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

APPLICATION FOR REHEARING OR, IN THE ALTERNATIVE,
MOTION FOR RECONSIDERATION

Global Crossing hereby submits this Application for Rehearing or, in the Alternative, Motion for Reconsideration, pursuant to 4 CSR 240-2.160 and Section 386.500,[1] seeking rehearing on, or reconsideration of, the Commission's December 15, 2010 Decision in the above-captioned proceeding.

Pursuant to Commission regulation and Missouri statute, Global Crossing has the right to apply for a rehearing in respect to any matter determined in a Commission order or decision.[2] However, a party seeking rehearing must apply to the Commission for such rehearing before the effective date of the order or decision.[3] Because the Commission issued its December 15, 2010 Decision with an effective date of December 15, 2010, it has effectively denied Global Crossing its statutory right to seek rehearing. For this reason, Global Crossing submits this Application for Rehearing or, in the Alternative, Motion for Reconsideration within ten (10) days of the date

1 All statutory citations are to the Missouri Revised Statutes (2000), as amended by the Cumulative Supplement (2009).

2 *See* 4 CSR 240-2.160(1), Section 386.500.1.

3 Section 386.500.2.

the Decision was issued, which is within the required timeframe for a motion for reconsideration and the typical timeframe for an application for rehearing.[4]

I. The Commission's Decision on Issue 1 Regarding the Appropriate Compensation for VOIP Traffic is Unreasonable and Unlawful.

The first arbitrated issue submitted to the Commission related to intercarrier compensation for VOIP traffic. Rather than adopt either AT&T's language, which would explicitly subject VOIP traffic that crosses exchange boundaries to access charges, or Global Crossing's language, which would specifically exempt such traffic from access charges, the Commission's Decision removes all of the disputed language on the issue of VOIP compensation and replaces it with the following:

> 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.[5]

This language is unreasonable and unlawful because VOIP, as an information service, is clearly exempt from access charges and the Missouri statute at issue — Section 392.550.2 — has been preempted by federal law.

As discussed at length in Global Crossing's briefs and comments in this proceeding, 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.[6] It is a fiction that the exemption applies only to

---

4 *See* 4 CSR 240-2.160(2).

5 Decision at 18-19.

6 Initial Brief of Global Crossing, Sept. 29, 2010, at 4-8 ("Global Crossing Brief"); Global Crossing Comments on Arbitrator's Draft Report, Nov. 18, 2010, at 4 ("Global Crossing Comments"). These documents are incorporated herein by reference.

enhanced services providers ("ESPs") and not to carriers handling ESP traffic.[7] Nevertheless, the Decision states that "[t]he IS [information services] exception does not classify services, it classifies companies."[8] If this were correct, then presumably the Decision would have incorporated ICA language requiring that the traffic Global Crossing originates as a retail VOIP provider to be exempt from access charges. Yet the Decision does not even mention that category of traffic.[9]

In reaching this conclusion the Commission misreads applicable precedent on the access charge exemption for information services like VOIP, explained at length in Global Crossing's briefs and comments.[10] But even if the Decision 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. Section 251(b)(5) of the federal

---

[7] Reply Brief of Global Crossing, Oct. 18, 2010, at 3-7 ("Global Crossing Reply Brief"), incorporated herein by reference.

[8] Decision at 12.

[9] The Decision ignores the fact that Global Crossing provides retail VOIP services and, without basis, says that "Global emphasizes its character as a wholesaler," Decision at 10, and "Global does not claim to be, and is not, an ISP," *id*. at 13. As pointed out in the Global Crossing Comments (at 4), that conclusion is totally devoid of record support. 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.

[10] For example, the Decision fails to explain why the Commission reaches its conclusion in light of the federal district court's decision in *PAETEC Communications, Inc. v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010), which, following on decisions of the Supreme Court in *National Cable & Telecomms. Ass'n v. Brand X Internet Servs*., 545 U.S. 967 (2005), and the Eastern District of Missouri in *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), held VOIP traffic to be exempt from access charges regardless of the type of entity transmitting it.

Communications Act 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.[11] Yet the Decision 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."[12]

The Decision further claims that the FCC's *Time Warner*[13] order supports the idea that the access charge exemption applies only to ESPs[14] and that the *Time Warner* decision "remains silent on VoIP's classification expressly because it is irrelevant to the IS exception. The IS exception applies when an ISP provides service."[15] The Commission simply is reading 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.[16] What's more, even if *Time Warner* did provide support to the idea that the ESP exemption does not apply to carriers handling VOIP traffic, the Decision fails to address the applicability of access charges to VOIP traffic that Global Crossing generates as a retail VOIP provider.

