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IN THE SUPREME COURT OF ARKANSAS

ALLTEL ARKANSAS INC.; ALLTEL
COMMUNICATIONS, INC.; AT&T
COMMUNICATIONS OF THE SOUTHWEST,
INC.; SOUTHWESTERN BELL TELEPHONE
COMPANY; CONSUMER UTILITIES RATE
ADVOCACY DIVISION OF THE ARKANSAS
ATTORNEY GENERAL OFFICE

✓ 99-236-u
99-237-u

APPELLANTS

VS.

NO. _____

ARKANSAS PUBLIC SERVICE COMMISSION

APPELLEE

ON APPEAL FROM THE
ARKANSAS PUBLIC SERVICE COMMISSION
AND REVIEW FROM THE
ARKANSAS COURT OF APPEALS
CASE NO. CA 00-1109

PETITION FOR REVIEW OF APPELLEES
CENTURYTEL OF NORTHWEST ARKANSAS, LLC AND CENTURYTEL OF
CENTRAL ARKANSAS, LLC

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Arkansas, LLC and CenturyTel of Central
Arkansas, LLC

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Arkansas, LLC

PETITION FOR REVIEW

COME CenturyTel of Northwest Arkansas, LLC and CenturyTel of Central Arkansas, LLC (herein collectively referred to as "CenturyTel"), pursuant to Rule 2-4 of the Rules of the Supreme Court, for their Petition for Review, state:

1. CenturyTel respectfully requests that this Court review the decisions of the Arkansas Court of Appeals in Case No. CA00-855 and the related case CA00-1109. In these cases, the Court of Appeals vacated and remanded the orders of the Arkansas Public Service Commission ("Commission") that allow CenturyTel to provide telephone services to approximately 213,000 Arkansans. By taking this action, the Court of Appeals has contradicted Supreme Court precedent and jeopardized CenturyTel's ability to continue providing telephone service to the affected customers. Taken together, these reasons satisfy the requirements of Supreme Court Rule 2-4(c). CenturyTel attaches a copy of its Petition for Rehearing pending before the Court of Appeals.

2. On March 29, 2000, in Docket No. 99-220-U, the Commission approved CenturyTel's \$843 million purchase of GTE's assets throughout most of Arkansas. The sale closed on July 31, 2000, and CenturyTel began operating the facilities the following day. In its order, the Commission approved CenturyTel's plan to charge local and toll service telephone rates at the same rates charged by GTE. In addition, the Commission approved CenturyTel's plan to set its intrastate switched access rate (the rate it charges other telecommunications companies for the use of its facilities) according to the same method used by GTE, that being a rate set at parity with its corresponding interstate rate as approved by the Federal Communications Commission ("FCC"). By using this method to set its rate, CenturyTel complied with the Commission's orders in Docket No. 83-042-U (the "Access Parity Order").

3. Soon after approving the asset purchase, the Commission issued another order (in

Docket Nos. 99-236-U and 99-237-U) approving CenturyTel's requests for Certificates of Public Convenience and Necessity ("CCNs"). Arkansas law requires that public utilities secure CCNs in order to provide service. The Commission found that CenturyTel's setting of its intrastate switched access rate at parity with the FCC-approved federal rate was in the public interest and consistent with the methodology used by GTE.

4. The Appellants before the Court of Appeals (specifically, ALLTEL, Southwestern Bell Telephone Company, and the Arkansas Attorney General) argued that the Commission erred in allowing CenturyTel to set its intrastate switched access rates according to the mandates of the Access Parity Order. However, the Appellants below failed to include the Access Parity Order in either the record or the abstract presented to the Court of Appeals. Both the majority and the concurring opinions of the Court of Appeals state that the court could not adequately address the issues argued by the Appellants due to the absence of the Access Parity Order in the abstract of the case. Regardless of this fact, the court punished the Appellees (the Commission and CenturyTel) for the deficiencies of the Appellants' abstract. According to Rule 4-2(b)(3) of the Rules of the Supreme Court, the Court of Appeals acted outside its authority by vacating and remanding the Commission's decisions due to the deficient abstract. According to Rule 4-2(b)(3), the court had the option of either affirming the decision of the Commission or ordering the Appellants to revise their briefs and abstracts. The Court of Appeal's failure to adhere to the requirements of Rule 4-2(b)(3) requires that this Court review its decision according the Rule 1-2(b)(6).


