BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

PRE-HEARING BRIEF OF AT&T Missouri

"NON-PROPRIETARY"

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The purpose of this proceeding is to address implementation of the FCC's *Triennial Review Remand Order*[1] ("*TRRO*") rules regarding whether and where AT&T Missouri is required to unbundle certain high-capacity loops and interoffice transport facilities. For these network elements, the FCC's *TRRO* rules state that unbundled access may not be required in wire centers (as to loops) and routes (as to transport) that satisfy specific thresholds for the number of "business lines" and "fiber-based collocators." Applying the FCC's rules, AT&T Missouri has designated several Missouri wire centers (and associated routes) as "non-impaired" – that is, not subject to unbundling – for one or more network elements.

These wire centers, known by their common geographical names and their corresponding Common Language Location Identifier ("CLLI") codes, are listed in Attachment 1 hereto. The wire center designations at issue are shown at Attachment 2 (HC) hereto, reflecting designations made on March 11, 2005, and subsequent updates on December 16, 2005, and December 29, 2006, due to commitments made in connection with the AT&T and BellSouth mergers, respectively. AT&T Missouri requests that the Commission approve its three designations of non-impaired wire centers.

In February 2005 the FCC issued its *Triennial Review Remand Order*[2] ("*TRRO*") and accompanying rules.[3] These rules addressed the scope of an incumbent local exchange carrier's ("ILEC") duty to provide unbundled network elements ("UNEs") to competing local exchange carriers ("CLECs") under the federal Telecommunications Act of 1996 ("1996 Act" or "Act").

[1] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005), *aff'd*, *Covad Comms. Corp. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).
[2] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005), *aff'd*, *Covad Comms. Corp. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).
[3] *TRRO*, at Appendix B - Final Rules.

The FCC's new rules took effect on March 11, 2005, given the FCC's decision that they be implemented promptly after issuance of its order.[4]

The Commission Staff has determined, based on its own investigation which included "CLEC verification," that "all of the wire centers identified by AT&T [Missouri] meet the non-impaired criteria as defined in the TRRO for interoffice dedicated transport and loops."[5] As to the CLEC parties in this case, almost all of AT&T Missouri's designations are undisputed. Even though the CLECs raise some issues with the precise methodology for counting, almost all of the designated wire centers would still satisfy the FCC's rules under the CLECs' tests. On the few wire centers where the designation is disputed, Staff agrees that the Commission should rule in AT&T Missouri's favor.

The Commission should resolve the disputed issues in AT&T Missouri's favor and approve AT&T Missouri's designations made in March 2005 and its current designations. As demonstrated below, on each issue AT&T Missouri has applied the plain language of the FCC's rules and the FCC's order. By contrast, the CLECs attempt to rewrite the FCC's rules and eviscerate its intent.

Business Line Count Issues. The first issue concerns whether the count of business lines should include "all UNE loops" as AT&T Missouri maintains, or only "some UNE loops" as the CLECs contend. The FCC's rule plainly states that "[t]he number of business lines in a wire center shall include . . . *all* UNE loops." The *TRRO* likewise states that the count shall include "UNE loops" without any limitation or qualification. The plain language of the order and rule are dispositive, and Staff accordingly agrees with AT&T Missouri. Moreover, in March 2005, several CLECs (including NuVox and XO) filed a Petition for Reconsideration of the

[4] *TRRO*, ¶ 235.
[5] Scheperle Direct at 2.

TRRO regarding the business line rule. In that Petition, the CLECs admitted that the rule "counts *all* UNE-L lines provided to CLECs" and that "[*a*]*ll* UNE-L lines are included [as business lines] . . . *regardless of whether they are used to serve business or residential customers.*"[6] The CLECs know full well what the FCC's rule requires, and they have not convinced the FCC to change it. The FCC has not changed a word of its rule.

The next issue concerns how to count the business lines within a high-capacity loop. The FCC's rule states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loop as one "business line." 47 C.F.R. § 51.5 (emphasis added). Applying the FCC's "digital equivalence" rule, AT&T Missouri counts each 64 kbps-equivalent channel as one business line. The FCC's rule refutes the CLECs' proposal that the Commission only count *some* 64 kbps-equivalent channels. Moreover, the CLECs' interpretation of the rule is flatly inconsistent with their March 2005 Petition for Reconsideration of the *TRRO* in which they affirmatively asserted that the FCC's "most egregious" error was in "counting DS1s and other digital lines on a per 64 kbps-equivalent basis."[7] For purposes of this case, there is no legitimate issue regarding interpretation of the FCC's rule. Rather, the CLECs are simply waging a collateral attack on it, and this Commission should not countenance that strategy.

Next, the FCC's order calls for incumbents to use "ARMIS 43-08 business lines" as a component of the count. AT&T Missouri's first set of designations took effect on March 11, 2005 – the same day as the FCC's *TRRO* rules – and they were based on the most recent ARMIS 43-08 report available at the time (the April 2004 report). The CLECs initially contend that AT&T Missouri should have used the April 2005 report – but that report did not even exist when

[6] Chapman Rebuttal at 19 & Att. CAC-1, at 15 (emphasis added, footnotes omitted).
[7] Chapman Direct, Att. CAC-1, at 11.

the FCC's rules took effect on March 11, 2005. Plainly, the FCC did not require incumbents to use data that were not even available at that time.

Alternative, the CLECs agree that the Commission can use the April 2004 report that AT&T Missouri used, but they contend that the Commission should *miscount* the data in that report. They want the Commission to use the line counts that AT&T Missouri gave to the FCC *before* the *TRRO* came out and which did not reflect the FCC's above-described digital equivalence rule because that rule had not yet been issued. The CLECs describe their proposal as a "simple solution" but it is neither "simple" nor a "solution" to disregard the FCC's digital-equivalence rule. Instead, it is a blatant attempt to end-run the FCC's rule.

Fiber-Based Collocation Issues.

The issues for fiber-based collocation primarily concern whether to count both carriers in a "collo-to-collo" arrangement. These issues do not have any impact on the three lists of wire-center designations that AT&T Missouri seeks to have approved here, for all the wire centers meet the FCC's non-impairment thresholds even if one did not count both carriers in a collo-to-collo arrangement. The issues may, however, affect AT&T Missouri's future designations.

The first issue is whether a carrier that cross-connects to leased interoffice fiber in another carrier's collocation space must actually provide the optronics for that fiber in order to "operate" it and thus count as a fiber-based collocator. The CLECs propose the optronics requirement but pull it from thin air. There is no such requirement in the FCC's definition of a fiber-based collocator or in the *TRRO*. Furthermore, cross-connected collocators undeniably operate the transmission facility consisting of the cross-connect plus the leased fiber or fiber capacity, for they control the use and characteristics of that transmission path in many ways. In

this regard, a collo-to-collo arrangement is similar to Verizon's Competitive Alternate Transport Terminal ("CATT") arrangement, which the FCC decided qualifies as fiber-based collocation.

The second, related issue is whether a DS3 or greater capacity transmission facility is "comparable" to fiber. It does, because a minimum DS3 transmission capacity is the same as that used by fixed wireless collocation arrangements, which the FCC said count as fiber-based collocation.

The final collocation issue concerns NuVox, which claims it is not a fiber-based collocator in certain of AT&T Missouri's wire centers. NuVox cannot prevail. First, as to all of the wire centers inquestion, NuVox presented no evidence that it was not a fiber-based collocator in these wire centers in March 2005, when AT&T Missouri's wire center designations were made, whereas AT&T. On the other hand, it is undisputed that Missouri's on-site physical inspection revealed that NuVox was then a fiber-based collocator. In any case, although NuVox was properly identified as a fiber-based collocator in each instance, only one such arrangement (in **_____**) could at all impact AT&T Missouri's wire center designations; AT&T Missouri's designation for each of the remaining wire centers would remain intact even if NuVox's claim was well-taken. However, for this wire center, NuVox's discovery responses to Staff also confirms that it was a fiber-based collocator. And even if NuVox were not counted in this wire center, NuVox identified another carrier to be counted in its place, a carrier that was not on AT&T Missouri's list before. In short, even if that carrier were to replace NuVox in this wire center, the total number of fiber-based collocators, and thus the wire center's non-impairment designation, remains the same.

HC

II. FACTUAL AND LEGAL BACKGROUND

A. The Telecommunications Act of 1996

The federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at scattered sections of 47 U.S.C.) was enacted to transform local telecommunications from a market characterized by exclusive franchises to one in which "meaningful facilities-based competition" flourishes. S. Conf. Rep. No. 104-230, at 148 (1996). To that end, the 1996 Act authorizes the FCC to require incumbent LECs, like AT&T Missouri, to "unbundle" certain of their "network elements" and lease them to other carriers for use in providing competing local services. 47 U.S.C. § 251(c)(3). Types of network elements include loops (the wires that connect a customer's home or business to the incumbent LEC's local switch), switches (computers that route calls through the network), and interoffice transport (cables that connect switches). 47 C.F.R. §§ 51.319(a), (d), and (e). An incumbent LEC can be required to unbundle a network element for CLECs only if the FCC finds, at a minimum, that CLECs would otherwise be "impaired" in their ability to compete with the incumbent. 47 U.S.C. § 251(d)(2). The FCC applies the "impairment" requirement in Section 251(d)(2) to establish rules that determine whether, and under what conditions, specific network elements must be unbundled. 47 U.S.C. § 251(d)(2); *see TRRO*, ¶¶ 20-24.

