BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

RESPONDENTS' POST-HEARING BRIEF

September 10, 2007

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COME NOW Respondents, CenturyTel of Missouri, LLC ("CenturyTel") and Spectra Communications Group, LLC, d/b/a CenturyTel ("Spectra") (collectively "Respondents"), and pursuant to the Commission's *Order Setting Briefing Schedule* issued on July 17, 2007 as subsequently modified, submit Respondents' Post-Hearing Brief in the above-captioned case.

I. INTRODUCTION

A. Issues Requiring Decision

Respondents submitted only one issue requiring a Commission decision, namely, whether:

> "*Under applicable Federal Law, Federal Communications Commission ("FCC") rules, regulations and orders, is CenturyTel or Spectra required to fulfill the two port requests specifically at issue in this case when the customer is physically relocating outside the customer's exchange?*"

Both the Complainant Socket Telecom, L.L.C. ("Complainant" or "Socket") and the Commission Staff ("Staff") have submitted this same basic issue in slightly different form, which for reference will be referred to as "issue number one". As indicated in earlier pleadings, Respondents believe that the resolution of issue number one in favor of Respondents is dispositive of the entire case as a matter of law.

Socket (directly) and Staff (indirectly), however, submitted the additional issue of whether the Interconnection Agreements ("ICAs") between Socket and Respondents legally obligate Respondents to fulfill the porting requests at issue. For reference, this ICA issue will be referred to as "issue number two". Socket's and Staff's submission of issue number two necessarily but wrongfully presumes that the ICAs place local number portability obligations on Respondents beyond that required by applicable federal law. Interestingly, implicit in Staff's treatment of issue number two is that issue number one should be decided in favor of Respondents.[1]

In addition, Staff on its own submitted an additional issue respecting transport of traffic to the Point of Interconnection ("POI") under the ICAs.[2] Socket on its own submitted two more issues, one respecting network capacity and another respecting number block assignment.[3]

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1 *See, e.g., Staff's Statement of Positions*, filed July 3, 2007.

2 There appears to be no disagreement between Staff and Respondents on this issue. Respondents have clearly stated that under the terms of the ICAs, each party is responsible for transporting traffic to the POI, *provided* that the POIs are established in accordance with the terms of the ICAs. *See*, Exh. 11 NP, Smith Rebuttal, p. 30; Exh. 12 Smith Surrebuttal, pp. 32-33; ICAs Article V, Section 4. Staff's inclusion of this issue highlights that Socket's refusal to follow the threshold POI requirements and procedures set forth in the ICAs continue to create network traffic capacity and compensation problems which will only become worse if Socket's requested relief is granted.

3 These additional issues raised by Socket are, quite simply, superfluous for purposes of this proceeding. As noted in *Respondents' Motion Regarding Procedural Schedule and Motion For Expedited Treatment*, the dispute resolution procedure required for these or any other similar issues that might arise between the parties that are not directly related to the specific geographic porting requests at issue in this case is governed by Article III, Section 18.4 of the ICAs, a procedure that Socket thus far has chosen to ignore. Without waiving this objection, Respondents nevertheless have addressed these additional issues in testimony. *See,* Exh. 11 HC, Smith Rebuttal, pp. 15, 18, 25; Exh. 12, Smith Surrebuttal, pp. 30-31.

B. Respondents' Position

Respondents' position with respect to issue number one is straightforward. Socket is requesting "location portability".[4] Respondents were not at the time the *Complaint* was filed, and are not now, lawfully required under applicable federal law to provide "location portability". Socket cannot point the Commission to any currently applicable federal law directly on point that requires Respondents to provide wireline-to-wireline "location portability" for the simple reason that none exists. The *Staff's Statement of Positions* reflect that the Staff agrees with Respondents at least on these three points. Standing alone, resolution of issue number one not only should be dispositive of the entire case as a matter of law, but this also should compel a decision in favor of the Respondents without the need for any further inquiry.

This being said, Respondents' position with respect to issue number two (and the myriad sub-issues that necessarily flow from it) is equally straightforward. Assuming, *arguendo*, that a review of the ICAs for purposes of this proceeding is somehow appropriate, the ICAs by their own terms: 1) must be read in conjunction with and in light of applicable federal law, and not be interpreted as in some way overriding it; 2) apply only to local exchange traffic and not to the type of interexchange traffic at issue in this case; 3) impose no obligation upon Respondents to provide "location portability" beyond that required by applicable federal law; and 4) provide no legal basis for this Commission to order Respondents to complete Socket's specific porting requests at issue

[4] "*Location portability*" is defined as "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**". 47 C.F.R. 52.21 (j). If Respondents were not lawfully required by applicable federal law to fulfill the two porting requests specified in the *Complaint* at the time the *Complaint* was filed, the question of fulfilling similar future porting requests is rendered moot.

