

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Birch Telecom of Missouri, Inc., AT&T)	
Communications of the Southwest, Inc.,)	
TCG Kansas City, Inc., and TCG)	
St. Louis, Inc., NuVox Communications)	
of Missouri, Inc., and XO Missouri, Inc.)	
)	
Complainants,)	Case No. TC-2003-0547
)	(with Consolidated Case Nos.
)	XC-2003-0421 and LC-2003-0570)
vs.)	
)	
Southwestern Bell Telephone, L.P.,)	
d/b/a SBC Missouri,)	
)	
Respondent.)	

**JOINT RESPONSE OF NUVOX COMMUNICATIONS OF MISSOURI, INC.
AND XO MISSOURI, INC. TO SBC'S MOTIONS TO DISMISS**

Come Now NuVox Communications of Missouri, Inc. ("NuVox") and XO Missouri, Inc. ("XO") pursuant to 4 CSR 240-2.080(15) and for their Joint Response to SBC's Motions to Dismiss state to the Commission:

1. Without any factual basis whatsoever, and without any citation of "authority under which relief is requested",¹ SBC has frivolously moved the Commission to dismiss the complaints filed by NuVox and XO for: (1) purported failure to comply with allegedly applicable billing dispute resolution provisions contained in SBC's tariff; and (2) purported

¹ Because SBC's Motions violate 4 CSR 240-2.080(3), the Commission could simply strike them.

failure to state a claim upon which relief may be granted. The Commission should deny SBC's Motions to Dismiss as unfounded in fact and law. NuVox and XO have properly presented a dispute over the meaning of provisions in SBC's Physical Collocation Tariff that is without question a matter of primary jurisdiction for the Commission to resolve. At hearing, NuVox and XO will prove that SBC has violated its tariff by unilaterally and secretly reinterpreting provisions regarding DC power and related HVAC in an unlawful attempt to double its charges. NuVox and XO will prove that SBC's actions totally disregard and violate the interpretation and application of the tariff, and related provisions in interconnection agreements, used by all parties - including SBC - over a period of more than two years (and for more than one year after the tariff took effect plus a six-month retroactive true-up). Further, at hearing NuVox and XO will prove that the dispute resolution and escrow provisions that SBC seeks to hide behind are inapplicable to this sorry situation.

2. In summary, the complaints aver the following:

- a. NuVox and XO have been collocating in numerous SBC locations in Missouri since 1999.
- b. In connection therewith, NuVox and XO have obtained DC power and related HVAC from SBC in order to operate their collocated equipment.
- c. NuVox and XO originally obtained collocation from SBC under interconnection agreements that called for ICB pricing.
- d. NuVox and XO then adopted the M2A, which included interim provisions for collocation and called for a six-month true-up upon adoption of permanent provisions.
- e. On October 12, 2001 SBC's physical collocation tariff took effect pursuant to Commission approval, replacing the M2A interim provisions.

- f. SBC performed the true-up in late 2001.
- g. NuVox and XO obtain DC power at collocation locations from SBC by means of two redundant power feeds, consistent with accepted and established industry practices regarding network and service reliability.
- h. The interconnection agreements and collocation tariff expressly acknowledge that the power feeds are redundant.
- i. When NuVox and XO ordered their respective power arrangements, they did so by describing the desired amperage of one of the redundant power feeds.
- j. NuVox and XO do not (and by design cannot) consume more DC power than the amperage of one of the redundant power feeds, consistent with accepted and established industry practices.
- k. NuVox and XO actually consume far less DC power than the amperage of one of the redundant power feeds.
- l. There has been no change in the manner in which NuVox and XO obtain, and SBC provides, collocation power and related HVAC.
- m. From 1999 through late 2002, under ICB pricing, the interim collocation provisions of the M2A, and the October 12, 2001 tariffs, SBC uniformly quoted and charged for collocation power and related HVAC based on the amperage of one of the redundant power feeds.
- n. When it performed its true-up in late 2001, SBC determined charges for collocation power and related HVAC based upon the amperage of one of the redundant power feeds.

