

**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	)	File No. IO-2011-0057
Interconnection Agreement with Global Crossing	)	
Local Services, Inc. and Global Crossing	)	
Telemanagement, Inc.	)	

**AT&T MISSOURI'S SUBMISSION CONCERNING  
LEGAL STANDARDS AND BURDEN OF PROOF**

Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri"), pursuant to the Order Setting Procedural Schedule and Notice of Hearing in this matter, respectfully submits its discussion of legal standards and burden of proof.

**Legal Standards**

Congress established the standards for this arbitration in section 252(c) of the federal Telecommunications Act of 1996 ("1996 Act"), 47 U.S.C. § 252(c), which provides:

STANDARDS FOR ARBITRATION -- In resolving by arbitration . . . any open issues and imposing conditions upon the parties to the [interconnection] agreement, a State commission shall --

(1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the [Federal Communications] Commission pursuant to section 251;

(2) establish any rates for interconnection, services or network elements according to subsection [252](d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Only subsection (1) pertains here,<sup>1</sup> and for each of the three issues in this arbitration, the resolution proposed by AT&T Missouri is consistent with the requirements of section 251, including the regulations the Federal Communications Commission promulgated pursuant to section 251.

Issue 1 in this proceeding is, “What is the appropriate compensation for VoIP?” Consistent with the reciprocal compensation requirement in section 251(b)(5) of the 1996 Act (pursuant to which reciprocal compensation applies to telecommunications that are not subject to access charges) and with section 251(g), which preserves the access charge regime as it existed at the time of enactment of the 1996 Act, AT&T Missouri maintains that Voice over Internet Protocol (“VoIP”) traffic, like telecommunications traffic in general, should be subject to either reciprocal compensation or access charges depending upon the geographic locations of the calling party and the called party. That is, “local” VoIP calls, like traditional local phone calls, should be subject to reciprocal compensation, and “long distance” VoIP calls, like traditional long distance calls, should be subject to access charges. This resolution of the issue is consistent not only with the requirements of section 251 and an extensive body of FCC jurisprudence, but also with a controlling Missouri statute.

Issue 2 poses two questions: “Should Global Crossing be permitted to obtain more than 25% of AT&T Missouri’s available Dark Fiber?” And, “Should Global Crossing be allowed to hold onto Dark Fiber that it has ordered from AT&T Missouri indefinitely, or should AT&T be allowed to reclaim unused Dark Fiber after a reasonable period so that it will be available for use

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<sup>1</sup> As to subsection (2), the Commission has not been asked to establish any rates for interconnection services or network elements in this proceeding. As to subsection (3), state commission arbitration orders, including those of this Commission, typically direct the parties to file within a specified time an interconnection agreement conforming with the commission’s resolutions of the open issues, so that the commission can approve or reject the agreement pursuant to section 252(e)(1) of the 1996 Act, but they do not in practice provide an actual schedule for implementation of the terms and conditions in the agreement.

by other carriers?” Dark fiber is a network element that AT&T Missouri must, under section 251(c)(3) of the 1996 Act, make available to Global Crossing (and other competing local exchange carriers) on “rates, terms and conditions that are just, reasonable and nondiscriminatory.” AT&T Missouri will show that its proposed dark fiber terms are just, reasonable and nondiscriminatory, and should therefore be adopted under the governing arbitration standard.

Issue 3 is, “Which Routine Network Modification (‘RNM’) costs are not being recovered in existing recurring and non-recurring charges?” AT&T Missouri will show that the contract language it proposes in connection with this issue is just, reasonable and nondiscriminatory, because it accurately identifies those activities for which AT&T Missouri is not currently recovering their associated costs.

### **Burden of Proof**

Issue 1, concerning compensation for VoIP traffic, is predominantly or exclusively a legal issue – as reflected by the parties’ agreement to address it in legal briefs rather than in testimony. Since the issue does not turn on questions of fact, burden of proof will not come into play. However, each party proposes contract language on this issue, and each party bears the burden of going forward<sup>2</sup> and of persuading the Commission that its own proposed contract language should be adopted under the arbitration standards set forth above.<sup>3</sup> As noted above, AT&T Missouri’s position on Issue 1 is squarely supported by a Missouri statute and by federal law. Global Crossing’s Position Statement on this issue on the Disputed Point List (filed with AT&T Missouri’s Petition for Arbitration) indicates that Global Crossing will argue the Missouri

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<sup>2</sup> By “burden of going forward” AT&T Missouri refers not to an evidentiary burden, but to a party’s burden, as the proponent of proposed contract language or of a legal position, to justify that language or position in the first instance, subject to such counter-argument as the opposing party may offer in response.

<sup>3</sup> Neither the 1996 Act nor any FCC regulation implementing the 1996 Act sets forth a general burden of proof for interconnection agreement arbitrations.

statute “does not apply here,” by which Global Crossing means it will contend the statute is preempted by federal law. Global Crossing bears the burden of going forward on and persuasion with respect to its preemption argument, which is in the nature of an affirmative defense.<sup>4</sup>

Issue 2, concerning dark fiber, turns on a determination whether AT&T’s proposed language limiting Global Crossing to 25% of available dark fiber and permitting AT&T Missouri to reclaim unused dark fiber is just, reasonable and non-discriminatory. AT&T Missouri does not believe the issue comprises any purely factual disputes. On this issue, only AT&T Missouri proposes contract language, and AT&T Missouri bears the burdens of going forward and of persuasion with respect to that language.

On Issue 3, the parties agree that AT&T Missouri may charge Global Crossing for “routine network modifications” if AT&T Missouri is not already recovering the cost of those RNMs as a component of its current recurring and non-recurring charges. AT&T Missouri has proposed contract language that identifies the particular RNMs whose cost AT&T Missouri is not already recovering, and Global Crossing has challenged AT&T Missouri to prove that it is in fact not recovering those costs. AT&T Missouri bears the burden of proving that it is not already recovering the costs for the RNMs in question.

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<sup>4</sup> Gennari v. Prudential Ins. Co., 335 S.W. 2d 55, 60 (Mo. 1960) (“The burden of proof on all affirmative defenses rests upon the defendant as the asserting party. This burden of proof to establish affirmative defenses is on the defendant from the beginning, and it remains upon the defendant throughout the case.”) (internal citation omitted). That being said, the Commission will have no occasion to reach such a claim, if made, should it rule that AT&T Missouri’s position on the issue is consistent with federal law or if it finds that it is not empowered to make such a declaration.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY  
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### **CERTIFICATE OF SERVICE**

Copies of this document and all attachments thereto were served on the following by e-mail on September 28, 2010.

  
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