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

AT&T MISSOURI'S REPLY BRIEF

COMES NOW Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri") and respectfully submits its reply brief on the three arbitration issues in this proceeding.[1]

ARGUMENT

ISSUE 1: WHAT IS THE APPROPRIATE COMPENSATION FOR VOIP?

Issue 1 is easily resolved, because the Missouri Legislature has already determined the appropriate compensation for interconnected VoIP traffic (*i.e.*, VoIP traffic that originates in the IP format over a broadband connection and is terminated to the public switched telephone network ("PSTN")). Section 392.550.2, RSMo, provides: "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." As explained in AT&T Missouri's initial brief on Issue 1, this means that interconnected VoIP traffic is subject to terminating access charges when it originates and terminates in different local exchanges, just like any interexchange telecommunications services traffic.

[1] The parties filed their initial briefs on Issues 2 and 3 on October 13, 2009. We cite to those briefs as follows: Post-Hearing Brief of Global Crossing ("Global Br."); AT&T Missouri's Initial Post-Hearing Brief on Arbitration Issues 2 and 3 ("AT&T Br."). The parties filed their initial briefs on Issue 1 on September 29, 2010. We cite to those briefs as follows: Initial Brief of Global Crossing ("Global VoIP Br."); AT&T Missouri's Initial Brief on Issue 1 ("AT&T VoIP Br.").

Global Crossing does not dispute that AT&T Missouri's proposed language is consistent with Section 392.550.2, and that Global Crossing's proposed language is inconsistent with that statute. Instead, Global Crossing asserts that the Missouri statute conflicts with federal law and is preempted.[2] That assertion is both irrelevant and wrong.

It is irrelevant because the Commission is required to apply Section 392.550.2, and lacks authority to declare the statute unlawful. The Commission, as a creature of the Missouri Legislature, has no authority to find, conclude or in any other manner declare that the provisions of Section 392.550.2 are preempted by federal law or are otherwise unenforceable. The Missouri Supreme Court has long recognized that the Public Service Commission "is the creature of the legislative department of the State exercising lawmaking powers, not judicial power in the constitutional sense." *Clark v. Austin*, 101 S.W.2d 977, 995 (Mo. 1937). While state agencies may sometimes exercise "quasi-judicial" powers when adjudicating disputes, that authority "is not plenary." *State Tax Commission of Missouri v. Administrative Hearing Commission*, 641 S.W.2d 69, 75 (Mo. 1982). In particular, "[a]n administrative body or even a quasi-judicial body is not and cannot be a court in a Constitutional sense," and "[u]nder our Constitution the lawmakers cannot vest purely judicial functions in an administrative agency." *Id.* (internal citations and quotations omitted).

It is also well-settled that "[t]he declaration of the validity or invalidity of statutes and administrative rules . . . is purely a judicial function." *Id.* at 75. Consequently, the Commission has no authority to determine that Section 392.550.2 is unlawful. Indeed, the Commission has expressly "disavow[ed] power to repeal a statute or to declare a statute unconstitutional," and the Missouri Supreme Court held that "[t]hat disavowal is correct," because "[t]o declare a statute unconstitutional is a judicial act" and "[i]n this state all judicial power is vested in the courts."

[2] Global VoIP Br. at 9.

State ex rel. Missouri Southern Railroad v. Public Service Commission, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914). *See also State ex rel. Kansas City Terminal Railway v. Public Service Commission*, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of an ordinance).

Global Crossing's assertion that Section 392.550.2 is preempted also is wrong. Citing the FCC's *Vonage Order*,[3] Global Crossing argues that "[t]he 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."[4] But the FCC's holding in that case was nowhere near as broad as Global Crossing would have it.

In the *Vonage Order* (¶¶ 5, 8), the FCC preempted a Minnesota Public Utilities Commission decision that attempted to regulate under "traditional 'telephone company' regulations" Vonage's provision of its DigitalVoice service, which was provided to end users over "a broadband connection to the Internet" such that "the subscriber's outgoing calls originate on the Internet and are routed over the Internet to Vonage's servers" (*i.e.*, Vonage's end user customers originated voice calls in Internet Protocol ("IP") format using the Internet). Applying the "impossibility exception," the FCC determined that the interstate and intrastate portions of Vonage's VoIP service could not practicably be separated because Vonage's service was "nomadic," allowing Vonage's customer to place a call over any broadband Internet connection, and the FCC concluded that the Minnesota commission's attempt to apply its traditional telephone company regulations to Vonage to require Vonage to, *e.g.*, "obtain operating authority, file tariffs, and provide and fund 911 emergency services," would conflict with valid federal

[3] *In re Vonage Holdings Corp.*, 19 FCC Rcd. 22404, 2004 WL 2601194 (2004).
[4] Global VoIP Br. at 9.

regulatory policies. *Id.* ¶ 10. This holding has no effect here, for a number of independent reasons.

