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 AT&T Missouri Asserts are Non-Impaired Under the TRRO.	)))))	Case No. TO-2006-0360

CLEC COALITION RESPONSE TO ORDER
DIRECTING FILING REGARDING PROCEDURAL PROCESS

COME NOW NuVox Communications of Missouri, Inc. ("NuVox"), XO Communications Services, Inc. ("XO"), and McLeodUSA Telecommunications Services, Inc. ("McLeod")(collectively, "CLEC Coalition") and file their joint response to the Commission's Order Directing Filing Regarding Procedural Process in the above-referenced docket.

I. Introduction.

The CLEC Coalition urges the Commission to approve a procedural schedule that comprehensively addresses the issues in this docket in a single "phase." As discussed herein, this case presents four basic issues. It is therefore much simpler to process than most of the telecommunications arbitrations that come to this Commission for resolution. Experience in other state proceedings demonstrates that a "two phase" approach to the issues in this case does not result in more expeditious resolution of the disputed issues, adds unnecessary layers of complication, impedes discovery of relevant facts, and divorces consideration of legal and factual issues in counterproductive ways.

II. The Nature of The Issues In This Docket Do Not Justify A Departure From The Traditional Procedural Framework For Resolving Disputes.

The FCC issued its *Triennial Review Remand Order* ("*TRRO*")[1] in February 2005. The proper interpretation and practical application of specific terms of the *TRRO* is the subject of this case. The *TRRO* provisions directly applicable to the issues in this proceeding include *TRRO* paragraphs 78-132, 149-181, and 233-234. In addition the Rules adopted by the FCC in the *TRRO* relevant to unbundling of high-capacity loops and dedicated transport include the definitions of "Business Line," "Fiber-Based Collocator," and "wire center," at 47 C.F.R. § 51.5, as well as the general provisions governing unbundling of high-capacity loops (47 C.F.R. § 51.319(a)(4)-(5)) and dedicated transport (47 C.F.R. § 51.319(e)).[2]

The parties' disputes center on their differing views regarding the facts and law related to the following questions:

- What constitutes a "Fiber-Based Collocator" as defined in the *TRRO*?
- What is the proper way to identify "Business Lines," as that term is defined in the *TRRO*?
- What data sources should be used to compile the count of "Fiber-Based Collocators" and "Business Lines," and on what time period should that data be based?
- Are the counts of "Fiber-Based Collocators" and "Business Lines" that AT&T Missouri submitted to the FCC and this Commission factually accurate?

Based on the Commission's answers to these questions, the parties can complete a final, Commission-approved list of wire centers in Missouri where AT&T is no longer required to provide access to unbundled high-capacity loops or dedicated transport pursuant to Section 251 of the federal Telecommunications Act of 1996 (the "1996 Act").

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1 *In the Matter of Unbundled Access to Network Elements,* WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338. (TRO Remand Order), rel'd February 4, 2005.

2 The Rules amended by the *TRRO* are included as "Appendix B" to the *TRRO* as issued by the FCC.

The issues are not extensive, especially not when compared to recent telecommunications arbitrations conducted by the Commission in "one phase" proceedings. The issues do, however, require the presentation of factual information and legal argument in order to be resolved. For example, the question of what data sources should be utilized in the count of Fiber-Based Collocators can be best evaluated if the Commission has before it the results of the application of one standard or the other. The assessment of the credibility of various parties' views on what data the FCC meant to be used is more difficult if the facts (*i.e.,* how the actual counts are affected by the application of the parties' theories) are not considered concurrently with the law.

Moreover, the question of whether AT&T accurately identified all carriers as Fiber-Based Collocators is a factual inquiry that the Commission will need to undertake regardless of the outcome of the related legal issues. The CLEC Coalition is aware of factual errors in the identification of Fiber-Based Collocators by the ILECs in states served by both AT&T and BellSouth. Without adequate discovery, such errors (which may directly affect the de-listing of wire centers) may not be detected. No matter how the legal issues related to the interpretation of the *TRRO* are resolved, there still must be a procedure for confirming that the carriers identified as Fiber-Based Collocators by AT&T were correctly identified. Hence, separation of phases only puts off resolution of the factual issues; it cannot eliminate the need to address them.