o. Starting in late 2002, without any advance notice and without any explanation,² SBC began to include in its invoices charges for collocation power and related HVAC based upon the combined amperage of both of the redundant power feeds.

p. Starting in late 2002, again without advance notice and without any explanation, SBC also issued invoices that purported to impose such double charges on a retroactive basis, back to the date the collocation tariff took effect (October 12, 2001), even though NuVox and XO had already paid the invoices that had been issued by SBC for services over the intervening period of time for an accord and satisfaction of those invoices.

q. SBC's unilateral reinterpretation of its tariff, in a manner that contradicts more than two years of established practices and that also contradicts the manner in which collocation power is provided and used, would impose hundreds of thousands of dollars of new unauthorized costs on both NuVox and XO each year in Missouri.

r. SBC has engaged in the same unlawful tactics in other states, thereby multiplying the adverse impact on NuVox and XO such that millions of dollars are at stake.³

s. SBC has violated Sections 392.200.1 and 392.240.2 RSMo. by attempting to impose charges (both prospectively and retroactively) greater than those allowed by a tariff and related interconnection agreements and Commission orders.

² SBC has never made any attempt at an explanation for its unilateral change in practices despite informal attempts to resolve the matter and despite this formal complaint proceeding.

³ While admittedly outside the four corners of the complaints, and therefore not directly germane to the denial of SBC's Motions to Dismiss, the Commission is no doubt aware from news reports that SBC's multistate effort has already started to crumble. With its 271 application for Ohio and Indiana in jeopardy because of these practices, SBC has issued an accessible letter offering to cease such practices and essentially go back to the established practice of charging for the amperage of only one of the redundant feeds. In Texas, in proceedings mentioned in the complaints, the ALJ has ruled that SBC's practices violate its tariff and interconnection agreements. Interestingly, the ALJ also held that the tariff requires SBC to limit its charges to the amps actually consumed by collocators (i.e. even less than the nominal amperage of a single feed).

t. SBC has violated Section 392.480 by attempting to impose charges outside the provisions of a tariff.

u. SBC has violated Section 392.230.3 by attempting to change tariffed rates without submitting the proposed changes to the Commission.

v. SBC has violated Sections 251(c)(6) and 252(d)(1) of the Telecommunications Act of 1996 and 47 CFR 51.501-09 by attempting to impose unapproved collocation prices that exceed TELRIC.

w. SBC has violated Sections 392.200.6 and 392.240.3 by threatening to break established connections between carriers without prior authorization from the Commission.

3. Regarding the dispute resolution and escrow provisions of the tariff - which SBC invokes in an attempt to avoid Commission scrutiny of its illegal conduct - in summary the complaints aver the following:

a. Such provisions on their face only apply to timely billings and SBC's attempt to retroactively impose double charges, for a period in excess of one year for which it had already received payment on its invoices, is not only outside such provisions but also taints all subsequent double-billings and takes them outside such tariff provisions as well.

b. SBC's attempt to interpret these provisions of its tariff as applying to this situation is anticompetitive and against public policy, in that it would allow SBC to tie up critical working capital of its competitors, and perhaps even drive them out of business, by unilaterally placing huge bogus charges on its invoices without any regulatory constraint whatsoever.

c. SBC's bad faith actions take this situation outside such provisions of the tariff, which only apply to "bona fide" disputes (i.e. the positions of both parties to the dispute are held in good faith).

d. NuVox and XO did not order the amount of power for which SBC now seeks to impose charges; hence this dispute is outside such provisions of the tariff which apply to disputes over things "ordered from the tariff".

e. The amounts in dispute exceed 1% of the amounts charged by SBC to NuVox and XO, respectively, under the tariff in the preceding twelve months, hence this dispute is outside such provisions of the tariff which only apply to minor disputes that are subject to mandatory arbitration.

f. The provisions of the M2A regarding audits and termination of services override such provisions of the tariff.

