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.	)))))	**File No. IO-2011-0057**

Decision

Issue Date: December 15, 2010 Effective Date: December 15, 2010

The Commission is deciding a petition for compulsory arbitration ("petition") of a telecommunications interconnection agreement ("agreement"). The parties to the agreement and this action are:

- Petitioner, Southwestern Bell Telephone Company d/b/a AT&T Missouri ("ATT"); and
- Respondents,
    - Global Crossing Telemanagement, Inc. ("Global Telemanagement"); and
    - Global Crossing Local Services, Inc. ("Global Local"); (together, "Global").

The Commission chooses between the parties' offers as follows.

On the issue of:	*the Commission adopts the offer of:*	*because:*
1. Intercarrier Compensation for Certain IP Traffic	Neither Party	Neither party's language sufficiently describes intercarrier compensation for interconnected VoIP within existing law.
2: Dark Fiber Possession	ATT	ATT's proposed language provides non-discriminatory service.
3. Routine Network Maintenance	Global	Global's offer of undisputed language constitutes just and reasonable terms.

On each issue, language complying with the law's requirements as set forth below shall be part of the agreement. The Commission bases its decision on the law and facts as follows.

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I. Procedure

The parties filed pleadings, statements and offers as follows. On August 27, 2010, AT&T filed the petition. On September 21, 2010, Global filed its response to the petition ("response"). The parties submitted final offers on September 27, 2010; jointly filed a revised statement of unresolved issues on September 28, 2010; and submitted subsequent final offers and jointly filed a final statement of unresolved issues on October 4, 2010.

The arbitrator convened the initial arbitration meeting on September 9, 2010; issued the procedural schedule on September 16, 2010; and convened the mark-up and pre-hearing conference ("conference") on October 5, 2010.

The parties waived hearing and other procedural formalities[1] as follows. On October 4, 2010, the parties filed *Joint Motion to Waive Cross-Examination and Cancel Hearing*, stipulating to a decision on pre-filed testimony. On October 5, 2010, the arbitrator issued an *Order Canceling Hearing, Allowing Late Filing and Allowing Entry into Record*. In that order, the arbitrator allowed ATT to file a discovery response from Global and enter it into the record as the parties stipulated at the conference. On October 8, 2010, ATT made that filing and entered Global's responses to data requests into the record.

The parties filed initial briefs as to Issue 1 on September 29, 2010, initial briefs as to Issues 2 and 3 on October 13, 2010. The filing of initial briefs "submitted [the case] for decision."[2] The parties filed reply briefs on October 18. 2010.

Also on October 18, 2010, the "set time" for final post-offer negotiations, during which no draft report shall issue, [3] expired. On October 8, 2010, the arbitrator filed the draft report. The Commission received public comments as to the draft report from the parties on November 18, 2010. The Commission received no other public comments. On November 18, 2010, the time for filing public comments expired, and the case was ready for the arbitrator's final report.

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[1] Section 536.060, RSMo 2000.

[2] 4 CSR 240-36.040(23).

[3] 4 CSR 240-36.040(5)(C).

II. Generally as to All Issues

Any interconnection agreement, negotiated or arbitrated, is subject to the Commission's approval.[4] The filing of the petition vested jurisdiction to arbitrate the agreement in the Commission.[5] The Commission's regulation gives the parties the right to an evidentiary hearing[6] so the arbitrator conducted this action as a contested case.[7]

A. Summary

The Commission's decision addresses only the issues as set forth in the parties' pleadings, statements and offers. [8]

B. Facts

1. An entity that transmits telephone communication service ("traffic") is a carrier. Carriers transmit switched traffic on a set of transmission facilities called the Public Switched Telephone Network ("PSTN").[9] Within the PSTN, the geographical area of service that has historically delineated basic service from long distance and toll service is a local exchange. [10]

2. A carrier that serves a local exchange is a local exchange carrier ("LEC"). A LEC that served a local exchange on December 31, 1995, is an incumbent LEC ("ILEC"). A LEC

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[4] 47 USC Section 252(e)(1).

[5] Section 386.230, RSMo 2000; 4 CSR 240-36.040(2); 47 USC Section 252(a)(2)(B)1.

[6] 4 CSR 240-36.040(10).

[7] Section 536.010(4), RSMo Supp. 2009.

[8] 47 USC Section 252(b)(4); 4 CSR 240-36.040(11).

[9] Traffic that does not go through a public switch, like traffic through a private line or other dedicated service, is called unswitched traffic (even though it may go through a private switch), and is not at issue.

