Robert J. Gryzmala
General Attorney

AT&T Missouri
One AT&T Center
Room 3516
St. Louis, Missouri 63101

T: 314.235.6060
F: 314.247.0014
robert.gryzmala@att.com

November 8, 2007

Honorable Kennard Jones
Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street
Jefferson City, MO 65101

Re: TO-2006-0360 (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*) -- October 8, 2007 Arkansas Public Service Commission Order

Dear Judge Jones:

The CLEC parties and AT&T Missouri respectfully present this joint submission in the above-referenced case to bring your attention to the above-referenced Arkansas PSC Order.

On July 23, 2007, the CLEC parties and AT&T Missouri jointly submitted Judge's Exhibit A, consisting of two matrices (Other State Decisions -- Business Line Definition; Other State Decisions -- Fiber Based Collocator Definition). The CLEC parties and AT&T Missouri agreed to update Judge's Exhibit A when necessary to reflect decisions in other jurisdictions germane to the issues before the Commission here. This is to advise that on October 8, the Arkansas PSC issued the attached Order in which the Commission ruled in favor of AT&T Arkansas with respect to the business line issues (Order, pp. 9, 12) and in favor of CLEC NuVox with respect to the fiber-based collocator issues (Order, p. 16). The contested issues in the Arkansas case are likewise presented in this case.[1]

Mr. Magness and I will update Judge's Exhibit A as and when decisions such as this are issued prior to the issuance of the Commission's own decision, absent different instructions.

Sincerely

Robert J. Gryzmala

Attachment

cc: Mr. William L. Magness
Mr. William K. Haas
Mr. Michael F. Dandino
Mr. Carl J. Lumley
Mr. William D. Steinmeier
Ms. Mary Ann Young
EFIS

[1] The October 8 Order, though issued by the Presiding Officer, represents the Findings and Conclusions of the Arkansas PSC pursuant to the Arkansas PSC's December 7, 2005, Redesignation Order, which provides among other things that the Arkansas PSC could modify the Presiding Officer's Order within thirty days of its issuance. However, the Arkansas PSC did not do so.

ARKANSAS PUBLIC SERVICE COMMISSION

SOUTHWESTERN BELL TELEPHONE, L.P. D/B/A AT&T ARKANSAS, COMPLAINANT VS. NUVOX COMMUNICATIONS OF ARKANSAS, INC., RESPONDENT	DOCKET NO. 05-140-C ORDER NO. 8

ORDER

By this Order the Presiding Officer finds that: (1) all UNE loops should be included in the business line count in determining whether a given wire center is unimpaired; (2) ISDN and other digital lines should be counted by counting each 64 kbps equivalent to one business line; and (3) a collocator that has no fiber of its own but buys fiber-based service from another carrier with whom it cross connects at a collocation site does not meet the definition of a fiber-based collocator contained in 47 C.F.R. §51.5 and should not be included the fiber based collocator counts referred to in 47 C.F.R. §51.319.

Background

The Telecommunications Act of 1996 ("the Act"), Pub. L. No. 104-104, 110 Stat. 56, imposes certain duties on incumbent local exchange carriers ("ILECs") in order to facilitate competitors' entry into the market. Among these duties is the obligation to allow competitive local exchange carriers ("CLECs") to interconnect with an ILEC's established infrastructure. 47 U.S.C. § 251(c).

Section 251 of the Act requires ILECs to provide unbundled network elements ("UNEs"). Specific unbundling requirements are contained in 47 U.S.C. § 251(c)(3) and the rules implementing those requirements are contained in 47 C.F.R. § 51.1 *et seq.*

The FCC has the exclusive authority to determine which network elements must be made available as UNEs. *United States Telecom Ass'n v. FCC,* 359 F.3d 554, 568 (D.C.Cir., 2004), holding that the FCC may not "delegate to state commissions the authority to determine whether CLECs are impaired without access to network elements". In determining whether a network element must be provided on an unbundled basis, the FCC must consider whether an ILEC's failure to provide access to a non-proprietary element would "impair" a CLEC's ability to compete, or, if the element is proprietary in nature, whether access to it is "necessary." 47 U.S.C. § 251(d)(2); 47 C.F.R. § 51.317.

The obligations imposed on ILECs by the Act include the obligation to provide interconnection to an ILEC's network to a competing carrier, allow a competing carrier that desires to lease all or part of the ILEC network with access to its network elements on an unbundled basis, and an obligation to sell services at wholesale prices to competing carriers. 47 U.S.C. § 251 (c). The Act also directs the FCC to create regulations implementing these obligations and the Act gives general oversight responsibility of the interconnection agreements to the state public utility commissions. Under 47 USC § 251(d)(2) the FCC is required to determine which network elements should be made available for unbundling and in so determining the FCC must consider the network elements or necessary and whether failure to provide access to such network elements would impair the ability of a competing carrier to offer its service.

The FCC issued its first set of regulations in the *First Report and Order*, (See *In Re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499 (1996). The United States Supreme Court determined that certain provisions of the First Report and Order were unlawful. *AT&T Michigan Corporation v. Iowa Utilities Bd.*, 525 U.S. 366 (1999). Subsequent regulations were developed in the FCC *UNE Remand Order*, 15 FCC R'cd 3696, FCC 99-238 (1999), and the FCC's *Triennial Review Order*, 18 FCC R'cd 19020, FCC 03-36 (2003). Ultimately, the FCC issued unbundling rules in its *Triennial Review Remand Order* ("TRRO") (See *Order on Remand, In re Unbundled Access to Network Elements*, 20 FCC R'cd 2533, FCC 04-290 (2005)). The unbundling requirements contained in the TRRO are codified at 47 C.F.R. § 51 *et seq.*

The present case centers on three primary issues: (1) whether all UNE loops should be included in the business line count in determining whether a given wire center is unimpaired or should an effort be made to determine which UNE loops are used to serve business customers; (2) whether all ISDN and other digital lines should be counted by counting each 64 kbps equivalent to one business line or should an effort be made to determine which digital lines, or a portion of their capacity, are used to serve business customers; and (3) whether a "collocator" that has no fiber of its own but buys fiber-based service from another carrier with whom it cross-connects at a collocation site meets the definition of a fiber-based collocator contained in 47 C.F.R. §51.5.

This docket was initiated by the filing of a complaint by Southwestern Bell Telephone, L.P. d/b/a AT&T Arkansas ("AT&T") against NuVox Communications of Arkansas, Inc. ("NuVox"). The parties address several issues which need not be addressed in resolving the primary issues presented. For example, AT&T suggests that

because the term "comparable transmission facility" is not specifically defined in the FCC's rules, the Commission should consider a dictionary definition of "comparable", which, according to AT&T, leads to the conclusion that a collocator cross-connected to another collocator using coaxial cable could quality as a fiber-based collocator, depending upon how one defines "comparable" and "terminates" and "leaves" as those terms are used in the definition of fiber-based collocator in 47 C.F.R. §51.5.

Nuvox argues that the hypothetical described does not constitute a "comparable transmission facility" which "terminates at a co-location arrangement within the wire center" and "leaves the incumbent LEC wire center premises." Likewise, Nuvox argues that in counting the number of business lines, the definition contained in §51.5 suggests that a determination must be made as to whether a UNE loop is used as a switched access business line. Nuvox makes essentially the same argument in determining how ISDN and digital access lines should be considered in determining the number of business lines and Nuvox suggests that a "good faith estimate" be used to remove UNE loop capacity of other CLECs to equal the percentage of the maximum potential capacity of AT&T's high-capacity loops which are used to provide switched access line services.

The Commission need not look outside the requirements of 47 C.F.R. §51.5 if, in the Commission's opinion, there is no ambiguity in the rules. The Presiding Officer believes there is no ambiguity in the requirements of 47 C.F.R. §51.5 and the plain language of the rules contained in §51.5 are dispositive of the issues.

Procedural History

AT&T's complaint states that AT&T is an ILEC under federal law, citing 47 C.F.R. § 51.5, and that it provides wholesale telecommunications services to CLECs, including NuVox, which purchases wholesale telecommunications services from AT&T pursuant

to the terms and conditions of the parties A2A Interconnection Agreement. AT&T states that the FCC has conditioned certain unbundling obligations relating to the UNE loops and dedicated inter-office transport on the determination of whether an ILEC wire center is deemed is deed impaired. The determination is based on the number of fiber-based collocators and the number of business access lines present in a specific wire center. 47 C.F.R. § 51.5.

AT&T notes that the TRRO places the burden on a carrier requesting service from a given wire center to undertake an inquiry and to self certify that, to the best of its knowledge, the carrier's request for interconnection is consistent with the requirements for unbundling of high capacity loops and interoffice transport. Pursuant to a request by the FCC's Wire Line Competition Bureau, AT&T submitted a list of non-impaired wire centers to the FCC. Thereafter, NuVox attempted to self certify access to UNEs pursuant to the provisions of the TRRO, ¶ 234, despite AT&T's determination that the wire centers were non-impaired.

AT&T states that recognizing that not all self-certification submitted by carriers would be accurate, the FCC authorizes ILECs to challenge the carriers' request for UNE access to the dispute resolution procedures provided for the carrier's interconnection agreement. Section 9 of the A2A Interconnection Agreement allows a disputing party to invoke the dispute resolution procedures made available by this Commission. AT&T therefore filed its complaint requesting this Commission to determine that NuVox is not entitled to UNE access and dedicated interoffice transport in certain specific wire centers.

NuVox filed its answer to AT&T's complaint asserting that AT&T has refused to provide NuVox certain information it needs to verify AT&T's determination that certain

wire centers are non-impaired and asserting that AT&T has incorrectly interpreted certain provisions of the TRRO and the rules for interpreting wire center impairment contained at 47 C.F.R. § 51.1 *et seq.*

The TRRO adopted a new test to determine wire center impairment and the new test considers the number of business lines in a wire center and the number of fiber-based collocators in a wire center. CLECs are deemed to be non-impaired for high capacity DS1 loops in any building within a wire center where there are 4 or more fiber-based carriers and at least 60,000 business lines. For high capacity DS3 loops, CLECs are deemed to be non-impaired if there are 4 or more fiber-based carriers and at least 38,000 business lines. CLECs are deemed to be non-impaired for DS1 transport on routes connecting a pair of wire centers if both wire centers have at least 4 fiber-based carriers or at least 38,000 business lines. For DS3 transport CLECs are deemed to be non-impaired if both wire centers have at least 3 fiber-based carriers or at least 24,000 access lines.

AT&T argues that these FCC required tests are designed to identify wire centers where sufficient revenue opportunities exists to make it feasible for CLECs to build duplicative network facilities, not to determine whether duplicative facilities exist. AT&T asserts that this FCC position is designed to promote an increase in actual facilities' based competition and that any approach to the counting methodologies that reduces the business line or fiber-based collocator count would result in a movement away from facilities-based competition.

Issue I. Whether all UNE loops should be included in the business line count in determining whether a given wire center is unimpaired or should an effort be made to determine which UNE loops are used to serve business customers.

47 U.S.C. §51.5 states:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
>
> (1) Shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) Shall not include non-switched special access lines,
>
> (3) Shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 ``business lines."

AT&T asserts that the FCC clarified how the business line count was to be made at paragraph 105 of the TRRO, stating:

> "[B]usiness line counts are an objective set of data that incumbent LEC already have created for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines plus business UNE-P, UNE-Loops. We adopts 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 . . . [B]y 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 threshold, in a simplified ability to obtain the necessary information.

AT&T asserts that "UNE loops must be counted in a manner that complies with the full FCC definition. This means that in order to be counted, a UNE loop must be (1) used to serve a business customer; [and] (2) used to provide switched services." (T. 277).

NuVox's position is based on the first sentence of the FCC's business line definition which defines a business as "an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent." NuVox also relies on

subparagraph (1) of the definition which provides that the business line count "shall include only those access lines connecting end-users customers with incumbent LEC end-offices for switched services and shall not include non-switched special access lines". NuVox asserts that the count should attempt to include only those access lines which can be shown, or be reasonably determined, to be used to serve business. NuVox suggests that such interpretation is the only reasonable interpretation which gives effect to the first sentence of the definition and subparagraph 1 of the definition when those provisions are read in conjunction with the term "plus the sum of all UNE loops." In order to accomplish a consistent reading of the definition, NuVox suggests using a "good faith estimate" to remove UNE loop capacity of other CLECs to equal the percentage of the maximum potential capacity of AT&T's high-capacity loops which are used to provide switched access line services. This would, according to NuVox, remove capacity used to provide residential service, empty capacity and capacity used for data services. (T. 284).

AT&T asserts that there is no inconsistency between the FCC's use of the phrase "all UNE loops" in the second sentence of the business line definition in §51.5 and the terms relied by NuVox in the first sentence and subparagraph (1). AT&T states that paragraph 105 of the TRRO supports its position in that the paragraph directs ILECs to "include all ARMIS 43-08 business lines, business UNE-P lines and UNE loops in their business line counts". AT&T argues that this precludes "adjustments" to the number of UNE loops which may included in the business line count. (AT&T Initial Brief, p.12).

AT&T notes that NuVox's position assumes that AT&T has the information to determine how a CLEC is actually using the UNE loops provisioned by AT&T. AT&T asserts that many ILECs, including AT&T, do not possess this information and

therefore, could not make the determinations required by NuVox's analysis. (AT&T Initial Brief, pp.13-14). AT&T asserts that paragraph 105 of the TRRO states the FCC's intent that business line counts are to be based on "an objective set of data that [ILECs] already have created for other regulatory purposes" and in paragraph 108 the FCC stated the proxy approach "relies on objective criteria to which the [ILECs] have full access . . ." (AT&T Initial Brief, p.14). AT&T also notes that NuVox witness, Joseph Gillan acknowledges that AT&T may not have the data needed to implement the NuVox recommendations. (*id at p. 15*).

Although the parties arguments, regarding how to interpret the business line definition to give due accord to each word and also considering the FCC's preference for the line count information to be readily available, are well reasoned, they need only be considered if there is an ambiguity in the plain language of the definition. The Presiding Officer finds no ambiguity in the language of the definition. As noted by the Court in *Logix Communications v. Public Utility Commission of Texas,* U.S.D.C. for the Western Dist. of Texas, Austin Div., Case No. A-06-CA-548-SS, filed Nov. 6, 2006,

> "[T]he rule identifies the number of business lines in a wire center as "the sum of all incumbent LEC *business switched access lines,* plus the sum of *all UNE loops* connected to that wire center, *including UNE loops provisioned in combination with other unbundled elements.*" The FCC explicitly intended to count all UNE loops, not jut those "provisioned in combination with" business lines.

(*id.*, emphasis in original). All UNE loops should be included in the business line count in determining whether a given wire center is unimpaired.

Issue II. Whether all ISDN and other digital lines should be counted by counting each 64 kbps equivalent to one business line or should an effort be made to determine which digital lines, or a portion of their capacity, are used to serve business customers.

47 U.S.C. §51.5 (3) provides that in considering the capacity of digital access lines in the business line count the tallie "[s]hall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

With regard to this issue AT&T states:

> In this docket there is no real dispute between the parties that subparagraph (3) of the business line definition in Rule 51.5 requires AT&T Arkansas to make the digital equivalency conversion on the UNE loops it provides to CLECs before completing its business line tallies. The parties' dispute focuses on whether the digital equivalency conversion calculation should be based on the capacity UNE loop it has provided to a CLEC, or instead limited to the capacity of the digital line actually being used by the CLEC in providing switch access service to its business customers. (Tr. 99).

(AT&T Initial Post Hearing Brief, p. 20). AT&T argues that subparagraph (3) of Rule 51.5 should be strictly applied. AT&T supports this argument by stating that it has no way of knowing how a CLEC is using the digital loop provided to it.

> From its business records, AT&T Arkansas only knows what it has actually provisioned to the CLEC. For instance, if the CLEC buys six analog UNE loops from AT&T Arkansas, it counts those six analog UNE loops as six business lines. (Tr. 145).
>
> If, however, the CLEC purchases a DS1 UNE loop from AT&T Arkansas, and then breaks the loop into different bandwidths, AT&T Arkansas would count the DS1 UNE loop as 24 separate business lines in accordance with the FCC business directive. In this latter instance, this is reasonable because AT&T Arkansas clearly has no way of determining from its records how the CLEC is actually using the DS1 UNE loop or, indeed, whether any of the loop's bandwidth is actually being used by the CLEC to provide service to its customers. Therefore, if NuVox's proposal is adopted by the Commission, AT&T Arkansas would have no recourse except to engage in the potentially lengthy and contentious investigations or proceedings criticized by the FCC in the TRRO to even attempt to obtain the information necessary to make the adjustments to the bandwidth capacity of digital access lines provided to CLECs urged by NuVox. See for example, TRRO at ¶ 99.

(AT&T Initial Post Hearing Brief at pp. 21-22). AT&T also notes that NuVox appears to be deviating from its initial understanding of the requirements of subparagraph 3. AT&T notes that in its Petition for Reconsideration filed with the FCC in WC Docket No. 04-313 and CC Docket No. 01-338 NuVox and other CLECs stated that:

> The most egregious over counting of business lines results from the [FCC's] treatment of digital access lines. Rule 51.5 states that business line tallies "shall account for ISDN and other digital access lines by counting each 64 kbps equivalent as one line." Thus, a DS1 is counted as 24 "lines;" a DS3 is counted as 672 "lines", etc.

(AT&T Initial Post Hearing Brief at p. 23, referencing AT&T Exhibit 1, p. 11, see also, p. 13).

NuVox again asserts that some consideration should be given to a determination of whether the capacity in question is being used to provide services to businesses. As with the previous issue, the Presiding Officer finds no ambiguity in the language of the definition. Further, the FCC appears to have rejected the type of analysis contemplated by NuVox. The TRRO provides:

> 158. First, building-by-building evaluation of competitive deployment would require collection and analysis of information that is not easily verifiable, and is often exclusively within the possession of competitive LECs, many of which have little incentive to provide that information to regulators evaluating impairment. Incumbent LECs assert that this problem manifested itself during the state proceedings conducted to implement the *Triennial Review Order*, and recurred in the instant proceeding, during which they suggest competitive LECs submitted only limited, anecdotal evidence of their own. Competitive LECs, for their part, criticized incumbent LEC data regarding competitive deployment.
>
> 159. Second, even if all parties cooperated in providing the relevant data, that data would require substantial analysis before it could be used to reach impairment determinations. For example, competitive LEC commenters have proposed extremely complex criteria to identify which observed competitive facilities should be included in any analysis of current competition in particular buildings – criteria which would require evaluation of which parts of a building were served by the competitive facility, where that facility interconnects with the incumbent LEC's

network, and the systems used for ordering and provisioning the competitive service, among other things. Even if these factors could be reasonably enumerated, it is inevitable that incumbent LECs and competitive LECs would engage in disputes over many of them, building-by-building, raising the prospect of expensive, fact-intensive litigation for years to come. The expense of such litigation could not be justified by the revenue available from the majority of individual customers. We thus conclude that such detailed and potentially subjective building-by-building and loop-by-loop evaluations, conducted for between 700,000 and 3 million buildings, involving data parties will be reluctant to provide, are not practical. Indeed, various incumbent LECs have agreed, advocating a wire center-based approach to the high-capacity loop impairment inquiry.

(TRRO ¶¶ 158-159, footnotes omitted).

The plain language of §51.5 should apply and ISDN and other digital lines should be counted by counting each 64 kbps equivalent to one business line.

Issue III Whether a "collocator" that has no fiber of its own but buys fiber-based service from another carrier with whom it cross connects at a collocation site meets the definition of a fiber-based collocator contained in 47 C.F.R. §51.5.

47 U.S.C. §51.5 defines a fiber-based collocator stating:

> Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical power supply, and operates a fiber-optic cable or comparable transmission facility that
> (1) Terminates at a collocation arrangement within the wire center;
> (2) Leaves the incumbent LEC wire center premises; and
> (3) Is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.

AT&T refers to paragraph 102 of the TRRO which elaborates on the term "fiber-based collocator" and states:

> We define fiber-based collocation simply . . . as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center . . . .
>
> In determining the number of fiber-optic collocators, AT&T states that it:
>
> [P]erformed a comprehensive fiscal review of all the wire centers identified by A&T Industry Markets which were believe to be likely to meet some or all of the FCC's criteria for non-impairment to identify arrangements that had a fiber-optic cable or comparable transmission facility, which terminated at collocation arrangement with active electrical supply within the wire center, and which left AT&T Arkansas' wire center." (Tr. 197-98, 86). In making its count of FBCs [fiber-based collocators], AT&T Arkansas counted as an FBC each arrangement in the wire center it physically inspected which satisfied the aforementioned criteria of Rule 51.5.

(AT&T Initial Post Hearing Brief at p. 29).

The arguments on determining whether cross-connected collocation arrangements should be counted as a facilities-based collocator frequently refer to an exhibit offered to NuVox witness, Joseph Gillan (Exhibit JPG-3) and, as noted by AT&T, the parties appear to agree that, with regard to Exhibit JPG-3, CLEC A and CLEC B depicted in the exhibit would each qualify as a fiber-based collocator since each appears to operate a fiber optic cable or comparable transmission facility. The real question presented is whether a CLEC which is cross connected to a fiber based CLEC collocator would count as a second fiber-based collocator.

As stated by NuVox:

> The parties' dispute regarding the counting Fiber-Based Collocators is whether a carrier that is "cross-connected" to another carrier that has installed and does control fiber that terminates in a collocation in a wire center is properly considered a Fiber-Based Collocator by virtue of that cross connection. . .
>
> The "cross-connect" dispute arises for two reasons. First, AT&T claims that even though the cross-connected carrier has no control over the fiber that enters and leaves the wire center, it nonetheless has a "comparable

> transmission facility" . . . Second, AT&T claims that the cross-connected carrier by sending transmission over the other carrier's fiber cable, satisfied the requirement in the FCC's definition that a carrier must "operate" fiber in order to be a Fiber-Based Collocator.

(NuVox Post Hearing Brief, p. 5).

NuVox notes that the FCC determined that the presence of fiber-based collocators in a wire center service area is a good indicator for the potential for competitive deployment of fiber rings. (See TRRO ¶ 167). NuVox goes on to say that:

> Given the FCC's purposes for choosing the presence of Fiber-Based Collocators as one of the two non-impairment criteria, the FCC could not rationally have conceived of counting collocators who do not possess lit fiber that leaves the ILEC wire center. A collocator that has no fiber of its own (and therefore does not *operate* it), but is simple buying a fiber-based service (e.g., DS3 transport service) from a carrier to whom it cross-connects at a collocation site does not meet the criteria the FCC had in mind for "Fiber-Based Collocators." The presence of a collocated carrier that is using leased lit capacity via a cross-connect does not establish an inference that the carrier has, or would, deploy "fiber rings," nor does it indicate that the carrier has, or would, deploy a competitive transport route between the wire center where the collocator resides and any other wire center.

(NuVox Initial Post Hearing Brief at pp. 10-11, citation omitted). NuVox argues that a collocator should only be included in the count of fiber-based collactors if the collocator actually operates fiber facilities that are capable of providing competitive interoffice transport or high-capacity loops to other carriers. As explained by NuVox's witness, Mr. Gillan:

> Fiber optic networks "terminate" where fiber strands terminate into optronics equipment that determine system capacity. As an engineering fact, any individual fiber strand will terminate once and only once in a wire center, because only one set of optronics . . . can be installed on a fiber. Moreover, the carrier that installs the optronics equipment is the carrier that operatives the fiber-optic cable, because it is this carrier that determines the capacity of the system and its operating characteristics. (T. 295).

