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

LEGAL STANDARDS AND BURDEN OF PROOF

Come now Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. (collectively, "Global Crossing" or "Respondent"), pursuant to Sections 251 and 252 of the federal Communications Act of 1934, as amended (the "Act"), and 4 CSR 240-36.040, and hereby submit their discussion of legal standards and burden of proof regarding the Petition for Arbitration filed by Southwestern Bell Telephone Company ("ATT" or "Petitioner"), stating the following:

1. The Commission is required to follow federal law in this arbitration proceeding.

The Missouri Public Commission ("PSC" or "Commission") is obligated to interpret and apply existing law in this arbitration proceeding. *UTEX Communications Corp.*, 24 FCC Rcd 12573, 12578 (Wireline Comp. Bur. 2009). Congress, in the Telecommunications Act of 1996, fundamentally changed — and narrowed — the scope of State authority over the interconnection of telecommunications networks. As the U.S. Supreme Court has stated:

> [T]he question in this case is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed in the 1996 Act, it unquestionably has. . . . Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control.[1]

[1] *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 378 n.6, 381 n.8 (1999). *See also Iowa Network Services v. Qwest,* 363 F.3d 683, 686 (8th Cir. 2004) ("The 1996 Act also thrust the federal government into the local exchange telephone market regulatory arena, which had previously been the exclusive domain of the states."); *id.* at 690 ("There can be no doubt that in the 1996 Act Congress greatly expanded the federal government's involvement in

The Commission, in arbitrating and resolving the open issues, has only that authority which the Congress has expressly delegated to it.[2] The obligation to apply federal law thus applies even if State law or precedent differs from federal law. The Eighth Circuit has stated in this regard: "We must defer to the FCC's view . . . . The new regime for regulating compensation in this industry is federal in nature, and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law*." *Southwestern Bell v. FCC,* 225 F.3d 942, 946–47 (8th Cir. 2000) (emphasis added; internal citations omitted). *See also Atlas Telephone v. Oklahoma Corporation Comm'n,* 400 F.3d 1256, 1263 (10th Cir. 2005) ("These FCC determinations have since been codified as regulations *binding on* the industry and *state commissions*.") (emphasis added). It bears noting that federal courts, not State courts, will entertain any appeal of the Commission's decision.[3]

2. Congress has specified the legal standard the Commission is to utilize in rendering its arbitration decision.

The governing legal standard for this arbitration proceeding is set forth in Section 252(c) of the Act, which provides:

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the telecommunications industry, even into areas such as local exchange service that previously had been left to state regulation.").

[2] As the Federal District Court of Missouri has held, "Absent Congressional authority, the PSC would have no right to participate in the unique dispute resolution process devised by Congress, in which the PSC is authorized to arbitrate disputes between private telecommunication companies." *AT&T v. Southwestern Bell,* 86 F.Supp.2d 932, 946 (W.D. Mo. 1999).

[3] *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section"). *See also Iowa Network Services v. Qwest,* 363 F.3d at 692 ("Once the agreement is either approved or rejected by the [state commission], any aggrieved party is directed by Congress to bring an action in federal court to challenge the [state commission's] determination that the agreement is, or is not, in compliance with §§ 251 and 252."); *id.* at 693–94 ("Congress gave the authority to interpret § 251(b)(5) to the federal courts."). Indeed, Congress has determined that "[n]o State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4).

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, *a State commission shall –*
>
> (1) *ensure* that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the [FCC] pursuant to section 251 of this title; [and]
>
> (2) *establish* any rates for interconnection, services, or network elements according to subsection (d) of this section (emphasis added).

47 U.S.C. § 252(c) (emphasis added).

A federal court will overturn a State commission's arbitration decision if the order does not follow the requirements of Sections 251 and 252 and the FCC's implementing regulations. *See, e.g., AT&T v. Iowa Utilities Board*, 525 U.S. at 378 n.6 ("[T]here is no doubt . . . that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel.").

