

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

Socket Telecom, LLC,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2007-0341
)	
CenturyTel of Missouri, LLC and)	
Spectra Communications Group, LLC,)	
d/b/a CenturyTel,)	
)	
Respondents.)	

MOTION FOR EXPEDITED RULING ON RESPONDENTS’
PENDING MOTION TO DISMISS
AND
MOTION FOR SUMMARY DETERMINATION

COME NOW Respondents, CenturyTel of Missouri, LLC (“CenturyTel”) and Spectra Communications Group, LLC, d/b/a CenturyTel (“Spectra”) (collectively “Respondents”), pursuant to 4 CSR 240-2.117, and for their *Motion For Expedited Ruling On Respondents’ Pending Motion To Dismiss And Motion For Summary Determination*, respectfully state as follows:

INTRODUCTION

In this case, the Complainant has urged the Commission order Respondents to port the telephone numbers of two specific customers. Complainant has requested and received expedited treatment of its Complaint on the basis of these two specific customers. Respondents are under no legal obligation to port those numbers, and therefore have denied Complainant’s porting requests.

The threshold if not the *only* issue presented in this case is whether Respondent is under a legal obligation to port those numbers. Because it is not, this

Complaint should be immediately dismissed. This is so despite Complainant's and Staff's attempts to broaden the scope of this proceeding far beyond the two porting requests at issue.

All the other broad, tangential, generic, and policy issues raised by the Complainant and by the Staff, which read like a policy change "wish list"--and which certainly involve and will impact other carriers not parties to this case, especially in the context of what does and what does not constitute "industry practices"--need not and should not be addressed in this Complaint proceeding, under an expedited procedural schedule or otherwise. To the extent the Complainant, the Staff, or even the Commission wishes to address these broader issues, a separate case should be brought, the additional affected carriers be made parties, and the case then proceed on a procedural schedule adequate and realistic for that purpose.

PENDING MOTION TO DISMISS

1. On April 2, 2007 Respondents filed their *Motion To Dismiss, Answer And Affirmative Defenses*. As indicated therein, the basis of Respondents' *Motion To Dismiss* was and continues to be that Complainant has failed to state a claim upon which its requested relief can be granted. Respondents' *Motion to Dismiss* was timely filed within the expedited response time (14 days) ordered by the Commission. The Commission has yet to rule on Respondents' *Motion To Dismiss* which still remains pending.

2. Notwithstanding Respondents' pending Motion, and pursuant to the expedited procedural schedule requested by the Complainant and ordered by the Commission, on May 1, 2007, Complainant filed its Direct Testimony, Respondents filed

their Rebuttal Testimony on May 22, 2007, and Staff filed its Rebuttal Testimony on June 12, 2007. An evidentiary hearing is scheduled for July 11-12, 2007.

3. The Missouri Rules of Civil Procedure allow for the dismissal of a suit, or the granting of summary judgment in order to avoid the expense and delay of meritless claims and to permit the efficient use of judicial resources. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W. 2d 371, 376 (Mo. Banc 1993). The Commission's Summary Disposition rule, 4 CSR 240-2.117, echoes the Missouri Rules of Civil Procedure and exists for the same reasons. If the Complainant has failed to state a claim upon which its requested relief can be granted, the Commission should not by inaction or otherwise require Respondents to continue to defend themselves in meritless, time consuming, and costly litigation nor should the Commission be wasting its scarce resources.

4. Complainant's requested relief is based on Respondents' denial of two customer-specific porting requests. Complainant has asked the Commission to direct Respondents "to complete the pending number port order submitted by Socket on October 30, 2006 for 573-322-8421 and on February 23, 2007 for 417-469-9090 and 417-469-4900". Complaint, page 13. The two customers specified are internet service providers ("ISPs"), one of which is a corporate affiliate of the Complainant. The Staff (in theory an objective, neutral party to the case) acknowledges that the substance of the Complaint is based on these "two specific instances" involving these two particular customers. Voight Rebuttal, page 3; *see, also*, Voight Rebuttal, pages 15-16.

5. It is an uncontested and material fact that the first customer identified in the Complaint (porting request for 573-322-8421) was physically relocating out of its existing exchange from Willow Springs to St. Louis.

6. It is an uncontested and material fact that the second customer identified in the Complaint (porting request for 417-469-9090 and 417-469-4900) was physically relocating out of its existing exchange from Ellsinore to St. Louis.

7. The Commission need not rely solely on Respondents' verified pre-filed Rebuttal testimony as to the truth of these material facts. The Staff's verified testimony states that the Complainant has acknowledged that the customers in question are physically moving from one location to another outside the customers' existing telephone exchange area. Voight Rebuttal, page 3.

8. It is important for the Commission to recognize and understand that there have been no allegations that Respondents have refused or are refusing to port numbers when customers switch carriers, or even relocate, *within* the customer's existing exchange. Again, according to the Staff: "Socket witness Kohly acknowledges that CenturyTel ports numbers to Socket when customers move, so long as the customer is not physically moving outside the exchange area (Kohly direct testimony, page 8, line 16,; page 33, line 20; page 34, line 20)." Voight Rebuttal, pages 16-17.

