BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

SOUTHWESTERN BELL TELEPHONE COMPANY D/B/A AT&T MISSOURI'S RESPONSE TO LEVEL 3 COMMUNICATIONS, LLC'S MOTION TO DISMISS

AT&T Missouri respectfully submits this response to the motion to dismiss filed by Level 3.[1] Level 3's motion – based on alleged pre-emption principles – should be denied in its entirety. While this is so for several reasons, it is enough that the Commission simply has no authority to render null and void laws duly enacted by the legislature to whom the Commission owes its existence, and in this particular case, to whom the Commission is duty bound to respect the VoIP intercarrier compensation provisions attacked by Level 3.

I. SUMMARY

Despite a "Byzantine and broken" intercarrier compensation regime,[2] and multiple prompts by the industry to fix it, the FCC has yet to adopt any comprehensive or fundamental reforms to that regime – including determining whether, prospectively, a

[1] Southwestern Bell Telephone Company d/b/a AT&T Missouri will be referred to herein as "AT&T Missouri" and Level 3 Communications LLC will be referred to as "Level 3."
[2] Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685 (2005), Separate Statement of Commissioner Michael J. Copps.

new or separate compensation methodology should be adopted for VoIP traffic. Recent developments offer no hope of such reform anytime soon. Instead, the FCC has invited, if not directed, the states to move forward in resolving intercarrier compensation disputes, as those disputes arise under Section 252 of the federal Telecommunications Act of 1996 ("the Act"), by applying existing law.[3]

Given this vacuum – and given the propensity of numerous carriers, including Level 3, to arbitrage and exploit potential loopholes they see in the existing intercarrier compensation regime – the Missouri Legislature stepped in and closed at least one potential loophole, when it last year enacted Subsection 2 of Section 392.550, RSMo, the intercarrier compensation provisions of a comprehensive VoIP statute, as part of HB 1779. AT&T Missouri next sought to amend its existing interconnection agreements ("ICAs") to incorporate the new law's intercarrier compensation provisions. When certain carriers, including Level 3, refused to voluntarily amend their ICAs, AT&T Missouri brought its complaint here under Section 252 to enforce the intervening law provisions of those ICAs.[4] It is beyond question that the Commission's Section 252 authority includes the power to interpret and enforce the terms of those ICAs, including the ICA between AT&T Missouri and Level 3.

Level 3's preemption arguments, though lacking in merit, are being played to the wrong audience. Level 3's motion broadly asserts that "the Missouri Legislature's action in enacting Section 392.550.2 as part of HB 1779] is preempted by federal law" and that,

[3] *See*, Petition of UTEX Communication 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, WC Docket No. 09-134, DA 09-2205, Memorandum Opinion and Order, rel. October 9, 2009 ("*Utex Order*")..

[4] As of this writing, conforming amendments have been supplied by 10 of the 13 CLECs originally named as Respondents, the amendments have been submitted to the Commission, and AT&T Missouri has dismissed these CLECs from the case.

therefore, "the Commission lacks the authority to enforce the legislation and hence cannot compel Level 3 to execute the [interconnection agreement] amendment."[5] It also argues that under a decision of the D.C. Circuit Court of Appeals, traffic that would be encompassed by the access charges provisions of Section 392.550.2 "must be subject to Section 251(b)(5)'s reciprocal compensation regime" instead.[6] These arguments are inapposite because, as AT&T Missouri respectfully submits, the Commission – a creature of the Missouri Legislature – has no authority to find, conclude or in any other manner declare that the provisions of Section 392.550.2 are preempted by federal law or are otherwise unenforceable. The legal authority on this point is well-established and unequivocal. In any event, Level 3's preemption arguments are wrong. Therefore, the Commission should deny Level 3's motion and grant the relief requested by AT&T Missouri's complaint.

II. THE COMMISSION SHOULD USE ITS AMPLE SECTION 252 AUTHORITY TO ENFORCE THE PARTIES' INTERCONNECTION AGREEMENT.

The Commission's authority to compel Level 3 to honor its ICA with AT&T Missouri, including the ICA's intervening law provisions, is not open to question. Level 3 admits that the Commission approved the parties' interconnection agreement.[7] There is no dispute that when it did so, the Commission was acting pursuant to its grant of authority conferred under Section 252(e)(1).[8] It is also settled law that the Commission's

[5] *See*, Level 3 Motion, at p. 3.
[6] *Id.*, at p. 10
[7] *See*, Level 3 Answer, at p. 2 ("Level 3 admits that the Commission approved the Interconnection Agreement between Level 3 and the Complainant in Case No. TK-2005-0285.").
[8] 47 U.S.C. § 252(e)(1).

