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

INITIAL BRIEF OF GLOBAL CROSSING

Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. (collectively, "Global Crossing") hereby submit this Initial Brief in the above-captioned matter.

Introduction

Global Crossing and Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T") began negotiating a new interconnection agreement ("ICA") for the State of Missouri on March 31, 2010, pursuant to Sections 251 and 252 of the federal Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 251, 252. At the end of the prescribed negotiating window, *see* 47 U.S.C. § 252(b), there were three unresolved issues. On August 27, 2010, AT&T filed a Verified Petition for Arbitration with this Commission, pursuant to 47 U.S.C. § 252(b) and 4 CSR 240-36.040, seeking arbitration of the unresolved issues. Those issues are as follows:

Issue 1: What is the appropriate compensation for voice over Internet protocol ("VOIP") traffic?

Issue 2: Should Global Crossing be permitted to obtain more than 25% of AT&T available Dark Fiber? And 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?

Issue 3: Which Routine Network Modification (RNM) costs are not being recovered in existing recurring and non-recurring charges?

Attached as Exhibit B to AT&T's Petition was a matrix entitled "Disputed Point List (DPL)" that described each of the three issues, provided cites to the relevant sections of the parties' draft ICA, and summarized the positions of AT&T and Global Crossing on each of the open issues.

On August 30, 2010, the Commission issued notice of the commencement of a contested case, and appointed Daniel Jordan, Regulatory Law Judge, as the arbitrator in this matter. *See* Notice of Contested Case and Appointment of Arbitrator (Aug. 30, 2010). Pursuant to Commission order, Mr. Jordan convened the initial arbitration meeting with the parties on September 9, 2010. *See* Notice of Arbitrator's Advisory Staff and Order Setting Initial Arbitration Meeting (Sept. 3, 2010). Following this initial meeting, the Commission ordered that the parties file a joint procedural schedule and statement of unresolved issues by September 13, 2010. *See* Order Directing Filings and Supplemental Notice of Arbitrator's Advisory Staff (Sept. 9, 2010). On September 13, 2010, the parties jointly filed a proposed procedural schedule, which was adopted by the Arbitrator on September 16, 2010. *See* The Parties' Jointly Proposed Procedural Schedule (Sept. 13, 2010); *see* Order Setting Procedural Schedule and Notice of Hearing (Sept. 16, 2010).

The parties and Mr. Jordan agreed, as reflected in the September 16 order, that Issue 1 is exclusively legal in nature and that the parties' pre-filed testimony would be limited to addressing Issues 2 and 3. Thus, the September 16 order requires the filing of stipulated facts and briefs on Issue 1, and the filing of pre-filed direct testimony on Issues 2 and 3, by September 29, 2010.

In accordance with the procedural schedule from the Arbitrator's September 16 order, Global Crossing submitted its Response to Petition for Arbitration on September 21, 2010. In

that Response, Global Crossing affirmed that the DPL attached as Exhibit B to AT&T's Petition contained Global Crossing's position on each unresolved issue.

This brief addresses the question of what is the appropriate compensation for voice over Internet protocol ("VOIP") traffic, presented in Issue 1.[1] For the reasons discussed below, applicable law supports Global Crossing's position on this issue.

Argument

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

Section 6.14.1 of Attachment 02 (ISP – Network Interconnection) of AT&T's template ICA contains the following language on intercarrier compensation:

> 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 transport) and/or (ii) terminates to/originates from the End User's premises in IP format**. . . .

Global Crossing believes that the bold underlined language should be struck because access charges do not apply to VOIP or any other type of traffic that originates as IP and terminates over the public switched telephone network ("PSTN") — *i.e.*, in time division multiplex ("TDM") format — or vice versa. *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. February 18, 2010) (holding that VOIP-TDM calls are not

[1] Global Crossing provides retail VOIP services and terminates traffic that originates from those services; it also provides wholesale services to other VOIP providers. *See* M. Henry Direct Testimony at 1.

telecommunications and therefore not subject to access charges). The following should be inserted instead of the disputed language above:

> **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.**

As explained below, this language reflects current law and should be included in the parties' ICA.

