

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	)	Case No. TO-2006-0360
AT&T Missouri Asserts are Non-Impaired	)	
Under the TRRO	)	

**NUVOX COMMUNICATIONS OF MISSOURI, INC.'S RESPONSE TO  
COMMISSION ORDER DIRECTING FILING**

**COMES NOW** NuVox Communications of Missouri, Inc. ("NuVox") and files this Response to the Commission's Order Directing Filing entered on April 11, 2008 and states as follows:

1. In its Application for Reconsideration and/or Rehearing filed in this case on April 9, 2008, AT&T Missouri ("AT&T") asserted that one of the wire centers it had designated as a Tier 1 wire center should not be classified by the Commission as a Tier 2 wire center. Specifically, AT&T stated that if the Commission does not change its ruling holding that NuVox is not a fiber-based collocater in that wire center, then the carrier referenced in the affidavit of Mr. Edward Cadieux provided to Staff by NuVox in this proceeding should be counted as a fiber-based collocater.<sup>1</sup>

2. The Commission's Order Directing Filing directs NuVox and Commission Staff to respond to AT&T's assertion that the exclusion of NuVox as a fiber-based collocater resulted in the inappropriate exclusion of the carrier with which NuVox has an arrangement.

3. Mr. Cadieux' affidavit was entered into evidence as an exhibit to Staff witness Sheperle's testimony.<sup>2</sup> Mr. Cadieux stated in his affidavit that:

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<sup>1</sup> The identity of the carrier referenced in Mr. Cadieux' affidavit and the identify of the wire center are highly confidential information.

<sup>2</sup> Exhibit 22, Sheperle Direct, HC Schedule 2-C 28 and 29.



evidence test); *Wilson v. Labor and Industrial Relations Comm'n*, 573 S.W.2d 118, 121 (Mo. App. 1978) (hearsay evidence will not qualify as competent and substantial evidence upon the whole record to support a finding of fact by an administrative agency). Mr. Cadieux did not demonstrate any personal knowledge of the carrier's corporate ownership structure, or of any specific information regarding the configuration and operation of the carrier's facilities and network. Such testimony is insufficient if it is not based upon personal knowledge, or is speculative and conjectural. *Hemeyer v. Wilson*, 59 S.W.3d 574, 581 (Mo. App. W.D. 2001).

6. Nothing in AT&T's testimony establishes that \*\* XXXX \*\* is a fiber-based collocator. AT&T did not name this carrier as a fiber-based collocator in the wire center.<sup>4</sup> AT&T states in its Application that its "evidence showed that 4 FBCs were identified in the wire center in March 2005 on the strength of a physical, on-site inspection showing that each collocation arrangement there met the physical requirements necessary to be classified as an FBC." (Application at 3) But the testimony to which AT&T cites in support of this statement is Ms. Chapman's Rebuttal at pages 65-66, testimony that reveals that this witness has no personal knowledge, did not receive any information from any AT&T employee as to the status of the carrier in question, and in fact does not make any assertion as to whether the carrier is a fiber-based collocator.

7. In its response to the Commission's Order Directing Filing, Staff points to pages 69-71 of Ms. Chapman's Rebuttal as evidence that NuVox' arrangement with the other carrier is indicative of a fiber-based collocator. However, NuVox' review of Ms. Chapman's testimony indicates that she only addresses NuVox, and only reiterates AT&T's assertion that NuVox is a fiber-based collocator; there is nothing whatsoever in this testimony or in the

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<sup>4</sup> At footnote 5 of its Application AT&T lists the four carriers that it identified as fiber-based collocators when it developed its wire center classifications in response to the *TRRO*. AT&T has never modified that list except to delete pre-merger AT&T from the count as of December 2005.

testimony of any AT&T witness that constitutes evidence that \*\* XXXXX \*\* is a fiber-based collocator. Nor did Coalition witness Mr. Gillan testify that the carrier is a fiber-based collocator. Rather, Mr. Gillan testified at hearing that if either NuVox or the other carrier were a fiber-based collocator, then there would be the requisite number of fiber-based collocators for classification of the wire center as Tier 1.<sup>5</sup>