The FCC's first two sets of unbundling rules were reversed because they found impairment to exist virtually everywhere and for all network elements, regardless of actual market conditions.[8] In reversing the FCC's second set of rules, the D.C. Circuit singled out fiber transmission facilities – the same type of facilities at issue in this proceeding – as an example of a network element that "is significantly deployed on a competitive basis," such that the FCC

[8] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *United States Telecom Ass'n v. FCC,* 290 F.3d 415, 422-30 (D.C. Cir. 2002) ("*USTA I*").

could not adequately "explain[] why the record supports a finding of material impairment." *USTA I*, 290 F.3d at 422.

The FCC promulgated a third set of rules in the 2003 *Triennial Review Order* ("*TRO*").[9] For the network elements at issue here, the 2003 rules established "triggers" based on the level of existing competitive facilities that had already been deployed: either at the same individual building (for DS1 and DS3 loops), or along the same "route" between two incumbent LEC switches (for DS1, DS3, and dark fiber dedicated transport). Those 2003 rules were reversed and vacated in pertinent part on appeal, for two principal reasons. First, the D.C. Circuit found that the 2003 rules improperly limited the analysis of impairment by considering only the competitive facilities deployed on the exact route in question, and thus "simply ignore[d] facilities deployment along similar routes." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 575 (D.C. Cir. 2004). Second, the court held that the rules delegated too much discretionary decision-making authority to state commissions and did not adopt sufficiently clear standards. *Id*. at 573-74.

On remand, the FCC established a new set of unbundling rules in the *TRRO*, and citing the need for prompt action, made them effective on March 11, 2005, on an expedited basis. *TRRO*, ¶ 235. These unbundling rules were upheld on appeal. *Covad*, 450 F.3d at 541-46.

B. The FCC's Rules for High-Capacity Loops and Dedicated Transport.

The purpose of this proceeding is to address implementation of the *TRRO*'s rules with respect to DS1 and DS3 loops (collectively, "high-capacity loops") and DS1, DS3 and dark fiber dedicated transport (collectively, "high-capacity dedicated transport"). The FCC's rules do not require blanket unbundling of an incumbent LEC's high-capacity loops and dedicated transport

[9] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978 (2003).

facilities. Rather, the FCC decided that there is no impairment, and thus no unbundling requirement, where the revenue opportunities for CLECs in a given geographic area are sufficient to enable them to deploy their own high-capacity loops and interoffice transport. *TRRO*, ¶¶ 43, 87-92, 146-54. "The theory behind the FCC's approach is that when enough money can be made by the CLEC in a particular area, the CLEC has the incentive to install and operate its own fiber facilities, and thus, there is no reason to require the ILEC to provide them." *Cbeyond Comms. of Texas, L.P. v. Public Util. Comm'n of Texas*, Case No. A-05-CA-862-SS, at 3 (W.D. Tex., Jan. 24, 2006).

The FCC's rules analyze impairment at the level of the "wire center," i.e., the area served by a given switch. *TRRO* ¶¶ 87 n.251, 155. The FCC held that competing carriers can deploy (and in many cases have deployed) their own high-capacity loop and transport facilities in certain areas, particularly dense urban areas where there are greater opportunities to gain revenue that will justify the cost of deployment. *TRRO* ¶ 70 (transport); *id*. ¶ 154 (loops).

To identify the wire centers where there is no impairment, the FCC rules employ a straightforward that count two criteria: (1) the number of business lines in the wire center (which corresponds to the number of potential high-capacity customers) and (2) the number of "fiber-based collocators" in the wire center *Id*. ¶¶ 102-103, 167. The FCC chose these criteria because they correlate with the evidence of actual competitive deployment and with the revenue opportunities that would support deployment in the future. *Id*. ¶¶ 87, 167, 174. In affirming the FCC's rules, the D.C. Circuit observed that they "use[] market data to predict when and where the CLECs will be economically able to deploy their own high-speed facilities, thus obviating the need for UNEs" and upheld the rules as a "reasonable" balance of competing interests. *Covad*, 450 F.3d at 544.

Notably, the FCC emphasized that only this objective approach would establish a much needed shot in the arm for certainty in the industry. The FCC expressly noted that its approach would "significantly reduce the burdens of implementing the standard in comparison with the extensive and litigious proceedings that followed the issuance of the *Triennial Review Order*." *TRRO*, ¶ 108.

The specific numeric thresholds for DS1 and DS3 loops are as follows:

- For DS3 loops, the FCC's order "denies unbundling" in any wire center "with at least 38,000 business lines and four fiber-based collocators." *Id*. ¶ 174.
- For DS1 loops, the FCC held there is "no impairment for DS1-capacity loops . . . in those wire center service areas with 60,000 business lines and four fiber-based collocators" and accordingly decided to "eliminate DS1 loop unbundling" in those wire centers. *Id*. ¶¶ 178, 179.

The FCC's implementing rule categorically states that "[o]nce a wire center exceeds both" of the applicable thresholds, "*no further [DS1 or DS3] loop unbundling* will be required in that wire center." 47 C.F.R. § 51.319(a)(4)(i) (DS1) & (a)(5)(i) (DS3) (emphasis added). Thus, once a wire center has crossed the applicable non-impairment threshold, that status is irrevocable.

With respect to dedicated transport, the FCC classifies wire centers into "tiers" as a shorthand for the number of business lines and fiber-based collocators in each wire center. "Tier 1" wire centers have "four or more fiber-based collocations or with 38,000 or more business lines" or are "incumbent LEC switching locations that have no line-side facilities." *Id*. ¶ 112. "Tier 2 wire centers" are those "with three or more fiber-based collocations or with 24,000 or

greater business lines." *Id*. ¶¶ 111, 118. "Tier 3" consists of all wire centers that do not fall into Tiers 1 or 2. *Id*. ¶ 123. The FCC's specific thresholds for assessing impairment are:

- For dark fiber and DS3 transport, the FCC held that requesting carriers "are not impaired without access" to unbundled transport between wire centers "where both of the wire centers are either Tier 1 or Tier 2 wire centers." *TRRO*, ¶ 129 (DS3); see *id*. ¶ 133 (stating same rule for dark fiber).
- For DS1 transport, the FCC held that "incumbent LECs . . . are not obligated to provide unbundled DS1 transport on routes connecting two Tier 1 wire centers." *Id*. ¶ 126.

The applicable rule mandates that for those routes "[w]here incumbent LECs are not required to provide unbundled . . . transport" pursuant to the FCC's thresholds, "requesting carriers may not obtain new [DS1, DS3 or dark fiber] transport as unbundled network elements." 47 C.F.R. § 51.319(e)(2)(ii)(C), (iii)(C), (iv)(B). As with loops, once a wire center crosses the numeric threshold, its "non-impaired" status is irrevocable: "Once a wire center is determined to be a [Tier 1 or 2] wire center, that wire center is not subject to later reclassification" to a lower tier. 47 C.F.R. § 51.319(e)(3)(i), (ii).

Business Lines. The FCC's definition of "business line" in Rule 51.5 provides detailed instructions for computing the number of "business lines" in a wire center. Rule 51.5 provides that "[t]he 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." 47 C.F.R. § 51.5 (emphasis added). The rule also directs how to count "business lines" on high-capacity loops, such as DS1 and DS3 facilities. Such facilities have the capacity to carry the equivalent of many individual voice-grade lines, or, in engineering terms, "64 kpbs-equivalents." A DS1 can

carry 24 64 kbps-equivalents and a DS3 can carry 672 64 kbps-equivalents. R. 21, Ex. 13 at 15. The FCC's rule states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loop as one "business line." 47 C.F.R. § 51.5 (emphasis added) "For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" *Id.*

Counting "all UNE loops" and "each 64 kbps-equivalent" as a "business line" will inevitably result in some lines being counted as "business lines" even though they do not actually serve a business customer. The FCC, however, was well aware that its rule could never be perfect and would necessarily lead to some over- or under-inclusiveness. *TRRO*, ¶¶ 88, 94, 104, 155, 169. For example, the business line rule does not count lines built and owned by CLECs, even though these provide compelling existence of CLEC revenue opportunities and a lack of impairment, because data on such lines is too difficult to obtain and verify. *Id.* ¶¶ 104-105. Nevertheless, the FCC selected its method for computing "business lines" because it relies on "an objective set of data that incumbent LECs already have created for other regulatory purposes" and that is "readily confirmable by competitors." *Id.* ¶¶ 105, 108. Specifically, incumbent LECs already provide the FCC with various reports that reflect the number of the incumbent's own business switched access lines as well as the number of "all UNE loops" provided by the incumbent and the number of 64 kbps-equivalents in the incumbent's high-capacity loops. Chapman Direct at 11-12, 24-25. By contrast, AT&T Missouri does not (and cannot) separately identify and report the number of UNE loops or 64 kbps-equivalents that are used to serve business customers only, because that information is maintained by CLECs. *Id*. at 26.

Relying exclusively on reported, verifiable data allowed the FCC to be "confident in the accuracy of the thresholds" it established in its unbundling rules and to ensure a "simplified ability to obtain the necessary information" when applying the rule to specific wire centers. *TRRO*, ¶ 105. This advanced the FCC's overarching goal of making rules that were "self-effectuating" and "readily administered" by carriers and state commissions. *Id.* ¶¶ 3, 4, 93, 105, 108; *see also id.* ¶ 169 (FCC's "selection of specific criteria is not an exact science," but is "based on a desire to provide an easily administered and reasonable bright-line rule to guide the industry"). The FCC also adopted this approach because it was keen to avoid the problems created by the vacated loop and transport "triggers" it previously adopted in its *Triennial Review Order*. Those standards relied on subjective data regarding competitive facilities that were "exclusively within the possession of competitive LECs." *Id.* ¶ 158. Such information turned out to be "not easily verifiable," because CLECs have a "disincentive[] to provide relevant data that is in their possession." *Id.* ¶¶ 157-158. Furthermore, any information they did provide "would require substantial analysis before it could be used to reach impairment determinations" and result in "expensive, fact-intensive litigation for years to come." *Id.* ¶¶ 99, 158-59. The FCC therefore refused to have its rules rely on any data that would have to be supplied by CLECs or be subject to manipulation or dispute. *Id*. ¶¶ 105, 108 and n.309.

Fiber-Based Collocators. The FCC's definition of "fiber-based collocator" in 47 C.F.R. § 51.5 likewise relies on objective data that is "readily available" to the incumbent "via review of billing records or physical inspection of central office premises" and that "can be verified by competitive LECs." *TRRO*, ¶ 100. The FCC noted that "[m]any incumbent LECs have been reviewing and maintaining this data for years." *Id.* ¶ 100. Relying on such data was a conscious departure from the *TRO*, which adopted a rule based on data that "was possessed

entirely by a span of competitive LECs and was not easily verifiable." *Id.* ¶ 99. The FCC defined fiber-based collocation as a LEC collocation arrangement that uses "non-incumbent LEC fiber-optic cable," including "less traditional collocation arrangements," such as those that may use facilities that are "comparable" to fiber. *Id.* ¶ 102. These "less traditional" arrangements include fixed wireless collocation and Verizon's CATT arrangement, where one carrier brings fiber into a wire center and then leases capacity to other collocated carriers. *Id.*

C. The Current Proceeding.

In this proceeding, AT&T Missouri seeks Commission approval of the methodology that it has used in "designating" certain wire centers as satisfying the FCC's non-impairment thresholds. Since the FCC's rules took effect on March 11, 2005, AT&T Missouri has issued and applied three sets of wire center designations. Chapman Direct at 10.

- The first set of designations took effect on the March 11, 2005 effective date of the *TRRO* and reflect the FCC's rules as written. Chapman Direct at 10 & Ex. CAC-1 (HC).
- The second set of designations reflects the designations made pursuant to the FCC's rules (as noted immediately above), as modified by certain commitments that AT&T made in connection with the 2005 SBC/AT&T merger, pursuant to which AT&T excluded the pre-merger AT&T Corporation from its count of "fiber-based collocators." Chapman Direct at 10, 15. These designations took effect on December 16, 2005, and will remain in effect until the expiration of the merger commitment. *Id*. at 10 & Ex. CAC-2 (HC).
- The third set of designations reflects the designations made pursuant to the FCC's rules, as modified by the SBC/AT&T merger commitments (noted immediately above) and by certain additional commitments AT&T made in connection with the 2006 AT&T/BellSouth merger, which excluded certain carriers from the count of "fiber-based collocators" (see Section III.B.1 below). Chapman Direct at 10, 15. These designations

took effect on December 29, 2006, and will remain in effect until the merger commitment expires. *Id*. at 10 & Ex. CAC-3 (HC). Although that exclusion changed the exact count of fiber-based collocators in some wire centers, it did not affect the end result for any wire center: that is, the same wire centers that satisfied the FCC's thresholds in the previous designations still satisfied those thresholds after the exclusion. *Id*. at 16.

In the original designations effective March 11, 2005, AT&T Missouri determined that three wire centers in Missouri satisfied the FCC's non-impairment thresholds for DS3 loops. Chapman Direct at 15 & Ex. CAC-1 (HC). For dedicated transport, AT&T Missouri determined that 14 wire centers qualified as "Tier 1" under the FCC's rules. *Id*. at 16-17 & Ex. CAC-1 (HC). Under the revised designations effective December 16, 2005, five wire centers dropped from Tier 1 to Tier 2; as a result, three wire centers are "non-impaired" for DS3 loops; 9 wire centers qualify as Tier 1 wire centers, and 5 wire centers qualify as Tier 2. *Id*. at 17-18 & Ex. CAC-2 (HC). The revisions effective December 29, 2006 did not affect the ultimate classification of any wire centers; all retained the same designation they had as of December 16, 2005. *Id*. at 19 & Ex. CAC-3 (HC).

The CLECs participating in this case disagree with AT&T Missouri on some aspects of the methodology for counting business lines and fiber-based collocators. AT&T Missouri addresses those disputes below. To keep the issues in perspective, however, the Commission should keep in mind that most of AT&T Missouri's ultimate designations are undisputed; that is, for most wire centers the parties' disputes do not affect the bottom-line classification. To illustrate: Assume that AT&T Missouri maintains that a given wire center has 11 fiber-based collocators, while the CLECs claim there are only 6. Both sides would still agree that there are more than enough collocators to satisfy the FCC's threshold for Tier 1 dedicated transport (four

collocators), so their counting dispute would have no impact on that designation. And once there are at least four collocators, any dispute that the parties might have with respect to business lines would have no impact on the wire center's designation for dedicated transport either, because under the transport rules *either one* of the FCC's criteria (collocators *or* business lines) is sufficient.

Tables 1 and 2 below summarize each of the wire centers at issue in the case, showing (i) how AT&T Missouri designated them, and (ii) whether there is a dispute as to the ultimate question. Disputed wire centers are also highlighted. Table 1 shows the results for dedicated transport, while Table 2 shows the results for high-capacity loops. The data in Tables 1 and 2 are taken from the Direct Testimony of Carol Chapman on behalf of AT&T Missouri, pages 15-19 and Exhibits CAC-1 (HC), CAC-2 (HC), and CAC-3 (HC), and from the Direct Testimony of Michael S. Scheperle of Staff, pages 5-9 and 14-15.

Table 1: Summary of Dedicated Transport Designations

WIRE CENTER	3/11/05 Designation	12/16/05 Designation	12/29/06 Designation	Disputed?
KSCYMO02 (Hiland)	Tier 1	Tier 1	Tier 1	No dispute
KSCYMO05 (Westport)	Tier 1	Tier 1	Tier 1	No dispute
KSCYMO55 (McGee)	Tier 1	Tier 1	Tier 1	No dispute
SPFDMOMC (Springfield McDaniel)	Tier 1	Tier 1	Tier 1	No dispute
SPFDMOTL (Springfield Temple)	Tier 1	Tier 1	Tier 1	No dispute
SPFDMOTU (Springfield Tuxedo)	Tier 1	Tier 2 *	Tier 2 *	Disputed
STLSMO01 (Chestnut)	Tier 1	Tier 1	Tier 1	No dispute
STLSMO05 (Jefferson)	Tier 1	Tier 1	Tier 1	No dispute
STLSMO07 (Parkview)	Tier 1	Tier 2 *	Tier 2 *	No dispute
STLSMO08 (Prospect)	Tier 1	Tier 2 *	Tier 2 *	No dispute
STLSMO21 (Ladue)	Tier 1	Tier 1	Tier 1	No dispute
STLSMO27 (Creve Coeur)	Tier 1	Tier 1	Tier 1	No dispute
STLSMO41 (Kirkwood)	Tier 1	Tier 2 *	Tier 2 *	No dispute
STLSMO42 (Bridgeton)	Tier 1	Tier 2 *	Tier 2 *	No dispute

***** Denotes the five wire centers that were reclassified from Tier 1 to Tier 2 upon application of the SBC/AT&T merger commitment (to exclude collocations by pre-merger AT&T Corp.) effective December 16, 2005. As discussed later, the CLECs argue that AT&T Missouri should have backdated the December 16, 2005 wire center reclassifications to Tier 2 by making them retroactive to March 11, 2005. Their argument must be rejected for, among other things, it overlooks the fact that the FCC's rules were properly applied to the facts as they existed in March, 2005 (i.e., neither company was an affiliate of the other), and it also overlooks the solely prospective effect of the AT&T's merger commitment.

Table 2: Summary of High-Capacity Loop Designations

WIRE CENTER	3/11/05 Designation	12/16/05 Designation	12/29/06 Designation	Disputed?
KSCYMO55 (McGee)	DS3 Loops	DS3 Loops	DS3 Loops	No dispute
STLSMO01 (Chestnut)	DS3 Loops	DS3 Loops	DS3 Loops	No dispute
STLSMO21 (Ladue)	DS3 Loops	DS3 Loops	DS3 Loops	Disputed

For each of the wire centers where the ultimate designation is in dispute, Staff recommends that the Commission find in favor of AT&T Missouri. Scheperle Direct at 13, 15. And as shown below, Staff and AT&T Missouri are correct.

III. ARGUMENT

A. Business Line Count Issues

1. Should the Business Line count include all UNE-L lines or only UNE-L lines used to provide switched service to business end users?

The FCC's instructions for how to compute "business lines" in a wire center are set forth in 47 C.F.R. § 51.5, which provides as follows:

> Business line. 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. . . . (Emphasis added).

