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.	)	

APPLICATION FOR REHEARING

COME NOW CenturyTel of Missouri, LLC and Spectra Communications Group, LLC d/b/a CenturyTel (collectively "Respondents"), and for their Application for Rehearing pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160, respectfully state the following:

INTRODUCTION

On March 26, 2008, the Missouri Public Service Commission ("Commission") issued in this case its Report and Order ("Order") bearing an effective date of April 5, 2008. Also on that date, Commissioners Murray and Jarrett jointly issued their Concurring Opinion ("Concurrence"). The Commission in its Order correctly found that the number porting requests at issue constituted "location porting", and that currently applicable federal law does not in any way mandate telecommunications carriers to provide location portability. Nevertheless, the Commission ultimately concluded that Respondents were obligated under the provisions of the parties' Interconnection Agreements ("ICA's") to provide location portability, and ordered Respondents to port the numbers at issue in this case as well as similar number porting requests in the future.

Respondents respectfully request that the Commission grant rehearing and reconsideration of those portions of its Order: (1) that find Respondents were under a legal obligation to port the numbers in question *at the time* Socket Telecom, LLC ("Socket") first submitted to Respondents the number porting requests at issue in this proceeding, as well as porting requests made at any time since Socket filed this Complaint; (2) that find the ICAs impose a legal obligation on Respondents to provide location portability generally, and more specifically, to fulfill the location porting requests at issue in this proceeding as well as similar porting requests in the future; and (3) that summarily denies Respondents' various motions filed throughout the proceeding.

1. Pursuant to Section 386.500 RSMo 2000 and 4 CSR 240-2.160, and for the reasons described below, Respondents also seek rehearing and reconsideration because the Commission's Order and ultimate decision requiring Respondents to provide location portability:

    a. is in violation of constitutional provisions of due process under the Missouri Constitution (1945) Article I Section 10; is in violation of the constitutional prohibition against *ex post facto laws* under the Missouri Constitution Article I Section 13, as well as under Article I Section 10 of the United States Constitution; and is in violation of the constitutional provisions of equal protection of the law as guaranteed by the Missouri Constitution Article I Section 2 and the 14th Amendment of the Constitution of the United States;

    b. constitutes a taking without compensation under the Missouri Constitution Article I, Section 28 (*see* paragraphs 7 & 10).

c. directly contradicts and conflicts with currently applicable federal law governing local number portability obligations and the entity empowered by federal law to impose those obligations, and as such, cannot impose a legal obligation on Respondents to provide location portability;

d. is otherwise unauthorized by law and is discriminatory in its legal application and effect;

e. erroneously interprets the meaning of the ICAs and the Respondents' legal obligations under the ICAs;

f. is made upon an unlawful procedure and is in contravention of the Commission's own rules;

g. is otherwise unlawful, unjust and unreasonable and is arbitrary, capricious, unsupported by substantial and competent evidence, and is against the weight of the evidence considering the whole record;

h. constitutes an abuse of discretion; and

i. fails to contain adequate findings of fact and conclusions of law set forth in the Order in a sufficient unequivocal affirmative manner that a reviewing court could properly review the decision to determine if was reasonable.

2. The Commission in its order has imposed and applied a legal obligation on Respondents retroactively. Socket filed this Complaint on March 19, 2007. Even assuming, *arguendo*, that the Local Number Portability Administration–Working Group's ("LNPA_WG) PIM-60/BP-50 constitutes "industry agreed-upon practices" and/or "industry guidelines" as those terms are to be applied under the ICAs, and that as such, that Respondents are under an obligation to fulfill Socket's location porting requests, the

LNPA-WG clearly had not adopted PIM-60 or Best Practice-50 as of March 19, 2007 – let alone at the time Socket first submitted its porting requests and Respondents' had denied them.[1] For the Commission to find that Respondents somehow were under any legal obligation whatsoever to fulfill Socket's location porting requests on or prior to March 19, 2007 based on action by the LNPA-WG purports to apply and impose a supposed legal obligation on Respondents that certainly did not exist at that time Respondents denied Socket's porting requests. This violates the constitutional protections against retroactive, *ex post facto* application of law as contained in both the Constitution of the United States (Article I, Section 10) as well as the Missouri Constitution (Article I, Section 13), and therefore, is clear error.[2]

