

**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.)	

**RESPONDENTS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW**

COME NOW Respondents, CenturyTel of Missouri, LLC ("CenturyTel") and Spectra Communications Group, LLC, d/b/a CenturyTel ("Spectra") (collectively "Respondents") and respectfully submit the following proposed specific findings of fact and conclusions of law for incorporation into the Commission's Report and Order in this proceeding.

PROPOSED FINDINGS OF FACT

1. This is a case of first impression, both in Missouri and nationally.
2. The two customers requesting porting in this case are both internet service providers ("ISPs"), one of which is an affiliate of Socket.
3. All telecommunications customers, including the two customers in this case, are legally entitled to switch between carriers and that Respondents routinely process such customer requests.
4. All telecommunications customers, including the two customers in this case, are free to switch between carriers *and* keep their original telephone numbers, provided

the customers remain physically located at the same location¹ (*i.e.*, within the same exchange) and that Respondents routinely process such customer requests.

5. All telecommunications customers, including the two customers in this case, have the ability to supplement their basic local telephone service with optional expanded calling plans that allow them to make and receive calls outside their existing telephone exchange boundaries *as if* such calls were still local calls, provided their carrier of choice offers expanded calling plans pursuant to their respective Commission-approved tariffs and the customers comply with the terms of those tariffs.

6. Under traditional FX (foreign exchange) service or other expanded calling plans, such as remote call forwarding (RCF), EAS (extended area service) or MCA (metropolitan calling area) service, the carriers that offer these services receive compensation, usually directly from the customer, to cover the additional cost of utilizing the interexchange (toll) network to carry traffic beyond the customer's local exchange boundaries and such compensation is appropriately shared with any other carriers that are involved in the transport of such traffic.²

7. With some minor exceptions, in Missouri an "exchange" normally is considered to be the same as a "rate center" (Exh. 5, Voight Rebuttal, p. 3, footnote 1).

¹ This is "*service provider portability*" as defined by the FCC in 47 C.F.R. 52.21(q). The definition of "*service provider portability*" is exactly the same as the definition of "*number portability*", both in the federal statute, 47 U.S.C. 153 (30), and in the FCC rules, 47 C.F.R. 52.21(l).

² Normally, the additional cost of using the interexchange/toll network to complete such calls comes in the form of an additive or separate charge to the customer's basic local telephone service rate and is built into the rates charged for the expanded calling service itself. See further discussion below. Other carriers involved in jointly provided dedicated facilities or switched interexchange transport are compensated at their tariffed rates.

8. Completion of calls outside an exchange boundary necessarily requires the use of either the interexchange (toll) network or, such as is the case of FX service, the use of dedicated facilities.³

9. This particular case involves the porting requests of two ISP customers, one in the Willow Springs exchange and one in the Ellsinore exchange, who wish to retain their existing local telephone numbers after relocating their modem banks outside their current rural Missouri exchanges to metropolitan St. Louis.⁴

10. Neither of these two customers currently subscribe to any type of supplemental expanded calling service offered by Respondents.⁵

11. Socket's proposed service in this case is *not* the provision of traditional FX service (which requires the customer to purchase a dedicated facility between the originating and terminating calling areas), and since Socket does not intend to utilize dedicated facilities from the originating calling area, all traffic under its proposed service provisioning necessarily must be carried over common trunk groups over the interexchange (toll) network.

12. Respondents are required under the ICAs to deliver Socket's traffic to Socket's nearest POI.

13. With respect to the Willow Springs exchange customer, Socket's nearest POI is located in Branson, some one hundred miles away and CenturyTel has its own interexchange (toll) trunking facilities between Willow Springs and Branson.

³ Exh. 11, Smith Rebuttal, pp. 5-10; Exh. 12, Smith Surrebuttal, pp. 20-22; Tr. 179-180, 297.

⁴ The first customer (porting request for 417-469-9090 and 417-469-4900) is physically relocating out of its existing exchange from Willow Springs to St. Louis. The second customer (porting request for 573-322-8421) is physically relocating out of its existing exchange from Ellsinore to St. Louis.

