BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

Southwestern Bell Telephone Company, d/b/a AT&T Missouri,	)	
Complainant,	)	
v.	)	File No. TC-2010-0107
KMC Telecom III, LLC; Level 3 Communications, LLC; Matrix Telecom, Inc.	)	
Respondents.	)	

REPLY OF LEVEL 3 COMMUNICATIONS, LLC

In further support of its motion to dismiss the Complaint, Level 3 Communications, LLC ("Level 3") replies as follows:

I. Introduction.

In its response to Level 3's motion to dismiss, filed on December 14, 2009, AT&T Missouri ("AT&T") offers the following arguments:

1. The Commission has the power to enforce the change of law provision in the parties' interconnection agreement ("Agreement"). Given that power, the analysis of the issues should "begin, and end, there." (AT&T response – p. 6). The Commission is limited to enforcing the change of law provision as is and requiring Level 3 to sign an amendment to the Agreement that incorporates the provisions of HB 1779. In short, the Commission is prohibited from considering the arguments Level 3 raises in its motion to dismiss.
2. The Commission lacks authority to declare that HB 1779 is preempted by federal law. Declaratory relief is a judicial function. Under state law, the Commission lacks authority to exercise the judicial function of granting declaratory relief to Level 3.
3. The Federal Communications Commission ("FCC") is not the only agency that can decide whether access charges apply to interconnected VoIP services, but the Missouri legislature can also do so.

4. The FCC's Vonage Order and the 8th Circuit decisions which Level 3 cites to support preemption do not apply to carriers like Level 3 who provide wholesale telecommunications services to VoIP service providers.

5. The FCC's pre-1996 intercarrier compensation rules apply to all telecommunications services unless and until the FCC says otherwise and these rules are agnostic as to the particular transported technology used. Level 3's assertion that VoIP did not exist prior to 1996 is irrelevant.

6. HB 1779 only involves the clarification of existing intercarrier compensation rules to eliminate arbitrage of those rules being engaged in by Level 3 and other carriers.

For the following reasons, these arguments are without merit.

First, AT&T applies the wrong change of law provision. AT&T and Level 3 adopted a specific change of law provision governing intercarrier compensation for IP-PSTN traffic -- which includes all VoIP at issue here. That provision only permits changes on the basis of an FCC Order, and not any other change in law. AT&T has waived any right it may otherwise have had to invoke the general change of law provision with respect to HB 1779. The Commission has the power to enforce the Agreement, but it must apply the correct provision of the Agreement.

Second, the Commission cannot, consistent with its duties under Section 252 of the federal Telecommunications Act, 47 U.S.C. 252 ("Act"), selectively choose to apply Missouri law in lieu of federal law. The FCC Wireline Competition Bureau's decision in UTEX[1] instructed the Texas PUC to apply "existing law" when confronting a legal issue not addressed by the FCC. That necessarily includes federal law. Indeed, as the 5th Circuit underscored, Section 252 gives the state commissions the choice of applying

[1] *In the Matter of Petition of UTEX Communications Corporation, Pursuant to Section 252(e)(5) of the Communications Act, for Preemption of the Jurisdiction of the Public Utility Commission of Texas Regarding Interconnection Disputes with AT&T Texas*, Memorandum Opinion and Order, 24 FCC Rcd 12573, 12578 ¶ 10 (2009).

federal law or declining to act. *AT&T Communs. v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 646 (5th Cir. 2001). Having accepted such authority, the Commission is required to consider and apply federal law in resolving the dispute, including FCC decisions declaring VoIP traffic as subject to FCC, rather than state, rules of decision.

Third, nothing in Section 252 of the Act authorizes a state legislature, rather than a state commission, to decide contested issues pertaining to interconnection agreements. Section 252 assigns duties only to state commissions. Contrary to AT&T's suggestion, *UTEX* cannot support a state legislature deciding issues, particularly with respect to all questions involving the applicability of the appropriate compensation for VoIP traffic which lie exclusively within the FCC's substantive jurisdiction. Moreover, in *UTEX*, it was the fact specific nature of the dispute which caused the FCC to decline to preempt the Section 252 jurisdiction of the Texas PUC. *UTEX*, n. 35. There is nothing fact-specific about HB1779.

