

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.)	

**AT&T MISSOURI'S RESPONSE TO ORDER DIRECTING
FILING REGARDING PROCEDURAL PROCESS**

AT&T Missouri,¹ in accordance with the Commission's August 9, 2006, Order Directing Filing Regarding Procedural Process ("Order"), respectfully submits that this case should proceed – as has every other similar "wire center non-impairment" case among the other four AT&T ILEC Southwest states – in a bifurcated manner. In other words, the case should "be resolved using two phases; the first phase to determine the methodology and the second to check the results." Order, p. 1.

SUMMARY

Bifurcation would allow the case to be tried far more efficiently. There are two principal reasons why this is so. First, any issues ruled in favor of AT&T Missouri in Phase I regarding whether its "methodology" to assess wire center non-impairment accurately replicates the methodology intended by the FCC in its TRRO² decision would necessarily eliminate the need to perform a Phase II "recount" under a different methodology. The savings in the Commission's, Staff's and the parties' resources relating to such a recount (including but not limited to preparation of testimony and hearing room time) would be significant.

¹ Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri.

² In the Matter of Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, 20 FCC Rcd 2533 (2005).

Second, discovery limited to a potential recount (i.e., Phase II discovery) could be conducted when and if a recount becomes necessary, based upon a Commission decision regarding Phase I, a decision which may moot much if not all of any need for a recount, and most certainly will limit it to at least some degree. This consideration is important, as several discovery issues regarding a potential recount are already emerging and will likely require Commission intervention unless the case is bifurcated. For example, parties are seeking AT&T Missouri's ARMIS information from 2004 and 2005, even though that information will be completely irrelevant if the Commission agrees that AT&T Missouri appropriately followed the FCC's TRRO by relying on ARMIS data filed in 2003 (as several other state commissions have recognized, including both Kansas and Texas), which was the most recent data available at the time of AT&T Missouri's wire center designations. In contrast, very few issues are emerging with respect to discovery directed to AT&T's Missouri's methodology itself.

The CLECs will no doubt argue that some form of a recount will almost certainly be required, so there is no reason to defer the matter. That misses the mark. While only Texas and Kansas have ruled among the five commissions in the AT&T Southwest ILEC states, neither gave a complete victory to either AT&T Missouri or the CLECs. Importantly, however, the decisions served to narrow recount issues and associated work. For example, those commissions adopted AT&T's methodology on most or all "business line" counting issues.

In sum, this case would be more efficiently prepared, tried and decided if it is bifurcated. Phase I testimony and a decision could move forward quickly, and could eliminate some or all recount issues. To the extent Phase II issues remain, AT&T Missouri would be amenable to participating in a prehearing conference very shortly after issuance of a Phase I order, to complete Phase II expeditiously.

BIFURCATION OF THIS CASE WOULD BE MOST EFFICIENT

The FCC's TRRO decision, issued following the remand of the FCC's TRO decision, reflects a desire to provide "easily implemented and reasonable bright-line rule[s] to guide the industry." (TRRO, para. 169). These rules are captured at 47 C.F.R. 51.5 and 47 C.F.R. 51.319, and they prescribe the criteria, or "methodology," by which wire centers may be regarded as "non-impaired" for purposes of the FCC's loop and transport unbundling requirements. Simply put, once certain criteria are met (which differ depending upon the type of loop and type of dedicated transport involved), no further unbundling of that network element "will be required in that wire center."³ The rules are based upon identifying a requisite number of fiber-based collocators and business lines in a wire center. Employing these bright-line rules, AT&T Missouri developed a list of wire centers and their non-impairment status under the TRRO.

The issue presented by this case is whether AT&T Missouri correctly interpreted the criteria prescribed by the FCC. Depending upon the resolution of that issue, the task of engaging in a "recount" may never surface, or be limited even if it does. For example, if the Commission were to determine that AT&T Missouri's methodology is correct, no further action in the case would be necessary or required. A recount would become necessary only if the Commission were to conclude that the methodology AT&T Missouri used was flawed -- and then only to the

³ 47 C.F.R. 51.319(a)(4)(i) (DS1 loops); 47 C.F.R. 51.319(a)(5)(i) (DS3 loops); see also, 47 C.F.R. 51.319(e)(2)(ii)(A) (dedicated DS1 transport unbundling required except where both wire centers defining the route are so-called "Tier 1 wire centers" according to the FCC's criteria); 51.319(e)(2)(iii)(A) (dedicated DS3 transport unbundling required except where both wire centers defining the route are "either Tier 1 or Tier 2 wire centers" according to the FCC's criteria).

extent of the flaw. All of the other AT&T ILEC Southwest states have proceeded on this agreed-to “bifurcated” approach. As the CLECs’ counsel explained in more detail in this case:

“In Kansas, Oklahoma and Arkansas there was agreement to do this two-phase approach, and that was following a case in -- the case on this in Texas where the Commission decided it wanted to look at the, call it methodology questions. That is, when AT&T produced its list of wire centers it said should be delisted, were they -- were they basically interpreting the FCC rule correctly.

