

Exhibit No.:

Issue(s): FCC Issues; Number
Portability

Witness: Harold W. Furchtgott-Roth

Type of Exhibit: Surrebuttal
Testimony

Sponsoring Party: CenturyTel of
Missouri, LLC and Spectra
Communications Group, LLC d/b/a
CenturyTel

Case No.: TC-2007-0341

SURREBUTTAL TESTIMONY

OF

HAROLD W. FURCHTGOTT-ROTH

ON BEHALF OF

CENTURYTEL OF MISSOURI, LLC AND SPECTRA

COMMUNICATIONS GROUP, LLC d/b/a CENTURYTEL

CASE NO. TC-2007-0341

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

Socket Telecom, LLC,

Complainant,

v.

Case No. TC-2007-0341

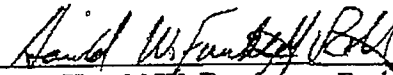
CenturyTel of Missouri, LLC and
Spectra Communications Group, LLC,
d/b/a CenturyTel,

Respondents.

AFFIDAVIT OF HAROLD W. FURCHTGOTT-ROTH

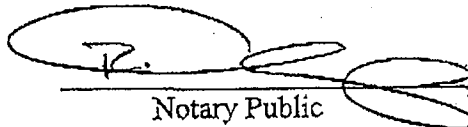
I, Harold W. Furchtgott-Roth, of lawful age and being duly sworn, state as follows:

1. My name is Harold W. Furchtgott-Roth. I am presently president of Furchtgott Roth Economic Enterprises.
2. Attached hereto and made a part hereof for all purposes is my surrebuttal testimony in the above referenced case.
3. I hereby swear and affirm that my statements contained in the attached testimony are true and correct to the best of my knowledge, information and belief.



Harold W. Furchtgott-Roth

Subscribed and sworn to before me this 25th day of June, 2007.


Notary Public

My Commission expires: _____

(Seal)

My Commission Expires June 21, 2010

1 **SURREBUTTAL TESTIMONY OF HAROLD W. FURCHTGOTT-ROTH**
2 **ON BEHALF OF CENTURYTEL OF MISSOURI, LLC AND SPECTRA**
3 **COMMUNICATIONS GROUP, LLC d/b/a CENTURYTEL**

4 **Q. Please state your name.**

5 A. Harold Furchtgott-Roth.

6 **Q. Are you the same Harold Furchtgott-Roth who filed rebuttal testimony in**
7 **this case?**

8 A. Yes.

9 **Q. What is the purpose of your surrebuttal testimony?**

10 A. The purpose of my testimony is to clarify, address and respond to points raised by
11 Staff's Rebuttal Testimony within my areas of expertise. In doing so, I will
12 explain why CenturyTel's positions are consistent with the federal
13 communications law and regulations, and their underlying goals.

14 **Q. Is Staff's position correct that the Act defines number portability between**
15 **carriers to include retention of telephone numbers only when the customer**
16 **remained at the same physical location?**

17 A. Yes. Staff states on page 19: "From the Staff's perspective, in the 1996 Act the
18 Congress defined number portability between carriers to include retention of
19 telephone numbers at the same physical location."

20 **Q. Does Staff agree that the definition of location portability is as you state in**
21 **your rebuttal testimony and has never changed?**

22 A. Yes. In its testimony, Staff explicitly states that "[h]owever, as a federal matter,
23 the Staff tends to agree with what it understands is Dr. Furchtgott-Roth's position:

1 The federal definition of location portability for landline telephone service has not
2 morphed into something different than the customer's physical location, ..."
3 (Voight, page 20)

4 **Q. Does Staff agree that there are no specific FCC regulations requiring**
5 **CenturyTel to honor Socket's porting request in this case?**

6 A. Yes. Staff explicitly states this more than once in its testimony: "...there are no
7 specific FCC regulations requiring CenturyTel to honor Socket's porting request
8 in this case" (Voight, page 20) and "the Act (and by extension, to the FCC),
9 which, in the Staff's opinion, *does not require* any form of location portability."
10 (Voight, page 8).