9. In order to proceed with its Complaint, the Complainant must show a currently existing *legal basis* for the relief requested, otherwise the Complainant has failed to state a claim for which relief can be granted. Complainant asserts Section

251(b) of the 1996 Act and federal rules and Federal Communications Commission (“FCC”) decisions as the legal basis for its requested relief.¹

10. However, based on the verified testimony already filed in this case, both the Respondents and here again even the Staff agree that **Respondents are not lawfully required under the specific language of the currently applicable federal law and the FCC’s currently applicable existing rules and decisions to provide what is defined as “location portability”** (also sometimes referred to as “geographic portability”) **in wireline porting situations.** According to witness Dr. Furchtgott-Roth, “...neither Congress nor statute nor the FCC authorizes any and all forms of portability to include location portability.”² Indeed, the FCC has reviewed, considered and deliberately decided not to require geographic portability in wireline porting situations.³

11. The term “location portability” is defined in 47 C.F.R. Section 52.21(j) as follows: “The term *location portability* means the ability of users of telecommunications services to retain existing telecommunications numbers without impairment of quality, reliability, or convenience **when moving from one physical location to another.**”⁴ Based on this unambiguous definition, Respondents are not legally required or obligated under currently applicable federal law or currently applicable FCC rules or decisions to provide Complainant “location portability” (or geographic portability), i.e. to port an

¹ Complaint and Motion for Expedited Relief, paragraphs 24 and 27.

² Furchtgott-Roth Rebuttal, page 9.

³ FCC, RM 8535, Second Memorandum Opinion and Order on Reconsideration, Released October 20, 1998.

⁴ In his Rebuttal Testimony, pages 7-8, Dr. Furchtgott-Roth discusses the several definitions contained in 47 C.F.R. Section 52.21 respecting the different types of “portability”. In his Rebuttal Testimony, page 19, Mr. Voight states that “in the 1996 Act the Congress defined “number portability” between carriers to include retention of telephone numbers *at the same location*” (emphasis supplied).

existing telephone number when the customer physically moves to a location outside of the exchange.

12. In response to this unambiguous definition, Complainant suggests that its two porting requests at issue do not constitute “location portability”, and that therefore, Respondents must honor the porting requests. Even the Staff does not accept this interpretation. Staff witness Voight on page 8 of his verified Rebuttal Testimony states: “The Staff acknowledges that the Socket/CenturyTel Interconnection Agreement(s) (sic) does generally refer to the Act (and by extension, to the FCC), which, in the Staff’s opinion *does not require* any form of location portability such as that requested by Socket...” (emphasis by Mr. Voight).⁵ See, also, Voight Rebuttal, page 20 (“However, as a federal matter, the Staff tends to agree with what it understands is Dr. Furchtgott-Roth’s position: The federal definition of location portability for landline telephone service has not morphed into something different than the customer’s physical location, and there are no specific FCC regulations requiring CenturyTel to honor Socket’s porting request in this case).”⁶

13. Regarding the misguided assertion of any obligation beyond applicable law that may be contained within the Parties’ Interconnection Agreements, the cornerstone of the Agreements can be found in the SCOPE AND INTENT OF AGREEMENT sections where it begins and specifically states:

⁵ The Parties’ Interconnection Agreement does much more than just “refer” to the Act. See discussion below at paragraphs 13-14.

⁶ At no place in Complainant’s Complaint nor in its testimony has Complainant ever cited any federal or state commission decision that specifically expands the definition of “location portability” in wireline porting situations beyond that of the definitions currently used by the FCC. The Staff itself acknowledges that the FCC’s decision respecting portability in the wireless context, cited as justification for its position by the Complainant, is “not on point in wireline porting situations”. Voight Rebuttal, page 26.

Pursuant to this Agreement, and **to the extent required by the Act** and other applicable provisions of federal and state law, the Parties will extend certain arrangements to one another.... [emphasis added].

Further, the cornerstone of the Parties' local number portability obligation under the Agreements can be found in **ARTICLE XII: LOCAL NUMBER PORTABILITY – PERMANENT NUMBER PORTABILITY** where it begins and specifically states:

1.1 CenturyTel and Socket shall provide to each other, on a reciprocal basis, Permanent Number Portability (PNP) **in accordance with requirements of the Act** [emphasis added].

14. Contrary to Complainant's and Staff's assertions to the contrary, "industry practice" does not supersede or trump applicable FCC rules and orders. However, even if this misplaced standard of industry practices is considered, Socket's entire complaint and testimony, as well as Staff's testimony, lacks any evidence of a material issue of fact that the industry has definitively agreed that an obligation to port under the conditions of these two instances was required *at the time of the porting order placements*. In other words, Socket and the Staff offer only anecdotal perceptions, speculation and conjecture and cannot prove that the industry has reached a consensus upon this type of porting being an obligation or even a standard industry practice.