---

11 Global Crossing Brief at 8-9; Global Crossing Reply Brief at 5-6; Global Crossing Comments at 5. These documents are incorporated herein by reference.

12 Decision at 7.

13 22 FCC Rcd 3513 (2007).

14 *See* Decision at 13-14.

15 Decision at 14.

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

The Decision also incorrectly claims that *Time Warner* held that "intercarrier compensation is subject to determination by the relevant state jurisdiction."[17] In the language from *Time Warner* quoted on page 14 of the Decision, the "Commission" being referred to is the FCC, not a *state* commission.[18] The Commission thus 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.[19] In its *Vonage* decision 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."[20] 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.

The FCC and the federal district court in Minnesota 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.[21] According to the district court, "VoIP services necessarily are information services, and state regulation over VoIP services is

---

17 Decision at 14.

18 This was pointed out in Global Crossing's Comments (at 6-7) concerning the Arbitrator's Draft Report, but the Commission did not even address Global Crossing's Comments in the Decision.

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

20 *Vonage*, 19 FCC Rcd at 22418.

21 *Vonage*, 290 F. Supp. 2d at 997 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986)).

not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated."[22]

Thus, the FCC preempted state regulation due to "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."[23] The FCC also said in *Vonage* that "[r]egardless of the definitional classification of DigitalVoice [Vonage's VOIP service] 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."[24]

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 should it be referred to in the Global Crossing/AT&T ICA. For this reason, the Commission's Decision does not reflect current federal law exempting information services traffic like VOIP from access charges and preempting state laws inconsistent with that exemption.

---

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

23 *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.").

24 *Vonage*, 19 FCC Rcd at 22415.

II. The Commission's Decision Violates Due Process and the Missouri Administrative Procedure Act.

To withstand judicial review, any Commission decision must be both lawful and reasonable.[25] Furthermore, to meet basic standards of due process and to avoid being arbitrary, capricious, or unreasonable any Commission decision must be made using some kind of objective data.[26] The Commission's Decision in this arbitration is neither lawful nor reasonable, as the Commission failed to consider key positions and arguments of Global Crossing in making its decision in violation of Global Crossing's due process rights and its rights under the Missouri Administrative Procedure Act.

Section 536.090 of the Missouri Administrative Procedure Act requires the Commission to make findings of fact and conclusions of law in a contested case.[27] Whether such findings of fact and conclusions of law are sufficient is a legal issue that may be addressed by a reviewing court.[28] "While the Commission does not need to address all of the evidence presented, the reviewing court must not be left to speculate as to what part of the evidence the court found true or was rejected."[29] Importantly, "an agency which completely fails to consider an important aspect or factor of the issue before it may also be found to have acted arbitrarily and capriciously."[30]

---

[25] Section 386.430; *see also State ex rel. Missouri Gas Energy v. Public Serv. Comm'n*, 186 S.W.3d 376, 381 (Mo. App. W.D. 2005).

[26] *See Board of Educ. of the City of St. Louis v. Missouri State Bd. of Educ.*, 271 S.W.3d 1, 11 (Mo. en banc 2008).

[27] *See State ex rel. GS Technologies Operating Co., Inc. v. Public Serv. Comm'n*, 116 S.W.3d 680, 691 (Mo. App. W.D. 2003) ("*GS Technologies*").

[28] *Id.*

[29] *Id.* (internal quotations and citations omitted).

[30] *Barry Serv. Agency Co. v. Manning*, 891 S.W.2d 882, 892 (Mo. App. W.D. 1995). *See also State ex rel. Public Counsel v. Public Serv. Comm'n*, 289 S.W.3d 240, 251 (Mo. App. W.D. 2009) (holding that

After asserting this standard, the Missouri Court of Appeals in *GS Technologies* held that the Missouri Public Service Commission erred in failing to make findings of fact on all issues because it failed to specifically address evidence offered by GS Technologies that could have formed the basis for a finding of imprudence, a dispositive issue in the case.[31] The Court of Appeals so held, despite the Commission's statement in its Report and Order that it considered the positions and arguments of all the parties in making its decision, and that its "[f]ailure to specifically address a piece of evidence, position or argument of any party does not indicate that the Commission has failed to consider relevant evidence, but indicates rather that the omitted material was not dispositive of this decision."[32]

