

1 BEFORE THE PUBLIC SERVICE COMMISSION

2 STATE OF MISSOURI

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4 TRANSCRIPT OF PROCEEDINGS

5 Prehearing Conference

6 February 20, 2007

7 Jefferson City, Missouri

8 Volume 2
9 _____

10 In the Matter of the Application of)
11 NuVox Communications of Missouri, Inc.,)Case No. TO-2006-0360
12 for an Investigation into the Wire)
13 Centers that AT&T Missouri Asserts Are)
 Non-Impaired under the TRRO)

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15 _____
16 KENNARD L. JONES,
17 SENIOR REGULATORY LAW JUDGE.

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FOR: Staff of the Missouri Public Service Commission

1 P R O C E E D I N G S

2 JUDGE JONES: We're on the record in Case
3 No. TO-2006-0360 in the matter of the application of NuVox
4 Communications of Missouri, Incorporated for an investigation
5 into the wire centers that AT&T Missouri asserts are
6 non-impaired under the TRRO.

7 At this time we'll take entries of appearance
8 beginning with NuVox.

9 MR. LUMLEY: Thank you, Judge. Carl Lumley
10 with the Curtis, Heinz law firm representing both NuVox and
11 XO, 130 South Bemiston, suite 200, Clayton, Missouri 63105.

12 I'm joined by telephone by Mr. Magness and
13 I'll let him speak for himself.

14 JUDGE JONES: Mr. Magness, can you hear us
15 okay?

16 MR. MAGNESS: Yes, sir.

17 JUDGE JONES: Go right ahead, Mr. Magness.

18 MR. MAGNESS: Bill Magness with the firm of
19 Casey, Gentz and Magness, 98 San Jacinto Boulevard,
20 suite 1400, Austin, Texas 78701. I'm representing NuVox
21 Communications, XO Communications and McLeod USA
22 Telecommunications Services, Inc. along with Ms. Young.

23 JUDGE JONES: And from AT&T?

24 MR. GRYZMALA: Good morning, your Honor. Bob
25 Gryzmala on behalf of Southwestern Bell Telephone, LP, d/b/a

1 AT&T Missouri. I office at One AT&T Center, room 3516,
2 St. Louis, Missouri 63101.

3 JUDGE JONES: Thank you, sir.

4 And from the Staff of the Commission?

5 MR. HAAS: Good morning. William K. Haas
6 appearing on behalf of the Staff of the Public Service
7 Commission. My address is Post Office Box 360, Jefferson
8 City, Missouri 65102.

9 JUDGE JONES: Thank you.

10 And, McLeod, are you --

11 MS. YOUNG: Yes. Thank you. Mary Ann Young
12 with the law firm William D. Steinmeier, PC, PO Box 104595,
13 Jefferson City, Missouri 65110 representing McLeod USA
14 Telecommunications Services, Inc.

15 JUDGE JONES: All right. So you all think
16 this will need to go to hearing?

17 MR. LUMLEY: Yes, sir.

18 JUDGE JONES: All right. Well, let's talk
19 about what we'll need in order to get to a hearing. I don't
20 think we want any pre-filed testimony. Do you all prefer to
21 do pre-filed testimony? Do you have a preference either way
22 or what?

23 MR. LUMLEY: We've been discussing a schedule
24 that involved pre-filed testimony. And I think we're all
25 pretty close to agreement give or take, you know, a day here

1 or there on the dates.

2 This is a matter that has had similar cases in
3 other states so the witnesses, you know, have sort of stock
4 testimony to start from and it would probably be a more
5 efficient hearing for everyone if sort of the preliminary
6 stuff is all in writing and then we just have the
7 cross-examination.

8 MR. GRYZMALA: We tend to agree on behalf of
9 AT&T. And I anticipate, to pick up on Carl's point, the
10 hearing room time spent would probably be fairly abbreviated
11 if we filed pre-filed.

12 JUDGE JONES: Well, we can get to a hearing
13 faster if we don't file pre-filed testimony.

14 MR. GRYZMALA: I don't know what other hearing
15 room dates are available.

16 JUDGE JONES: Oh, so you've checked out the
17 calendar?

18 MR. GRYZMALA: No. We knew -- quote me -- or
19 correct me, Bill. I think we know May 15 or 17 is available,
20 which I think is suitable to all of us. At least it is to
21 Carl and me.