Fourth, the FCC's *Vonage Order*, and the 8th Circuit's decisions in *Minn. Pub. Util. Comm'n. v. FCC*, 483 F.3d 570, 574, 578 (8th Cir. 2007) and *Vonage v. Nebraska Public Service Commission*, 564 F.3d 900, 905 (8th Cir. 2009), make clear that it is the FCC's substantive rules of decision that apply to VoIP traffic, not those promulgated by the Missouri legislature. If this Commission does attempt to decide the issue of whether access charges apply to VoIP, it must do so by applying the FCC's existing law for such traffic which is exclusively within FCC jurisdiction.

Fifth, to the extent that the Commission undertakes to determine the applicability of access charges to VoIP traffic, the Commission must decide that access charges do not

apply to the exchange of VoIP traffic. After *Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the proper compensation regime for such traffic is governed by section 251(b)(5) of the Act. HB1779 cannot override the federal mandate of Section 251(b)(5) and *Worldcom*.

Contrary to AT&T's position, there was no pre-1996 intercarrier compensation rule for the exchange of any kind of traffic, let alone VoIP traffic, between two local exchange carriers serving the same service territory. Rather, prior to 1996, under the ESP exemption, information service providers could obtain access to the public switched telephone network from a LEC by purchasing services under ordinary business tariffs as an end user. In addition, prior to 1996, only interexchange carriers paid access charges to local exchange carriers for the carriage of long distance traffic. The Act established competition in the local exchange market between the incumbent carrier and competitive local exchange carriers. The intercarrier compensation rule for the exchange of VoIP traffic between such carriers is reciprocal compensation under section 251(b)(5) of the Act.

The intercarrier compensation regime may be "byzantine and broken", but it is not within the Missouri legislature's authority to supply rules of decision for VoIP traffic, for which the FCC has asserted jurisdiction to supply the rules of decision. Nor, in any event, would it ever be within the Missouri legislature's jurisdiction to decide when VoIP traffic passing between two states is subject to the FCC's interstate access charge rules.

II. The applicable change of law provisions in the Agreement bar the Commission from re-writing the Agreement to require the parties to abide by HB 1779.

AT&T contends that the Commission's power is limited to mere enforcement of the Agreement, that the change of law provisions of the Agreement mandate adoption of AT&T's proposed amendment in the wake of HB 1779 and that no further analysis of the relevant issues is necessary or permitted. In support of this contention, AT&T relies upon the 8th Circuit's decision in *Southwestern Bell Telephone Co. v. Connect Communications Corp.*, 225 F.3d 942 (8th Cir. 2000). But *Connect Communications* establishes only that a state commission has the jurisdiction under Section 252 to interpret and enforce an interconnection agreement. That proposition is not in dispute.

However, the Agreement by its terms does not mandate adoption of AT&T's amendment in the wake of HB 1779. AT&T invokes the general change of law provision set out in section 2.1 of the General Terms and Conditions of the Agreement, but ignores the *specific* change of law provision governing intercarrier compensation that is set forth in Section 7.8 of the first amendment to the Agreement ("Amendment" – attached as Exhibit A). The Amendment, entitled *First Amendment Superseding Certain Intercarrier Compensation, Interconnection and Trunking Provisions*, was approved in the same case and simultaneously with the Agreement itself (*Order Approving Interconnection Agreement*…, Case No. TK-2005-0285, May 3, 2005). It is Section 7.8 that controls.

In the Amendment, the parties agreed that for the exchange of IP-PSTN traffic (which includes VoIP traffic) they would compensate each other at specific rates per minute of use as provided for in section 7.3 of the Amendment. The parties further

agreed in the Amendment that they would calculate the difference between the amount Level 3 pays (per the rates in the Amendment) to AT&T to terminate IP-PSTN traffic and the amounts Level 3 would have paid to AT&T if the same traffic were rated per AT&T's intrastate or interstate switched access tariffs (the "Delta"). The parties also agreed that should the FCC decide a different intercarrier compensation regime for IP-PSTN traffic in specific pending proceedings that calculation of the Delta would be adjusted in a manner consistent with the FCC decision. This specific change of law provision controls here (Section 7.8 of the Amendment). It provides:

> This Section 7.0 shall remain in effect until the effective date of an FCC order or [sic] addressing compensation for IP-PSTN/PSTN-IP traffic, at which time the Parties agree to allocate the Delta identified in Section 7.3 in a manner consistent with such . . . FCC order and the affected provisions shall be immediately invalidated, modified, or stayed, consistent with the action of the legislative body, court or regulatory agency upon the written request of either party (emphasis added).