⁵ Tr. 296-297.

14. With respect to the Ellsinore exchange customer, Socket's nearest POI is located in St. Louis (over two hundred miles away), and in order to deliver Socket's ISP traffic as proposed, Spectra must route this traffic through two separate tandems utilizing AT&T's interexchange (toll) trunking facilities between Ellsinore and St. Louis, and therefore, Spectra necessarily will incur both non-recurring and recurring costs related to such Socket ISP traffic and will be billed by AT&T.

15. Should the Commission grant the relief requested by Socket in this case, Respondents necessarily will incur significant costs related to the increased use of the interexchange (toll) network (both its own and that of other interexchange carriers) for this ISP traffic for which Respondents will receive no compensation.⁶

16. Should the Commission grant the relief requested by Socket in this case, Socket intends to expand its proposed VNXX service statewide, thereby necessarily forcing Respondents to incur further increasing costs without any compensation for Socket's use of the state-wide interexchange (toll) network and for Respondents' installation of new facilities in order to carry Socket's ever increasing heavy ISP (and possibly some non-ISP) traffic.⁷

17. The Staff and Respondents agree that under the ICAs Socket is required to establish new POIs in all Respondents' exchanges when Socket's traffic volume exceeds

⁶ In the specific case of the Ellsinore exchange, and in addition to non-recurring charges, it is estimated that Spectra could incur over \$2000.00 per month in recurring charges to deliver the Ellsinore customer's ISP traffic to St. Louis (Tr. 301-302, Smith). Such costs will compound significantly as Complainant expands its scheme statewide, which theoretically could include ISP traffic from, for example, the Bootheel area all the way to Maryville. This problem exists whether the customer ports its local number and re-locates outside their exchange simultaneously or whether the customer first ports its local number then waits some amount of time to relocate.

⁷ Exh. 19; Tr. 255-257.

the thresholds set forth ICAs, and that in so doing, the uncompensated costs incurred through the use of the interexchange (toll) network under Socket's proposed service provisioning would be at least mitigated and network capacity issues would be better and more equitably addressed.⁸

18. Socket is not a wireless carrier (Tr. 62, lines 13-14) and the porting requests at issue here do not occur in the wireless/wireline context.

19. Respondents have presented significant and credible evidence through the testimony of both Susan Smith and Dr. Harold Furchgott-Roth showing subject to current number portability requirements under federal law or under the ICAs⁹ and the Commission so finds. There are a number of reasons why Socket's proposed service is not FX. The FCC has defined FX to be a service that "connects a subscriber ordinarily served by a local (or 'home') end office to a distant (or "foreign") end office through a dedicated line from the subscriber's premises to the home end office, and then to the distant office."¹⁰ Socket does not provision its proposed service over dedicated facilities but rather indirectly through common trunk groups. With FX, the subscriber purchases local exchange service from the foreign or distant end office and purchases dedicated interoffice transport between the subscriber's location and the foreign or distant end office. Not so with Socket's proposed service. With FX, all providers whose facilities are used to provide the FX service receive compensation from the end user. Not so with

⁸ Socket has taken the position that the traffic threshold POI provisions of the ICAs do not apply in Spectra exchanges and has even given notice to Respondents that it intends to decommission the few POIs it currently has in Spectra exchanges. Exh. 11, Smith Rebuttal, p. 26; Exh. 5, Voight Rebuttal, p. 32; Tr. (Kohly) pp. 62-66. Spectra has 107 exchanges in Missouri.

⁹ Exh. 11 NP, Smith Rebuttal, pp. 5-9; Exh. 12, Smith Surrebuttal, pp. 20-21; Exh. 6, Furchgott-Roth Rebuttal, p. 12.

¹⁰ *AT&T Corporation, MCI Corporation v. Bell Atlantic*, 14 FCC Rcd 556, at paragraph 71 (1998).