3. Compliance with federal requirements cannot be avoided through the use of "baseball" arbitration procedures.

The Commission uses "issue-by-issue final offer arbitration." 4 CSR 240-36.040(5)(A). The use of "baseball" arbitration does not change an incumbent's LEC's burden of establishing that its proposals comply fully with federal law. The FCC itself uses "baseball" arbitration. Under 47 C.F.R. § 51.807(f), "[e]ach final offer shall":

> (1) Meet the requirements of section 251, including the rules prescribed by the Commission pursuant to that section; [and]
>
> (2) Establish rates for interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the Commission pursuant to that section.

This Commission's rules parrot the FCC rules, with 4 CSR 240-36.040(5)(D) providing:

> Each final offer submitted by the parties to the arbitrator shall:

1. Meet the requirements of section 251 of the Act, including the rules prescribed by the commission and the [FCC] pursuant to that section; [and]

2. Establish interconnection, services, or access to unbundled network elements according to section 252(d) of the Act, including the rules prescribed by the Commission and the [FCC] pursuant to that section.

Thus, if Petitioner makes a final offer that does not comply with federal law, the Commission must reject Petitioner's final offer.[4]

"Baseball" arbitration does not mean that the Commission has only two choices. Ordinarily, with true "baseball" arbitration, "the arbitrator must select one of the parties' final offers and may not consider other arbitral awards or other offers."[5] What can the Arbitrator in this proceeding do if he finds that Petitioner's final offer does not comply with the Act?

The Arbitrator has three alternatives. Specifically, the Arbitrator may: (1) accept Respondent's position; (2) require "the parties to submit new final offers within a time frame specified by the arbitrator," 4 CSR 240-36.040(5)(E); *or* (3) adopt "a result not submitted by any party that is consistent with the requirements of section 252(c) of the Act, and the rules prescribed by the Commission and the [FCC] pursuant to that section." *Id.* In short, the Arbitrator has choices – as long as his decision meets the requirements of the Act and FCC regulations.

4. Petitioners, not Respondents, have the burden of proving that their proposed language is consistent with FCC regulations.

As noted above, Section 252(c) requires the Commission to ensure that its arbitration order complies with Sections 251 and 252, and the FCC's implementing rules. Petitioner, as an

[4] *See, e.g., Sprint/GTE Arbitration Order*, TO-97-124, at 9-10 (Jan. 15, 1997) ("This provision expresses Congress's clear intent to ensure that interconnection agreements reflect the requirements of § 251 and § 252(d) of the Act and to set rates and terms accordingly. . . . The Commission's goal is to decide the arbitration issues in a manner which ensures that the interconnection agreement between GTE and Sprint conforms to the requirements of the Act.").
[5] *Southern Pacific v. ICC*, 69 F.3d 583, 585 (D.C. Cir. 1995).

incumbent LEC, bears the burden of proof on all issues.[6] Thus, Petitioner ATT is *not* entitled to the benefit of the doubt. If the Commission is unsure of the correct position on any given issue (i.e., which parties' position best reflects federal law), the Commission must rule in favor of Respondent Global Crossing because, on that issue, Petitioner ATT necessarily has failed to meet its burden of proof.

Wherefore, Global Crossing requests that the Commission consider its Legal Standards and Burden of Proof.

Respectfully submitted,

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[6] *See, e.g., AT&T/GTE Minnesota Arbitration Order*, Docket No. P442,407/M-96-939, 1996 Minn. PUC LEXIS 171 at *10 (Dec. 12, 1996) ("The Federal Act attempts to introduce competition into the monopoly markets of incumbent providers. It does this by imposing a number of specific duties on incumbent LECs, all aimed at giving new entrants reasonable and nondiscriminatory access to the networks of incumbents. The Act, in effect, puts the onus on incumbent LECs to open their markets to competitors. It follows then that the burden of proof in proceedings to implement the Act should fall on the incumbent, in this case, GTE.").

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 28th day of September, 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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