AT&T Missouri and Staff agree that the phrase "all UNE loops" means just what it says – that *all* UNE loops are counted as "business lines." Chapman Direct at 24-25; Scheperle Direct at 12, 15. The CLECs, however, contend that the FCC did not really mean what it said. Rather,

they claim, the rule must be interpreted as referring only to "some UNE loops," *i.e.*, those that are specifically determined (by complex investigation and/or litigation) to serve business customers. Gillan Direct at 13. The CLECs' position is refuted by the plain language of the rule, the FCC's explanation of the rule and the intent behind it, and the decisions of numerous other state commissions.

a. The Plain Language of the FCC's Rule is Dispositive.

The starting point for interpreting any regulation is its language. If the language is unambiguous, there is no reason to go further. *E.g.*, *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989). The FCC's rule here unequivocally mandates that "all UNE loops" be counted as business lines. 47 C.F.R. § 51.5. "All" means all – there is no ambiguity and no basis for the CLECs' argument that "all UNE loops" really means just "some UNE loops."

The structure of the sentence referring to "all UNE loops" confirms that the FCC meant what it said. In the sentence of Rule 51.5 that defines how lines are to be computed, the FCC used the word "business" as a qualifier for the separate component of "incumbent LEC business switched access lines" but conspicuously did not use any qualifier before "UNE loops." As Staff cogently puts it, "[t]he rule identifies ILEC <u>business</u> switched access lines and <u>all</u> UNE loops." Scheperle Direct at 12. (emphasis original). Similarly, in the *TRRO* the FCC explained that its rule is based on the sum of "ARMIS 43-08 *business* lines [*i.e.*, the incumbent's lines serving its business customers], plus *business* UNE-P, plus UNE-loops."[10] *TRRO*, ¶ 105 (emphasis added).

[10] ARMIS 43-08 refers to reports filed by incumbent LECs under the FCC's ARMIS rules. *See* http://www.fcc.gov/wcb/armis. The ARMIS 43-08 report reflects the incumbent LEC's business switched access lines. "UNE-P" stands for "UNE Platform" and refers to a combination of unbundled network elements that a CLEC leases from an incumbent LEC that is composed of a UNE loop plus use of the incumbent's local switch and interoffice transmission network. *TRRO*, ¶ 200. These must be distinguished from "UNE-L" loops, which are unbundled loops that are connected to a CLEC's own switch. *Id.* As used throughout this brief and in the FCC's rule, then, "UNE loop" refers to a UNE-L loop, not a loop provided as part of a UNE-P combination. Chapman Direct at 11 n. 24.

Here too, the FCC used "business" as a qualifier where it explicitly chose to include it, but not with respect to the UNE loops at issue here. Staff correctly acknowledges that "[t]he FCC did not use the word *business* to modify UNE-loops but simply used the term UNE-loops." Scheperle Direct at 12.

This careful drafting confirms that the FCC's omission of "business" before "UNE loops" was intentional, and therefore that "all UNE loops" count as "business lines" regardless of what type of customer they serve. *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972) (words in statutes are presumed to be deliberately chosen, and words omitted are deemed to be deliberately omitted).

The language of the rule is so plain that two of the parties here, NuVox and XO (as well as other CLECs) have admitted to the FCC that the rule requires all UNE loops to be counted as "business lines." In March 2005,NuVox, XO and several other CLECs filed a Petition for Reconsideration of the *TRRO* regarding the business line rule. In that Petition, the CLECs admitted that the rule "counts *all* UNE-L lines provided to CLECs" and that "[*a*]*ll* UNE-L lines are included [as business lines] . . . *regardless of whether they are used to serve business or residential customers.*" Chapman Rebuttal at 19 & Att. CAC-1, at 15 (emphasis added, footnotes omitted). The CLECs were asking the FCC to change this rule, of course, but it has now been two years since the CLECs' request and the FCC has not changed a word.

Finally, the FCC's actions confirm that it meant to count "all UNE loops" as "business lines." The FCC's unbundling rules for high-capacity loops and transport establish "thresholds" and "tiers" that determine whether impairment exists in a wire center or route and thus whether unbundling will be required there. *See* 47 C.F.R. §§ 51.319(a)(4) & (5), 51.319(e)(2)(ii) & (iii). These thresholds and tiers are based, in part, on the number of "business lines" in a wire center.

Id. The FCC established these thresholds and tiers by reviewing business line data submitted by ILECs and then correlating it with wire centers that provided the greatest revenue opportunities for CLECs. *E.g.*, *TRRO*, ¶ 114, 118. The business line data that the FCC used to establish these thresholds and tiers counted *all* UNE loops as business lines. *See id.*, ¶ 105 & n.322; Chapman Direct at 24-25 & Ex. CAC-4 at 3 & Exs. CAC-6 and CAC-6 (Ex Parte Submissions to the FCC). Given that the FCC itself counted "all UNE loops" in formulating the rules, there is no basis to conclude that the FCC intended to deviate from this method and count only a subset of UNE loops when applying the same rules in the real world.

The CLECs ask the Commission to disregard the FCC's unambiguous mandate that "[t]he number of business lines in a wire center shall include . . . all UNE loops." They contend that a plain reading of the FCC's formula would conflict with the FCC's statement in the first sentence of Rule 51.5, which states that "[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." But there is no conflict at all. By its plain terms, the first sentence of the Rule addresses the entirely separate issue of what an *individual* "business line" is. See also Chapman Rebuttal at 16-17. The issue here – how to count "[t]he number of business lines" (plural) "in a wire center" – is addressed by the second sentence of the Rule, which requires that "all UNE loops" be counted, as both Staff and AT&T Missouri recognize. And as the next section shows, the FCC's order makes clear that it did not intend the count of business *lines* to require parties and state commission to pick over and litigate every individual *line*, an approach that the FCC squarely and properly rejected as "impracticable and unadministrable." *TRRO*, ¶ 157.

b. Counting All UNE Loops is Consistent With the FCC's Decision to Rely Only on Objective, Reported Data in Order to Create an Easily Administered Rule.

As noted earlier, the CLECs' argument on UNE loops is in effect a collateral attack on the FCC's rule, for their entire theory is that the FCC did not really mean what it said ("all UNE loops"). The plain language of the rule is dispositive, in and of itself, because the CLECs cannot challenge the FCC's rule here.[11] Moreover, the CLECs ignore the FCC's extensive discussion of the purpose and intent behind its business line rule, which fully supports the position of AT&T Missouri and Staff.

The FCC was well aware that its definition of "business lines" would not produce an exact count of the number of lines in a wire center being used to serve business customers. *TRRO*, ¶ 104 (noting that rule was under-inclusive because it would not count lines CLECs build themselves to serve business customers); *see also id.* ¶¶ 88, 94, 104, 155, 169 (recognizing proxies could never be precise). As the FCC repeatedly emphasized, however, its goal was not perfection but practicality. That is, its goal was to establish a workable proxy that could be readily administered by carriers and state commissions without costly disputes over subjective data. In the FCC's words, "[w]e are acutely aware of the need to base any test we adopt here on the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis." *Id.* ¶ 99 (citing *WorldCom v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001) (FCC entitled to "make ease of administration and enforceability a consideration in setting its standard for regulatory relief"). The FCC therefore chose to rely only on data that is objective, verifiable, readily available, and already reported by incumbent LECs for other regulatory purposes. *Id.* ¶¶ 105, 108. As the FCC

[11] 28 U.S.C. § 2342(1) (FCC orders can only be challenged on direct appeal); *FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468 (1984).

explained, "by basing our definition [of business line counts] 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 thresholds, and a simplified ability to obtain the necessary information." *Id.* ¶ 105 (emphasis added). This approach "significantly reduce[s] the burdens of implementing the standard." *Id.* ¶ 108.

The FCC's decision to count "all UNE loops" as "business lines" – rather than engaging in a one-by-one evaluation of literally tens of thousands of loops – is fully consistent with the FCC's goal of establishing "an easily implemented and reasonable bright-line rule to guide the industry." *Id.* ¶ 169. It is undisputed that incumbent LECs, including AT&T Missouri, do report to the FCC their total number of "all UNE loops," but do *not* separately identify and report the number of UNE loops used to serve business customers. Chapman Direct at 26. This makes perfect sense, for when an incumbent LEC leases a UNE loop to a CLEC the CLEC is free to use the loop as it likes and has no duty to tell the ILEC or regulators what type of customer it serves over that loop. *Id*. Thus, the FCC's rule can be administered by simply using data that ILECs already gather and publicly report based on established rules, making it objective, verifiable, and easy to apply. *Id*. at 7.

The FCC specifically chose this approach to avoid the problems of its vacated 2003 unbundling rules – namely, that they improperly delegated too much discretion to state commissions and relied heavily on CLEC data that was difficult to obtain and interpret. As described above, the FCC's previous rules (in its 2003 *TRO* decision) had depended on data produced by competing LECs. The FCC later recognized in the *TRRO* that relying on such data was a bad idea, for CLECs have no incentive to provide data that may support removal of ILEC's unbundling duties; furthermore, any data they did provide would not be the kind that is

regularly gathered and reported for other purposes and therefore would require subjective interpretation, leading to complex and costly disputes. *TRRO*, ¶¶ 157-59 & n.442. The FCC made a conscious decision not to rely on CLEC-provided data.