in this case under the umbrella of "industry agreed-upon practices", "industry guidelines", or any other specific provisions.[5] With respect to the ICAs generally, the Commission should recognize that it is Socket and the Staff--not the Respondents--who first raised questions about interpretation of the terms of the ICAs in an attempt to justify an obligation that does not exist under applicable law; Respondents, therefore, in responding to Socket's claims hardly can be legitimately accused of attempting to try to turn this proceeding into a relitigation of the Commission's arbitration decision in Case No. TO-2006-0299.[6]

C. Socket's Position

Socket's position with respect to issues number one and two is much more nebulous and convoluted although it appears to consist of three alternative prongs. First, Socket claims that the customers in question are remaining at the same location, despite the fact that they are physically moving their modem banks from the rural Willow Springs and Ellsinore exchanges (served by Respondents) to a metropolitan St. Louis exchange (served by AT&T). Socket supports this startling claim by engaging in clever but tortured definitional gymnastics involving the word "location" and a reliance on language from an FCC decision (discussed below) that that both the FCC and the DC Circuit Appeals Court confirm simply does not apply in the context of wireline-to-wireline porting. Because in Socket's view these customers are not "moving from one

[5] These ICA issues, and related sub-issues, are discussed in detail under Section IV below.

[6] Since Socket and the Staff have chosen to raise the ICAs and Case No. TO-2006-0299, Respondents would here note that the repeated warnings raised by Respondents in Case No. TO-2006-0299 regarding the potential for arbitrage now has ripened into reality.

physical location to another", Socket argues that its porting requests do not constitute "location portability".[7]

Socket next argues, in the alternative, that even if it *is* requesting "location portability", the Commission nevertheless should do what neither the FCC nor any other state commission has yet to do by finding that currently applicable federal law has *implicitly evolved* in such as way as to today somehow mandate "location portability" in the wireline-to-wireline context--explicitly stated FCC precedent (one as recent as June 29, 2007) to the contrary notwithstanding.[8]

Socket finally argues that the Commission must go back and again traverse the thorny thicket of the ICAs and the Commission's decision in Case No. TO-2006-0299 in order to interpret the ICAs in such a way as to manufacture and then impose, a legal obligation on Respondents—a legal obligation heretofore not found in currently applicable federal law respecting "location portability"-- to port the numbers at issue in this case.[9]

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[7] The Staff agrees with Respondents that Complainant is in fact requesting "location portability". *See*, Exh. 5, Voight Rebuttal, pp. 8, 18-20.

[8] *See*, Exhibit 16, "Kansas Order" (June 29, 2007) and Exhibit 15, "Katrina Order" (September 9, 2005). The Staff agrees with Respondents that currently applicable federal law places no legal obligation upon Respondents to port the numbers in question. *See*, Exh. 5, Voight Rebuttal, pp. 8, 18-20; Tr. (Voight) p. 192.

[9] As discussed below, the Staff bases its position that the ICAs impose a legal obligation on Respondents to port the numbers in question on Staff's conclusion that Socket's proposed service is V-NXX service and that V-NXX traffic, in Staff's opinion, should be deemed to be local traffic under the ICAs; this despite the clear finding of the ICAs arbitration and subsequent terms in the ICAs that V-NXX is not local (Article V, 9.2.3-"VNXX Traffic…shall not be deemed Local Traffic…"). Despite Staff's failure to consider the Arbitration outcome and the definitive ICA terms on this point and despite Respondents' disagreement with Staff, even the Staff concedes that if V-NXX traffic is interexchange traffic, then Socket necessarily cannot prevail and its *Complaint* should be dismissed. *See*, Exh. 5, Voight Rebuttal, pp. 6, 15. Interestingly, Socket itself does not claim that its proposed service is V-NXX service.

D. Additional Context Elicited From the Bench

Three important points that deserve some brief up-front comment were raised at the hearing through questions from the bench that help put this case in the proper context.

1. Case of First Impression

It was correctly noted at the hearing and agreed to by all the parties that this is a case of first impression, both in Missouri and elsewhere. (Tr. 46, 203). This being so, for the Commission in this case for the first time to require "location portability" will have significant ramifications both statewide and nationally, impacting far more than just the two carriers that are parties to this case.[10] Given that neither the FCC, which has primary jurisdiction over the question of "number portability", nor any other state commission has yet imposed a "location portability" obligation in a wireline-to-wireline context, the Commission should be more than a little cautious. As discussed below, even the federal Local Number Portability Administration Working Group (LNPA-WG), which Socket proudly and inaccurately claims recently has issued an opinion in Socket's favor, specifically declined to decide whether *Socket's specific porting requests* at *issue in this case* actually met all the necessary criteria (or caveats) arising out of the LNPA-WG's proceedings respecting Problem Identification and Management Statement Issue No. 60 ("PIM-60"). Although Socket has argued to the contrary, Socket's proposed service does not meet a clear reading of the PIM-60 criteria. Socket exchanges the traffic indirectly and does not provide an FX service "in accordance with regulatory requirements", which means the end user purchasing a *dedicated interexchange circuit*

[10] *See*, *e.g.*, Exhibit 13, the July 9, 2007 letter from counsel for some of Missouri's small rural incumbent local exchange carriers.

from the original local calling area. (Tr. 226, 229). Moreover, as discussed in Section IV below, the LNPA-WG's PIM 60 actions are not binding on the industry or the Respondents, and in any event, the PIM 60 process is far from over.

