

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

NuVox Communications of Missouri, Inc.,)	
)	
Complainant,)	
)	
v.)	Case No. XC-2003-0421
)	
Southwestern Bell Telephone, L.P. d/b/a)	
SBC Missouri)	
)	
Respondent.)	

SBC MISSOURI'S RESPONSE TO NUVOX'S REPLY

COMES NOW Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (SBC Missouri), and for its Response to NuVox's Reply to SBC Missouri's Response to Request for Expedited Orders and Notice Regarding Request for Expedited Orders (NuVox's Reply), states to the Missouri Public Service Commission (Commission) as follows:

1. In its continuing efforts to mislead the Commission and evade the controlling provisions contained in SBC Missouri's physical collocation tariff, NuVox again mischaracterizes the dispute in this case. In its Reply, NuVox goes to great lengths to convince the Commission that its complaints about how SBC Missouri is billing NuVox for DC power arrangements provided to NuVox pursuant to SBC Missouri's collocation tariff should not be subject to the mandatory billing dispute resolution provisions contained in that tariff. The Commission must reject NuVox's request for any expedited relief, which is nothing more than an attempt to evade the controlling tariff provisions.

2. Contrary to NuVox's claims, SBC Missouri is not attempting to impose charges that are different or greater than the rates contained in SBC Missouri's physical collocation tariff. The charges that SBC Missouri claims are owed are the charges specifically identified in SBC Missouri's physical collocation tariff. It is NuVox -- not SBC Missouri -- that seeks to avoid the

plain language of SBC Missouri's physical collocation tariff, and claims this is something other than a billing dispute.

3. Likewise, SBC Missouri is not attempting to change the rates or rate elements contained in its physical collocation tariff without submitting the proposed changes to the Commission for approval as NuVox claims.¹ As described in this Response, SBC Missouri is complying with its Commission-approved tariffs by charging -- and attempting to collect -- the monthly recurring rates for DC power arrangements described in SBC Missouri's physical collocation tariff.

4. In its Reply, NuVox criticizes SBC Missouri's accurate characterization of NuVox's complaint. NuVox then argues that the "ultimate issue" for the Commission to determine is "the maximum amount of DC power being provided by SBC to NuVox is defined by the capacity of the primary feed, which for all NuVox collocations in Missouri is 100 amps."² NuVox goes on to claim that the "per amp" rate set forth in SBC Missouri's physical collocation tariff only applies to the DC power being provided to NuVox over what NuVox characterizes as the "primary feed."³ NuVox is wrong.

5. DC power arrangements are included as a specific rate element in SBC Missouri's physical collocation tariff as follows:

20.5 DC Power Consumption

The DC Power Charge consists of use of the DC power system, with AC input and AC backup for redundant DC power expressed on a per amp basis. The cost for HVAC to support DC Power Consumption is recovered as a separate but related rate element on a per 10-amp basis. DC Transmission Energy Charge provided per 2" mounting space consists of the AC energy to provide redundant DC power to an CEV/HUT/Cabinet arrangement expressed in a monthly rate. Rates and charges are as found in paragraph 21.4.

¹ NuVox Reply, para. 2, pp. 2-3.

² NuVox Reply, para. 3, p. 3.

³ Id.

Contrary to NuVox’s arguments, nothing in the description of the DC Power Consumption rate element requires or even suggests that NuVox only has to pay for the per amp capacity provided on only one of its two power leads. To the contrary, this rate element requires that the DC Power Charge is on a “per amp” basis, whether power is made available over one or two power leads.

6. In addition, Section 21.4 of SBC Missouri’s physical collocation tariff, which is referenced in the DC Power Consumption rate elements description and contains the rates for DC Power Consumption, provides as follows:

	<u>USOC</u>	<u>Rate Per Month</u>	<u>Non-recurring Charge</u>
21.4 DC Power Consumption (Caged, Cageless, and Caged Common Arrangements)			
- Per AMP	SP1PT	\$10.61	None
- HVAC (Per 10 Amps)	XXXX	\$14.62	None
Adjacent On-Site Arrangements			
- DC Power Consumption (CEV, Hut, and Cabinet)	SP1PT	\$10.61	None
21.4 DC Power Consumption (continued)			
- Per 2” Mounting Space	SP1QK	\$ 1.27	None

Again, nothing in this description of the rates for DC Power contained in SBC Missouri’s collocation tariff supports NuVox’s argument. Rates for DC Power are described as “per amp,” not “per amp for only one feed” as NuVox would have the Commission believe.

