BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Southwestern Bell Telephone Company d/b/a AT&T Missouri's Petition for Compulsory Arbitration of Unresolved Issues for an Interconnection Agreement With Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc.	)))))	Case No. IO-2011-0057

REPLY BRIEF OF GLOBAL CROSSING

This Reply Brief responds to AT&T's Initial Brief on Issue 1 dated September 29, 2010 and Initial Post-Hearing Brief on Arbitration Issues 2 and 3 dated October 13, 2010.

I. Issue 1: What is the Appropriate Compensation for VOIP Traffic?

In its Initial Brief, Global Crossing demonstrated that IP-PSTN traffic is not subject to access charges under current law.[1] The extensive federal caselaw Global Crossing cited supports this conclusion, including FCC precedent dating back to the 1980 *Computer II* decision and several federal court cases, including *PAETEC Communications, Inc. v. CommPartners, LLC*[2] from earlier this year and *Southwestern Bell v. Missouri Public Service Commission*,[3] where a federal court in Missouri upheld this Commission's ruling in the M2A arbitration that VOIP is not subject to access charges.[4] Global Crossing also demonstrated that the FCC has preempted RSMo Section 392.550.2 and that the state statute does not apply in this proceeding.[5]

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1 *See* Global Crossing Initial Brief at 3-9.

2 No. 08-0397 (D.D.C. Feb. 18, 2010) ("*PAETEC*").

3 461 F. Supp. 2d 1055 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009).

4 *See* Arbitration Order, TO-2005-0336 (ordering "that IP-PSTN traffic be charged under the reciprocal compensation regime rather than be subject to access charges").

5 *See* Global Crossing Initial Brief at 9.

In its Initial Brief, AT&T argues that federal law subjects IP-PSTN traffic to access charges because: (1) the FCC's rules require carriers to pay access charges on interexchange traffic, and neither those rules nor AT&T's tariffs "turn upon the particular format in which an interexchange call is carried";[6] (2) the exemption from access charges for information services like VOIP does not apply to carriers terminating IP-PSTN traffic because those carriers are providing a telecommunications service to VOIP providers;[7] and (3) other state commissions have in the past supported AT&T's position.[8] Apparently unaware of the FCC's preemption of state jurisdiction over VOIP services, AT&T also argues that RSMo 392.550.2 precludes this Commission from taking any action other than subjecting VOIP traffic to access charges.[9] Each of AT&T's arguments is addressed below.

A. Federal Law Subjects VOIP Traffic to Reciprocal Compensation, Not Access Charges.

AT&T's arguments that federal law subjects VOIP traffic to access charges suffer from many problems, the most significant of which is that they have been considered by federal courts and completely rejected. As discussed in Global Crossing's Initial Brief, earlier this year the U.S. District Court for the District of Columbia ruled decisively in the *PAETEC* case that IP-PSTN traffic, when transmitted to a LEC by an interexchange carrier ("IXC") for termination, is not subject to access charges.[10] The court considered the argument, which AT&T is now making, that the local exchange carrier's ("LEC's") tariffs in that case required payment of

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6 AT&T Initial Brief at 5.

7 *Id*. at 6-7.

8 *Id*. at 9-11.

9 *Id*. at 3-4.

10 *See PAETEC* at 5-6 (citing *AT&T Access Charge Petition*, 19 FCC Rcd 7457, 7459-61 (2004)).

access charges regardless of the technology used to originate or transmit the traffic.[11] The LEC had argued that the filed-rate doctrine required the tariff to prevail over the exemption for enhanced/information services. The court disagreed, stating that access charges are inapplicable to VOIP because it is an enhanced/information service; and, because a "tariff cannot be inconsistent with the statutory framework pursuant to which it is promulgated," the LEC's tariff does not trump the VOIP access charge exemption.[12]

The *PAETEC* court also disagreed with the argument AT&T makes in its Initial Brief that the exemption for enhanced or information services only applies to enhanced service providers ("ESPs") themselves, and not to carriers that transmit ESP traffic.[13] According to the court, "[i]nformation services are not subject to the access charge regime."[14] The court did not make the distinction AT&T believes exists between information services traffic transmitted to LECs by ESPs and such traffic when it is transmitted by underlying carriers. The court's finding on this matter is consistent with well-settled federal law. In *National Cable & Telecommunications Association v. Brand X Internet Services*, the U.S. Supreme Court held that the use of telecommunications as an underlying component in the provision of an information service (such as, in this case, an IXC's transmission service) does not transform the information service into a telecommunications service.[15] Hence, just because a carrier is providing a transmission

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11 *See id*. at 8-11.

12 *Id*. at 11.

