

**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)	Case No. IO-2011-0057
With Global Crossing Local Services, Inc. and Global)	
Crossing Telemanagement Inc.)	

**AT&T MISSOURI'S RESPONSE IN OPPOSITION TO
GLOBAL CROSSING'S APPLICATION FOR REHEARING OR,
IN THE ALTERNATIVE, MOTION FOR RECONSIDERATION**

COMES NOW AT&T Missouri¹ and submits its response in opposition to Global Crossing's² Application for Rehearing or, In the Alternative, Motion for Reconsideration ("Motion"). For the reasons explained below, the Commission should deny Global Crossing's Motion.

I. The Commission's Decision on Issue 1 Is Not Unreasonable Or Unlawful.

In its ruling on Issue 1, regarding the appropriate intercarrier compensation for VoIP traffic, the Commission ordered the parties to include language in their interconnection agreement to comply with Missouri statutory law, Section 392.550.2. Global Crossing does not dispute that the contract language required by the Commission comports with Section 392.550.2. Instead, Global Crossing reiterates its assertion that that statute is preempted by federal law because, according to Global Crossing, federal law exempts interconnected VoIP traffic from access charges. The Commission should again reject Global Crossing's assertion.

As the Commission correctly concluded, the Commission is bound to apply Section 392.550.2 and it "has no authority to declare the Missouri statute invalid." Decision, at 10.

¹ Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri").

² Global Crossing Local Services, Inc. and Global Crossing Telemanagement, Inc. ("Global Crossing").

Global Crossing does not contest this conclusion, which reflects well-settled Missouri law. *See, e.g., State ex rel. Missouri Southern Railroad v. Public Service Commission*, 168 S.W. 1156, 1164 (banc 1914) (holding that the Commission has no authority to declare a statute unconstitutional). As a result, the Commission need not even consider Global Crossing’s preemption argument.

Further, even if the Commission were to consider that argument, it should continue to reject it. Global Crossing asserts that FCC precedent “exempts information services traffic . . . from access charges.” Motion, at 2. However, the FCC’s ESP exemption exempts enhanced or information service providers from access charges, where those providers choose to purchase retail business service from a carrier in lieu of access services. The FCC has explained that the exemption does *not* apply to a carrier from which an ESP purchases service. In the FCC’s words, under its ESP exemption “enhanced service providers are treated as end users for purposes of [the FCC’s interstate] 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.” *Northwestern Bell*,³ ¶ 21.

Global Crossing also suggests that access charges cannot apply to a carrier transporting VoIP traffic for an ESP because “only in the very limited circumstances covered by Section 251(g) do access charges apply” and “VoIP traffic is not one of those circumstances.” Motion, at 3-4. Global Crossing is wrong. Section 251(g) “carves out” certain traffic from section 251(b)(5)’s reciprocal compensation provision – “the statute does not mandate reciprocal

³ *In re Northwestern Bell Tel. Co. Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, 1987 WL 344405, ¶ 21 (1987), *vacated on other grounds*, 7 FCC Rcd 5644 (1992). While the FCC ultimately vacated the *Northwestern Bell* decision for mootness, that decision still carries informational and persuasive value as the FCC’s own explanation of its ESP exemption (and, more importantly, the limits of that exemption).

compensation for ‘exchange access, information access, and exchange services for such access’ provided to IXC [interexchange carriers] and information service providers.” *ISP Remand Order*,⁴ ¶ 34. Even if VoIP service did not exist prior to the 1996 Act, the compensation obligation at issue here – the obligation of interexchange carriers to pay access charges for “exchange access,” or the use of local exchange switching facilities to terminate traffic – long predates the Act, and is precisely what section 251(g) was intended to preserve.

Contrary to Global Crossing’s suggestion (Motion, at 3-4), the same result applies where Global Crossing provides retail VoIP services. In these circumstances too, Global Crossing has admitted that the traffic is delivered to an *interexchange carrier* (Global Crossing Telecommunications, Inc.) for transport and delivery to the LATA of termination. *See* Global Crossing Response to Data Request 3. Thus, there is an interexchange carrier providing a telecommunications service,⁵ and AT&T Missouri is entitled to access charges in connection with the interexchange carrier’s use of the PSTN in the provision of the interexchange telecommunications service.

Finally, Global Crossing reiterates its assertion that the FCC’s and Minnesota district court’s *Vonage* decisions preempt Section 392.550.2. Motion, at 5-6. Even if the Commission were empowered to hold Section 392.550.2 preempted (which, again, it is not), the *Vonage* decisions have no application here. Those decisions concerned preemption of a state commission’s attempt to regulate Vonage’s retail provision of nomadic VoIP service like a traditional telephone company, including certification and tariffing requirements. Section 392.550.2, on the other hand, does not purport to regulate the retail provision of any VoIP

⁴ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 16 FCC Rcd. 9151, 2001 WL 455869 (2001) (“*ISP Remand Order*”) (subsequent history omitted).