The FCC order referred to in Section 7.8 refers collectively to FCC orders that may be entered in pending proceedings (see definition of FCC Order in section 2.1 of the Amendment): *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC. Docket 0192, established in the Notice of Proposed Rulemaking Order No. 01-132 (April 27, 2001) and/or *In the Matter of IP Enabled Services*, WC Docket 04-36.

Given the specificity of section 7.8 of the Amendment, which the Commission approved, the parties superseded Section 2.1 with respect to intercarrier compensation and agreed to allow the FCC to determine the correct intercarrier compensation regime for VoIP traffic and, unless and until that occurs, Level 3 would continue to compensate AT&T for the termination of this traffic at rates established in section 7.3, not as established by any other law. However, if the Commission gives effect to HB 1779 and

requires Level 3 to sign an amendment incorporating this state law, it will have effectively re-written the Amendment and eliminated the force and effect of the section 7.8 change of law provision. The Commission has the power to interpret and enforce the Amendment, but it does not have the power to re-write it or modify it in a manner that is inconsistent with its express provisions.

III. As a deputized federal regulator under section 252 of the Act, the Commission must apply federal law when applicable, including where such law preempts HB 1779, or it must decline to act.

Contrary to AT&T's assertion, the Commission's authority is not limited by state law. As *UTEX* made clear, the Commission's role under Section 252 is to apply "existing law." *UTEX* in no way excused the Commission from its obligation to apply federal law where applicable. Indeed, in its role enforcing the Agreement, the Commission must exercise powers specified by Congress, *or* decline to act and be subject to preemption under Section 252(e)(5). The Commission is charged with the first line of authority to enforce the provisions of the Act with respect to interconnection agreements between ILECs and other carriers. According to the 7th Circuit, the Commission's role in this context is limited:

> The role that the Act carves out for the states is that of ancillary enforcers of the comprehensive scheme of federal telecommunications regulation set forth in the Act. The state commissions are not enforcing policies central to state government when they are regulating telecommunications; in that role they are "'deputized' federal regulator[s]" of the Telecommunications Act.

Illinois Bell v. Global Naps, 551 F.3d 587, 595 (7th Cir. 2008). This narrowed authority means that the Commission must follow federal law -- including federal rules of decision -- when it acts as enforcer of the Act. When a state commission undertakes to play its

delegated role under the Act (which the Commission does in this enforcement proceeding), the Commission must govern the interconnection proceedings according to federal law. *Bell Atlantic v. Global Naps*, 77 F.Supp.2d 492, 500 (D. Del. 1999) (The Telecommunications Act offers state regulatory commissions a choice: a commission may govern the interconnection proceedings according to federal law, or it may decline to act), *Sprint v. Nebraska Public Service Commission,* 2007 WL 2682181 *5 (D. Neb. 2007) ([S]ince a state commission assumes federal authority when it acts pursuant to Section 252 of the Act, the Commission is required to employ these [federal] standards when arbitrating an interconnection agreement), *AT&T Communs. v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 646 (5th Cir. 2001) (After passage of the 1996 Act, regulation of competition among providers of local phone service is no longer within the province of states' inherent authority. . . . Accordingly, Congress established a federal system headed by the FCC to regulate local telecommunications competition. The Act permissibly offers state regulatory agencies a limited mission, which they may accept or decline: to apply federal law and regulations as arbitrators and ancillary regulators within the federal system and on behalf of Congress), *Verizon Md., Inc. v. Global Naps*, 377 F.3d 355, 368 (4th Cir. 2004) (Here, however, Congress has simply required states to choose between regulating pursuant to federal standards or allowing the FCC to take over).

IV. The Missouri legislature lacked the authority to determine the intercarrier compensation regime applicable to the exchange of VOIP traffic between Level 3 and AT&T.