13 *See* AT&T Initial Brief at 7-9.

14 *PAETEC* at 5.

15 545 U.S. 967, 989-90 (2005).

component to a VOIP provider does not transform the VOIP traffic into a telecommunications service and subject it to access charges.[16]

Moreover, AT&T's argument that the ESP exemption applies only to ESPs themselves and not to the traffic they generate, as transmitted by underlying carriers, would completely gut the ESP exemption. If an ESP has a customer in, say, New York that makes a VOIP call bound for the customer of an ILEC in Missouri, and that ESP does not have direct connectivity to the ILEC in Missouri to which the traffic is bound, the ESP must acquire that connectivity from a carrier that is itself connected to the ILEC in Missouri. But AT&T believes that the carrier transmitting the traffic for the VOIP provider is not exempt from access charges, and so neither is the traffic.[17] How, then, is the ESP exempt from access charges if its underlying providers

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[16] AT&T's Initial Brief ignores *PAETEC* but cites to a 23-year-old FCC decision, *Northwestern Bell Tel. Co.*, 2 FCC Rcd 5986 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992), for the proposition that only ESPs are entitled to receive the ESP exemption. *See* AT&T Initial Brief at 9 n.18. As the *Northwestern* case holds, though, where a carrier is itself an ESP, it is entitled to receive the exemption. 2 FCC Rcd at 5987 ("[I]nterexchange carriers … are eligible for an interstate access charge exemption for their enhanced service offerings."); *see also infra* note 19 and accompanying text (discussing the fact that carriers transmitting VOIP traffic may offer their own retail VOIP offerings). And on the narrow issue for which AT&T cites *Northwestern* — that where an ESP sends traffic to an IXC only the ESP, and not the IXC, is entitled to the ESP exemption — the case has clearly been overtaken by *PAETEC* as well as *Brand X*, which more recently determined that the use of telecommunications as an input for an information service does not change the nature of the information service.

[17] AT&T claims that the ESP exemption only applies to "use of the PSTN for *originating* the telecommunications used to provide the enhanced or information service" and not to the termination of such traffic. AT&T Initial Brief at 10. AT&T is only half right. While the two FCC orders it selectively quotes indicate that the ESP exemption applies to origination of ESP traffic, they do not in any way preclude the exemption from applying to termination of ESP traffic. Indeed, the 1997 *Access Charge Reform Order*, 12 FCC Rcd 15982, 16131 (1997), says, in language not quoted by AT&T, that "[i]n the 1983 Access Charge Reconsideration Order, the Commission decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and *terminate* interstate calls, ISPs should not be required to pay interstate access charges." In that order the FCC went on to conclude that "[w]e decide here that ISPs should not be subject to interstate access charges," without distinction between originating and terminating access charges. *Id.* at 16133. This is consistent with the FCC orders that originally established and later affirmed the ESP exemption, none of which indicate that the exemption applies only to originating access charges. *See Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture*, 6 FCC Rcd 4524 (1991); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd

must pay them on the traffic the ESP generates? The answer is that the traffic, and not just the ESP itself, is exempt from access charges because, under *Brand X*, such traffic is an information service.[18]

The *Brand X* decision simply makes AT&T's attempt to differentiate ESPs offering retail VOIP services from carriers transmitting VOIP traffic on their behalf into a red herring. VOIP traffic itself is an information service, and so any carrier transmitting it is entitled to the exemption from access charges. Moreover, AT&T's argument fails to account for the fact that a carrier transmitting VOIP traffic may itself offer VOIP services on a retail basis, as does Global Crossing.[19] But even if *Brand X* had never been decided and IP-PSTN traffic were considered a telecommunications service, Section 251(b)(5) of the Communications Act of 1934 (the "Act"), which was added by the Telecommunications Act of 1996, requires all telecommunications

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2631 (1988); *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, 77 FCC 2d 384, 428-35 (1980).

[18] AT&T understands that dial-up Internet service providers, which are ESPs, may originate traffic from ILEC customers, which then typically travels from the ILEC to a CLEC and then to the ISP, without the CLEC having to pay *originating* access charges. *See AT&T Initial Brief* at 7. But if AT&T's theory were correct — i.e., that only the ESP has the benefit of the exemption — then the CLEC transmitting the dial-up traffic to the ISP would be required to pay originating access, which it is not. *See generally, e.g., Core Communications, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010). This being the case, there is no reason why ESPs cannot also send their traffic to carriers like Global Crossing for termination to ILEC networks without access charges.

