

**BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION**

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

**NUVOX COMMUNICATIONS OF MISSOURI, INC.'S AND  
XO COMMUNICATIONS SERVICES, INC.'S 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 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 the individual 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 four of the fifteen DRs served upon AT&T Missouri.

**I. Background of Discovery Dispute and Motion to Compel**

As stated in the Commission’s Order Regarding Procedural Process issued on August 29, 2006, this proceeding will determine the proper application and interpretation of the Federal Communications Commission’s (“FCC”) rulings in its *Triennial Review Remand Order* (“*TRRO*”)<sup>1</sup> regarding the methodology to be used in counting the number of fiber-based

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<sup>1</sup> *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-388, Order on Remand, 20 FCC Rcd 2533 (2005).

collocators located in and the number of business lines served by AT&T Missouri's wire centers, and will determine the accuracy of its identification of wire centers that are non-impaired. (Order at 1) This proceeding is an investigation. (Order at 2)

The discovery requests that are the subject of this Motion to Compel have one purpose—to obtain information that will enable NuVox and XO to evaluate the accuracy of AT&T Missouri's methodology and calculations in counting business lines. AT&T Missouri's basic objection is that such evaluation is improper because it contends the FCC ruled that impairment determinations would rely upon the ILEC's data; thus, according to AT&T Missouri the only data relevant to this proceeding are AT&T Missouri's line counts for the wire centers it identified as non-impaired. AT&T Missouri's position is not supported by the FCC's rulings in the *TRRO*.

In the *TRRO*, the FCC sought to avoid the difficulties caused by the complex impairment standards it approved in its *Triennial Review Order* (“*TRO*”).<sup>2</sup> The FCC explicitly provided, however, that ILECs' calculations under the *TRRO* standards are subject to verification by CLECs. The FCC expressed its view that the impairment criteria—the number of fiber-based collocators and number of business lines—adopted in the *TRRO* are more easily administered than the “triggers” for impairment adopted in the *TRO*.<sup>3</sup> But, the FCC did not conclude that

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<sup>2</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003), *corrected by Errata*, 18 FCC Rcd 19020 (2003).

<sup>3</sup> *TRRO* at ¶ 99:

Fiber-based collocation also stands out as one of the most objective indicia of competitive deployment available to us. Both incumbent LECs and competitive LECs agree that fiber-based collocation data are relatively simple to identify and collect. We are acutely aware of the need to base any test we adopt here on the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis. Most parties seem to

CLECs must blindly accept the ILEC's conclusions nor did it preclude CLEC verification. As the FCC concluded: “[I]ncumbent LEC counts of fiber-based collocations can be verified by competitive LECs, which will also be able to challenge the incumbent’s estimates . . . .”<sup>4</sup> Similarly, the FCC addressed verification when discussing its definition of business lines and the thresholds it was establishing in the *TRRO*:

We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, *we can be confident in the accuracy of the thresholds*, and a simplified ability to obtain the necessary information.<sup>5</sup>

Thus the FCC sought to use indicia of non-impairment based on information simpler to obtain and verify than the data relied on in the *TRO*. It did not conclude that the ILECs’ non-impairment designations or the data underlying them were sacrosanct.

Indeed, the FCC in paragraph 234 of the *TRRO* established a self-certification process by which a CLEC can order, and the ILEC must provision, high-capacity loops and transport circuits in wire centers the ILEC designated as non-impaired, if the CLEC has “undertak[en] a reasonably diligent inquiry and, based on that inquiry, self-certif[ies] that, to the best of its

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agree that long, extended proceedings add significant costs as well as uncertainty about the future state of the rules and an easily administrable test will avoid that uncertainty. Unlike our approach here, the data required to administer our previous transport test was complex and allowed significant latitude to decipher exactly what type of data counted toward the application of a trigger. Moreover, unlike information regarding fiber-based collocation, the information necessary to implement the previous self-deployment triggers was possessed entirely by a span of competitive LECs and was not easily verifiable.

(footnotes omitted)

<sup>4</sup> *TRRO* at ¶ 100.

<sup>5</sup> *TRRO* at ¶ 105 (emphasis added).

knowledge, its request is consistent” with the unbundling rules adopted in the *TRRO*. What is clear from paragraph 234 is that, although the FCC said it was establishing unbundling rules governing access to dedicated transport and high-capacity loops that “evaluate impairment based upon objective and readily obtainable facts” it did not deny CLECs the ability to “test” those facts for themselves through reasonably diligent inquiry.

