BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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**

NUVOX COMMUNICATIONS OF MISSOURI, INC.'S AND XO COMMUNICATIONS SERVICES, INC.'S REPLY TO SOUTHWESTERN BELL TELEPHONE, L.P.'S RESPONSE TO THEIR MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS

COME NOW NuVox Communications of Missouri, Inc. ("NuVox") and XO Communications Services, Inc. ("XO") and file their Reply to Southwestern Bell Telephone, L.P.'s Response to their Motion to Compel Responses to Discovery Requests propounded to Southwestern Bell Telephone, L.P. d/b/a AT&T Missouri ("AT&T Missouri").

I. Reply to AT&T Missouri Regarding Its Procedural Objections to Responding to Discovery

AT&T Missouri argues that XO's and NuVox' Motion to Compel should not be granted, because doing so would prejudice AT&T in the presentation of its case. Specifically, AT&T asserts that discovery at this stage of the proceeding, when testimony is being filed, is untimely and improper. There is nothing unusual about discovery during the testimony cycle. AT&T Missouri cites to no Commission rule supporting its contention that discovery cannot take place during the period in which the parties are developing and filing their testimony. Nor, has AT&T cited to any Commission rule that states motions to compel must be filed within a particular time. Certainly there is nothing in the hearing schedule for this proceeding that contains any limitations on discovery.

AT&T Missouri is well aware that negotiations between counsel regarding AT&T Missouri's objections took place last fall, at which time AT&T Missouri's position was that the

filing of a motion to compel was premature because no hearing schedule had been established for this case. AT&T should not be heard to complain about a delay in filing a motion to compel until a procedural schedule was established when its own position was that a motion filed earlier would have been untimely.

AT&T Missouri also argues that, because it has responded to discovery from Commission Staff, it should not be required to respond to NuVox' and XO's DRs. CLECs' discovery questions are not duplicative of Staff's questions. The fact that AT&T has responded to Staff has no bearing on the rights of other parties to the case to serve discovery upon and seek responses to questions that seek relevant information.

AT&T Missouri further contends that, because information responsive to the discovery requests would be used in CLECs' rebuttal testimony, AT&T will be deprived of any opportunity to respond. AT&T Missouri's objection is totally without merit. AT&T has known of these DRs for months and because it is AT&T's own information that is being sought there is no question that AT&T knows what the answers to the questions will be if it is required to respond. There is no surprise here; there is no prejudice. In any event, in every proceeding, one party or the other has the "last word." Both AT&T and CLECs have the same opportunity to address each other's rebuttal testimony through cross-examination.

II. Reply to AT&T Missouri Regarding Relevance and CLECs' Right to Verify the ILECs' Business Line Counts

AT&T Missouri correctly quotes from the Commission's August 29, 2006, Order Regarding Procedural Process concerning the purposes of this case. Nonetheless, AT&T argues that none of the DRs in dispute has to do with whether AT&T correctly interpreted and correctly applied the FCC's rulings in the *TRRO*. Furthermore, AT&T contends that it cannot be required

to respond to the DRs in dispute because CLECs have no right under the *TRRO* to verify the ILECs' business line counts, only the count of fiber-based collocators.

As stated in the Commission's Order Regarding Procedural Process issued on August 29, 2006, this proceeding will determine the proper application and interpretation of the Federal Communications Commission's ("FCC") rulings in its *Triennial Review Remand Order* ("*TRRO*")[1] regarding the methodology to be used in counting the number of fiber-based collocators located in and the number of business lines served by AT&T Missouri's wire centers, and will determine the accuracy of its identification of wire centers that are non-impaired. (Order at 1) This proceeding is an investigation. (Order at 2)

The discovery requests that are the subject of this Motion to Compel have one purpose—to obtain information that will enable NuVox and XO to evaluate the accuracy of AT&T Missouri's methodology and its calculations in counting business lines. AT&T argues that the DRs are challenging its "data integrity" as if that in itself were *per se* forbidden somehow. AT&T's attempt to apply another name to the CLECs' objective of determining whether AT&T accurately performed the counts of business lines using a proper interpretation of the FCC's rulings is ludicrous. NuVox and XO are not challenging AT&T's billing records or whether its billing systems produce accurate results. What these CLECs are seeking is data AT&T Missouri compiles for purposes other than non-impairment to compare the two sets of line counts. If the two sets are different, that fact would shed significant light on whether AT&T's interpretation of the FCC's rules is appropriate. If the two sets are different, and the difference is not due to

[1] *Unbundled Access to Network Elements and Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-388, Order on Remand, 20 FCC Rcd 2533 (2005).

differing interpretations of the FCC's rules, then that fact would shed light on the accuracy of AT&T's count of business lines.

