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

CLEC COALITION'S RESPONSE TO AT&T MISSOURI'S APPLICATION FOR REHEARING AND/OR RECONSIDERATION

COME NOW NuVox Communications of Missouri, Inc. ("NuVox"), XO Communications Services, Inc. ("XO"), and McLeodUSA Telecommunications Services, Inc. ("McLeodUSA") (collectively, "Coalition") and pursuant to Commission Rule 2.160 (4CSR 240-2.160) file their Response to AT&T Missouri's Application for Rehearing and/or Reconsideration.

I. Summary

AT&T Missouri ("AT&T") seeks rehearing and/or reconsideration of two rulings made by the Commission in its Report and Order issued in this case on March 31, 2008 (the "R&O"). First, AT&T states that the Commission should conclude that one wire center, the ** XXXXXXX ** wire center should be designated as a Tier 1 wire center. What AT&T is asking for is another bite at the apple, a chance to correct with the benefit of hindsight its hearing strategy. 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 ** XXXXXXX ** in any manner.

What AT&T undoubtedly expected was that the end result in Missouri would be the same result obtained in all other states – namely that its wire center classification list would be the one submitted to the FCC in December 2005, months before the deadline for completing the transition from UNEs to alternative services – and that counting ** XXXXXXX ** instead of NuVox would

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have no effect on the classification of the ** XXXXXXX ** wire center. As of the December 2005 wire center list, there were only three fiber-based collocators in this wire center because pre-merger AT&T no longer could be counted. Now, however, AT&T sees an opportunity to gain an advantage through a "do-over." AT&T has presented no justification whatsoever for its utter failure to take any steps to present a complete case through its filed testimony and at hearing. Absent justification, remanding this case for the purpose of presenting evidence AT&T could have presented at hearing is inappropriate.

Second, AT&T urges the Commission to conclude that the FCC's definition of a fiber-based collocator includes any carrier that is cross-connected to a carrier that has deployed fiber that terminates in and leaves a wire center. With respect to this issue, the Commission should deny AT&T's Application. AT&T's interpretation of the FCC's words is contrary to the very foundation of the FCC's impairment analysis and the FCC's statements that it was basing its impairment decisions on its finding that the presence of a threshold number of fiber-based collocators is an indicator that CLECs have competitive alternatives available to them. The upshot of AT&T's counting methodology, however, is that it results in counting a single competitive fiber network multiple times.

AT&T's interpretation would result in a wire-center being categorized as "unimpaired" if just one carrier deployed facilities in that wire center so long as that carrier sold its services, *e.g.*, DS-3 or OC level transport, to three other CLECs. That cannot be so. The FCC's analysis in ¶¶ 102 and 93 of the *TRRO* requires that a distinct alternative for transport exist in a wire center in order for the collocation arrangement to be counted as a fiber-based collocator. Cross-connected carriers present no such alternative for they are merely riders on the fiber network another carrier controls. No matter how many carriers collocate in a wire center, those that use cross-connects to obtain

transport service from a carrier that controls fiber that terminates and leaves the wire center present no competitive alternative. The Commission has correctly interpreted and applied the FCC's rulings and the definition of a fiber-based collocator adopted in the *TRRO*.

II. The Commission correctly found on the record before it that the ** XXXXXXX ** wire center is not a Tier 1 wire center

AT&T asserts that in determining ** XXXXXXX's ** wire center classification as of March 2005, the Commission incorrectly designated the wire center as Tier 2. AT&T argues that even if NuVox is not a fiber-based collocator because of its collo-to-collo arrangement, "that would necessarily mean that *one* CLEC should count as an FBC – that is, either NuVox or ** XXXXXXX ** . . . ." (Application at 3) AT&T then states that it presented evidence showing that there were four fiber-based collocators in the wire center in March 2005 and claims that "there is nothing in the record even remotely suggesting that its evidence is disputed." (*Id.*) AT&T is wrong. NuVox' affidavit of Edward J. Cadieux flatly contradicts AT&T's assertion that NuVox is a fiber-based collocator under the FCC's definition in the *TRRO*.