15. The known example of industry consensus on *obligatory* porting practices is found in 47 CFR 52.26(a) where it states:

Local number portability administration shall comply with the recommendations of the North American Numbering Council (NANC) as set forth in the report to the Commission prepared by the NANC's Local Number Portability

Administration Selection Working Group, dated April 25, 1997 (Working Group Report) and its appendices, which are incorporated by reference pursuant to 5 U.S.C. 552(a) and 1 CFR part 51. Except that: Section 7.10 of Appendix D of the Working Group Report is not incorporated herein.

These referenced industry practices do not include any standards, requirements or procedure for location porting.

16 Because the underlying material facts set forth in Complainant's Complaint and in its pre-filed Direct Testimony show that Complainant has requested the porting of telephone numbers of customers who have physically moved to a location outside their existing exchanges, and because Respondents are not required under currently applicable federal law, currently applicable FCC rules or decisions, or the Parties' agreement terms⁷ to complete the porting requests identified in the Complaint, Complainant has failed to state a claim upon which its requested relief can be granted.

17. Respondents have timely and properly filed their Motion To Dismiss at the very outset of this case and is entitled to a ruling on their Motion without further delay. For all the reasons stated above, the Commission should immediately dismiss this case in order to avoid the further expense and delay of the litigation of meritless claims and in the interest of the efficient use of the Commission's resources.

MOTION FOR SUMMARY DETERMINATION

18. Respondents believe that the Commission can and should grant Respondents' still pending Motion To Dismiss for the reasons set forth above. Respondents' Motion To Dismiss notwithstanding, Commission rule 4 CSR 240-2.117 also specifically allows the Commission to dispose of a case when it is shown that there

⁷ ICAs Article XII, section 1.1.

is no genuine issue of material fact and when the party (here, the Complainant) is not entitled to relief as a matter of applicable law.

19. For the legal basis of Respondents' Motion For Summary Determination, Respondents state that they are not required by current applicable federal law, current applicable FCC rules or decisions, or the Parties' agreement terms⁸ to provide "location portability" generally, and specifically, that it is not required to port the specific ISP customer numbers that constitute the basis of the Complaint.

20. Respondents assert that it is uncontroverted in the Complaint and verified pre-filed testimony that customer numbers 573-322-8421, 417-469-9090 and 417-469-4900 involve customers physically relocating outside their respective existing exchanges. For purposes of Respondents' Motion For Summary Determination, Respondents further hereby incorporates the underlying material facts contained hereinabove as if more fully set out verbatim.

21. It is clear from the Complaint itself, as well as the verified pre-filed testimony of all parties, that the porting requests in question involve customers moving from one location to another outside the customers' existing exchange area. Neither the Complainant nor the Staff dispute this nor can they or will they be able to offer any supplemental evidence to the contrary should this case be allowed to proceed to hearing. Accordingly, there is no genuine issue of material fact. The Commission can make its summary determination based on the pre-filed verified testimony already submitted, so no additional or supplemental affidavits are necessary even though permitted under 4 CSR 24-2.117 (1) (B).

⁸ ICAs Article XII, section 1.1.

22. It is also clear that currently applicable federal law, currently applicable FCC regulations and decisions, and the Parties' agreement terms do not impose any legal obligation on Respondents to port the ISP customer numbers which form the basis of the Complaint. For purposes of Respondents' Motion For Summary Determination, Respondents hereby incorporates the legal arguments contained hereinabove as if more fully set out verbatim. Further, in accordance with the provisions of 4 CSR 240-2.117 (B), attached hereto is a separate, brief legal memorandum explaining why summary determination should be granted in favor of Respondents.

23. Respondents have filed this Motion For Summary Determination after the filing of responsive pleadings and after the close of the intervention period as permitted in 4 CSR 240-2.117 (1) (A). However, this Complaint proceeding is unusual in that Complainant has requested, and the Commission has granted, expedited treatment and set an extremely compressed procedural schedule with an evidentiary hearing set for July 11-12, 2007. The Commission has yet to rule on Respondents' still pending Motion To Dismiss, which was filed in less than 30 days from the date the Complaint was filed. Moreover, the Staff filed its Rebuttal Testimony, after requesting an extension of time, only on June 12, 2007; prior to this time Respondents could not know the Staff's position. Under these unique circumstances, Respondents respectfully asks leave of the Commission under 4 CSR 240-2.117 (1) (A) to file this Motion For Summary Determination less than 60 days prior to the hearing. Respondents further request that because of the expedited procedural schedule requested by the Complainant and the fast approaching scheduled evidentiary hearing as a result of that expedited schedule, that Complainant be directed to file its response to this Motion For Summary Determination

(if any) no later than June 22, 2007 so that the Commission will have the opportunity to deliberate and issue its decision on this Motion at least one week prior to the scheduled hearing.

WHEREFORE, for the reasons stated herein Respondents move the Commission as expeditiously as possible to: 1) grant Respondents' still pending *Motion To Dismiss* this proceeding; 2) grant Respondents' Motion For Summary Determination pursuant to Commission Rule 4 CSR 240-2.117 with the time line modifications as stated above; and 3) grant such other and further relief as the Commission deems just and proper in the premises.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, transmitted by electronic mail or mailed, First Class, postage prepaid, to the following parties on the 14th day of June, 2007.

/s/ Charles Brent Stewart

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