Section 252 authority necessarily includes the power to enforce the terms of the parties' interconnection agreement.[9]

In this case, Level 3 does not deny that the agreement between it and AT&T Missouri contains terms calling for an amendment to be executed in cases where intervening law emerges.[10] Level 3 also does not deny that the Commission has Section 252 authority to compel Level 3 to enter into an amendment to its ICA to recognize and conform to new law, or that Section 392.550.2, enacted as a part of HB 1779, qualifies as an intervening law. In these circumstances, and without more, the Commission has full authority to, and should, compel Level 3 to enter into a suitable change of law amendment reflecting the provisions of Section 392.550.2.[11]

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[9] *See*, Southwestern Bell Telephone Co. v. Connect Communications Corp., 225 F.3d 942, 946 (8th Cir. 2000) ("The Act provides that an interconnection agreement, reached either by negotiation or arbitration, must be submitted to the state commission for approval. *See*, 47 U.S.C. § 252(e)(1). This grant of power to state commissions necessarily includes the power to enforce the interconnection agreement.") (further citation omitted). The Commission also has authority, conferred under Section 251(d)(3) of the Act (47 U.S.C. Section 251(d)(3)) to enforce any regulation, order or policy that is consistent with the requirements of Section 251 with respect to the matters raised in AT&T Missouri's complaint.

[10] In fact, the precise terms of that agreement appear to be identical to those quoted in AT&T Missouri's complaint, at p. 3, which drew from the terms stated in the 2005 Commission-approved Generic Successor ICA. The Level 3 intervening law language, at Section 21.1 of the General Terms and Conditions, reads in part as follows:

> If any action by any state or federal regulatory or legislative body or court of competent jurisdiction invalidates, modifies, or stays the enforcement of laws or regulations that were the basis or rationale for any rate(s), term(s) and/or condition(s) ("Provisions") of the Agreement and/or otherwise affects the rights or obligations of either Party that are addressed by this Agreement, specifically including but not limited to those arising with respect to the Government Actions, the affected Provision(s) shall be immediately invalidated, modified or stayed consistent with the action of the regulatory or legislative body or court of competent jurisdiction upon the written request of either Party ("Written Notice"). With respect to any Written Notices hereunder, the Parties shall have sixty (60) days from the Written Notice to attempt to negotiate and arrive at an agreement on the appropriate conforming modifications to the Agreement. If the Parties are unable to agree upon the conforming modifications required within sixty (60) days from the Written Notice, any disputes between the Parties concerning the interpretation of the actions required or the provisions affected by such order shall be resolved pursuant to the dispute resolution process provided for in this Agreement.

[11] To the extent that Level 3 maintains that the amendment tendered to it "does not correctly state the 'intervening law[,]" *see*, Level 3 Answer, at p. 3, AT&T Missouri disagrees. The same amendment language as was tendered to Level 3 has been agreed to by multiple CLECs, and the executed amendments containing such language are Commission-approved pursuant to the Commission's Section 252 authority. *See*, *e.g.*, tw telecom of kansas city llc amendment, at para. 6 (approved in VT-2010-0008), Ren-Tel

Moreover, Level 3's motion, if taken at face value, is inconsistent with the rights Level 3 has exercised in entering into and operating under its present ICA which the Commission approved. The law is settled that "wholesale providers of telecommunications services are telecommunications carriers for the purposes of sections 251(a) and (b) of the Act, and are entitled to the rights of telecommunications carriers under that provision."[12] That being the case, Level 3's interconnection agreement with AT&T Missouri already has language pertaining to compensation applicable to its exchange of traffic with AT&T Missouri. To now argue that the Missouri Commission is without authority to include compensation language pertaining to the exchange of that traffic is to necessarily suggest that the Commission lacked authority to decide rates, terms and conditions in the first instance; but were that the case, Level 3 would have no rights to exchange traffic with AT&T Missouri at all. Level 3's argument also flies in the face of the FCC's holding that, because interconnected VoIP services "by definition….are those permitting users to receive calls from and terminate calls to the

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Communications, Inc. amendment, at para. 5 (VT-2010-0005), and New Edge Network, Inc. amendment at para. 5 (approved in IK-2009-0133).