The traditional procedure for presenting disputes puts both the facts and the law before the Commission, which provides the Commission the opportunity to assess the real world impact of its rulings as well as their legal niceties. A hearing that covers all the disputed issues also creates a more complete record on which the Commission can base its final decisions.

II. The "Two Phase" Process Delivers No Benefits and Causes Unnecessary Problems.

As discussed during the prehearing conference on June 14, 2006, the parties have litigated the issues raised in NuVox's petition before numerous state commissions. There have been dozens of state proceedings implementing the *TRRO*; only four of those have utilized the "two phase" process advocated by AT&T. While the procedure appeared to promise certain benefits when it was first conceived soon after the issuance of the *TRRO*, those benefits have not been realized. Instead, the process has resulted in problems that can be avoided if the Commission opts to use the normal process for litigating disputed issues.

The companies in the CLEC Coalition (as well as their counsel and consultants) have been involved in *TRRO* implementation proceedings all over the country. The only states that have utilized the two-phase process are the former "SWBT" states of Arkansas, Kansas, Oklahoma, and Texas. Other states served by AT&T have used a "one phase" process (including Illinois, Indiana, Michigan, and Ohio.) All nine states in the BellSouth region considered the issues in dispute here in one-phase proceedings that also took up over 30 other *TRRO*-related implementation issues.

The purported benefit of the two-phase process is related to the alleged speed of completing the dispute resolution proceeding. According to AT&T, if the Commission resolves all the disputed legal issues in its favor, there is no reason for the parties to conduct discovery and to confirm AT&T's counts of Fiber-Based Collocators and Business Lines. AT&T's argument is incorrect. As discussed above, no matter how the Commission resolves the disputed legal issues, it will still need to investigate and confirm AT&T's actual count of Fiber-Based Collocators and Business Lines. Only after the Commission confirms the final numbers can it make a final determination of the wire centers in which the *TRRO* requires limitations on the availability of Section 251 high capacity loop and dedicated transport UNEs.

In addition, while AT&T bases its claims of expedience on an assumption that the Commission will endorse every aspect of AT&T's legal position, thus far, only one state (Ohio) has agreed with AT&T's interpretation of both the *TRRO* Fiber-Based Collocator and Business Line standards. Other states have disagreed with some or all of AT&T's legal position. Either way, the state commission did not avoid the completion of the "second phase" of the two-phase proceeding. Notably, only one state that undertook a two-phase proceeding (Texas) has actually completed it. And in Texas, the proceeding took just under one year to complete.[3] In addition, the two-phase approach resulted in disputes among the parties about what was included in the first versus the second phase, and at what point in the process particular discovery was to be permitted. The two-phase process simply did not deliver the "speed" and "simplicity" that its proponents hoped it would.

In Arkansas, Kansas, and Oklahoma, NuVox agreed to use the two-phase process used in Texas for the wire center de-listing proceedings in those states.[4] In those states, however, the number of wire centers AT&T claimed as "de-listed" was significantly smaller than it is here in Missouri. Due to the smaller markets present in those states, AT&T could not claim any de-listing of unbundled high-capacity loops in any state, and the number of purportedly de-listed transport routes was much smaller than what is now claimed in the major Missouri markets. Given those differences, NuVox was more willing to try the unusual two-phase approach in those states.

In addition, NuVox was hopeful that the two-phase process might achieve the speed and efficiency claimed by AT&T. In practice, however, that has not been the case. The two-phase

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[3] SBC Texas filed its complaint initiating the Texas proceeding on June 30, 2005. The Texas PUC's Order resolving the final "phase two" issues was issued June 16, 2006. *See* Texas Public Utility Commission, Docket No. 31303, SBC Texas' Complaint for Post-Interconnection Dispute Resolution Regarding UNE Declassification By Wire Center, docket sheet available at http://interchange.puc.state.tx.us.