AT&T Missouri asserts that NuVox and XO should not have asked DR 6 as the question was structured. AT&T states that the CLECs should have asked only for the total counts, state-wide, and not by wire center. One party cannot dictate to another party the form and content of discovery requests. The only issue here is whether the information sought is relevant. It does not matter whether NuVox and XO asked for wire center detail and intend to total the numbers themselves. Moreover, the possibility exists that a review of wire center detail could lead to the discovery of other information, as well as insights into the data that would not be apparent from state-wide totals. Finally, given the virulence and tenacity with which AT&T Missouri has resisted responding to CLECs' discovery, it takes little imagination to recognize that had CLECs asked for statewide totals, AT&T would almost certainly have objected that it does not have statewide data and is under no obligation to calculate any totals in response to DRs.

The only issue here is whether the discovery that has been propounded is relevant to the issues in the proceeding. The responses need not be admissible into evidence to be discoverable. AT&T can argue that any comparison CLECs make between AT&T's discovery responses and other information is flawed at the hearing, or in AT&T's own rebuttal testimony since the information sought belongs to AT&T.

Inexplicably, AT&T Missouri implies that a higher standard of relevance applies when responsive information is proprietary confidential information. Nothing in the Commission's rules or in the Rules of Civil Procedure support that view. A protective order has been entered in this case and the confidentiality of AT&T Missouri's information is fully protected in line with the Commission's rules.

Finally, AT&T Missouri argues that CLECs' ability to verify the ILECs' data on which non-impairment determinations are based is limited solely to the counts of fiber-based collocators. The FCC did not conclude in the *TRRO* that CLECs must blindly accept the ILECs' conclusions as to which wire centers are non-impaired. Rather, in describing the proxy approach of relying on both the number of fiber-based collocators and on the number of business lines served by a wire center the FCC said in paragraph 108: "we adopt a proxy approach that . . . relies on objective *criteria* to which the incumbent LECs have full access, is readily confirmable by competitors, and make appropriate inferences regarding potential deployment." (Emphasis supplied)

AT&T points to the portion of the FCC's discussion in the *TRRO* that NuVox and XO quoted in their Motion to Compel as proof of AT&T's position that only fiber-based collocators are subject to CLEC verification:

> We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs. Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, *we can be confident in the accuracy of the thresholds*, and a simplified ability to obtain the necessary information.[2]

But, AT&T Missouri misreads the quoted language when it concludes that the FCC considers the ARMIS data unchallengeable for any purpose. Nothing in the quoted language says that. The FCC is stating its confidence that it has set the thresholds in its rules and in the *TRRO* correctly, not that the data are infallible.

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[2] *TRRO* at ¶ 105 (emphasis added).

Indeed, if only the count of fiber-based collocators reported by the ILEC could be challenged, as AT&T contends, why would self-certification as expressly permitted by the FCC in paragraph 234 of the *TRRO* apply to all high-capacity loops in wire centers the ILECs designated as non-impaired? Why would the FCC have provided that CLEC are to "undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent" with the unbundling rules adopted in the *TRRO* unless CLECs are entitled to confirm the non-impairment determination, even when a wire center is non-impaired for loops solely because of the business line count? Moreover, AT&T's suggestion that CLECs simply inquire of other CLECs to establish a basis for self-certification, implies that the filing of a self-certification permanently entitles a CLEC to a UNE loop or UNE transport circuit. That is patently false. AT&T surely is not contending here that it has no right to bring a challenge to the self-certification, even though paragraph 234 expressly grants such right. And, unless AT&T's challenge to self-certification is to be sustained automatically, without any investigation, the data on which it relies must be examined. AT&T's argument simply makes no sense.

The DRs to which AT&T Missouri objects are relevant to the issues in this case and its objections must be overruled.

III. Reply to AT&T Missouri's Response with Respect to Objections to Individual DRs

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:
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> 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.

