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

POST-HEARING BRIEF OF GLOBAL CROSSING

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

I. 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, 47 U.S.C. § 252(b), there were three unresolved issues. On August 27, 2010, AT&T filed its Verified Petition for Arbitration with this Commission, pursuant to 47 U.S.C. § 252(b) and 4 C.S.R. 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 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 is a matrix entitled "Disputed Point List (DPL)" that describes each of the three issues, provides cites to the relevant sections of the parties' draft ICA, and summarizes the positions of AT&T and Global Crossing on each of the unresolved 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. 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. 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. 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. The Parties' Jointly Proposed Procedural Schedule (Sept. 13, 2010); Order Setting Procedural Schedule and Notice of Hearing (Sept. 16, 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.

The parties and Arbitrator 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 required 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. Global Crossing filed its Initial Brief addressing Issue 1 and the Direct Testimony of Mickey Henry addressing Issues 2 and 3 on September 29, 2010. The parties filed rebuttal testimony on October 4, 2010. Mr. Henry sponsored Global Crossing's rebuttal testimony.

An evidentiary hearing was scheduled to commence on October 7, 2010. The parties filed a Joint Motion to Waive Cross-Examination and Cancel Hearing on October 4, 2010, and the Arbitrator agreed to cancel the evidentiary hearing on October 5, 2010. Order Canceling Hearing, Allowing Late Filing and Allowing Entry Into Record (Oct. 5, 2010).

Because the parties already filed initial briefs on Issue 1, this brief incorporates by reference the Initial Brief of Global Crossing filed on September 29 addressing Issue 1, and addresses Issues 2 and 3. For the reasons discussed below, applicable law and the weight of the testimony in this proceeding support Global Crossing's position on all three issues.

II. ARGUMENT

A. Issue 2: Should Global Crossing be permitted to obtain more than 25% of AT&T 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?

In Section 10.4.3 of Attachment 13 to its ICA template, AT&T proposes to restrict Global Crossing from obtaining "any more than twenty-five (25%) percent of the UNE Dedicated Transport Dark Fiber contained in the requested segment during any two-year period." The FCC's dark fiber rule contains no such restrictions. 47 C.F.R. § 51.319(e)(iv). Therefore, Global Crossing opposes inclusion of this language in the parties' ICA.

AT&T relies on language from the FCC's 1999 *UNE Remand Order* to justify the restriction for pro-competitive reasons. Niziolek Direct Testimony at 5–6; DPL at 7–8. According to that order, "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 state." *Implementation of the Local Competition Provisions of the Telecomms. Act of 1996*, 15 FCC Rcd 3696, 3786 (1999) ("*UNE Remand Order*"). 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.[1]

AT&T's witness, Deborah Fuentes Niziolek, has offered no evidence that AT&T's ability to provide service is threatened. It is pure speculation that AT&T's ability to provide service would be threatened by the absence of a 25% limitation or, for that matter, even a 75% limitation. The figure AT&T advances is completely arbitrary. AT&T provides no factual support in its testimony, other than to assert that three other state commissions deemed this figure reasonable approximately 10 years ago, and citing a recent Kansas Corporation Commission decision. Niziolek Direct Testimony at 6–8. However, Ms. Niziolek fails to address whether the ILECs in those other states provided those commissions with adequate evidence to find that a 25% limitation was reasonable in those states at that time. This failure is particularly notable in the cited Kansas proceeding, where AT&T was itself the ILEC at issue. Regardless of whether those ILECs adequately demonstrated that a 25% limitation is reasonable in those cases, AT&T has failed to do so here.

Ms. Niziolek also attempts to rely on the 2005 post-M2A arbitration proceeding, in which it claims this Commission adopted virtually identical contract language offered by AT&T Missouri over language offered by a coalition of CLECs. Ms. Niziolek concedes, however, that this language was not even contested by the CLEC coalition. *Id*. at 8. Reliance on that

[1] The quoted language in the *UNE Remand Order* requires the ILEC to "demonstrate" that its ability to provide service is threatened. *Id*. Thus, AT&T has the burden of proving such a threat. Global Crossing has no burden on this issue.

proceeding, therefore, is inapplicable as this language is clearly contested by Global Crossing in this case.