3. By its Order, the Commission has unlawfully expanded Respondents' permanent number portability obligations under federal law; obligations that even the Commission acknowledges did not exist at the time the ICAs became effective. After correctly finding despite Socket's strained arguments, that Socket's porting requests constitute location portability and that currently applicable federal law does not require Respondents to provide location portability as part of its required local number portability obligations, the Commission nevertheless concluded that Respondents are legally required to provide location portability. For the Commission to attempt to expand *Respondents'* local number portability legal obligations beyond that *required* of any other carrier under currently applicable federal law, especially when neither the Federal

[1] As evidenced by the meeting minutes of the LNPA-WG, submitted by Socket as a late-filed exhibit by on March 4, 2008 pursuant to order of the Commission, the LNPA-WG only adopted PIM-60 as a Best Practice for the first time on July 10, 2007.

[2] The notion that the ICAs automatically trigger a new legal obligation on Respondents based solely on the purported unilateral actions of other carriers, without some sort of official prior notice to Respondents, likewise is both constitutionally untenable and directly contrary to other specific provisions of the ICAs. See discussion below.

Communications Commission ("FCC"), nor even any other state commission has yet to require location portability of any other carrier, is on its face unlawful, discriminatory, and is in practical effect anti-competitive and unjust.

4. The Commission erred in concluding that *any* unilateral action by the LNPA-WG could somehow dictate or change currently applicable federal requirements and policy respecting location portability. 47 CFR Section 52.26(b)(3) gives the North American Numbering Council ("NANC")—not the LNPA-WG—ongoing oversight of number portability administration. Even then, the NANC's actions are subject to further review by the Federal Communications Commission ("FCC") before becoming legally binding. Ultimately, the FCC establishes what does and what does not fall within local number portability obligations under federal law. This established federal process was fully explained in the uncontested surrebuttal testimony of former FCC Commissioner Dr. Furchtgott-Roth (Exhibit 7, pp. 8-11). The evidentiary record before the Commission reflects that neither the NANC nor the FCC had acted to require location portability at the time Socket initially made its location porting requests, at the time it filed its Complaint, or even by the time the record in this case was closed.[3] For the Commission to disregard 47 CFR Section 52.26(b)(3) and Dr. Furchtgott-Roth's uncontested testimony and find that Respondents are obligated to fulfill Socket's location porting requests based solely on a contested *ex post facto* action by the LNPA-WG is clear error.[4]

[3] A review of the publicly available records of the NANC and the FCC would reveal that this is still the case as of today.

[4] The Commission notes in footnote 59 of its Order that "CenturyTel did not offer any evidence of any 'stay' of industry practices". The Commission misconstrues how the LNPA-WG/NANC/FCC process operates. No "stay" is provided for under this process, only "appeals". CenturyTel had not yet appealed the LNPA-WG's action as of the time of the close of the evidence in this case, mainly because the action of the LNPA-WG occurred first on July 10, 2007. CenturyTel subsequently did file an appeal and as of today even Socket admits in its most recent pleadings that the LNPA-WG's BP-50 is not yet final. The

