

**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.)	

**RESPONSE TO SOCKET TELECOM’S MOTION
TO REOPEN RECORD AND ADMIT AFFIDAVIT**

COME NOW CenturyTel of Missouri, LLC and Spectra Communications Group, LLC d/b/a CenturyTel (collectively “Respondents”), pursuant to 4 CSR 240-2.080 (15), and for their Response to *Socket Telecom’s Motion To Reopen Record and Admit Affidavit* (“Socket’s Motion”) filed on October 17, 2007, respectfully state as follows:

INTRODUCTION

Socket’s Motion, and the so called “new evidence” contained in the Supplemental Affidavit of Mr. Kohly attached thereto, are objectionable and entirely inappropriate on so many grounds it is difficult to know where to begin.¹ Perhaps the best place to start is with an overview.

Under the guise of updating the Commission on post-hearing and post-briefing “developments” at the Local Number Portability Administration Working Group (“LNPA-WG”) and the North American Numbering Council (“NANC”), Socket claims

¹ Socket’s Motion was filed on October 17, 2007. 4 CSR 240-2.080(15) allows parties to file responsive pleadings within ten days unless otherwise ordered by the Commission. This responsive pleading, therefore, is timely filed.

to offer the Commission “new evidence” that Socket claims is material and necessary for the Commission to reach a proper decision in this case. As discussed below, Socket’s “update” is entirely improper both procedurally and substantively and its “new evidence” is neither material nor necessary.

Procedurally, granting Socket’s Motion would violate established Commission rules, specifically 4 CSR 240-2.110(8), 4 CSR 240-2.130(17), and 4 CSR 240-2.150(1).

Moreover, the Commission should not be taken in by Socket’s latest ploy to attempt to supplement the record through Mr. Kohly’s Supplemental Affidavit just because Socket failed to meet its burden of proof after having been given more than sufficient opportunity to do so prior to the close of the record. As the Complainant, Socket bears the burden of proof in this proceeding.² The Commission already has provided Socket more than sufficient opportunity to present its evidence under the timeframe of the expedited procedural treatment Socket requested. The Commission is required to treat Socket as it would any other complainant and hold Socket to the same rules and procedures respecting complaint proceedings before the Commission. Socket merits no special treatment by the Commission and Mr. Kohly holds no special entitlement to provide *any* testimony (extra-record or otherwise) through a mere supplemental affidavit, in a manner where the information contained therein--and Mr. Kohly himself--cannot be cross-examined or challenged. To grant Socket’s Motion would deny Respondents their right of due process of law and be contrary to established Commission complaint case procedures.

Substantively, Socket’s so-called “new evidence” in many instances is inaccurate, or at best cumulative; its characterization of and its conclusions related to the “new

² For case citations, see Respondents’ Brief, p. 39.

developments” at the LNPA-WG/NANC and the appeal procedures related thereto are simply wrong; and Mr. Kohly’s Supplemental Affidavit in large part does not contain “evidence” at all but rather is a re-hash by a non-attorney and Socket witness of erroneous legal arguments already contained in Socket’s Brief.

The Commission at the outset should immediately take note of what Socket’s Motion and Mr. Kohly’s Supplemental Affidavit *do not claim*. First, neither claims that currently applicable and controlling federal statutory and case law, and Federal Communications Commission (“FCC”) rules, regulations and decisions, somehow have changed in such a way as to now for the first time mandate “location portability”. If it had, Socket no doubt would have included it. As fully discussed in Respondents’ Brief, currently applicable federal law controls Respondents’ number portability obligations, not Mr. Kohly’s tortured legal analysis and misinterpretation of the language of the parties’ interconnection agreements (“ICAs”).

II. ADMISSION OF SOCKET’S EXTRA-RECORD “EVIDENCE”

1. Commission Rule 4 CSR 240-2.150(1) states that the record of a case stands submitted for Commission consideration after the filing of briefs. The parties filed simultaneous post-hearing briefs on September 10, 2007 pursuant to Commission order.