22 JUDGE JONES: Well, how many witnesses do you
23 all anticipate having?

24 MR. LUMLEY: Bill, do you want to speak to
25 that for us?

1 MR. MAGNESS: Judge, I think we'd have two.

2 JUDGE JONES: And AT&T?

3 MR. GRYZMALA: I believe we will have two.

4 JUDGE JONES: And McLeod?

5 MS. YOUNG: We're in the coalition that will
6 have the two witnesses Mr. Magness spoke of.

7 MR. HAAS: And, your Honor, Staff will have
8 one witness.

9 JUDGE JONES: So we're talking five witnesses.
10 Do you all want to file pre-filed briefs too?

11 MR. GRYZMALA: My thinking on that, your
12 Honor, was the position statement would be acceptable.

13 JUDGE JONES: Position statement.

14 MR. GRYZMALA: I mean, in an abbreviated
15 format because the post-briefing would be fairly important.

16 JUDGE JONES: It seems like this is a factual
17 issue, isn't it?

18 MR. LUMLEY: Well, there's legal issues in
19 terms of the proper interpretation of some of the FCC
20 standards and then there's factual issues in terms of applying
21 those standards as interpreted -- as interpreted. So it's a
22 combination.

23 MR. GRYZMALA: If your Honor will recall, at
24 one time the dispute -- or the disagreement between the
25 parties was whether the cases should be bifurcated. You might

1 recall --

2 JUDGE JONES: Yeah, I do remember.

3 MR. GRYZMALA: -- the question was whether we
4 were properly applying the methodology that was laid down by
5 the FCC in its TRRO order. I only say that to point out that
6 a goodly part of this case, if not the principal part of this
7 case, has to do with legal interpretation.

8 JUDGE JONES: And I don't believe I
9 bifurcated, did I?

10 MR. GRYZMALA: No, you did that. That's
11 right, your Honor. It's a one-phase case.

12 JUDGE JONES: How did that affect your
13 progress, just in retrospect?

14 MR. LUMLEY: Well, from our perspective, it
15 was helpful because some discovery obstacles were dropped,
16 some additional information was obtained.

17 JUDGE JONES: Bill, you got any --

18 MR. MAGNESS: I'd echo what Carl said. I
19 think we were able to move forward with discovery. I think
20 what slowed the case more than anything, as we described in
21 the status report, that some of the issues in this case got
22 involved in another proceeding, the AT&T/Bell South merger
23 proceeding. And I think everybody sort of stood back to wait
24 to see how that would come out before we wanted to press
25 forward.

1 MR. GRYZMALA: I think largely at this time,
2 your Honor, we're, you know, satisfied with ultimately how it
3 turned out. So with the pre-filed and a day or two, I
4 wouldn't think any more in the hearing room, post-hearing
5 briefs. And as Carl said, I think we -- at least when Carl
6 and I talked, Mr. Lumley, we were pretty close to agreement on
7 an acceptable schedule.

8 JUDGE JONES: Okay. I won't stand in your
9 way.

10 MR. GRYZMALA: We need still to talk to Bill.

11 MR. MAGNESS: And we did in the draft schedule
12 reserve, I guess as Bob had mentioned, the 15th through the
13 17th. I think particularly if we do pre-filed, my expectation
14 is -- of course, depending on the extent of cross, I think we
15 can get this done in a day and it may go into a second day.
16 But just based on past experience with similar issues, so --

17 MR. GRYZMALA: That's been your experience in
18 other states more or less, Bill; is that right?

19 MR. MAGNESS: Yeah.

20 MR. GRYZMALA: Yeah. I would concur in that
21 thinking.

22 JUDGE JONES: I don't have a problem with
23 however you all want to present your case. Quite honestly, I
24 don't really have an interest in that. I will, however --
25 I'll probably speak with each Commissioner to see how they

1 feel about this, because there's been some discussion about
2 the process of our hearings. And I'm sure some of you
3 probably are aware of that. Actually the discussion's
4 probably been going on for 20 years. I don't know. So
5 there's always discussion about how to improve the process.