[10] Provisions of law may organize more than one exchange into a local calling scope, treating such exchanges as a single exchange for billing purposes.

that serves or seeks to serve a local exchange already served by an ILEC, is a competitive LEC ("CLEC").

3. Global is a CLEC. ATT is an ILEC. ATT and Global intend to send traffic through each others' facilities, which require interconnection, which requires an agreement.

C. Law

The Commission instructs the arbitrator that:

> . . . in resolving these issues, the arbitrator shall ensure that such resolution meets the requirements of the Act [.[11]]

The Act is 47 USC Sections 251 and 252 as enacted in the Telecommunications Act of 1996, under which ATT must allow access to its network:

> . . . on rates, terms, and conditions that are just, reasonable, and nondiscriminatory [.[12]]

Those standards generally determine the facts relevant to the issues.

As to the burden of proof, Global cites a sister-state commission order,[13] concluding that the burden of proof is on the party whose facilities are at issue, and ATT does not dispute the matter. The Commission concludes that ATT has the burden of proof. The Commission has considered each party's allegations and evidence on the whole record, and the Commission's findings of fact reflect the Commission's determinations of credibility.

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[11] 4 CSR 240-36.040(11).

[12] 47 USC Sections 252(b)(4)c and (c)1; and 251(e)(2)B; and (c)(2)(d).

[13] *AT&T Communications of the Midwest, Inc.*, Docket No. P-442,407/M-96-939 (Dec. 12, 1996) (order resolving arbitration issues and opening cost proceedings) slip order at 5.

The Commission's regulations direct the arbitrator to use final offer arbitration. Because the parties did not agree to an "entire package"[14] resolution, the arbitrator must use "issue-by-issue" resolution.[15] Issue-by-issue resolution requires the arbitrator to:

> . . . select the position of one of the parties as the arbitrator's decision on that issue [[16]]

except in the circumstances discussed in part C.1 below. In making the decision, the Commission has considered each party's theories and authorities. The Commission's conclusions of law reflect the Commission's resolution of conflicting arguments.

The arbitrator's draft report included a concise summary of each issue resolved by the arbitrator and a reasoned articulation of the basis for the decision on each issue. Such draft report also set forth how the decision meets the standards set in 47 USC Sections 251 and 252 ("the Act"). The arbitrator's final report included a statement of findings and conclusions on all the material issues of fact, law or discretion presented on the record. The arbitrator's final report also set forth the reasons or basis therefore.

The Commission's decision contains no discourse upon matters that are not determinative of the issues**.**

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[14] 4 CSR 240-36.040(5)(A).

[15] 4 CSR 240-36.040(5).

[16] 4 CSR 240-36.040(19).

III. Specific Issues

The issues remaining for the Commission's decision are three: intercarrier compensation for certain Internet Protocol format ("IP") traffic, dark fiber possession, and routine network maintenance.

1. Intercarrier Compensation for Certain IP Traffic

The issue is how ATT and Global shall bill one another ("intercarrier compensation") for traffic over the Public Switched Telephone Network ("PSTN") that uses IP at some point in such traffic ("IP traffic").

A. Summary

Generally, IP traffic is subject to the same charges as any other PSTN traffic—reciprocal compensation charges within a local calling area; or switched access charges between local calling areas—with certain exceptions. Neither party's offer follows that general principle and its exceptions. ATT argues that switched access charges apply to most of Global's proposed IP traffic. Global argues that only reciprocal compensation charges apply to IP traffic, if any charge applies at all. Therefore, the Commission adopts an alternative not set forth in either party's offer.

B. Facts

1. Carriers that own facilities may charge other carriers to use to such facilities generally as follows. If such use has both its origin and destination within the same local exchange, a reciprocal compensation charge applies. If such use has either its origin or its destination outside the local exchange, a switched access charge—also known as an

exchange access charge—applies. Reciprocal compensation and switched access charges generally constitute[17] the methods of intercarrier compensation.

2. Any traffic may change format during its travels on the PSTN. Traffic that changes to IP, but has changed back when it reaches its destination, is IP-in-the-middle, which the parties treat like any other PSTN traffic.

3. Traffic that includes more than basic service, like computer processing, is information service ("IS"). A provider of direct access to the Internet is an internet service provider ("ISP"). ISPs generally transmit IS in IP.

4. IP is also useable for voice communications. IP may be present at different stages of voice traffic over the PSTN. Such use constitutes one example of Voice over Internet Protocol ("VoIP"). VoIP, when traveling over PSTN facilities, is interconnected VoIP traffic ("IVoIP").