AT&T's Response to Motion to Compel: AT&T objected to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence and is overly broad and unduly burdensome, but it nonetheless stated that it would provide a response to this Request. Because AT&T Missouri provided information *solely* for the wire centers it asserts are non-impaired, rather than for *all of its wire centers*, XO and NuVox filed their Motion to Compel. AT&T's additional arguments in its Response are that it need not provide the detailed information because it is confidential and proprietary, and because it is not readily available.

Reply to AT&T: As explained in Part II of this Reply, under the *TRRO* CLECs are entitled to verify AT&T Missouri's non-impairment determinations, including verifying that AT&T Missouri has performed the counts of business lines. As already noted, a protective order has been entered in this proceeding and the fact that the responsive information is confidential and proprietary is no reason to deny discovery. NuVox and XO want to perform a cross-check of the business line counts on which AT&T Missouri made its non-impairment determinations against other reported data, including the statewide ARMIS data that AT&T Missouri has submitted to the FCC. To do that, CLECs need the data for all the wire centers, not just the 14 that AT&T asserts are non-impaired.

As NuVox and XO already have stated, no party can dictate to another party the form its discovery questions must take or the information that is discoverable so long as the information sought is relevant. CLECs are entitled under the *TRRO* to verify the data on which non-impairment determinations rest. NuVox and XO are not required to accept as fact AT&T's interpretation of the FCC's rulings and AT&T line counts. Comparison of the data can shed light on the correctness of AT&T's interpretation of the FCC's rulings and the accuracy of the

line counts; on what basis is AT&T entitled to assert that CLECs cannot perform their own arithmetic to add the individual wire center data to obtain statewide totals?

AT&T Missouri states that the data are not readily available and its production unduly burdensome. NuVox and XO find this hard to believe, since AT&T Missouri necessarily accessed its records in order to generate ARMIS reports and to comply with the requirements of the *TRRO*. How would AT&T know which wire centers pass the threshold tests for non-impairment if AT&T did not examine line counts in its wire centers? Is AT&T now stating that it did a cursory and incomplete calculation? Is AT&T now stating that the data it assured the FCC was so readily available in fact is difficult to ascertain? AT&T Missouri's arguments ring hollow and should be overruled.

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).

AT&T's Response to Motion to Compel: AT&T Missouri objected to this Request on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence. In its Response to the Motion to Compel, AT&T submitted a revised relevance argument, this time contending that no response to this Request is necessary, because XO and NuVox already know that the business line counts AT&T (then SBC) submitted to the FCC in December 2004 counted lines differently from the way business lines were subsequently counted when AT&T made its non-impairment determinations. AT&T Missouri asserts that its interpretation of the FCC's rulings in the *TRRO* is correct; therefore, XO and NuVox have no need to perform any comparison of the data submitted to the FCC in 2004 against the business line counts that AT&T Missouri asserts support its non-impairment determinations.

Reply to AT&T: AT&T Missouri's position at bottom is that it has properly calculated its business line counts and, therefore, any information CLECs would or could use to challenge AT&T's interpretation of the Business Line definition in the *TRRO* is irrelevant. AT&T apparently forgets that the Commission has not completed its investigation and has not ruled that business line counts are to be calculated in the manner used by AT&T. Much of AT&T's response to the Motion to Compel is an argument on the merits of its interpretation of the FCC's rulings, not an argument on relevance. NuVox and XO are challenging AT&T Missouri's interpretation and application of the FCC's rulings. NuVox and XO are entitled to discovery of information that bears on the correctness of AT&T's position. The fact that the data AT&T gave to the FCC and on which the FCC relied is not the same as what AT&T now says is the appropriate business line count can shed light on whether AT&T's interpretation is correct and should be approved by this Commission. That is the standard for relevance.