6 And my feeling now is that they're trying to
7 get away from pre-filed testimony and just have live testimony
8 and cross-examination. If you have pre-filed or you have
9 live, you're still going to have the same amount of paper in
10 your file. If you have live, well, then all of it's in one
11 place so you can read a transcript and you have the whole case
12 right there instead of having to pull testimony here and
13 transcripts over here, evidence from over here. I don't know.

14 But at this point go ahead and plan for
15 pre-filed testimony. I will tell you that -- well, I'll let
16 you know something before the next couple of days, whether or
17 not that's going to work -- whether there's strong objection
18 to it, I should say.

19 And if that's the case, the only thing that
20 would change from my perspective and what I would want to
21 change if we don't have pre-filed testimony, is you actually
22 have pre-filed briefs that say, you know, this is my
23 contention and this witness will testify to, that sort of
24 thing, you know.

25 But beyond that, go ahead and plan like you

1 all are planning to do it and I'll see what the mood is on the
2 ninth floor with regard to pre-filed testimony.

3 MR. LUMLEY: I would say if there's a change,
4 that we would require substantially more hearing time.

5 JUDGE JONES: Right. I understand that.

6 MR. LUMLEY: Probably more in the order of
7 three days. Wouldn't you think, Bill Magness?

8 MR. MAGNESS: I would think so. It may look
9 more like one side putting on its case one day and then the
10 next the next. It may go more into three days I'd think,
11 because there would be a fair amount of direct testimony to
12 lay out all the legal and the factual issues.

13 JUDGE JONES: Okay. Well, I'll reserve three
14 days regardless just in case. You never know.

15 But I will tell you all, I don't know if
16 you've been listening to any of my hearings recently, but
17 there's no dumping in my record. If you're talking crap, if
18 no one objects, I'll ask the witness something, I'll ask the
19 attorneys something. I'll say, Man, what are you talking
20 about? What does this have to do with what we're talking
21 about?

22 So if somebody's talking about something
23 that's irrelevant, you got to object during the hearing. You
24 know, I'd rather the attorneys object because I don't like to
25 make your case for you, but at the same time I don't like to

1 sit there and listen to something I don't think I should have
2 to hear if it's irrelevant, you know, or if it's in some way
3 prejudicial or what the objection is, if it's hearsay,
4 whatever, the objection is considered seriously. I'm pretty
5 quick to sustain objections if there's merit to them, of
6 course. And that can shorten the time that we spend in the
7 hearing room also.

8 Other than that --

9 MR. GRYZMALA: One thing, your Honor, I think
10 you're going to find -- and I only say this because the case
11 has been effectively tried in several states. And I think
12 you're going to find that -- with the pre-filed, it lays the
13 story out, the law in particular. The parties have competing
14 contentions about what the law is, that the attorneys here
15 have met the other parties in some cases, have already crossed
16 the other parties. It's going to move pretty quickly, I'm
17 thinking.

18 JUDGE JONES: Well, this issue, has it been
19 settled in other case, in other states?

20 MR. GRYZMALA: No. It's been litigated.

21 JUDGE JONES: And now it's pending?

22 MR. GRYZMALA: In some states there have been
23 Commission decisions made. The parties would lay those out,
24 I'm sure. There is a judicial activity in at least one and in
25 another perhaps as well.

1 JUDGE JONES: So appeals have been made from
2 State Commission decisions?

3 MR. GRYZMALA: Bill, help me here. Judge Sam
4 Sparks, Federal District Court in Austin, issued an order I
5 believe in December-ish on the matter. And I believe that's
6 under appeal presently to the Fifth Circuit Court of Appeals.

7 I believe -- Bill, help me here if you know,
8 that there is awaited or pending an appeal from the Michigan
9 Commission's Decision to the Eastern District, Michigan
10 Federal District Court.

11 MR. MAGNESS: Yeah. Those are the only two
12 I'm aware of.

13 MR. GRYZMALA: That's right.

14 MR. MAGNESS: The District Court decision in
15 the Texas case. The Michigan case is set for hearing late
16 March. And there's a Federal District court up there.
17 Several other states, as Bob said, have issued Commission
18 decisions, but to my knowledge, those are the only ones that
19 have gone up on appeal to Federal Court.