Socket's proposed service. FX service is provisioned out of the original wire center. Not so with Socket's proposed service. FX is a retail service offering that provides a direct connection to the called party, not a wholesale service providing a connection to an intermediate carrier such as Socket. FX normally is a two-way service while Socket's proposed service is one-way, inward only (similar to 800 service, not usually FX). While network capacity and traffic volume normally is not an issue with FX service since it is provisioned over dedicated facilities, Socket's proposed service to transport high volume ISP traffic over interexchange common trunk groups creates significant capacity concerns.

20. Socket in this proceeding has never asserted that its service is V-NXX service.

21. The LNPA-WG is a voluntary industry association that deals with technical issues involving number portability. It advises and makes recommendations to the Number Portability Administration Center (NPAC) and to the FCC. The LNPA-WG is a forum where technical LNP issues are identified, discussed and resolutions suggested. As a body that reviews technical LNP issues, it is reviewing **how** ports are completed, not whether certain types of ports should be required. Once an issue is closed, it is passed on to the appropriate governing body to be considered for approval as part of the governing body's policy. The LNPA-WG's determinations are neither binding on its members nor on the industry as a whole.¹¹ Likewise, any consensus reached by the LNPA-WG does not constitute an industry-wide agreement with respect to a carrier's legal obligations.¹²

¹¹ Exh. 8, Penn Rebuttal, p. 5-6; Exh. 9, Penn Surrebuttal, p. 6; Exh. 5, Voight Rebuttal, p. 24; Tr. (Kohly) 83.

¹² Exh. 9, Penn Surrebuttal, p. 6-7.

Any member who disputes the finding of a LNPA-WG “consensus” may initiate an appeal by bringing their position to the next higher authority as a “minority” opinion.¹³

22. Above the LNPA-WG is the North American Numbering Council (“NANC”). The NANC primarily is an advisory group to the FCC on technical issues, and like the LNPA-WG, is not by itself a standard-setting body or a body that determines “industry agreed-upon practices”. Even if it were a standard-setting body, it would create nation-wide rather than state-specific standards.¹⁴ The FCC specifically has stated that “[w]e believe that allowing number portability to develop on a state-by-state basis could potentially thwart the intentions of Congress in mandating a national number portability policy, and could retard the development of competition in the provision of telecommunications services”.¹⁵

23. Pursuant to the FCC’s rules, it is the NANC, not state commissions, industry members, or groups of industry members that has “ongoing oversight of number portability administration”. Even then, all its actions are subject to FCC review and adoption or rejection. The procedure for the implementation of industry LNP standards is one of industry consensus and a multi-step process, first formalized at the LNPA-WG and then the NANC, and then finally adopted as a formal policy at the FCC via the NANC and the FCC Bureau procedures.¹⁶ Industry members are permitted to file appeals from actions taken by the LNPA-WG to the NANC, then to the FCC.

¹³ *Id.*, pp. 8-10.

¹⁴ Exh. 7, Dr. Furchtgott-Roth Surrebuttal, p. 8-9.

¹⁵ *First Order*, 11 FCC Rcd 8352 at paragraph 37.

¹⁶ See, Exh. 12, Smith Surrebuttal, p. 12.

24. Socket raised an issue before the LNPA-WG involving its number porting requests that was placed on the LNPA-WG's agenda as PIM 60. PIM 60 was *not* at all typical of the types of issues normally discussed and addressed by the LNPA-WG.¹⁷ According to Mr. Penn, who has participated in the LNPA-WG for six years, prior to the submission of Socket's PIM 60 the industry had never considered, let alone reached an agreed-upon consensus respecting the type of porting requested by Socket.¹⁸

25. Socket's proposed number porting necessarily will result in an improper competitive advantage in favor of Socket and its ISP affiliate.

26. Socket's proposed number porting necessarily require the establishment of new facilities by Respondent, will improperly shift costs to Respondents and other carriers for the increased use of the interexchange toll network, and will result in network congestion, all to the detriment of Respondents and their customers.

27. Respondents' traffic studies in this case and its methodology of conducting their traffic studies are appropriate for use in determining when traffic volume meets the traffic threshold contained in the ICAs.