As explained in XO and NuVox' Motion to Compel, paragraphs 111 through 120, and footnote 322, of the *TRRO* make clear the fact that the FCC set its non-impairment thresholds for high-capacity loops and transport after reviewing data it asked the RBOCs to submit on their business line counts in their wire centers. AT&T agrees there is a discrepancy between the two sets of business line count data, but argues that the size of the discrepancy is irrelevant because it is merely abiding by the FCC's rules. NuVox and XO do not agree that AT&T is abiding by the FCC's rules; if it were true that AT&T always is right then no state commission that has examined AT&T's business line counts would ever have found to the contrary and this proceeding would be a waste of time and resources. The *size* of the discrepancy, the *extent* to which AT&T Missouri's business line count performed for determining non-impairment exceeds the count given to the FCC is a factor in judging the reasonableness of AT&T's interpretation. If

the discrepancy is more than de minimus, more than negligible, then AT&T's interpretation eliminates CLECs' access to UNEs in more wire centers than was contemplated by the FCC when it set the thresholds in the *TRRO*. NuVox and XO are entitled to make their case to the Commission in this proceeding that AT&T's interpretation produces an unreasonable result and is therefore wrong. Again AT&T is arguing that CLECs are only entitled to data for the non-impaired wire centers, as if AT&T's view of this proceeding were binding and conclusive, and AT&T even goes so far as to tell CLECs to "do the math" on the non-impaired wire centers and be satisfied. AT&T has the submission it made to the FCC readily at hand; AT&T has stated no basis for refusing to provide it.

AT&T Missouri finally contends that the fact that its affiliates in Indiana and Illinois provided data in response to similar requests is of no consequence. The purpose of pointing out that the information was provided was to demonstrate that AT&T Missouri's objections not only were not upheld in similar proceedings before other state commissions but were not pursued. The question is not why those affiliates responded to discovery, as AT&T Missouri contends, but rather why AT&T believes that circumstances here are so vastly different that the data sought need not be provided.

Under Rule 56.01(b)(1) of the Rules of Civil Procedure the information sought is relevant to the issues being investigated in this proceeding and is discoverable.

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:
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> 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.

AT&T's Response to Motion to Compel: AT&T Missouri argues that "[i]t does not know the number of loops 'separately for XO and NuVox,' if any, that were included in the business line counts." (Response at 13) AT&T also states that records may not exist that enable it to provide the information sought and, in any event, XO and NuVox can check their own records.

Reply to AT&T: The purpose of this Request is to compare AT&T Missouri's count of UNE loops it provided to XO and NuVox against these CLECs' records of the UNE loops they obtained from AT&T Missouri at the same time period. Through this comparison, XO and NuVox can determine whether any discrepancy exists such that it is more or less likely that AT&T Missouri's calculation of business lines is correct. It is useless, therefore, for XO and NuVox to look at their own bills received in 2003 and quit there, as AT&T suggests. Further, although in the Motion to Compel CLECs *suggested* that AT&T Missouri look in its billing records for the data being sought, nothing in the DR or in the Motion states that XO and NuVox have asked for AT&T Missouri's billing records.[3]

The FCC's business line definition requires the ILECs to count several types of access lines when performing their calculations, including counting UNE loops the ILECs provide to CLECs for purposes of serving business customers. This Request asks AT&T Missouri to state how many UNE loops it provided to NuVox and to XO as of a specific date, i.e., the date that AT&T Missouri contends should be used for determining which wire centers are non-impaired.

[3] The Motion states at page 9: "The Request is specific on its face and is not overly broad. It asks AT&T Missouri to state, separately for XO and for NuVox, the number of analog UNE loops, DS1 UNE loops and DS3 UNE loops, AT&T Missouri provided to each CLEC at a specific time. AT&T Missouri is only being asked to state what its records show, records it necessarily maintains in order to provide and bill for UNEs. AT&T Missouri does not – and could not – contend that it does not keep records of the UNE loops it sells to specific CLECs in Missouri."

AT&T Missouri's response that "[i]t does not know the number of loops 'separately for XO and NuVox,' if any, that were included in the business line counts" (Response at 13) misstates the question the CLECs' asked.

AT&T Missouri's objections should be overruled.

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.

XO and NuVox have withdrawn their Motion to Compel with respect to DR 15. No ruling is required on their Motion with respect to this Request.

WHEREFORE, PREMISES CONSIDERED, NuVox and XO pray that their Motion to Compel be granted and that AT&T Missouri be ordered to provide responses to DRs 6, 7 and 14 within five business days of issuance of the presiding officer's Order granting this Motion.

Respectfully submitted,

/s/ Carl J. Lumley

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served upon the attorneys for all parties on the following list by either U.S. Mail, fax, or email on this 9th day of April, 2007.

/s/ Carl J. Lumley

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