11 **Q. Does Staff agree that the FCC is a reliable source of information on federal**
12 **regulation?**

13 A. At least in one instance, Staff appears to disagree with the FCC's representation
14 of federal regulation. As Staff states (Voight, page 21):

15 Staff respectfully suggests that use of the FCC's website
16 information is misleading in this regard.
17 The examples shown are also misleading because they only refer to
18 Congress' mandate to provide service provider portability – they
19 do not inform the reader of the location portability practices that
20 obviously have become common place in the industry today,
21 irrespective of the actions of the Congress and the FCC.

22 I respectfully disagree with Staff on this matter. The FCC website is an accurate
23 reflection of federal law in this matter, and the examples used at the website
24 accurately reflect federal regulation. The FCC is not using its website to
25 misinform consumers, carriers, or the public about number portability and
26 location portability.

1 **Q. Is it appropriate for Staff to interpret “the intent of the Congress to insist on**
2 **local number portability as one means to promote local telephone**
3 **competition” as Mr. Voight does on pages 21 and 22 of his testimony?**

4 A. Well, there is no doubt that specific sections of the Act give a state commission
5 some authority to interpret specific provisions of the Act such as the interpretation
6 required to grant exemptions, suspensions, or modifications of a LEC’s 251
7 obligations under the specific requirements of 251(f)(1) and (2). I note that the
8 intent of Congress is as reflected in statutory language, however, and that
9 language in the Telecommunications Act of 1996 requires number portability, but
10 not location portability.

11 **Q. Did you make any statements regarding the intent of Congress in regards to**
12 **local number portability?**

13 A. Yes. Staff acknowledges these in its testimony on page 22 where it is attributed
14 to me that “Congress only intended to enable competition for a customer in a
15 specific location, and that neither Congress nor the FCC authorizes telephone
16 number portability that includes moving from one location to another (location
17 portability).” Further Staff accurately quotes that I “[maintain] that the FCC does
18 not have authority to write rules to achieve specific market outcomes, and that
19 unpredictable and unlawful interpretations of the Act have undermined both the
20 Act and business and consumer confidence in a competitive industry” and that
21 “granting Socket’s request under the guise of Section 251(b)(2) would undermine
22 the Act.”

23 **Q. And what was Staff’s position on your statements that were quoted?**

1 A. I don't know. Staff raised the question on the intent of Congress and quoted my
2 testimony as well as that of others but Staff never tied all of this to any specific
3 argument for or against the issue at dispute. I continue to believe that the intent of
4 Congress can only be interpreted from actual statutory language, not conjectures
5 based on language that is not in statute. The statutory language only confirms my
6 understanding that CenturyTel is not obligated to port these numbers.

7 **Q. Does Staff acknowledge that the Interconnection Agreements do refer to the**
8 **Act and to the FCC and that both do not require any form of location**
9 **portability such as that requested by Socket?**

10 A. Yes. On page 8, "Staff acknowledges that the Socket/CenturyTel Interconnection
11 Agreements do refer generally to the Act (and by extension, to the FCC), which,
12 in the Staff's opinion, *does not require* any form of location portability such as
13 that requested by Socket; ..." [emphasis added by Staff].

14 **Q. Does Staff attempt to put a condition on this acknowledgement?**

15 A. Yes. In trying to overcome the emphasis of this acknowledgement, Staff suggests
16 that "the Agreement also requires the parties to adhere to industry practices,
17 which the Staff conclusively finds to have dramatically leapfrogged the FCC's
18 rules in the matter." (Voight, Page 8)

19 **Q. Is it your understanding that the Interconnection Agreement refers to**
20 **industry practices independent of FCC rules for number portability?**

21 A. No, to the contrary, the Interconnection Agreement conditions the reference to
22 industry practices to FCC rules with the phrase "As such." Note, in Article XII,

1 3.0 LOCAL ROUTING NUMBER - PERMANENT NUMBER PORTABILITY

2 (LRN PNP):

3 3 .2 .1 The Parties agree that the industry has established local
4 routing number (LRN) technology as the method by which
5 permanent number portability (PNP) will be provided in response
6 to FCC Orders in FCC 95-116 (i.e., First Report and Order and
7 subsequent Orders issued as of the date this Agreement was
8 executed). As such, the Parties agree to provide PNP via LRN to
9 each other as required by such FCC Orders or industry agreed-
10 upon practices.