First, the FCC's holding does not apply to all VoIP services, as Global Crossing suggests. Rather, as the Eighth Circuit explained on review of the *Vonage Order*, that order applies to nomadic VoIP (where the geographic location of the VoIP user cannot be determined), and "does not purport to preempt" state regulation with respect to "fixed" VoIP services. *Minnesota Public Utils. Comm'n v. FCC*, 483 F.3d 570, 582 (8th Cir. 2007). As the court noted, "the FCC has since indicated VoIP providers who can track the geographic end-points of their calls do not qualify for the preemptive effects of the Vonage order." *Id.* at 583. In particular, the FCC stated that "an interconnected VoIP provider with a capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation. This is because the central rationale justifying preemption set forth in the *Vonage Order* would no longer be applicable to such an interconnected VoIP provider." *Universal Serv. Contribution Methodology*, 21 FCC Rcd. 7518, 2006 WL 1765838, ¶ 56 (2006). Here, Global Crossing has admitted that it "has the ability to identify the geographic location of its retail VoIP services customer when the customer places a call."[5] As a result, Global Crossing does not qualify for the preemptive effects of the *Vonage Order*.[6]

[5] *See* AT&T Missouri's Entry of Discovery Responses into the Record, October 8, 2010, *attaching* Global Crossing's Response to AT&T Missouri Data Request 8.

[6] *See also State of Missouri ex rel. Time Warner Cable Information v. Missouri Public Service Commission*, Case No. 06AC-CC00935, Circuit Court of Cole County, Findings of Fact, Conclusions of Law, and Judgment, September 5, 2007, at 13 (rejecting Time Warner's pre-emption argument, and noting that the Eighth Circuit had confirmed that the FCC had not preempted state regulation over fixed interconnected VoIP service); *Comcast IP Phone of Missouri, LLC v. Missouri Public Service Commission*, 2007 U.S. Dist. LEXIS 3628 (W.D. Mo. 2007) ("*Comcast*") *15 ("[T]he Court is unable to find that the FCC has preempted the entire field of VoIP services or that allowing state regulation of intrastate telecommunications services, which happens to be VoIP services, stands as an obstacle to the accomplishment and execution of the full objectives of Congress.").

Second, the *Vonage Order* did not purport to preempt the kind of state statute at issue here, specifying the compensation that applies when a carrier uses the PSTN to terminate VoIP traffic. The *Vonage Order* preempted a state commission's attempt to regulate Vonage's retail provision of nomadic VoIP service like a traditional telephone company, including certification and tariffing requirements. Section 392.550.2, on the other hand, does not purport to regulate the retail provision of any VoIP service. Rather, it regulates the provision of service by *AT&T Missouri* (and other local exchange carriers operating the PSTN), specifying the compensation that is due for use of the PSTN to terminate certain traffic. The *Vonage Order* says nothing about the regulation of services provided by local exchange carriers like AT&T Missouri, whether those services are provided to Vonage or anyone else.

Third, contrary to Global Crossing's suggestion, the *Vonage Order* did not hold that "information services such as VOIP are interstate in nature" or preempt any state commission authority over information services. The *Vonage Order* did not purport to address information services at all, as the FCC made clear it was *not* ruling that Vonage's VoIP service was an information service. *See Vonage Order* ¶ 15 ("the definitional classification of DigitalVoice under the Act, *i.e.*, telecommunications or information service, [is] a determination we do not reach in this Order"). Indeed, the federal district court for the Western District of Missouri specifically determined that "[the Court] is unable to find that the FCC has declared all VoIP services to be information services"[7] and, in fact, the FCC has never ruled upon the appropriate regulatory classification of VoIP traffic or the associated intercarrier compensation obligations. *See UTEX Order*,[8] ¶¶ 9-10. In the absence of such a ruling, there is no basis to conclude that Section 392.550.2 "would interfere with valid federal rules or policies" (*Minnesota PUC*, 483

[7] *Comcast*, at *14-15.
[8] *In the Matter of Petition of UTEX Comm'ns Corp.*, 2009 WL 3266623 (FCC Oct. 9, 2009) ("*UTEX Order*").