The CLECs' proposed approach, however, would require "business lines" to be computed through a loop-by-loop analysis of CLEC-provided data to determine whether each individual line serves a business customer – the very approach that the FCC expressly rejected. See *TRRO*, ¶ 159 ("loop-by-loop evaluations . . . are not practical"). Information on how each UNE loop is used is not readily available to or verifiable by the FCC, for incumbents do not generally report or even have information on how CLECs use their UNE loops; rather, that information is exclusively within the possession of CLECs. Chapman Direct at 26. Consequently, the CLECs' position is contrary not only to the plain language of the rule, but also to the FCC's goal of an objective, easily administrable rule. *Id*. at 7-8. Staff agrees with AT&T Missouri, reasoning that "[i]f the CLEC definition is adopted, AT&T would not have information readily available on how each CLEC uses its UNE loops"; thus, the CLEC proposal "would contradict the idea that the business line count is an objective set of data that incumbent LECs already have created and also would contradict the idea that the business line count is a simplified ability to obtain the necessary information." Scheperle Direct at 12.

c. The Overwhelming Majority of Other State Commissions Agree With Staff and AT&T Missouri.

Numerous state commissions have interpreted the FCC's rule in the same straightforward way as Staff and AT&T Missouri do here, and have rejected the same arguments that the CLECs make here:

- **Alabama: "**BellSouth asserts that it is proper to include all UNE loops in the number of business lines calculated in affected wire centers, including UNE loops used to serve residential customers. . . . [BellSouth's position] is hereby adopted." *Alabama Business Line Order*, 2006 WL 1752312, at *12.

- **California:** "Since the FCC uses the phrase 'UNE loops' in both the discussion and in its rule," rather than adding "business" as a qualifier, "we must assume that that is exactly what the FCC meant. . . . [T]he FCC's language is clear that all UNE loops are to be included in the count." *California Business Line Order*, 2006 WL 238404, at *4-5.
- **Florida:** "We note that the rule refers to ILEC 'business' switched access lines, but does not specify any particular UNE loops; rather, it says 'all' UNE loops connected to the wire center, including UNE loops provisioned in combination with other unbundled elements. This is consistent with the language from the text of the TRRO, cited above. We find that this distinction is significant and indicates that ILEC switched business access lines and UNE loops should be treated differently." *Florida Business Line Order*, 2006 WL 656737, at *26.
- **Georgia:** "[T]he Commission agrees with BellSouth that the FCC rule appears to contemplate the inclusion of all UNE loops, and not just those that are business UNE loops." *Georgia Business Line Order*, 2006 WL 758303, at Issue 4.
- **Illinois:** "The phrase 'all UNE loops' encompasses residential customers and non-switched services." *Illinois Business Line Order*, 2005 WL 3359097, at *26.
- **Indiana:** "The FCC's rule, 47 C.F.R. § 51.5, defines 'business lines' to include all UNE loops connected to a wire center at issue, regardless of the type of customer served." *Indiana Business Line Order*, 2006 WL 618004, at *12.
- **Kansas:** "The FCC's requirement of counting all UNE loops in a wire center is unqualified." *Kansas Business Line Order*, 2006 WL 2360900, at *11. "This second sentence of the [FCC's business-line] rule is eminently easy to understand – follow the instructions and compliance with the rule will be assured." *Kansas Business Line Reconsideration Order*, 2006 WL 2794797, at *2.
- **Ohio:** "The FCC has clearly stated that all UNE loops connected to the wire center should be counted as part of the business line density in determining wire center non-impairment for high capacity loops and transport." *Ohio TRO/TRRO Order*, 2005 WL 3018712 at Issue 3; *Ohio Business Line Order*, 2006 WL 1540270, at *13.
- **South Carolina:** "[T]he text of the FCC's definition of 'business line' calls for the inclusion of 'all UNE loops,' and BellSouth included all UNE loops in its count. . . . The Commission finds that BellSouth's count is appropriate." *South Carolina Business Line Order*, 2006 WL 2388163, at *17.
- **Texas:** "The Commission notes that the FCC indicated that when counting business lines the ILEC should include ARMIS 43-08 business lines (i.e., business line service for ILEC customers), plus UNE-P business lines (i.e., business lines service by CLEC customers using UNE-P), plus UNE loops. The Commission is persuaded that if the FCC intended that only UNE loops serving

business customers should be counted, it would have stated this in ¶ 105 of the *TRRO*. *Texas Business Line Order*, Docket No. 31303, April 6, 2006, at 30.[12]

- **Utah:** "[A]ll UNE loops, whether residential or business, switched or non-switched, should be added to the ARMIS business line data." *Utah Business Line Order*, 2006 WL 4043040, at *10.
- **Washington, D.C.:** "Because the definition of business line includes all UNE loops attached to a wire center, it appears that residential lines would be included in the definition of 'business line.'" *Washington, D.C. Business Line Order*, 2005 WL 3541003, at *15.[13]

These decisions, and the plain text and purpose of the FCC rule that they apply, confirm that Staff and AT&T Missouri are correct that all UNE loops shall be included in business line counts – just as the FCC's rule says.

2. Should the Business Line count for digital UNE-L be based on the loop's capacity or the loop's usage?

This issue is just as straightforward as the first. The parties' dispute centers on how to count "UNE loop" facilities that have the capacity to serve more than one line, namely, BRI ISDN, DS1 and DS3 loops. BRI ISDN loops have the capacity to serve 2 64 kbps-equivalents. DS1 loops have the capacity to serve 24 64 kbps-equivalents. Chapman Direct at 27 n.42. DS3 facilities can serve up to 672 64 kbps-equivalents. *Id*. Such facilities are commonly referred to as "digital access lines."

The question is how to account for such digital lines when computing the number of "business lines." The FCC's rule makes that easy, stating that business line tallies "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For

[12] In a November 6, 2006 Order, the United States District Court for the Western District in Texas upheld the Texas Commission's order in which the commission concluded that the count should include all UNE loops connected to a wire center and (as noted later herein) should apply the FCC's digital equivalence rule. *See, Logix Communications L.P. v. Public Utility Commission of Texas*, Case No. A-06-CA-548-SS, Order, November 6, 2006 (granting summary judgment to Defendants AT&T Texas and the Texas Commission). The order has been appealed to the Fifth Circuit Court of Appeals.

[13] To the best of AT&T Missouri's knowledge, the only state commissions that have concluded that "all UNE loops" applies only to those used to serve business lines are Michigan (2005 WL 2291952, at *5 (Sept. 20, 2005)) and North Carolina (2006 WL 995866, at *54-55 (Mar. 1, 2006)). Those decisions are wrong for all the reasons stated in the text, and AT&T Missouri's Michigan affiliate has appealed the Michigan decision.

example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" 47 C.F.R. § 51.5. This is generally referred to as the "digital equivalency" requirement. Based on the plain language of the FCC's rule, AT&T Missouri maintains that business line tallies should count each 64 kbps-equivalent as one "business line." Chapman Direct at 27.[14] The CLECs nonetheless argue that some 64 kbps-equivalents should be excluded. The CLECs' arguments fail again.

a. The Plain Language of the FCC's Rule is Dispositive.

Once again, the plain language of the FCC's Rule 51.5 is dispositive. The rule is explicit: business line tallies "shall" account for high-capacity loops as "business lines" by "counting each 64 kbps-equivalent as one line." 47 C.F.R. § 51.5. And as if that were not enough, the FCC precluded all doubt by giving a concrete example, within the rule itself, of how the rule is to be applied: "a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" *Id.*

The CLECs ask the Commission to either ignore this language or treat it as merely one example of how a DS1 loop *might* be counted. Gillan Direct at 14. But the FCC's rule is unqualified and suggests no exceptions or limitations. The rule is not, as the CLECs suggest, merely that each 64 kbps-equivalent *might* be counted as a "business line" depending on other factors (which could be evaluated only through protracted litigation over subjective, CLEC-provided data), but rather that each equivalent "*shall*" be treated as a "business line" no matter what.

Moreover, both NuVox and XO (and other CLECs) have again admitted to the FCC that this is the only way to read the rule. In the CLECs' Petition for Reconsideration of the *TRRO*

[14] Staff's testimony does not directly address this issue, but agrees with AT&T Missouri's ultimate conclusion that the number of business lines exceeds the FCC's thresholds. Scheperle Direct at 13, 15.

cited above, CLECs stated that "[t]he most egregious over counting of business lines results from the [FCC's] treatment of digital access lines," which, they conceded, includes the "64 kbps-equivalents rule [that] *counts every DS1 provided by CLECs as 24 business lines*." Chapman Rebuttal at 26-27 & Ex. CAC-1 at 11, 13 (emphasis added). Those CLECs therefore recognized that the rule as written is not open to any other interpretation.

b. Counting High-Capacity Loops at Their Full Digital Equivalency is Fully Consistent With the FCC's Intent.

Counting UNE loops according to their full digital equivalency also is consistent with the FCC's intent to "rel[y] on objective criteria to which the incumbent LECs have full access" and that is reported and can be verified by others. *TRRO*, ¶ 108. AT&T Missouri knows the type and number of high-capacity loops they have leased to CLECs, and thus knows the number of 64 kbps-equivalents on these loops, which they report to the FCC. Chapman Direct at 27. Just as with all other UNE loops, however, AT&T Missouri does *not* separately identify and report how a CLEC uses a high-capacity loop or each 64 kbps-equivalent on that loop or what type of customers it serves on that loops. *Id*. Nor could they, for the data are maintained by CLECs. *Id*.

In addition, counting high-capacity loops at their full digital equivalency is consistent with how all other facilities are counted under both the FCC's rule and incumbent LECs' ARMIS 43-08 reports to the FCC. When an incumbent LEC provides a single 64 kbps line to one of its own business customers, it counts that line as one business line for ARMIS reporting purposes; but when a business customer buys a full DS1 line, AT&T Missouri counts it as 24 lines for ARMIS reporting purposes. Chapman Direct at 26; Chapman Rebuttal at 25. Likewise, when AT&T Missouri provides a CLEC with a single 64 kbps UNE loop, it counts the loop as one business line for reporting purposes; but when the CLEC leases a DS1 loop it is reported as

24 business lines. *Id*. at 27. In both instances AT&T Missouri counts the total *capacity* actually requested by and provided to the customer.

By contrast, the CLECs' proposal to separately analyze each 64 kbps-equivalent to see whether it actually provides switched service to a business customer is the very kind of line-by-line analysis that the FCC expressly rejected. Data on actual end use is not readily verifiable by the FCC, nor is it objective. Indeed, in order to exclude from the "business line" counts all the types of 64 kbps-equivalents that the CLECs seeks to exclude (*see* Gillan Direct at 16), incumbent LECs would have to obtain that data from CLECs. Chapman Direct at 27; Chapman Rebuttal at 25-26. This would require extensive discovery of every CLEC that uses such loops to determine whether the CLEC is actually using each 64 kbps-equivalent to provide service and, if so, whether that capacity is being used to provide business or residential service, data or voice service, and switched or non-switched service. Chapman Direct at 27. Such an undertaking would be "exceedingly difficult" and "impractical and unadministrable." *TRRO*, ¶¶ 157-59. For example, to compute the number of business lines on a single DS3 loop, one would have to analyze 672 separate 64 kbps-equivalents. Requiring incumbent LECs to endure the delay, expense, and complexity of trying to obtain, analyze, and verify such data from dozens of CLECs is exactly what the FCC wanted to avoid. *Id*. ¶¶ 93, 99, 105, 108, 157-59.[15]

Recognizing that line-by-line litigation would be insupportable, the CLECs contend that the Commission should develop some "factor" for digital lines: *e.g.*, 11 number of lines per

[15] Counting UNE loops at their full digital equivalency also is consistent with the FCC's intent that business line counts reflect revenue *opportunities* for CLECs. *See TRRO*, ¶ 88 ("The tests we adopt today are designed to capture both actual and potential competition, based on indicia of significant revenue opportunities at wire centers"); *id.*, ¶ 43 ("we adopt below a regime that accounts for actual and potential deployment"). The fact that a CLEC chooses to lease a high-capacity DS1 or DS3 loop at a particular wire center, rather than a smaller number of individual lines, shows that the CLEC sees enough revenue opportunity at that location to justify using that more expensive, high-capacity facility. This is evidence of the potential revenue opportunities in that location and thus justifies counting that loop at its full capacity for determining non-impairment, regardless of whether the CLEC actually uses the entire capacity.

DS1. Gillan Direct at 20. The CLECs' first and fatal error is that the FCC's rule has already specified the appropriate factor: business line tallies "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.'" 47 C.F.R. § 51.5. The Commission has no authority to change the FCC's clear rule.

Moreover, the CLECs' proposal would not simplify matters. It would simply replace protracted litigation over each digital line with protracted litigation over the appropriate factor, all to come up with a highly subjective number. Chapman Rebuttal at 27. Such a result would be directly contrary to the FCC's intent of using readily available, objective criteria that can be implemented without lengthy disputes. *Id.*

c. The Overwhelming Majority of Other State Commissions Agree With AT&T Missouri.

Numerous state commissions have agreed with AT&T Missouri and rejected the same arguments that the CLECs make here:

> **Alabama:** Counting HDSL-capable loops "as 24 voice grade equivalents is the approach most consistent with the findings and conclusions of the FCC in the TRO and TRRO because such an approach better addresses the competitive 'revenue opportunity' criteria relied upon by the FCC." "[T]he FCC, in the TRO and TRRO, made references that tend to support the more generous business line count methodology that BellSouth seeks to apply in this proceeding" and "there is no evidence of record that would adequately support a different determination of the applicable business line counts." *Alabama Business Line Order*, 2006 WL 1752312, at *12, *23.
>
> **Florida:** "We also agree with BellSouth that unused capacity on channelized high capacity loops should be counted in the business lines." *Florida Business Line Order*, 2006 WL 656737, at *26.
>
> **Illinois:** "Any ambiguity contained within the TRRO as to whether digital equivalency is proper, is resolved by the FCC's enactment of § 51.5. Section 51.5 changed the methodology of how business lines were to be computed by including digital equivalency." *Illinois Wire Center Order*, 2006 WL 4049768, at *8.
>
> **Kansas:** "NuVox also claimed that the rule does not direct an incumbent LEC to count each channel in a high capacity facility as a 'business line.' The Commission finds this

claim to be without any merit whatsoever. . . . If the FCC had intended to limit each 64 kbps-equivalent as NuVox suggested, it would not have stated that a DS1 line corresponds to 24 'business' lines. The Commission concludes that the FCC plainly and unambiguously stated its intentions: each 64 kbps-equivalent shall be counted as a CLEC-served business line for purposes of its impairment analysis." *Kansas Business Line Order*, 2006 WL 2360900, at *10-11.

Ohio: "The Commission rejects the CLEC Coalition's proposal to exclude unused capacity and capacity used for residential services on high capacity UNE-L lines. . . . To the contrary, the FCC has explicitly stated that ILECs shall account for high capacity digital access lines by counting each 64 kbps-equivalent as one line." *Ohio Business Line Order*, 2006 WL 1540270, at *13.

South Carolina: "[T]he federal rule requires ISDN and other digital access lines, whether BellSouth's lines or CLEC UNE lines, to be counted at their full system capacity; that is, each 64 kbps-equivalent is to be counted as one line." *South Carolina Business Line Order*, 2006 WL 2388163, at *18.

Texas: "The Commission finds that AT&T Texas's counting and reporting of UNE-L capacity complies with the FCC's definition of a business line in 47 C.F.R. §51.5 as well as the FCC's specific instruction on reporting such lines found in ¶ 105 of the TRRO. . . . The Commission notes that two-wire switched digital access lines have a capacity of two 64 kbps circuits, therefore, each switched two-wire switched digital line used to provide business service should be counted as two business lines as directed in 47 C.F.R. §51.5(3)." *Texas Business Line Order*, Docket No. 31303, April 6, 2006, at 33.[16]

Utah: "[A]djusting wholesale DS1 and DS3 numbers to account for their total VGE capacity and counting all UNE loops accords with the FCC's view that the number of business lines fairly represents the business opportunities available in a given wire center." *Utah Business Line Order*, 2006 WL 4043040, at *10 (adopting incumbent's position).[17]

3. On what vintage of data should the Business Line counts supporting the wire center designations rely?

The FCC's rule mandates that "[t]he 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." 47 C.F.R. § 51.5. Consistent with the FCC's underlying intent to

[16] In the *Logix* decision noted earlier, the United States District Court for the Western District in Texas upheld the Texas Commission's order concluding that the count should apply the FCC's digital equivalence rule.

[17] To the best of AT&T Missouri's knowledge, the North Carolina and Oregon commissions are the only state commissions in the nation to have reached the contrary conclusion advocated by the CLECs here. *In re Covad Comms. Co.*, No. UM 1251, http:apps.puc.state.or.us/edockets/docket.asp?DocketID=13173 (Order No. 07-109), at 9 (Mar. 20, 2007). Those decisions are incorrect for all the reasons stated in the text.

use "an objective set of data that incumbent LECs already have created," the accompanying order gives a simple recipe for carrying out the rule: "ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops." *TRRO*, ¶ 105 (footnote omitted). The first component, ARMIS 43-08, refers to periodic reports that incumbents file for other regulatory purposes: the issue presented here is what date or "vintage" of that report may be used. In making its March 2005 designations, AT&T Missouri used the April 2004 report, which reflects data as of December 31, 2003, because that was the most recent report available at the time. See Chapman Direct at 12; Chapman Rebuttal at 33. The CLECs suggest that the Commission use the April 2005 reports, which were not filed until weeks after the *TRRO* took effect. Gillan Rebuttal at 28. In the alternative, the CLECs propose a purported "simple solution" under which the Commission would use the December 2003 data – but count the data incorrectly, by using the counts that incumbents submitted to the FCC *before* the *TRRO* was even issued. Gillan Direct at 4. Neither "outcome-based" CLEC proposal has any merit.

a. The Commission Should Approve AT&T Missouri's Use Of The December 2003 ARMIS 43-08 Data.

As with the other business line issues, the FCC's order and rules provide an unmistakably clear and straightforward answer to the "vintage" question, in AT&T Missouri's favor. The FCC plainly stated that its rules "shall take effect on March 11, 2005." *TRRO*, ¶ 235. The FCC's order is equally plain that incumbents are to include "ARMIS 43-08 business lines" in counting business lines. *Id*. ¶ 105. AT&T Missouri made its first designation effective March 11, 2005, the effective date of the *TRRO*. Chapman Direct at 10 & Att. CAC-1 (HC). There is no dispute that, on that date, the latest "ARMIS 43-08" report available was the April 2004 report that AT&T Missouri used. Chapman Direct at 12; Chapman Rebuttal at 33. Plainly, then, the use of that report was permitted by – indeed, *compelled* by – the FCC.