In this investigative proceeding, the data NuVox and XO are seeking through discovery are data needed to perform a reasonable cross-check of AT&T Missouri’s impairment determinations. 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 the Requests that are the subject of this Motion to Compel is relevant and therefore of a type that is discoverable under the Rule.

Finally, among AT&T Missouri’s objections was an objection to providing certain data prior to the Commission ruling on the question of whether this proceeding would be bifurcated in two phases.<sup>6</sup> The Commission ruled on the issue of bifurcation in its Order Regarding Procedural Process issued on August 29, 2006; as a result, that objection has become moot.

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<sup>6</sup> See AT&T Missouri’s Objection J: “AT&T Missouri objects to the Requests to the extent that they are not reasonably calculated to lead to the discovery of admissible evidence, are overly broad and unduly burdensome under the present procedural posture of the case. In particular, the Requests were served . . . without the Commission’s first having decided whether, as AT&T Missouri maintains, the case

## II. Motion to Compel Regarding AT&T Missouri's Objections to Individual DRs

### Discovery Request 6:

Provide, in electronic spreadsheet form (EXCEL), separately for each AT&T Missouri wire center, 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 UNE Loops (*note*—do not convert to VGEs; do include EELs and standalone loops, but do not include UNE-P).

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

**AT&T's Objection:** AT&T objected to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and is overly broad and unduly burdensome, but it nonetheless stated that it would provide a response to this Request.

**Motion to Compel:** AT&T Missouri did not provide the information sought in this discovery request and, therefore, NuVox and XO move to compel a response. Instead of providing *for all of its wire centers* the number of its own retail switched business lines and the number of UNE loops provided to CLECs, AT&T Missouri provided information *solely* for the wire centers it asserts are non-impaired. This limited information is non-responsive, incomplete and insufficient.

As explained above, under the *TRRO* CLECs are entitled to verify AT&T Missouri's non-impairment determinations, including verifying that AT&T Missouri has performed the counts of business lines and fiber-based collocators correctly. AT&T Missouri and its parent company file various reports with the SEC, the FCC and state commissions that are a matter of public record. Such public reports present the number of residential and business lines served by

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should be adjudicated in two separate and distinct phases, i.e., Phase I (regarding the appropriate "methodology to be employed in determining the presence and number of Fiber Based Collocators, and Phase II ( a "recount," if necessary). Briefing on the issue is presently due by August 19, 2006."

AT&T, and the number of access lines—including UNE loops—AT&T Missouri provides to its CLEC competitors. Comparing, for example, the number of business lines reported to stockholders against the business line count AT&T Missouri reported in its non-impairment determinations, shows whether AT&T Missouri's counts are reasonably consistent. Thus, the comparison can shed light on the accuracy of AT&T Missouri's business line counts.

The publicly available data are not presented by wire center, however, but instead are presented on a state-wide basis. As a result, NuVox and XO must have access to the business line count for all of AT&T Missouri's wire centers so that the comparison—the cross-check for reasonableness—can be performed. AT&T Missouri has only provided data for the individual wire centers it contends are non-impaired; it has provided no data for any other 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, and AT&T Missouri's objection should be overruled.

AT&T Missouri's objections that the Request is overly broad and unduly burdensome also must be overruled. The Request is very specific and asks only for data in AT&T Missouri's possession, data it relied on to develop the business line counts that are the basis of its non-impairment determinations. If AT&T Missouri had not calculated the number of business lines by wire center for each Missouri wire center, it could not have generated its list of impaired and non-impaired wire centers. AT&T Missouri provided no explanation and no support for its assertion that responding to the Request 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). AT&T Missouri necessarily

accessed its records in order to generate ARMIS reports and to comply with the requirements of the *TRRO*. The data exist; no extraordinary burden is imposed by this Request.

**Discovery Request 7:**

Please provide, in un-redacted form and disclosing the actual CLLI codes, the number of business lines at each AT&T Missouri wire center that was provided by SBC to the FCC in SBC's December 7, 2004 ex parte letter (cited by the FCC in *TRRO*, paragraph 105 [sic], n. 322).

