

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

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

**AT&T MISSOURI'S RESPONSE TO NUVOX/XO'S SUPPLEMENTAL  
MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS**

AT&T Missouri,<sup>1</sup> in accordance with Commission Rules 2.080(15) (4 CSR 240-2.080(15)) and 2.090 (4 CSR 240-2.090), respectfully submits this response to the April 6, 2007, Supplemental Motion to Compel Responses to Discovery Requests filed by NuVox/XO.<sup>2</sup> For the reasons stated herein, NuVox/XO's Supplemental Motion should be denied.

**I. SUMMARY OF RESPONSE**

NuVox/XO's Supplemental Motion, which seeks to compel responses to Data Requests ("DRs") 4 and 5, should be denied for the same reasons its motion brought almost four weeks ago should be denied.<sup>3</sup> First, it is untimely, even more so than the motion earlier brought (which itself should be denied due to untimeliness), and its grant would severely prejudice AT&T Missouri. Indeed, counsel for NuVox/XO offers no explanation why the Supplemental Motion could not have been brought earlier. Under the procedural schedule, final testimony is due to be filed on April 27, and the procedural schedule does not provide for any further testimony. As a result, were the Commission to grant any part of NuVox/XO's Supplemental Motion, AT&T Missouri would not have an opportunity to provide evidence regarding any claims the CLECs

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

<sup>2</sup> 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. ("NuVox/XO's Supplemental Motion").

<sup>3</sup> AT&T Missouri's Response to NuVox/XO's Motion to Compel Responses to Discovery Requests Propounded to Southwestern Bell Telephone, L.P. ("NuVox/XO's Motion"), March 30, 2007.

may make in their April 27 testimony based on any information AT&T Missouri had produced as a result of their motions. This would be so fundamentally unfair as to deny AT&T Missouri due process.

Second, DRs 4 and 5 are clearly irrelevant and overly broad. AT&T Missouri has already provided information (albeit in a different format) for year-end 2003. Information for year-end 2004 and for year-end 2005 is not relevant to this case. Consistent with the *TRRO*, AT&T Missouri's business line counts were based on the data then available to AT&T Missouri (i.e., as of December 31, 2003) when the FCC made its *TRRO* effective, i.e., March 11, 2005. Further, its fiber-based collocator identifications were based on inspections likewise made in early 2005. Inspections in 2003 would have been a waste, as they would have preceded the order by over a year before the order's rules for determining fiber-based collocators were even established.

Third, NuVox/XO do not quarrel with AT&T Missouri's responses to DRs 4 and 5. Instead, they now seek different information -- but they cannot point to a single DR which specifically asks for this information (irrelevant though it would be). The Commission cannot order one to provide information that would be responsive to a DR that was never propounded in the first place.

For all these reasons, NuVox/XO's Supplemental Motion should be denied. In addition, under no circumstances should the Commission require AT&T Missouri to provide any response within five business days, as NuVox/XO's Supplemental Motion requests. The information, even if it could be assembled in the format in which the information responsive to DR 3 was formatted, would not be available for approximately ten to fourteen days. An earlier filed motion (even assuming it were well taken) would have alleviated this particular concern and

AT&T Missouri should not have to absorb the consequence of NuVox/XO's failure to have brought such a motion.

## **II. ANALYSIS**

As AT&T Missouri previously stated in its response to NuVox/XO's previous motion, while it has maintained from the beginning that it "welcomes the Commission's oversight in a proceeding to validate the accuracy of AT&T Missouri's list of non-impaired wire centers,"<sup>4</sup> discovery should be subject to reasonable limits. The two DRs which are the subject of NuVox/XO's instant motion (like those which are the subject of their earlier motion) were generated over seven months ago. Were the Commission to grant the NuVox/XO's Supplemental Motion in any respect, the only testimony in which such discovery responses could conceivably now be included is Rebuttal Testimony, which is due on April 27, 2007. But that would not be proper, because there is no provision in the procedural schedule for any further testimony. As a result, were the Commission to grant any part of NuVox/XO's Motion, it would deny AT&T Missouri an opportunity to respond to any claims the CLECs may make regarding the additional information produced. Evidence as to which there is no opportunity afforded to respond is not admissible. To hold otherwise would be inconsistent with (if not directly violative) of due process. That being the case, neither of the two DRs is reasonably calculated to lead to the discovery of admissible evidence and NuVox/XO's Supplemental Motion must be denied for this reason alone.