Conversely, given that the FCC required incumbents to use the ARMIS 43-08 report and specified a March 11 effective date, it would have made no sense for the FCC to rule out the use of the only ARMIS 43-08 report that was available – or to require incumbents to use the April 2005 report, which was *un*available on the effective date. Under the CLECs' approach, the FCC's rules for high-capacity loops and transport would not have "take[n] effect on March 11, 2005" (*TRRO*, ¶ 235) but would instead have begun their lives in a regulatory limbo, because incumbents and state commissions would have been unable to perform the business line counts that the rules required until a month later. Indeed, the FCC -- emphasizing the need for "prompt action" -- expressly *accelerated* the effective date of the *TRRO* to March 11, 2005 (normally, FCC rules take effect 30 days after publication in the Federal Register). *TRRO*, ¶ 235. Had the FCC truly intended that incumbents or state commissions use the April 2005 report, it would not have bothered to move up the effective date of the rules to a date before April 2005. Such a result would have been as absurd as saying "hurry up and wait."

The FCC's order hammers home the point made by its rules: that incumbents may use their April 2004 ARMIS reports as AT&T Missouri has done. In developing the numeric thresholds for non-impairment, the FCC *used* business line data *from those very same reports*. Chapman Rebuttal at 40. It is simply untenable to say, as the CLECs do, that the FCC somehow precluded incumbents from using the same reports to implement the rules that the FCC used to formulate the rules.

What if the number of business lines in a wire center decreases after the April 2004 report? The FCC's rules expressly state that such a decrease would be irrelevant, because once a wire center crosses the FCC's non-impairment thresholds it cannot later be called "impaired." For loops, the FCC's rule categorically states – twice – that "[o]nce a wire center exceeds both"

of the applicable thresholds, "*no further [DS1 or DS3] loop unbundling* will be required in that wire center." 47 C.F.R. § 51.319(a)(4)(i) (DS1) & (a)(5)(i) (DS3) (emphasis added). Likewise, with respect to dedicated transport, the FCC's rule commands – twice – that "[o]nce a wire center is determined to be a [Tier 1 or 2] wire center, that wire center is not subject to later reclassification" to a lower tier. 47 C.F.R. § 51.319(e)(3)(i), (ii).

The FCC's rule makes perfect sense, for two reasons. First, it gives finality and certainty to incumbents and competitors alike. The ultimate goal of the FCC's rules – and of the 1996 Act – is to promote the deployment of competitive facilities and the growth of facilities-based competition. Where unbundling is not required, it is because the FCC has found that competitors can and should deploy their own facilities. A competitor seeking to enter a wire center that has been designated as non-impaired would naturally be encouraged to deploy its own facilities there. It would be patently unfair if the designation could later be reversed, forcing facilities-based competitors to compete against CLECs that use unbundled access.

Second, in the interest of practicality the FCC's "business line count" includes only those lines that are served over the incumbent's loops (lines used by the incumbent to serve its own business customers, or lines leased by competitors from the incumbent on an unbundled basis), not lines deployed by facilities-based competitors. *TRRO*, ¶ 104. Thus, the business line counts are *likely* to decrease as facilities-based competitors grow and take over more of the incumbent's lines. Chapman Rebuttal at 38. It is simply perverse for the CLECs to use a decrease in the incumbent's business lines – which demonstrates the *success* of facilities-based competition *without* unbundled access – as evidence that competitors are "impaired" without such access. *Id.*

b. The Commission Should Reject The CLECs' Purported "Simple Solution."

The CLECs' alternative proposal is equally invalid. Under their so-called "simple solution," they are willing to use the April 2004 ARMIS *data* that AT&T Missouri used – but they want the Commission to *miscount* the data, in a manner directly contrary to the FCC's rules. The CLECs use a backhanded approach to accomplish this result, asking the Commission to use the line counts that incumbents originally provided to the FCC during the *TRRO* proceedings, before the *TRRO* was issued. Gillan Direct at 4-7. As the CLECs know – but did not disclose in their direct testimony – those original counts were incorrect, because they did not reflect the FCC's subsequent rule for counting the "digital equivalency" of high-capacity loops (discussed at Section III.A.2 above). Chapman Rebuttal at 10, 39-40. The reason for the mistake is simple: when AT&T provided the data to the FCC, it did not know about the digital equivalence rule, because the rule did not exist. *Id*. at 40. Once the rule was issued, AT&T promptly gave the FCC revised counts reflecting the new rule. *Id*. at 44. The FCC has never objected to the revisions, nor has it made any change to the digital equivalence rule. *Id*. at 44.

Thus, the CLECs' proposal is nothing but a back-door attempt to get the Commission to endorse their misguided approach to digital equivalency. The Commission should reject their "simple solution" for the same reason that it should reject the CLECs' arguments on digital equivalency. See Section III.A.2 *supra*.

It does not help the CLECs to call their error a "simple solution." Gillan Direct at 4. In the first place, the preceding sections show that the FCC's rules for counting business lines are already eminently simple. Moreover, it is hardly a "solution" for the Commission to adopt a patently erroneous approach in the name of simplicity. After all, throwing darts at a wire center

map may be the simplest approach of all to designating wire centers, but no one could contend that it is a lawful "solution."

Nor are the CLECs correct to say that AT&T Missouri somehow "consented" to their error on digital equivalency. Gillan Rebuttal, at 5. When AT&T made its original submission to the FCC, it had no way of knowing the FCC's rule on digital equivalency (because the rule did not even exist) and thus could not possibly have "consented" to depart from that rule. Now that the FCC's rule does exist – and is in effect – the Commission cannot simply blind its eyes to that rule.

B. Fiber-Based Collocator Issues

The second proxy for determining non-impairment is the number of "fiber-based collocators" ("FBCs") in a wire center. 47 C.F.R. §§ 51.319(a)(4)(i), (a)(5)(i), and (e)(3). As with business lines, the FCC defined a fiber-based collocator in a manner that is easy to administer and based on data that are objective, readily verifiable, and possessed by incumbents. *TRRO*, ¶¶ 99-102.

> 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 of this Title. [47 C.F.R. § 51.5].

AT&T Missouri implemented this rule by identifying wire centers that might have enough collocators to meet the FCC's non-impairment test and then physically inspecting those

wire centers to determine the actual number of FBCs. Nevels Direct at 6-7. Ms. Chapman provided the results of those inspections in Exhibit CAC-1 (HC) to her direct testimony, including the number of fiber-based collocators and the Tier designation for each wire center. Those results were as of March 11, 2005. AT&T Missouri then updated its results as of December 16, 2005 in order to remove fiber-based collocation by AT&T CLECs, as SBC and AT&T committed to do in the FCC's review of the SBC-AT&T merger. Chapman Direct at 9. The updated results are in Exhibit CAC-2 (HC) of Ms. Chapman's direct testimony. This change caused five wire centers to drop from Tier 1 to Tier 2. Compare *id*., Ex. CAC-1 (HC) with Ex. CAC-2 (HC). AT&T Missouri updated its designations again as of December 29, 2006, this time to comply with a commitment made in the FCC's AT&T-BellSouth merger proceeding to temporarily exclude collocation-to-collocation arrangements from its fiber-based collocation counts. *Id*. at 9 & n. 21. These latest results are in Exhibit CAC-3 (HC) to Ms. Chapman's direct testimony. This update did not change the non-impairment designations for any of AT&T Missouri's wire centers. *Id*. at 9.

The primary issue here is whether AT&T Missouri can count both carriers in a collocation-to-collocation ("collo-to-collo") arrangement as FBCs. For purposes of this discussion, a collo-to-collo arrangement exists where one carrier uses a cross-connect with DS3 or greater transmission capacity to connect to another carrier's collocation and then to a leased fiber-optic cable (or comparable facility) that leaves the central office. Nevels Direct at 10. Mr. Nevels diagrammed this arrangement in Attachment MN-1 to his rebuttal testimony.

AT&T Missouri contends that both collocators in this arrangement qualify as FBCs. This is based on the similarity between such an arrangement and fixed wireless collocation, which also can start at a DS3 level of capacity and which FCC said can count as fiber-based

collocation, and the similarity to Verizon's CATT arrangement, which also involves a collocated carrier cross-connecting to another carrier's interoffice fiber facility.[18] *TRRO*, ¶ 102; Nevels Direct at 7-8, 13-15. The FCC said that both carriers in Verizon's CATT arrangement could count as FBCs (*TRRO*, ¶ 102) and the same thinking should apply to collo-to-collo arrangements.

The CLECs, however, claim that the cross-connected carrier in a collo-to-collo arrangement cannot count as an FBC. They assert that a carrier cannot "operate" a transmission facility that "terminates" in and "leaves" a wire center, as required by 47 C.F.R. § 51.5, unless it provides the optronics to light the facility. Gillan Direct at 24; Gillan Rebuttal at 17. They also contend that a transmission facility that consists of a DS3 or greater capacity coaxial cable that is cross-connected to fiber that leaves the wire center is not "comparable" to fiber. The CLECs' arguments have no support in the FCC's rule or the *TRRO*.[19]

[18] The service Verizon provides allows a carrier that is not itself a collocating carrier, but is a wholesale transport facilities provider, to terminate fiber cables in a Verizon wire center, and then offer these transport facilities to other collocated carriers at that location, including all CLECs. Nevels Direct at 13-15. Similarly, AT&T Missouri allows carriers to terminate their fiber cable at cross-connect facilities in their collocation arrangements and then make spare capacity available to third-party carriers collocated within the wire center. *Id.* In this manner, AT&T Missouri allows collocated carriers to cross-connect their arrangements together and, as with Verizon's CATT service, allows one collocated carrier to use the fiber transmission facilities of another collocated carrier, rather than deploying its own fiber or having to rely on AT&T Missouri. If the FCC did not intend for such fiber-sharing arrangements to count, it would not have counted Verizon's CATT fiber termination arrangements.