According to Global Crossing's witness, Mickey Henry, AT&T is being fairly compensated in accordance with the pricing decisions of this Commission for dark fiber UNEs, and there is no legal or factual basis for AT&T to impose its restrictions on use of that dark fiber. Henry Direct Testimony at 4. Further, in his rebuttal testimony, Mr. Henry makes it clear that AT&T has provided no evidence to support a 25% or any other limitation on competitors' use of dark fiber, and that giving ILECs the ability to "ration" network elements in this way is itself anticompetitive. Henry Rebuttal Testimony at 2.

AT&T seeks to impose another limitation on dark fiber in Section 10.7.2 of Attachment 13, which states:

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

Again, not relying on any provisions in the FCC's rules, but instead on the language quoted above in the FCC's *UNE Remand Order*, AT&T asserts that "[i]f AT&T were not permitted to revoke unutilized dark fiber, AT&T Missouri's ability to provide dark fiber would be impaired . . . ." Niziolek Direct Testimony at 10. AT&T offers scant evidence regarding the necessity of the specific 12-month limitation it tries to impose in its template agreement. AT&T mentions one state, Texas, where such a restriction was found to be reasonable 10 years ago. *Id.* AT&T also raises the recent Kansas Corporation Commission decision. *Id.* at 11. Similar to its 25% limitation argument, AT&T fails to discuss the bases on which either of these state commissions relied in allowing AT&T to impose this limitation. Regardless of whether those ILECs adequately demonstrated that imposing the right to revoke unutilized dark fiber is reasonable,

AT&T simply does not provide the necessary evidence for this Commission to allow AT&T to impose such a restriction. AT&T further attempts to justify its position by raising a case where similar language was approved in an ICA arbitration with a CLEC coalition. But again, AT&T also acknowledges that the CLEC coalition did not contest that language, which is not the case here. *Id*. Citing to a case where a state commission simply approves uncontested language has no use or value in this proceeding.

Moreover, AT&T's position ignores the fact that if a competitor were leasing dark fiber from AT&T that the competitor was not using, and another competitor needed dark fiber that AT&T did not have, that second competitor could simply lease the dark fiber from the first competitor. There is no need, nor is there a legal requirement, for AT&T to be involved in that transaction. Henry Rebuttal Testimony at 3–4. This fact refutes AT&T's notion that its proposed limitations on dark fiber are pro-competition. Rather, this fact demonstrates that these limitations are anticompetitive and should be removed from the parties' ICA.

If you cut through the rhetoric and focus just on the core of AT&T's arguments, it appears that AT&T believes it should be allowed to impose dark fiber restrictions under some sort of absurd theory that its interconnection agreements should be standardized or uniform. All of the cases cited by its witness stand for the proposition that identical or "virtually identical" language should appear in all of AT&T's interconnection agreements. Niziolek Direct Testimony at 11. In its rebuttal testimony, AT&T goes so far as to suggest that lack of uniformity equates to discrimination. Niziolek Rebuttal Testimony at 3–5. There is no requirement that interconnection agreements utilize standardized language. In fact, the opposite is true. The Act explicitly requires ILECs to *negotiate* interconnection agreements with CLECs. 47 U.S.C. § 251(c)(1). Thus, deviations from ICA to ICA are specifically contemplated by the Act. If a valid claim for discriminatory treatment were raised, the remedy is that one CLEC is

permitted to adopt the ICA of another CLEC. 47 C.F.R. § 51.809. The remedy is not, as AT&T suggests, to shoehorn all CLECs into AT&T's "one-size-fits-all" model — a model, moreover, which advantages only AT&T. This Commission needs to exercise its authority under Section 252(c) of the Act as part of this arbitration and strike extra-legal requirements that AT&T seeks to impose.

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

Section 11.1.7 of Attachment 13 to AT&T's ICA template states:

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

Global Crossing objects to the bold underlined language (1) because it is unnecessarily redundant and unclear, and (2) because any RNM costs that AT&T is not recovering in its existing TELRIC-based rates in Missouri must be first approved by this Commission.