5. IVoIP appears to the end user to be ordinary telephone service because it uses traditional telephone handsets, connects with PSTN, and reaches any other end user connected to the PSTN, including other IVoIP users, cell phone users or traditional land-line users. IVoIP may be geographically identifiable as to its points of origin and termination. IVoIP for which either the origin or destination is moveable and not geographically identifiable is nomadic.

C. Law

The Commission must apply existing law to the parties' offers as best it can, even where the federal government has not yet clarified the existing law.[18] Existing law includes Section 392.550.2, RSMo Supp. 2009,[19] ("the Missouri statute") which provides that:

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[17] A third type of charge, called bill-and-keep, is not at issue.

> Interconnected VoIP traffic shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.

That language generally applies switched access charges to interconnected VoIP like any other switched traffic.

Exceptions are few. The Missouri statute does not apply to switched traffic that constitutes:

> . . . commerce among the several states of this union, except insofar as the same may be permitted under the provisions of the Constitution of the United States and the acts of Congress.[20]

Generally, that provision and the federal impossibility doctrine exclude nomadic VoIP from switched access charges. Also, existing federal law provides an exception related to IS from intercarrier compensation ("IS exception").

The parties' final offers summarize their arguments and provide (disputed language in bold, ATT's underlined, Global's italicized) as follows:

> 6.14.1 For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an End User physically located in one (1) local exchange and delivered for termination to an End User physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in AT&T-22STATE's local exchange tariffs on file with the applicable state commission) **including, without limitation, any traffic that originates/terminates over a Party's circuit switch, including traffic from a service that (i) terminates/originates over a circuit switch and uses Internet Protocol (IP) transport technology (regardless of how many providers are involved in providing IP**

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[18] *UTEX Communications Corp.*, 24 F.C.C. 12573, 12577-78 (2009).

[19] RSMo Supp. 2009.

[20] Section 386.030, RSMo 2000.

> **transport) and/or (ii) terminates to/originates from the End User's premises in IP format,** ***except that Switched Access Traffic shall not include any traffic that originates and/or terminates at the End User's premises in Internet Protocol format***. Notwithstanding anything to the contrary in this Agreement, all Switched Access Traffic shall be delivered to the terminating Party over feature group access trunks per the terminating Party's access tariff(s) and shall be subject to applicable intrastate and interstate switched access charges. However, in states where applicable law provides, such compensation shall not exceed the compensation contained in the respective AT&T-22STATE tariff in whose exchange area the End User is located, provided, however, the following categories of Switched Access Traffic are not subject to the above stated requirement relating to routing over feature group access trunks[.]

In support of their respective positions, the parties read the law expansively, but inaccurately, and so err as to the IS exception, fixed location VoIP, and nomadic VoIP.

i. IS Exception

Global argues that the Missouri statute does not apply to any VoIP traffic. Global argues that Missouri law is not among the standards under which the Commission decides the petition for arbitration. But the Commission must apply existing law, [21] which includes the Missouri statute. The Commission has no authority to declare the Missouri statute invalid,[22] and Global cites no authority expressly invalidating or pre-empting the Missouri statute.

a. Global's Arguments

Instead, Global emphasizes its character as a wholesaler and the mutually exclusive classifications of IS and telecommunications services. The IS/telecommunications services distinction is older than the Act, from a time when the term for IS was ES, for enhanced

[21] *UTEX Communications Corp.*, 24 F.C.C. 12573, 12577-78 (2009).

[22] *State Tax Comm'n v. Administrative Hearing Comm'n*, 641 S.W.2d 69 (Mo. banc 1982).

service. Global's premise is that whether switched access charges apply depends on whether VoIP constitutes IS or telecommunications services.

It is true—as the parties agree—that IP-in-the-middle is subject to switched access charges,[23] as the Missouri statute provides, because it constitutes a telecommunications service and not IS.[24] It is also true that IP-in-the-middle, by definition, ends in the same format as it starts. Global argues the reverse: that starting and ending in different formats ("net conversion") equals IS.

Global cites *PAETEC Communications, Inc. v. CommPartners, LLC,*[25] which discussed a position issue similar to Global's, which is that (1) origination and:

> . . . termination of VoIP-originated calls is an "information service" exempt from access charges; and (2) that access charges cannot apply to VoIP-originated calls because "reciprocal compensation" applies instead.[[26]]

The court cited a holding in *Southwestern Bell Telephone, L.P. v. Missouri Public Service Comm'n*:[27]

> . . . "[n]et-protocol conversion is a determinative indicator of whether a service is an enhanced or information service." [[28]]

The *PAETEC* court found persuasive the authorities holding:

> . . . that transmissions which include net format conversion from VoIP to TDM are information services exempt from access charges. [[29]]

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[23] *In the matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, 19 F.C.C.R. 7457, 7465 (2004).