11 **Q. What is your understanding of "industry practices"?**

12 A. The interconnection agreement refers to "industry agreed-upon practices." I am
13 not sure of the definition of "industry agreed-upon practices." It would be
14 reasonable that "agreed-upon practices" are practices that are both documented
15 and have a certification or verification of "agreement" by several parties. It
16 would be impossible to verify "agreed-upon practices" unless they were
17 documented, and there appear to be no such documented "agreed-upon practices."
18 Whether parties to the "agreed-upon practices" are the parties to the
19 interconnection agreement or a broader industry group is unclear. I find no
20 reference in Staff's testimony, or elsewhere, to documents that define and certify
21 the "agreed-upon practices." Absent such a document, I would find it difficult for
22 a regulatory body to rely upon the concept of "agreed-upon practices."

23 I would also note that "practices" are not necessarily the same as
24 "standards." Staff refers to a much broader concept of "industry practices." I
25 would interpret "industry practices" to mean exactly what the words mean.
26 Absent qualifying adjectives such as "best" or "most common" or "approved,"
27 "industry practices" encompass the entire range of practices found anywhere. I

1 understand that CenturyTel witness Susan Smith will explain in more detail what
2 the Agreements actually require and what constitutes industry practices.
3 CenturyTel witness Michael Penn will also discuss the state of what constitutes
4 industry practices.

5 **Q. Does Staff quote your rebuttal testimony in regards to industry practices?**

6 A. Yes, indirectly in the context of “location portability practices,” which
7 presumably reflect “industry practices.” Staff states: “The examples shown are
8 also misleading because they only refer to Congress’ mandate to provide service
9 provider portability – they do not inform the reader of the location portability
10 practices that obviously have become common place in the industry today,
11 irrespective of the actions of the Congress and the FCC.” (Voight, page 21) Staff
12 takes my statement “[d]etails of those plans [a workable LNP architecture] were
13 largely left to *local exchange carriers and state commissions* (emphasis added by
14 Staff)” (Voight, page 21) and places it in a context for which it was not intended.

15 **Q. What did you mean with this statement?**

16 A. As my rebuttal testimony clearly states when read in context (HFR at page 13), I
17 was referring to local exchange carriers and state commissions working only on
18 the details of LNP architecture plans, not any porting obligations, policies or
19 practices. I further state that “[a]ctual FCC rules [as opposed to the details of
20 LNP architectures plans], however, were based on many factors including
21 statutory language that dominate the details of rating and routing information.
22 Most importantly, nothing in FCC rules would lead to a conclusion that “location”

1 for purposes of 251(b)(2) or any other statutory or regulatory provision is
2 equivalent to rating or routing information.” My actual testimony is:

3 **Q. Is Ms. Kistner’s discussion of the factors affecting LNP**
4 **architecture and rules accurate?**¹

5 A. Only partly. As Ms. Kistner observes, rating and routing
6 information clearly had some influence on each of the hundreds of
7 specific LNP architectures plans around the country. Details of
8 those plans were largely left to local exchange carriers and state
9 commissions. Other factors also influenced those plans including
10 available equipment, location of points of interconnection, and, as
11 Ms. Kistner observes, other LEC obligations such as CALEA.
12 Actual FCC rules, however, were based on many factors including
13 statutory language that dominate the details of rating and routing
14 information. Most importantly, nothing in FCC rules would lead to a
15 conclusion that “location” for purposes of 251(b)(2) or any other
16 statutory or regulatory provision is equivalent to rating or routing
17 information.

18 **Q. Staff places great emphasis on Section 3.2.1, Article XII, of the Agreements**
19 **which includes language to the effect that porting will be provided as**
20 **required by such FCC Orders or industry agreed-upon practices. Staff**
21 **further contends that because some LECs have ported geographically to**
22 **Socket in Missouri, industry practice includes the obligation to location port.**
23 **Is this a valid conclusion?**

24 A. No. CenturyTel witness Susan Smith testifies that Staff is taking 3.2.1, a citation
25 in the LRN section, out of context by ignoring the overriding Scope and Intent,
26 Applicable Law and Compliance with Laws and Regulations sections and even
27 the defining Section 1.1 of the LNP Article. But even if 3.2.1 was in context with
28 the above overriding terms, a company acting unilaterally to implement a
29 practice, or even multiple companies acting in concert, does not set "industry

¹ Kistner Direct Testimony at 7-8.