F.3d at 581), as required for preemption under the "impossibility exception" invoked in the *Vonage Order*.[9]

In any event, Section 392.550.2 is fully consistent with current federal law. Citing the FCC's *MTS/WATS Market Structure Order*,[10] Global Crossing asserts that the FCC has exempted "enhanced" or information services, including VoIP, from access charges.[11] Global Crossing is wrong, even if VoIP service constituted an enhanced or information service (an issue on which, again, the FCC has yet to rule).

In the *MTS/WATS Market Structure Order*, the FCC did not exempt any particular *traffic* from access charges. Rather, it held that in certain circumstances particular *persons* – enhanced service providers ("ESPs") – should be exempt from access charges. The FCC explained: "[E]nhanced service providers . . . , who have been paying the generally much lower business service rates, would experience severe rate impacts were we immediately to assess carrier access charges upon them. . . . Were we at the outset to impose full carrier usage charges on enhanced service providers . . . , these entities would experience huge increases in their costs of operation which could affect their viability."[12] In its subsequent access charge orders, the FCC reiterated that the access charge exemption applies to enhanced service providers. *See 1988 Access*

[9] Global Crossing points (at 5-6) to a stray sentence from the FCC's 2001 Notice of Proposed Rulemaking, *In re Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd. 9610, 2001 WL 455872 (2001), stating that "long-distance calls handled by ISPs using IP telephony are generally exempt from access charges under the enhanced service provider (ESP) exemption." As an initial matter, as explained in AT&T Missouri's initial brief and explained further below, the traffic here concerns long-distance calls handled by an *interexchange carrier*, not an Internet service provider. Further, that sentence was merely dicta in an FCC notice, not an actual FCC ruling; the FCC has never ruled that all VoIP is exempt from access charges. Earlier this year the FCC confirmed this once again, explaining that "the question of whether access charges apply to voice-enabled Internet communications is a significantly contested area of the law, which is currently under consideration in other, industry-wide proceedings." Order on Reconsideration, *In the Matter of Feature Group IP Petition for Forbearance*, 25 FCC Rcd. 8867, 2010 WL 2641485, n.39 (June 30, 2010).

[10] *In re MTS and WATS Market Structure*, 97 FCC 2d 682, 1983 WL 183026, ¶ 83 (1983) ("*MTS/WATS Market Structure Order*").

[11] Global VoIP Br. at 4.

[12] *In re MTS and WATS Market Structure*, 97 FCC 2d 682, 1983 WL 183026, ¶ 83 (1983) ("*MTS/WATS Order*").

Charge Order[13] ("decid[ing] not to eliminate the exemption from interstate access charges currently permitted *enhanced service providers*"); *1997 Access Charge Reform Order*,[14] (explaining that in 1983, the FCC "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," that "incumbent LECs will not be permitted to assess interstate per-minute access charges *on ISPs*," and "*ISPs* should remain classified as end users for purposes of the access charge system").

More to the point, in a 1992 order, the FCC explained that under its ESP exemption "enhanced service providers are treated as end users for purposes of [the FCC's interstate] access charge rules" (and thus pay end user charges rather than access charges), but "[e]nd users that purchase interstate services from interexchange carriers *do not thereby create an access charge exemption for those carriers*."[15] In other words, ESPs may be exempt from interstate access charges because they are treated as end-users, but that does not create an access charge exemption for an interexchange carrier from whom the ESP purchases service.

As a result, Global Crossing is not entitled to any access charge exemption for the interexchange VoIP traffic it terminates to AT&T Missouri. Global Crossing purports to provide wholesale transport service to VoIP providers, including the interexchange transport of their traffic from one LATA to another.[16] Even if the VoIP providers are ESPs, in this circumstance Global Crossing is merely acting as an interexchange carrier, providing a wholesale

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[13] *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, 1988 WL 488404, ¶¶ 1, 2 (1988) ("*1988 Access Charge Order*") (emphasis added).

[14] *In re Access Charge Reform*, 12 FCC Rcd. 15982, 1997 WL 268841, ¶¶ 341, 344, 348 (1997) ("*1997 Access Charge Reform Order*") (emphases added).

[15] *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, 1987 WL 344405, ¶ 21 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992). While the FCC ultimately vacated the *Northwestern Bell* decision for mootness, that decision still carries informational and persuasive value as the FCC's own explanation of its ESP exemption (and, more importantly, the limits of that exemption).

[16] *See* AT&T Missouri's Entry of Discovery Responses into the Record, October 8, 2010, *attaching* Global Crossing's Response to AT&T Missouri Data Request 3.

telecommunications service to ESPs. The *Northwestern Bell* order makes clear that even if the ESP is exempt from access charges, the interexchange carrier – here, Global Crossing – is not.