[24] *Id.*

[25] Civil Action No. 08-0397 (JR), 2010 WL 1767193, (D.D.C., Feb. 18, 2010).

[26] *PAETEC*, 2010 WL 1767193 at 2.

[27] 461 F.Supp.2d 1055, 1081 (E.D. Mo., 2006).

[28] *Id*., (citations omitted).

Global argues that switched access charges cannot apply under that authority,

Global's authorities provide the following. All conversion to IP is IS, and neither the courts nor the Federal Communications Commission ("F.C.C.") have ever ruled that VoIP is not IS. IS, even when travelling over the PSTN, does not become telecommunications service.[30] All IS is exempt from access charges. Therefore, all conversion to IP is exempt from switched access charges, under Global's authorities.

But Global's authorities are incomplete. Federal authorities have not stated that VoIP is not IS because it doesn't matter for the IS exception. The IS exception does not classify services, it classifies companies.

b. ATT's Arguments

ATT's authorities show that the IS exception is both more and less than Global's authorities describe: more because there is a provision of law missing from Global's authorities; less because the missing provision narrows the IS exception. The missing provision is that the IS exception belongs only to ISPs.

The IS exception is a rule of the F.C.C. that pre-dates the Act.[31] It began as an exception for ESPs,[32] and survived the Act as an exception for ESPs, re-named ISPs. [33] The IS exception addresses the classification, not of service, but of carriers. An ISP would

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[29] *PAETEC*, 2010 WL 1767193 at 3.

[30] Citing *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 988-990 (2005).

[31] *MTS and WATS Market Structure,* 97 FCC 2d 682, 711-22 (1983).

[32] *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, 419–20 (1980).

[33] *In re Access Charge Reform*, 12 FCC Rcd. 15982, 16131-33 (1997).

be just another carrier subject to switched access charges but for the IS exception, which classifies ISPs as end users. End users are not subject to switched access charges.

As ATT notes, the *Southwestern Bell Telephone, L.P.* and *PAETEC* courts overlooked their own description of the IS exception. As the court in *Southwestern Bell Telephone, L.P.* stated, the ISP exception simply:

> . . . classifies enhanced service providers ("ESPs") as end users of telecommunications service. Because only "carriers" are subject to access charges, being an "end user" means that ESPs do not pay those charges. ESPs' status as end users places them outside the access charge regime "even for calls that appear to traverse state boundaries." [34]

Global does not claim to be, and is not, an ISP.

ATT cites *In re Time Warner Cable,* [35] to show that wholesaling IS does not make Global an ISP. That order also shows that interconnection rights in general—and intercarrier compensation in particular—depend on neither the wholesale/retail distinction, nor the IS/telecommunications distinction. In *Time Warner Cable,* the F.C.C. stated:

> 14. [W]e make clear that the rights of telecommunications carriers under sections 251 (a) and (b) apply regardless of whether the telecommunications services are wholesale or retail [.]
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> * * *
>
> 15. [W]e clarify that the statutory classification of a third-party provider's VoIP service as [IS] or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b). . . . We thus reject the arguments that the regulatory status of VoIP is the underlying issue in this matter[.]

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[34] 461 F. Supp. 2d at 1081.

[35] 22 FCC Rcd. 3513 (2007).

> 16. Finally, we emphasize that our ruling today is limited to telecommunications carriers that provide wholesale telecommunications service and that seek interconnection *in their own right* for the purpose of transmitting traffic to or from another service provider.
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> * * *
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> 17. Certain commenters ask us to reach other issues, including the application of section 251(b)(5) and the classification of VoIP services. We do not find it appropriate or necessary here to resolve the complex issues surrounding the interpretation of Title II more generally or the subsections of section 251 more specifically that the Commission is currently addressing elsewhere on more comprehensive records. For example, the question concerning the proper statutory classification of VoIP remains pending in the *IP-Enabled Services* docket [.[36]]

Thus, the F.C.C. remains silent on VoIP's classification expressly because it is irrelevant to the IS exception. The IS exception applies when an ISP provides service. When Global provides service to an ISP, the IS exception does not apply.