5. Even assuming, *arguendo*, that the LNPA-WG, acting alone, could lawfully determine and change federal obligations and policies and "industry agreed-upon practices" respecting location portability and did so as of July 2007, this would constitute a significant and material change to Respondents' existing legal obligations since at the time the ICAs first became effective Respondents were under no obligation to provide location porting. The Commission itself has found that were it not for the ICAs, today Respondents would be under no legal obligation to provide Socket's requested location porting. Such a significant and material change to Respondents' legal obligations necessarily would have triggered the ICA amendment provisions of Article III, Sections 3 and 42, a very important part of the ICAs that the Commission apparently ignored. These provisions recognize that the parties' legal obligations may change over time due to changes in applicable law and, therefore, they provide a very specific method and procedure to deal with such changes when they occur. Without the amendment provisions, the parties would be subjected to new, material legal obligations without any notice or due process that is contemplated by the very language of the ICAs. As evidenced by the very existence of Article III, Sections 3 and 42, this later scenario was not the intent of the parties. In addition to totally ignoring the applicability of these specific amendment provisions and procedures of the ICAs, to the extent that the Commission based its decision to require Respondents to provide location portability solely on actions by the LNPA-WG—or worse yet what other *carriers* might or might not

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Commission also is in error in concluding that only CenturyTel is "a holdout". The record before the Commission reflects that several Missouri rural carriers expressed their opposition to PIM-60 at the July 10, 2007. Beyond this, over 50 rural carriers voiced their opposition to PIM-60/BP-50 at the most recent meeting of the LNPA-WG.

do unilaterally (intentionally or unintentionally) without at least some sort of established prior notice procedure—the Commission erred.

6. The entire basis for the Commission to decide that Respondents have a legal obligation to provide location portability relies on two phrases contained in the ICAs: "industry agreed-upon standards" and "industry guidelines" (Article XII, Section 3.2.1 and Section 6.4.4). The Commission's analysis and conclusions are misplaced and are erroneous.

a. The Order on page 11 correctly notes that the parties disagree about the meaning and interpretation of these two phrases. When such a disagreement occurs, the Commission is called upon to analyze the arguments of both parties before determining which interpretation is controlling. This means that Respondents' interpretation must be considered, and the Commission's ultimate decision must be fully explained in its order. Section 386.420 RSMo, *State ex rel. Laclede Gas v. PSC*, 103 S.W.3d, 813, 816 (Mo. App. 2003).

The Commission here, however, summarily discounts *Respondents'* interpretation of the ICAs on the grounds that Respondents' "voluntarily agreed" to the inclusion of these two phrases in the ICAs.[5] It is erroneous for the Commission to simply assume without any record evidence that at the time they agreed to the inclusion of these phrases in the ICAs that Respondents agreed with Socket as to the meaning and import of these phrases. There is no evidence whatsoever for the Commission to find that Respondents *ever* agreed with Socket's and Staff's interpretation of the meaning of those phrases, either in Respondents' conduct or in the record evidence. A state agency cannot put the

[5] Order, page 11.

cart before the horse by making its decision then later making findings of fact and conclusions of law to support that decision. *Stephen and Stephen Properties, Inc. v. State Tax Commission*, 499 S.W.2nd 798, 804[9] (Mo. 1973).

b. The Order continues its findings against Respondents by broadly asserting how changes in telecommunications technology outpace regulatory requirements, how interconnection agreements often contain voluntary provisions that go beyond statutory/regulatory obligations, and how the ICAs in this instance provide for permanent number portability "as required by the FCC **or** industry agreed upon practices".[6] The Commission then concludes its discussion by finding that the parties "apparently recognized that the industry could go beyond the requirements of the FCC in porting numbers".[7]

As discussed above, the parties' legal obligations under the Act can change and the ICAs have a clear procedure to address this situation. Respondents do not disagree that as a general principle evolving technology can outpace the network technical provisioning requirements that were in effect at the time the ICAs were executed. The ICAs properly allow for this, specifically in the sections of Article XII relied upon by the Commission in its Order. The Commission, however, fails to make the very critical distinction between *how* technically porting is to occur and *whether* a particular *type* of porting is mandatory in the first place.

The Commission correctly found that location portability currently is not required under federal law as a part of Respondents' "permanent number portability" obligations.

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[6] *Id*., page 11, emphasis in the original.