1 agreed-upon practices." See my comments on "industry agreed-upon practices"
2 above.

3 **Q. Is the North American Numbering Council (NANC) capable of creating**
4 **"industry agreed-upon practices"?**

5 A. NANC is primarily an advisory group to the FCC, and is not by itself a standard-
6 setting body or a body that develops "industry agreed-upon practices." Even if
7 NANC were a standard-setting body, it would create nation-wide rather than
8 state-specific standards. As the FCC stated in 1996:

9 37. The 1996 Act directs this Commission to adopt regulations to
10 implement number portability, and we believe it is important that
11 we adopt uniform national rules regarding number portability
12 implementation and deployment to ensure efficient and consistent
13 use of number portability methods and numbering resources on a
14 nationwide basis. Implementation of number portability, and its
15 effect on numbering resources, will have an impact on interstate, as
16 well as local, telecommunications services. Ensuring the
17 interoperability of networks is essential for deployment of a
18 national number portability regime, and for the prevention of
19 adverse impacts on the provision of interstate telecommunications
20 services or on the use of the numbering resource. *We believe that*
21 *allowing number portability to develop on a state-by-state basis*
22 *could potentially thwart the intentions of Congress in mandating a*
23 *national number portability policy, and could retard the*
24 *development of competition in the provision of telecommunications*
25 *services.*² *(Emphasis added)*

26 Section 52.26 of the FCC's rules leaves to NANC, not to state commissions or
27 individual industry members or groups of industry members, "ongoing oversight
28 of number portability administration . . . subject to [FCC] review." The term
29 "location portability" however is not part of FCC rules, and as I explained in my
30 rebuttal testimony, "location portability" is different from "number portability."

² *In the Matter of Telephone Number Portability*, CC Docket No. 95-116, First Report and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352 (1996) (released 6/28/1996) (emphasis added).

1 **Q. Has NANC created "industry agreed-upon practices" for location**
2 **portability?**

3 A. Again, NANC is an advisory group primarily on technical issues to the FCC. In
4 that capacity, NANC has found "location portability is technically limited to rate
5 center/rate district boundaries of the incumbent LEC due to rating/routing
6 concerns. Additional boundary limitations, such as the wire center boundaries of
7 the incumbent LEC may be required due to E911 or NPA serving restrictions
8 and/or regulatory decisions."³ These are not "industry agreed-upon practices," but
9 observations on technical limitations. Nor are the technical limitations on
10 location portability ever translated into requirements for location portability under
11 federal rules.

12 **Q. Can Staff accurately determine "industry standards" merely based upon a**
13 **statement by Socket that location ports are processed by Embarq and AT&T**
14 **who are not even a party to this case?**

15 A. No. I address the concept of industry practice above. I would also suggest that
16 only Embarq and AT&T, and not any third parties, are in a position to describe
17 their number porting practices. Those practices, whether in Missouri or
18 elsewhere, are not codified and publicized by the individual companies, much less
19 a broader industry group to which various carriers have "agreed-upon practices."

20 **Q. Do you agree with Staff's conclusion "that the decisions of the LNPA-WG**
21 **are not binding on its members or any telecommunications company"?**
22 **(Voight, page 24).**

³ North American Numbering Council Local Number Portability Administration Selection Working Group Final Report and Recommendation to the FCC, Appendix D at 5 (sec. 7.3) (released April 25, 1997), in the NANC Architecture and Administrative Plan for Local Number Portability.