AT&T nonetheless continues to attack the NuVox affidavit by stating that it does not verify whether NuVox was a fiber-based collocator on March 11, 2005 – it only verifies the collocation's current status. (*Id.*) AT&T witness Ms. Chapman speculated that perhaps NuVox changed its collocation arrangement since 2005, or maybe there is another FBC in the wire center that should be counted if NuVox is not included.[1] The Commission correctly rejected AT&T's speculation and arguments in this regard and should reject them now.

First, AT&T's "factual" arguments are nothing more than another version of their flawed legal argument that attempts to make every CLEC connected to non-ILEC fiber facilities a FBC. Ms. Chapman's "factual" contentions with regard to Mr. Cadieux' affidavit do nothing more than

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[1] Chapman Rebuttal at 65-68.

re-state AT&T's legal arguments about the qualifications for fiber-based collocator designation. Second, while AT&T asserts that the NuVox affidavit offers "no proof" that NuVox was not a fiber-based collocator in 2005, AT&T accepts without question or challenge all the other CLEC verifications obtained by Staff that support AT&T's position. None of those verifications date back to March 2005.

Third, Mr. Cadieux' affidavit provides the only testimony in this proceeding from a witness with actual knowledge of NuVox' collocation arrangements. While Ms. Chapman can speculate about what NuVox' Missouri collocation arrangements might be, Mr. Cadieux submitted a sworn affidavit based on actual knowledge of his company's network. Moreover, AT&T presented no direct evidence contradicting any of Mr. Cadieux' statements. When asked in her testimony why she is so confident that AT&T correctly identified NuVox as a FBC, Ms. Chapman responds: "As explained in the testimony of Mr. Nevels, AT&T Missouri performed physical inspections of each of the wire centers identified as meeting one or more of the FCC's non-impairment thresholds."[2] None of the AT&T personnel who actually performed the "physical inspections" provided testimony in this proceeding.

The record demonstrates that NuVox is not a fiber-based collocator under the FCC's definition and the Commission's ruling on this issue is correct. Thus, it cannot be counted as the fourth fiber-based collocator and result in designation of the ** XXXXXXX ** wire center as Tier 1.

AT&T correctly states that the Commission did not rule in its R&O that the existence of a collo-to-collo arrangement means that every CLEC involved in the arrangement should be ignored. (Application at 4) It then asserts, however, that that means the Commission must count **

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[2] Chapman Rebuttal at 65.

XXXXXXX ** as the fourth fiber-based collocator. (*Id.*) There is insufficient evidence in the record to permit the Commission to count this carrier as a fiber-based collocator in the ** XXXXXXX ** wire center.

Under Missouri law, there must be competent and substantial evidence found in the record to support any decision of an administrative body. *Psychcare Management, Inc. v. Dept' of Social Svcs.*, 980 S.W.2d 311, 312 (Mo. 1998). Evidence that is not competent will not suffice to support an agency's decision. *See, e.g., State v. Public Service Comm'n*, 359 Mo. 109, 116, 220 S.W.2d 61, 65 (1949) (if evidence is not credible, it does not meet the required substantial 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).

In this case, the only evidence is a confidential affidavit solicited by Commission Staff, and attached to the testimony of Staff witness Mr. Sheperle.[3] In his affidavit, Edward J. Cadieux presented information disputing AT&T's designation of NuVox as a fiber-based collocator. Mr. Cadieux stated that NuVox purchases OC-level transport services from ** XXXXXXX ("XXXXXXX") **. Cadieux Aff. at 2. Mr. Cadieux also opined that "it is likely that ** XXXXXXX ** does qualify as a fiber-based collocator in each wire center." *Id.* Standing alone, this affidavit is not sufficient to prove that ** XXXXXXX ** qualifies as a fiber-based collocator, because Mr. Cadieux did not demonstrate any personal knowledge of ** XXXXXXX's ** corporate ownership structure, or of any specific information regarding the configuration and operation of ** XXXXXXX ** facilities and network. All that Mr. Cadieux stated is that ** XXXXXXX's ** fiber terminates in NuVox' collocation and that, as compared to NuVox, it is ** XXXXXXX ** that

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[3] Exhibit 22, Sheperle Direct, HC Schedule 2-C 28 and 29.