5. In approving CenturyTel's purchase and operation of the former-GTE properties, the Commission held that CenturyTel had to comply with the longstanding requirement that telecommunications carriers set their intrastate switched access rate in parity with rates approved by

the FCC. Most local carriers in Arkansas have elected to be subject to alternative regulation under Act 77 of 1997; therefore, they are no longer subject to the Access Parity Order. However, CenturyTel remains one of the few, but not the only, carrier whose rates are regulated by the Commission. As such, CenturyTel remains subject to the Access Parity Order. Arkansas law is clear that “ratemaking is a legislative, not a judicial, function.” *Southwestern Bell Telephone Company v. Arkansas Public Service Comm’n*, 58 Ark. App. 145, 151, 946 S.W.2d 730, 735 (Ark. App. 1997). The Commission has wide discretion in choosing its approach to rate regulation, and the Court of Appeals has stated that it does not advise the Commission concerning how to make its findings or exercise its discretion. *Id.* at 151-52, 946 S.W.2d at 735-36. Yet, that is exactly what the court below did in this instance. The Court of Appeals has ruled, without the benefit of a review of the underlying order, that the Commission erred in setting CenturyTel’s intrastate switched access rate according to the Access Parity Order that has been in place since 1986.

6. CenturyTel has provided service to approximately 213,000 Arkansans since August 2000. The Court of Appeal’s decisions in vacating the asset purchase and CCNs leaves telecommunications services to these customers in question. Arkansas law requires that utilities providing service to the public possess a CCN issued by the Commission. The public interest will be greatly affected if the court’s vacation of CenturyTel’s authority to purchase and operate the utility facilities is not reviewed. If the Court of Appeal’s decisions become final without modification, CenturyTel will no longer have the legal authority to continue providing service to approximately 213,000 customers. On review, this Court should reverse the Court of Appeal’s decision to vacate the Commission’s orders. The public interest requires that this Honorable Court take jurisdiction of this matter.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Lawrence E. Chisenhall, Jr., do hereby certify that I have served a copy of the foregoing upon the following parties of record via U.S. Mail, postage prepaid, this 1st day of April, 2002:

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ARKANSAS PUBLIC SERVICE COMMISSION

APPELLEE

PETITION FOR REHEARING

COME CenturyTel of Northwest Arkansas, LLC and CenturyTel of Central Arkansas, LLC (herein collectively referred to as "CenturyTel"), pursuant to Rule 2-3 of the Rules of the Supreme Court, for their Petition for Rehearing, state:

1. Through the Opinions delivered on March 13, 2002 in this case and in CA00-855, the Arkansas Court of Appeals has revoked CenturyTel's authority to continue to provide telephone service to approximately 213,000 Arkansas citizens. Further, the Court's action, by vacating Arkansas Public Service Commission ("Commission") Order Nos. 15 and 16 in Docket No. 99-220-U, has called into question the validity of a \$843 million purchase transaction that closed on July 31, 2000 under which CenturyTel purchased and paid for the assets and facilities of GTE Southwest Inc., GTE Arkansas Inc., and GTE Midwest Inc. (hereinafter "GTE"). The Court's Opinions must be modified in order to allow CenturyTel to continue to provide necessary local and long distance telecommunications service to the affected customers.