PROPOSED CONCLUSIONS OF LAW

1. Under applicable federal law, Respondents were not at the time that Socket's *Complaint* was filed, and are not now, legally obligated to fulfill porting requests when a customer is physically relocating outside Respondents' exchanges. Socket's porting requests in this case constitute "location portability" as that term is defined in federal law. Neither are Respondents so obligated to fulfill such porting requests under the terms of

¹⁷ Exh. 8, Penn Rebuttal, p. 6.

¹⁸ Exh. 9, Penn Surrebuttal, p. 2.

the ICAs. The ICAs impose no obligation upon Respondents to provide “location portability” beyond that required under applicable federal law.

2. 47 U.S.C. Section 251(b)(2) provides that all local exchange carriers have the statutory obligation “to provide, to the extent technically feasible, number portability in accordance with the requirements prescribed by the Commission” (FCC).

3. The term “number portability” is statutorily defined in 47 U.S.C. Section 153 (30):

The term “number portability” means the ability of users of telecommunications services to retain, *at the same location*, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another. (emphasis supplied).

4. 47 U.S.C. Section 251(d)(1) further directs the FCC “to establish regulations to implement” the statutory requirements, which it has done.

5. Pursuant to 47 U.S.C. Section 251(d), the FCC adopted its Part 52 rules in order to implement number portability as mandated by statute. As discussed in Dr. Furchtgott-Roth’s Rebuttal Testimony, pages 7-8, the FCC has adopted four definitions of portability under those rules.¹⁹ Three of those definitions are relevant here. The definition of “number portability” in the FCC’s rule is the same as found in the statute and includes the limiting language “at the same location”.²⁰ The definition of “service

¹⁹ 47 C.F.R. 52.21.

²⁰ 47 C.F.R. 52.21(l).

provider portability” is exactly the same as the definition of “number portability” and includes the same limiting language “at the same location”.²¹

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.**” (emphasis supplied).

These rules are clear. The porting of a number when the customer moves from one physical location to another constitutes “location portability”, not “service provider portability”. The FCC has not modified these Part 52 rule definitions so they remain controlling as a matter of law by virtue of 47 U.S.C. Section 251(d).

6. The FCC has issued a number of decisions respecting number portability. In its First Report and Order and Further Notice of Proposed Rulemaking, *Telephone Number Portability* (“First Order”), the FCC required all carriers to provide “service provider portability”, which it made synonymous with the statutory definition of “number portability”. It also expanded the number portability obligation to porting between wireline and wireless carriers (“intermodal portability”).²² In this order, the FCC specifically declined to mandate “location portability” between wireline carriers.²³

7. The FCC in its Second Report and Order, *Telephone Number Portability* (“Second Order”)²⁴, and in related subsequent proceedings, again considered wireline to

²¹ 47 C.F.R. 52.21(q).

²² 11 F.C.C.R. 8352 (1996).

²³ 11 F.C.C.R. 8352, at 8443.

²⁴ 12 F.C.C.R. 12, 281 (1997)

wireline portability but once again decided not to change the definition of “location portability” nor require “location portability” among wireline carriers, even within the same exchange area.²⁵

8. In 2003, the FCC issued its *Intermodal Order*²⁶ wherein it mandated number portability between *wireless and wireline* carriers. Not only did the FCC *not* mandate wireline-to-wireline “location portability” in this order, it explicitly noted “that wireline carriers are not able to port a number to another wireline carrier if the rate center [exchange] associated with the number does not match the rate center [exchange] associated with the customer’s physical location”.²⁷ Simply put, the *Intermodal Order* changed nothing with respect to wireline-to-wireline porting.

9. To date the FCC has reviewed, considered and deliberately decided not to require location portability under Section 251(b)(2) in wireline porting situations although it has reserved its prerogative to mandate it in the future under a different section of the Act:

“The Commission concluded in the First Report and Order that the requirement that all LECs provide local number portability (i.e., service provider portability) pursuant to section 251(b)(2) does not include location portability because the Act’s number portability mandate is limited to situations when users remain ‘at the same location’ when switching from one telecommunications carrier to another. Although we did not require LECs to provide location portability when the First Report and Order was issued, we nevertheless concluded that nothing in

²⁵ FCC, RM 8535, Second Memorandum Opinion and Order on Reconsideration, Released October 20, 1998, cited in relevant part in Exh. 6, Furchtgott-Roth Rebuttal, page 11.

