

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

NuVox Communications of Missouri, Inc,	)	
	)	
Complainant,	)	Case No. CC-2009-0435
	)	
vs.	)	
	)	
	)	
Southwestern Bell Telephone	)	
Company d/b/a AT&T Missouri,	)	
	)	
Respondent.	)	

**NUVOX FURTHER REPLY TO AFFIRMATIVE DEFENSES  
AND RENEWED MOTION FOR MORE DEFINITE STATEMENT**

COMES NOW NuVox Communications of Missouri, Inc. (NuVox), pursuant to Commission Order Directing Filing and pursuant to 4 CSR 240-2.080(15) in response to AT&T Missouri's Reply filed on or about August 28, 2009 and for its Further Reply to AT&T Missouri's affirmative defenses, and its renewed motion for more definite statement regarding such affirmative defenses, states:

1. In its August 28, 2009 Reply, AT&T Missouri erroneously seeks to place the burden on NuVox to provide a factual basis for AT&T Missouri's purported affirmative defenses.<sup>1</sup> AT&T Missouri did not file a motion for more definite statement as to the Complaint, but rather answered and attempted to state certain affirmative defenses, for which it bears the burdens of sufficient pleading and proof. "The burden of proof on all affirmative defenses rests upon the defendant as the asserting party. This burden of proof to establish affirmative defenses is on the defendant from the beginning, and it remains upon the defendant throughout the case." *Gennari v. Prudential Ins. Co.*, 335 SW2d 55,

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<sup>1</sup> To the extent AT&T Missouri purports to characterize and/or selectively quote from the contents of NuVox's Complaint, NuVox denies those characterizations and refers the Commission to the text of the Complaint.

60 (Mo. 1960)(citation omitted). With limited exceptions, AT&T Missouri has not amplified the conclusory statements set forth in its original statement of its affirmative defenses and has failed to plead any facts regarding those purported defenses. Accordingly, NuVox continues to move the Commission to require AT&T Missouri to make a more definite statement of its affirmative defenses in order to more specifically define the issues in this case.

2. NuVox continues to deny AT&T Missouri's assertion that the Complaint fails to state a claim on which relief may be granted. In its Reply, AT&T Missouri identifies as **the sole basis** for its assertion of a defect in NuVox's Complaint, a contention that NuVox should provide an explanation of why AT&T Missouri is not permitted to impose the contested charges. But it is plain from the Complaint that NuVox has shown exactly why AT&T Missouri is not permitted to impose the contested charges – because there are no such charges authorized by the Interconnection Agreement (see, e.g. Complaint, para. 9-11). NuVox has paid all the applicable charges for EELs obtained from AT&T Missouri as full compensation in accordance with the terms and conditions of the Interconnection Agreement, and that is all AT&T Missouri is entitled to be paid. This case is not a proceeding to set a new EEL rate structure, but rather concerns AT&T Missouri's illegal attempt to impose charges that are not authorized by the Interconnection Agreement. AT&T Missouri's discussion of purported "work" is irrelevant to this dispute. Hence, based on AT&T Missouri's Reply the Commission should dismiss AT&T Missouri's first affirmative defense immediately.

3. NuVox continues to deny AT&T Missouri's bald assertions that the Complaint is barred and/or relief thereunder is limited by statute of limitations or contractual claim

limitations. AT&T Missouri has yet to plead any facts in support of its contention that NuVox did not timely commence the dispute resolution process under the interconnection agreement. Although there is no requirement that NuVox plead additional facts at this time regarding AT&T's affirmative defenses, nonetheless it states that:

(a) NuVox timely brought its claims each time that it disputed an AT&T Missouri invoice involving the unauthorized and contested charges, which practice dates back to at least into 2006. NuVox conducted discussions about its claims with AT&T Missouri at various times since then as well.

(b) On or about October 27, 2008 NuVox advanced its claims to another level by initiating formal dispute resolution under section 13.2.1 of the General Terms and Conditions of the Interconnection Agreement.<sup>2</sup> Discussions with AT&T Missouri continued.

(c) On or about June 5, 2009, NuVox advanced its claims to another level by filing the Complaint with the Commission.

3. NuVox denies AT&T Missouri's assertions that the Complaint is barred and/or relief thereunder is limited by contractual credit claim limitations or bill dispute limitations. As indicated above, NuVox began disputing the overcharges and withholding payment in 2006 and has been engaged in ever-escalating attempts to resolve the matter with AT&T Missouri. Accordingly, in the Complaint, NuVox pleads that it has disputed the overcharges in accordance with the Interconnection Agreement. (Complaint, para. 15).

WHEREFORE, NuVox moves the Commission to (1) dismiss AT&T Missouri's first affirmative defense; (2) direct AT&T Missouri to make a more definite statement of

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<sup>2</sup> AT&T Missouri admits receipt of this communication in footnote 4 of its Reply.

its remaining affirmative defenses, (3) deny AT&T Missouri's requests for relief, and (4) grant NuVox the relief sought pursuant to the Complaint.

Respectfully submitted,

CURTIS, HEINZ,  
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

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#### **CERTIFICATE OF SERVICE**

A true and correct copy of the foregoing document was either mailed, faxed, or emailed this 8th day of September, 2009, to the persons listed on the attached service list.

/s/ Carl J. Lumley

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