

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of)
NuVox Communications of Missouri, Inc. for)
an Investigation into the Wire Centers that) **Case No. TO-2006-0360**
AT&T Missouri Asserts are Non-Impaired)
Under the TRRO.)

**NUVOX COMMUNICATIONS OF MISSOURI, INC.’S AND
XO COMMUNICATIONS SERVICES, INC.’S
SUPPLEMENTAL MOTION TO COMPEL
RESPONSES TO DISCOVERY REQUESTS PROPOUNDED TO
SOUTHWESTERN BELL TELEPHONE, L.P.**

COME NOW NuVox Communications of Missouri, Inc. (“NuVox”) and XO Communications Services, Inc. (“XO”) and file their Supplemental Motion to Compel Responses to Discovery Requests Propounded to Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri (“AT&T Missouri”). In conformance with 4 CSR 240-2.090 of the Commission’s Rules of Practice and Procedure, counsel for NuVox and XO has conferred with counsel for AT&T Missouri by telephone regarding these additional Discovery Requests that are in dispute, but the parties have been unable to resolve their disputes. Counsel for the parties have held a telephone conference with the presiding officer regarding their discovery dispute. NuVox and XO seek a ruling on an additional two of the fifteen DRs served upon AT&T Missouri.

I. Introduction

The two Requests which are the subject of this Supplemental Motion to Compel are two of a series of three questions within the DRs that ask AT&T Missouri for details on the number of particular types of loops that it provides to its retail and wholesale customers. The difference between the three Requests is the date of the information requested. Request No. 3 asks for loop counts as of the date AT&T Missouri considers appropriate for the business line count in this proceeding. AT&T Missouri responded to this Request and provided data for the year 2003.

AT&T Missouri has refused to respond to Request Nos. 4 and 5, however, which ask for the same information but for later time periods, i.e., December 2004 and December 2005 respectively.¹

II. Motion to Compel Specific DRs

Discovery Request 4

Provide, in electronic spreadsheet form (EXCEL), separately for each wire center where AT&T Missouri claims non-impairment for loops and/or transport, the following data as of December 31, 2004:

- a. The number of retail switched business lines;
- b. The number of analog UNE Loops;
- c. The number of DS1 UNE Loops (if provided in VGEs, please so indicate);
- d. The number of DS3 UNE Loops (if provided in VGEs, please so indicate);
- e. The number of DS1 UNE EELs (if provided in VGEs, please so indicate);
- f. The number of DS3 UNE EELs (if provided in VGEs, please so indicate);
- g. The number of business UNE-P; and
- h. The number of business lines provided under AT&T Missouri's Local Wholesale Complete.

¹ Because AT&T Missouri began offering an alternative to UNE-P in 2004—called Local Wholesale Complete—and because the FCC ruled in the *TRRO* that after February 2005 UNE-P no longer was available to CLECs, except for purposes of providing service to CLECs' embedded base of customers for a one-year transition period, Request Nos. 4 and 5 contain an additional subpart (h) that also asks for the number of loops provided under Local Wholesale Complete. Request No. 3 stated as follows:

3. Provide, in electronic spreadsheet form (EXCEL), separately for each wire center where AT&T Missouri claims non-impairment for loops and/or transport, the following information as of the date AT&T Missouri contends the business line calculation required by the FCC in the *TRRO* should be conducted for determining non-impairment for loops and transport:
 - a. The number of retail switched business lines;
 - b. The number of analog UNE Loops;
 - c. The number of DS1 UNE Loops (if provided in VGEs, please so indicate);
 - d. The number of DS3 UNE Loops (if provided in VGEs, please so indicate);
 - e. The number of DS1 UNE EELs (if provided in VGEs, please so indicate);
 - f. The number of DS3 UNE EELs (if provided in VGEs, please so indicate); and
 - g. The number of business UNE-P.

Please identify the date (month and year) for which the data are being provided.

Discovery Request 5

Provide, in electronic spreadsheet form (EXCEL), separately for each wire center where AT&T Missouri claims non-impairment for loops and/or transport, the following data as of December 31, 2005:

- a. The number of retail switched business lines;
- b. The number of analog UNE Loops;
- c. The number of DS1 UNE Loops (if provided in VGEs, please so indicate);
- d. The number of DS3 UNE Loops (if provided in VGEs, please so indicate);
- e. The number of DS1 UNE EELs (if provided in VGEs, please so indicate);
- f. The number of DS3 UNE EELs (if provided in VGEs, please so indicate); and
- g. The number of business UNE-P, and
- h. The number of business lines provided under AT&T Missouri's Local Wholesale Complete.

AT&T's Objections: In its Objections filed on August 16, 2006, AT&T Missouri objected to these two Requests on the grounds that they are not reasonably calculated to lead to the discovery of admissible evidence and are overly broad and unduly burdensome. In its subsequently filed Responses to the NuVox and XO DRs, AT&T Missouri relied upon these objections and additionally stated as grounds for not responding that the "information as requested does not exist in compiled form."