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controls the fiber. Mr. Cadieux gave an opinion as to the likelihood that this third party would qualify as a fiber-based collocator; he did not, however, state this to be a fact within his personal knowledge. Such testimony, standing alone, is not sufficient to prove that ** XXXXX ** is a fiber-based collocator. Testimony that is not based upon personal knowledge, or is speculative and conjectural, will not pass muster. *Hemeyer v. Wilson*, 59 S.W.3d 574, 581 (Mo. App. W.D. 2001).

AT&T had the burden of proof in this proceeding; consequently, 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. *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). 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 AT&T 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.[4] AT&T chose to focus on NuVox. AT&T chose to provide testimony 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 ** XXXXXXX ** in any manner. Hence, AT&T did not meet its burden of proof.

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[4] 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."

In addition, basing a decision solely on Mr. Cadieux' statement in his affidavit is very likely insufficient under the general evidentiary principle embodied in the best evidence rule. That rule provides that "the best evidence of which the case in its nature is susceptible and which is within the power of the party to produced, or is capable of being produced, must always be adduced in proof of every disputed fact." *Miller v. John Hancock Mut. Life Ins. Co.*, 155 S.W.2d 324, 327 (Mo. App. 1941). Second-hand evidence is never admissible unless first-hand evidence is totally unavailable. *Id.*

Here, AT&T had the opportunity to pursue the question of whether ** XXXXXXX ** should be counted as a fiber-based collocator. AT&T could have conducted a further physical examination of its wire center and its records regarding carriers that had collocation arrangements in that wire center in order to demonstrate whether ** XXXXXXX ** met the FCC's definition of a fiber-based collocator. It did not do so. AT&T never listed ** XXXXXXX ** as one of, or potentially one of, the fiber-based collocators in any wire center. Nor, obviously, did AT&T request Staff to propound upon ** XXXXXXX ** the same data requests that Staff propounded on other CLECs AT&T identified as fiber-based collocators. And, AT&T chose not to conduct discovery of NuVox even though NuVox is a party to the proceeding. AT&T had opportunity and every incentive to determine ** XXXXXXX's ** status, including going straight to the source, but chose not to do so. Reliance on speculation by NuVox was never necessary and certainly was not the best evidence as to the status of ** XXXXXXX **.

The Coalition does not dispute that there may be another carrier that qualifies as a fiber-based collocator in the wire center in dispute. There is insufficient evidence in the record, however, to demonstrate the other carrier's status. And, absent sufficient evidence in the record, the Commission cannot make a finding of fact and conclusion of law on reconsideration that **

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XXXXXXX ** is a fiber-based collocator in the ** XXXXXXX ** wire center and cannot rule that that wire center is a Tier 1 wire center. If the Commission finds that AT&T's Application justifies its failure to present evidence it could have acquired and could have presented at hearing, then the appropriate procedural course is to remand this proceeding to the Regulatory Law Judge for the limited purpose of taking of additional evidence on ** XXXXX ** status.

The Coalition 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 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 the carrier in question, as it did to obtain information from other Missouri CLECs. The Coalition suggests that Staff be given a period of time in which to obtain a sworn affidavit regarding ** XXXX ** 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. By taking this course of action, the Commission will ensure that its determination is supported by a sufficient evidentiary record.

III. The Commission correctly concluded that a carrier is not a fiber-based collocator simply because it is cross-connected to a carrier that is a fiber-based collocator

AT&T asserts in its Application that the Commission erroneously ruled that a cross-connected carrier is not a fiber-based collocator for purposes of determining impairment under the *TRRO*. Specifically, AT&T describes the Commission as having concluded that the "'collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center' but that the carrier cross-connected to the collocated carrier does not do so." (Application at 5) AT&T

then complains that the Commission "does not explain precisely why" the cross-connected carrier cannot be regarded as operating a transmission path out of the wire center. (*Id.*) AT&T fails to grasp the Commission's full discussion and analysis.