2. The Compensation Issue

It further was correctly noted from the bench during the hearing that there seemed to be "a catch here" and "something that's missing here" with respect to Socket's porting requests. (Tr. 141). That "catch" is that Socket is attempting to require Respondents to wrongfully incur costs without compensation for the transport of Socket's high volume ISP traffic over the interexchange (toll) network while Socket pockets the premium charged to its customer to cover interexchange transport costs for its V-NXX service. No one, including Respondents, disputes that Socket is free to offer and provide its customers with whatever types of services it desires and charge its customers whatever rates it desires for those services. That is not an issue here. However, what Socket cannot legitimately do, and should not be allowed by the Commission to do, is to arbitrage the provisioning of its expanded calling services over the interexchange (toll) network in such a way as to require Respondents, other third-party interexchange carriers, and their respective customers to subsidize Socket's services and operations. Without establishing its own POI in the originating local calling area, Socket's porting requests are an attempt to do just that, under the guise of claiming that it is simply offering a new type of service for its customers. If Socket in fact established a POI in the originating local calling area, Socket would bear the transport costs and could recover those costs from its customer.

Socket is not being candid with the Commission. Socket's repeated assurances to the Commission that Socket's requested relief "will have no impact" on Respondents is demonstrably and patently false. This is clearly illustrated in Exhibits 22, 23, 24 and 25 which were received into evidence without objection on the last day of the hearing. These four exhibits show how Socket's proposed service provisioning, that necessarily will require the use of the interexchange (toll) network to transport Socket's ISP traffic far across the state, will improperly shift significant costs to Respondents for which they will receive no compensation.[11] This compensation issue is an extremely important one, not only with respect to the two specific porting requests at issue, but even more so should Socket be permitted to expand its expanded calling scheme statewide. The Commission needs only to look at these four unchallenged exhibits to find "the catch" in Socket's proposal and to recognize Socket's disingenuousness and complete lack of credibility and candor on this issue.

3. No Anti-competitive Special Treatment

It also was correctly noted during the hearing and is not disputed that Respondents have not in the past offered, and do not currently offer the type of "location portability" requested by Socket to *Respondents' own customers*.[12] It likewise is undisputed that the two particular customers at issue in this case currently do not subscribe to any of *Respondents'* expanded local calling plans or foreign exchange (FX) services. (Tr. 296). This is not, therefore, an anti-competitive situation.

[11] *See*, Tr. 299-304 for a full explanation of what each chart depicts. In all four charts, the "brown line" indicates the interexchange (toll) route miles for which Respondents would be financially responsible but would receive no compensation under Socket's proposed service provisioning. Because it involves third party interexchange carriers and longer transport distances, the Ellsinore scenario is the more egregious of the two.

[12] *See*, Exh. 7, Furchtgott-Roth Surrebuttal, pp. 10-11.

Respondents certainly would not permit their own customers to physically relocate from one exchange in rural south Missouri to metropolitan St. Louis and still retain their old local telephone numbers, unless there was some mechanism in place to recover the additional costs that necessarily would be incurred.[13] Nor would Respondents attempt to shift any of their own transport costs to another carrier or deny such a carrier the right to recover any costs. This situation certainly is not unique to Respondents. As noted from the bench, most Missouri wireline customers currently have no general expectation that they can physically re-locate to a different part of the state, especially to an area served by a different incumbent carrier, and keep their existing local telephone number. (Tr. 80). The FCC's website (despite Staff's desire that the FCC "update" it), supports this notion, as do the websites of at least two other major carriers.[14]

II. UNDISPUTED FACTS

In deciding any case before it the Commission must first ascertain the underlying facts then apply the applicable law to those facts. *State Tax Commission v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982). Fortunately, most of the facts in this case are, or at least should be undisputed. Based on the evidentiary record, there should be no dispute that:

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;

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[13] Exh. 11, Smith Rebuttal, pp. 10-11.