That was taken up in a -- in a first phase, and then the second phase was devoted if the answer is no, that AT&T did not do it completely correctly, how do we go back and correct their assertions about what should be delisted.”⁴

This Commission should likewise take advantage of the same efficiency that other states enjoyed and to which the CLECs agreed. In the CLECs’ own words, Phase I would decide whether AT&T Missouri was “basically interpreting the FCC rule correctly.”⁵ Thus, if the Commission answers this question in the affirmative, a Phase II recount would become moot. At a minimum, a Phase II recount would be narrowed to only those instances in which the Commission were to decide that AT&T Missouri fell short in “basically interpreting the FCC rule correctly.” That in itself represents a significant savings in the Commission’s Staff’s and the parties’ resources when preparing pre-filed testimonies, framing issues, identifying witnesses and scheduling sufficient hearing dates.

Another significant efficiency benefit is the proper management of discovery, so that the parties’ focus on bringing Phase I issues to conclusion is not hindered by preparing or responding to discovery or resolving discovery disputes limited to Phase II issues which may never surface.

⁴ Transcript of Proceedings, June 14, 2006, p. 11.

⁵ Id.

This consideration is important. Parties waived discovery altogether in Arkansas, Kansas and Oklahoma.⁶ In contrast, AT&T Missouri has already received several data requests from NuVox and XO which have nothing to do with the “methodology” AT&T Missouri employed. Rather, these data requests are principally directed to other matters that may never surface in a Phase II case. Two examples illustrate.

NuVox and XO ask whether, in identifying fiber-based collocators, AT&T Missouri “traced an interoffice fiber-optic cable directly from outside the wire center to the collocation arrangement of the named fiber-based collocator.” This inquiry is properly directed to whether AT&T Missouri’s methodology was proper. However, NuVox and XO also seek the name of

⁶ See, *Southwestern Bell Telephone, L.P. d/b/a AT&T Arkansas vs. NuVox Communications of Arkansas, Inc.*, Docket No 05-140-C, Order No. 6, issued February 13, 2006, p. 1 (in which NuVox asked to bifurcate the proceedings, and the subsequent Order states: “By agreement of the parties, this docket will be conducted in two phases. Phase I will consider the methodology to be used in determining wire center ‘impairment’ and will deal with the issues of the appropriate methodology for business line counts and fiber based collocator counts. Phase II will establish wire center impairment in accordance with the methodology developed in Phase I. . . . NuVox Communications of Arkansas, Inc. agrees to waive the discovery requests filed in this docket.”). The procedural schedule was thus streamlined, consisting of the filing of direct, rebuttal and surrebuttal testimonies, followed by a hearing. *Id.*, Order No. 5, issued January 19, 2006, p. 1.

See also, *In the Matter of the Complaint for Post-Interconnection Dispute Resolution of Southwestern bell telephone, L.P., Against NuVox Communications of Kansas, Inc. regarding Wire Center UNE Declassification*, Docket No. 06-SWBT-743-COM, Order Adopting Procedural Schedule, issued February 23, 2006, p. 1 (indicating that “SWBT and NuVox agreed that no discovery was necessary at this point of the proceedings” and that the procedural schedule was likewise streamlined, consisting of the filing of simultaneous initial and rebuttal testimonies, followed by a hearing, then briefs).

In Oklahoma, the parties likewise agreed to a bifurcated proceeding and the parties waived discovery. See, *In the Matter of the Complaint of Southwestern bell telephone, L.P., d/b/a AT&T Oklahoma Against NuVox Communications of Oklahoma, Inc. regarding Wire center UNE Declassification*, Cause No. PUD 200600034, Order No. 520427, issued February 22, 2006, p. 1 (similarly reflecting the parties’ agreement to bifurcate the proceedings and stating that “NuVox waives *de novo* discovery on [methodology] issues in this Oklahoma proceeding.”).