[4] NuVox was not a party to the Texas proceeding. McLeod and XO were parties to the Texas case, but not parties in the other three former "SWBT" states. In Texas, the Commission ordered the use of the two-phase process. The CLEC Coalition of which McLeod and XO were members was involved in the various Texas procedural disputes about which issues were to be addressed in which phase of the proceeding. McLeod, NuVox, and XO are all parties to the wire center de-listing proceedings in the former "Ameritech" states in the upper Midwest.

process has not yet been completed in Arkansas, Kansas, or Oklahoma, and only Kansas has even completed the first phase of the proceeding. The CLEC Coalition understands the resource constraints experienced by state commissions and has no complaints about how much effort has been devoted to the cases in those states. The Coalition notes, however, that in each of those states the completion of the first phase will not wrap up the case; rather, the second phase must still be scheduled and completed. In sum, experience with the two-phase process has not provided any evidence that it provides a more efficient method for resolving the disputes in this context.

In a normal one-phase proceeding, by contrast, all the factual and legal issues are "on the table" when the case goes to hearing. The parties can advocate their positions on all the disputes related to interpretation of the *TRRO* (the counting "methodology" issues) and the accuracy of AT&T's counts (the "confirmation" issues). In the former "Ameritech" states where CLEC Coalition companies have been participants, their experience has been that the methodology and confirmation issues both require discovery, and both require attention at the hearing on the merits. A process that separates those issues into two phases (with two associated procedural schedules, hearings, sets of briefs, and Commission decisions) has proved to be less conducive to the complete and efficient resolution of the issues before the state commissions.

Finally, the resolution of the factual issues can be completed without overly burdensome discovery. In the BellSouth region, the CLECs (including NuVox and XO) engaged in a straightforward process with BellSouth for confirmation of its Fiber-Based Collocator counts. The key to the process was a simple discovery request to the companies alleged to be Fiber-Based Collocators by BellSouth. Through this request, numerous CLEC collocators were confirmed as true "Fiber-Based Collocators" as defined in the *TRRO*, and several incorrect designations by BellSouth were corrected. The process was completed through a simple process involving BellSouth and

CLEC personnel, working cooperatively to create a "consensus" list of agreed Fiber-Based Collocators in BellSouth's wire centers in nine states.

As Staff noted in its filing earlier this week,[5] AT&T's advocacy of a two-phase process goes hand-in-hand with its resistance to discovery needed to resolve the disputed issues. Lack of discovery impedes Staff's and the other parties' ability to investigate – and thereby confirm or dispute – AT&T's claims. Deferring discovery in this context is not conducive to the development of the record the Commission needs to make its determinations in this case efficiently and judiciously. The CLEC Coalition concurs in Staff's opposition to bifurcating this proceeding into two phases.[6]

III. Conclusion

The traditional process for dispute resolution provides the best model for resolving the issues presented in this case. The two-phase process advocated by AT&T was a procedural experiment that has not benefited either the parties or the commissions in the states in which it was used. As discussed herein, the two-phase process actually created problems and additional disputes that simply do not exist when the Commission uses the traditional litigation and case management procedures applicable to other dispute resolution proceedings.

The CLEC Coalition urges the Commission to require the parties to establish a procedural schedule, including a discovery schedule, based on the Commission's traditional dispute resolution procedures.

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[5] Case No. TO-2006-0360, *Staff's Response TO Order Directing Filing Regarding Procedural Process* (August 14, 2006) ("*Staff Response*").

[6] *See* Staff Response at 1 ("Because Southwestern Bell's view of a bifurcated proceeding appears to include delaying the discoverability of facts relevant, or potentially relevant, to the second phase, the Staff opposes bifurcating the proceedings in this case.")

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 18th day of August, 2006

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