[14] *Id.*, pp. 3-4. *See, also*, Exh. 18. Respondent's unsuccessfully attempted to illustrate this point at the hearing (Tr. 181-183) by having Mr. Voight access AT&T's and Qwest's web sites but was unable to do so due to technical difficulties. Exh. 18 provides the web addresses of both of these sites should the Commission desire to access them to confirm Respondents' contention. Staff as part of its review, both before and after filing its Rebuttal testimony, apparently did not check the websites of any carriers to determine their respective porting practices.

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 location[15] (*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;[16]

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[15] 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).

[16] 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

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);

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;[17]

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;[18]

10) neither of these two customers currently subscribe to any type of supplemental expanded calling service offered by Respondents;[19]

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;[20]

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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.

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

18 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.

19 Tr. 296-297.

20 See citations in footnote 15 above.

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;

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) if the Commission rules in Socket's favor 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;[21]

16) if the Commission rules in Socket's favor in this case, Socket intends to expand its proposed V-NXX service statewide, thereby necessarily forcing Respondents to incur further increasing costs without any compensation for Socket's use of the state-

[21] 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.

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;[22]

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 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.[23]

III. CURENTLY APPLICABLE FEDERAL LAW

Socket's porting requests constitute "location portability" as that term is defined in federal law, Socket's claims to the contrary notwithstanding. As discussed below, nothing in the currently applicable federal law mandates that Respondents provide "location portability" in the wireline-to-wireline context. Accordingly, the Commission has no legal basis under currently applicable federal law to grant Socket's requested relief.

A. Federal Statutes

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

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[22] Exh. 19; Tr. 255-257.

[23] 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.

> 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).

47 U.S.C. Section 251(d)(1) further directs the FCC "to establish regulations to implement" the statutory requirements, which it has done as discussed below.

These statutes are clear. Pursuant to Section 251(b)(2), Respondents are obligated to provide "number portability". Pursuant to Section 150 (30), this number porting obligation only applies when a customer remains at the same location.

B. FCC Rules

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.[24]

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".[25] The definition of "service provider portability" is exactly the same as the definition of "number portability" and includes the same limiting language "at the same location".[26]

The term "location portability" is defined in 47 C.F.R. Section 52.21(j) as follows:

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[24] 47 C.F.R. 52.21.

[25] 47 C.F.R. 52.21(l).

[26] 47 C.F.R. 52.21(q).

> "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).

C. FCC Decisions

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").[27] In this order, the FCC specifically declined to mandate "location portability" between wireline carriers.[28]

The FCC in its Second Report and Order, *Telephone Number Portability* ("Second Order")[29], and in related subsequent proceedings, again considered wireline to 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.[30]

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[27] 11 F.C.C.R. 8352 (1996).

[28] 11 F.C.C.R. 8352, at 8443.

[29] 12 F.C.C.R. 12, 281 (1997)
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[30] 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.

In 2003, the FCC issued its *Intermodal Order*[31] 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".[32] Simply put, the *Intermodal Order* changed nothing with respect to wireline-to-wireline porting.

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 the Act would preclude us from mandating location portability if, in the future, we determine that location portability is in the public interest"[33]

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

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

[32] *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*.

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

actually found it necessary to waive its rules to temporarily *permit* wireline geographic number porting due to a natural disaster.[34]

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 portability[35]…[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."[36]

The Staff agrees with Dr. Furchgott-Roth: "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."[37]

Socket cannot cite the Commission to any currently applicable federal law, whether it be statute, rule or decision, that requires "location portability" in a wireline-to-wireline setting for the simple reason that none exists. In fact, the FCC has specifically declined to require this type of number porting. Socket's attempt to try to expand the scope of the FCC's *Intermodal Order* to apply to wireline-to-wireline "location

[34] 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.

[35] Exh. 6, Furchtgott-Roth Rebuttal, page 9.

[36] *Id*., at page 10.

[37] Exh. 5, Voight Rebuttal, page 20.

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. Even the Staff concedes that the FCC's conclusions with respect to wireless number portability in the *Intermodal Order* are not on point in wireline porting situations.[38]

D. The Definition of "Location"

In an attempt to try get around the inconvenient truth that no currently applicable federal law imposes a legal obligation upon Respondents to provide "location portability", Socket tries to claim that its porting requests, in reality, do not constitute "location portability" but rather "service provider portability" *because the customers in question really are not "moving from one physical location to another"*.

Both common sense and the evidentiary record belies Socket's claim. Even the Staff agrees that Socket's requested porting constitutes "location portability".[39] It is an uncontested evidentiary record fact that the two customers at issue are physically relocating their ISP modem banks from the Willow Springs and Ellsinore exchanges in rural south Missouri to a metropolitan St. Louis exchange. The customers' modem banks will be physically moving outside their existing exchange boundaries. The geographic distance involved is almost half the size of the entire width of the state. The modem banks start in a rural area and end up in an urban area. There necessarily will be a change in the incumbent carrier, *i.e.*, from Respondents to AT&T.