Finally, the FCC expressly refrained from determining a state's intercarrier compensation regime:

> In the particular wholesale/retail provider relationship described by Time Warner in the instant petition, the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein. We do not, however, prejudge the [state] Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* docket. [[37]]

Under that language, intercarrier compensation is subject to determination by the relevant state jurisdiction.

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[36] *Id*. at 3520-23 (2007) (footnotes omitted).

[37] *Id*. at 3523 (footnotes omitted).

ii. Reciprocol Charges for IVoIP

The Missouri statute provides that switched access charges apply to IVoIP traffic. Global argues, in the alternative to its-IP-equals-IS-exception theory, that VoIP is subject only to reciprocal compensation charges. In support, Global cites Section 251 of the Act.

> (b) Each local exchange carrier has the following duties:
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> * * *
>
> (5) Reciprocal compensation
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> The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

But that provision does not require reciprocal communications charges to apply to any particular traffic. ATT also cites Section 251 of the Act's requirement to provide:

> (g) . . . access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after February 8, 1996. During the period beginning on February 8, 1996, and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

As stated in the *Time-Warner Cable* decision, the FCC has left the applicable type of interconnection compensation to the state having jurisdiction over the traffic.

iii. Fixed Location and Nomadic

The issue of jurisdiction also finds some resolution in FCC decisions. Both parties cite *Vonage Holdings Corporation*;[38] Global to show that no IP is subject to state jurisdiction, and ATT to show that some IP is within state jurisdiction. ATT's reading is

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[38] 19 F.C.C.R. 22404, 22412-13 (2004).

correct. The jurisdiction of a state and the F.C.C. depend on the traffic's geographic points of origination and destination under the Act:[39]

> 16. . . . In section 2(a) of the Act, Congress has given the [F.C.C.] exclusive jurisdiction over "all interstate and foreign communication" and "all persons engaged ... in such communication." Section 2(b) of the Act reserves to the states jurisdiction "with respect to intrastate communication service ... of any carrier."
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> 17. In applying section 2 to specific services and facilities, the [F.C.C.] has traditionally applied its so-called "end-to-end analysis" based on the physical end points of the communication. Under this analysis, the [F.C.C.] considers the "continuous path of communications," beginning with the end point at the inception of a communication to the end point at its completion, and has rejected attempts to divide communications at any intermediate points. Using an end-to-end approach, when the end points of a carrier's service are within the boundaries of a single state the service is deemed a purely intrastate service, subject to state jurisdiction for determining appropriate regulations to govern such service. When a service's end points are in different states or between a state and a point outside the United States, the service is deemed a purely interstate service subject to the [F.C.C.]'s exclusive jurisdiction. Services that are capable of communications both between intrastate end points and between interstate end points are deemed to be "mixed-use" or "jurisdictionally mixed" services. Mixed-use services are generally subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service's intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. In such circumstances, the [F.C.C.] may exercise its authority to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations.

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[39] *Id.*

That distinction applies (as in *Time-Warner Cable*) whether IP traffic constitutes IS or telecommunications.[40] The "impossibility exception"[41] controls the application of the Missouri statute under federal[42] and Missouri[43] law.

The state having jurisdiction over the traffic is generally determinable for fixed location VoIP. If fixed location VoIP does not "constitute commerce among the several states of this union,"[44] and Missouri otherwise has jurisdiction over such traffic, the Missouri statute applies. Therefore, fixed location VoIP is subject to the Missouri statute when it demonstrably originates and terminates in Missouri.

But whether the Missouri statute applies to nomadic VoIP traffic is generally impossible to prove. That is because nomadic VoIP traffic is generally, by definition, not subject to the geographic ascertainment necessary to separate the interstate and intrastate components and prove that such traffic is within any state's jurisdiction. That is not a problem in the agreement, ATT argues, so the Commission can order a blanket application of switched access charges to all VoIP traffic because Global can:

> . . . identify the geographic location of its retail VoIP services customer when the customer places a call. It does so by account and originating ANI. [[45]]

But ATT has not shown that Global's retail services customers constitute all of its prospective VoIP traffic, so no such blanket order is possible. Nor is it necessary: when it is

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[40] *Vonage Holdings Corp.* at 22416-17.

[41] *Id.* at 22415.

[42] U.S. Const., Art. I, Section 8, clause 3 (the Commerce Clause).

[43] Section 386.030, RSMo 2000.

[44] *Id*.