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<sup>4</sup> AT&T Missouri's Response to NuVox/XO Motion, March 30, 2007, p. 2, quoting AT&T Missouri's Response to Order making AT&T Missouri a Party and Directing Filing, April 20, 2006, p. 2.

NuVox/XO may argue in reply that no Commission rule prevents granting its belated motion.<sup>5</sup> That argument is a red herring. The fact that a Commission rule does not expressly prohibit an act or course of conduct does not necessarily validate or sanction that act or course of conduct. This Commission and the parties who appear before it are quite familiar with the need to conduct discovery and resolve disputes in an expeditious and timely manner that takes into account an orderly process for the filing of testimony. The Commission is not required to alter the procedural schedule here to suit NuVox/XO's belated motion, particularly given its tenuous nature. Rather, the motion should simply be denied.<sup>6</sup>

NuVox/XO may also argue that it would be sufficient were AT&T Missouri allowed to address NuVox/XO's Rebuttal Testimony through cross-examination of NuVox/XO's witness.<sup>7</sup> That argument likewise misses the mark. If NuVox/XO's motion is granted, and NuVox/XO include in their April 27 testimony information that AT&T Missouri produced as a result of an order requiring it to do so, due process requires that AT&T Missouri be allowed to present affirmative evidence addressed to NuVox/XO's testimony. Due process is not afforded by merely allowing cross-examination of the witness whose testimony discusses the details and import of the information that AT&T Missouri would have provided.

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<sup>5</sup> See, e.g., NuVox/XO's Reply to AT&T Missouri's Response to NuVox/XO Motion, April 9, 2007, p. 1.

<sup>6</sup> If, however, the motion is granted, then the procedural schedule should be amended to allow AT&T Missouri to respond to NuVox/XO's Rebuttal Testimony relating to the information produced. Compare, In the Matter of the Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing, Case No. TO-2001-440, Order Regarding Request for Supplemental Testimony, et al., 2001 Mo. PSC LEXIS 1366, October 9, 2001, at \*1 and \*3 (denying a CLEC's leave to file supplemental surrebuttal testimony claimed necessary due to alleged "failure to properly and timely respond to [the CLEC's] discovery requests," thus mooted the need to address AT&T Missouri's request that it be permitted to respond to such testimony to preserve its due process rights and a fair hearing and opportunity to respond to [the CLEC's] claims"), with, GST Steel Company v. Kansas City Power & Light Co., Case No. EC-99-553, Order Regarding KCPL's Motion for Clarification, et al., 1999 Mo. PSC LEXIS 86, August 19, 1999, at \*2 and \*19 (amending procedural schedule to accommodate delay occasioned by discovery disputes).

<sup>7</sup> See, e.g., NuVox/XO's Reply to AT&T Missouri's Response to NuVox/XO Motion, April 9, 2007, p. 2.

As to the substance of the DRs themselves, NuVox/XO acknowledge that AT&T Missouri adequately responded to DR 3, which requested that AT&T Missouri produce certain business line count 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.”<sup>8</sup> Their Supplemental Motion, recognizing that the information produced in response to DR 3 was not in the precise form requested,<sup>9</sup> similarly does not seek responses to DRs 4 and 5 in the precise form requested. Instead, NuVox/XO state that “NuVox and XO are not asking AT&T [Missouri] to provide what it does not have; they are asking AT&T [Missouri] to respond to Request Nos. 4 and 5 with the same type information AT&T [Missouri] provided in response to Request No. 3.”<sup>10</sup>