Socket makes far flung arguments with respect to how the word "location" might be defined--in one instance referencing the crab nebula--and has accused Respondents of using the word "location" imprecisely and in a "colloquial manner". If according to

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[38] Id., at page 26.

[39] *Id.*, at page 8.

Socket a customer remains in the same physical location when it moves from a rural area half-way across the state of Missouri to downtown St. Louis, it seems fair to ask Socket how much farther that customer would need to go before the customer could be deemed to have changed its physical location? Presumably that customer could relocate *anywhere* within the state of Missouri, perhaps even farther. While conceding that words can have different meanings in different contexts, Respondents suggest that defining a word in such a way as to basically make it meaningless is worse than being colloquial.

In addition to its etymological arguments, Socket also claims that the FCC in any event has now defined the word "location" as Socket is seeking to define it. The FCC clearly has not added a definition of "location" to its Part 52 rules, so if such a definition is not found in the FCC's rules, where could such a definition be found? According to Socket, it is in the *Intermodal Order*.

The mile-wide flaw in Socket's argument is that, as discussed above, the *Intermodal Order* only addressed and mandated number portability in the wireless/wireline context; Socket is comparing apples to oranges. 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. The FCC *could* have chosen in its *Intermodal Order* to specifically discuss, address, and perhaps even mandate geographic porting beyond the wireless/wireline context, but despite having this opportunity it specifically chose not to do so.

Socket previously has called the Commission's attention to particular paragraphs of the *Intermodal Order* (primarily paragraph 28) to support its claim that there is no "location portability" when call rating and routing remain the same.[40] The Commission should carefully re-read paragraph 28. The FCC's discussion regarding rating and routing remaining the same, and what does not constitute "location portability", explicitly occurs within the limited context of "porting from a wireline to a wireless carrier". The same holds true with respect to virtually all if not all of the language in the *Intermodal Order*. One would have to amend the *Intermodal Order* by striking the word "wireless" each time it appears and substitute in lieu thereof the word "wireline" in order to make the *Intermodal Order* say what Socket claims it says.

IV. THE INTERCONNECTION AGREEMENTS

A. Generally

Implicit in Socket's and Staff's issue number two respecting the ICAs is the fundamental notion that the ICAs somehow place additional obligations upon Respondents with respect to number portability and the particular porting requests at issue here above and beyond currently applicable federal law. As discussed below, this notion is false.

In addition to this, in order for Socket to prevail on issue number two it necessarily must convince the Commission as it attempts to interpret the ICAs: 1) that the ICAs should *not* be interpreted and read in light of currently applicable federal law; **and** 2) to completely set aside and ignore that currently applicable federal law does not mandate "location portability"; **and** 3) that the ICAs *even apply* to the type of service and

[40] Dr. Furchtgott-Roth testified that the term "rate center" is not found in the federal statutes, while "origination" and "termination" are. For regulatory purposes, physical end points are extremely important. Staff's contention that it is the rate center "that forms the basis of legal and regulatory treatment" and the compensation scheme associated with it" rather than the physical end points is incorrect. *See*, Exh. 7, pp. 11-12. *See, also,* his discussion, citing the U.S. Court of Appeals for the District of Columbia's March 11, 2005 decision and the *Intermodal Order's* focus on rating and routing, at pp. 13-16.

porting requests at issue in this case; **and** 4) that the specific terms of the ICAs can be somehow interpreted to require Respondents to port the numbers at issue. Socket and Staff fail not only on one, but on all counts.

Moreover, while in some instances making the same or similar arguments, the Commission should note at the outset that the Staff places an extremely important precondition on all of its arguments in support of Socket under issue number two; namely, that if the service offered by Socket is V-NXX service and V-NXX traffic is not local traffic, then Socket cannot prevail in this proceeding.[41] Even though its service clearly meets the V-NXX definition of the Agreements under Article II, Section 1.131, Socket has never asserted that its service is V-NXX for precisely the reason that admitting such would correctly end this dispute in CenturyTel's favor. Article V, section 9.2.3 of the ICAs specifically and unequivocally states that V-NXX traffic "shall not be deemed Local Traffic".[42] If the Commission were to adopt Staff's analysis in deciding issue number two, the Commission necessarily would have to decide this case in favor of Respondent.

B. The ICAs and Currently Applicable Federal Law

The Commission need not suspend its common sense nor engage in the inherent complexities of the rules of contract interpretation of ambiguous contracts in order to conclude that the ICAs must be interpreted consistent with, in light of, and not contrary

[41] Exh. 5, Voight Rebuttal, pp. 6, 12, 15.