[7] *Id.*

These obligations are determined by the FCC. While not required currently by federal law, no one disputes that a carrier certainly can *voluntarily* choose to offer location portability. In the event the carrier does so, it must be technically provisioned pursuant to existing and evolving local routing number (LRN) technology and practices. While Respondents agreed in the ICAs to provide "permanent number portability" by LRN technology in response to FCC orders, that does not mean that Respondents are then required to offer location portability a component of their "permanent number portability" obligations, at least until such time as the FCC concludes that location portability between wireline carriers should be part of those overall permanent number portability obligations.

c. The Commission on page 16 of the Order cites the testimony of Mr. Voight (Tr. 164) and Ms. Smith (Tr. 296) for the proposition that "Staff and CenturyTel both agree with Socket that ALL porting is LRN porting." The Commission here mischaracterizes Respondents' position, which actually is that all types of porting *required by the FCC*, or *voluntarily* undertaken by a carrier, are provisioned pursuant to the LRN method. The Commission also has mischaracterized and apparently has misunderstood this testimony to which it cites. The relevant exchange between Staff Counsel Haas and Mr. Voight was as follows:

> Q. Would you agree with me that in accordance with FCC requirements, *service provider portability* is provided by all carriers pursuant to the LRN method?
>
> A. Yes.
>
> Q. So when the agreement refers to providing LRN pursuant to industry guidelines and practices, they're talking about *number portability*?
>
> A. Yes. Location routing number portability. (emphasis supplied).

Nothing in this exchange is contrary to Respondents' interpretation and actually supports Respondents' position. "Service provider portability", which is required by the FCC, is separate and distinct from "location portability", which is not, and therefore service provider portability of course must be provided pursuant to LRN technology. The Commission erroneously uses "number portability" and "location portability" interchangeably. "Number portability", defined in 47 CFR 52.21(l), is *not* the same as "location portability", as defined in 47 CFR 52.21(j). The Commission likewise mischaracterizes and misunderstands Ms. Smith's testimony, which when read in context beginning at Tr. 295, simply explains the difference between "*interim* number portability" and "*permanent* number portability" and how LRN was decided upon as the technology to be used when fulfilling Respondents' permanent number portability obligations—which again under applicable federal law does not include location portability on either an interim or permanent basis.

d. The entire foundation and basis of the Commission's decision in this case is based upon the interpretation and application of Article XII, Sections 3.2.1 and 6.4.4. If the Commission's interpretation and application of those sections is erroneous, Socket cannot prevail. The Commission's interpretation of these sections is erroneous because:

- The ICAs require the parties to provide permanent number portability in accordance with the Federal Telecommunications Act and applicable FCC rules and decisions and that the ICAs should be interpreted as a whole in such a way as to be consistent with the requirements of currently applicable federal law. A contract or written obligation is to be construed in the light of the law existing at the time it was entered into. *State of*

Missouri ex rel. Jesse E. Smith v. City of Springfield, Missouri, 375 S.W.2d 84 (Mo. 1964).

- Article XII, Section 3.2.1 only addresses the use of the Local Routing Number (LRN) and describes how a port is *technically* completed and provisioned for those types of porting required under applicable federal law.
- The phrase "industry agreed-upon practices", contained in Article XII, Section 3.2.1. and when read in context, only refers to *technical standards* for porting using LRN for purposes of implementing permanent number portability, and even with the conjunctive word "or", still limits the scope of *permanent number portability* to the types of porting *required* by federal law.
- Even if "industry agreed-upon practices" could be interpreted to require Respondents to provide location portability when it is not required by federal law, a company voluntarily (or unwittingly) acting unilaterally to provide location portability--or even multiple companies acting in concert in one or more states--does not rise to the level of "industry agreed-upon practices".
- Article XII, Section 6.4.4 ("industry guidelines") is a *subsection* of Section 6.4, which in turn applies only to the porting of Direct Inward Dialing (DID), and not to all forms of number portability addressed elsewhere in the ICAs, let alone to location porting. General terms and provisions of a contract yield to specific ones. *Smith*, at 91. Language

which deals with a specific situation prevails over more general provisions if there is ambiguity or inconsistency between them. *H.B. Oppenheimer & Co. v. The Prudential Insurance Company of America*, 876 S.W.2d 629, 632 (Mo. App. 1994).