NuVox/XO’s entire theory of relevancy rests on its assertion that “AT&T[] [Missouri’s] count of fiber-based collocators uses 2005 data; thus, the business line count should be based on 2005 data as well.”<sup>11</sup> But, this is a clearly incomplete and misleading statement. Moreover, the facts reflect precisely why NuVox/XO’s requests for 2004 and 2005 information are not relevant and are overbroad and unduly burdensome. As explained below, AT&T Missouri relied on 2003 business line data because it was the only data available when the *TRRO* became effective -- on March 11, 2005. It also identified all fiber-based collocations in place as of March 11, 2005,

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<sup>8</sup> See, DR 3; NuVox/XO’s Supplemental Motion, p. 1 (stating without qualification that “AT&T Missouri responded to [DR 3] and provided data for the year 2003”), and p. 5 (stating that NuVox/XO “are asking AT&T [Missouri] to respond to Request Nos. 4 and 5 with the same type of information AT&T [Missouri] provided in answer to Request No. 3”).

<sup>9</sup> Although AT&T Missouri interposed an objection to DR 3, and further stated that “its supporting data is not disaggregated into the specific subparts requested,” it nevertheless provided NuVox/XO, among other things, business line data “based on December 31, 2003 data that was the most current business line data as of the effective date of the *TRRO* (March 11, 2005).” (See, AT&T Missouri’s Supplemental Response, September 14, 2006).

<sup>10</sup> NuVox/XO’s Supplemental Motion, p. 5.

<sup>11</sup> NuVox/XO’s Supplemental Motion, p. 4.

based on actual site inspections.<sup>12</sup> The FCC did not question this approach, and business line data for 2004 and 2005 thus have not been compiled, as it has been unnecessary to do so.

Following years of protracted litigation and related appeals, the FCC's *TRRO* made abundantly clear that, for good cause, the order was to be implemented as soon as possible: "Given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register."<sup>13</sup> Moreover, it determined that once a wire center was determined "non-impaired," that classification would excuse future unbundling. Indeed, it said so not once, but four times, and in the clearest of terms. Appendix A of the *TRRO* contains the rules (specifically, FCC Rule 51.319), setting forth the FCC's unbundling requirements:

As to DS1 loops:

(a)(4) DS1 loops. (i) Subject to the cap described in paragraph (a)(4)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center. (emphasis added)

As to DS3 loops:

(a)(5) DS3 loops. (i) Subject to the cap described in paragraph (a)(5)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center. (emphasis added).

And, as to transport:

(e)(3) Wire center tier structure. For purposes of this section, incumbent LEC wire centers shall be classified into three tiers, defined as follows:

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<sup>12</sup> Thus, NuVox/XO incorrectly suggest that AT&T Missouri "interprets the *TRRO* as specifying the use of 2003 data to count business lines." NuVox/XO's Supplemental Motion, p. 14. Rather, the *TRRO* expressly permits the use of 2003 data, for the reasons explained herein, and the FCC has never taken issue with AT&T Missouri's having done so.

<sup>13</sup> *TRRO*, ¶ 235.

- (i) Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center. (emphasis added).
- (ii) Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center. (emphasis added).

Given these dictates, AT&T Missouri submitted to the FCC certain information with respect to wire centers it had determined as “non-impaired” -- and it has given the same information to NuVox/XO in response to DR 3. The business line counts provided were based on December 31, 2003 data, the most current business line data available as of the March 11, 2005, effective date of the *TRRO*. In consistent fashion, the identified fiber-based collocations included all fiber-based collocations in place as of March 11, 2005. On December 16, 2005, AT&T provided the FCC -- and has also provided to NuVox/XO -- changes to the original wire center designations required by the SBC/AT&T merger conditions. This information, provided in response to DR 3, strips from the fiber-based collocation arrangements in place as of March 11, 2005, all pre-merger AT&T (and affiliates) fiber-based collocation arrangements.<sup>14</sup>

It is of no consequence that the fiber-based collocator counts rested on 2005 inspections. Inspections conducted in 2003, based upon requirements set forth in the *TRRO* issued in 2005,

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<sup>14</sup> The only difference between the March 11 and December 16 submissions is the exclusion of the pre-merger AT&T (or its affiliates) from the fiber-based collocator counts, which resulted in the reclassification of several AT&T Missouri wire centers. However, in both instances, the line counts remain based on December 31, 2003 data, which was the most current business line data available as of the March 11, 2005, effective date of the *TRRO*.

would have been physically impossible. Yet, as noted above, the FCC fully envisioned, if not invited, non-impairment designations to be made as of the effective date of the *TRRO*. Indeed, to accept NuVox/XO's view would have effectively denied AT&T Missouri its right to proceed until after 2005 business line count became available (sometime in spring, 2006), thus effectively "putting off" the effective date of the *TRRO*. The FCC never intended such a result.