[42] ICAs, Article V, Section 9.2.3 speaks to a condition where a V-NXX number is assigned by Socket. The only question to answer is if Socket ports a CenturyTel NPA/NXXs to a customer physically located outside of the CenturyTel Local Calling Area containing the Rate Center to which the NPA/NXX is assigned, is this also V-NXX service? The answer must be yes and Staff agrees that this is so.

to, currently applicable federal law. The ICAs' own terms make this clear on its face.

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].[43]

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.[44]

In addition, 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.[45]

Additional portions of the ICAs further support Respondents' point, for example: Article II, Sections 1.8, 1.10, 1.75; and Article III, Sections 13.0, 23.0, 35.0, 50.0.

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[43] ICAs, Article I, page 2 of 2.

[44] 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.

[45] ICAs, Article III, Section 13.0, page 9 of 38.

Socket has suggested that these more general provisions are insufficient. To the extent the Commission might be temped to follow Socket's argument, 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].[46]

Even the paragraph in Article XII containing the term "industry agreed-upon practices", which is the term so heavily relied upon by Socket and the Staff, when read in full context shows that its primary emphasis is on permanent number portability requirements based upon applicable federal law:

> 3.2.l 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].[47]

The ICAs by their own terms state that they are intended be interpreted consistent with, in light of, and not contrary to, applicable federal law. Given that currently applicable federal law places no legal obligation on Respondents to provide

[46] ICAs, Article XII, page 1 of 5.

[47] ICAs, Article XII, page 2 of 5.

"location portability" as part of PNP "in response to FCC Orders", the Commission can and should again rule in favor of Respondents without further inquiry.

C. Applicability of the ICAs to Socket's Proposed Service

In order for Socket and the Staff to prevail on issue number two, they first must prove that the ICAs even apply to Socket's proposed service and the number porting requests at issue. As noted by the Commission in Case No. TO-2006-0299, 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.[48] It is an uncontested fact that ports in question are ISP dial-up 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.[49] If Socket's proposed service and the traffic it generates are not local, then the ICAs do not even apply and the Commission again necessarily must rule in favor of Respondents.

D. Socket's Proposed Service

Socket and the Staff part ways in describing and labeling the type of service Socket wants to provide here.

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

[49] *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.

1. Socket's View--FX

Socket claims that its proposed service is basically foreign exchange ("FX"), or at least a form of FX. Respondents have presented significant and credible evidence through the testimony of both Susan Smith and Dr. Harold Furchgott-Roth showing that Socket's proposed service is not FX service, and why in any case FX service is not a service subject to current number portability requirements under federal law or under the ICAs.[50]

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."[51] 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 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

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

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

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. Even the Staff does not believe that Socket's proposed service is FX service and concedes at least some of the differences pointed out by Respondents.[52]

Even if Socket's proposed service was in fact FX, or shared enough of the hallmarks of FX to be considered to be "FX-like", FX is neither subject to currently applicable federal number portability requirements nor subject to porting requirements via the ICAs. Aside from the fact that currently applicable federal law does not place an obligation to port the numbers here in question regardless of how Socket's proposed service is identified, 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.[53] FX is an interexchange, not a local service even if, as Staff states, FX is included in local exchange *retail* tariffs. 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.[54] Moreover, no mention is made

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[52] Exh. 5, Voight Rebuttal, p. 11; Tr. 179-180.

[53] 47 C.F.R. 69.2. See discussion in Exh. 5, Dr. Furchtgott-Roth Rebuttal, p. 12.

[54] *See*, *e.g*., *Arbitration Order*, pp. 29-31, 45.

whatsoever of FX in Article XII of the ICAs wherein Respondents' LNP obligations are addressed.

2. Staff's View—V-NXX

Staff on the other hand claims that Socket's proposed service is not FX service but rather V-NXX service. Staff's interpretation is contradicted by the language of the ICAs in that the ports in question have nothing to do with V-NXX. 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.[55]

As discussed in the introduction to Section IV above, the Staff has correctly put an important precondition on its view that the ICAs provide a legal basis to require Respondents to port the numbers at issue; specifically, that V-NXX traffic must be exchange traffic. Staff's wishes to the contrary notwithstanding, V-NXX traffic has already been deemed to be non-local traffic by the Commission in the *Arbitration Order* and in specific language of Article V, Section 9.2.3 of the ICAs. Moreover, just because that same section states that V-NXX traffic will be billed at "bill and keep" does not

[55] Exh. 12, Smith Surrebuttal, p. 2-4.

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.[56] Based upon Staff's own analysis, the Commission should rule in favor of Respondents on issue number two.

E. Specific LNP Provisions

In addition to all the above, even a cursory review of Article XII of the ICAs governing LNP/PNP supports Respondents' position on issue number two. 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 paragraph (subsection 6.2.2 under the heading of Limitations of Service), addresses the porting of already existing remote call forwarding (RCF) numbers.