2. In essence, this Court determined that the appellate record was deficient. Here, the deficiency stemmed from the absence of Order No. 56 from Docket No. 83-042-U (the "Access Parity Order") from the appellate record, since this was the basis upon which the Commission set the intrastate switched access rate. The net effect of this Court's Opinion in vacating and remanding

the Commission's orders was to reward the Appellants for presenting a deficient record and punish the Appellees who have followed the dictates of the Commission. Due to the far-reaching effect of vacating the Commission's orders, CenturyTel respectfully submits that the more appropriate remedy would be for this Court to affirm the orders of the Commission and remand the issue of intrastate switched access rates to the Commission.

3. By vacating the Commission's orders, the Court has gone much further than simply remanding the issue of parity back to the Commission. As it currently stands, the Court has vacated the Commission's orders, thereby stripping CenturyTel of its authority to provide telephone service on a going-forward basis. No evidence indicates that another local exchange carrier could step in and provide service to the affected Arkansans in a timely fashion should CenturyTel not be allowed to continue its operations. The Court's Opinions must be modified to make clear that this Court did not intend to undo the \$843 million sales transaction or remove CenturyTel's authority to provide telephone service to approximately 213,000 Arkansans.

4. Moreover, CenturyTel does not believe that any party to this appeal sought such drastic action from the Court. The Appellants' arguments before this Court centered upon their disagreement with CenturyTel's intrastate switched access rate being set according to the Access Parity Order. The issue of parity can be addressed before the Commission separate and apart from the other matters approved by the Commission. CenturyTel is prepared to go back before the Commission to address the Court's concerns regarding parity following the development of a more complete record on this subject.

5. Prior to such proceedings before the Commission on the issue of parity, this Court should modify its Opinions to clarify that the Commission's orders authorizing CenturyTel to

purchase and operate the affected facilities remain in full force and effect. CenturyTel respectfully requests that the Court modify its Opinions in CA00-855 and CA00-1109 as follows:

(a) CA00-855: Affirm Commission Order Nos. 15 and 16 in Docket No. 99-220 as they relate to the Commission's approval of the sale transaction between CenturyTel and GTE, and remand said orders as they relate to the Commission's determination that CenturyTel should set rates according to Order No. 56 in Docket No. 83-042-U.

(b) CA00-1109: Affirm Commission Order No. 10 in Docket Nos. 99-236-U and 99-237-U, as related to the Commission's approval of CenturyTel's Certificates of Public Convenience and Necessity, and remand said orders as related to the Commission's approval of tariff rates set according to Order No. 56 in Docket No. 83-042-U.

6. In sum, CenturyTel has provided service through the operation of the former GTE facilities for the past twenty (20) months. CenturyTel stands ready, willing, and able to continue providing telephone service to its customers; however, the wording in the Court's Opinions must be modified to allow this service to continue according to the laws governing public utilities. The Access Parity Order does not affect the local rates that CenturyTel is authorized to charge its residential and business customers; however, due to the far-reaching language in the Court's Opinions, these approximately 213,000 citizens may find their local and long distance telephone service jeopardized if no modification is made to the language of the Court's Opinions.

WHEREFORE, CenturyTel respectfully requests that the Court grant this Petition for Rehearing and modify its opinions pursuant to the language set forth in paragraph five (5) above.

ARGUMENT IN SUPPORT OF PETITION FOR REHEARING

CenturyTel files its Petition for Rehearing requesting that the Court remand only that portion of the Arkansas Public Service Commission's orders dealing with the issue of intrastate switched access rates. This would require that the Court modify its earlier opinions in which it vacated the orders of the Commission authorizing CenturyTel to purchase and operate public utility assets and facilities formerly owned by GTE.