²⁶ *In the matter of Telephone Number Portability*, FCC CC Docket No. 95-116, 18 F.C.C.R. 23697 (November 10, 2003).

²⁷ *Id.*, at paragraph 43. This order in paragraph 22 also limited the wireless/wireline porting obligation to only those circumstances where the wireless carrier’s coverage area overlapped the geographic location of the rate center (exchange) in which the customer’s wireline number is provisioned. The FCC found that this type of intermodal porting would be consistent with the requirement to port *when customers remained in the same location*.

the Act would preclude us from mandating location portability if, in the future, we determine that location portability is in the public interest”²⁸

10. That the FCC has not yet mandated “location portability” in the wireline-to-wireline setting is reflected in an FCC order issued as recently as June 29, 2007 wherein the FCC actually found it necessary to waive its rules to temporarily *permit* wireline geographic number porting due to a natural disaster.²⁹

11. Dr. Furchtgott-Roth correctly summarizes the current state of FCC decisions and federal precedent when he states:

“...neither Congress nor statute nor the FCC authorizes any and all forms of portability to include location portability³⁰ ...[t]he FCC is aware of the differences between location portability and service portability, and to date, the FCC has declined to adopt regulations with respect to location portability, even within the same exchange area.”³¹

12. The FCC has specifically declined to require the type of number porting at issue in this case. Socket’s attempt to try to expand the scope of the FCC’s *Intermodal Order* to apply to wireline-to-wireline “location portability” not only is contrary to the very language and holding of that order but also is contrary to the much more recent June 2007 FCC order cited above.

²⁸ FCC, RM 8535, Second Memorandum Opinion and Order on Reconsideration, Released October 20, 1998 at paragraph 29.

²⁹ Exh. 16, *In the Matter of Telephone Number Portability Numbering Resources Optimization*, CC Docket No. 95-116 and CC Docket No. 99-200 (released June 29, 2007). *See, also*, Exh. 15.

³⁰ Exh. 6, Furchtgott-Roth Rebuttal, page 9.

³¹ *Id.*, at page 10.

13. The ICAs by their own terms state that they are intended be interpreted in conjunction with, consistent with, in light of, and not contrary to, applicable federal law.

The introductory scope and intent section contained in Article I specifically states:

SCOPE AND INTENT OF AGREEMENT

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....This Agreement also governs, as allowed under the Act.....This Agreement will be submitted to the Missouri Public Service Commission, (the “Commission”) for approval pursuant **to the Act and Applicable Law**...The Parties agree that their entry into this Agreement is without prejudice to and does not waive any positions they may have taken previously, or may take in the future, in any legislative, regulatory, judicial or other public forum addressing any matters, including matters related to the same types of arrangements and/or matters related to CenturyTel’s cost recovery covered in this Agreement....[emphasis added].³²

This language unambiguously shows that not only the ICAs must be interpreted in light of currently applicable federal law, but also that Respondents by entering into the ICAs have not waived any arguments they might make with respect to the porting requests at issue with this case.³³

14. The “Compliance With Laws and Regulations” clause of Article III states:

Each Party shall comply with all federal, State, and local statutes, regulations, rules, ordinances, judicial decisions, and administrative rulings applicable to its performance under this Agreement.³⁴

15. Additional portions of the ICAs further support this: Article II, Sections 1.8, 1.10, 1.75; and Article III, Sections 13.0, 23.0, 35.0, 50.0.

³² ICAs, Article I, page 2 of 2.

³³ This is similar to the general waiver provision found in Article III, Section 45. Under this provision, even if Respondents had inadvertently or mistakenly ported similar requests in the past, that does not mean that Respondents are obligated to repeat this mistake.

³⁴ ICAs, Article III, Section 13.0, page 9 of 38.