AT&T contends that, in addition to the FCC, the Missouri legislature has authority to determine the proper intercarrier compensation arrangement for the exchange of

VoIP traffic. For the reasons already stated in its motion to dismiss, Level 3 disagrees with AT&T's contention. However, to the extent the Commission undertakes to review the question, it must follow existing federal law. That law is clear. It must first engage in federal preemption analysis to determine whether HB 1779 is controlling in the first instance. Such an analysis will lead the Commission to the conclusion that HB 1779 does not control. Rather, the Commission should hold that, consistent with federal law, when local exchange carriers exchange VoIP traffic they are required to follow the requirements of section 251(b)(5) of the Act and pay reciprocal compensation to each other for the termination of the traffic.

The sweep of the Missouri legislature's action in HB1779 also shows why it must be preempted. Even if the FCC had not ruled in its *Vonage Order* that all VoIP traffic was subject to FCC jurisdiction because intrastate VoIP traffic was inseverable from interstate VoIP traffic, the Missouri legislature never had the authority to legislate regarding the access charge treatment of VoIP traffic originating in another state and terminating in Missouri to an AT&T customer. In that case, the interstate traffic would remain within the FCC's jurisdiction and, if subject to access charges at all, would be governed by the FCC's interstate access rules – which exempt enhanced traffic from access charges. The Missouri legislature has no authority to supply a rule of decision with respect to the applicability of interstate access charges to such traffic.

V. The *Vonage Order* and its 8th Circuit progeny preempt HB 1779 with respect to VoIP traffic, not just VoIP providers.

Without citation to any authority, AT&T would have this Commission believe that the FCC's *Vonage Order* and the affirming decisions of the 8th Circuit only apply to carriers

such as Vonage and not to wholesale providers of VoIP services such as Level 3. This argument makes no sense and is not supported by the decisions. In reaching its decision that state authority to regulate nomadic interconnected VoIP providers was preempted, the FCC concluded that there was no way to identify for separate regulatory treatment VoIP-PSTN traffic that flowed between two geographic end points within the same state, and VoIP PSTN traffic that flowed between two geographic end points in different states. *Vonage Holding Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Pub. Util. Comm'n*, 19 FCC Rcd 22404, 22405 ¶¶ 23-32 (2004). Thus, with no more than a *de minimis* amount of interstate traffic inseverable from intrastate traffic, the FCC preempted state regulation of VoIP providers. *Id.* at ¶ 46

The geographic endpoints of the call are no more knowable for a wholesale carrier serving a VoIP provider, and the VoIP providers themselves are incapable of determining the geographic endpoints of a VoIP call. What is inseverable for the VoIP provider remains inseverable for the wholesale carrier. Thus, the jurisdictional classification of the traffic remains the same irrespective of whether it is being handled by the VoIP provider or the wholesale carrier. State authority is preempted with respect to the traffic, not just the entity.

VI. There was no compensation rule prior to 1996 governing the exchange of VoIP traffic.

Ignoring the entire *Worldcom* analysis described in Level 3's motion to dismiss, AT&T contends that a pre-1996 rule governed the exchange of VoIP traffic between local exchange carriers. This argument is incorrect with respect to the exchange of VoIP traffic between carriers for the same reason that it was incorrect with respect to another species of PSTN-IP traffic, ISP-bound traffic. In fact, it relies upon regulatory alchemy and requires the commission to convert a local exchange carrier into something it is not – an interexchange carrier.

AT&T does not dispute that in order for access charges to apply to particular traffic exchanged between two carriers, there must have been in place on the day before the enactment of the Act a rule requiring the payment of access charges with respect to that traffic exchange between those two types of carriers. *See Worldcom*, 288 F.3d at 430-32 (describing access-charge regime as "a transitional device, preserving various LEC duties that antedated the 1996 Act until such time as the Commission should adopt new rules pursuant to the Act" and holding that 47 U.S.C. § 251(g) provides only for "the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations'"). AT&T asserts that 47 CFR Part 69 was not limited to or dependent upon one type of transport technology, but that argument is beside the point. Prior to the passage of the Act -- and even today -- local exchange carriers assess access charges on interexchange carriers. 47 CFR 69.5. Prior to the passage of the 1996 Act, local exchange carriers did not exchange any VoIP traffic with