- Even if the phrase "industry guidelines" found in Article XII, Section 6.4.4 did apply beyond the porting of DID numbers, the LNPA-WG has no legal authority via the establishment of a "Best Practice" to change currently applicable statutory law and FCC rules and policy in such a way as to make location porting mandatory.
- The LNPA-WG was created and is empowered to address *technical* porting issues through its established "consensus" procedures; it is not unilaterally empowered to change fundamental FCC policy and the existing FCC rules and regulations governing number portability generally. Its "Best Practices" do not *automatically* become "industry guidelines" or "industry agreed-upon practices" when logged into its "Best Practices" document, and moreover, any action by the LNPA-WG is subject to the multi-level review process set forth in 47 CFR 52.26 in the event a carrier or carriers object, which of course has occurred here.
- Exhibit 13 shows that Respondents are not the *only* carriers to object to the LNPA-WG's PIM-60 prior to the time that the LNPA-WG first included PIM-60 (as then constituted) in its "Best Practices" document.
- The Commission directed and Socket submitted as a late-filed exhibit the LNPA-WG's meeting minutes of the July 10, 2007 along with a hard copy

of and an electronic cite to the resulting LNPA-WG's "Best Practices" document but as noted in Respondents' subsequent objections, Socket's submission in both versions was incomplete. The LNPA-WG's web site setting forth the LNPA-WG's "Best Practices" document at the time the LNPA-WG first included PIM-60 as BP-50 clearly states that: "The members of the LNPA have created a 'Best Practices" document for porting between and within telephony carriers. This document is NOT a mandate, but rather a gentleman's agreement on porting between carriers" (emphasis in the original). To the extent the Commission relied on this late-filed exhibit as a basis of its decision to require Respondents to provide location portability, the Commission should take into account the LNPA-WG's own disclaimer, and at minimum, explain in its Order why it ignored this very straightforward disclaimer.

- The Commission's discussion and findings respecting Issue 3 is unnecessary to resolve this Complaint and in any event the subject matter of Issue 3 is the subject of a separate case now pending before the Commission in Case No. TC-2008-0225. Case No. TC-2008-0225 currently is in mediation by agreement of the parties and by order of the Commission.

7. The Commission on page 12 of its Order then addresses the testimony filed by Embarq in a Pennsylvania arbitration proceeding, and Mr. Kohly's "ample and unrefuted" evidence of his own experiences as further support of "industry agreed-upon practices" and "guidelines". With respect to the Embarq testimony, the Commission

concluded that Embarq's situation in Pennsylvania was the same as Respondents with respect to Embarq's interconnections with CLECs. This simply is *not* correct. There is a huge difference here, namely, that in Pennsylvania the VNXX traffic[8] (at this point in the Pennsylvania arbitration proceeding) IS SUBJECT TO ACCESS CHARGES as opposed to the situation in Missouri. This means that in Pennsylvania, Embarq is fully compensated immediately for the use of its interexchange facilities whereas in Missouri Respondents are not. This obviously makes a huge difference as to Embarq's willingness to offer location portability on a voluntary basis.[9] Had Respondents been given the opportunity to pursue Embarq's complete position during the hearing in this case, this important difference would have come out, but of course Embarq was not a party to this proceeding so Respondents were denied the opportunity to present this significant evidence. The truly "complete information" referred to by the Commission on page 15 of its Order is found in the Recommended Decision by the ALJ in the Pennsylvania Embarq arbitration proceeding, attached hereto for the Commission's reference.

With respect to Mr. Kohly's "ample and unrefuted" personal experiences, Respondents previously noted in their brief that because the other carriers referenced by Mr. Kohly were not parties to this case, Respondents were given no opportunity to cross examine these carriers to determine whether in fact they knowingly provide location portability. Had Respondents been given the opportunity to do so, Embarq would have been able to explain in detail its complete position on location portability. Moreover, it is

[8] A review of the underlying factual circumstances reveals that the VNXX traffic addressed by the Pennsylvania Commission is the same as the "FX-like" traffic addressed in LNPA Working Group Best Practice 50.

