

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

JACOR CONTRACTING, INC.	)	
	)	
Complainant,	)	
	)	
v.	)	
	)	
NUVOX COMMUNICATIONS OF	)	Case No. CC-2009-0128
MISSOURI, INC.	)	
	)	
and	)	
	)	
SOUTHWESTERN BELL TELEPHONE	)	
COMPANY D/B/A AT&T MISSOURI,	)	
	)	
Respondents.	)	

AT&T MISSOURI'S MOTION TO DISMISS

COMES NOW Respondent, Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T Missouri"), and pursuant to the Commission's January 21, 2009, Order Directing Filing of Status Report and Re-Setting Procedural Schedule ("Order"), respectfully files herewith its Motion to Dismiss directed to the Complaint of JACOR Contracting, Inc. ("JACOR").

JACOR's Complaint must be dismissed because it fails to state a claim on which relief may be granted against AT&T Missouri, and it seeks relief which is beyond the jurisdiction of the Commission to grant. JACOR's Complaint makes claims against NuVox and AT&T Missouri pursuant to the "just and reasonable" and "anti-discrimination" provisions of Section 392.200.1 and .3, RSMo, respectively. Complaint, ¶ 9, 10. However, the Complaint recognizes that NuVox and AT&T Missouri perform very different roles insofar as JACOR is concerned, and while these roles may allow JACOR to make such claims against NuVox (JACOR's telecommunications services provider), they do not permit JACOR to make such claims against

AT&T Missouri (NuVox's wholesale facilities provider). In addition, the Complaint should be dismissed for the separate reason that it is moot.

1. The Complaint makes clear that JACOR is NuVox's customer, not AT&T Missouri's customer. The Complaint states that JACOR "is a telecommunications service customer of Respondent NuVox and those services are a subject of this Complaint." Complaint, ¶ 1. Elsewhere, JACOR explicitly states that it is NuVox (not AT&T Missouri) which "provid[es] telecommunications services to JACOR." Complaint, ¶ 4. Thus, the Commission has jurisdiction to resolve JACOR's Section 392.200 claims directed to NuVox.

2. In contrast, the Complaint does not claim that JACOR is a customer AT&T Missouri and it does not claim that AT&T Missouri provides JACOR any telecommunications services. Indeed, JACOR does not claim that it has any contractual or other legal relationship with AT&T Missouri. JACOR could not make such a claim because no such contractual or legal relationship exists between JACOR and AT&T Missouri. Instead, JACOR merely alleges that "[i]n the course of providing telecommunications services to JACOR, NuVox utilizes the telecommunications facilities of AT&T Missouri which are made available to NuVox pursuant to the Telecommunications Act of 1996, 47 U.S.C. § 251 *et seq.*" Complaint, ¶ 4.

3. AT&T Missouri's provision of its network facilities to NuVox pursuant to the interconnection agreement between NuVox and AT&T Missouri is solely a subject of federal law. It is clear that the Act fundamentally restructured local telephone markets. *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 371 (1999). The states' role is specifically limited to that conferred by federal law. Thus, Section 252(e)(1) of the Act provides that an interconnection agreement -- like that between NuVox and AT&T Missouri -- must be (and here, was) submitted to the state commission for approval. This grant of power to approve necessarily includes the

power to enforce the interconnection agreement, as a matter of federal (not state) law. *Southwestern Bell Tel. Co. v. FCC*, 225 F.3d 942, 946 (8th Cir., 2000); *Southwestern Bell Tel. Co. v. Public Utilities Commission*, 208 F.3d 475, 479-80 (5th Cir. 2000) (further citations omitted).

4. Here, however, JACOR attempts to invoke a state law having no application to AT&T Missouri's provision of facilities to NuVox. Under controlling law, that attempt must be rejected:

"The question ... is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has." AT&T Corp., 525 U.S. at 379 n. 6. The new regime for regulating competition in this industry is federal in nature, see *id.*, and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state law. Therefore, while the grant of state commission enforcement power in § 252 is implicit rather than express, we can reach no conclusion but to agree with the FCC's determination that the state commissions' power to enforce interconnection agreements springs from § 252." (emphasis added)

Southwestern Bell Tel. Co., 225 F.3d at 946-947.

5. While the Commission has the authority to enforce an interconnection agreement between the parties, neither NuVox nor AT&T Missouri approached the Commission with a request that the Commission do so.¹ Regardless, AT&T Missouri's provision of its network facilities to NuVox is not, and cannot be made, the subject of a Section 392.200 claim on behalf of JACOR. Therefore, the Complaint fails to state a viable claim, and the Commission lacks jurisdiction to provide JACOR relief. The Complaint should be dismissed as to AT&T Missouri.

6. Finally, JACOR's Complaint is moot and should be dismissed for this separate reason. As is stated in the parties' Joint Status Report (filed January 26, 2009), "work on

¹ Moreover, should this motion to dismiss be granted, the matter of AT&T Missouri's crossclaim will no longer be ripe and need not be addressed.

JACOR's facilities has been completed and has resulted in providing JACOR uninterrupted service to date."

WHEREFORE, AT&T Missouri respectfully requests that JACOR's Complaint be dismissed with respect to AT&T Missouri, and for such other and further relief as may be just and appropriate under the circumstances.

Respectfully submitted,

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

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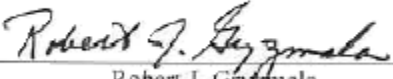
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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by e-mail on February 12, 2009.


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