16. Respondents' *specific and undeniable local number portability obligations* are found in Article XII of the ICAs, which state:

**ARTICLE XII: LOCAL NUMBER PORTABILITY – PERMANENT
NUMBER PORTABILITY**

**1.0 PROVISION OF LOCAL NUMBER PORTABILITY—
PERMANENT NUMBER PORTABILITY**

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].³⁵

17. Article XII containing the term “industry agreed-upon practices” when read in full context shows that its primary emphasis is on permanent number portability requirements based upon applicable federal law:

3.2.1 The parties agree that **the industry has established local routing number (LRN) technology** as the method by which permanent number portability (PNP) will be provided **in response to FCC Orders** in FCC 95-116 (i.e., First Report and Order and subsequent Orders issued as of the date this Agreement was executed.) As such, **the Parties agree to provide PNP via LRN to each other as required by such FCC Orders** or industry agreed-upon practices. [emphasis added].³⁶

18. The Commission in Case No. TO-2006-0299 concluded that the ICAs apply to wholesale arrangements for local exchange services and traffic, not interexchange services and traffic. The Commission repeatedly denied earlier attempts by Socket to include non-local traffic in the ICAs on the basis that non-local traffic should not be subject to the ICAs.³⁷ It is an uncontested fact that ports in question are ISP dial-up

³⁵ ICAs, Article XII, page 1 of 5.

³⁶ ICAs, Article XII, page 2 of 5.

³⁷ *Petition of Socket Telecom, LLC for Compulsory Arbitration of Interconnection Agreements with CenturyTel of Missouri, LLC and Spectra Communications, LLC, pursuant to Section 251(b)(1) of the*

numbers; all traffic to those numbers is therefore ISP-bound traffic. The FCC and the courts clearly have ruled that ISP-bound traffic is interexchange traffic.³⁸ As Socket's proposed service and the traffic it generates are not local, then the ICAs do not even apply.

19. FX service is neither subject to currently applicable federal number portability requirements nor subject to porting requirements via the ICAs. Under FCC rules, FX service is a form of private line interexchange service, not a local exchange number portability service; even remote call forwarding (RCF), which is another form of expanded calling, is treated only as a "transitional" portability measure that would not comply with federal long term number portability requirements.³⁹ FX is an interexchange, not a local service. In Case No. TO-2006-0299 the Commission repeatedly rejected Socket's attempts to include FX and other forms of interexchange service in the ICAs and removed references to FX traffic under several sections because FX traffic had been deemed non-local traffic.⁴⁰ Moreover, no mention is made whatsoever of FX in Article XII of the ICAs wherein Respondents' LNP obligations are addressed.

20. The Staff asserts that Socket's proposed service is not FX service but rather V-NXX service. The Staff's conclusions with respect to how this applies in this case,

Telecommunications Act of 1996, Case No. TO-2006-0299, Report and Order, ("Arbitration Order"), *see*, *e.g.*, pp. 24-26, 29-32.

³⁸ *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 96-98, CC Docket No. 99-68, ORDER ON REMAND AND REPORT AND ORDER, April 27, 2001 ("ISP Remand Order"). *See, also*, court cases cited in Exh. 12, Smith Surrebuttal, p. 5.

³⁹ 47 C.F.R. 69.2. *See* discussion in Exh. 5, Dr. Furchtgott-Roth Rebuttal, p. 12.

⁴⁰ *Arbitration Order*, pp. 29-31, 45.

however, are contradicted by the language of the ICAs in that the ports in question have nothing to do with V-NXX.

21. Article V, section 9.2.3 of the ICAs specifically and unequivocally states that V-NXX traffic “shall not be deemed Local Traffic. Article V, Section 9.2.3 defines V-NXX service as a service where *Socket* assigns NPA/NXXs to a customer physically located outside Respondents’ local calling area containing the rate center with which the NPA/NXX is located. By definition in Article II, Section 1.131, V-NXX means service to a customer located outside of the exchange to which the assigned NXX is rated; this definition includes both Socket-provided NXXs and Respondent-provided NXXs. Respondent does not provide V-NXX service; its numbers are assigned only to customers that have a physical service location in Respondents’ exchanges, or, that pay access costs to Respondents to transport locally-dialed calls across the exchange boundary.⁴¹ Just because Article V, Section 9.2.3 states that V-NXX traffic will be billed at “bill and keep” does not override the “not deemed to be local traffic” provision and somehow converts V-NXX traffic into exchange traffic. The type of compensation, or the lack thereof, does not necessarily define the type or jurisdiction of the traffic.⁴²