[45] [*ATT*]*'s Entry of Discovery Responses into the Record*, Attachment A, paragraph 5.

impossible to determine that traffic is Missouri intrastate traffic, the Missouri statute cannot apply.[46]

iv. Resolution

The Commission has described the existing law regarding switched access charges, which finds no full reflection in parties' final offers. The final offer of one party over the other party generally constitutes the arbitrator's recommendation, but the Commission's regulation generally assumes that all parties' offers will:

> Meet the requirements of section 251 of the Act, including the rules prescribed by the commission and the Federal Communications Commission pursuant to that section [.[47]]

But, if the result of recommending an offer:

> . . . would be clearly unreasonable or contrary to the public interest [,[48]]

the Commission directs the arbitrator to make a recommendation in an alternative fashion by:

> . . . adopting 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 Federal Communications Commission pursuant to that section. [[49]]

Under that standard, the Commission adopts neither party's disputed language and imposes clearer language in lieu of the disputed language as follows.

> Consistent with Missouri law, interconnected voice over Internet protocol traffic that is not within one local exchange is subject to access charges as is any other switched traffic,

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[46] *Vonage Holdings Corp.*, 19 F.C.C.R. 22404, 22406 (2004).

[47] 4 CSR 240-36.040(5)(D)1.

[48] 4 CSR 240-36.040(19).

[49] 4 CSR 240-36.040(5)(E).

regardless of format.

2. Dark Fiber Possession

Among the facilities that ILECs must make available to CLECs is dark fiber: a line, not yet in use, but ready to carry a telecommunications signal.

A. Summary

As to dark fiber, the parties dispute two related matters.

- Global seeks the right to possess all ATT's available dark fiber indefinitely.
- ATT seeks to limit Global to 25% of available dark fiber and to retain the right to repossess amounts unused after two years.

The problem is that, if Global possesses dark fiber, no other CLECs and ATT can use it, even if Global never uses it.

B. Facts

1. ATT's services include sending telecommunications signals by pulses of light through optical fiber ("fiber"). Dark fiber is fiber useable but not yet in use. ATT owns dark fiber, but dark fiber is a limited resource, and is not available throughout ATT's network.

2. For a CLEC to connect to dark fiber of an ILEC, the ILEC extends dark fiber to the CLEC, and the CLEC must connect to such extension. If one CLEC connects to ("possesses") any amount of dark fiber, such amount is unavailable to any other CLEC and the ILEC that owns it. Limiting the amount of dark fiber that any one CLEC may possess allows other CLECs, and the ILEC, a chance to possess the remainder.

3. ATT's certificate of public convenience and necessity[50] requires it to serve any customer, a status known as "carrier of last resort."

4. Under ATT's proposed contract language, any CLEC may possess 25 percent of dark fiber available. Available dark fiber means dark fiber not possessed by another carrier

5. Under ATT's proposed contract language, the LEC with the greatest initiative may possess the largest amount of dark fiber compared to any others, but such other CLECs and the ILEC may still compete and serve their customers.

6. ATT has several data bases that inventory, and track the use of, dark fiber and allocate its use among possessors.

7. Global has never ordered dark fiber from ATT, nor from any ILEC related to ATT.

C. Law

ATT must allow Global access to its facilities under federal law:

> [E]ach [ILEC] has the following duties:
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> * * *
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> (3) The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. [[51]]

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[50] Most carriers do business in Missouri under a "certificate of service authority," but the regulation of ATT's business in Missouri goes back to a regime set forth in 1879 statutes.

[51] Section 251(c)(3).

Unbundled network elements ("UNEs") include dark fiber.[52] As to whether any limitation of amount or time should restrain Global's possession of ATT's dark fiber, the scenarios are plain.

If any CLEC possesses all an ILEC's dark fiber, such possession excludes all other CLECs and the ILEC from access to such fiber. That scenario assuredly burdens such other CLECs and the ILEC.

The F.C.C. has permitted limitations on dark fiber possession in similar circumstances as follows:

> In addition, [parties to the action] argue that requiring incumbent LECs to unbundle fiber will reduce their incentive to build fiber loops in the first place. We remain skeptical that this is the case, because incumbents face loop unbundling obligations no matter which technology they deploy. We note, however, that the Texas commission has already established moderate restrictions governing the availability dark fiber. We do not wish to disturb the reasonable limitations and technical parameters for dark fiber unbundling that Texas or other states may have in place. If incumbent LECs are able to demonstrate to the state commission that unlimited access to unbundled dark fiber threatens their ability to provide service as a carrier of last resort, state commissions retain the flexibility to establish reasonable limitations governing access to dark fiber loops in their states.[53]

Global argues that, under that language, ATT must show impairment of its duties as carrier of last resort. ATT argues that, in context, the factors that the F.C.C. lists are sufficient, but not necessary, support for reasonable regulation of dark fiber possession. ATT is correct.