2. Commission Rule 4 CSR 240-2.110(8) governs the type of relief requested in Socket’s Motion and was promulgated to protect the due process rights that Socket’s requested relief would have the Commission ignore. This rule provides:

(8) A party may request that the commission reopen a case for the taking of additional evidence if the request is made after the hearing has been concluded, **but before briefs have been filed** or oral argument presented, or before a

decision has been issued **in the absence of briefs or argument**....(emphasis supplied).

Socket's Motion contains no reference whatsoever to this rule, for obvious reasons.

3. Socket's reference to Commission Rule 4 CSR 240-2.130(17) also misses the mark, as any post-hearing exhibits are only contemplated when the RLJ, in conformance with 4 CSR 240-2.130(14), has "authorized the filing of specific evidence as a part of the record within a fixed time after submission, reserving exhibit numbers, and setting other conditions for such production". No such reservation was made or contemplated in this proceeding and no such authorization was given. In any event, Mr. Kohly's Supplemental Affidavit is not the type of post-hearing *exhibit* contemplated by these rules (such as revised financial information, additional copies of documents used during the hearing or the like); as noted above, it is instead *supplemental testimony* (offered without the opportunity to cross-examine the witness at hearing) and it otherwise constitutes improper legal argument reserved for a brief submitted by counsel.

4. As noted above and in Respondents' Brief, Socket as the Complainant initiated this proceeding and therefore bears the burden of proof. The opportunity for Socket to meet its burden of proof in this case should not and cannot be open-ended. The Commission already has given Socket more than sufficient opportunity to present and argue its case. Socket requested and received expedited treatment of its case, a full and fair hearing was conducted and concluded, and the evidence adduced at the hearing recorded.

5. The Commission should take note that this is not Socket's first attempt to improperly supplement the record since briefs were filed and should indicate to the

Commission that Socket itself is not satisfied that it met its burden of proof on the existing record.

III. MR. KOHLY'S SUPPLEMENTAL AFFIDAVIT

6. Contrary to Mr. Kohly's allegation, Respondents have in fact appealed the decision of LNPA-WG that adopted as an industry "best practice" PIM-60. Attached hereto as **Attachment A** and incorporated herein by reference is a copy of Respondents' appeal.

7. That Respondents appeal was not submitted until October 25, 2007 is of absolutely no legal consequence. Unlike this Commission, who by statute and rule as a quasi-judicial regulatory body operates under strict jurisdictional filing deadlines, the LNPA-WG and the NANC are not regulatory bodies and their procedures set no deadlines for appeals of actions by these bodies.

8. Without here repeating all the discussion and specifics contained in **Attachment A**, Respondents' appeal notes several important and material facts, conveniently ignored or misrepresented in Mr. Kohly's Supplemental Affidavit. For instance:

- a. the LNPA-WG adopted PIM-60 over the objections of a number of incumbent local exchange carriers ("ILECs"), thereby failing to follow its own internal procedures;
- b. the LNPA-WG is not legally authorized to adopt PIM-60;
- c. the LNPA-WG improperly submitted its report to the NANC on October 10, 2007;

- d. it is Respondents' understanding that as of today the NANC never formally approved the LNPA-WG's report at its October 10, 2007 meeting;
- e. established FCC procedure was not followed with respect to PIM-60, in clear violation of Section 52.26(b)(3) of the FCC rules;
- f. PIM-60 has not been considered--let alone adopted--by the FCC and violates the FCC's currently applicable number portability rules and policies;
- g. by law, it is the FCC--not the LNPA-WG or the NANC--that establishes number portability policy and obligations under federal law, and as such, the LNPA-WG's improper adoption of PIM-60 in no way changes federal law requirements with respect to "location portability", either retroactively to the time that Socket filed its Complaint at the Commission earlier this spring or currently on a going forward basis; and
- h. there were several instances of abuse of process with respect to PIM-60 (including that the NANC uncharacteristically failed to post notice of its October 10, 2007 meeting on the NANC website) such that the many negative impacts of PIM-60 on ILECs have not been even considered even by the NANC, let alone by the FCC.