other, competing local exchange carriers, just as they did not exchange the ISP-bound traffic at issue in *Worldcom*. With passage of the Act, a new party was introduced: a competitive local exchange carrier. With the introduction of this type of carrier, traffic indeed could be exchanged between two local exchange carriers. But, because there were no competitive local exchange carriers prior to passage of the Act, there could not conceivably have been a compensation regime established for the exchange of traffic between these two carriers. As with ISP-bound traffic, *Worldcom*, 288 F.3d at 433, there could not have been a pre-1996 Act rule to govern this LEC to LEC traffic exchange, because such a traffic exchange did not yet exist. And, as with ISP-bound traffic, this means that Section 251(g) does not preserve the applicability of access charges to this LEC-to-LEC exchange of VoIP traffic. Accordingly, as with ISP-bound traffic, intercarrier compensation for VoIP traffic must be governed by Section 251(b)(5)'s reciprocal compensation provisions and the FCC's rules thereunder. *See In re High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-92 and 99-68, 24 FCC Rcd 6475, 6483 ¶16 (November 5, 2008) (Because "the D.C. Circuit has held that ISP-bound traffic did not fall within the section 251(g) carve out from section 251(b)(5)," "we find that ISP-bound traffic falls within the scope of section 251(b)(5).")

The foregoing notwithstanding, AT&T actually views the new competitive local exchange carrier as just another IXC who should pay access charges to it. As just explained, however, this is not a correct view of the carrier architecture after passage of the Act. IXCs and competitive local exchange carriers are completely different entities, who compensate local exchange carriers differently. As Level 3 explains in

considerable detail in its motion to dismiss, after *Worldcom*, the correct compensation arrangement between a local exchange carrier and a competitive local exchange carrier is reciprocal compensation under section 251(b)(5) of the Act.

VII. HB 1779 does not clarify existing law to prevent arbitrage.

AT&T's claim that HB 1779 clarifies existing law to close an arbitrage loophole is a specious misrepresentation of the law. Nonetheless, this is a refrain that Level 3 has heard AT&T articulate repeatedly to regulators. (In AT&T's eyes, competition is arbitrage). AT&T claims that "existing law" means that Level 3 is just another IXC that must pay AT&T's high switched access charges, not reciprocal compensation, for the termination of VoIP traffic. Level 3's alleged "arbitrage" is the payment of lower reciprocal compensation charges for the exchange of this traffic. AT&T claims that HB 1779 simply makes clear existing law that access charges apply.

HB 1779 does no such thing. It actually creates a new intercarrier compensation arrangement between local exchange carriers for the exchange of VoIP traffic that did not exist prior to its passage and has never existed either before or after passage of the Act. The Missouri legislature had no authority to create this new regime. HB 1779 is preempted by federal law and is otherwise inconsistent with the correct compensation regime established under section 251(b)(5) of the Act for the exchange of VoIP traffic.

VIII. Conclusion.

For these reasons and the reasons set forth in Level 3's motion to dismiss, the Commission should dismiss AT&T's complaint with prejudice.

Respectfully submitted,

/s/ William D. Steinmeier
William D. Steinmeier, MoBar #25689
WILLIAM D. STEINMEIER, P.C.
2031 Tower Drive
P.O. Box 104595
Jefferson City MO 65110-4595
Telephone: 573-659-8672
Facsimile: 573-636-2305
Email: wds@wdspc.com

/s/ Gregory Diamond
Gregory Diamond, IL Bar #6195100
WA Bar #28025
CO Bar #700161
Regulatory Counsel
Level 3 Communications
1025 Eldorado Blvd.
Broomfield CO 80021
Telephone: 720-888-3148
Facsimile: 720-888-5143
Email: greg.diamond@level3.com

ATTORNEYS FOR LEVEL 3 COMMUNICATIONS, LLC

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been served electronically on Staff Counsel at gencounsel@psc.mo.gov, the Office of Public Counsel at opcservice@ded.mo.gov, and counsel for AT&T Missouri at rg1572@att.com, and on all other parties of record with known addresses either electronically or by mail, on this 8th day of January 2010.

/s/ William D. Steinmeier