Not only is there no such language indicating that arguments or evidence not addressed are regarded as having been considered in this Commission's Decision, but the Arbitrator in making its Final Arbitration Report and the Commission in largely adopting that Report verbatim in its Decision completely ignore Global Crossing's Comments on the Arbitrator's draft decision, as well as several arguments in Global Crossing's briefs. Global Crossing's Comments explicitly lay out the reasons why the Arbitrator's draft decision is in violation of federal precedent and Section 251 of the federal Communications Act, issues that are clearly dispositive of the issues in this arbitration. The Commission's findings of fact and conclusions of law in its Decision are therefore insufficient and unlawful.[33]

---

because the Commission failed to consider a multitude of costs that go beyond the meters and pipes installed on a residential customer's premises, the Commission acted unreasonably and arbitrarily in making its findings regarding subsidization and the cost to serve residential customers; thus, the Commission's adoption of the SFV rate design cannot be upheld based upon those findings).

31 *GS Technologies*, 116 S.W.3d at 692.

32 *Id.*

33 *See id.*

Furthermore, because the Commission completely ignored evidence discussed by Global Crossing in its Comments, it also acted arbitrarily and capriciously and its Decision is therefore unreasonable.[34] "The reasonableness of the PSC's order depends on whether it was supported by competent and substantial evidence upon the *whole record*; whether it was arbitrary, capricious, or unreasonable; or whether the PSC abused its discretion."[35] Because the Commission fails to even mention Global Crossing's Comments, let alone address any arguments contained therein, the Commission provides no indication that its Decision is supported by competent and substantial evidence. It plainly failed to consider the whole record in this arbitration. The Commission's complete failure to consider Global Crossing's Comments is unreasonable, arbitrary, and capricious.[36] For this reason, the Commission's Decision, largely adopting the Arbitrator's Final Report, would not withstand judicial scrutiny and must be reconsidered.[37]

III. Conclusion

For the foregoing reasons, Global Crossing respectfully requests that the Commission grant its Application for Rehearing in this proceeding or, in the alternative, reconsider its December 15, 2010 Decision consistent with this Motion and with Global Crossing's Initial Brief, Post-Hearing Brief, Reply Brief, and Comments.

---

[34] *See Barry Serv. Agency Co.*, 891 S.W.2d at 892.

[35] *State ex rel. Inter-City Beverage Co. v. Pub. Serv. Comm'n*, 972 S.W.2d 397, 401 (Mo. App. W.D.1998) (emphasis added). *See also* Section 536.140.

[36] *See Barry Serv. Agency Co.*, 891 S.W.2d at 892.

[37] *See State ex rel. Public Counsel v. Public Serv. Comm'n*, 289 S.W.3d 240, 251 (Mo. App. W.D. 2009).

Respectfully submitted,

/s/ Lisa A. Gilbreath

Mark P. Johnson #30740
Lisa A. Gilbreath #62771
SNR Denton US LLP
4520 Main Street, Suite 1100
Kansas City, MO 64111
Telephone: (816) 460-2424
Fax: (816) 531-7545
mark.johnson@snrdenton.com
lisa.gilbreath@snrdenton.com

Attorneys for Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc.

Of Counsel:

Michael J. Shortley, III
R. Edward Price
Global Crossing North America, Inc.
225 Kenneth Drive
Rochester, NY 14623
Telephone: (585) 255-1439
Fax: (585) 334-0201
michael.shortley@globalcrossing.com
ted.price@globalcrossing.com

CERTIFICATE OF SERVICE

I hereby certify that I have on this 27th day of December, 2010, served a true and final copy of the foregoing by electronic transmission upon the following, listed below, in accordance with Commission rules.

General Counsel
Kevin Thompson
Missouri Public Service Commission
PO Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov
kevin.thompson@psc.mo.gov

Office of the Public Counsel
PO Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Leo J. Bub
Robert J. Gryzmala
Southwestern Bell Telephone Company
d/b/a AT&T Missouri
One AT&T Center, Room 3516
St. Louis, MO 63101
leo.bub@att.com
robert.gryzmala@att.com

/s/ Lisa A. Gilbreath
Attorney for Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc.