

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

ORDER GRANTING MOTION TO COMPEL DISCOVERY REQUESTS

Issue Date: April 18, 2007

Effective Date: April 18, 2007

On March 17, 2006, NuVox Communications of Missouri, Inc. filed an application for an investigation into the wire centers that Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri asserts are non-impaired under the Federal Communications Commission's Triennial Review Order (TRRO). Applications to intervene were thereafter granted to XO Communications Services, Inc. and MCLeodUSA Telecommunications Services, Inc. On March 20, 2007, NuVox Communications of Missouri, Inc. and XO Communications Services, Inc. filed a motion to compel AT&T Missouri to respond to discovery requests. NuVox and XO filed a second motion to compel on March April 6. The first set of discovery requests are at issue as follows:

- 1. Discovery Request 6** – Provide, in electronic spreadsheet form (EXCEL), separately for each AT&T Missouri wire center, the following 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:
 - a. The number of retail switched business lines;
 - b. The number of UNE Loops (Note – do not convert to VGEs; do include EELs and standalone loops, but do not include UNE-P).Please identify the date (month and year) for which the data are being provided.

2. Discovery Request 7 – Please provide, in un-redacted form and disclosing the actual CLLI codes, the number of business lines at each AT&T Missouri wire center that was provided by SBC to the FCC in SBC's December 7, 2004 ex parte letter (cited by the FCC in TRRO, paragraph 105 [sic], n. 322.)

3. Discovery Request 14 – Provide separately for XO and NuVox the total number of UNE loops (for the types of loops identified below) that were provided by AT&T Missouri to each of these carriers in Missouri as of the date AT&T Missouri contends should be used for the business line calculation:

- a. The number of analog UNE loops;
- b. The number of DS1 UNE loops (include EELs); and
- c. The number of DS3 UNE loops (include EELs).

As part of your answer, please state the date (month and year) for which the response is being provided, Note: in preparing and providing your response to this Data Request, do not convert (b) and (c) to VGEs.

4. Discovery Request 15 – Provide separately for each company the number of DS3 Local Loop and DS3 EEL UNEs attributable to XO and NuVox that you included in your calculation of business lines for Missouri in your determination of wire centers that are non-impaired for loops and/or transport.

The second set of discovery requests are at issue as follows:

5. Discovery Request 4 – 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, 2004:

- 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 provide din VGEs, please so indicate);
- g. The number of business UNE-P; and
- h. The number of business lines provided under AT&T Missouri's Local Wholesale Complete.

6. Discovery Request 5 – 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 provide din VGEs, please so indicate);
- g. The number of business UNE-P; and
- h. The number of business lines provided under AT&T Missouri's Local Wholesale Complete.

In its response, AT&T asserts several grounds upon which the Commission might deny the motion. AT&T asserts that the motions are untimely in light of the current stage of these proceedings. AT&T argues that rebuttal testimony is to be filed by all parties on April 27, 2007, and that there remains no further opportunity for a response to any claims made by Movant regarding the additional information. In support of its position, AT&T states that; “[e]vidence 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, none of the three DRs is reasonably calculated to lead to the discovery of admissible evidence and NuVox/XO’s motion must be denied for this reason.”

AT&T also asserts that the DRs are irrelevant and overly broad. Although AT&T makes even more specific arguments as to each discovery request, generally the opposition is couched as irrelevant, overly broad and untimely. In some instances, AT&T asserts that it does not even have the requested information any more.

Discussion

The information Movants seek may or may not be offered at the hearing or in any other context. If and when the information sought is offered, its relevance will be further considered. That AT&T will be unable to respond is unfounded. First, this matter has no time limitations as the procedural schedule can be changed, if necessary, to ensure fairness and due process. Second, if Movants use this information in their rebuttal testimony, AT&T will have the opportunity to cross-examine any sponsoring witness(es) during the hearing, which is not scheduled to take place until May 16 and 17, 2007. Arguing that an opportunity to cross-examine will not allow for sufficient specificity, AT&T requests that if the DRs are allowed, it should also be allowed to file response(s) to any rebuttal testimony containing information from the DRs. This request is reasonable and will be granted. Finally, AT&T's statement that, "evidence as to which there is no opportunity afforded to respond is not admissible" is misplaced. This statement assumes an unfair surprise during trial. AT&T is well aware of the substance of possible evidence, arising from discovery, Movants might offer. There is no surprise. It is upon this faulty premise that AT&T rests its conclusion that the information sought cannot be reasonably calculated to lead to the discovery of admissible evidence.

With regard to relevance, "it is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."¹ Movants seek such information because AT&T has made certain assertions that Movants have a right to challenge under the

¹ Rule 56.01(b)(1) Missouri Rules of Civil Procedure.

TRRO.² The Commission is also concerned about the permanency of these determinations as set out in the *TRRO*, which states that once a wire center satisfies certain standards, the incumbent LEC shall not, in the future, be required to unbundle loops in that wire center.³

After reviewing the pleadings on this matter, the Commission finds in favor of Movants. However, if Movants use any information obtained through these DRs in the rebuttal testimony, the Commission will allow AT&T to respond by filing surrebuttal testimony.

IT IS ORDERED THAT:

1. The motions to compel discovery requests, filed by NuVox Communications of Missouri, Inc. and XO Communications Services, Inc., are granted.

2. Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri shall file responses to the discovery requests no later than April 23, 2007.

3. If NuVox Communications of Missouri, Inc. or XO Communications Services, Inc. uses information gathered from the discovery requests in the rebuttal testimony to be filed on April 27, 2007, Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri may file surrebuttal testimony limited to those issues, no later than May 10, 2007.

² *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of Section 251 Unbundling Obligations of incumbent Local Exchange Carriers*, CC Docket No. 01-338 (rel. Feb 4, 2005) (*TRRO*), Paragraph 100.

³ *TRRO*, footnote 466.

4. This order shall become effective on April 18, 2007.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', written over a horizontal line.

Colleen M. Dale
Secretary

(S E A L)

Kennard L. Jones, Senior Regulatory
Law Judge, by delegation of authority
pursuant to Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri,
on this 18th day of April, 2007.