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

COMMENTS OF GLOBAL CROSSING
ON ARBITRATOR'S DRAFT REPORT

Global Crossing hereby comments on the Arbitrator's Draft Report issued on November 8, 2010 in the above-captioned proceeding. The Draft Report: (1) adopts language relating to intercarrier compensation for VOIP traffic (Issue 1) that neither party put forward and that does not reflect current law; (2) adopts AT&T's restrictions on dark fiber (Issue 2) even though they are contrary to the FCC's rules and are not justified by the record in this proceeding; and (3) adopts Global Crossing's proposal on routine network modifications (Issue 3). Global Crossing agrees with the Draft Report's conclusion on Issue 3 and therefore has no further comment on that issue. Global Crossing disagrees with the Draft Report with respect to Issues 1 and 2 and addresses those issues below.

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

The following paragraph contains each party's proposal relating to intercarrier compensation for VOIP traffic (with the bold underlined language representing disputed language proposed by AT&T's and the bold italicized language representing disputed language proposed by Global Crossing):

> 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 (i) terminates over a Party's circuit switch, including traffic from a service that originates over a circuit switch and uses Internet Protocol (IP) transport technology (regardless of whether only one provider uses IP transport or multiple providers are involved in providing IP transport) and/or (ii) originates from the End User's premises in IP format and is transmitted to the switch of a provider of voice communication applications or services when such switch utilizes IP technology.,** ***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. . . .***[1]

AT&T's language would explicitly subject VOIP traffic that crosses exchange boundaries to access charges, and Global Crossing's language would specifically exempt such traffic from access charges.

Rather than accepting the exact wording proposed by either AT&T or Global Crossing, the Draft Report proposes removing all of the disputed language in the above paragraph and replacing it with the following:

> Missouri law provides that interconnected voice over Internet protocol traffic that is not within a calling scope is subject to access charges as is any other switched traffic, regardless of format.[2]

This proposed language represents a narrow holding that does not make an expansive determination about the regulatory classification of VOIP or whether Global Crossing is subject to the access charge exemption for VOIP traffic. Rather, the language simply states that Missouri law subjects such traffic to access charges if it originates and terminates in different calling scopes, and the Draft Report makes it clear this does not apply to traffic that constitutes "commerce among the several states of this union."[3] Thus, the effect of the Arbitrator's language is to subject only intrastate Missouri traffic that is between local calling scopes to

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1 DPL at 1.

2 Draft Report at 18, 25.

3 *Id*. at 8 (quoting RSMo 386.030).

intrastate access charges. The language, and hence the parties' ICA, would be silent as to interstate traffic and therefore creates a very narrow range of VOIP traffic to which access charges would apply.

Nevertheless, in its analysis the Draft Report rejects Global Crossing's position that VOIP, as an information service, is exempt from access charges[4] and that the Missouri statute at issue — RSMo 392.550.2 — has been preempted by federal law.[5] For that reason Global Crossing addresses here the merits of those issues and the flaws contained in the Draft Report, which may properly be categorized as *dicta*. Regarding the applicability of the FCC's access charge exemption to VOIP, the Arbitrator argues that only enhanced or information service providers ("ESPs") are exempt from paying access charges; that carriers transporting VOIP traffic on behalf of ESPs do not enjoy that exemption; and that Global Crossing is not an ESP.[6] The Draft Report also argues that the Missouri statute subjects interconnected, intrastate, fixed-location VOIP traffic to intrastate access charges and that statute has not been preempted by federal law because it is possible to discern the jurisdiction of a fixed-location VOIP call.

As addressed further below, the Draft Report's conclusions are demonstrably wrong and should be reversed in the Commission's final order in this proceeding.

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4 *See id.* at 12-15.

5 *See id*. at 10, 15-17.

6 The terms "enhanced services" and "information services" mean the same thing. *See* Global Crossing Brief at 5. In its briefs Global Crossing referred to a provider of enhanced or information services as an "enhanced service provider" or "ESP." It did not use the term "information service provider" or "ISP" in order to avoid confusion with "Internet service providers," which are also commonly referred to as "ISPs." The Draft Report, however, refers to ESPs as ISPs. Global Crossing will continue to use the term "ESP" in these Comments for the sake of consistency with its briefs, but it should be noted that there is no difference between an ESP and an ISP as the Arbitrator uses that term in the Draft Report.