Neither Socket nor Staff can point to any provision in Article XII that specifically addresses either FX or V-NXX in the context of number porting. The only expanded local calling service that is specifically addressed is already existing RCF numbers, and there, RCF porting cannot be used for toll bypass and Socket must pay access for RCF porting. This RCF provision is hardly one that Socket would want to use as an analogy for its proposal.

F. "Industry agreed-upon practices" and "industry guidelines"

Against the weight of all the above respecting issue number two, Socket and Staff finally are left to rely on only *six words* in the ICAs to support their position, "industry

[56] Exh. 12, Smith Surrebuttal, pp. 6-8.

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.[57] 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 Springfiel*d, 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 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*

[57] Exh. 12, Smith Surrebuttal, p. 12.

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).

Based upon their reading of Article XII totally out of context, both Socket and the Staff argue that the industry has "evolved" to the point where the type of number porting requested by Socket is now commonplace throughout the industry such that virtually the entire industry (except for Respondents) are routinely porting the types of numbers here requested by Socket. In support of this allegation, they offer only anecdotal evidence of what they believe to be the porting practices of a few Missouri incumbent carriers, that are not even parties to this case and that have had no opportunity to confirm or deny whether they even understand that Socket's requests[58] may constitute location porting. Socket also points to the recent actions by the LNPA-WG on PIM 60.

1. Record Evidence From Other Carriers

Respondent in earlier pleadings already have raised the significant problem that the incumbent carriers referenced by Socket and the Staff are not parties to this case. 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.[59] Staff apparently relied solely on an incomplete data

[58] 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.

[59] Tr. 183-184.

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.[60]

Because these carriers were not parties to the case, neither the Commission nor the Respondents had the 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.

In response to this anecdotal evidence, 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, the Commission has 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 that was received into the record without objection.

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"[61]. 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

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[60] Tr. 180-181.

[61] Exh. 12, Smith Surrebuttal, Schedule SS-1.

“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. Even so, the bottom line in terms of the Commission’s evidentiary record is that the overall weight of Socket’s use of this Pennsylvania testimony is significantly lessened because the Commission and the parties had no opportunity to inquire directly of Embarq one way or the other.

The lack of direct record evidence from other Missouri ILECs aside, “industry agreed-upon practices” cannot be ascertained by looking at the porting practices of a few individual Missouri companies in any event. 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”. The Commission should note the total lack of direct record evidence of ILECs porting practices in other states. Presumably if some existed, Socket and the Staff would have offered it.

2. LNPA-WG and PIM 60

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.[62] Likewise, any consensus reached by the LNPA-WG does not constitute an industry-wide agreement with respect to a carrier's legal obligations.[63] 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.[64]

Above the LNPA-WG in the food chain 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.[65] 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".[66]

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

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

[63] Exh. 9, Penn Surrebuttal, p. 6-7.

[64] *Id.*, pp. 8-10.

[65] Exh. 7, Dr. Furchtgott-Roth Surrebuttal, p. 8-9.

[66] *First Order*, 11 FCC Rcd 8352 at paragraph 37.

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.[67] Industry members are permitted to file appeals from actions taken by the LNPA-WG to the NANC, then to the FCC.

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.[68] 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.[69]

Socket claims that the LNPA-WG's recent "consensus" shows that Socket's porting requests now reflect "industry-agreed upon practices". As discussed above and during questioning at the hearing, this certainly is not the case.[70] 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".

G. Commission Authority Under Section 251(d)(3)

[67] See, Exh. 12, Smith Surrebuttal, p. 12.

[68] Exh. 8, Penn Rebuttal, p. 6.

[69] Exh. 9, Penn Surrebuttal, p. 2.

[70] Tr. 226, 229-231, 233.

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 discussion above should indicate why the Commission should not grant Socket's requested relief under this or any other section of the Act or under the ICAs. Respondents do not believe that Staff's suggestion requires further response, but if the Commission desires to consider it Respondents direct the Commission to the Surrebuttal testimony of Dr. Furchgott-Roth, who fully addresses the issue on pages 16-20.

V. POIs, COMPENSATION, AND NETWORK CAPACITY

Granting Socket's requested relief would inappropriately advantage Socket's own ISP affiliate, permit Socket ISP to use porting to avoid toll charges or the cost of establishing facilities for transporting its ISP-bound traffic[71], competitively disadvantage Respondents, and congest Respondents' interoffice networks and the interexchange toll network itself to the detriment of Respondents' customers.

While in Respondents' view Socket should be establishing POIs on Respondents' network for all traffic exchange, at minimum Socket should be required to establish a POI when traffic meets the thresholds designated in Article V of the ICAs. Staff agrees with Respondents that Socket is required to establish POIs whenever any of Socket's traffic meets the thresholds set forth in Article V of the ICAs. Socket, however, has made it clear that it has no intention of ever establishing a POI in the Ellsinore exchange or any other Spectra or CenturyTel exchange, regardless of the traffic volumes, where

[71] Thereby competitively disadvantaging its ISP competitors and also providing windfall profit to the owners of Socket ISP at CenturyTel's expense.