In any event, AT&T Missouri would have no objection were the Commission to order that Level 3 execute a different form of amendment more closely tracking the text of Section 392.550.2. Examples of those which track the words of the statute almost verbatim abound, and all are Commission-approved, pursuant to the Commission's Section 252 authority *See, e.g.*, KMC Data, LLC amendment, at para. 5 (VT-2010-0014), Big River Telephone Company, LLC, amendment, at para. 6 (approved in VT-2010-0011), Socket Telecom, LLC amendment, at para. 2 (approved in VI-2010-0004), and NuVox Communications of Missouri, Inc. amendment, at para. 2 (approved in VT-2010-0007). These amendments state as follows: "House Bill 1779, Section 392.550. The Parties shall exchange interconnected voice over Internet protocol service traffic, as defined in Section 386.020 RSMo, subject to the appropriate exchange access charges to the same extent that telecommunications services are subject to such charges; provided, however, to the extent that as of August 28, 2008, the Agreement contains intercarrier compensation provisions specifically applicable to interconnected voice over Internet protocol service traffic, those provisions shall remain in effect through December 31, 2009, and the intercarrier compensation arrangement described in this Section shall not become effective until January 1, 2010."

[12] In the Matter of Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007), para. 1.

PSTN…..we find interconnected VoIP providers to be 'providing' telecommunications regardless of whether they own or operate their own transmission facilities or they obtain transmission from third parties."[13] Level 3 cannot have it both ways. The language in the parties' agreement exists, and Level 3 has intentionally sought and obtained the benefits of interconnection pursuant to it.

Choosing to altogether avoid addressing these points, Level 3 engages instead in a misdirection play. In particular, Level 3 reads AT&T Missouri's complaint as asking this Commission to enforce "the legislation."[14] Level 3's assertion is completely wrong. AT&T Missouri is merely asking the Commission to use its unquestionable Section 252 authority to enforce the terms of the *parties' interconnection agreement*. The analysis should begin, and end, there. Consequently, the Commission should deny Level 3's motion.

III. THE COMMISSION HAS NO AUTHORITY TO RENDER AN ACT OF THE MISSOURI LEGISLATURE NULL AND VOID.

Dissatisfied with what it regards as "HB 1779's impermissible intrusion into the FCC's jurisdiction,"[15] Level 3 wages a constitutional assault against that legislation, claiming that "[t]he Missouri Legislature cannot, consistent with the Supremacy Clause of the United States Constitution, overturn the FCC's determination that it alone has the authority to decide the rules that will be applicable to interconnected VoIP services."[16] It next argues that under a decision of the D.C. Circuit Court of Appeals involving the FCC's authority to adopt new intercarrier compensation rules not for VoIP traffic but for

[13] In re Universal Service Contribution Methodology, 21 FCC Rcd 7518, 7539-40, para. 41 (2006), *aff'd sub nom.*, Vonage Holdings v. FCC, 489 F.3d 1232, 1239 (D.C. Cir. 2007).
[14] Level 3 Motion, at p. 3.
[15] Level 3 Motion, at p. 7.
[16] *Id.*, at p. 4.

ISP-bound traffic (which traffic is not even at issue here), traffic that would be encompassed by the access charge provisions of Section 392.550.2 "must be subject to Section 251(b)(5)'s reciprocal compensation regime" instead.[17]

As noted above, however, AT&T Missouri's complaint does not present any occasion or need for the Commission to "enforce" any legislation. In any case, what Level 3 asks the Commission to do – declare that HB 1779's Section 392.550.2 is null and void – is beyond the Commission's authority. Simply put, the Commission, as a creature of the Missouri legislature, has no authority to find, conclude or in any other manner declare that the provisions of Section 392.550.2 are preempted by federal law or are otherwise unenforceable. On this separate and independent basis, Level 3's motion should be denied.

The Missouri Supreme Court has long recognized that "[t]he Public Service Commission 'is the creature of the legislative department of the State exercising lawmaking powers, not judicial power in the constitutional sense.'"[18] State offices, boards and commissions such as this Commission may "carry out" "legislative purposes and promulgate rules by which to put in force legislative regulations."[19]

In essence, Level 3 seeks a finding, conclusion or other form of declaration from this Commission that the Missouri legislation Level 3 attacks is null and void. That is because the Commission cannot grant Level 3 what it expressly requests -- "entry of an order dismissing AT&T's complaint" -- without the Commission's first issuing a declaration, whether by means of specific findings of fact or conclusions of law, which would be the predicate for such an order. But the nature of such relief is wholly judicial

[17] *Id.*, at p. 10
[18] Clark v. Austin, 101 S.W.2d 977, 995 (Mo. 1937).
[19] Ex parte Williams, 139 S.W. 2d 485, 491 (Mo. 1940), *cert denied*, 311 U.S. 675 (1940),

and, as the Missouri Supreme Court has emphasized, the quasi-judicial powers held by an agency are not the same as the plenary judicial powers held only by courts of law:

> This Court has recognized that executive agencies may exercise "quasi judicial powers" that are incidental and necessary to the proper discharge of their administrative functions, even though by doing so they at times determine questions of a purely legal nature. Agency adjudicative authority, however, is not plenary. An administrative body or even a quasi-judicial body is not and cannot be a court in a Constitutional sense. Under our Constitution the lawmakers cannot vest purely judicial functions in an administrative agency. Agency adjudicative power extends only to the ascertainment of facts and the application of existing law thereto in order to resolve issues within the given area of agency expertise.[20]

Furthermore, for the additional reasons explained by the Court, the Commission simply cannot declare HB 1779 null and void, which is effectively what Level 3's motion asks the Commission to do, as that would be exercising a purely judicial function:

> The declaratory judgment is a judicial remedy. Declaratory judgments are sui generis and are neither strictly legal nor equitable, but they have an historical affinity with equity. Courts in the exercise of their inherent powers rendered declaratory judgments long before the enactment of declaratory judgment statutes. This Court has recognized that a declaratory judgment action provides an appropriate method of determining controversies concerning the construction of statutes and powers and duties of governmental agencies thereunder, and that in a proper case courts have the right, independent of the Declaratory Judgment Act, to declare void the rules or regulations of an administrative body. The declaration of the validity or invalidity of statutes and administrative rules thus is purely a judicial function. In Gershman Investment Corp. v. Danforth, 517 S.W.2d 33, 35 (Mo. banc 1974), we noted that the attorney general, as a member of the executive branch, "has no judicial power and may not declare the law. . . . The judicial power of the state is vested in the courts designated in Mo. Const. Art. V, § 1. The courts declare the law." *See also* Lightfoot v. City of Springfield, 361 Mo. 659, 669, 236 S.W.2d 348, 352 (1951) (Public Service Commission "has no power to declare . . . any principle of law or equity"); State ex rel. Kansas City Terminal Railway v. Public Service Commission, 308 Mo. 359, 373, 272 S.W. 957, 960 (1925) (Public Service Commission has no power to declare the validity or invalidity of city ordinance); State ex rel.

[20] State Tax Commission of Missouri v. Administrative Hearing Commission, 641 S.W.2d 69, 75 (Mo. 1982) (internal citations and quotations omitted).

> Missouri Southern Railroad v. Public Service Commission, 259 Mo. 704, 727, 168 S.W. 1156, 1164 (banc 1914) (Public Service Commission has no power to declare statutes unconstitutional); State ex rel. Missouri & North Arkansas Railroad v. Johnston, 234 Mo. 338, 350-51, 137 S.W. 595, 598 (banc 1911) (secretary of state has no power to declare a statute unconstitutional)."[21]

These authorities make it abundantly clear that the Commission may not grant Level 3's motion, because the Commission's doing so would represent an exercise of authority which the Commission does not have. Accordingly, the motion should be denied. To the extent Level 3 wishes to advance its claim that Missouri law is inconsistent with federal law (including the inapt federal law that Level 3 cites), and thus preempted, Level 3 should advance that claim elsewhere. It should not be permitted to use this case, an essentially "administrative housekeeping" proceeding involving one ILEC and a handful of CLECs, to obtain relief the Commission lacks authority to grant.

IV. THE FCC IS NOT THE ONLY PARTY WHICH HAS AUTHORITY TO DECIDE WHETHER ACCESS CHARGES APPLY TO INTERCONNECTED VOIP SERVICES.

Level 3's broad assertion that only the FCC can decide whether access charges apply to interconnected VoIP services is not correct. Indeed, in its recent *UTEX Order*, the FCC concluded that the Texas Commission can and should move forward to resolve VoIP-related issues presented in an interconnection agreement dispute. While the matters raised in that proceeding included the regulatory classification of VoIP traffic, as well as intercarrier compensation obligations (as in the case of Section 392.550.2), the FCC concluded that "the lack of regulatory direction from the [FCC] regarding these issues does not, in fact, stand as a legal obstacle to the [Texas Commission's] resolution of the

[21] *Id.*, at 75-76 (internal citations and internal quotations omitted) .

arbitration."[22] This reasoning applies no less to the Missouri legislature's moving forward to enact intercarrier compensation provisions. Thus, even if the Commission were authorized to entertain Level 3's motion on the merits (which it is not, for the reasons earlier explained), the motion should be denied.

V. IN ANY EVENT, LEVEL 3'S PREEMPTION ARGUMENTS MISSTATE THE FACTS AND THE LAW.

Even if this case were an appropriate forum for Level 3 to raise its preemption argument, that argument misstates both the facts and the law in several respects.