1 A. Yes.

2 **Q. Staff states that because CenturyTel is willing to port a number when the**
3 **customer is also moving within the exchange that this “represent[s] an**
4 **attempt by CenturyTel to make the law work in instances it agrees with, and**
5 **not work in instances it disagrees with.” (Voight, page 17). Staff further**
6 **highlights what it perceives as disparities between your rebuttal testimony**
7 **and that of CenturyTel witness Susan Smith’s. Is there a discrepancy**
8 **between the witnesses?**

9 A. No. Based on available information, CenturyTel is complying with federal rules
10 with respect to number portability. For clarification, let me point to the *First*
11 *Order* where directly after defining “location portability,” the FCC states: “Today,
12 telephone subscribers must change their telephone numbers *when they move*
13 *outside the area served by their current central office* [emphasis added].”⁴ This
14 sentence makes it clear that *unless* the Commission were to impose location
15 portability, which it has declined to do, subscribers would have to change their
16 numbers if they moved outside the area served by their current carrier’s central
17 office. Moreover, among CenturyTel’s obligations as an ILEC and a
18 telecommunications carrier is nondiscrimination--what it does for its own
19 customers, it is required to do for customers of other carriers. The Act has many
20 nondiscrimination provisions including Sections 201, 202, or 251 and 252. To the
21 extent that CenturyTel allows customers to keep phone numbers when moving
22 within a central office area, CenturyTel must provide the same service to
23 customers of other carriers. CenturyTel does not provide the service of "number

⁴ First Order 174, 11 F.C.C.R. at 8443.

1 porting" from one part of the state to another. This is consistent with the First
2 Order reference that I previously mentioned where Staff's "if within the central
3 office area is permitted, then beyond the central office area should be permitted"
4 is not consistent.

5 **Q. Staff states that "it is the telephone rate center that forms the basis of legal**
6 **and regulatory treatment, and the associated intercarrier compensation**
7 **scheme, not the physical end points of the telephone connection." (Voight,**
8 **page 14). Is this an accurate assessment?**

9 A. Interestingly, the term "rate center" is not found in the Act. On the other hand,
10 "origination" and "termination" are found repeatedly in the Act. Thus the "the
11 basis of legal and regulatory treatment" is certainly not exclusively the "rate
12 center." Specific examples illustrate the importance of physical end points. One
13 obvious example is interLATA telecommunications under Sections 271 and 272.
14 The statutory definition was based on physical endpoints, not rate centers.

15 More generally, consider an interexchange call. For a traditionally dialed
16 voice toll call, it is the mere fact that the called rate center is different than the
17 calling rate center that implies access compensation is due to the originating and
18 terminating local carriers. But it is the physical end points of the telephone
19 connection that determines if the compensation and regulatory oversight is
20 interstate or intrastate.

21 As another example, the called rate center and the calling rate center are
22 the same with FX and RCF but varying access compensation is due to the
23 originating local carrier based on the physical end points of the telephone

1 connection. The regulatory treatment may vary as well if the end points are in
2 different states.

3 **Q. Staff likens VNXX to FX service (Voight, pages 9 and 11) and considers FX**
4 **to be an exchange service (Voight, page 12). What is your opinion of the**
5 **regulatory status of FX service?**

6 A. I addressed the regulatory treatment of foreign exchange in my rebuttal testimony
7 (Furchtgott-Roth, page 12). Specifically, under FCC rules, foreign exchange is a
8 form of private line interexchange service, not a local exchange service or a local
9 exchange number portability service.⁵

10 **Q. Staff states that “[i]f Socket’s VNXX service was an interexchange service,**
11 **exchange access charges would apply, which clearly is not the case with the**
12 **CenturyTel/Socket Interconnection Agreement.” (Voight, page 14). Does the**
13 **lack of access charges make this an exchange service and not interexchange?**

14 A. No. Moreover, as CenturyTel witness Susan Smith testifies in surrebuttal,
15 federal courts have already said that interexchange access charges can be applied
16 to VNXX by Commission decision. Additionally, witness Smith testifies that the
17 Agreements specifically state that VNXX traffic is not local traffic.⁶

18 **Q. But Staff says that the VNXX telephone traffic subject to this dispute is**
19 **Telephone Exchange Traffic subject to 47 U.S.C Sections 251(b)(2) and**
20 **251(c)(2)(A)&(B)? (Voight, page 34).**

⁵ 47 CFR 69.2. “(dd) *Private line* means a line that is used exclusively for an interexchange service other than MTS, WATS or an MTS-WATS equivalent service, including a line that is used at the closed end of an FX WATS or CCSA service or any service that is substantially equivalent to a CCSA service.”