A. VOIP Traffic Is Exempt from Access Charges.

As discussed at length in Global Crossing's briefs, FCC precedent dating back to 1980, which has been confirmed in recent federal court cases, clearly exempts information services traffic — i.e., traffic like interconnected VOIP that undergoes a net protocol conversion — from access charges.[7] It is a fiction that the exemption applies only to ESPs and not to carriers handling ESP traffic.[8] Nevertheless, the Draft Report states that "[t]he IS [information services] exception does not classify services, it classifies companies."[9] If this were correct, then presumably the Draft Report would have proposed ICA language requiring that the traffic Global Crossing originates as a retail VOIP provider to be exempt from access charges. Yet the Draft Report does not even mention that category of traffic.[10] Nor does the Draft Report explain why it reaches this conclusion in light of the federal district court's decision in *PAETEC*,[11] which, following on decisions of the Supreme Court in *Brand X*[12] and the Eastern District of Missouri in

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7 Initial Brief of Global Crossing, Sept. 29, 2010, at 4-8 ("Global Crossing Brief").

8 Reply Brief of Global Crossing, Oct. 18, 2010, at 3-7 ("Global Crossing Reply Brief").

9 Draft Report at 12.

10 The Arbitrator ignores the fact that Global Crossing provides retail VOIP services and, without basis, says that "Global emphasizes its character as a wholesaler," Draft Report at 10, and "Global does not claim to be, and is not, an ISP," *id*. at 13. That conclusion is totally devoid of record support, and ignores unrebutted record evidence to the contrary. In fact, Global Crossing does provide retail VOIP services, and thus is not simply a wholesale carrier for ESPs for all VOIP traffic it transmits. *See* Direct Testimony of Mickey Henry, Sept. 29, 2010, at 1 ("Global Crossing Local Services, Inc. provides facilities-based local services as well as VOIP retail and wholesale service."); AT&T Missouri's Entry of Discovery Responses Into the Record, Oct. 8, 2010, Attachment A, at 1 ("Global Crossing Local Services, Inc. provides retail VoIP services."). And Global Crossing has explained in this proceeding that with respect to such traffic Global Crossing is an ESP. *See* Global Crossing Reply Brief at 4-5 & nn.16, 19.

11 *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010).

12 *National Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Southwestern Bell v. Missouri Public Service Commission,[13] held VOIP traffic to be exempt from access charges regardless of the type of entity transmitting it.

Even if the Arbitrator and AT&T were correct that the access charge exemption applies only to ESPs themselves and not carriers handling their traffic — on the theory that the carriers are providing those ESPs with a telecommunications service — access charges still would not apply to VOIP traffic handled by carriers. As explained in Global Crossing's briefs, Section 251(b)(5) subjects telecommunications to reciprocal compensation; only in the very limited circumstances covered by Section 251(g) do access charges apply; and VOIP traffic is not one of those circumstances.[14] Yet the Draft Report gets this paradigm exactly backwards when it says, without citing any support, "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."[15] What it should have said is that IP traffic is not telecommunications and hence not subject to access charges; but if it were telecommunications (which it is not) it would generally be subject to reciprocal compensation (regardless of whether it is local or interexchange) or, in very limited circumstances (which do not include IP traffic), access charges.

The Draft Report claims that the FCC's *Time Warner*[16] decision supports the idea that the access charge exemption applies only to ESPs.[17] In that decision the FCC held that CLECs may

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13 *Southwestern Bell Tel., L.P. v. Missouri Pub. Utils. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006), aff'd, 530 F.3d 676 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 971 (2009). Nor does the Draft Report discuss this Commission's ruling in the M2A arbitration that VOIP is not subject to access charges under federal law, *see* Arbitration Order, TO-2005-0336, which ruling was affirmed in the district court's decision in *Southwestern Bell*.

14 Global Crossing Brief at 8-9; Global Crossing Reply Brief at 5-6.

15 Draft Report at 6.

16 22 FCC Rcd 3513 (2007).

interconnect with ILECs for the purpose of terminating wholesale traffic regardless of the types of customers CLECs serve. For this reason, the FCC found it unnecessary to decide whether VOIP is itself a telecommunications service.[18] But according to the Draft Report, the FCC in *Time Warner* "remains silent on VoIP's classification expressly because it is irrelevant to the IS exception. The IS exception applies when an ISP provides service."[19] The Draft Report does not quote any language from *Time Warner* supporting this assertion, and in fact it reads something into the decision that is not there: *Time Warner* remained silent on VOIP because reaching the issue of VOIP's classification was not necessary to deciding the issue of the interconnection rights of CLECs carrying VOIP traffic.[20] *Time Warner*'s silence does not, as the Draft Report supposes, in any way reflect on the issue of the applicability of the access charge exemption to carriers handling VOIP traffic.[21]

The Draft Report also claims that *Time Warner* held that "intercarrier compensation is subject to determination by the relevant state jurisdiction."[22] This is simply untrue and, frankly, reflects a gross misreading of the order. In the language quoted on page 14 of the Draft Report, the FCC said that CLECs have interconnection rights under Section 251 and that CLECs and ILECs should make arrangements to compensate each other for traffic exchanged pursuant to

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17 *See* Draft Report at 13-14.