⁵ Global Crossing does not and cannot contest that an interexchange carrier that transports VoIP traffic for a retail VoIP provider is engaged in the provision of a telecommunications service. That is precisely what the FCC held in the *Time Warner Order*, *In the Matter of Time Warner Cable*, 22 FCC Rcd. 3513, 2007 WL 623570 (2007).

service. Rather, it regulates the provision of service by *AT&T Missouri* (and other local exchange carriers operating the PSTN), specifying the compensation that is due for use of the PSTN to terminate certain traffic. The *Vonage* decisions say nothing about the regulation of such services provided by local exchange carriers like AT&T Missouri, whether those services are provided to Vonage or anyone else.

In short, Global Crossing's preemption argument is both misdirected and wrong, and the Commission thus should deny Global Crossing's Motion.

II. The Commission's Decision Does Not Violate Due Process or the Missouri Administrative Procedure Act.

Global Crossing asserts that the Commission's decision violates due process and the Administrative Procedure Act because "the Commission failed to consider key positions and arguments of Global Crossing in making its decision." Motion, at 7. That is nonsense.

As an initial matter, Global Crossing fails to specifically identify what "key positions and arguments" the Commission supposedly overlooked. As a result, Global Crossing's motion fails to provide any sufficient reason to grant rehearing or reconsideration.

Furthermore, it is plain that the Commission's decision, contrary to Global Crossing's suggestion, sufficiently considered both the issues presented and the arguments advanced by the parties in support of their positions on those issues. The issues presented to the Commission were straightforward: first, what is the appropriate intercarrier compensation for interconnected VoIP traffic under Missouri and federal law, and second, should the Commission conclude that federal law somehow preempts the controlling Missouri statute. The parties presented several arguments in support of their positions on these issues. In its Decision, the Commission addressed these issues and the parties' arguments carefully and in detail. In accordance with due process and the Administrative Procedure Act, the Commission's decision clearly "show[s] how

the controlling issues have been decided,” it explains “the factual basis upon which the commission reached its conclusion and order,” and it is “sufficiently specific to enable the reviewing court to assess the agency decision intelligently.” *State ex rel. GS Tech. Operating Co., Inc. v. Public Serv. Comm’n*, 116 S.W.3d 680, 691, 692 (Mo. App. 2003) (quoting *Cummings v. Mischeaux*, 960 S.W.2d 560, 563 (Mo. App. 1998), and *St. Louis County v. State Tax Comm’n*, 515 S.W.2d 446, 448 (Mo. 1972)).

Finally, Global Crossing’s suggestion (Motion, at 9) that the decision is not “supported by competent and substantial evidence” and failed to consider the whole record because the Commission neglected to consider Global Crossing’s comments on the Arbitrator’s Draft Report is specious. As an initial matter, there is no indication that the Commission failed to consider Global Crossing’s comments. Even if the final decision does not specifically mention Global Crossing’s comments, that is of no import because those comments merely reiterate Global Crossing’s position and arguments in its initial briefs, which are fully addressed by the final decision. In any event, Global Crossing’s comments are merely arguments – advocacy by Global Crossing’s counsel – and do not constitute “evidence.”

III. Conclusion

For the reasons explained above, the Commission should deny Global Crossing’s Motion.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY
D/B/A AT&T MISSOURI

BY 

Jeffrey E. Lewis #62389

Leo J. Bub #34326

Robert J. Gryzmala #32454

Attorney for Southwestern Bell Telephone Company

One AT&T Center, Room 3516

St. Louis, Missouri 63101


314-235-6060 (tn)/314-247-0014 (fax)

leo.bub@att.com

robert.gryzmala@att.com

CERTIFICATE OF SERVICE

Copies of this document and all attachments thereto were served on the following by e-mail on January 6, 2011.


Robert J. Gryzmala

General Counsel
Kevin Thompson
Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
gencounsel@psc.mo.gov
kevin.thompson@psc.mo.gov

Public Counsel
Office Of The Public Counsel
P.O. Box 7800
Jefferson City, MO 65102
opcservice@ded.mo.gov

Mark P. Johnson
Lisa Gilbreath
SNR Denton US LLP
4520 Main, Suite 1100
Kansas City, Missouri 64111
mjohnson@sonnenschein.com
lgilbreath@sonnenschein.com
Attorneys for Global Crossing Local Services, Inc.
and Global Crossing Telemanagement, Inc.