⁶ Agreements, Article V- 9.2.3, VNXX Traffic.

1 A. With all due respect, I find this conclusion problematic. First, the traffic in
2 question appears to be ISP-bound traffic,⁷ and the FCC has consistently found
3 ISP-bound traffic to be interstate traffic. Second, it appears that the Agreement
4 specifically states that VNXX traffic is not local traffic.⁸

5 **Q. On page 26 of Staff's Rebuttal Testimony, Staff states that "[t]he FCC has**
6 **ordered implementation of wireline to wireless number portability in a**
7 **manner that lends credence to Socket's argument that its request does not**
8 **constitute location portability. This is because the rating of calls to the ported**
9 **number remains the same." What is your response to this statement?**

10 A. I believe that staff has misinterpreted the FCC orders. See my rebuttal testimony
11 (Furchtgott-Roth, pages 13-14). Consider the following findings of the US Court
12 of Appeals for the District of Columbia:⁹

13 "But this focus on the "location" of the telephone number, based solely on
14 its rating, is at best metaphysical. It surely is not the physical location discussed in
15 the First Order. Moreover, the First Order emphasized the user's location, not the
16 number's. See First Order 172, 11 F.C.C.R. at 8443 ...Indeed, in the sentence
17 highlighted by the FCC and discussed above, the First Order explained that in the
18 absence of location portability, "subscribers must change their telephone numbers
19 when they move outside the area served by their current central office." Id. 174, at
20 8443." (Page 16)

⁷ Kohly Direct Testimony at 15; Voight Rebuttal Testimony at 3-4.

⁸ Agreements, Article V- 9.2.3, VNXX Traffic

⁹ United States Court of Appeals for the District of Columbia Circuit, March 11, 2005
No. 03-1414, UNITED STATES TELECOM ASSOCIATION AND CENTURYTEL, INC.,
PETITIONERS v. FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA.

1 “The principal limit on portability announced by the *Intermodal Order* is
2 that the wireless carrier’s coverage area must overlap the geographic rate center in
3 which the customer’s wireline number is provisioned. And at oral argument, the
4 FCC conceded that, had the *Intermodal Order* not included such a limit on the
5 porting obligation, it “would have begun to be inconsistent with location
6 portability.” Oral Arg. Tape at 38:51-39:28.” (Page 18)

7 For purposes of clarification, I note that a wireless carrier’s coverage area
8 is not merely some listing of an exchange in a tariff. It is the actual and technical
9 provision of local service to the physical location from which the port is made.
10 This provision of service is accomplished by the deployment of a network that
11 covers the physical location.

12 **Q. Can Staff rely on the Intermodal Order for any guidance on location porting**
13 **between wireline carriers?**

14 A. Yes, at least to the extent the court review of the Order clarifies that location
15 portability does not apply in the wireline-to-wireline context. Again, consider the
16 findings of the DC Court:

17 “Finally, the FCC complains that technological disparities require a
18 different interpretation of the statutory term “location” in the intermodal context
19 than in the wireline-to-wireline context, and that the Commission’s regulations
20 should reflect that difference. The Commission may well be correct. It may be
21 that, as a matter of telecommunications policy, “location” should have reduced
22 significance *in the wireline-to-wireless context* (emphasis added), ...” (page 19)

1 In the *Second Order*, which established the *requirements for number*
2 *portability in the wireline-to-wireline context* (emphasis added), the FCC
3 provided that such portability was “limited to carriers with facilities or numbering
4 resources in the same rate center...” *Intermodal Order* ¶ 7, 18 F.C.C.R. at 23,700
5 (page 13)

6 The *Second Order* was limited to wireline-to-wireline portability and did not
7 resolve any issues relating to intermodal portability. (page 6)

8 Portability obligations are clarified in the First Order. Wireline-to-
9 wireline portability is clarified in the Second Order. The Intermodal Order is just
10 that- porting between intermodal carriers which does not change anything
11 concluded in the First and Second Orders for wireline ports.