7. Other provisions of the collocation tariff compel the conclusion that NuVox is wrong. Section 21.14 of the tariff, which contains the rates for DC Power Arrangement Provisioning, describes the applicable rates as follows:

	<u>USOC</u>	<u>Rate Per Month</u>	<u>Non- recurring Charge</u>
21.14 DC Power Arrangement Provisioning (Caged, Cageless, and Caged Common Collocation)			
- 2-20 AMP Power Feeds	SP1QU	\$ 7.74	\$1,570.84
- 2.50 AMP Power Feeds	SP1QW	9. 57	1,954.85
- 2-100 AMP Power Feeds	SP1QX	11.39	2,344.44

In this section, the tariff contains specific language which provides for a monthly recurring rate applicable to two power feeds. In Section 21.4 of the tariff, however, the language is equally clear in describing a monthly recurring rate that is applicable on a “per amp” basis, irrespective of the number of feeds.

8. Thus, under SBC Missouri’s collocation tariff, where NuVox has 100 amps of DC power available over each of two separate power leads to its collocated facilities, NuVox is required to pay for 200 amps of DC power SBC Missouri makes available to NuVox’s collocation locations. Contrary to NuVox’s assertions, the central dispute in this case is whether SBC Missouri is correctly billing NuVox under SBC Missouri’s collocation tariff for the DC power SBC Missouri makes available to NuVox. NuVox’s argument is that it should not have to pay the rates for DC Power contained in SBC Missouri’s collocation tariff.

9. It is ironic that NuVox continues to argue that it should only have to pay for the DC power amperage provided on what it insists is the “primary” feed, and should not have to pay for DC power available over what it insists is a “redundant” power feed. When NuVox filed its original Complaint in this case, NuVox stated that it:

does not use the primary “A” feed and the redundant “B” feed in an additive manner -- i.e., NuVox never simultaneously draws power from both the primary “A” feed and the redundant “B” feed. In fact, NuVox’s power distribution systems and collocated equipment are engineered in a manner that does not permit

the simultaneous use of both the “A” and “B” feeds.⁴ (emphasis in NuVox’s Complaint).

NuVox’s Complaint was supported by a verification executed by Edward J. Cadieux on April 14, 2003, the same date NuVox filed its original Complaint. When NuVox filed its amended Complaint⁵ the following day, NuVox again asserted that it:

does **not** use the primary “A” feed and the redundant “B” feed in an additive manner - i.e., NuVox never simultaneously draws power from both the primary “A” feed and the redundant “B” feed. In fact, NuVox’s power distribution systems and collocated equipment are engineered in a manner that does not permit the simultaneous use of both the “A” and “B” feeds.⁶ (emphasis in NuVox’s Complaint).

NuVox’s Amended Complaint was again supported by a verification executed by Edward J. Cadieux. However, it is interesting to note that Mr. Cadieux’s verification of NuVox’s amended complaint was also executed on April 14, 2003, the same date NuVox filed its original Complaint, and one day prior to NuVox filing its amended Complaint.

10. On April 21, 2003, NuVox filed its second amended Complaint. In its second amended Complaint, NuVox did an about face with respect to whether it uses both the “A” and the “B” power feed provided by SBC Missouri at the same time. Despite its “verified” assertions in its original and amended Complaints, in its second amended Complaint, NuVox appears to concede that it does in fact use both the “A” and “B” power leads at the same time, although NuVox attempts to hide this concession by stating that it “never simultaneously draws power from both the primary “A” feed and the redundant “B” feed *in excess of a total of 100 amps.*”⁷

In its Reply, NuVox attempts to gloss over this concession and change in its position, by simply

⁴ NuVox Complaint, para. 15.

⁵ NuVox filed its Complaint on April 14, 2003, its Amended Complaint on April 15, 2003, and its Second Amended Complaint on April 21, 2003. NuVox did not seek leave from the Commission to file either of its amended Complaints.

⁶ NuVox Amended Complaint, para. 15.