This makes perfect sense. The ESP access charge exemption treats ESP as end users. In the FCC's words, "[t]he access charge exemption for enhanced services is implemented by treating ESPs as end users for the purposes of Part 69 [the FCC's access charge rules]." *In the Matter of Amendments of Part 69*, 4 FCC Rcd. 3983, 1989 WL 512039, n.71 (1989). As one U.S. Court of Appeals has explained, under the FCC's enhanced service provider (ESP) exemption, "[r]ather than directly exempting ESPs from interstate access charges, the Commission defined them as 'end users' – no different from a local pizzeria or barber shop." *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 409 (D.C. Cir. 2002). When Mike's Pizzeria makes a long distance call, Mike's Pizzeria pays no access charges, because it is an end user. But that does not mean all of Mike's Pizzeria's long distance traffic is exempt from access charges. Rather, Mike's Pizzeria's long distance carrier pays access charges to the terminating local exchange carrier.

The FCC's *Time Warner Order*[17] also makes this clear. In that order, the FCC held that wholesale carriers providing transport service to VoIP providers – exactly as Global Crossing purports to do – are providers of "*telecommunications services*." *Time Warner Order*, ¶¶ 8-16. Providers of telecommunications services are, of course, not exempt from access charges. To the contrary, the FCC's access charge rule, 47 C.F.R. § 69.5(b), plainly states: "Carrier's carrier charges [*i.e.*, access charges] shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b). When Global Crossing acts as an interexchange carrier, providing interstate telecommunications services (*e.g.*, the transport

[17] *In the Matter of Time Warner Cable*, 22 FCC Rcd. 3513, 2007 WL 623570 (FCC 2007) ("*Time Warner Order*").

service described in the *Time Warner Order*), it is thus required to pay access charges when it uses AT&T Missouri's local exchange switching facilities for the provision of that service – including when it terminates traffic on AT&T Missouri's network like any other interexchange carrier.

Pointing to the Supreme Court's *Brand X* decision, Global Crossing argues that VoIP is an information service even if it involves the use of telecommunications, such as a carrier's transmission service.[18] That is a red herring. In *Brand X* the Court upheld the FCC's determination that when a person is providing an information service, the service is not transformed into a telecommunications service merely because "telecommunications" (including transport) is a component of the service. But as the *Time Warner Order* makes clear, there is a distinction between the service provided by a retail VoIP provider and the service provided by a carrier that transports traffic for a VoIP provider. If the former constitutes an information service, then per *Brand X* the retail VoIP provider is not providing "telecommunications services" to end users even if there is a "telecommunications" component. But the FCC held that a wholesale carrier providing service to a VoIP provider is providing a "telecommunications service" *irrespective* of the classification of VoIP service. *See Time Warner Order* ¶ 15 ("[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"). Such a carrier is not an ESP, and thus is not entitled to the "ESP exemption" from access

[18] Global VoIP Br. at 7-8.

charges, but instead is required to pay access charges for its use of the PSTN in its provision of interexchange telecommunications service.[19]

Global Crossing seeks to evade the clear application of the FCC's orders to its business as "a wholesale provider for other entities with VOIP retail offerings"[20] by asserting that it also provides retail services. But, the assertion is entitled to no weight since Global Crossing here (as in Kansas) never identifies what portion of its wholesale business is attributable to its own retail VoIP service.[21] In any event, the conclusion that access charges are due does not change in those instances where Global Crossing purports to provide retail VoIP service. Global Crossing has admitted that even where it provides retail VoIP service, the traffic is delivered to its affiliated *interexchange carrier* (Global Crossing Telecommunications, Inc.) for transport and delivery to the LATA of termination.[22] Thus, there is an interexchange carrier providing a *telecommunications service*, and AT&T Missouri is entitled to access charges in connection with

[19] In paragraph 17 of the *Time Warner Order*, the FCC stated: "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." The FCC then noted in a footnote that Sprint Nextel, one of the wholesale carriers serving Time Warner (the VoIP provider), had offered to provide "intercarrier compensation, including *exchange access* and reciprocal compensation." *Time Warner Order*, ¶ 17 n.53. The FCC also cited Verizon's assumption of responsibility for intercarrier compensation under its section 251 agreement. *Id.* Verizon explained that "when Verizon delivered traffic originated by a Time Warner Cable VoIP customer, Verizon agreed that, for purposes of an agreement with these independent LECs, the same rules applicable to circuit-switched traffic – based on the end points of the call – would determine whether that call was subject to reciprocal compensation or intrastate or interstate access charges." Verizon Reply Comments, WC Docket No. 06-55, at p.11.