First, Level 3 suggests that its status as a provider of "interconnected VoIP services" somehow exempts it from any and all state regulation. But, as noted above, that suggestion misstates what Level 3 does. Level 3 is not solely a provider of "interconnected VoIP services" to end-users; if it were, then Level 3, like Vonage or any other pure provider of VoIP services to end-users, would have no rights to interconnect with AT&T Missouri (or with any other telecommunications carrier) at all. Rather, the factual predicate for Level 3's interconnection rights is that it acts as a wholesale provider of telecommunications services <u>to</u> other carriers and service providers, including VoIP service providers like Vonage. Level 3 does not and cannot deny this factual predicate for its interconnection rights (and for its certification by the Commission as a telecommunications carrier).

Second, Level 3's assertion that there was no FCC intercarrier compensation regime for VoIP traffic prior to 1996 is baseless. The assertion ignores the fact that the FCC's intercarrier compensation regime – and its intercarrier compensation rules codified

[22] *UTEX Order*, at para. 9.

at 47 C.F.R. Part 69 – are not, and have never been, limited to or dependent on the use of any one particular telecommunications transport technology (whether that technology is Internet Protocol, Asynchronous Transfer Mode, Time Division Multiplexing, or string-and-tin can). Stated another way, the FCC's pre-1996 intercarrier compensation rules apply to all interstate telecommunications unless and until the FCC says otherwise, and the rules are agnostic as to the particular transport technology used for those telecommunications. Accordingly, Level 3's assertion that VoIP purportedly did not exist in 1996 is legally irrelevant, as it begs the question of whether the services Level 3 provides to its customers are telecommunications services, which they clearly are (and must be in order for Level 3 to interconnect with AT&T Missouri).[23]

Third, the Missouri legislation that Level 3 attacks does not involve regulation of VoIP service providers. It involves the clarification of existing intercarrier compensation rules to eliminate the arbitrage of those rules being engaged in by Level 3 and other carriers. The FCC and Eighth Circuit authority cited by Level 3 does not extend to carriers who (like Level 3, as noted above) provide wholesale telecommunications services *to* VoIP service providers, or to the application of existing intercarrier compensation rules to those carriers. Nor do these decisions address, let alone limit, restrict, or preempt, a state commission's authority to enforce an ICA entered into and approved by the state commission under Section 252 of the Act.

[23] In any event, Level 3's assertion that VoIP did not exist in 1996 is factually incorrect. "Internet Protocol," or packetized communications transport technology, has existed for more than 35 years; the most common Internet Protocol software in use today, Internet Protocol Version 4, was deployed in the early 1980s; and Internet Phone Software was being commercially released and used at least as early as 1995. See Cerf & Kahn, "A Protocol for Pocket Network Interconnection", Institute of Electrical and Electronic Engineers (IEEE) Transactions on Communications, vol. 22, No. 5 at pp. 637-648 (May 1974); Defense Advanced Research Projects Agency, DARPA Internet Program Protocol Specification (1981), available at http://tools.ietf.org/html/rfs791; VocalTec Internet Phone Release 4 (1995), reviewed in CTI For Management Magazine, Volume 1, Number 1 (1996); VocalTec Communications Ltd. Form 20-F, 1999 Annual Report, available at http://www.sec.gov/Archives/edgar/data/1005699/000095017200001111.

Fourth, the new law enacted by the Missouri legislature is completely consistent with federal law and the FCC's existing intercarrier compensation regime for telecommunications. The FCC has never held that VoIP traffic should be treated differently for intercarrier compensation purposes than any other telecommunications traffic. To the contrary, to the extent the FCC has addressed the issue at all, it has said that VoIP traffic should not be treated differently from any other telecommunications traffic for intercarrier compensation purposes:

> As a policy matter, we believe that any provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways.[24]

VI. CONCLUSION

For the foregoing reasons, the Commission should deny Level 3's motion in its entirety, grant the relief requested by AT&T Missouri's complaint, and grant AT&T Missouri such further and other relief as may be just and proper under the circumstances.

[24] In the Matter of IP-Enabled Services, WC Docket 04-36 (March 10, 2004), Notice of Proposed Rulemaking,19 FCC Rcd 4863 (2004), at para. 33.

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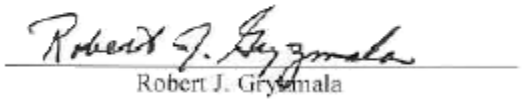
CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served upon each of the following by e-mail on December 14, 2009.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