In short, in each of these three cases, the parties relied on Texas discovery and no “new” discovery was undertaken in those states. As did its ILEC affiliates in those states, AT&T Missouri undertook the same methodology in implementing the TRRO rules as was undertaken in Texas.

each fiber-based collocator.⁷ The names of specific collocators are not relevant to the issue of methodology. Moreover, given the highly confidential nature of the information sought by NuVox and XO, it makes more sense for the Commission to wait and see whether such information would even be relevant under the counting methodology it approves in the first phase.

As a second example, NuVox and XO also ask for a great deal of numerical data directed to business lines as of end-year December 31, 2003, 2004 and 2005.⁸ In this case, as elsewhere, AT&T Missouri developed business line count data based upon the last ARMIS 43-08 data submitted to the FCC before the issuance of the TRRO, i.e., data filed with that agency as of December 31, 2003. The CLECs will no doubt claim, as they have elsewhere, that later data should have been employed, presumably because of their assumption that later data will reflect lower business line counts (due in part to migration to wireless and other inter-modal services), and thus a greater likelihood that the wire center may not be deemed non-impaired.

⁷ The entire data request is as follows:

For each wire center where AT&T Missouri claims non-impairment for loops and/or transport based in whole or in part on the number of fiber-based collocators, please:

- a. Provide the name of each fiber-based collocator;
- b. State for each named fiber-based collocator whether AT&T Missouri traced an interoffice fiber-optic cable directly from outside the wire center to the collocation arrangement of the named fiber-based collocator (i.e., there is no cross-connection from the collocation of the named fiber-based collocator to the collocation arrangement of another carrier); and
- c. If your answer to (b) is “no”, describe the specific configuration that AT&T Missouri observed for the named fiber-based collocator.

⁸ The entirety of one example of such a data request is as follows:

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.

Such discovery has nothing to do with the threshold methodological question presented in this case, i.e., whether AT&T Missouri was “basically interpreting the FCC rule correctly” in using the data it did. If the Commission holds, as it should and as several other state commissions have (including Kansas and Texas),⁹ that AT&T Missouri’s reliance on 2003-filed data was appropriate, issues regarding what the business line count would have been using data filed in 2004 or 2005 become moot, and so too does all of the discovery and other case preparation and decision work associated with it.

These and other discovery issues are ripening now into disputes that will no doubt surface at the Commission unless it takes a firm hand now to manage these proceedings by imposing the same bifurcated approach to which the CLECs agreed elsewhere. The result will yield a more efficient process, both with respect to the case at large, and in particular, with respect to the conduct of discovery and development of a procedural schedule.¹⁰

Staff’s Response filed August 14, 2006, opposes bifurcation because it “appears to include delaying the discoverability of facts relevant, or potentially relevant, to the second phase.” (Staff’s Response, p. 2). This observation is singularly unhelpful, since it merely begs the question of whether delaying all activities related to Phase II while Phase I is in progress

⁹ In the Matter of the Complaint for Post-Interconnection Dispute Resolution of Southwestern bell telephone, L.P., Against NuVox Communications of Kansas, Inc. regarding Wire Center UNE Declassification, Docket No. 06-SWBT-743-COM, Order Determining Proper Method For Fiber-Based Collocator and Business Line Counts, June 2, 2006, pp. 28-29; Post-Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification, PUC Docket No. 31303, Arbitration Award, April 6, 2006, pp. 27-29.

¹⁰ Finally, AT&T Missouri notes that the Commission has previously ordered bifurcated proceedings. One recent example is Case No. TE-2006-0053, Order Establishing Procedural schedule, Bifurcating Proceeding, Extending Temporary Waiver and Changing Style of Case, issued March 1, 2006. AT&T Missouri is confident that in the present case, it can agree, for its part, that “[i]f the decision in this matter [regarding methodology] does not moot the remaining issues [regarding recount], the parties will file a suggested procedural schedule for further proceedings within 10 days of the issuance of such decision.” Id., at 3.

would represent the most efficient means of proceeding here. Staff never addresses that fundamental question. Even if the discovery of facts relevant to Phase II is delayed, the fact is that the delay will allow the discovery issues to be narrowed (or perhaps eliminated), thus allowing the case as a whole to be run more efficiently and economically for all concerned.

For the foregoing reasons, AT&T Missouri respectfully submits that this case should proceed – as has every other similar wire center non-impairment case among the other four AT&T ILEC Southwest states – in a bifurcated manner.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.

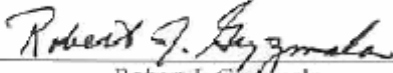
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CERTIFICATE OF SERVICE

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