[19] *See* Mickey Henry Direct Testimony at 1 ("Global Crossing Local Services, Inc. provides facilities-based local services as well as VOIP retail and wholesale services."); AT&T's Entry of Discovery Responses on the Record, Oct. 8, 2010 (Answer to Question 2: "Global Crossing Local Services, Inc. provides retail VOIP services."). AT&T claims that "Global Crossing may suggest that it sometimes acts as a retail provider of VoIP service, and not merely as a carrier of VoIP traffic for VoIP providers. But Global Crossing has presented no evidence to support its suggestion …." AT&T Initial Brief at 10. Clearly that is not the case, as the record reflects. Under the circumstances, the argument AT&T makes in its initial brief — that only ESPs may receive the ESP exemption — requires that Global Crossing at least be entitled to the ESP exemption for VOIP traffic that originated through Global Crossing's own retail VOIP offerings. *See supra* note 16.

traffic to be subject to reciprocal compensation and not access charges.[20] Section 251(g) of the Act[21] creates a limited exemption from the reciprocal compensation requirement of Section 251(b)(5) where there was a "pre-Act obligation relating to inter-carrier compensation."[22] As the court in *PAETEC* held, "[t]here cannot be a pre-Act obligation relating to intercarrier compensation for VoIP, because VoIP was not developed until the 1996 Act was passed."[23] The U.S. District Court for the Eastern District of Missouri made an identical ruling in 2006 when, in upholding this Commission's 2005 M2A arbitration order, it held that "[b]ecause IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable."[24]

AT&T cites the FCC's 2007 *Time Warner Order*[25] as support for the idea that a carrier provides a telecommunications service even when it transmits VOIP traffic.[26] But that order provides no such support. The FCC ruled in *Time Warner* that CLECs providing wholesale services are entitled to interconnect with ILECs regardless of the types of customers the CLECs serve (end users, VOIP providers, etc.).[27] Just because those CLECs are entitled to interconnect

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[20] 47 U.S.C. § 251(b)(5). AT&T notes correctly that "'local' calls … are subject to 'reciprocal compensation' rates." AT&T Initial Brief at 1-2. But in truth *all* telecommunications traffic, whether local or not, is subject to reciprocal compensation under Section 251(b)(5), except for calls that are part of the narrow category of traffic that is subject to Section 251(g). *See generally Core*, 592 F.3d at 145.

[21] 47 U.S.C. § 251(g).

[22] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

[23] *PAETEC* at 7-8.

[24] *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1080 (E.D. Mo. 2006).

[25] 22 FCC Rcd 3513 (2007).

[26] *See* AT&T Initial Brief at 6-7.

[27] In this respect *Time Warner* undercuts AT&T's view that only ESPs, and not the carriers they use to connect to the PSTN, are entitled to the ESP exemption from access charges. In *Time Warner* the FCC acknowledged the importance of ensuring access to the PSTN for VOIP providers through competitive carriers. *See* 22 FCC Rcd at 3519 ("[T]he Commission expressly contemplated that VoIP providers

under Section 251 does not affect the classification of the services VOIP providers offer to their end users or remove the access charge exemption from VOIP traffic sent to LECs for termination. As the FCC said in *Time Warner*, "[t]he regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251."[28] Thus, ESP traffic remains subject to the access charge exemption regardless of the type of underlying carrier transmitting it. And, again, even if the traffic can be considered a telecommunications service, it would still only be subject to reciprocal compensation under Section 251(b)(5) and not access charges under Section 251(g). *Time Warner* does nothing to change this.[29]

B. The Missouri Statute Is Preempted, and This Commission Must Make its Ruling Based on Federal Law.

AT&T claims that "in Missouri" the issue of whether VOIP traffic is subject to access charges "has been conclusively resolved by the Missouri Legislature" in RSMo Section 392.550.2.[30] As Global Crossing makes clear in its Initial Brief, however, that statute has been

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would obtain access to and interconnection with the PSTN through competitive carriers."). It would not make sense for the Commission to encourage the growth of enhanced services by providing ESPs with an exemption from access charges, *see MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983), only to turn around in *Time Warner* and encourage ESPs to interconnect to the PSTN through CLECs if the ESP exemption goes away when ESP traffic is transmitted by CLECs or IXCs.

[28] *Time Warner*, 22 FCC Rcd at 3520.

[29] AT&T also cites decisions from this Commission and the commissions in California, Ohio and Illinois that it claims support the imposition of access charges on IP-PSTN calls. *See* AT&T Brief at 10-11. These decisions misunderstand FCC precedent, but in any event they predate the federal court ruling in *PAETEC* and have therefore been overtaken by events. There is no reason to address them further, given that they are clearly contrary to established federal law on this subject. The one state arbitration decision AT&T does not cite in this context is this Commission's decision in the M2A proceeding that VOIP should not be subject to access charges. *See supra* note 4 and accompanying text. That decision was based on federal law and was upheld in federal court. *See supra* notes 3-4 and accompanying text. Because the subsequently passed Missouri statute is preempted, *see* Global Crossing Initial Brief at 9, this Commission should stand on its own precedent in this proceeding.

