposing automatic change trigger would severely undermine the efficiency incentives of the FCC's price cap rate regulation scheme and should not be adopted.

VI. CONCLUSION

For the foregoing reasons, CenturyTel urges the Commission not to adopt any changes to its tariff processes aimed at addressing access stimulation. The FCC should be vigilant in relying on existing enforcement tools, including pre-effective tariff review and Sections 205 and 208 investigations, to control the infrequent, potentially unlawful behavior of access carriers.

Respectfully submitted,

By: /s/ Gregory J. Vogt

Jeffrey S. Glover
John F. Jones
CenturyTel, Inc.
100 CenturyTel Park Drive
Monroe, LA 71203
(318) 388-9000

Gregory J. Vogt
Law Offices of Gregory J. Vogt, PLLC
2121 Eisenhower Ave.
Suite 200
Alexandria, VA 22314
(703) 838-0115

Of Counsel

Counsel for CenturyTel, Inc.

December 17, 2007

²³ *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, CC Docket Nos. 94-1, 96-262, 12 FCC Rcd 16642, ¶ 153 (1997).

Certificate of Service

I, Gregory J. Vogt, do hereby certify that I have on this 17th day of December 2007 caused a copy of the foregoing “Comments of CenturyTel, Inc.” to be served by electronic mail upon the following:

Best Copy and Printing, Inc.
Portals II
445 S.W. Twelfth St.
Washington, D.C. 20554
fcc@bcpiweb.com

/s/ Gregory J. Vogt
Gregory J. Vogt