**AT&T's Objection:** AT&T Missouri objected to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

**Motion to Compel:** In the *TRRO*, the FCC established thresholds for both the number of fiber-based collocators in a wire center and for the number of business lines served by a wire center as indicators of wire centers where CLECs are not impaired without access to high-capacity loops and transport circuits as UNEs. For example, the FCC concluded that DS1 loops shall not be available as a UNE in a wire center having at least 60,000 business lines and at least 4 fiber-based collocators.<sup>7</sup> As is clear from paragraphs 111 through 120 and footnote 322 of the *TRRO*, the FCC set its non-impairment thresholds after reviewing data it asked the RBOCs to submit on their business line counts in their wire centers. NuVox and XO in this Request ask AT&T Missouri to provide the information that its parent (then SBC) submitted to the FCC and on which the FCC relied in setting the thresholds. Again, the purpose of the Request is to perform a cross-check of AT&T Missouri's data to determine whether any discrepancies exist, discrepancies that would shed light on whether it is more or less likely that AT&T Missouri has properly interpreted the FCC's *TRRO* and the rules adopted therein, and whether its non-impairment determinations are correct. Under Rule 56.01(b)(1) of the Rules of Civil Procedure

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<sup>7</sup> 47 C.F.R. § 51.319(a)(4)(i).

the information sought is relevant to the issues being investigated in this proceeding and is discoverable.

AT&T Missouri has argued that the data submitted to the FCC can be reviewed under the Protective Order entered in the *TRRO* proceeding. That Order, however, precludes use of the data in any other proceeding, including this investigation. (A copy of the Order is provided as Attachment A; the restriction on use appears in paragraph 3 of Appendix A to that Order.) Furthermore, under the Order no copies of the information are permitted, a restriction that obviously frustrates any effort to compare and cross-check the data on which the FCC relied against AT&T Missouri's business line counts on which it made its non-impairment determinations.

In any event, however, AT&T Missouri's affiliate AT&T Indiana, in response to discovery requests in a similar state commission proceeding in that state, produced the data SBC submitted to the FCC for the state of Indiana. In Cause No. 42986, *Petition of Indiana Bell Telephone Company, Incorporated for Expedited Resolution of Dispute with NuVox Communications Inc. Regarding Non-Impaired Wire Centers*, NuVox issued DR 1.2.9 that asked for an unredacted copy of the submission. AT&T Indiana objected to the Request on relevance grounds, but nonetheless voluntarily provided the information requested. AT&T has no basis for refusing to do the same in Missouri. Similarly, in Illinois Commerce Commission Docket No. 06-0029, *Illinois Commerce Commission On Its Own Motion vs. Illinois Bell Telephone Company – Investigation into Illinois Bell Telephone Company's Designation of Certain of its Wire Centers as Non-Impaired*, Illinois Bell Telephone Company provided this data in response to McLeod/NuVox Data Request 1.34.



**Discovery Request 14:**

Provide separately for XO and NuVox the total number of UNE loops (for the types of loops identified below) that were provided by AT&T Missouri to each of these carriers in Missouri as of the date AT&T Missouri contends should be used for the business line calculation:

- a. The number of analog UNE loops;
- b. The number of DS1 UNE loops (include EELs); and
- c. The number of DS3 UNE loops (include EELs).

As part of your answer, please state the date (month and year) for which the response is being provided. *Note:* In preparing and providing your response to this Data Request, do not convert (b) and (c) to VGEs.

**AT&T's Objection:** AT&T Missouri objected to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and is overly broad and unduly burdensome.

**Motion to Compel:** The purpose of this Request is to compare AT&T Missouri's count of UNE loops it provided to XO and NuVox against these CLECs' records of the UNE loops they obtained from AT&T Missouri at the same time period. Through this comparison, XO and NuVox can determine whether any discrepancy exists such that it is more or less likely that AT&T Missouri's calculation of business lines is correct. Under Rule 56.01(b)(1) of the Rules of Civil Procedure it is discoverable.

The FCC's business line definition requires the ILECs to count several types of access lines when performing their calculations, including counting UNE loops the ILECs provide to CLECs for purposes of serving business customers. This Request asks AT&T Missouri to state how many UNE loops it provided to NuVox and to XO as of a specific date, i.e., the date that AT&T Missouri contends should be used for determining which wire centers are non-impaired. The Request is specific on its face and is not overly broad. It asks AT&T Missouri to state, separately for XO and for NuVox, the number of analog UNE loops, DS1 UNE loops and DS3

UNE loops, AT&T Missouri provided to each CLEC at a specific time. AT&T Missouri is only being asked to state what its records show, records it necessarily maintains in order to provide and bill for UNEs. AT&T Missouri does not – and could not – contend that it does not keep records of the UNE loops it sells to specific CLECs in Missouri.