[20] *See*, the parties' joint DPL, Issue No. 1, Global Crossing Position, at p. 3.

[21] Arbitration Award, *Petition of Southwestern Bell Telephone Company d/b/a AT&T Kansas for Compulsory Arbitration of Unresolved Issues with Global Crossing Local Service, Inc. and Global Crossing Telemanagement, Inc. for an Interconnection Agreement Pursuant to Sections 251 and 252 of the Federal Telecommunications Act of 1996*, Kansas Corporation Commission Docket No. 10-SWBT-419-ARB (April 23, 2010), at 36, *aff'd in pertinent part*, Order Adopting Arbitrator's Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing (Aug. 13, 2010), at 10 ("Even if the Commission would be convinced to entertain this new claim, it would deny it because Global Crossing failed to identify what portion of its transport of enhanced services was attributable to its retail VoIP services. A third-party transporter does not obtain total exemption from access charges because some portion, if any, of its transport is dedicated to its retail VoIP services.").

[22] *See* AT&T Missouri's Entry of Discovery Responses into the Record, October 8, 2010, *attaching* Global Crossing's Response to AT&T Missouri Request 3.

the interexchange carrier's use of the PSTN in the provision of the interexchange telecommunications service.

Global Crossing points (at 6, 9) to two cases holding that IP-PSTN VoIP calls are not subject to access charges, *PAETEC*[23] and *Southwestern Bell*.[24] Neither decision is persuasive.

In *Southwestern Bell*, the district court concluded that "federal access charges are inapplicable to IP-PSTN traffic because such traffic is an 'information service' or an 'enhanced service' to which access charges do not apply." *Id.* at 1079. Addressing the ESP exemption, the court noted that "[t]he *ESP Exemption Order* classifies enhanced service providers ('ESPs') as end users," and "[b]ecause only 'carriers' are subject to access charges, being an 'end user' means that ESPs do not pay those charges." *Id.* at 1081. "Consequently," the court concluded, "if IP-PSTN traffic is an enhanced or information service, then the [state commission] correctly ruled that CLECs should not pay access charges when they originate or terminate IP-PSTN traffic." *Id.* In *PAETEC*, the court conducted no real additional analysis, but adopted the reasoning of *Southwestern Bell*. *PAETEC*, slip op. at 6.

As an initial matter, *Southwestern Bell* was handed down before the enactment of Section 392.550.2, and the Commission is bound to follow that statutory provision for the reasons explained above. In any event, the courts' conclusion misconstrues the ESP exemption, for the reasons AT&T Missouri previously explained. Even if VoIP traffic is "enhanced or information service," the ESP exemption only "classifies enhanced service providers ('ESPs') as end users," which are thus exempt from access charges because "only 'carriers' are subject to access charges." *Southwestern Bell*, 461 F. Supp. 2d at 1081. Contrary to the courts' suggestion, a

[23] *PAETEC Comm'ns, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010).
[24] *Southwestern Bell Tel., L.P. v. Missouri Pub. Utils. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006).

carrier that transports VoIP traffic for termination is not an ESP or an end user, is not providing "enhanced or information service," and thus is not entitled to the ESP exemption.

Again, the FCC's *Time Warner Order* – which was released after the *Southwestern Bell* decision and was not even mentioned in *PAETEC* – makes plain the error of the courts' suggestion that competitive carriers are entitled to the ESP exemption because "IP-PSTN traffic is an information service." *Southwestern Bell*, 461 F. Supp. 2d at 1082. In the *Time Warner Order*, the FCC concluded that a wholesale provider that carries traffic for VoIP providers is providing a *telecommunications service*, even if the VoIP provider itself provides enhanced or information service, and the wholesale provider remains a *telecommunications carrier*. *See Time Warner Order*, ¶¶ 8-16. The ESP exemption plainly does not apply to a telecommunications carrier that is providing telecommunications service. As noted in AT&T Missouri's initial brief, several state commissions have reached the same conclusion.

Finally, Global Crossing argues that because VoIP was not developed until after the 1996 Act, section 251(g) of that Act, which preserves pre-1996 Act intercarrier compensation obligations, does not apply and instead section 251(b)(5), which requires reciprocal compensation for all other telecommunications, applies.[25] Global Crossing is wrong. As the FCC has explained, section 251(g) "carves out" certain traffic from section 251(b)(5)'s reciprocal compensation provision – "the statute does not mandate reciprocal compensation for 'exchange access, information access, and exchange services for such access' provided to IXCs [interexchange carriers] and information service providers."[26] Even if VoIP service did not exist prior to the 1996 Act, the compensation obligation at issue here – the obligation of interexchange carriers to pay access charges for "exchange access," or the use of local exchange switching

[25] Global VoIP Br. at 8-9.