⁷ NuVox Second Amended Complaint, para 15, p. 7 (emphasis added).

claiming that “SBC has always provided two feeds for redundancy, but while electric current flows over both feeds for a balanced load, the actual amount never exceeds the 100-amp capacity of the primary feed.”⁸ The fact of the matter is that NuVox has now admitted that it simultaneously uses both DC power feeds for its collocation arrangements in Missouri, and NuVox’s argument that it does not have to pay for DC power provided over the second power feed (which NuVox continues to mislabel as “redundant”) is hogwash.

11. Interestingly enough, however, NuVox’s Second Amended Complaint was also supported by a verification of Edward J. Cadieux executed on April 14, 2003, the very same date as Mr. Cadieux’s two earlier verifications. Clearly, NuVox cannot be correct with regard to its contradictory assertions concerning its use of the two power leads. Frankly, from reviewing Mr. Cadieux’s three verifications, it is not clear to SBC Missouri that Mr. Cadieux *ever* reviewed NuVox’s Amended or Second Amended Complaints, as the verifications attached to those Complaints appear to be copies of Mr. Cadieux’s original verification.

12. Notwithstanding these significant irregularities regarding the verifications submitted in support of NuVox’s Complaint, Amended Complaint and Second Amended Complaint, the fact remains that NuVox has not complied with the tariff provision directly applicable to billing disputes. NuVox asserts that the dispute resolution section of the tariff was only meant to apply to disputes regarding bills issued on a timely basis and in due course between the parties.⁹ Even if the tariff contained such an express limitation, which of course it does not, SBC Missouri has timely billed NuVox since November, 2002. NuVox neither paid these bills nor complied with the billing dispute resolution provisions. NuVox cannot avoid the escrow requirements under these facts. NuVox also contends that the escrow provisions of the

⁸ NuVox Reply, para. 3.

⁹ NuVox Reply, para. 9.

tariff are “contrary to sound public policy” and should not be enforced.¹⁰ As the Commission is aware, tariffs have the force and effect of law, and the Commission does not have authority to choose not to apply a tariff provision. Unless and until a tariff is lawfully changed, on a prospective basis, the tariff must be followed. There are many provisions in this and other Commission-approved tariffs that SBC Missouri considers to be contrary to sound public policy, but it cannot declare these provisions unenforceable on that basis.

13. As this Commission is well aware, the proceeding in which SBC Missouri’s physical collocation tariff was approved was extensive and disputed. SBC Missouri’s physical collocation tariff was the result of extensive settlement negotiations among numerous parties, and the physical collocation tariff that was ultimately approved by the Commission includes unequivocal and mandatory escrow provisions in recognition that SBC Missouri is entitled to assurance of payment if a CLEC’s dispute regarding billing does not prevail. NuVox is obviously concerned about *its* working capital, but NuVox would have this Commission ignore the clear tariff provision designed to ensure payment to SBC Missouri if NuVox does not prevail on its claim.

14. NuVox chose to convert its existing collocation arrangements to tariffed rates available under SBC Missouri’s newly approved physical collocation tariff. NuVox was a party to Case No. TT-2001-298, in which SBC Missouri’s physical collocation tariff was submitted to the Commission (in a unanimous stipulation and agreement) and approved. Many rates that NuVox was required to pay under the new tariff went down in the conversion process, and NuVox benefited. But NuVox did not adjust its power requirements in light of the DC power provisions contained in SBC Missouri’s collocation tariff.

¹⁰ NuVox Reply, para. 10.

15. NuVox also claims that the dispute resolution provisions contained in SBC Missouri's physical collocation tariff are limited to "bona fide" disputes, and urges that because NuVox does not wish to pay for the DC power being provided to its collocation arrangements, its refusal to pay is not a "bona fide" dispute. NuVox has the cart before the horse. It is NuVox which must raise a bona fide dispute in order to avail itself of the dispute resolution process, including complying with the tariff requirement to establish an appropriate escrow account. If the dispute NuVox seeks to raise is not bona fide, it is not entitled to claim the benefits of the dispute resolution process.

16. NuVox also claims that the escrow provisions of the tariff do not apply because the amounts at issue exceed one percent of the amounts charged to NuVox under the tariff in the preceding 12 months. NuVox claims that because of the amount in dispute, mandatory arbitration does not apply, and therefore the escrow provisions are not applicable to the dispute. Again, NuVox's position is inconsistent with the clear language of the tariff, and NuVox is wrong again. NuVox can point to no provision in the tariff which limits the applicability of the billing dispute resolution provisions contained in the tariff, including the escrow requirement, to arbitrated disputes.