Additionally, in its response to AT&T Arkansas' supplement to post hearing brief, NuVox notes that the ATT&T supplement refers to a decision by the Kansas Corporation

Commission ("KCC") for the business line count issue; however, the KCC decision also concluded that AT&T incorrectly interpreted the FCC's fiber-based collocator rule because AT&T counted all collocators that have the ability to provide the at least a DS3 transport out of a wire center. As stated by the Corporation Commission of Kansas:

> SWBT's fiber-based collocator count is fatally flawed because SWBT included in its count all collocators that have the "ability to provide at least DS3 transport out of the wire center." The FCC never prescribed that an incumbent LEC should include in its fiber-based collocator count those collocator competitors that had the "ability" to operate a fiber-optic cable, or comparable facilities, that both terminated at a collocation facility in a wire center and left that wire center . . . [T]he Commission concludes that SWBT badly misinterpreted the context in which the term "ability" was used by the FCC. Here, "ability" refers to the enabling power of a wire center's revenue opportunities, just as the FCC's use of *capable* did in paragraph 87 of the *TRRO* in discussing end-points. The FCC was very straight forward with its view on this matter

(*Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts* ¶ 25, State Corporation Commission of Kansas, Docket No. 06-SWBT-743-Com, entered June 2, 2006).

The KCC then quotes from the pertinent provisions of the TRRO which state:

> Specifically, our approach focuses on actual competitive deployment, which signifies that actual and potential revenues justified the underlying costs[of deployment]. . .
>
> Specifically, we utilize evidence of actual deployment to define the general characteristics of incumbent LEC wire centers where we believe ther is a lack of impairment - - that is, where reasonably efficient competitive LECs are capable of duplicating the incumbent LEC's network.

(*Id.*, quoting TRRO ¶¶ 87, 94).

The Kansas Commission went on to note that the FCC indicated, at paragraph 74 of the TRRO that the approach preferred by the FCC focuses on actually competitive deployment to define the characteristics of incumbent LEC wire centers (i.e. the

impairment determination). As noted by the Kansas Commission, any collocator could have the ability to be a fiber-based collocator; however, the FCC test is not based on ability but rather on the deployment of the required fiber-based facility. (*Id.* at ¶ 26).

The Presiding Officer believes that a collocator which merely cross-connects with a fiber-based collocator does not qualify as a second fiber-based collocator. First, the mere presence of a cross-connect does not suggest that the nonfiber-based carrier has "actual competitive deployment, which signifies that actual and potential revenues justified the underlying costs of deployment." In fact the hypothetical suggests the opposite; the cross-connected carrier cannot justify the cost of fiber deployment and therefore elects to cross-connect with a fiber-based carrier. Second, the cross-connected carrier does not appear to have fiber-optic cable or comparable transmission facilities that terminate at a collocation arrangement within the wire center and leaves the incumbent LEC wire center premises. Finally, since affiliated fiber-based collocators are clearly counted as a single collocator under the FCC's rules, it defies logic to suggest that a cross-connected collocator should be considered fiber-based merely because it is cross-connected with a fiber-based company. Such an arrangement does not imply that there is sufficient revenue potential in the wire center to support additional fiber deployment.

A collocator that has no fiber of its own but buys fiber-based service from another carrier with whom it cross connects at a collocation site does not meet the definition of a fiber-based collocator contained in 47 C.F.R. §51.5 and should not be included the fiber based collocator counts referred to in 47 C.F.R. §51.319.

BY ORDER OF THE PRESIDING OFFICER PURSUANT TO DELEGATION.

This 8th day of October, 2007.

Arthur H. Stuenkel
Presiding Officer

Kristi Rhude (Acting)
Diana K. Wilson
Secretary of the Commission

I hereby certify that the following order issued by the Nebraska Public Service Commission has been served on all parties of record this date by U.S. mail with postage prepaid, using the address of each party as indicated in the official docket file.

Diana K. Wilson
Secretary of the Commission
Date 10/8/07