Motion to Compel: With respect to AT&T Missouri's contention that these Requests seek irrelevant information, AT&T Missouri is wrong. The Commission's Rules at 4 CSR 240-2.090(1) state that discovery "may be obtained by the same means and under the same conditions as in civil actions in the circuit court." Rule 56.01(b)(1) of the Rules of Civil Procedure states that discovery may be had regarding any matter, not privileged, that is relevant to the subject matter involved, whether it relates to the claim or defense of the party seeking discovery or that of the party on which discovery was propounded. The Rule further states that it is not a ground for objection that the information will be inadmissible at hearing if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. The information sought in these Discovery Requests is related to the issue of whether AT&T has correctly

interpreted and applied the FCC's directives in the *Triennial Review Remand Order*² and the FCC's definition of a business line when determining which wire centers in Missouri are non-impaired.

AT&T interprets the *TRRO* as specifying the use of 2003 data to count business lines. NuVox and XO contend *inter alia* that the FCC's language in the *TRRO* does not specify that 2003 data be used and that, instead, wire center classifications should reflect contemporaneous data for business lines and fiber-based collocators. AT&T's count of fiber-based collocators uses 2005 data; thus, the business line count should be based on 2005 data as well. The loop counts for the years 2004 and 2005 that NuVox and XO seek will allow a direct comparison of business line counts in 2003 vs. subsequent years, and thus reveal the impact that using more recent data would have on AT&T's designation of non-impaired wire centers.

Under Rule 56.01(b)(1) of the Rules of Civil Procedure the information sought is relevant and/or is likely to lead to the discovery of relevant information to the discovering party's presentation of its case, and AT&T Missouri's objection should be overruled.

AT&T Missouri's objections that these Discovery Requests are overly broad and unduly burdensome also must be overruled. The Requests are very specific. They ask only for loop data for the wire centers that AT&T has identified as non-impaired. Moreover, the data should be readily available. In the *TRRO*, the FCC described its decision to use business lines counts and the number of fiber-based collocators in wire centers to determine where non-impairment exists as follows: "we adopt a proxy approach that, unlike the *Triennial Review Order* triggers, relies on objective criteria to which the incumbent LECs have full access, is readily confirmable

² *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*TRRO*").

by competitors, and makes appropriate inferences regarding potential deployment.”³ AT&T has repeatedly argued to the FCC and to state commissions that impairment determinations should be based on readily available data within the ILECs’ possession. And, indeed, it is clear that the FCC believed that “the tests [it] adopt[ed in the *TRRO*] rely on data regarding the number of business lines and fiber-based collocators in a wire center, which are objective and readily available.”⁴ In its Objections, AT&T Missouri provided no explanation and no support for its assertion that responding to these Requests would impose an undue burden. Discovery is not objectionable where it seeks factual information that is readily available to the answering party. *Arth v. Director of Revenue*, 722 S.W.2d 606 (Mo. banc 1987). The data exist; the data are precisely the data which AT&T (then SBC) and other ILECs urged the FCC to rely upon when making its impairment decisions.

Finally, AT&T Missouri has stated that the “information as requested does not exist in compiled form.” AT&T however did provide a response to Request No. 3; the DR asked for virtually the same information as is sought in Requests No. 4 and 5. AT&T understood that it was proper to respond to discovery by providing the information in its possession that is responsive to DR 3, even though that information is not available in the precise level of detail sought in DR 3. Inexplicably, AT&T claims that it need not provide a similar response—that is, it need not provide responsive information in the form in which it does exist—for subsequent years, which is all that NuVox and XO are seeking. NuVox and XO are not asking AT&T to provide what it does not have; they are asking AT&T to respond to Request Nos. 4 and 5 with the same type of information AT&T provided in answer to Request No. 3. Plainly, AT&T

³ *TRRO* at ¶ 108.

⁴ *TRRO* at ¶ 161.

understands what is being sought; plainly it has in its possession information that is responsive to the discovery requests.

AT&T Missouri's objections are without merit and should be overruled.

WHEREFORE, PREMISES CONSIDERED, NuVox and XO pray that their Supplemental Motion to Compel be granted and that AT&T Missouri be ordered to provide responses to DRs 4 and 5 within five business days of issuance of the presiding officer's Order granting this Motion.

Respectfully submitted,

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
Curtis, Heinz, Garrett & O'Keefe, PC
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
Telephone: (314) 725-8788
Facsimile: (314) 725-8789
Email: clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

Bill Magness
Texas State Bar No. 12824020
Casey, Gentz & Magness, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
Telephone: (512) 480-9900
Facsimile: (512) 480-9200
Email: bmagness@phonelaw.com

ATTORNEYS FOR NUVOX COMMUNICATIONS OF
MISSOURI, INC., AND
XO COMMUNICATIONS SERVICES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served upon the attorneys for all parties on the following list by either U.S. Mail, fax, or email on this 6th day of April, 2007.

/s/ Carl J. Lumley

Carl J. Lumley

Office of the Public Counsel
PO Box 7800
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

Office of General Counsel
Missouri Public Service Commission
PO Box 360
Jefferson City, Missouri 65102
gencounsel@psc.mo.gov

Robert J. Gryzmala
AT&T Missouri
One SBC Center, Room 3520
St. Louis, Missouri 63101
rg1572@att.com

Mary Ann (Garr) Young
William D. Steinmeier, P.C.
2031 Tower Drive
P. O. Box 104595
Jefferson City, MO 65110-4595
myoung0654@aol.com