17. NuVox also claims that the escrow provisions do not apply because this is not a dispute over "anything ordered from [the physical collocation] tariff."¹¹ NuVox's assertion illustrates the lengths that it will go to avoid the controlling tariff provisions. There is simply no question that NuVox is purchasing physical collocation from SBC Missouri's physical collocation tariff, and DC power is one of the rate elements contained in SBC Missouri's physical collocation tariff. NuVox disputes how SBC Missouri is billing for DC power, but

¹¹ NuVox Reply, para. 12.

there can be no dispute that the DC power arrangements that SBC Missouri is providing to NuVox pursuant to SBC Missouri's collocation tariff are being provided pursuant to tariff.

18. NuVox's arguments as to why the clear escrow provisions contained in SBC Missouri's physical collocation tariff should not apply to NuVox should be viewed by the Commission for what they are -- NuVox's attempt to avoid legitimate tariff provisions contained in SBC Missouri's approved physical collocation tariff. Because NuVox has not complied with the escrow provisions, and has waived its right to bring this claim, NuVox is attempting to raise whatever arguments it can dream up to claim that it needs "expedited" relief and the escrow provisions contained in the tariff are not applicable. The Commission must follow the clear language of the tariff, however, in this case. The escrow provisions are mandatory, and NuVox has simply not complied with these mandatory provisions.

19. Given that the applicable tariff provisions defeat each and every one of NuVox's arguments for "expedited" relief, it should come as no surprise to the Commission that NuVox does not provide any of the relevant and controlling tariff language contained in SBC Missouri's physical collocation tariff in its Reply. SBC Missouri will remedy this defect. Section 6.6.1, entitled "Billing Dispute Resolution" provides as follows:

In the event of a bona fide dispute between a collocater and SWBT regarding any bill for anything ordered from this tariff, collocater shall, prior to the Bill Due Date ("BDD"), give written notice to SWBT of the amounts it disputes ("Disputed Amounts") and include in such written notice the following information: (a) the date of the bill in question, (b) the Billing Account Number ("BAN") of the bill in question, (c) any USOC information question, (d) the amount billed, (e) the amount in question, (f) the reason that collocater disputes the billed amount. To be deemed a "dispute" under this paragraph 6.6.1, collocater must either (a) make payment in full to SWBT of the amount billed, or (b) provide proof (in the form of a copy of the executed written agreement with the financial institution) that it has established an interest bearing escrow account that complies with all of the requirements set forth in paragraph 6.6.2 of this tariff and proof (in the form of deposit slip(s)) that collocater has deposited all unpaid charges into that escrow account. Failure to provide payment in full or the

information and proof of compliance and deposit as required by this paragraph 6.6.1 not later than twenty-nine (29) days following the Bill Due Date shall constitute collocators irrevocable and full waiver of its right to dispute the subject charges.

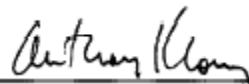
NuVox's claim that this provision does not apply to this dispute is preposterous.

20. NuVox has simply not complied with the mandatory provisions of SBC Missouri's collocation tariff, and should not be permitted to proceed with its Complaint, much less be awarded any "expedited" relief. Here, NuVox admits that it did not follow the requirements contained in the tariff for disputing billed amounts, as described above. NuVox has neither paid the entire amount billed, nor has it, in the alternative, established an appropriate interest bearing escrow account and provided evidence that it has paid the entire amount in dispute into this account, as specifically required under Section 6.6.1 of SBC Missouri's physical collocation tariff.

21. The Commission should not -- and indeed cannot -- issue any expedited order excusing NuVox from complying with SBC Missouri's physical collocation tariff on a retroactive basis.

WHEREFORE, SBC Missouri respectfully requests that the Commission deny NuVox's request for any "expedited orders" or any other relief in this case.

Respectfully submitted,
SOUTHWESTERN BELL TELEPHONE L.P.

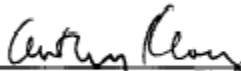
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served on counsel for all parties below by first-class postage prepaid, U.S. Mail on May 15, 2003.



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