Clearly, the Court found the record on appeal to be lacking as to the issue of parity. The Appellants failed to present Order No. 56 from Docket No. 83-042-U (the "Access Parity Order") to the Commission throughout the proceedings below, and they did not include the order in the record brought before this Court. By vacating and remanding the Commission's orders due to the deficient record, this Court rewarded the Appellants for presenting a deficient record, while at the same time it created uncertainty regarding the validity of CenturyTel's ownership and operation of telephone service for over 200,000 Arkansans. Such a drastic remedy is not required nor in the public interest. CenturyTel is prepared to conduct further proceedings before the Commission on the issue of parity; however, a complete remand of the authorization orders is not necessary. Instead, the Court should affirm the Commission's orders with instructions for further consideration of rates set according to the Access Parity Order.

Prior to the closing of the sale transaction, the Commission found that the proposed purchase and sale was in the "public interest" and that the corresponding Certificates of Public Convenience and Necessity ("CCNs") should be issued authorizing CenturyTel to operate the facilities. Since the closing of the transaction, CenturyTel has operated the purchased assets by providing telephone service to approximately 213,000 Arkansans. Throughout the proceedings before the Commission,

the Appellants herein challenged CenturyTel's authorization to charge an intrastate switched access rate in parity with its corresponding interstate rate. The Commission denied Appellants' argument; however, this Court agreed with Appellants that the Commission did not have substantial evidence before it to find that the use of the parity rate resulted in "just and reasonable" rates.

By vacating Order Nos. 15 and 16 in Commission Docket No. 99-220-U, the Court has stripped CenturyTel of the approval it received from the Commission to enter into an \$843 million asset purchase agreement with GTE. Such Commission approval is required pursuant to Ark. Code Ann. § 23-2-102 (1987) and Rules 6.01 to 6.03 of the Commission's Rules of Practice and Procedure. If the Opinion in CA00-855 is entered as now written, CenturyTel will no longer have the authority to own the purchased assets that it has been operating for the last twenty (20) months. CenturyTel has paid GTE the purchase price, hired additional employees, reprogrammed billing systems, enhanced the networks, expanded offerings and services, and made approximately \$60 million in capital improvements to the purchased assets and facilities. It is unlikely, even implausible, to believe that GTE can, in a reasonable time and manner, reassume title or operation of the facilities based on federal and state regulatory approval requirements. Surely, the Court did not intend that, through its Opinion, the Commission, CenturyTel, and GTE would be made to "undo" the entire sale transaction, particularly since no Appellant requested this relief.

By vacating Order No. 10 in Commission Docket Nos. 99-236-U and 99-237-U, the Court has stripped CenturyTel of the authority it received from the Commission to operate the facilities it purchased from GTE. These orders granted CenturyTel the CCNs required by Ark. Code Ann. § 23-3-201 (1987). If the Opinion in CA00-1109 is entered as written now, CenturyTel will no longer have the authority to operate the facilities that provide local and long distance service to

approximately 213,000 of CenturyTel's residential and business customers. Again, no Appellant requested the dramatic relief granted by the Court. CenturyTel would respectfully suggest that the Court did not intend to take away CenturyTel's authority to operate these facilities which could result in CenturyTel being forced to stop providing local and long distance phone service to its customers.

Instead, after a thorough review of the Court's Opinions, CenturyTel believes the Court intended to only remand that portion of the Orders from both dockets pertaining to the intrastate switched access rate set according to the Access Parity Order. The majority opinion in CA00-1109 states, "Both cases present, as their primary issue, the question of whether CenturyTel should have been permitted to use an order from a 1983 docket known as the parity order to increase its intrastate switched-access rates." CA00-1109, Slip Opinion, p. 1. Further, the majority opinion stated, "We are also asked to address whether the PSC, by allowing CenturyTel to use the parity order, abdicated its responsibility to determine whether those rates were just and reasonable." CA00-1109, Slip Opinion, p. 4. The majority opinion in CA00-855 states, "The question we are ultimately faced with on this point is whether the application of the parity order results in just and reasonable intrastate switched-access rates." CA00-855, Slip Opinion, p. 6.