This 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). Under existing law, IP-PSTN traffic is an "enhanced" service that is not subject to access charges. The Federal Communications Commission ("FCC") established its long-standing distinction between "basic" and "enhanced" services during the *Computer II* proceeding in 1980. *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384 (1980). According to the FCC in that proceeding,

> [a] basic transmission service is one that is limited to the common carrier offering of transmission capacity for the movement of information. . . . An enhanced service is any offering over the telecommunications network which is more than a basic transmission service. In an enhanced service, for example, computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber's information.

Id. at 419–20.

Enhanced services are not regulated under Title II of the Act, *id*. at 428–35 ("We believe that, consistent with our statutory mandate, enhanced services should not be regulated under the Act."), and are not subject to access charges, *MTS and WATS Market Structure*, 97 FCC 2d 682, 715 (1983). This is the case even for enhanced services that, like VOIP, involve voice communications. *See Computer II*, 77 FCC 2d at 421 ("[W]e are not foreclosing enhanced

processing applications from being performed in conjunction with 'voice' service."); *id*. at 428 ("[T]he public interest would not be served by any classification scheme that attempts to distinguish enhanced services based on the communications or data processing nature of the computer processing activity performed.").

The basic/enhanced nomenclature changed slightly with the passage of the Telecommunications Act of 1996 ("1996 Act"). Basic services are now referred to as "telecommunications services," *see* 47 U.S.C. § 153(43), (46), and enhanced services are now referred to as "information services," *see* 47 U.S.C. § 153(20); but the definitions remain substantially the same.

"Telecommunications," as defined in the Act (following its modification by the 1996 Act), is "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). An "information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ." 47 U.S.C. § 153(20). Services that perform a "net protocol conversion" qualified as enhanced services under the previous definition, *see Computer II*, 7 FCC 2d at 421–22, and, according to the U.S. Supreme Court, continue to qualify as information services under the current definition, *see National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 977 (2005). Such services thus continue not to be subject to regulation under Title II of the Act. *See id*.

Because it is not simply a transmission service, but rather an application that transforms a call when it either originates or terminates in IP and performs a net protocol conversion, VOIP is an enhanced/information service and is, therefore, not subject to access charges. *See Developing*

a Unified Intercarrier Compensation Regime, 16 FCC Rcd 9610, 9613, 9615 (2001) ("IP telephony [is] generally exempt from access charges under the enhanced service provider (ESP) exemption").

As noted above, the U.S. District Court for the District of Columbia recently held that VOIP traffic is not subject to access charges. *PAETEC, supra*. Noting first that "[i]nformation services are not subject to the access charge regime," *id.* at 5 (citing *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Tel. Servs. Are Exempt from Access Charges*, 19 FCC Rcd 7457, 7459–61 (2004)), the court turned to the parties' dispute, *i.e.*, whether VOIP traffic is an information service. Relying on the Supreme Court's holding in *Brand X*, 545 U.S. at 989–90, that "services that combine both telecommunications and information components are treated as information services," the court determined that VOIP-to-TDM conversion is an information service. *PAETEC* at 6. This is consistent with the rulings in recent years of other federal courts. *Id.* (citing *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1081–83 (E.D. Mo. 2006), *aff'd*, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S.Ct. 971 (2009), and *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999–1001 (D. Minn. 2003), *aff'd*, 394 F.3d 568 (8th Cir. 2004)).[2]

The FCC has on numerous occasions in recent years declined to rule that VOIP is not an information service. *See Universal Serv. Contribution Methodology*, 21 FCC Rcd 7518 (2006) (subjecting VOIP services to universal service requirements without concluding they are telecommunications services); *Communications Assistance for Law Enforcement Act and Broadband Access Servs.*, 20 FCC Rcd 14989 (2005) (subjecting VOIP services to the

[2] In *Southwestern Bell*, the Missouri federal court upheld a Missouri Public Service Commission arbitration order that IP-PSTN calls are subject to reciprocal compensation and not access charges. In *Vonage Holdings*, the Minnesota federal court overruled a Minnesota Public Utilities Commission decision that would have subjected VOIP services to telecommunications regulation.