[9] CenturyTel itself has agreed to provide location porting in those instances where CenturyTel is compensated for use of its network. See, Case No. LO-2005-0383. Therefore, contrary to the conclusion in this Commission's order, Embarq's position on location porting is actually similar to CenturyTel's.

distinctly possible that the other carriers mentioned by Mr. Kohly may have (like Respondents) *inadvertently* processed Socket's location ports, or had different interconnection agreement terms than that of Respondents respecting compensation for VNXX traffic. Based on the record, the Commission will never know. In addition to denying Respondents due process on this issue, the record is incomplete and as such does not support the Commission's finding with respect to these other carriers. Beyond this, even if these other carriers are knowingly and voluntarily providing location portability *in Missouri*, that does not rise to the level of "industry agreed-upon practices" on an industry-wide basis.

8. The Commission on pages 13 and 14 of its Order discusses the LNPA-WG's "caveats" and concludes that Socket has met these caveats. Even if Socket has met these caveats, for all the reasons discussed above that still does not place a legal obligation upon Respondents to provide Socket with location portability. A check of the publicly available record reveals that BP-50 has still not been finalized with respect to these caveats even as of today due to actions by the NANC and the LNPA-WG subsequently taken after the close of the evidence in this case. As such, there is no way to know whether Socket's porting requests as currently constituted will or will not meet these caveats. Beyond this, for the Commission to make a major change to Respondents legal obligations with respect to location portability based on a Best Practice which has not been finalized denies Respondents due process of law. Should BP-50 be finalized in such a way as to require Socket to modify its porting requests to comply with BP-50, the damage to Respondents already will have been done.

9. The evidentiary record in this case was closed upon the simultaneous submission of briefs on September 10, 2007 pursuant to Commission order and the Commission's own rules, specifically, 4 CSR 240-2.110(8), 4 CSR 240-2.130(17), and 4 CSR 240-2.150(1). Despite this, Socket flooded the Commission with a myriad of post-record submissions to try to bolster its case in contravention of the Commission rules and practice respecting Complaint proceedings. Respondents necessarily were then required to respond to these submissions and strongly objected by filing Motions To Strike. After this abuse of process, the Commission in its Order simply and summarily denied Respondents' Motions (including Respondents' earlier Motions for Summary Determination). The Commission should treat Socket just as it would any other party filing a complaint before the Commission but this was not the case here. The Commission should and must follow its own rules. Rules duly promulgated pursuant to properly delegated authority have the force and effect of law and are binding on the agency adopting them. *State ex rel. Stewart v. Civil Service Com'n of City of St. Louis*, 120 S.W.3d 279, 287 (Mo. App. 2003), *citing Martin-Erb v. Mo. Com'n on Human Rights*, 77 S.W.3d 600, 607 (Mo. banc 2002). The Commission's actions, or lack thereof, with respect to its special procedural treatment of Socket in this case, especially in light of everything else discussed above, reflects that the Commission's ultimate decision in favor of Socket is unfair, arbitrary, and possibly even fundamentally biased in favor of Socket.

10. The Concurrence of Commissioners Murray and Jarrett further points out the fundamental unfairness of the Commission's Order and reflects how--as predicted and argued by Respondents in their earlier ICA arbitration proceedings—Socket is engaging

in arbitrage and gaming the system. In light of this and all the foregoing, the Commission as a matter of fundamental fairness should rehear and reconsider its Order requiring Respondents to geographically port the numbers at issue in this case.

WHEREFORE, for all the reasons set forth herein, the Commission should grant Respondents' Application for Rehearing of its Report and Order issued in this case and find in favor of Respondents.

Respectfully submitted,

/s/ Charles Brent Stewart

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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 attorneys of all parties of record in Case No. TC-2007-0341 on the 4th day of April 2008.

/s/ Charles Brent Stewart