4. As the Commission is well aware, the standard of review for a motion to dismiss is that such a motion must be evaluated with the understanding that technical rules of pleading do not apply to Commission proceedings. Thus, if a complaint "fairly presents for determination some matter which falls within the jurisdiction of the Commission, it is sufficient." State ex rel Kansas City Terminal Ry. v. PSC, 272 SW 957, 960 (Mo. 1925). Furthermore, such a motion is solely a test of the adequacy of the complaints, based on an assumption that **all** the averments therein are true and a grant of **all** reasonable inferences therefrom. See, e.g., Duggan v. Pulitzer Publishing Co., 913 SW2d 807 (Mo. App. 1995). As stated by the Missouri Supreme Court:

A motion to dismiss for failure to state a cause of action is solely a test of the adequacy of the plaintiff's petition. It assumes that all of plaintiff's averments are true, and liberally grants to plaintiff all reasonable inferences therefrom. No attempt is made to weigh any facts alleged as to whether they are credible or persuasive. Instead, the petition is reviewed in an almost academic manner, to

determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.

Nazeri v. Missouri Valley College, 860 SW2d 303, 306 (Mo. banc 1993). Here, the complaints allege sufficient facts to show that SBC has violated its tariff and related interconnection agreements and Commission orders, as well as applicable law, by unilaterally and secretly attempting to reinterpret the tariff so as to double the amounts it had been charging for collocation power and related HVAC for over two years (and more than one year after the tariff took effect and after a six-month retroactive true-up to that tariff). No further factual allegations are required beyond those set forth in the complaints. Hence, SBC's Motions to Dismiss must be denied.

5. The specific tariff language in dispute, entitled "DC Power **Consumption**", states: "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." (Tariff Section 20.5, emphasis added). It is well established that the Commission has primary jurisdiction to interpret such tariff provisions. See, e.g., Inter-City Beverage Co., Inc. v. KCP&L, 889 SW2d 875, 877-78 (Mo. App. 1994); State ex rel KCP&L v. Buzard, 168 SW2d 1044, 1046 (Mo. banc 1943); DeMaranville v. Fee Fee Trunk Sewer, Inc., 573 SW2d 674, 676 (Mo. App. 1978).

6. SBC falsely states in its Motions that the tariff "requires that [NuVox and XO] pay the tariffed rates for each amp of DC power **capacity provided** by SBC." (Motions, page 2, emphasis added). There is no such language in the tariff.

7. SBC falsely states in its Motions that the tariff "unequivocally requires collocators to pay for all DC power amperage **capacity provided**." (Motions, page 3, emphasis added). Again, there is no such language in the tariff.

8. SBC falsely states that the "plain language" of the tariff requires collocators to pay for "all DC power **capacity provided** by SBC". (Motions, page 9, emphasis added). There is no such language in the tariff.

9. Contrary to SBC's assertions, the tariff does not state that charges apply to amperage of both of the redundant feeds. (Motions, page 10). Using SBC's own "analysis", the parties to the Stipulation and Agreement in Case TT-2001-298 could have used such language if that was their collective intent, but they did not. (Motions, page 12).

10. The complaints squarely place the actual language of the tariff before the Commission. That language addresses power "consumption" and "use", not "capacity" as SBC contends.

11. The complaints also squarely place the actual practices of the parties before the Commission. Those practices include NuVox and XO using substantially less than the amperage of a single feed in a redundant two-feed arrangement. Those practices include SBC charging only for the amperage of a single feed for over two years, including one year after the tariff took effect and an additional six months of retroactive application of the tariff under the true-up provisions of the M2A. Such practices definitively establish the meaning of the tariff. See, e.g., State ex rel. Inter-City Beverage v. PSC, 972 SW2d 397, 401 (Mo. App. 1998); KCS Ry. v. KCPL, 430 F. Supp. 722, 724 (W.D. Mo. 1976), aff'd 551 F2d 1134 (8th Cir. 1977); AC Jacobs & Co. Ins. v. Union Electric Co., 17 SW3d 579, 584 (Mo. App 2001). As in contract law, technical terms employed in tariffs "are to be given the meaning accorded to them in the trade or business," Foley Co. v. Walnut Assoc., 597 SW2d 685, 689 (Mo. App. 1980), and are to be construed as of the date the tariff was approved, see, e.g., CJS Contracts, Section 308. SBC itself concedes that the intentions of the parties are pertinent (Motions, page 12), and those intentions