22. Article XII of the ICAs specifically governs Respondents’ LNP/PNP obligations under the ICAs. In addition to the provisions regarding the overall architecture and various technical implementation requirements of LNP/PNP—which again, primarily focus on applicable federal law—this Article only specifically addresses the porting of Direct Inward Dialing (Section 6.4 and subsequent subsections), and one

⁴¹ Exh. 12, Smith Surrebuttal, p. 2-4.

⁴² Exh. 12, Smith Surrebuttal, pp. 6-8.

paragraph (subsection 6.2.2 under the heading of Limitations of Service), addresses the porting of already existing remote call forwarding (RCF) numbers.

23. Article XII contains no provision that specifically address FX or V-NXX in the context of number porting.

24. Socket and Staff rely on only *six words* in the ICAs to support their legal interpretation, “industry agreed-upon practices” (found in Article XII, Section 3.2.1 and quoted in full above) and “industry guidelines” (found in Article XII, Section 6.4.4). These six words do not have the broad meaning under the ICAs attributed to them by Socket and the Staff. Article XII, Section 3.2.1 read in proper context requires the parties to provide PNP in accordance with the Act, and to provide it via local routing number (LRN) as required by FCC orders or “industry agreed-upon practices”. LRN describes technically how a port is completed; the “industry agreed-upon practices” clause refers to the technical standards for use of the LRN.⁴³ The phrase “industry guidelines” is found in the subsequent subsection under the provision pertaining to the porting of DID numbers, which given its location and numbering, readily should indicate that it only applies to the porting of DID numbers, not number portability generally. General terms and provisions of a contract yield to specific ones. *State ex rel. Jesse E. Smith v. City of Springfield*, 375 S.W.2d 84, 91 (Mo. 1964); *H.B. Oppenheimer & Co. v. The Prudential Insurance Company of America*, 876 S.W.2d 629, 632 (Mo. App. 1994). Even assuming, *arguendo*, that this phrase is not limited solely to the porting of DID numbers, it too refers to the technical standards of how a port is completed rather than somehow imposing PNP beyond what is required by the Act. A contract or other written obligation

⁴³ Exh. 12, Smith Surrebuttal, p. 12.

is to be construed in the light of the law existing at the time it was entered into. *Smith v. City of Springfield*, at 21. Contract language is not interpreted in a vacuum, but by reference to the contract as a whole. *Purcell Tire and Rubber Company, Inc. v. Executive Beechcraft, Inc.*, 59 S.W.3d 505, 510 (Mo. 2001); *J.E. Hathman, Inc. v. Sigma Alpha Epsilon Club of Columbia, Missouri*, 491 S.W.2d 261, 264 (Mo. 1973) (even seeming contradictions must be harmonized away if that be reasonably possible).

25. Socket and the Staff have not offered competent and substantial evidence as to the porting practices of other Missouri incumbent local exchange carriers. These carriers are not even parties to this case and have had no opportunity to confirm or deny whether they even understand that Socket's requests⁴⁴ may constitute location porting. The Commission has no evidence in the record obtained directly from these carriers to test whether the anecdotal evidence offered by Socket is in fact true. In conducting its review, the Staff did not even bother to directly inquire of these carriers (formally or informally) not only prior to filing its testimony but not even between its testimony filing and the evidentiary hearing.⁴⁵ Staff apparently relied solely on an incomplete data request response from Socket, and even then, at the hearing Staff had to admit that Staff could not quantify exactly *how many* of Socket's porting requests were supposedly honored by these other incumbent carriers.⁴⁶ Because these carriers were not parties to

⁴⁴ CLEC orders sent to the major ILECs are often submitted electronically and therefore never reviewed by appropriate personnel for CLEC compliance with applicable law. In Respondents' case, Respondents inadvertently fulfilled a few of Socket's geographic porting requests in error although that does not mean it is Respondents' practice and policy to do so. Likewise, such mistakes do not bind Respondents to repeat such mistakes in the future (see footnote 44 the ICA's waiver provisions). Such mistakes easily can be made because Socket does not indicate on its local service requests (LSRs) that the requests are ones for geographic porting. Tr. (Kohly) 67-68.

