

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

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

**AT&T MISSOURI'S REPLY TO THE CLECS' RESPONSE TO ITS APPLICATION
FOR REHEARING AND/OR RECONSIDERATION**

AT&T Missouri¹ respectfully submits this Reply in support of its Application for Rehearing and/or Reconsideration of the Commission's March 31, 2008, Report and Order ("R&O"), pursuant to Commission Rule 2.160 (4 CSR 240-2.160).

I. SUMMARY

The decision required of the Commission regarding the **_____** wire center is simply stated. The Commission can accept the CLECs' various evidentiary arguments and discount entirely the existence of a fourth fiber-based collocater ("FBC") in the wire center. Or, the Commission can accept AT&T Missouri's arguments and find -- based upon the record as a whole, including the testimony of two AT&T Missouri witnesses, the sworn affidavit of NuVox's Senior Regulatory Counsel, and the testimony of the CLECs' expert witness -- that AT&T Missouri properly counted a fourth FBC in the wire center. AT&T Missouri submits that only the latter course would remain true to the record as a whole, as well as common sense.

II. DISCUSSION

The CLECs' responses to AT&T Missouri's Application mischaracterize AT&T Missouri's and Staff's straightforward and common-sense arguments regarding the **_____** issue. AT&T Missouri does not ask the Commission to "bas[e] a decision solely on Mr. Cadieux' statement in [the NuVox] affidavit." CLEC Coalition Response, p. 6. (emphasis added). Likewise, the issue here is not whether, "[s]tanding alone, Mr. Cadieux' statement that

¹ Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri").

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'it is likely' the carrier in question would be a fiber-based collocater," constitutes sufficient evidence that as of March, 2005, there were four FBCs situated in the ** _____ ** wire center. NuVox Response, p. 2. Rather, the pertinent question is "whether competent and substantial evidence upon the whole record supports [the Commission's] decision."² The record taken as a whole leaves no doubt that there were four FBCs (not just 3) in the ** _____ ** wire center in March, 2005.

First, AT&T Missouri's evidence of having identified four FBCs in the ** _____ ** wire center is based on physical, on-site inspection showing that each collocation arrangement there met the physical requirements necessary to be classified as an FBC.³ When, on March 30, 2007, AT&T Missouri's Mr. Nevels submitted pre-filed direct testimony, he stated unequivocally that "[i]n February, 2005, AT&T Missouri personnel intimately familiar with collocation arrangements and fiber facilities completed physical site inspections at each of the identified Missouri wire centers."⁴ The CLECs' Rebuttal Testimony did not so much as mention, much less challenge, Mr. Nevels on this point. The CLECs did not file any motion to strike any portion of Mr. Nevels' testimony, and the CLECs did not object to the admission of that testimony into evidence.⁵ It thus became a part of "the whole record." The CLECs' newly raised objection has been waived.⁶

Second, AT&T Missouri's Carol Chapman referenced the same on-site inspections. When, on April 27, 2007, she submitted pre-filed rebuttal testimony, she referred to Mr. Nevels'

² See, Psychcare Management, Inc. v. Department of Social Services, 980 S.W. 2d 311, 312 (Mo. 1998). (emphasis added). The CLECs' cite Psychcare as standing for the proposition that "there must be competent and substantial evidence found in the record to support any decision of an administrative body." NuVox Response, p. 2; CLEC Coalition's Response, p. 5. Left out is any mention of the court's express reference to competent and substantial evidence upon "the whole record." Psychcare, at 312. .

³ Exhs. 12, 13 (HC) (Nevels Direct, p. 6); Exh. 18 (Chapman Rebuttal), at 65-66.

⁴ Exh. 12 (Nevels Direct, p. 6).

⁵ See, Tr. 134 ("Judge Jones: 'Mr. Magness, any objection?' Mr. Magness: 'No, your Honor.' Judge Jones: 'Exhibits 12 and 13 are admitted into the record.'").

⁶ See, Seabaugh v. Milde Farms, Inc., 816 S.W. 2d 202, 209 (Mo. banc 1991) ("The general rule is that objections to evidence and the basis therefore must be brought to the attention of the trial court in time for it to act. . . . Timely objections to evidence are necessary to ensure that the trial judge has an opportunity to intelligently rule [on] the challenge and to give opposing counsel the opportunity to respond.") (further citation omitted).

testimony and expressly recounted that "AT&T Missouri performed physical inspections of each of the wire centers identified as meeting one or more of the FCC's non-impairment thresholds."⁷ As in the case of Mr. Nevels' pre-filed direct testimony, the CLECs did not file any motion to strike any portion of Ms. Chapman's rebuttal testimony, and the CLECs did not object to the admission of that testimony into evidence.⁸ It thus became, as did Mr. Nevel's direct testimony, a part of "the whole record." The CLECs' newly raised objection has been waived for the same reason as in the case of Mr. Nevels.

Third, the October 13, 2006, affidavit submitted by NuVox's Senior Regulatory Counsel expressly admitted to NuVox's "operational collocation" in the ** _____ ** wire center. Furthermore, while he disputed NuVox's identification as an FBC in the wire center, he also admitted -- under oath -- that "it is likely that ** _____ ** does qualify as a fiber-based collocater."⁹

The CLECs' attempt to dismiss the clear import of these admissions on the basis of lack of personal knowledge must be rejected. FBC. NuVox Response, pp. 3-4; CLEC Coalition Response, pp. 5-6. The affidavit focused on the specific details of the collocation arrangement, and concluded with an expression of opinion by legal counsel based on the facts as he knew them. His statements are each admissible as against NuVox's interest, because the CLECs well know that the consequences of increased FBC counts increase the incidence of wire center non-impairment designations.¹⁰ Moreover, the fact that the statements were made by means of an

⁷ Exh. 18 (Chapman Rebuttal), at 65.

⁸ See, Tr. 186 ("Judge Jones: 'Any objections? Mr. Magness: 'No objection, your Honor.' Judge Jones: 'Exhibits 15, 16, 17, 18 and 19 are admitted into the record.'").

⁹ Exh. 21 (Scheperle Direct), Sch. 2C, at 28, 29 (HC).

¹⁰ See, Allison v. Agribank, FCB, 949 S.W. 2d 182, 188, n. 11 (Mo. App. S.D. 1997) ("In order for a statement of a party to be competent as an admission against interest, it is not necessary that it be a direct admission of the ultimate facts in issue, and it may be competent if it bears on the issue incidentally or circumstantially. . . . Like interrogatories, affidavits are sworn statements that may constitute admissions against interest.") (further citation omitted).

instrument uniquely intended to convey personal knowledge under oath undercuts any notion that the statements may now be summarily dismissed.¹¹

Nor is it germane that AT&T Missouri did not pursue the affidavit further by conducting additional discovery or a second inspection. NuVox Response, p. 4; CLEC Coalition Response, p. 6. Given the abundant clarity of the affidavit, no additional discovery was needed. Moreover, a second inspection in October, 2006 could not be squarely directed to non-impairment designations made in March, 2005, which the CLECs well know. Instead, it was incumbent on NuVox, to dispel the inference warranted by the AT&T Missouri's testimony and the NuVox affidavit. NuVox could have submitted testimony by its Senior Regulatory Counsel. Its not doing so warrants an inference that the testimony would not have been favorable to the CLECs.¹²

Fourth, the CLEC Coalition's own expert witness expressly admitted that *one* CLEC should count as an FBC in a collo-to-collo arrangement. He never stated that *neither* should count, a point which is glaring in its omission from the CLECs' responses. Yet, counting neither of the two would be the precise result were the Commission to deny AT&T Missouri's Application. In seeking to avoid "double-counting," their expert challenged "AT&T Missouri[']s claim[] that it may count any carrier that is cross-connected to a *legitimate* [FBC]"¹³ and agreed that the FCC's requirement means "that only *one* [FBC] per network may be counted."¹⁴ The Commission too acknowledged that "[t]he collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center" and is an FBC. R&O, p. 12. In sum, as all parties and the Commission acknowledge, there is always *one* collocater whose arrangement is a *legitimate* FBC in a collo-to-collo arrangement.

¹¹ *Id.*

¹² See, Kelly by Kelly v. Jackson, 798 S.W. 2d 699, 701 (Mo. banc 1990) ("Failure of a party to call a witness who has knowledge of facts and circumstances vital to the case generally raises a presumption that the testimony would be unfavorable to the party failing to offer the testimony.") (further citation omitted).

¹³ Exh. 3 (Gillan Rebuttal), at 16. (emphasis added).

¹⁴ Exh. 3 (Gillan Rebuttal), at 20. (emphasis added).

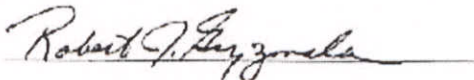
Fifth, and last, all of the other many affidavits secured in Staff's own investigation further fortify the ample evidence outlined above. It is remarkable that the CLECs here challenged none of those many affidavits, except the affidavit of one of the CLEC parties to this case. That affidavit has never given anyone, other than the CLEC parties here, any pause as to whether a fourth FBC was correctly identified in the ** _____ ** wire center.

III. CONCLUSION

AT&T Missouri respectfully requests that the Commission grant its Application for Rehearing and/or Reconsideration.

Respectfully submitted,

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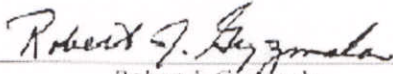
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CERTIFICATE OF SERVICE

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