[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151, 2001 WL 455869 (2001) ("*ISP Remand Order*"), ¶ 34 (subsequent history omitted).

facilities to terminate traffic – long predates the Act, and is precisely what section 251(g) was intended to preserve.

ISSUE 2: SHOULD GLOBAL CROSSING BE PERMITTED TO OBTAIN MORE THAN 25% OF AT&T MISSOURI'S AVAILABLE DARK FIBER?

SHOULD GLOBAL CROSSING BE ALLOWED TO HOLD ONTO DARK FIBER THAT IT HAS ORDERED FROM AT&T MISSOURI INDEFINITELY, OR SHOULD AT&T MISSOURI BE ALLOWED TO RECLAIM UNUSED DARK FIBER AFTER A REASONABLE PERIOD SO THAT IT WILL BE AVAILABLE FOR USE BY OTHER CARRIERS?

The 25% limitation: Limiting each CLEC to 25% of the spare dark fiber in any segment is a patently reasonable way to try to ensure that multiple carriers will have fair access to AT&T Missouri's limited supply of dark fiber. To try to avoid the obvious conclusion – that AT&T Missouri's proposed language should be adopted – Global Crossing argues that "AT&T has failed to discharge its obligation to prove that its ability to provide service is threatened if the 25% rule is not adopted."[27] That argument fails, first and foremost because AT&T Missouri has no such obligation.

FCC Rule 307(a) requires AT&T Missouri to provide access to UNEs, including dark fiber, "on terms and conditions that are just, reasonable, and nondiscriminatory."[28] AT&T Missouri's proposed 25% limitation is just, reasonable and nondiscriminatory, and that alone is a sufficient basis for adopting it. The FCC's approval of an identical restriction in the *UNE Remand Order*[29] strongly supports AT&T Missouri's position – but it is not a prerequisite to its approval. Indeed, the 25% limitation that the FCC endorsed had previously been adopted by the Texas Public Utility Commission – without benefit of the FCC's pronouncement. Thus, the

[27] Global Br. at 4.
[28] *See* AT&T Br. at 5.
[29] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696, ¶ 199 (1999) ("*UNE Remand Order*").

FCC's commentary on the Texas restriction cannot be read, as Global Crossing reads it, as limiting the circumstances in which a state commission can adopt such provisions.

Moreover, when the FCC referred to carrier of last resort duties in the *UNE Remand Order*, it was not establishing a rule that dark fiber restrictions are appropriate only when the ILEC proves that their absence would threaten its ability to perform those duties. The FCC was considering whether to require dark fiber to be unbundled, and carriers that opposed a dark fiber unbundling requirement argued that such a requirement would discourage ILECs from deploying fiber loops, which would inhibit their ability to provide service as carriers of last resort.[30] *In that context*, the FCC stated:

> We note . . . that the Texas commission has already established moderate restrictions governing the availability of 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.[31]

The FCC's recognition that Texas, and perhaps other states, had already imposed reasonable limitations on dark fiber unbundling, and its use of the word "retain," make clear that the FCC was not newly authorizing states to impose such limitations, but rather was acknowledging the appropriateness of such limitations – limitations that were within the states' already established flexibility to establish – as a means to address the carrier of last resort concern that opponents of dark fiber unbundling had raised. Contrary to Global Crossing's premise, the FCC was not establishing a rule that reasonable restrictions on dark fiber unbundling can be imposed *only* when the ILEC proves its ability to provide service as a carrier of last resort will be threatened without such restrictions.

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[30] *Id.*
[31] *Id*. (emphasis added).

To try to shore up its baseless argument that AT&T Missouri has failed to prove something that it must prove in order to justify the 25% restriction, Global Crossing suggests that in the California, Texas and Wisconsin arbitrations in which the 25% limitation was adopted, the incumbent LEC may have introduced evidence that AT&T Missouri has not introduced here.[32] That speculation is refuted by the California, Texas and Wisconsin decisions themselves, which explain why the commissions adopted the restriction and which make no mention of evidence of the sort that Global Crossing mistakenly claims is required – and that includes the Texas decision that the FCC cited with approval. None of the state commission decisions adopting the 25% limitation suggests that the ILEC made any showing that AT&T Missouri has not made here. And as for the parties' recent Kansas arbitration in which AT&T's dark fiber language was adopted, Global Crossing knows that AT&T introduced no evidence there that it has not introduced here.[33]

Finally, the Commission's approval of the 25% limitation in the 2005 post-MTA proceeding[34] does support AT&T Missouri's position here, notwithstanding that the CLEC Coalition did not oppose the limitation. If Global Crossing were correct that a state commission can lawfully impose the limitation only if the incumbent shows it would otherwise be unable to perform its carrier of last resort duties, then the Commission could not lawfully have approved the limitation in the 2005 proceeding, whether or not the CLEC Coalition opposed it. Furthermore, the fact that the CLEC Coalition acceded to the limitation, while not dispositive, certainly suggests that the limitation is, at a minimum, not unreasonable.

