

**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 INITIAL BRIEF ON ISSUE 1

Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri")
respectfully submits its initial brief on Issue 1.

Issue 1: What is the appropriate compensation for VoIP?

When a customer of Global Crossing calls a customer of AT&T Missouri, Global Crossing first carries the call on its own network, and then hands off the call to AT&T Missouri at the point of interconnection between the two carriers' networks. From that point, AT&T Missouri carries the call on its network, delivering or "terminating" the call to AT&T Missouri's customer. The parties do not dispute that under state and federal law, AT&T Missouri is entitled to compensation from Global Crossing for terminating Global Crossing's traffic in this manner. (Nor do they dispute that the reverse is true: Global Crossing is entitled to compensation from AT&T Missouri for terminating traffic that originates from AT&T Missouri's customers and that AT&T Missouri delivers to Global Crossing for completion to Global Crossing's customers.)

The specific compensation that applies to the termination of a particular call depends upon the type of call. Under the Federal Communications Commission's ("FCC") regulations implementing the Telecommunications Act of 1996, "local" calls (*i.e.*, calls where the calling and called parties are located in the same local calling area) are subject to "reciprocal

compensation” rates. Non-local calls, such as traditional long-distance calls, are subject to the tariffed “access charges” that have existed since years before the 1996 Act was enacted.¹

Issue 1 concerns the appropriate intercarrier compensation for the termination of Voice over Internet Protocol, or VoIP, traffic. VoIP traffic is voice traffic that originates in the IP format and terminates on the public switched telephone network (“PSTN”) – here, AT&T Missouri’s network, or vice versa. For example, if a customer of Comcast Digital Voice calls a customer of AT&T Missouri, the call may originate in the IP format over the Comcast customer’s broadband connection, be converted into the time-division-multiplexing format traditionally used by local exchange carriers (“LECs”) like AT&T Missouri, and be handed off to AT&T Missouri for termination on the PSTN to AT&T Missouri’s end user customer.²

In Attachment 2 (Network Interconnection) of the interconnection agreement (“ICA”) the parties are arbitrating, the parties generally agree that telecommunications traffic between end users located in the same local exchange area (commonly referred to as local traffic) is subject to reciprocal compensation charges (§ 6.2), while traffic between end users in different local exchanges is subject to tariffed switched access charges (§ 6.14.1). However, the parties disagree about the appropriate treatment of VoIP traffic. AT&T Missouri proposes in § 6.14.1 to

¹ See, e.g., *Global NAPS, Inc. v. Verizon New England Inc.*, 603 F.3d 71, 77 (1st Cir. 2010) (the 1996 Act “requires carriers to pay ‘reciprocal compensation’ for *local* calls, in which the carrier for the customer making the call shares fees with the carrier that terminates the call,” while “[f]or long-distance calls (known as ‘interexchange’ traffic), in contrast, the long-distance carrier pays ‘access charges’”); see also *AT&T Corp. v. FCC*, 292 F.3d 808, 809 (D.C. Cir. 2002) (explaining the “access charge” regime).

² Comcast’s VoIP service is an example of a “fixed location” VoIP service, where the call originates over Comcast’s cable line from the home or business to which the line is extended (a fixed location). Vonage’s VoIP service, on the other hand, is a “nomadic” VoIP service, where the VoIP customer can originate a call over any broadband connection provided by any broadband service provider (*i.e.*, over the customer’s DSL or cable modem service, or over a Wi-Fi or other broadband connection while travelling). In both cases, the VoIP customer originates and receives calls in the IP format over a broadband connection. The parties’ dispute concerns both fixed and nomadic VoIP, and neither party proposes language that distinguishes between fixed and nomadic VoIP. The parties have no dispute in this proceeding over “IP in the middle traffic,” which is not true VoIP traffic at all, but is traffic that both originates and terminates on the PSTN in the traditional time-division-multiplexing format and is merely converted to IP format by a carrier for some portion of the call’s transport. Under the interconnection agreement language agreed to by the parties, “IP in the middle” traffic is to be treated like any other non-VoIP traffic.

specify that VoIP traffic between end users in different local exchanges is “Switched Access Traffic” subject to switched access charges, just like non-VoIP traffic between end users in different local exchanges. Global Crossing, on the other hand, proposes that all VoIP traffic should be subject to reciprocal compensation charges, whether or not it is between end users in the same local exchange.