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[52] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 16 F.C.C. 1724, paragraph 326 (1999) (*Third Report and Order and Fourth Notice of Proposed Rulemaking*) ("UNE remand order").

[53] *Id*. at paragraph 199 (footnote omitted).

Global offers no policy support for its scheme and the Commission can find none. The only advantage possible is to Global. Possession of dark fiber allows Global to sublease it to competitors.

But if a CLEC can possess only a limited amount of available dark fiber, and must use it or lose it in a reasonable time, other CLECs and the ILEC can have access to dark fiber. ATT argues that the amount and duration of dark fiber possession are legitimate concerns that support reasonable limitations, and that such reasonable limitations include those set forth in ATT's proposed contract language. Global argues that ATT's language does not follow any F.C.C. regulation, but ATT's language does follow F.C.C. authority.

ATT cites an F.C.C. regulation reiterating the federal statutory requirement of just, reasonable, and nondiscriminatory terms and conditions.[54]ATT also cites an F.C.C. decision, which describes the ATT's arguments as "legitimate concerns" as follows:

> [T]he Texas Commission allows incumbent LECs, upon establishing need to the satisfaction of the state commission, to revoke leased fiber from competitive LECs with 12 months notice. The Texas commission's dark fiber unbundling rules also allow incumbent LECs to take back underused (less than OC-12) fiber, and forbid competitors in any two year period from leasing more than 25% of the dark fiber in a given segment of the network. We believe the measures established by the Texas PUC address the incumbent LEC's legitimate concerns. [[55]]

Further, in that same decision, the F.C.C. allows:

> State commissions . . . to establish reasonable limits governing access to dark fiber if incumbent LECs can show

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[54] 47 CFR Section 51.307(a).

[55] UNE remand order at 3696, fn. 694.

> that they need to maintain fiber reserves. [56]

That language describes a regulatory remedy, and the parties cite no corresponding provision in the Commission's regulations, but ATT has shown the need for such provisions by evidence of record.

ATT submits the following language:

> 10.4.3. CLEC will not obtain any more than twenty-five (25%) percent of the spare UNE Dedicated Transport Dark Fiber contained in the requested segment during any two-year period.
>
> 10.7.2. Should CLEC not utilize the fiber strand(s) subscribed to within the twelve (12) month period following the date AT&T-21STATE provided the fiber(s), AT&T-21STATE may revoke CLEC's access to the UNE Dedicated Transport Dark Fiber and recover those fiber facilities and return them to AT&T-21STATE's inventory.

That language is similar to language that the Commission adopted in a previous decision.[57] Global submits no proposed contract language for this issue.

Global cites no authority to the contrary, and has shown no grounds for a different conclusion on this record. Global has shown no prejudice from ATT's language and the Commission concludes that there is none, especially because Global has never sought dark fiber possession from ATT. Therefore, the Commission concludes that existing law supports ATT's position.

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[56] *Id.,* part II, fourth paragraph, seventh bullet point.

[57] *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successful Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Case No. TO-2005-0336 (June 21, 2005) *Final Arbitrator's Report, Att. III.A, Part 6, Detailed Language Decision Matrix, CLEC Coalition Issue 27 (Section 5.4.6.2)*, *aff'd in pertinent part*, Arbitration Order, July 11, 2005.

The Commission concludes that ATT's proposed language constitutes "terms and conditions that are just, reasonable, and nondiscriminatory [58]" so the Commission decides Issue 2 by adopting ATT's proposed language.

3. Routine Network Modifications

Issue 3 relates to Routine Network Modifications ("RNMs"), which describes certain materials and labor.

A. Summary

The parties have partly resolved Issue 3. Since the beginning of this action, the parties have agreed that Global should pay for RNMs not already included in ATT's access charges. Until the conference, Global denied that there were any RNMs not already included in ATT's access charges. At the conference, Global stated that it no longer disputes that matter. Nevertheless, the parties still disagree as to the language that best describes the coverage of RNMs.

B. Facts

1. RNMs are materials and labor required to bring Global's signal up to industry standards. RNMs include a repeater, a device that regenerates a voice signal to amplify it up to industry standards. Those devices are not useful for providing advanced service.

2. For accountancy purposes, repeaters and associated devices are capital items, not operating expenses. Nevertheless, ATT's charges do not factor in repeaters and associated devices. That is because ATT's charges include only costs expected in the future, and future capital items will not include repeaters.