AT&T Missouri also objected to this Request on the ground that responding would impose an undue burden, but it utterly failed to explain why any extraordinary burden would result. Discovery necessarily imposes some burden to review and produce information contained in the records of persons and business entities that are parties to litigation and administrative proceedings. Discovery is not objectionable where it seeks factual information that is readily available to the answering party. *Arth* at 608, citing to *State ex rel Gamble Construction Company*, 408 S.W.2d 34, 38 (Mo.banc) (1966) (“the objection that preparing an answer would require research by the interrogated party *is not enough to bar the interrogatories in every case*. In order to justify sustaining of an objection to such an interrogatory, it must be shown that the research is unduly burdensome and oppressive. The party seeking to avoid answering the interrogatories carries the burden of showing that the information sought is not readily available to him . . . .). NuVox and XO cannot imagine how reviewing AT&T Missouri’s records for these specific services, for only two CLEC customers, and for single month and year would tax AT&T Missouri’s personnel and resources.

Finally, AT&T Missouri’s contention that this Request is objectionable because it cannot lead to the discovery of relevant information also is groundless. As previously explained, the FCC did not rule that CLECs must unquestioningly accept the ILECs’ non-impairment determinations or their business line counts. The Commission has concluded that this proceeding will investigate whether the methodology AT&T Missouri used in counting business

lines is consistent with the *TRRO* and the rules adopted in that Order, and confirm that the count was calculated in accordance with the correct methodology. Whether AT&T Missouri's records match the records of two of its CLEC customers bears on the accuracy of the data on which AT&T Missouri relied.

AT&T Missouri's objections should be overruled.

**Discovery Request 15:**

Provide separately for each company the number of DS3 Local Loop and DS3 EEL UNEs attributable to XO and NuVox that you included in your calculation of business lines for Missouri in your determination of wire centers that are non-impaired for loops and/or transport.

**AT&T's Objection:** AT&T Missouri objected to this Request on the grounds that that it is not reasonably calculated to lead to the discovery of admissible evidence and is overly broad and unduly burdensome.

**Motion to Compel:** This Request asks for further detail on a portion of the information sought in Request 14. Specifically, this question asks AT&T Missouri to separate out the number of DS3 loops associated with DS3 EELs that its records show it provided to XO and to NuVox.

Like Request 14, this Request is very specific on its face and is not overly broad as AT&T Missouri contends. The Request is limited in time; it asks AT&T Missouri to provide the information as of the date AT&T Missouri calculated business lines for purposes of identifying which wire centers are unimpaired. AT&T Missouri necessarily has this information because it bills NuVox and XO for the UNEs and the EELs it provides.

AT&T Missouri also objected to this Request on the ground that responding would impose an undue burden, but again it failed to explain why providing the requested information would be so burdensome as to excuse it from discovery. Under the law, discovery that imposes an extraordinary burden on a party because the information sought is not readily available is

objectionable. *Arth* at 608. NuVox and XO cannot imagine that reviewing AT&T Missouri's records for these DS3 UNE loops and for DS3 EELs, for only two CLECs, and for a specific month and year would tax AT&T Missouri's resources.

Finally, AT&T Missouri's contention that this Request is objectionable because it cannot lead to the discovery of relevant information also is groundless. As previously explained, the FCC did not rule that CLECs must unquestioningly accept the ILECs' non-impairment determinations or their business line counts. The purpose of this Request is to allow NuVox and XO to compare their records against AT&T Missouri's to determine whether any discrepancy exists. Whether AT&T Missouri's records match the records of two of its CLEC customers bears on the accuracy of the data on which AT&T Missouri relied. The impact of an error in counting DS3 UNE loops is particularly great because AT&T Missouri interprets the FCC's definition of a business line as allowing it to count each DS3 loop as the maximum number of circuits that could be provided over such loop and multiplying each loop by 672. If a discrepancy is found between AT&T Missouri's records and the records of two of its CLEC customers, such discrepancy casts doubt on the accuracy of AT&T Missouri's count of DS3 UNE loops and, potentially, on the accuracy of the method it used to determine the number of business lines served by specific wire centers.

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

**WHEREFORE, PREMISES CONSIDERED,** NuVox and XO pray that their Motion to Compel be granted and that AT&T Missouri be ordered to provide responses to DRs 6, 7, 14 and 15 within five business days of issuance of the presiding officer's Order granting this Motion.

Respectfully submitted,

/s/ Carl J. Lumley

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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 20th day of March, 2007.

/s/ Carl J. Lumley

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