18 *Time Warner*, 22 FCC Rcd at 3520-21.

19 Draft Report at 14.

20 *See Time Warner*, 22 FCC Rcd at 3520-21.

21 Even if *Time Warner* did provide support to the idea that the ESP exemption does not apply to carriers handling VOIP traffic, the Commission's final order in this proceeding would still need to address the applicability of access charges to VOIP traffic that Global Crossing generates as a retail VOIP provider. *See supra* note 10 and accompanying text.

22 Draft Report at 14.

those interconnection rights.[23] But the FCC made clear in its ruling that "[w]e do not, however, prejudge the Commission's determination of what compensation is appropriate, or any other issues pending in the *Intercarrier Compensation* Docket."[24] The "Commission" being referred to in that sentence is the FCC and what it may or may not determine with respect to the status of VOIP and the appropriate compensation for that traffic in a pending FCC docket. The Arbitrator, however, mistakenly believes that the term "Commission" — with a capital "C," which the FCC uses to refer to itself — meant a *state* commission. In quoting that language, the Draft Report even inserts the term "[state]" in brackets before the term "Commission."[25] But the quoted paragraph clearly indicates that the FCC was referring to *itself* and was not talking about the authority of state commissions over intercarrier compensation for VOIP.[26]

The Draft Report therefore oversimplifies and misreads applicable precedent on the access charge exemption for information services like VOIP. As reflected in its erroneous reading of *Time Warner* concerning state authority over intercarrier compensation for VOIP, the Draft Report also misperceives the authority of states to regulate VOIP and mistakenly applies the Missouri statute on that subject, even though it is clearly preempted by federal law. The preemption issue is discussed further below.

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23 *Time Warner*, 22 FCC Rcd at 3523.

24 *Id*.

25 Draft Report at 14.

26 In a prior sentence in the same paragraph the Draft Report quotes, the FCC says that "in this declaratory ruling proceeding we do not find it appropriate to revisit any *state commission's* evidentiary assessment of whether an entity demonstrated that it held itself out to the public sufficiently to be deemed a common carrier …." *Time Warner*, 22 FCC Rcd at 3523 (emphasis added). Note that in making a generic reference to "state commissions" the FCC used the term "commissions" in lower case, preceded by the word "state" to make it clear what commissions it was talking about. Only in referring to *itself* later on does it use the term "Commission" with a capital C.

B. Federal Law Preempts the Missouri Statute.

The Draft Report notes correctly that the Missouri statute does not apply to interstate VOIP traffic (due to the Commerce Clause) or to nomadic VOIP traffic (for which it is inherently impossible to determine the jurisdiction of particular calls).[27] But the Draft Report incorrectly concludes that the Missouri statute applies to interconnected VOIP traffic between points located in Missouri.[28] The Arbitrator may believe that this should be the outcome if he were the FCC or a federal court deciding for the first time whether state regulation of VOIP should be preempted, but it is certainly not the conclusion the FCC and the U.S. District Court for the District of Minnesota reached in their explicit preemption of state law in their *Vonage* decisions.[29] Nor is it the conclusion that the Eighth Circuit reached when it affirmed those decisions.[30]

In its *Vonage* decision the FCC did not make a granular analysis of the different kinds of VOIP traffic and rule that nomadic VOIP of indeterminate jurisdiction is not subject to state jurisdiction (based, as the Draft Report would have it, on determining the end points of particular calls) and then allow states to go ahead and regulate fixed, intrastate VOIP. The FCC, in preempting state regulation of VOIP, clearly ruled that "the fact that a particular service enables communications within a state does not necessarily subject it to state economic regulation."[31] Thus, just because the end points of a particular call can be determined to be within a certain state does not allow a state to regulate it.

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27 Draft Report at 8-9.

28 *Id*. at 17.

29 *See Vonage Holdings Corp*., 19 FCC Rcd 22404 (2004); *Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n*, 290 F. Supp. 2d 993 (D. Minn. 2003).

30 *See Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

31 *Vonage*, 19 FCC Rcd at 22418.

The FCC and district court determined that such state regulation was preempted not only for reasons relating to ability to determine jurisdiction of VOIP services, but also because of important federal policies that seek to encourage growth of the Internet that are in conflict with the idea of any state regulation of VOIP.[32] According to the district court, "VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."[33] The FCC echoed this when it said the following:

> Allowing Minnesota's order to stand would invite similar imposition of 50 or more additional sets of different economic regulations on DigitalVoice [Vonage's VOIP service], which would severely inhibit the development of this and similar VoIP services. We cannot, and will not, risk eliminating or hampering this innovative advanced service that facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet. To do so would ignore the Act's express mandates and directives with which we must comply, in contravention of the pro-competitive deregulatory policies the Commission is striving to further.[34]