20 JUDGE JONES: Are Commission decisions
21 consistent with one another?

22 MR. MAGNESS: In some respects. They're not
23 entirely consistent on either of the major contested issues.

24 JUDGE JONES: So this is an issue nobody
25 really knows the answer to?

1 MR. GRYZMALA: Well, I don't want to beat it
2 up, your Honor. Bill and I had this very discussion a couple
3 of days ago and he can take issue. I mean, from a very high
4 level, you have two things going on in this case in terms of
5 determining wire center impairment. You have counting the
6 business lines and you have counting the fiber-based
7 collocators.

8 And to your point with regard to the
9 methodology that AT&T employed in connection with counting the
10 business lines, my scorecard suggests that the vast majority
11 of the commissions who have made a cut have ruled in terms --
12 or in favor of AT&T Missouri. And that would be the subject
13 to the briefing, but there are at least four or five
14 commissions who have already made the cut.

15 Now -- and I don't believe that -- I'm not
16 stating that that's without exception. There may be an
17 outlier, as it were.

18 On the fiber-based collocator front, in all
19 candor, I think that's been a mixed bag. CLECs have prevailed
20 with regard to particularly the issue in some jurisdictions,
21 not all, of whether cross-connect facilities are counted.

22 JUDGE JONES: I understand that.

23 MR. GRYZMALA: You remember that discussion.

24 JUDGE JONES: I do.

25 MR. GRYZMALA: So to answer your question, I

1 don't want to -- but that's another thing that you're going to
2 see in the pre-filed testimony.

3 JUDGE JONES: Good. It sounds like it will be
4 fun.

5 MR. LUMLEY: Judge, you may also want to give
6 us a specific deadline to file a proposed schedule.

7 JUDGE JONES: Well, you all want to have a
8 hearing May 15th through 17th? Are those dates that have
9 been --

10 MR. LUMLEY: At least the last time we
11 checked.

12 MR. GRYZMALA: That's still open, but I think
13 we're trying to fix on that May 15 and May 17. I believe that
14 I'm pretty close to that, but I want to talk to Bill and get a
15 better sense --

16 JUDGE JONES: How much time do you need to
17 come up with a procedural schedule?

18 MR. GRYZMALA: Come again.

19 JUDGE JONES: How much time do you all need?
20 You don't want to file any rebuttal testimony, do you? Just
21 direct. Right?

22 MR. LUMLEY: No. We were proposing direct and
23 rebuttal.

24 JUDGE JONES: Direct and rebuttal?

25 MR. GRYZMALA: No, sir. Simultaneous -- what

1 we were talking about was simultaneous direct, everybody
2 files, and then simultaneous rebuttal, everybody files, and
3 that's it.

4 JUDGE JONES: Why can't you do direct and
5 cross-exam? The purpose of rebuttal is to -- well, not really
6 cross-examine, but in some way rebut -- not exactly rebut the
7 direct testimony, which cross-examination would serve that
8 same purpose, wouldn't it?

9 MR. MAGNESS: Judge, we could do it either
10 way. We had circulated a proposal that had direct and
11 rebuttal, as Bob was saying, simultaneous. You know, maybe
12 after you discuss it with the Commissioners and think it
13 through, if you want us to come up with something that just
14 has one round, we can -- you know, we can work it out, I'm
15 sure.

16 JUDGE JONES: Okay.

17 MR. GRYZMALA: One issue, your Honor, that I
18 think plays into that very significantly or could is, I
19 understand -- I don't know all the facts. Maybe Bill can
20 speak to them.

21 But I understand that after some discovery had
22 transpired in the case, Mr. Scheperle and Staff went about
23 corresponding, if you will, with CLECs to secure to their
24 satisfaction a certain level of comfort with what they felt
25 were the business line count or the fiber-based collocater

1 count, you see. Because they had obtained from us, generally
2 speaking, how that turned out. They sought to go about
3 independently verifying it.