requirements of CALEA but refusing to categorize VOIP as "telecommunications" under the Act); *E911 Requirements for IP-Enabled Servs.*, 20 FCC Rcd 10245 (2005) (subjecting interconnected VOIP services to E911 requirements but refusing to categorize those services as telecommunications); *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Tel. Servs. are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) (ruling that "IP-in-the-middle" communications are subject to access charges because there is no net protocol conversion, but declining to so rule on VOIP calls where there is a net protocol conversion); *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecomms. Nor a Telecomms. Serv.*, 19 FCC Rcd 3307 (2004) (ruling that computer-to-computer VOIP communications are not telecommunications). Thus, the thirty-year-old ruling from *Computer II* stands, and under existing law VOIP traffic that involves a net protocol conversion is not a telecommunications service, but is rather an information service that is not subject to access charges.

The conclusion that IP-PSTN traffic is not subject to access charges does not change when that traffic is being sent to a LEC for termination by a carrier providing a wholesale transport service to a retail VOIP provider.[3] In *Brand X*, 545 U.S. at 989–90, the Supreme Court held that the use of telecommunications as an underlying component in the provision of an information service (such as carrier's transmission service) does not transform the information service into a telecommunications service. Hence, even where a carrier supplies a transmission component to a VOIP provider, the traffic terminated is still an information service not subject to access charges. Whether access charges apply to such traffic does not hinge on the nature of the carrier's underlying service but rather on whether the traffic undergoes a net protocol conversion.

[3] Global Crossing is a retail provider of VOIP services and supplies wholesale transport services to other retail VOIP providers. *See* M. Henry Direct Testimony at 1.

Because IP-PSTN traffic undergoes such a protocol conversion, *see Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Tel. Servs. Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004), it is not subject to access charges, regardless of the fact that it is delivered to a LEC by a carrier that is not itself an ESP.

Similarly, the fact that VOIP is an information service does not preclude the VOIP provider (Global Crossing Local Services, Inc. here) from paying reciprocal compensation rates for the termination of IP-originated traffic. As the Eastern District of Missouri has held:

> The reciprocal compensation obligation applies to IP-PSTN traffic because when a CLEC acts as a VOIP provider it uses "telecommunications" to transmit IP-PSTN traffic to the network of the carrier that provides services to the called party.

Southwestern Bell, 461 F. Supp. 2d at 1079.

That conclusion applied equally to wholesale to retail services.

Even if the Supreme Court had not issued its *Brand X* ruling and IP-PSTN traffic were considered a telecommunications service when handled by an underlying carrier, Section 251(b)(5) of the Act requires all telecommunications traffic to be subject to reciprocal compensation and not access charges. 47 U.S.C. § 251(b)(5). Section 251(g) of the Act 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." 47 U.S.C. § 251(g). 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." PAETEC at 7-8. The U.S. district court for the Eastern District of Missouri made an identical ruling in 2006 when 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." *Southwestern Bell*, 461 F. Supp. 2d at 1080.

In the DPL (at 3), AT&T cites to a Missouri statute enacted in 2008, which states "Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges." Section 392.550.2, RS Mo. This provision is in conflict with federal law, however, and is thus preempted. The FCC has made it clear that information services such as VOIP are interstate in nature and explicitly preempted any authority that state commissions may have over such services. *See Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm'n*, 19 FCC Rcd 22404 (2004) (preempting the authority of state commissions over VOIP services). FCC and court precedent require this Commission to apply existing federal law, *see UTEX*, 24 FCC Rcd at 12578, and make it clear that IP-PSTN calls are not subject to access charges. *See PAETEC* and *Southwestern Bell* (in which both federal courts specifically ruled that IP-PSTN calls are not subject to access charges under current law). The FCC has said that it may reconsider the way IP services are treated for purposes of applying Title II regulation, *see IP-Enabled Services*, 19 FCC Rcd 4863 (2004), but it has issued no orders to date that disturb the *Computer II* ruling and its applicability to IP-PSTN traffic.

For the foregoing reasons, this Commission should require that IP-originated traffic not be subject to access charges in the parties' ICA.

Conclusion

For the foregoing reasons, Global Crossing respectfully requests that the Commission issue findings in support of the Global Crossing position 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 29th 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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