As explained below, the Commission should adopt AT&T Missouri’s proposed ICA language, and reject Global Crossing’s proposed language, because only AT&T Missouri’s proposal is consistent with state and federal law.

1. Missouri law requires the adoption of AT&T Missouri’s proposed language.

While there has been much debate nationwide about the appropriate intercarrier compensation for VoIP traffic, in Missouri this issue has been conclusively resolved by the Missouri Legislature. Section 392.550.2, RSMo, enacted in 2008, states: “Interconnected voice over Internet protocol service shall be subject to appropriate exchange access charges to the same extent that telecommunications services are subject to such charges.” When Global Crossing delivers VoIP traffic to AT&T Missouri for termination, that traffic constitutes interconnected voice over Internet protocol service.³ As a result, pursuant to Section 392.550.2, Global Crossing is obligated by Missouri law to pay access charges to the same extent that telecommunications services are subject to such access charges.

AT&T Missouri’s proposed ICA language reflects the requirement of Section 392.550.2, treating Global Crossing’s VoIP traffic like any telecommunications services traffic, such that it is “switched access traffic” subject to access charges if the traffic originates from and terminates

³ See Section 396.020(23), RSMo (defining “interconnected voice over Internet protocol service” as a service that “[e]nables real-time, two-way voice communications,” “[r]equires a broadband connection from the user’s location,” “[r]equires Internet protocol-compatible customer premises equipment,” and “[p]ermits users generally to receive calls that originate on the public switched telephone network and to terminate calls to the public switched telephone network”).

to end users located in different local exchanges. *See* AT&T's Proposed § 6.14.1. Global Crossing's proposed language, on the other hand, cannot be squared with Section 392.550.2. While Global Crossing agrees that all non-VoIP traffic is switched access traffic, subject to access charges, if it originates and terminates between end users in different local exchanges, Global Crossing proposes to carve out VoIP traffic by stating that "Switched Access Traffic shall not include *any* traffic that originates and/or terminates at the End User's premises in Internet Protocol format." Global's Proposed § 6.14.1. As a result, the Commission must reject Global Crossing's proposed language, and adopt AT&T Missouri's language instead.⁴

The Commission need look no further than Section 392.550.2 to resolve Issue 1, because the Commission, as "the creature of the legislative department of the State exercising lawmaking powers, not judicial power in the constitutional sense,"⁵ is bound to follow the command of the Missouri legislature. However, wholly apart from Section 392.550.2, AT&T Missouri's language is consistent with federal law, while Global Crossing's proposed language is not.

2. AT&T Missouri's proposed language is consistent with federal law. As the Commission is undoubtedly aware, the FCC has for many years been considering new intercarrier compensation rules for VoIP traffic (and for all other types of traffic). It has not, however, decided how VoIP traffic fits into its current compensation rules. Instead, the FCC has concluded that state commissions should address this issue in interconnection agreement arbitrations by applying existing law.

⁴ In a prior arbitration, the Commission concluded that VoIP traffic should be subject to reciprocal compensation charges rather than access charges. *See Southwestern Bell Telephone, L.P. v. Missouri Public Serv. Comm'n*, 461 F. Supp. 2d 1055 (E.D. Mo. 2006) (upholding the Commission's determination). That decision, however, occurred before the enactment of Section 392.550.2, RSMo. It also occurred before the FCC ruling, addressed further below, holding that a carrier is not offering "information services" when it merely transports VoIP traffic for other providers.

⁵ *Clark v. Austin*, 101 S.W.2d 977, 995 (Mo. 1937).

In the *UTEX Order*,⁶ UTEX (a competing local exchange carrier like Global Crossing here) asked the FCC to “preempt the jurisdiction of the [Texas commission] and arbitrate pending interconnection disputes in the negotiation of a new interconnection agreement . . . involving the regulatory treatment of Voice over Internet Protocol (VoIP) traffic.” The Texas commission had delayed arbitrating the parties’ dispute “because the [FCC] has not resolved the regulatory classification of VoIP traffic, and the associated intercarrier compensation obligations.”⁷ But the FCC refused to preempt the Texas commission’s jurisdiction, holding that the “uncertainty in the law because the [FCC] has not addressed a particular question” was of no moment.⁸ Thus, the FCC directed the Texas commission to “proceed to arbitrate this interconnection agreement in a timely manner, relying on existing law.”⁹ The *UTEX Order* makes clear that the FCC has not yet promulgated any special compensation rules for VoIP, and that state commissions retain their authority under the Act to address such matters in arbitrations by applying existing law.