In sum, Global Crossing's contention that AT&T Missouri's evidence falls short is incorrect. The 25% limitation that AT&T Missouri proposes is reasonable and

[32] Global Br. at 4.
[33] *See id.*
[34] *See* Direct Testimony of Deborah Fuentes Niziolek at 8.

nondiscriminatory, has been approved by the FCC and by several state commissions,[35] and should be adopted here.

2. Revocation in case of non-use: The proposed language that would allow AT&T Missouri to reclaim dark fiber that Global Crossing leases but does not use for an entire year is also patently reasonable. Indeed, it is hard to imagine why any reasonable carrier would oppose it. Global Crossing gives a hint why it might oppose it, however, when it asserts that if it is not using the dark fiber it leased, and another carrier wants that fiber, that carrier could lease the fiber from Global Crossing.[36] Evidently, Global Crossing would like to make a profit by leasing the fiber from AT&T Missouri at low UNE rates and then subleasing it to carriers that need it at higher rates. That is contrary to the intent of the 1996 Act; those third party carriers should be able to lease the fiber at the same low UNE rates as Global Crossing. And if AT&T Missouri has misjudged Global Crossing's motives and Global Crossing actually has in mind that it would lease the fiber at the same UNE rates it is paying, then Global Crossing should have no objection to instead returning the fiber to AT&T Missouri and letting AT&T Missouri lease the fiber to the third party; after all, AT&T Missouri and that third carrier presumably have an interconnection agreement that provides all the necessary terms and conditions for leasing dark fiber, while Global Crossing would have to come to an agreement with that carrier.

Global Crossing dismisses as "absurd" AT&T Missouri's argument that an additional reason for adopting the two dark fiber restrictions that AT&T Missouri proposes is that they are, in addition to being reasonable, nondiscriminatory.[37] Global Crossing does not understand the argument – or pretends not to. AT&T Missouri does not contend that all ICAs should be alike in

[35] Global Crossing tries to diminish the import of the precedents that support AT&T Missouri's position (*id*.), but is unable to cite a single contrary authority. Perhaps because the 25% limitation is so patently reasonable, the issue has been arbitrated only a few times, and has been resolved in the incumbent's favor every time.
[36] Global Br. at 6.
[37] *Id*. at 8.

all respects, or that – again, in general – the fact that a provision is in most or all other ICAs necessarily means it should be in this one. The dark fiber contract provisions at issue here, however, are unusual in that they are inherently reciprocal, because they seek to ensure that all CLECs have access to their fair share of dark fiber. If every other CLEC in Missouri is subject to these limitations – and thereby helps ensure that dark fiber will be available for Global Crossing – it would be grotesquely unfair for Global Crossing not to be subject to those same limitations.

AT&T Missouri's proposed sections 10.4.3 and 10.7 2 of Attachment 13 should be included in the parties' ICA.

ISSUE 3: WHICH ROUTINE NETWORK MODIFICATION (RNM) COSTS ARE NOT BEING RECOVERED IN EXISTING RECURRING AND NON-RECURRING CHARGES?

Global Crossing's position on this issue is without any merit whatsoever. Global Crossing challenged AT&T Missouri to prove that it is not recovering in its existing charges the costs of the routine network modifications identified in the disputed language, and AT&T Missouri did so. Global Crossing does not contest – and has no basis to contest – AT&T Missouri's proof. Indeed, Global Crossing conceded at the October 5 prehearing and mark-up conference that it does not dispute AT&T Missouri's demonstration, as Judge Jordan correctly understood.[38]

Nonetheless, Global Crossing insists in its brief that because it has "no knowledge, outside of the testimony of AT&T witness Andrew D. Sanders, of whether AT&T included these costs in its UNE cost studies . . . , there is a possibility that allowing AT&T's proposed language will result in over-recovery."[39] That is preposterous. AT&T Missouri has conclusively proven

[38] *See* AT&T Br. at 10.
[39] Global Br. at 8.

that there will be no double recovery.[40] Global Crossing asserts that "only this Commission can ultimately determine what costs are or not being recovered."[41] AT&T Missouri agrees, and that is what it asks the Commission to do now, based on the uncontroverted evidence.

