

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

In the Matter of the Investigation of the)	
State of Competition in the Exchanges of)	Case No. TO-2001-467
Southwestern Bell Telephone Company.)	

**AT&T MISSOURI'S REPLY IN SUPPORT
OF ITS MOTION TO DISMISS**

COMES NOW Southwestern Bell Telephone, L.P., d/b/a AT&T Missouri ("AT&T Missouri")¹ and for its Reply in Support of its Motion to Dismiss states as follows:

1. This case is before the Missouri Public Service Commission ("Commission") pursuant to the mandate issued by the Missouri Court of Appeals which reversed the Commission's decision determining that certain services (intraLATA private line/dedicated services, intraLATA toll services, Wide Area Telecommunications Services and 800 services, special access services, and station-to-station, person-to-person and calling card services) were classified as competitive by operation of law under Section 392.370 RSMo.
2. AT&T Missouri filed its Motion to Dismiss and Reply to Response to Order Setting Procedural Conference on December 14, 2005. In its Motion, AT&T Missouri noted that the passage of SB 237 and the issuance of decisions by the Commission approving competitive classification for business and residential services in exchanges representing the vast majority of AT&T Missouri's access lines negated the need for any additional action by the Commission.
3. On December 19, 2005, NuVox Communications of Missouri, Inc., XO Communications Services, Inc., MCImetro Access Transmission Services, L.L.C. and MCI Communications Services, Inc. filed their Reply to AT&T Missouri's Motion to Dismiss

¹ Southwestern Bell Telephone, L.P. was formerly known as SBC Missouri.

(“NuVox Reply”). On December 21, 2005, the Office of the Public Counsel (“OPC”) filed its Response to AT&T Missouri’s Motion to Dismiss (“OPC’s Response”).

4. The NuVox Reply and OPC Response assert, without citation to any legal authority, that certain rates charged by AT&T Missouri for the services which the Commission classified as competitive by operation of law under Section 392.370 RSMo must be revised on a prospective basis pursuant to the mandate issued by the Court of Appeals.² The NuVox Reply and OPC Response do not, however, come to grips with the actual decision of the Court of Appeals or the facts of this case. In its decision, the Court of Appeals did not address the rates for any service offered by AT&T Missouri, nor did it direct the Commission to review any rate for service offered by AT&T Missouri. Instead, the Court of Appeals directed the Commission to consider whether the services at issue should have been classified as competitive pursuant to the “effective competition” standard of Section 392.245.5 RSMo. Nor would it have been appropriate for the Court of Appeals to address rates, since no rates were established in Case No. TO-2001-467 and the appeal did not address the rates for any service.

5. In its Motion to Dismiss, AT&T Missouri pointed out that the Commission’s decision which was reversed by the Court of Appeals addressed only the competitive classification of services, not the rates for any of the services which the Commission erroneously determined to be competitive pursuant to Section 392.370 RSMo. Rates for these services were changed in subsequent tariff filings over the last several years, none of which were the subject of any appeal or any request for stay by NuVox, OPC or any other party. Neither NuVox nor OPC even address the failure to appeal or seek a stay of these subsequent tariff filings; instead, NuVox

² No party seeks a retroactive revision of the rates for these services, and it is clear that any such revisions would be unlawful retroactive ratemaking. State ex rel. Util. Consumers Council v. Public Service Commission, 585 S.W.2d 41, 58 (Mo. banc 1979); Lightfoot v. City of Springfield, 236 S.W.2d 348, 353 (Mo. 1951); State ex rel. Barvick v. Public Service Commission, 606 S.W.2d 474, 476 (Mo. App. 1980).

and OPC erroneously assert that compliance with the Court of Appeals' mandate requires that rates be revised.

6. The mandate issued by the Court of Appeals provides as follows:

Now on this date the judgment of the Commission is affirmed as to Point I [i.e., a determination that business services in St. Louis and Kansas City and residential services in Harvester and St. Charles should be deemed competitive under Sections 392.245] and reversed and remanded to the Circuit Court of Cole County as to Point II [i.e., the decision concerning the services which were deemed competitive by operation of law under Section 392.370] for further proceedings all in accordance with the opinion of this court.

7. The Court of Appeals' decision found that the Commission had applied the incorrect standard in assessing competitive classification for certain services. Rather than relying upon Section 392.370 RSMo, the Court of Appeals directed the Commission to assess competitive classification for these services pursuant to the provisions of Section 392.245.5 RSMo. Accordingly, the Court of Appeals ordered the Commission to "re-examine the competitive status of these particular services by applying the 'effective competition' factors to the evidence the Commission has already accumulated with regard to these services both from the 1993 'transitionally competitive' hearing in Case No. TO-93-116 as well as from the hearing in the underlying case."³ It is clear that if the Commission had applied the competitive classification standard contained in Section 392.245.5 RSMo at the time it issued its Report and Order in 2001 (or if the Commission now applied the Section 392.245.5 standard as it existed in 2001), the services at issue would be found to be competitive. The Commission has already determined that most of the services at issues in this case were competitive, pursuant to Section 392.245.5 RSMo, on a statewide basis for Sprint in Case No. IO-2003-0281. Based on the record adduced in Case No. TO-2001-467, and in Case No. TO-93-116 (which the Court of

³ State ex rel. Coffman v. Public Service Commission, WD 63075, September 28, 2004, p. 22.

Appeals specifically directed the Commission to consider on remand) as well as the decision in the Sprint case (Case No. IO-2003-0281), the services which are the subject of the remand would be deemed competitive based upon the principles of Section 392.245.5 RSMo as they existed at the time of the Commission's determination in Case No. TO-2001-467. No party has or can make any legitimate claim to the contrary. If the Commission intends to take any action to investigate or attempt to require changes in the prices of any of the services which are subject to the remand, the Commission should not dismiss the case but should instead make the determination that the services at issue should be treated as competitive pursuant to the standard contained in Section 392.245.5 RSMo as of the time of the December 21, 2001 Report and Order in this case.

8. Strict compliance with the mandate would require the Commission to determine whether the services at issue should have been classified as competitive under the competitive classification criteria in Section 392.245.5. Had the Commission applied this standard, either at the time it issued its 2001 Report and Order or immediately after the mandate was issued in March, 2005, the Commission would be compelled to find the services at issue to be classified as competitive just as it did in the Sprint case. If the Commission does not seek to impose any changes in the current tariff prices for the services at issue, it need not make the determination and may instead dismiss the case. But if the Commission seeks to require any changes in the prices of the services at issue, then strict compliance with the mandate is necessary and would require a determination that the services should have been declared competitive, either as of December, 2001, or as of the issuance of the mandate in March, 2005, under the standard in Section 392.245.5 RSMo. The Commission may not, however, penalize AT&T Missouri by

requiring an adjustment of rates for services which should have been declared competitive in either December, 2001 or March, 2005.

9. As noted, rate changes for the services at issue were approved in subsequent proceedings without objection by either NuVox or OPC. Neither NuVox nor OPC address their failure to appeal the subsequent decisions of the Commission allowing rate changes for the services at issue to go into effect. Had the Commission applied the standard of Section 392.245.5 in its December 27, 2001, Report and Order in this case, it is clear that the price changes could not have been rejected by the Commission. Similarly, the rates would have been permitted to remain in effect had the Commission undertaken the review directed by the Court of Appeals in March, 2005. In any event, neither OPC nor NuVox cites any authority for the extraordinary proposition that the Commission may revise those rates when no party appealed the Commission's decision nor sought a stay of the Commission's decisions approving tariff price changes since the December, 2001 Report and Order. To the contrary, Section 386.370 RSMo 2000 provides that all rates shall be in force and be prima facie lawful until found otherwise in a suit brought for that purpose pursuant to the provisions of Chapter 386. No such suit has been initiated.

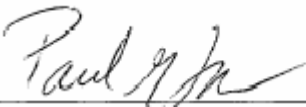
10. The Commission is without authority to undertake the action which NuVox and OPC seek. The rates for the services at issue here were not changed in the Report and Order in TO-2001-467, but were changed in subsequent cases which neither OPC nor NuVox appealed or sought a stay of implementation. Attempted revision of those rates is not required by the mandate of the Court of Appeals; instead, the mandate would require the Commission to assess competitive classification for the services at issue under the standard as it existed in Section 392.245.5 as of the December 27, 2001 Report and Order and as it existed at the time the

mandate was issued in March, 2005. If the Commission does not agree with AT&T Missouri's position that this case can be dismissed, then it must follow the mandate issued by the Court of Appeals and make the requisite determination that the services at issue should have been declared competitive as of the standard in Section 392.245.5 as it existed in December, 2001 and in March, 2005.

WHEREFORE, for all the foregoing reasons, AT&T Missouri respectfully requests the Commission to (1) dismiss this case pursuant to AT&T Missouri's Motion to Dismiss or (2) comply with the Court of Appeals' mandate and determine that the services at issue should have been declared competitive under the criteria of Section 392.245.5 as it existed as of the December 27, 2001 Report and Order in this case and at the time the mandate was issued in March, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing document were served to all parties by electronic mail on January 3, 2006.



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