Socket indirectly interconnects. Further, Socket also seeks to use its own method of measuring traffic threshold attainment as a further ploy to avoid POI establishment in CenturyTel of Missouri exchanges. Socket's method, unlike the Industry standard method used by CenturyTel, is a super parity method which measures attainment at a P.000 total non-blocking grade of service[72] rather than at an established telecommunications grade of service.[73]

The result of Socket not establishing POIs as required under the ICAs is that Respondents and other carriers then are required to improperly bear the expense of installing additional facilities to carry Socket's high volume ISP traffic, not only for other Socket customers, but in this case for Socket's corporate ISP affiliate. In the case of the Ellsinore exchange, the other carrier would be AT&T, and Spectra may be responsible for transiting charges from AT&T for tandem switching in Sikeston before the call is handed off to Socket. Socket's proposed provisioning of its self-labeled "soft FX" puts all the costs of interexchange transport on the incumbent carrier or tandem provider. This will grow geometrically if Socket is allowed to take its plan statewide.[74]

Socket's proposed provisioning of its service also raises some very significant network capacity issues for Respondents and their customers. Socket's ported numbers necessarily must utilize interexchange toll trunks, rather than the local trunk group. Porting means re-routing traffic to a new carrier. Under Socket's proposed porting

[72] Socket's method establishes DS1 threshold attainment as 24 of its Internet customers simultaneously placing calls to the Internet. This would be non-blocking P.000 grade of service rather than an Industry standard such as P.001.

[73] See Kohly Surrebuttal at 12.

[74] Exh. 11, Smith Rebuttal, p. 26; Exhibits 22-25. Respondents' traffic studies, used to determine the ICA thresholds, are fully discussed in Exh. 10, Anderson Rebuttal. *See, also*, Exh. 8, Penn Rebuttal, p. 5. See discussion about compensation in section I above.

scenario, the only option is to re-route Socket's traffic over the toll tandem group. Local trunk groups were designed to handle LNP traffic while toll trunk groups were not designed to handle LNP re-routing, especially at the traffic volumes created by ISP-bound calls. This is graphically demonstrated in Exhibit 19 and in the testimony of Ms. Anderson.[75] Granting Socket's requested relief in this case will lead to interexchange network congestion, blockage and dropped calls[76] as well as potential problems with respect to 911 calls.[77] Socket ignores these issues all together, other than to say they are not Socket's problem. Socket ignores these issues altogether, other than to say they are not Socket's problem. The Staff agrees that Respondents are "understandably concerned" about the potential for network congestion under Socket's porting scenario but conclude however that Socket's obligation to establish new POIs based on traffic volume thresholds resolves this problem.[78] The problem with Staff's conclusion is that Socket has refused to establish new POIs in any of Spectra's 107 exchanges.

VI. CONCLUSION

In this case as in all complaint cases Socket as the complainant bears the burden of proof to show it is entitled to the relief requested. *Shewmaker v. Laclede Gas Co.*, 2007 Mo. PSC LEXIS 1027, Case No. GC-2006-0549, *Report and Order* issued August 16, 2007; *citing*, *Ahlstrom v. Empire District Electric Company*, 4 Mo. P.S.C. 3d 187, 202 (1995) and *Margulis v. Union Electric Company*, 30 Mo. P.S.C. (N.S.) 517, 523 (1991). Not only has Socket failed to carry its burden of proof as to both issues number

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[75] Exh. 10, Anderson Rebuttal, p. 6-7.

[76] Exh. 8, Penn Rebuttal, pp. 8-10.

[77] Exh. 12, Smith Surrebuttal, pp. 24-26.

[78] Exh. 5, Staff Rebuttal, p. 28, 30.

one and two, the record shows that Socket is playing fast and lose with the facts in an attempt to bypass currently applicable federal law and the terms of the ICAs. Socket' proposed porting plan also raises significant compensation and network capacity problems, that Socket's evidence does not, and cannot, address. By filing this *Complaint*, Socket has asked the Commission to go where no other state commission or the FCC have gone before, in direct contravention of stated FCC policy and decisions. The Commission should reject Socket's invitation to do so and rule against Socket's attempt to find new ways to arbitrage the system by ignoring the rules the rest of the industry abides by.

Respectfully submitted,

/s/ Charles Brent Stewart

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing was served on counsel for all parties of record in Case No. TC-2007-0341 by depositing same in the U.S. Mail, first class postage prepaid, by hand-delivery, or by electronic transmission, this 10th day of September 2007.

/s/ Charles Brent Stewart