What the Commission actually concluded is that the FCC's definition of a fiber-based collocator requires that the collocator's transmission facility must terminate in, and leave, the wire center, a requirement that a collo-to-collo arrangement does not satisfy. (R&O at 11) The Commission also concluded that AT&T's witness' testimony showed that a cross-connected carrier has a transmission facility that begins and terminates within the wire center, but does not leave the wire center. (R&O at 11-12) Reflecting these conclusions, the Commission found that it is the collocated carrier, not the cross-connected carrier, that operates the fiber-optic transmission path that leaves the wire center. (R&O at 12)

AT&T rejects these conclusions, however, and argues that a cross-connected carrier satisfies the FCC's definition of a fiber-based collocation because the cross-connected carrier is *operating* the fiber owned by another carrier when the cross-connected carrier uses that fiber as part of a transmission path. AT&T's position is inconsistent with the FCC's rulings in the *TRRO* and the FCC's definition, and is contrary to practical application. Its arguments were considered and rejected by this Commission. AT&T's position has been rejected by every state commission that has considered this issue save one – the Public Utilities Commission of Ohio ("PUCO"). AT&T accurately points out that the Ohio federal court upheld the PUCO's ruling, but a full reading of the court's opinion reveals that its holding is expressly a result of the court's deference to the PUCO's factual findings.[5] That court's decision, in any event, is not binding on this Commission.

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[5] *XO Communications Services, Inc. v. The Ohio Bell Tel. Co.*, 2008 WL 755863 at *6, f 15 (S. D. Ohio, March 18, 2008).

A. The FCC's analysis

As it explained in numerous paragraphs in the *TRRO*, the number of fiber-based collocators in a wire center is intended to serve as an indicator not just of the presence of competitive fiber deployment in a single wire center, but also as an indicator of the existence of fiber rings connecting multiple wire centers (for transport) and providing opportunities for constructing short fiber laterals to particular buildings (for loops). The FCC recognized that the presence of one carrier's fiber-based collocation at one ILEC wire center, standing alone, offers no proof that the carrier could offer a competitive interoffice transport route to another wire center across town.[6] But, the presence of several carriers with fiber-based collocations in a wire center makes it likely that a competitively provided transport route is available between wire centers, or that one of the collocated carriers can potentially expand its network to provide competitive transport. Similarly, the presence of several carriers with fiber-based collocations in a wire center indicates the deployment of "fiber rings" from which competitors could economically construct fiber cable laterals to serve individual buildings in the vicinity of a particular wire center. Thus, the FCC's use of the presence of fiber-based collocators is not so much concerned with what is happening *inside* particular ILEC central offices as it is with what the presence of these collocators indicates about the alternative networks that have been or economically could be deployed between ILEC central offices and from ILEC central offices to end user customer premises.

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 have conceived of counting collocators who do not possess lit fiber that leaves the ILEC wire center.[7] A collocator that has no fiber of its own, but is

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[6] *See TRRO* ¶ 96.

[7] *See* 47 C.F.R. § 51.5 (defining a Fiber-Based Collocator as "any carrier ... that operates a fiber-optic cable...that ...leaves the [I]LEC wire center premises").

simply 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.[8] The ability to transmit voice and data over another carrier's fiber network indicates nothing about the existence of actual or potential deployment of competitive facilities.[9]

The FCC's analysis in ¶¶ 102 and 93 requires that a distinct alternative for transport exist in a wire center in order for the collocation arrangement to be counted as a Fiber-Based Collocator. Cross-connected carriers present no such alternative for they are merely riders on the fiber network another carrier controls. No matter how many carriers collocate in a wire center, those that use cross-connects to obtain transport service from a carrier that controls fiber that terminates and leaves the wire center present no competitive alternative.

Paragraph 135 of the *TRRO* is instructive as to the FCC's reasoning and what "control" of fiber means. There the FCC stated that a CLEC can operate more efficiently when it operates dark fiber transport than when it is merely using lit transport because when the CLEC operates dark fiber itself, the CLEC "engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber."[10] This discussion by the FCC is fully consistent with the testimony provided by Mr. Gillan: "The FCC's definition of fiber-based collocator (and relevant text) makes clear that only carriers' operating networks should be counted, not carriers obtaining

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8 Gillan Direct at 24.