Global Crossing contends in its brief that the disputed language "unnecessarily duplicates the uncontested language in this paragraph or, conversely, imprecisely adds an exception to the uncontested language, and by doing so adds uncertainty to the proposed agreement."[42] That contention is irrelevant, unsupported and wrong.

It is irrelevant because the question the parties agreed to present to the Commission is, "What Routine Network Modification ('RNM') costs are not being recovered in existing recurring and non-recurring charges?" That is the *agreed* statement of Issue 3 that appears in the DPL, and the answer to the question is straightforward: AT&T Missouri is not recovering in its existing recurring and non-recurring charges the costs of (at a minimum) the three items enumerated in AT&T Missouri's proposed language, and that language therefore belongs in the parties' interconnection agreement. Global Crossing's newly minted argument that the disputed language does not synch up properly with the agreed language simply has no bearing on the question presented by Issue 3.

Global Crossing's contention is unsupported because it has no foundation in Global Crossing's testimony. Global Crossing witness Henry said nothing, either in his direct testimony or his rebuttal testimony, concerning the way the agreed and disputed language in section 11.1.7

[40] AT&T Missouri's position is perfectly consistent with the FCC pronouncement in the *TRO* cited in Global Br. at 9 ("[W]e leave it to the state commissions to decide in the first instance whether a particular cost [for RNMs not recovered through TELRIC rates] should be recovered from a competitive LEC through a recurring charge, a non-recurring charge, or not at all . . . "). Global Crossing has already agreed, in the undisputed language in section 11.1.7 of Attachment 13 that AT&T Missouri is entitled to charge it for RNM costs it is not recovering through its existing recurring and non-recurring charges (*see* AT&T Br. at 28), and AT&T Missouri has proven that it is not recovering through those charges the costs of the RNM activities identified in the disputed language.
[41] Global Br. at 10.
[42] *Id.* at 7.

work together, or about the supposed imprecision or uncertainty that Global Crossing asserts in its brief.

Finally, Global Crossing's contention is wrong. The language that AT&T Missouri proposes is not duplicative; rather, it eliminates any possible question about whether AT&T Missouri is entitled to charge Global Crossing for the enumerated RNMs, and thus eliminates possible disagreements that would otherwise arise during performance of the ICA. The parties agree in section 11.1.7 that AT&T Missouri "will impose charges for RNM only in instances where such charges are not included in any cossets already recovered through existing, applicable recurring and non-recurring charges." The language that AT&T Missouri proposes for the sentence following the agreed language clearly and unambiguously identifies three such instances. There is nothing duplicative or uncertain about that, and Global Crossing's convoluted attempt to create such an impression is futile. Unless the Commission adopts AT&T Missouri's proposed language, AT&T Missouri risks that on the first occasion that Global Crossing orders a UNE that requires AT&T Missouri to install a repeater, the parties will disagree about whether AT&T Missouri is entitled to charge for the installation or whether the costs of the installation are already covered by AT&T Missouri's UNE rates – and the Commission will be called upon to resolve that disagreement. With AT&T Missouri's language, which is indisputably accurate, that potential risk is foreclosed.

As its final objection to AT&T Missouri's proposed language, Global Commission contends that any rates AT&T Missouri charges for RNMs (for which it is not recovering elsewhere) must be approved by the Commission. As we explained in our initial brief,[43] that objection is baseless. All AT&T Missouri's language purports to do – and all it does do – is to identify the specific RNM activities for which AT&T Missouri is entitled to charge Global

[43] AT&T Br. at 11-12.

Crossing because the costs of those activities are not recovered elsewhere. The disputed language says nothing about rates, and cannot properly be objected to on the ground that it does not address rates. And, in any event, Global Crossing has agreed to the determination of rates later through the ICB or SC process,[44] and so cannot appropriately demand that all rates be determined up front.

CONCLUSION

For the foregoing reasons, and the reasons set forth in AT&T Missouri's initial briefs, the Commission should resolve arbitration Issues 1, 2 and 3 in favor of AT&T Missouri.

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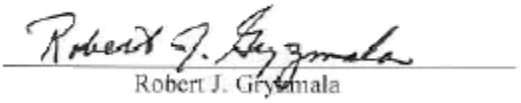
[44] *Id*. at 12-13.

CERTIFICATE OF SERVICE

Copies of this document and all attachments thereto were served on the following by e-mail on October 18, 2010.



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