⁴⁵ Tr. 183-184.

⁴⁶ Tr. 180-181.

the case, the Commission has had no opportunity to inquire directly of these carriers as to the scope and nature of their respective porting practices. To the extent they may in fact have honored some unknown quantity of Socket's porting requests, there is no record evidence whether this was done intentionally or by simple oversight and there is no way to find this out.

26. On the other hand, Respondents offered direct evidence that other ILECs certainly do not intentionally fulfill these types of porting requests as a matter of company practice. In addition, Exhibit 13, which is the letter from counsel for several independent local exchange carriers to the LNPA-WG, that protested Socket's PIM-60 and indicates that at least some other Missouri carriers do not engage in the porting practices alleged by Socket, was received into the record without objection.

27. Respondents also offered testimony without objection from Embarq that it discovered in the public record in a Pennsylvania Commission proceeding and which supported Respondents' position that it was not Embarq's overall company practice to provide "location portability"⁴⁷. In response, Socket offered what appeared to be contrary testimony from another Embarq witness in that same case. Read together, it appears from this additional testimony in the Pennsylvania case that Embarq still does not location port as a company practice and Embarq's apparent agreement to provide "location portability" in limited circumstances was contingent upon the competing carrier agreeing to certain conditional parameters that Socket has refused to agree to in Missouri. The weight of Socket's use of this Pennsylvania testimony is significantly lessened

⁴⁷ Exh. 12, Smith Surrebuttal, Schedule SS-1.

because the Commission and the parties had no opportunity to inquire directly of Embargo one way or the other.

28. What constitutes industry agreed-upon practices” in any event cannot be ascertained by looking at the porting practices of a few individual Missouri companies. To determine “industry” practices one needs to look at the whole industry, not just a small part of it, and certainly not limited to some few carriers in just one state. The practices of a few individual companies, or even the coordinated actions of multiple industry participants, do not rise to the level of “industry agreed-upon practices” or “industry standards”. Socket has offered no direct record evidence of ILECs porting practices in other states. Presumably if some existed, Socket and the Staff would have offered it.

29. Socket claims that the LNPA-WG’s recent “consensus” shows that Socket’s porting requests now reflect “industry-agreed upon practices”. The record evidence shows this certainly is not the case.⁴⁸ In fact Respondents are appealing PIM-60 to the NANC and a number of other ILECs have indicated to a willingness to join in that appeal, so this federal process is far from resulting in a federal policy respecting a sea-change in existing number portability legal obligations or “industry agreed-upon practices”.

30. The Staff has suggested that the Commission has the authority, outside the currently applicable federal law on number portability obligations, to grant Socket’s requested relief under the authority of Section 251(d)(3) of the Act on the basis that neither the Congress nor the FCC has preempted the Commission’s ability to do so. The

⁴⁸ Tr. 226, 229-231, 233.

Commission declines to do so for the reasons stated in the Surrebuttal testimony of Dr. Furchgott-Roth at pages 16-20.

31. Under the terms of the ICAs, Socket is required to establish POIs in both CenturyTel and Spectra exchanges when Respondents' traffic studies indicate that Socket's traffic volume meets the traffic threshold contained in the ICAs.

32. The additional issues raised by Socket in its *Complaint* and by the Staff are not relevant to and not dispositive of this proceeding. To the extent Socket has disputes with Respondents over order fulfilment, Socket is required to follow the procedures specified in Article III, Section 18.4 of the ICAs.

WHEREFORE, Respondents request the Commission incorporate Respondents' proposed findings of fact and conclusions of law in its Report and Order to be issued in this case.

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 following parties on the 10th day of September, 2007.

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