The orders vacated by the Court addressed and approved many issues in addition to those setting the intrastate switched access rate. Arkansas law requires that the Commission consider whether a proposed transaction is in the "public interest" as a whole, not simply as it might relate to other telecommunications providers. *See* Ark. Code Ann. § 23-3-102 (1987). In making this decision, the Commission is to consider the value of the property, plant, equipment or securities being acquired. Through Order Nos. 15 and 16 in Docket No. 99-220-U, the Commission approved the sale transaction as being in the public interest as a whole, with only one portion of this approval

concerning the intrastate switched access rate. Unquestionably, the intrastate switched access rate only relates to the rate that CenturyTel charges other telecommunications providers; therefore, if this rate is found to be unsupported, this rate alone should be the matter remanded to the Commission for further consideration.

By vacating the Commission's orders, the Court exceeded the remedy being sought by the Appellants. In CA00-855, the majority opinion states, "[The appellants] intervened and argued that, because of the potential switched-access rate increase, the sale was inconsistent with the public interest" and "We have been asked by the appellants to address several arguments involving the application of the parity order in this case." CA00-855, Slip Opinion, pp. 4, 5. In neither the briefs filed by the Appellants nor the arguments made to the Court, have the Appellants claimed the sale transaction as a whole or the CCNs as a whole should be set aside for any reason other than the applicability of the Access Parity Order.

Instead of vacating the Commission's orders, the Court should modify its opinions to remand that portion of the Commission's orders authorizing CenturyTel to charge an intrastate switched access rate in parity with the interstate rate approved by the Federal Communications Commission. Well-established precedent holds that the Court may affirm a portion of a Commission order and remand another portion for further proceedings. *See Brandon v. Arkansas Public Service Comm'n*, 67 Ark. App. 140, 992 S.W.2d 834 (Ark. App. 1999) (remanding Commission decision with instructions to conduct further proceedings to determine class certification).

Just as this Court held in the *Brandon* case, it should now modify its March 13, 2002 decisions to affirm the Commission's over-all approval of the asset purchase and CCNs, and simply remand that portion of the Commission's orders concerning the Access Parity Order from Docket

No. 83-042-U for further consideration. This modification will allow CenturyTel to continue to provide approximately 213,000 Arkansans with their local and long distance telecommunications service without interruption. Such a decision will allow any subsequent Commission proceedings to focus on the issue discussed in both the majority and concurring opinions in CA00-855 and CA00-1109. Pursuant to the Court's directive, CenturyTel will address the issue of the continuing validity of the Access Parity Order with the Commission after the development of a more complete record on the subject. Should any party continue to disagree with any further order of the Commission, that party will, of course, be able to have its complaint heard again by this Court with a fully developed record.

CenturyTel respectfully contends that the vacation of the applicable Commission orders in Docket No. 99-220-U and in Docket Nos. 99-236-U and 99-237-U exceeds the remedies and relief advanced by Appellants in both CA00-855 and CA00-1109. Moreover, the vacation of the Commission orders has the potential of placing the ownership of assets and the operational responsibility for the public utility facilities serving approximately 213,000 customers into such a legal quagmire that CenturyTel believes it necessary on behalf of the customers served by these facilities, as well as for the financial protection of GTE, as the seller, and CenturyTel, as the purchaser, to seek the Court's rehearing of this matter. Public interest would demand no less.

CenturyTel respectfully submits that the Court should modify its earlier Opinions by : (1) affirming Commission Order Nos. 15 and 16 in Docket No. 99-220 as they relate to the Commission's approval of the sale transaction between CenturyTel and GTE, and remanding said orders for further consideration as they relate to the rates set according to Order No. 56 in Docket No. 83-042-U; and (2) affirming Commission Order No. 10 in Docket Nos. 99-236-U and 99-237-U,

CERTIFICATE OF SERVICE

I, Lawrence E. Chisenhall, Jr., do hereby certify that I have served a copy of the foregoing upon the following parties of record via U.S. Mail, postage prepaid, this 21 day of March, 2002:

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