are made plain by the long-term conduct of the parties that preceded SBC's self-serving and anticompetitive attempt to unilaterally reinterpret its tariff.

12. Not only must the Commission take these allegations of the complaints as true for purposes of ruling upon the Motions, but also SBC does not even dispute these points in its Motions.

13. Even in its efforts to rewrite the tariffs for purposes of its Motions, SBC cannot avoid the fact that the complaints present claims upon which the Commission can grant relief. Even using SBC's own "spin" on the tariff language, the "capacity" of a redundant dual feed power arrangement under which the user cannot use more than the amperage of a single feed is in fact the capacity of a single feed. The actions of the parties confirm this fact. At hearing, NuVox and XO will prove that SBC's assertions regarding the purported double capacity of the redundant arrangement are purely fictional and a violation of TELRIC requirements.

14. SBC's efforts to pejoratively describe the complaints are equally unavailing. NuVox and XO do not seek to pay for "half of the DC power capacity provided" or to get something "for free". They just do not want to pay more than what they have been paying; namely charges based on the amperage of one of the feeds in a redundant dual feed arrangement. And SBC's implication that someone other than itself is trying to get away with something is again contradicted by the facts. Its own behavior proves the point, for it has acted without advance notice, and without explanation for its sudden and secret change in practices more than one year after its tariff took effect (and after consciously applying that tariff retroactively for another six months pursuant to the M2A true-up).

15. Notwithstanding SBC's argument, Section 21.14 of the tariff is not in dispute. These are the charges for the physical feeds themselves, not for the consumption and use of power.

16. SBC does not contest the Commission's jurisdiction in its Motions. It does not even purport to address the provisions of law cited in the complaints. The only purported basis of its assertion that the complaints fail to state a claim upon which relief may be granted is that the complaints contradict the "plain language" of the tariff. (Motions, page 13). This assertion is so patently false that it is clear that SBC's Motions are frivolous.

17. SBC states in its Motions that "the central dispute in this case is whether SBC Missouri is correctly billing [complainants] under SBC Missouri's collocation tariff..." (Motions, page 9). As stated above, the Commission has indisputable (and undisputed) jurisdiction over such a question. And the complaints squarely present that question - as SBC admits by its statement - for resolution by the Commission.

18. Knowing full well that the complaints clearly and unmistakably state claims upon which relief can be granted, and further that its outrageous clandestine misconduct cannot withstand "light of day" scrutiny on the merits, SBC predictably tries to hide behind procedural provisions of its tariff regarding dispute resolution and escrow. However, SBC's desperate efforts to avoid the day of reckoning must fail.

19. SBC cannot avoid the fact, as alleged in the complaints, that the provisions on which it relies do not apply to attempts to retroactively impose additional charges for past services that have already been billed and paid. Nor can SBC prevent the Commission from hearing the facts and determining whether such misconduct taints subsequent related billings as alleged in the complaints. As indicated in the response recently filed by the other complainants

in this consolidated action to a motion to dismiss filed by SBC, a hearing on the merits of the complaints regarding SBC's misconduct must proceed.

20. SBC cannot avoid the fact that its illegal billing practices are ongoing, as alleged in the complaints, and therefore SBC renews the dispute as each month goes by.