9 Gillan Rebuttal at 18-19.

10 *TRRO* at ¶ 135.

services."[11] This is the precise point made by the FCC in ¶ 135. And, the FCC codified this point in its rule by utilizing the word "operate."

B. Operation of a fiber-optic cable that terminates in and leaves the wire center

As Coalition witness Mr. Gillan testified, the FCC's definition of a fiber-based collocator contemplates a one-on-one relationship between the number of such collocators and distinct transport facilities.[12] The FCC's definition requires that a collocator that is a fiber-based collocator must operate a fiber-optic cable (or comparable transmission facility) that both terminates at a collocation arrangement within the wire center and leaves the wire center.[13] Only one carrier can "operate" and "terminate" a fiber-optic cable. When the FCC determined that before a collocator in a wire center can be counted as a fiber-based collocator it must operate and terminate fiber-optic cable, the FCC was identifying a particular sort of carrier, namely a carrier that has control of its own network transmission facilities that run through a particular wire center.[14]

The carrier controlling the optronics equipment controls how the fiber-optic cable in a wire center can be used. Optronics determine system capacity (*e.g.*, whether the fiber support capacities of OC-12, OC-48, etc.) and the ways in which the fiber-optic cable can be used. It is the carrier who installed the optronics and "lit" the fiber who *operates* fiber-optic cable for purposes of the FCC's

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11 Gillan Rebuttal at 16, noting in footnote 34 that: "When a carrier obtains a service, its capacity is multiplexed with the capacity of other carriers into the overall system capacity of the network. In contrast, when a carrier leases dark fiber and lights it with its own optronics, that carrier is defining the system capacity by the type of optronics being installed."

12 Gillan Direct at 23.

13 *Id.* at 23.

14 As Mr. Gillan explained at pages 23-24 of his Direct:

> 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 (also known as fiber optic terminating equipment) can be installed on a fiber. Moreover, the carrier that installs the optronics equipment is the carrier that "operates" the fiber-optic cable, because it is this carrier that determines the capacity of the system and its operating characteristics.

definition. A fiber-optic cable *terminates* in a wire center at the place where optronics equipment is installed on the cable. The carrier that operates the fiber-optic cable is the carrier who decides the type of optronics equipment to which the cable will terminate.

AT&T nonetheless claims that a cross-connected carrier meets the FCC's requirements because by cross-connecting to a legitimate FBC and leasing its capacity, the cross-connected CLEC still "operates" a transmission path created by the cross-connect in conjunction with the leased fiber transport facility. (Application at 6) AT&T claims that the cross-connected carrier "exercises the requisite functions and control tantamount to operating an end-to-end transmission path that terminates in its collocation arrangement and leaves the wire center." (Application at 5) But, the functions AT&T identifies — testing and operating multiplexing equipment, turning the arrangement on and off, determining the capabilities of the transmission it uses, attempting to ensure transmission quality of the transmission path, making engineering and market entry determinations in deciding its capacity needs and monitoring the comparable transmission facility to determine when modifications and augments are needed[15] – are not operational control. And it is *operational* control that the FCC discussed in ¶ 135 of the *TRRO*.

The decisions a CLEC can make that AT&T points to in its Application as being "*operation*" are no different from the types of decisions a CLEC makes when it buys and uses any service, such as special access, from AT&T. They are *not* the decisions made by a carrier that owns and controls its own network. The fallacy of AT&T's argument is evident when one considers that AT&T does not suggest that a CLEC is "operating" interoffice facilities when it orders transport services from AT&T as UNEs or tariffed special access. It is AT&T that "operates" the facility; the CLEC just obtains transmission capacity. The CLEC has a contractual right to use a certain amount of capacity

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[15] Application at 6, citing Nevels Rebuttal and Chapman Rebuttal.

at a certain price, but the CLEC has no right to perform maintenance on the facility, no right to reconfigure it, no right to expand its capacity (*e.g,.* from a DS3 to an OC-3), and no right to replace the facility in whole or in part. The cross-connected carrier is in the same position with respect to the provider to which it is cross-connected and from which it is purchasing interoffice transport service.