9. As such, Mr. Kohly's Supplemental Affidavit: contains inaccurate allegations with respect to Respondents' appeal of PIM 60; it misleads the Commission with respect to the timing of and the established procedures for Respondents' appeal of PIM 60; and it misleads the Commission with respect to the impact and import of the recent actions of the LNP-WG and NANC on PIM 60, not only generally, but also with respect to the particulars of and relevance to this case.

10. Mr. Kohly's Supplemental Affidavit also constitutes an attempted filing of a supplemental legal brief (by a witness not by counsel), containing cumulative legal argument with respect to the relevance and applicability of the language of the ICAs when such language and its import already have been fully addressed both in the record and in the one round of briefs ordered by the Commission to be filed simultaneously by the parties on September 10, 2007.

11. Respondents already have fully addressed in their Brief Mr. Kohly's erroneous allegations and legal conclusions with respect to the language of the ICAs and need not be here repeated but for the Commission's reference can be summarized as follows:

- a. Socket's porting requests constitute "location portability";
- b. nothing in currently applicable federal law requires Respondents to provide "location portability" in the wireline-to-wireline context;
- c. the FCC has reviewed, considered and deliberately decided *not* to require "location portability" nor has it defined the word "location" in the manner claimed by Socket in the wireline context;
- d. the ICAs do not place any additional number portability obligations upon Respondents above and beyond what is required under currently applicable federal law;
- e. the ICAs must be interpreted in harmony with and in light of currently applicable federal law;
- f. the ICAs apply only to wholesale arrangements for local exchange services and traffic, not interexchange services and traffic;

- g. the FCC and the courts have ruled that ISP-bound traffic is interexchange traffic;
- h. Socket's proposed service is not Foreign Exchange ("FX") Service³;
- i. even if Socket's proposed service shared enough of the hallmarks of FX service to be considered "FX-like", FX is not subject to currently applicable federal number portability requirements and it is not subject to porting requirements via the ICAs since FX service is a form of private line interexchange service;
- j. the Commission already has deemed both FX and virtual NXX ("V-NXX") traffic to be non-local;
- k. the ICA provisions relied upon by Socket (Section 6.4 and subsequent subsections) specifically apply only to Direct Inward Dialing and Socket, and in any event, to no provision of the ICAs specifically addresses FX or V-NXX in the context of number porting; and
- l. the sole basis of Socket's claim to relief under the ICAs rests upon only six words, taken wholly out of context, and then applied by Socket in contravention of currently applicable federal law.

12. Even assuming, *arguendo*, that Socket's interpretation of the ICAs has any merit whatsoever, Socket in any event has failed to provide competent and substantial record evidence that the type of number porting it requests now constitutes "industry agree-upon practice" or that such requests fall under current "industry guidelines". This is so with or without Socket's latest attempt to supplement the now closed record.

³ Even the LNPA-WG did not conclude that Socket's proposed service was FX service, let alone conclude that Socket's proposed service specifically presented in this case met the LNPA-WG's six caveats.

Whatever sparse, unsupported, and anecdotal evidence Socket provided at the hearing has been far outweighed by the record evidence already submitted by Respondents.

13. Finally, regardless of whatever recent actions may or may not have been taken (legally or otherwise) by the LNPA-WG and the NANC, Socket's scheme has not become an "industry agreed-upon practice". The LNPA-WG is a voluntary industry association that deals only with technical issues involving number portability; it reviews how ports are completed, not whether certain types of number porting should be required. Likewise, the NANC primarily is an advisory group to the FCC on technical issues, and like the LNPA-WG, the NANC is not a standard-setting or policy-making body. Neither entity is empowered to rule on state-specific porting requests nor determine "industry agreed-upon practices". In any event, neither entities' actions are binding on Respondents or on any other carrier. Consistent with FCC rules, only the FCC can mandate what forms of number portability are required under federal law or ultimately determine what constitutes "industry agreed-upon practices".

WHEREFORE, for all the reasons stated above, the Commission should deny *Socket Telecom's Motion To Reopen Record and Admit Affidavit* and otherwise reject any additional attempts by Socket to otherwise supplement the record.

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 29th day of October 2007.

/s/ Charles Brent Stewart