[30] AT&T Initial Brief at 3.

preempted because of the FCC's explicit decision in *Vonage* to remove the authority of states over VOIP services.[31] Moreover, the authority of state commissions to approve and arbitrate interconnection agreements comes only from federal law — i.e., Section 252 of the Act. According to Section 252(c), "In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall … ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251 …." No mention is made of state commissions applying state law in ICA arbitrations. Only applicable federal law is to be applied. And that federal law, as discussed above, is clear that VOIP traffic is an information service and that information services traffic is not subject to access charges.

II. Issue 2: Should Global Crossing Be Permitted to Obtain More Than 25% of AT&T Available Dark Fiber? Should Global Crossing Be Allowed to Hold Onto Dark Fiber That it has Ordered From AT&T Indefinitely, or Should AT&T Be Allowed to Reclaim Unused Dark Fiber After a Reasonable Period so that it Will Be Available for use by Other Carriers?

In its Initial Brief, AT&T reiterates arguments made in the DPL and in Ms. Niziolek's testimony relating to the template language restricting CLEC access to dark fiber. As Global Crossing discussed in its Post-Hearing Brief, and as the FCC said in the *UNE Remand Order*, ILECs seeking to restrict access to dark fiber must "demonstrate to the state commission that unlimited access to unbundled dark fiber threatens their ability to provide service as a carrier of last resort …."[32] AT&T has demonstrated nothing of the kind in this proceeding. AT&T's Post-Hearing Brief, along with Ms. Niziolek's testimony, makes the desperate argument that the principle of non-discrimination requires AT&T's dark fiber restrictions to be included in the

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31 Global Crossing Initial Brief at 9 (citing *Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004)).

32 15 FCC Rcd 3696, 3786 (1999).

Global Crossing ICA because they are standard in AT&T's ICAs with other CLECs.[33] As Global Crossing made clear in its Post-Hearing Brief, that argument runs afoul of the requirement in Section 251(c)(1) of the Act that ICAs be negotiated — meaning that different ICAs can and should contain different terms and conditions. Just because other CLECs did not contest AT&T's extra-legal dark fiber language in their ICA negotiations or arbitration proceedings does not make it reasonable or require other carriers to agree to it. The Commission should therefore reject AT&T's unsupported restrictions on dark fiber.

III. Issue 3: Which Routine Network Modification Costs Are not Being Recovered in Existing Recurring and Non-Recurring Charges?

As discussed in Global Crossing's Post-Hearing Brief, the FCC's *Triennial Review Order* allows AT&T to recover RNM costs not part of its TELRIC rates in Missouri through charges that are approved by this Commission.[34] This Commission has approved no such charges, and there is no requirement that Global Crossing agree in advance as to what costs AT&T is not recovering through TELRIC rates. If AT&T wants to impose charges for RNMs to recover costs beyond those in its TELRIC rates, the FCC requires this Commission to approve those charges. The disputed language relating to RNMs should therefore be struck.

AT&T claims that Global Crossing somehow conceded during the October 5 conference that AT&T is not recovering certain costs in its TELRIC rates reflected in the disputed ICA language.[35] That is clearly not the case. Global Crossing merely said that it has no basis on which to rebut the testimony of AT&T's witness, Mr. Sanders, on that point. Mr. Sanders has said AT&T is not recovering certain RNM-related costs in its TELRIC rates. Whether that is the

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33 *See* AT&T Post-Hearing Brief at 5, 7-8; Niziolek Rebuttal Testimony at 4-5.

34 Global Crossing Post-Hearing Brief at 9.

35 AT&T Post-Hearing Brief at 10.

case is for this Commission to decide and is not known or unknown by Global Crossing. And, again, any rates AT&T wishes to charge Global Crossing as a result of unrecovered costs also must be approved by this Commission. It is enough for Global Crossing to agree to the undisputed RNM language in the ICA and then to have AT&T obtain Commission approval of any RNM charges it wishes to assess.

IV. Conclusion

For the foregoing reasons, Global Crossing respectfully requests that the Commission issue findings in support of the Global Crossing positions described above and to modify the parties' draft ICA accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of October, 2010, served a true and final copy of the foregoing by electronic transmission upon the following, listed below, in accordance with Commission rules.

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