12 **Q. Does Staff state that wireline and wireless porting situations are different?**

13 A. Yes. On page 26 of Staff’s Rebuttal Testimony, Staff states that “[t]he Staff finds
14 the FCC’s conclusions on wireless number portability to be instructive but not on
15 point in wireline porting situations.”

16 **Q. Have the FCC or Federal Courts found that location portability was**
17 **occurring in the context of wireline to wireless porting?**

18 A. In the context of wireline-to-wireless porting, both the FCC¹⁰ and the Court¹¹
19 found that location portability was not taking place. While the Intermodal Order
20 does discuss rating and routing, the first criteria for submitting a valid port order
21 is that the wireless carrier has to have coverage in the area. With coverage as the

¹⁰ FCC, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, CC Docket 95-116, released November 10, 2003, paragraph 22.

¹¹ United States Court of Appeals for the District of Columbia Circuit, March 11, 2005, No. 03-1414, UNITED STATES TELECOM ASSOCIATION AND CENTURYTEL, INC., PETITIONERS v. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, page 18.

1 initial criteria, then the fact that the rating and routing is not changing shows that
2 the wireless customer is not relocating.

3 **Q. Staff recommends that the Commission exercise its prerogative pursuant to**
4 **Section 251(d)(3) and order CenturyTel to fulfill the port requests at issue in**
5 **this proceeding because neither the Congress nor the FCC has pre-empted its**
6 **ability to do so. (Voight, page 20) Do you agree with this recommendation?**

7 A. To answer that question we must look at the language of section 251(d)(3) which
8 states:

9 In prescribing and enforcing regulations to implement the requirements of
10 this section, the Commission shall not preclude the enforcement of any
11 regulation, order, or policy of a State commission that—

12 (A) establishes access and interconnection obligations of local
13 exchange carriers;

14 (B) is consistent with the requirements of this section; and

15 (C) does not substantially prevent implementation of the
16 requirements of this section and the purposes of this part.

17 Section 251(d)(3) is not a grant of new authority to a state; rather, it is a limitation
18 on the FCC with respect to state commission “enforcement” of independent
19 authority of “regulation, order, or policy” that meets all three of the necessary
20 conditions listed. Notice, the three conditions are connected by "and" not "or".

21 It is not clear that even one of the three necessary conditions is met with
22 respect to location portability. It is almost certain that all three are not met:

23 (A) To establish “access and interconnection” obligations, the state
24 commission must establish obligations linked to section 251. “Location
25 portability” is neither specifically an “interconnection” nor an “access”
26 issue under 251. As the FCC has consistently found, location portability is
27 not number portability. The FCC has already determined that it is not a

1 251(b) obligation, so it is unclear whether there is any linkage at all
2 between location portability and section 251.

3 (B) "Location portability" has not been found by the FCC to be
4 "consistent with
5 the requirements" of 251.

6 (C) Whether location portability "substantially prevent[s] implementation
7 of the requirements of this section and the purposes of this part" is subject
8 to debate, but not obvious.

9 Thus, one is left with one of the three requirements (B) certainly not met; one (A)
10 quite doubtful; and one (C) subject to debate. It is very difficult if not impossible
11 to see how section 251(d)(3) applies to this dispute.

12 Leaving aside for the moment the frailties of location portability under
13 federal law, let me further distinguish the potential applicability of section
14 251(d)(3) for the Missouri Public Service Commission under three different sets
15 of circumstances: (a) decision under 252 including resolution of a dispute; (b)
16 implementation of a Missouri state law; and (c) more common circumstances.

17 (a) Decision under 252 including resolution of a dispute:

18 There appears to be little if any basis for the Public Service Commission
19 to cite section 251(d)(3) in the context of a dispute resolution in a 252 proceeding.
20 It is not obvious that Section 251(d)(3) has a direct bearing on the state resolution
21 of a dispute under a 252 interconnection agreement between two local exchange
22 carriers, under which the present dispute arises. Section 251(d)(3) does not
23 directly address section 252, but rather pertains to Section 251 and "the purposes

1 of this part.” The FCC’s role with respect to Section 252 is specified in that
2 section (See, e.g., 252(e)(5) and (6).)