4 My only thinking is that if we don't have
5 rebuttal -- well, rebuttal will afford us a fair opportunity
6 to have taken a good look at Staff's direct evidence.
7 Heretofore, we've not seen anything -- I have not seen
8 anything that indicates the results of that investigation.

9 Now, could we see it in simultaneous direct
10 and then cross it if we were to come to that point? I tend to
11 think we could, but I still lean toward rebuttal primarily --
12 or partly for that purpose. I mean, that's just an element
13 out there.

14 We do know -- I think Carl and I both know
15 that Staff has sought to independently verify some things. I
16 don't know if the CLECs have access to that information. I do
17 not.

18 JUDGE JONES: Have you all made any discovery
19 requests or anything?

20 MR. GRYZMALA: Not as yet.

21 JUDGE JONES: Do you all foresee having to do
22 that?

23 MR. GRYZMALA: Well, it was just completed not
24 too awful long ago, wasn't it, Bill? Tail end of last year.

25 MR. HAAS: That's about right.

1 MR. MAGNESS: I assume we'd get the
2 information through the discovery requests. I think that --
3 to me the advantage of having rebuttal testimony opportunity
4 on that is you get the -- particularly if there were factual
5 issues that arise from the verification process that Staff
6 undertook, you give the subject matter experts a chance to
7 weigh in on that rather than just having it elicited through
8 cross. That might be helpful as everybody's looking at it.

9 JUDGE JONES: Okay. Well, today is Tuesday.
10 Go ahead and plan to schedule like you all want to do and the
11 only thing that may happen is something may come out. And
12 well, of course, if pre-filed testimony is affected to any
13 great extent, then of course, statement of position will
14 become a prehearing brief. I'll let you all know something.

15 I don't like to give exact deadlines because
16 I'm pretty prudent on doing it anyway. So I could say by the
17 end of the day, but you know, I'll probably go upstairs and
18 walk the only other leg of nine and two Commissioners will be
19 here and I won't be able to do anything. So I'll try to give
20 you all an answer by Thursday. So would a week from Friday be
21 too long -- or too short rather?

22 MR. GRZYMALA: To file a procedural --

23 JUDGE JONES: Yeah. I'm trying to give you a
24 week from the time that I would have given you information on
25 this pre-filed testimony.

1 MR. GRYZMALA: Let's see. The 30th?

2 JUDGE JONES: Let's just say a week from when
3 I tell you all what the deal is on pre-filed testimony.

4 MR. LUMLEY: That makes sense.

5 JUDGE JONES: That way the timeline is put on
6 me.

7 MR. MAGNESS: From our perspective, that's
8 plenty of time. Like everybody said, I think we're down to
9 just a few -- wrangling around with a few dates, but we're
10 pretty close to an agreement.

11 MR. GRYZMALA: Your Honor, one thing, if I
12 could get a bit of deference. One of my folks has a problem,
13 if you could keep this in your head as you talk to
14 Commissioners. The week of April 11th and July 9th would be
15 problematic for my one of my folks.

16 JUDGE JONES: To have a hearing?

17 MR. GRYZMALA: To be in Missouri

18 JUDGE JONES: Why else would they be in
19 Missouri other than have a hearing?

20 MR. GRYZMALA: Well, I mean, in case there's
21 some movement afoot by the Commissioners to have live
22 testimony to accelerate it or something else.

23 JUDGE JONES: I'm kind of set on the May date,
24 to be honest with you.

25 MR. GRYZMALA: I think we are pretty well

1 adjourned.

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1 CERTIFICATE OF REPORTER

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3 I, Tracy L. Thorpe Taylor, a Certified Shorthand
4 Reporter, within the State of Missouri, do hereby certify that
5 the witness whose testimony appears in the foregoing
6 deposition was duly sworn by me; that the testimony of said
7 witness was taken by me to the best of my ability and
8 thereafter reduced to typewriting under my direction; that I
9 am neither counsel for, related to, nor employed by any of the
10 parties to the action in which this deposition was taken, and
11 further, that I am not a relative or employee of any attorney
12 or counsel employed by the parties thereto, nor financially or
13 otherwise interested in the outcome of the action.

14

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Tracy L. Thorpe Taylor, CSR, CCR

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