Thus, the FCC preempted state regulation not only due to jurisdictional issues but also because "permitting Minnesota's regulations would thwart federal law and policy," including statements by Congress in Sections 203 and 706 of the Telecommunications Act of 1996 concerning the

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[32] Preemption can occur for several reasons, and they do not relate simply to whether a state has jurisdiction over an activity. According to the federal district court's *Vonage* decision, "[p]re-emption occurs when (1) Congress enacts a federal statute that expresses its clear intent to pre-empt state law; (2) there is a conflict between federal and state law; (3) 'compliance with both federal and state law is in effect physically impossible;' (4) federal law contains an implicit barrier to state regulation; (5) comprehensive congressional legislation occupies the entire field of regulation; or (6) state law is an obstacle to the 'accomplishment and execution of the full objectives of Congress.'" *Vonage*, 290 F. Supp. 2d at 997 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

[33] *Id*. at 1002. *See also id*. ("Where federal policy is to encourage certain conduct, state law discouraging that conduct must be pre-empted.").

[34] *Vonage*, 19 FCC Rcd at 22427 (footnote omitted) (citing *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 183 (S.D.N.Y. 1997) ("Haphazard and uncoordinated state regulation [of the Internet] can only frustrate the growth of cyberspace.").

Internet and other advanced services, and "the fact that multiple state regulatory regimes would likely violate the Commerce Clause because of the unavoidable effect that regulation on an intrastate component would have on interstate use of this service or use of the service within other states."[35] The FCC also said in *Vonage* that "[r]egardless of the definitional classification of DigitalVoice under the Communciations Act, the *Minnesota Vonage Order* directly conflicts with our pro-competitive deregulatory rules and policies governing entry regulations, tariffing, and other requirements arising from these regulations for services such as DigitalVoice."[36]

The Missouri statute similarly conflicts with federal law and policy related to the Internet, thus demonstrating why the FCC preempted all such state laws in the *Vonage* order. The FCC established the exemption from access charges due to a desire to encourage the growth of information services like VOIP. The Missouri statute subjects VOIP (even if only intrastate VOIP traffic between locations within Missouri) to access charges in direct conflict with this federal policy. Consistent with *Vonage*, then, the Missouri statute has been preempted and does not govern, not should it be referred to, in the Global Crossing/AT&T ICA. Instead, the ICA should incorporate Global Crossing's proposed language, which reflects current federal law exempting information services traffic like VOIP from access charges and preempting state laws inconsistent with that exemption.

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35 *Id*. at 22411. *See also Minnesota PSC*, 483 F.3d at 580 ("The FCC also determined state regulation of VoIP service would interfere with valid federal rules or policies.").

36 *Vonage*, 19 FCC Rcd at 22415.

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

The dark fiber issue does not require extended comment here. As Global Crossing made clear in its briefs, the FCC's rules require AT&T to make dark fiber available to CLECs without the restrictions AT&T is attempting to impose.[37] Global Crossing struck those restrictions in its proposed ICA language because they are not present in the FCC's rules. According to the FCC, AT&T bears the burden of demonstrating from a factual standpoint why such restrictions are necessary.[38] AT&T has demonstrated nothing of the kind in this proceeding, and in its testimony has only shown that such restrictions were approved by a small number of state commissions and has simply argued that such restrictions are good from a policy perspective.[39]

The Arbitrator agrees with the policy behind AT&T's proposal, but he ignores the need for factual support of AT&T's proposed restrictions. The FCC says that "[i]f 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 state."[40] There is no burden on Global Crossing or any other party imposing such proposed restrictions. Yet the Draft Report makes several statements about Global Crossing's position, such as "Global offers no policy support for its scheme and the Commission can find none"[41] and

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37 *See* Post-Hearing Brief of Global Crossing, Oct. 13, 2010, at 3 (citing 47 C.F.R. § 51.319(e)(iv)).

38 *See id*. at 3-4 (citing *UNE Remand Order*, 15 FCC Rcd 3696, 3786 (1999)).

39 *See id*. at 3-7.

40 *UNE Remand Order*, 15 FCC Rcd at 3786.

41 Draft Report at 21.

"Global submits no proposed contract language for this issue"[42] — all of which are completely beside the point and fail to account for the fact that the burden here is AT&T's and AT&T's alone. Merely agreeing with the policy behind AT&T's restrictions is not the same thing as having factual support, and without such support this Commission cannot approve AT&T's language and should strike it as Global Crossing has proposed.

III. Conclusion

For the foregoing reasons, Global Crossing respectfully requests that the Commission revise the Draft Order and issue a final order in this proceeding consistent with these Comments and with Global Crossing's Initial Brief, Post-Hearing Brief and Reply Brief.

[42] *Id*. at 23.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 18th day of November, 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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