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[58] 47 USC Sections 252(b)(4)c and (c)1; and 251(e)(2)B and (c)(2)(d).

3. The procedures of individual case basis ("ICB") and Special Construction ("SC") process are telecommunications industry standards for determining the cost of various matters including RNMs. The agreement specifies ICB or SC for certain matters and includes specific prices for others.

C. Law

ATT proposes the following bolded language:

> 11.1.7 AT&T-22STATE shall provide RNM at the rates, terms and conditions set forth in this Attachment and in the Pricing Schedule or at rates to be determined on an individual case basis (ICB) or through the Special Construction (SC) process; provided, however, that AT&T-22STATE will impose charges for RNM only in instances where such charges are not included in any costs already recovered through existing, applicable recurring and non-recurring charges. **The Parties agree that the RNM for which AT&T-22STATE is not recovering costs in existing recurring and non-recurring charges, and for which costs will be imposed on CLEC as an ICB/SC include, but are not limited to: (i) adding an equipment case, (ii) adding a doubler or repeater including associated line card(s), and (iii) installing a repeater shelf, and any other necessary work and parts associated with a repeater shelf.**

Global submits no proposed contract language of its own for this issue but argues that the disputed language introduces more vagueness than clarity.

Global is correct. The named items no longer add clarity since Global ceased to deny, and the Commission has found, that none are included in ATT's recurring and non-recurring charges. Also, by naming items for ICB/SC "without limitation," ATT calls into question the Pricing Schedule.

The Commission concludes that the disputed language derogates the agreement's other "terms and conditions that are just, reasonable, and nondiscriminatory [,[59]]" so the Commission decides Issue 3 by adopting neither party's disputed language and imposes only the undisputed language.

IV. Order

The Commission resolves the issues by adopting the following language for the agreement.

1. Intercarrier Compensation for Certain IP Traffic

> 6.14.1. For purposes of this Agreement only, Switched Access Traffic shall mean all traffic that originates from an End User physically located in one (1) local exchange and delivered for termination to an End User physically located in a different local exchange (excluding traffic from exchanges sharing a common mandatory local calling area as defined in AT&T-22STATE's local exchange tariffs on file with the applicable state commission). Consistent with Missouri law , interconnected voice over Internet protocol traffic that is not within one local exchange is subject to access charges as is any other switched traffic, regardless of format. Notwithstanding anything to the contrary in this Agreement, all Switched Access Traffic shall be delivered to the terminating Party over feature group access trunks per the terminating Party's access tariff(s) and shall be subject to applicable intrastate and interstate switched access charges. However, in states where applicable law provides, such compensation shall not exceed the compensation contained in the respective AT&T-22STATE tariff in whose exchange area the End User is located, provided, however, the following categories of Switched Access Traffic are not subject to the above stated requirement relating to routing over feature group access trunks[.]

[59] 47 USC Sections 252(b)(4)c and (c)1; and 251(e)(2)B and (c)(2)(d).

2. Dark Fiber Possession

10.4.3. CLEC will not obtain any more than twenty-five (25%) percent of the spare UNE Dedicated Transport Dark Fiber contained in the requested segment during any two-year period.

10.7.2. Should CLEC not utilize the fiber strand(s) subscribed to within the twelve (12) month period following the date AT&T-21STATE provided the fiber(s), AT&T-21STATE may revoke CLEC's access to the UNE Dedicated Transport Dark Fiber and recover those fiber facilities and return them to AT&T-21STATE's inventory.

3. Routine Maintenance Equipment

11.1.7. AT&T-22STATE shall provide RNM at the rates, terms and conditions set forth in this Attachment and in the Pricing Schedule or at rates to be determined on an individual case basis (ICB) or through the Special Construction (SC) process; provided, however, that AT&T-22STATE will impose charges for RNM only in instances where such charges are not included in any costs already recovered through existing, applicable recurring and non-recurring charges.

BY THE COMMISSION

(S E A L)

Steven C. Reed
Secretary

Clayton, Chm., Davis, Jarrett, Gunn,
and Kenney, CC., concur.

Jordan, Senior Regulatory Law Judge

V. Appendix: Appearances

For petitioner,
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For the Missouri Public Service Commission,
Arbitrator: Daniel Jordan, Senior Regulatory Law Judge.
Arbitrator's Advisory Staff:

Colleen M. Dale, Senior Staff Counsel.

William Voight, Supervisor, Rates and Tariffs.

Myron Couch, Utility Operations Technical Specialist II.

Dana Parish, Utility Policy Analyst.