Finally, AT&T Missouri notes that NuVox/XO request that AT&T Missouri be ordered to provide responses to DRs 4 and 5 "within five business days" after issuance of an appropriate order. For the reasons explained above, no order should be issued in the first instance. The CLECs' Supplemental Motion comes far too late and cannot be granted within the parameters of the present procedural schedule without denying AT&T Missouri's due process rights. Moreover, for the reasons noted above, the DRs are not relevant.

However, should the Commission disagree, AT&T Missouri respectfully requests that no information should be required to be made available any earlier than ten to fourteen calendar days from the date of an order granting the Supplemental Motion. AT&T Missouri emphasizes that it has not compiled, either as of December 31, 2004, and/or as of December 31, 2005, the business line data it had earlier compiled as of December 31, 2003. Indeed, there was no reason to do so, as the FCC has accepted the 2003 business line data without question. And, as a consequence of the SBC/AT&T merger, while the FCC required a restatement of fiber-based collocators, it did not require a restatement of business line counts. Clearly, the FCC did not intend one to occur, especially given that its own *TRRO* rules had affirmatively stated that the wire center "non-impaired" designations following issuance of the *TRRO*, and based on data then available, should not later be "turned around."




### III. CONCLUSION

For the foregoing reasons, AT&T Missouri respectfully submits that NuVox/XO's Supplemental Motion be denied in its entirety.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.  
D/B/A AT&T MISSOURI

BY 

TIMOTHY P. LEAHY #36197

LEO J. BUB #34326

ROBERT J. GRYZMALA #32454

Attorneys for Southwestern Bell Telephone, L.P.

One AT&T Center, Room 3516

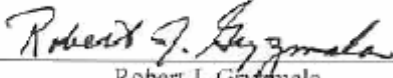
St. Louis, Missouri 63101

314-235-6060 (Telephone)\314-247-0014 (Facsimile)

[robert.gryzmala@att.com](mailto:robert.gryzmala@att.com)

## CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 16, 2007.

  
Robert J. Grymala

William K. Haas  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102  
[GenCounsel@psc.mo.gov](mailto:GenCounsel@psc.mo.gov)  
[William.Haas@psc.mo.gov](mailto:William.Haas@psc.mo.gov)

Michael F. Dandino  
Office of the Public Counsel  
P.O. Box 2230  
Jefferson City, MO 65102  
[opcservice@ded.mo.gov](mailto:opcservice@ded.mo.gov)  
[mike.dandino@ded.mo.gov](mailto:mike.dandino@ded.mo.gov)

Carl J. Lumley  
Leland B. Curtis  
Curtis, Heinz, Garret & O'Keefe, P.C.  
130 S. Bemiston, Suite 200  
Clayton, MO 63105  
[clumley@lawfirmemail.com](mailto:clumley@lawfirmemail.com)  
[lcurtis@lawfirmemail.com](mailto:lcurtis@lawfirmemail.com)

William D. Steinmeier  
Mary Ann (Garr) Young  
William D. Steinmeier, P.C.  
2031 Tower Drive  
P. O. Box 104595  
Jefferson City, MO 65110-4595  
[wds@wdspsc.com](mailto:wds@wdspsc.com)  
[myoung0654@aol.com](mailto:myoung0654@aol.com)

William L. Magness  
NuVox Communications of Missouri, Inc.  
98 San Jacinto Blvd., Suite 1400  
Austin, TX 78701  
[bmagness@phonelaw.com](mailto:bmagness@phonelaw.com)