Under the FCC’s current rules, access charges apply to AT&T Missouri’s termination of such interexchange traffic for Global Crossing, even if the traffic originated in IP format. Neither the FCC’s access charge rule (FCC Rule 69.5(b)) nor AT&T Missouri’s switched access tariffs turn upon the particular format in which an interexchange call is carried. To the contrary, access charges apply whenever an “interexchange carrier” uses AT&T Missouri’s local exchange facilities in the provision of interstate telecommunications services (or, in the case of AT&T Missouri’s state switched access tariff, in the provision of intrastate interexchange service).

⁶ *In the Matter of Petition of UTEX Comm’ns Corp.*, 2009 WL 3266623, ¶ 1 (FCC Oct. 9, 2009) (“*UTEX Order*”).

⁷ *Id.* ¶ 9.

⁸ *Id.* ¶ 10.

⁹ *Id.*

Thus, to the extent Global Crossing acts as an interexchange carrier, providing interexchange telecommunications service, it is subject to access charges under the FCC's current rules.

While the FCC has not specifically addressed the particular intercarrier compensation that applies to VoIP traffic, it has rejected the suggestion found in Global Crossing's position statement that VoIP traffic can never be "telecommunications" – and more importantly has made clear that the transport of VoIP traffic between local exchanges is merely a telecommunications service. In the *Time Warner Order*,¹⁰ the FCC held that whether VoIP was classified as an information service or as a telecommunications service was irrelevant to whether a "wholesale telecommunications carrier" providing service to VoIP providers is entitled to enter into an interconnection agreement under the 1996 Act to exchange such traffic with an incumbent carrier like AT&T Missouri. That is because the wholesaler is a telecommunications carrier providing telecommunications service, even if the VoIP provider is providing information services. As the FCC explained:

[A] provider of wholesale telecommunications service is a telecommunications carrier and is entitled to interconnection under section 251 of the Act. The regulatory classification of the service provided to the ultimate end user has no bearing on the wholesale provider's rights as a telecommunications carrier to interconnect under section 251. As such, we clarify that the statutory classification of a third-party provider's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under section 251(a) and (b).¹¹

The FCC went on to make clear that an "explicit condition" to this right of interconnection is that the telecommunications carrier has "assumed responsibility for compensating the incumbent

¹⁰ *In the Matter of Time Warner Cable*, 22 FCC Rcd. 3513, 2007 WL 623570 (FCC 2007) ("*Time Warner Order*").

¹¹ *Time Warner Order*, ¶ 15.

LEC for the termination of traffic under a section 251 arrangement” (though the FCC refused to “prejudge the Commission’s determination of what compensation is appropriate”).¹²

In short, pursuant to the *Time Warner Order*, even if VoIP providers like Vonage provide information services, and not telecommunications services, Global Crossing remains a telecommunications carrier providing telecommunications services to the extent it transports such traffic on a wholesale basis to AT&T Missouri for termination.

In its position statement, Global Crossing suggests that “VOIP services . . . are enhanced services and are exempt from access charges” under the FCC’s enhanced service provider (“ESP”) exemption. Global Crossing is wrong.

In 1983, in connection with the break-up of “Ma Bell,” the FCC created the access charge regime to govern payments from interexchange carriers (carriers that transport calls from one local calling area to another) to local exchange carriers for access to and use of the latter’s networks. At the same time, the FCC considered whether ESPs should be required to pay interstate access charges. As a policy matter, the FCC concluded that while ESPs use exchange access services just like long distance carriers,¹³ ESPs should not have to pay access charges for using LEC networks as mechanism for the ESP’s customers to reach the ESP, but instead should be treated like business customer end-users. That is, just as an auto mechanic or dentist’s office purchases local business service in order to receive calls from customers, and is not required to pay additional access charges on every call received from a customer, so too the FCC concluded

¹² *Id.* ¶ 17.