3 More importantly, Section 251(d)(3) is a limitation on FCC action, which
4 would not directly result from a dispute under section 252. Federal courts, rather
5 than the FCC, are the forums for disputes under 252 interconnection agreements.
6 Although, hypothetically, aggrieved parties to a state dispute resolution of an
7 interconnection agreement could petition the commission under one of the general
8 common carrier provisions of the Act, there is little precedent.

9 (b) Implementation of a Missouri state law:

10 Alternatively, there might be a basis for the Public Service Commission to
11 cite section 251(d)(3) in the promulgation of rules of a Missouri state law
12 specifically requiring location portability, although I have not seen reference to
13 such a law. Such a law could be implemented by the Public Service Commission
14 with a finding that such a law met the conditions of section 251(d)(3), which as
15 noted above, is doubtful in that none of the three necessary conditions is met.

16 (c) More common circumstances:

17 The state savings clause of section 251(d)(3) primarily pertains to access
18 to interconnection, UNEs and resale and the rates pertaining to the same. Further,
19 this clause gives the state commissions authority to grant exemptions,
20 suspensions, or modifications (limitations) of a LEC’s 251 obligations under the
21 specific requirements of section 251(f)(1) and (2). Section 251(d)(3) does not
22 grant a role to the states to expand number portability obligations. This is quite
23 clearly defined in the FCC’s Local Competition Order at paragraphs 135 and 136.

1 **Q. Staff states that neither Congress nor the FCC have pre-empted the**
2 **MoPSC's authority to rule for nor against CenturyTel or Socket in this**
3 **matter. (Voight, page 6). Is this correct?**

4 **A.** The Telecommunications Act of 1996 circumscribes the range of decisions that
5 States can make to be consistent with the Act. The Telecommunications Act of
6 1996 creates no specific authority for either federal or state regulation of location
7 portability. Federal law does not grant independent authority to states to grant
8 location porting. Further, location porting is not a 251 issue, nor is it consistent
9 with 251.

10 It is my understanding that state commissions can only regulate
11 telecommunications service in areas where first, federal law has not pre-empted
12 them, and second, where their state legislature has authorized them to act in that
13 area. Federal law can pre-empt, but only the state legislature can authorize. Thus,
14 state commissions derive their authority with respect to telecommunications law
15 primarily from state laws. It is my further understanding that the Parties and the
16 Commission have acknowledged this in the arbitrated agreements where the
17 Scope and Intent begins and affirmatively states: "Pursuant to this Agreement,
18 and to the extent required by the Act and other applicable provisions of federal
19 and *state law*, the Parties will extend certain arrangements to one another..."
20 [emphasis added].

21 For the Commission to rule for Socket, there must be existing Missouri
22 law which specifically gives the Commission the authority to develop obligations
23 on a carrier in excess of those required under the Act. Even assuming a state

1 ruling on location portability were otherwise consistent with 251(d)(3), an
2 extraordinarily unlikely event as discussed above, the state commission would
3 require specific state authority. Without this independent authority under state
4 law, state-mandated location portability would not meet the requirements of
5 Section 251(d)(3) in that it would not be “consistent with the requirements of this
6 section.” This section (i.e. 251(b)(2)) requires only that users be allowed to retain
7 their number when switching from one telecommunications carrier to another at
8 the same location.

9 I do not profess to be an expert on Missouri State law but a brief review of
10 the pertinent Missouri Revised Statutes, and the Code of State Regulation, Title 4,
11 Division 240 (as found on the Commission’s own website) do not seem to provide
12 the authority to develop carrier obligations beyond those required under the Act.

13 **Q. What is your conclusion?**

14 A. I have reviewed issues related to federal telecommunications regulation as
15 presented in the testimony of Staff. I find several misinterpretations of federal
16 telecommunications regulations in the testimony. Conclusions reached by the
17 Staff based a verbatim reading of federal telecommunications regulations are
18 sometimes correct but conclusions reached by Staff on its *interpretation* of federal
19 telecommunications regulations are not reliable. Staff has correctly
20 acknowledged that the Act and FCC rules do not require location porting. Staff
21 refers to the concept of “industry practices,” but offers no reliable evidence or
22 documentation of “industry agreed-upon practices.” Section 251(d)(3) by itself is
23 not a source of authority for state commission decisions.