It appears that the contested language unnecessarily duplicates the uncontested language in this paragraph or, conversely, imprecisely adds an exception to the uncontested language, and by so doing adds uncertainty to the proposed agreement. The undisputed language in Section 11.1.7 states that RNM will be provided "at the rates, terms and conditions set forth in this Attachment and in the Pricing Schedule or at rates to be determined on an individual case basis (ICB) or through the Special Construction (SC) process." If this uncontested language describes the universe of RNM costs that will be provided according to either the Pricing Schedule, on an

ICB, or through the SC process, then the contested language unnecessarily duplicates what has already been stated.

If, however, the contested language purports to create an exception to the universe of RNM costs that will be provided according to one of those three price determinants, and should be read to state that equipment case, doubler or repeater, and repeater shelf modifications will be provided only on an ICB or SC basis, and not in a Pricing Schedule, then this language is confusing at best. The vague construction of this section not only adds uncertainty to the proposed agreement, but also highlights Global Crossing's concern that such language could allow AT&T to over-recover for RNMs. Underscoring this concern is that AT&T's proposed language does not limit the contested clause to the three listed RNMs, as AT&T asks Global Crossing to agree that costs for which AT&T is not recovering in existing recurring and non-recurring charges "***include, but are not limited to***" the list that follows (emphasis added).

Because Global Crossing 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 filed with and approved by this Commission, there is a possibility that allowing AT&T's proposed language will result in over-recovery — in other words, double charging for the same RNM — because the functions specified in the language may already be included in AT&T's normal charges. Moreover, any rates AT&T does charge for RNM, even if they do recover costs that AT&T does not recover elsewhere, must first be approved by this Commission. As a result, Global Crossing cannot agree to such a provision in an interconnection agreement between the parties. Henry Direct Testimony at 6.

According to the FCC's rules:

> State commissions may, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and shall not permit an incumbent LEC to recover

> more than the total forward-looking economic cost of providing the applicable element.

47 C.F.R. § 51.507(e). In its 2003 *Triennial Review Order*, the FCC made it clear that ILECs may charge competitors for RNMs whose costs are not already recovered in TELRIC rates pursuant to the above-quoted rule, but only with approval from the relevant state commissions. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17378 (2003) ("*TRO*") ("[W]e leave it to 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 nonrecurring charge, or not at all . . . .").

Rather than demonstrating to this Commission what RNM costs it is not recovering under its TELRIC rates, and having this Commission approve certain charges to recover those costs, AT&T simply requires CLECs to agree in their interconnection agreements what RNM costs AT&T is not recovering. This is contrary to the *TRO*'s requirement that state commissions determine the unrecovered costs and decide the on the resulting charges. For that reason, the disputed language in Section 11.1.7 of Attachment 13 in AT&T's ICA template should be struck. If AT&T wishes to impose charges for RNMs to recover costs not recovered through TELRIC rates, it should ask this Commission to commence a proceeding to establish such charges for recovery over an appropriate period of time.

AT&T's witness Sanders attempts to demonstrate that AT&T Missouri is not double recovering certain RNM costs (*e.g.*, repeaters and related equipment) because such costs are not included in the development of long-run incremental costs for AT&T Missouri's network, and therefore they are not recovered in AT&T Missouri's wholesale rates. Sanders Direct Testimony at 5. Global Crossing does not contest that AT&T may have RNM costs that are not being recovered through TELRIC rates, and that it may recover such costs under current law. Global

Crossing has agreed to the non-disputed ICA language in Section 11.1.7 to this effect. But the point is that only this Commission can ultimately determine what costs are or are not being recovered, what charges should be imposed as a result, and over what time period recovery should occur. Henry Direct Testimony at 6; Henry Rebuttal Testimony at 4. The appropriate venue for determining unrecovered costs for RNMs is a Commission proceeding, not an interconnection agreement.

III. CONCLUSION

For the foregoing reasons, Global Crossing respectfully requests that the Commission issue findings in support of the Global Crossing positions 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 13th day of October, 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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