8. AT&T has failed to carry its burden of proof on the proper classification of this wire center. It was incumbent upon AT&T to present evidence that there were four fiber-based collocators in each wire center that it asserted should be classified as Tier 1 and to correctly identify the qualifying carriers. *See Dycus v. Cross*, 869 S.W.2d 745, 749 (Mo. 1994) (the party asserting the positive of a proposition bears the burden of proving that proposition). The carrier in question was not identified as a fiber-based collocator on AT&T's list provided to Commission Staff and the parties and, therefore, was not among the carriers to which Staff propounded data requests. AT&T became aware of Mr. Cadieux' affidavit at least as early as the time of filing of Staff witness Mr. Sheperle's Direct on March 30, 2007; nonetheless it utterly failed to (1) conduct a second inspection of the wire center that is at issue; (2) failed to request that Staff issue a data request to the carrier named in Mr. Cadieux' affidavit; and (3) failed even to seek discovery on NuVox which is a party to this proceeding. In addition, the CLEC Coalition stated in its Pre-hearing Brief that Mr. Cadieux would be available to testify at hearing, but AT&T did not suggest that testimony be taken regarding Mr. Cadieux' affidavit or NuVox' arrangements in the wire center in question.<sup>6</sup>

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<sup>5</sup> The exchange with Mr. Gillan was as follows: "Q. Did AT&T Missouri count that other carrier as a fiber-based collocator in those wire centers? A. Not to my knowledge. Q. If either NuVox or the other carrier, but only one of the two is counted as a fiber-based collocator in these wire centers, then the criteria for the presence of fiber-based collocators is met, isn't it? A. In those two, yes." Tr. 223.

<sup>6</sup> Footnote 82 of the Coalition's Pre-hearing Brief states that: "If the Commission seeks additional facts on this issue, Mr. Cadieux will be available at hearing to respond to questions."

9. AT&T has stated no justification for its failure to take prudent steps within its initiative and control to present evidence on the carrier's operations and facilities that show its status as a fiber-based collocator. AT&T chose to provide testimony and evidence asserting that NuVox was a fiber-based collocator, not that the third party from which NuVox purchased transport fit the requirements of the FCC's definition. There is no testimony whatsoever from AT&T mentioning \*\* XXXXX \*\* in any manner.

10. The evidence that is now in the record is of questionable sufficiency to form the basis of a Commission decision on reconsideration to count \*\* XXXX \*\* as a fiber-based collocator in the \*\* XXXXXXXXXXXX \*\* wire center and conclude that AT&T has correctly designated the wire center as Tier 1. That deficiency cannot be remedied by incorrectly counting NuVox as a fiber-based collocator, when the Commission's decisions resolving the legal issues regarding the fiber-based collocator definition make clear NuVox does not legally qualify.

11. NuVox suggests that the Commission Staff be given an opportunity to present information regarding the alleged fiber-based collocator from whom NuVox obtains transport service in the wire center in controversy. The identification of all of the other fiber-based collocators in this case was based on information from AT&T's physical inspections of its wire centers, as verified by affidavits from the alleged fiber-based collocators obtained by Staff. Staff should issue a data request on this issue to \*\* XXXXX \*\*, as it did to obtain information from other Missouri CLECs. NuVox suggests that Staff be given a period of time in which to obtain a sworn affidavit regarding \*\* XXXXXX \*\* alleged status as a fiber-based carrier and that all parties be given the opportunity to review the new evidence and notify the Commission whether they have any reason to contest it before it is admitted into the record.

WHEREFORE, NuVox recommends that, to ensure that the record is sufficient to support a finding that \*\* XXXXX \*\* is a fiber-based collocator under the FCC's definition and that the \*\* XXXXXXXXXXXXXXXX \*\* wire center should be classified as Tier 1, the Commission deny AT&T's Application for Reconsideration and/or Rehearing. To resolve this matter based on a full record, if the Commission determines that AT&T has stated sufficient grounds to justify reopening the record to take evidence that AT&T failed to produce at hearing, NuVox further recommends that the Commission remand this proceeding to the Regulatory Law Judge for the limited purpose of taking additional evidence. NuVox recommends that Staff be provided an opportunity to obtain a sworn statement from \*\* XXXXX \*\* as to its alleged status as a fiber-based collocator in the subject wire center.

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 21st day of April, 2008.

/s/ Carl J. Lumley

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