Testimony from AT&T's own witness showed that its argument suffers from two fundamental flaws. First, there is absolutely nothing in the text of the FCC's definition, nor in the relevant text of the *TRRO*, that supports the notion that if a collocated CLEC can create a "complete transmission path" to its customer by leasing fiber capacity from another carrier, that this arrangement qualifies it as a FBC. When asked whether the words "complete transmission path" even appear in the FCC's rule, AT&T witness Mr. Nevels had to admit that "those words in that exact line up are not listed in the order."[16]

Second, the argument makes no practical sense. Mr. Nevels would not recognize the logical extension of his argument: that any user of the network who controls a "complete transmission path" (like a caller who controls a transmission path between himself and the party he calls) thus "operates" a telecommunications network.[17] In addition, Mr. Nevels had to concede that a cross-connected CLEC does not "fix the cable when it breaks," because that is not the job of the company leasing capacity, it is the job of the company that actually *operates* the cable.[18]

In its Application, AT&T asserts that the Commission's ruling requires that a CLEC deploy its own transport facilities, something the FCC's definition does not require. (Application at 7) The Commission's R&O does no such thing. Nothing in the Commission's ruling alters the counting of

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16 Tr. at 155. AT&T uses the phrase "end-to-end transmission path" on page 5 of its Application; that phrase does not appear in the FCC's Rule § 51.5 definition either.

17 Tr. at 162.

18 Tr. at 163-64.

carriers that acquire dark fiber through an IRU arrangement and light that fiber with their own optronics. Nothing in the Commission's ruling alter the counting of carriers that have access to and operational control of fiber that terminates and leaves a wire center under a CATT arrangement such as that offered by Verizon. AT&T's claim that ownership is required in order to comply with the Commission's ruling is spurious.

AT&T's position simply cannot be made to square with the FCC's analysis and objective in the *TRRO* of using the presence of multiple fiber-based collocators as an indicator that competition in the provision of transport and loop facilities exists. It does not square with the FCC's definition of a fiber-based collocator. The "collo-to-collo" argument advanced by AT&T has been rejected by every state commission that has heard it save one – the Ohio PUC.[19] Furthermore, of the two federal district courts that have considered this issue, the one that accepted AT&T's argument expressly based its decision to uphold the Ohio Commission's ruling largely due to deference to be accorded to the state commission's factual determinations, determinations that reflect that Commission's acceptance of Mr. Nevels' testimony. *XO Communications Services, Inc.*, 2008 WL 755863 at *6, fn 15 ("There is no basis for rejecting PUCO's factfinding here, and that factfinding pervades much of the legal issues involved in this case.") This Commission has not found Mr. Nevels' testimony, or AT&T's position, persuasive.

By contrast, the Michigan federal district court recognized the fallacy of the claims AT&T is making here in a reasoned opinion in which the court "agree[d] that the term 'operating' suggests more than use" and in which the court looked at the overarching purpose of the FCC's analysis.

> The FCC's definition of a fiber-based collocator spells out several situations that qualify a collocator for wire center designations: 1) a collocator that has installed its

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[19] A listing of the state commissions that reached the same conclusion as this Commission on the issue of collo-to-collo arrangements was submitted jointly by the CLEC Coalition and AT&T on July 23, 2007, as Judge's Exhibit A.