¹³ An ESP, just like a long distance carrier, may use the local networks of LECs to access the ESP’s customers, and, like a long distance carrier, the ESP may then transport that traffic outside of the local calling area. For example, an Internet service provider providing dial-up Internet access (also known as an “ISP,” which is one species of an ESP) uses the local networks of LECs to connect to its customers, enabling the ISP’s customers to gain access to the Internet. That is, customers place calls to the ISP from their computer modems, and those calls originate on and travel over the local network of the customer’s local exchange carrier. After receiving the calls, the ISP may transport the calls to distant points, just like a long distance carrier. In particular, the ISP transports the calls to servers located around the country or the world, allowing customers to surf the Internet.

that ESPs should be permitted to purchase local business service in order to receive calls from their customers, without paying additional access charges even though, unlike an ordinary business end-user, the ESP may engage in additional transport of the call. As the FCC explained:

In the [1983] MTS/WATS Market Structure Order,[] the Commission acknowledged that ESPs were among a variety of users of LEC interstate access services. Since 1983, however, the Commission has exempted ESPs from the payment of certain interstate access charges. Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the public switched telephone network (PSTN).

....

This policy is known as the “ESP exemption.”¹⁴

As this language makes clear, the ESP exemption applies to ESPs, not any other persons. The FCC reiterated the same limitation in its subsequent access charge orders. *See 1988 Access Charge Order*¹⁵ (noting that in 1983, “we granted temporary exemptions from payment of access charges to certain classes of exchange access users, including enhanced service providers,” and “decid[ing] not to eliminate the exemption from interstate access charges currently permitted *enhanced service providers*”); *1997 Access Charge Reform Order*,¹⁶ (explaining that in 1983, the FCC “decided that, although information service providers (ISPs) may use incumbent LEC facilities to originate and terminate interstate calls, *ISPs* should not be required to pay interstate access charges,” “conclud[ing] that the existing pricing structure *for ISPs* should remain in place, and incumbent LECs will not be permitted to assess interstate per-minute access charges *on*

¹⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151, ¶ 11 & n.18 (2001) (“*ISP Remand Order*”) (subsequent history omitted), available at 2001 WL 455869.

¹⁵ Order, *Amendments of Part 69 of the Commission’s Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631 (1988) (“*1988 Access Charge Order*”), available at 1988 WL 488404, ¶¶ 1, 2 (emphasis added).

¹⁶ First Report and Order, *In re Access Charge Reform*, 12 FCC Rcd. 15982 (1997) (“*1997 Access Charge Reform Order*”), available at 1997 WL 268841, ¶¶ 341, 344, 348 (emphases added).

*ISPs,” and “ISPs should remain classified as end users for purposes of the access charge system”). See also FCC Fact Sheet*¹⁷ (“Since the access charge system was established in 1983, enhanced service providers have been classified as ‘end users’ rather than ‘carriers’ for purposes of the access charge rules, and therefore they do not pay the per-minute access charges that long-distance companies pay to local telephone companies.”).

Thus, to the extent Global Crossing merely provides telecommunications services to VoIP providers (such as wholesale transport of VoIP traffic to deliver the traffic to AT&T Missouri for termination), Global Crossing is not an ESP, and is not exempt from access charges under the ESP exemption. Indeed, the FCC has explained that under the ESP exemption, “enhanced service providers are treated as end users for purposes of [the FCC’s] access charge rules” (and thus pay end user charges rather than access charges), but “[e]nd users that purchase interstate services from interexchange carriers do not thereby create an access charge exemption for those carriers.”¹⁸ In other words, ESPs may be exempt from interstate access charges because they are treated as end-users, but that does not create an access charge exemption for the carriers that transport the ESP’s traffic from one local exchange to another local exchange.

Other state commissions have reached the same conclusion. For example, the Kansas Corporation Commission concluded “that access charges should apply to IP-PSTN traffic,” because “the current state of federal law is that access charges apply to interexchange traffic, barring a specific exemption,” and the ESP “exemption applies to the information service

¹⁷ Fact Sheet on The FCC, Internet Service Providers, and Access Charges, available at www.fcc.gov/Bureaus/Common_Carrier/Factsheets/ispfact.html (last updated 4/3/02) (hereinafter “FCC Fact Sheet”).