21. SBC cannot prevent the Commission from hearing evidence and deciding that the complaints correctly aver that it would be against public policy to interpret the tariff provisions on which SBC relies in a manner that would allow SBC to intentionally and in bad faith place huge bogus charges on its bills as a means of tying up the working capital of its competitors, and perhaps even drive them out of business, without any regulatory constraint whatsoever. Again, SBC does not contest the Commission's jurisdiction over the interpretation of tariffs. SBC misses the mark when it argues that tariffs have the force and effect of law (Motions, page 7) - it still falls upon the Commission's shoulders to determine in the first instance the meaning of disputed tariff provisions.

22. SBC cannot prevent the Commission from hearing evidence and deciding that the complaints correctly aver that NuVox and XO did not order the amount of collocation power that SBC has unilaterally decided to bill for, and therefore dispute resolution provisions regarding items "ordered from the tariff" do not apply.

23. SBC cannot prevent the Commission from hearing evidence and deciding that the complaints correctly aver that SBC has not been acting in good faith, and therefore dispute resolution provisions regarding "bona fide" disputes do not apply.

24. SBC cannot prevent the Commission from hearing evidence and deciding that the complaints correctly aver that the amounts in dispute exceed 1% of amounts billed in a year under the tariff. Nor can SBC avoid the incontrovertible facts that the tariff plainly provides that

only disputes of lesser amounts are subject to mandatory arbitration, and only such arbitrated disputes are subject to the escrow requirements. As indicated in the complaints, section 6.6.2(D)(5) of the tariff makes clear that the escrow provisions only apply to arbitrated minor disputes, because funds can only be released from escrow in the course of an arbitrated dispute. This is not such a dispute. There are no provisions for release of funds from escrow for a dispute such as this one. If the funds cannot come out, it is not called escrow, it is called payment. The escrow provisions are not applicable to this matter.

25. In summation, SBC cannot avoid a hearing on the merits of the complaints based on the escrow provisions to which it cites, because the complaints state a claim that the escrow provisions do not apply. For purposes of SBC's Motions, the assertions of the complaints regarding the inapplicability of these tariff provisions must be taken as true. And again, there is no dispute that the Commission can indeed grant relief on a dispute over the interpretation and applicability of tariff provisions.

WHEREFORE, for all the foregoing reasons, the Commission should deny SBC's frivolous Motions to Dismiss.

CURTIS, OETTING, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
(314) 725-8788
(314) 725-8789 (FAX)
clumley@cohgs.com
lcurtis@cohgs.com

Attorneys for NuVox Communications of Missouri, Inc.
and XO Missouri, Inc.

/s/ Carol Keith (by Carl J. Lumley)

Carol Keith, #45065
NuVox Communications
16090 Swingley Ridge Road, Suite 500
Chesterfield, Missouri 63017
(636) 537-7337
(636) 728-7337 (FAX)
ckeith@nuvox.com

Attorneys for NuVox Communications of Missouri, Inc.

Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 6th day of October, 2003, by placing same in the U.S. Mail, postage paid, by fax transmission, and/or by e-mail transmission.

/s/ Carl J. Lumley

Office of Public Counsel
P.O. Box 7800
Jefferson City, Missouri 65102
Fax 573-751-5562

Office of General Counsel
Missouri Public Service Commission
P.O. Box 360
Jefferson City, Missouri 65102
Fax 573-751-9285

Legal Department
Southwestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, Missouri 63101-1976
Fax 314-247-0014
robert.gryzmala@sbc.com

Katherine K. Mudge
Smith, Majcher & Mudge, LLP
816 Congress Ave. Suite 1270
Austin, Texas 78701
Fax (512) 322-9020
kmudge@reglaw.com

Rose Mulvany Henry
Birch Telecom, Inc.
2020 Baltimore Avenue
Kansas City, Missouri 64108
Fax (816) 300-3350
rmulvany@birch.com

Rebecca B. DeCook
AT&T
1875 Lawrence Street, Suite 1575
Denver, Colorado 80202
Fax (303) 298-6301
decook@att.com

Mark W. Comley
Newman, Comley & Ruth, PC
601 Monroe Street, Suite 301
Jefferson City, Missouri 65102
Fax (573) 636-3306
comleym@ncrpc.com