> own fiber, 2) a collocator that obtains fiber from a carrier other than the ILEC, and 3) a collocator that obtains fiber from the ILEC on an indefeasible right of use ('IRU') basis. The cross-connected carrier does not clearly fall into any of these three definitions, nor does it meet the definition of fiber-based collocator when read in conjunction with the FCC's other statements in the TRRO. Specifically in ¶ 96, the FCC stated that the presence of fiber-based collocators signals that significant revenue is available and the duplicability of the ILECs network elements. Also in ¶ 98, the FCC looked at the high costs involved with fiber deployment when defining impairment. Finally in ¶ 161, the FCC recognized that fiber-based collocators indicate the presence of extensive competitive fiber rings. The presence of several carriers with fiber facilities in a single wire center indicates that the market condition of the wire center is one that can economically support the deployment of CLEC fiber facilities. Counting one FBC's investment in fiber facilities more than once does not show that the wire center can economically support the deployment of multiple CLEC fiber facilities. In essence, AT & T double-counted a CLEC that has made the investment to install all the facilities and duplicate the ILEC's network. The first CLEC that has installed the fiber transport facilities has duplicated the ILEC's network. The second CLEC has not. [20]

The Michigan court's conclusion is exactly right. If, for example, only one carrier in a wire center has fiber cable terminating in its collocation arrangement and entering and leaving the wire center, but three other carriers were cross-connected to it, AT&T would count them as four fiber-based collocators. Only one fiber cable is entering and leaving the wire center. Only one carrier has a fiber-optic terminal that controls the bandwidth. But if that one true fiber-based collocator goes bankrupt (or is acquired by AT&T), the only competitive source of fiber-based transport or loops disappears. It is simply absurd to count collocators as fiber-based collocators when they are themselves dependent on the legitimate fiber-based collocator who actually operates and terminates the fiber for provision of alternative fiber capacity.

This Commission's ruling on the issue of collo-to-collo cross-connected carriers is correct and AT&T's Application for Reconsideration and/or Rehearing should be denied.

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[20] *Michigan Bell Tel. Co. d/b/a AT&T Michigan v. Lark,* 2007 WL 1343691, at *5-6 (E.D. Mich. May 8, 2007).

IV. CONCLUSION

For all the reasons stated, the CLEC Coalition respectfully requests that the Commission deny AT&T Missouri's Application for Rehearing and/or Reconsideration. If the Commission were to conclude, however, that AT&T Missouri's Application presents sufficient justification for its failure to present at hearing evidence obtainable by it through reasonable diligence, the Coalition would suggest that the appropriate course of action would be to remand this proceeding to the Regulatory Law Judge for the limited purpose of taking additional evidence to resolve the status of ** XXXXXXX ** and the tier classification of ** XXXXXXX ** wire center.

Respectfully submitted,

/s/ Carl J. Lumley

Carl J. Lumley, #32869
Leland B. Curtis, #20550
Curtis, Heinz, Garrett & O'Keefe, PC
130 S. Bemiston, Suite 200
Clayton, Missouri 63105
Telephone: (314) 725-8788
Facsimile: (314) 725-8789
Email: clumley@lawfirmemail.com
lcurtis@lawfirmemail.com

ATTORNEYS FOR
NUVOX COMMUNICATIONS OF MISSOURI, INC.,
AND
XO COMMUNICATIONS SERVICES, INC.

NP

Mary Ann (Garr) Young, #27951
WILLIAM D. STEINMEIER, PC
2031 Tower Drive
PO Box 104595
Jefferson City MO 65110-4595
Telephone: (573) 634-8109
Facsimile: (573) 634-8224
Email: myoung0654@aol.com

ATTORNEYS FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC,

Bill Magness
Texas State Bar No. 12824020
Casey, Gentz & Magness, L.L.P.
98 San Jacinto Blvd., Suite 1400
Austin, Texas 78701
Telephone: 512-480-9900
Facsimile: 512-480-9200
Email: bmagness@phonelaw.com

ATTORNEYS FOR MCLEODUSA
TELECOMMUNICATIONS SERVICES, INC,
NUVOX COMMUNICATIONS OF MISSOURI, INC.,
AND
XO COMMUNICATIONS SERVICES, INC.

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

Carl J. Lumley

Office of the Public Counsel
PO Box 2230
Jefferson City, Missouri 65102
opcservice@ded.mo.gov

William K. Haas
Deputy General Counsel
Missouri Public Service Commission
PO Box 360
Jefferson City, Missouri 65102
gencounsel@psc.mo.gov

Robert J. Gryzmala
AT&T Missouri
One SBC Center, Room 3520
St. Louis, Missouri 63101
rg1572@att.com