¹⁸ *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 21 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992) (emphasis added).

provider, not to carriers . . . that provide service to ESPs and other customers.”¹⁹ The Kansas commission recently reaffirmed this conclusion in the Global Crossing/AT&T Kansas arbitration, holding that under current law access charges apply to VoIP traffic terminated on the PSTN.²⁰ Similarly, the Ohio commission rejected the notion that VoIP traffic is somehow exempt from access charges, noting that “it has been clearly articulated by the FCC, in paragraph 61 of its *IP-Enabled Services NPRM*, that any service 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.”²¹ The Illinois commission also has concluded that the ESP exemption “exempts ESPs, and *only* ESPs, from certain access charges,” and does not apply to carriers that transport traffic for ESPs.²²

Global Crossing may suggest that it sometimes acts as a retail provider of VoIP service, and not merely as a carrier of VoIP traffic for VoIP providers. But Global Crossing has presented no evidence to support its suggestion (and indeed, elected to proceed instead on Issue No. 1 without any testimony). Even if it did, Global Crossing’s reliance on the ESP exemption would still be misplaced. The FCC’s access charge exemption applies only to an enhanced or information service provider’s use of the PSTN for *originating* the telecommunications used to provide the enhanced or information service. Here, in contrast, any VoIP service provided or transported by Global Crossing originates over broadband facilities, not the PSTN.

As the FCC described its ESP exemption, that exemption carves ESPs out from the access charge obligation when they “use incumbent LEC networks *to receive calls from their*

¹⁹ *Order No. 16: Commission Order on Phase II Intercarrier Compensation, Subloop and 911 Issues*, Docket No. 05-BTKT-365-ARB et al. ¶ 30, 31, 33 (KCC July 18, 2005).

²⁰ *Order Adopting Arbitrator’s Determination of Unresolved Interconnection Agreement Issues Between AT&T and Global Crossing*, Docket No. 10-SWBT-419-ARB, at 4-10 (KCC Aug. 13, 2010).

²¹ *Arbitration Award, In re TelCove Operations, Inc.’s Petition for Arbitration*, Case No. 04-1822-TP-ARB, at 16 (Jan. 25, 2006).

²² *Order, Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc.*, Docket No. 08-0105, at 22, 42 (ICC Feb. 11, 2009).

customers.”²³ In other words, the FCC “determined that exempted enhanced service providers (ESPs) should not be subjected to *originating* access charges for *ESP-bound* traffic.”²⁴ The exemption has no application to charges for using incumbent LEC networks to *terminate* calls to the *incumbent LEC’s* end user customers.

Other state commissions have rejected the contention that the ESP exemption applies to an ESP’s termination of VoIP traffic on the PSTN. For example, the California Public Utilities Commission (“CPUC”) has recognized that the “ESP exemption” has no application to traffic from an ESP that is terminated on the PSTN. In the Pacific Bell/MCI arbitration, the parties asked the CPUC to arbitrate appropriate interconnection agreement language governing the exchange of and compensation for such traffic. The CPUC concluded that “not all information or enhanced services qualify for the ESP exemption.”²⁵ Rather, the CPUC found that the exemption “applies only to an ESP’s use of the PSTN as a link between the ESP and its subscribers,” and thus concluded that the exemption does not apply to “IP-PSTN” traffic, or traffic *from* an ESP in the Internet protocol (IP) format that is then terminated on the PSTN like any other call.²⁶

* * *

For these reasons, the Commission should reject Global Crossing’s proposed language, and adopt AT&T Missouri’s proposal on Issue 1.

²³ 1997 Access Charge Reform Order, ¶ 343 (emphasis added).

²⁴ IP-Enabled Services NPRM, ¶ 25 (emphases added).

²⁵ Final Arbitrator’s Report, Application by Pacific Bell Tel. Co. d/b/a SBC California (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services LLC (U 5253 C), App. 05-05-027, at 127-129 (dated April 19, 2006), adopted by the Commission in D.06-08-029 (Aug. 24, 2006), available at 2006 Cal. PUC LEXIS 371.

²⁶ *Id.* at 127.

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CERTIFICATE OF SERVICE

I hereby certify that I have on this 29th day of September, 2010, served by electronic mail a true and final copy of the foregoing by electronic transmission upon the following:


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