[19] AT&T Missouri notes that the Commission's decision on the fiber-based collocation issues will have no immediate impact on which wire centers are non-impaired, since the two wire centers with collo-to-collo arrangements meet the FCC's thresholds even without counting both carriers in those arrangements. Nevels Direct at 10. In addition, AT&T's parent committed in the AT&T-BellSouth merger proceeding at the FCC not to count collocation-to-collocation arrangements as fiber-based collocation for a period of time. *Id.* at 11. The Commission's decisions could have an impact, however, on non-impairment designations made for other wire centers after the AT&T-BellSouth merger commitment expires. Chapman Direct at 33 n.52.

1. Does the definition of Fiber-based Collocator include collo-to-collo arrangements in which the connecting carrier establishes service without providing optronics for fiber that leaves the wire center?

a. A cross-connected carrier in a collo-to-collo arrangement "operates" a transmission facility that is comparable to fiber even if it does not provide the optronics.

The CLECs claim that a carrier must supply the optronics to light a fiber before it can be deemed to "operate" a qualifying transmission facility and count as an FBC. They are incorrect for several reasons.

First, the word "operate" is typically defined to mean "control" or "run." Chapman Rebuttal at 53. That perfectly describes what occurs in a collo-to-collo arrangement – where the cross-connected carrier leases spare capacity on a fiber-optic cable or a comparable transmission facility established by another carrier. Nevels Direct at 10; Nevels Rebuttal, Att. MN-1. Although the cross-connected carrier does not supply the optronics for the fiber, it still has an independent, fully functioning network, complete with a separate collocation arrangement and its own telecommunications equipment. Nevels Direct at 14-15; Nevels Rebuttal at 7-8; Chapman Rebuttal at 53-54. Indeed, the cross-connected carrier *must* "operate[]" the transmission facility in order to employ its own network equipment to complete its customers' calls. Nevels Rebuttal at 7; Chapman Rebuttal at 53-54. As Mr. Nevels explained, the cross-connected carrier obtains an end-to-end transmission path that terminates in its collocation arrangement and leaves the wire center. Nevels Rebuttal at 10. For that transmission path to function, the carrier must control it in many different ways:

- it tests and operates its own multiplexing equipment;
- it can turn the arrangement on and off;
- it determines the capabilities of the transmission that it uses, as well as the "operating characteristics" of that transmission path;

- it attempts to ensure that the transmission quality of the end-to-end transmission path meets(and continues to meet) its desired standards;
- it makes engineering and market entry determinations in deciding the transmission capacity required to meet the demands of its network; and
- it monitors the use of the comparable transmission facility to determine if and when network modifications and augments are needed.

Nevels Rebuttal at 7-8; Chapman Rebuttal at 53-54. Given these facts, it is appropriate to describe that collocator as "operat[ing]" the transmission path rather than acting as if the collocator were merely a passive entity that had no management over the functioning of its network. And because the cross-connected carrier in a collo-to-collo arrangement "operates" the transmission facility it satisfies Rule 51.5 and counts as an FBC.

Second, the CLECs argue that there can be only one fiber-based collocator that "operates" any fiber transmission facility. Gillan Direct at 24. Nothing in the FCC's rule or *TRRO* says that. And nothing in the FCC's rule says that the collocator must own the fiber, control the speed of the fiber, or run optronics equipment to be counted as a fiber-based collocator. To the contrary, carriers frequently "operate" networks composed of both their own facilities and facilities that they obtain from third parties. In fact, the *TRRO* assumes that not all fiber-based collocators will deploy their own facilities, and expressly acknowledges that some fiber-based collocators will use inputs from other competing carriers. *See TRRO*, ¶ 28 ("our inferences regarding the potential for deployment are based on the characteristics of markets where actual deployment has occurred, which presumes that competitive LECs will use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible"). The fact that they use inputs from other carriers does not mean they are not "operating" a comparable transmission facility. The FCC has even encouraged sharing of facilities, such as in the "shared collocation" requirement that ILECs were required to provide under the *First Report and Order* (¶ 41).

Third, the CLECs' optronics-based test would rely on data that ILECs do not possess and cannot readily obtain, which is precisely what the FCC rejected. *TRRO*, ¶ 99. For example, Mr. Gillan's Exhibit JPG-6 depicts two different collocation-to-collocation arrangements, between carriers A and B and B and C. According to Mr. Gillan, both A and B could be counted as fiber-based collocators because both have their own optronics (with A's optronics used on fiber coming out of B's collocation cage), but C could not be counted because it does not have its own optronics. Mr. Gillan thus concludes that C could not be counted even if it connected to B via fiber. Gillan Rebuttal at 17-18. The problem with that approach is that, standing outside the collocation cages, AT&T Missouri has no way of knowing whether C had its own optronics and thus no way to distinguish A from C, when both are connected to B via fiber. Nevels Rebuttal at 9 ("we cannot tell what goes on inside the cages at all – all we can see is the facility connecting the cages, which we can determine to be a DS-3 or higher"). Thus, Mr. Gillan's optronics-based approach would require AT&T Missouri to seek additional information from CLECs (*id.* at 9-10), which is contrary to the FCC's goal of relying only on data that ILECs already possess. *TRRO*, ¶ 99.

Fourth, the CLECs' interpretation of what it means to "operate[]" a fiber-optic cable or comparable transmission facility is far too narrow. Since only one carrier needs to supply the optronics to light a facility, the CLECs' approach would require the connecting carrier to own the fiber transmission facility. Gillan Direct at 23. The FCC's rule has no such requirement. Moreover, the CLECs' approach would require AT&T Missouri to count existing transport *facilities* instead of fiber-based *collocators*. That is not what the FCC intended. That was the old approach under the *TRO*, which has now been vacated, not the new rule established in the *TRRO*. The *TRO* required ILECs to count only instances where the competing carrier had

deployed *its own* transport facilities. *TRRO*, ¶ 400. By contrast, the *TRRO* requires a fiber-based collocator to "*operate*[] a fiber-optic cable or comparable transmission facility," and counts instances where the interoffice facilities are owned by another party, such as in Verizon's CATT arrangement. *TRRO*, ¶ 102; 47 C.F.R. 51.5.[20] In fact, the only time the *TRRO* mentions ownership of transmission facilities is in the discussion of fiber-based collocators where it states that the facility cannot be owned by the ILEC or an affiliate. *TRRO*, ¶ 102; 47 C.F.R. 51.5. Other than that, the facility can be owned by anyone.

Fifth, the CLECs also suggest that a cross-connected collocator does not meet the FCC's criteria for fiber-based collocators because leasing lit fiber capacity does not indicate that the carrier has, or would, deploy competitive transport on that route. The CLECs are wrong. To begin with, if a CLEC operates a facility capable of supporting DS3 or higher capacity (as AT&T Missouri's approach requires), then that CLEC could potentially offer transport to other carriers. Chapman Rebuttal at 54-55; Nevels Direct at 14. For example, if a carrier with DS3 capabilities was cross-connected to another fiber-based collocator, then *both* carriers could potentially offer competitive DS1 transport to other carriers. Chapman Rebuttal at 54-55. That being said, the CLECs' position is contrary to the FCC's rules and the *TRRO*. The test under the *TRRO* is not whether the particular collocators included in the count will act as wholesalers to other carriers, but rather whether their presence in a wire center serves to indicate the viability of self-deploying transport facilities there. *TRRO*, ¶ 101. A CLEC that has invested in collocation

[20] Indeed, the only express requirement in the fiber-based collocator definition that multiple collocation arrangements be counted as one is that "two or more affiliated fiber-based collocators shall be counted as a single fiber-based collocator." 47 C.F.R. § 51.5. Clearly, the FCC could have written a similar requirement into the fiber-based collocator definition had it intended for cross-connect arrangements to be counted as one, as the CLECs suggest.

and a high-capacity connection to another CLEC to use that CLECs' fiber interoffice facilities provides such evidence, regardless of whether it owns the interoffice facility.

b. The cross-connected carrier operates a facility that both "terminates" in and "leaves" the wire center.

The CLECs also claim that a cross-connected carrier in a collo-to-collo arrangement does not operate a transmission facility that "terminates" in the wire center, as required by FCC Rule 51.5. Gillan Direct at 24; Gillan Rebuttal at 17. Mr. Gillan contends that a transport facility "will terminate once and only once in a wire center, because only one set of optronics . . . can be installed on the fiber." Gillan Direct at 24 (emphasis in original). Similarly, Mr. Gillan argues that the cross-connected carrier does not operate the facility that actually "leaves" the wire center. Gillan Rebuttal at 17.

These arguments mischaracterize the facility at issue. The "comparable" transmission facility is not just the cross-connect between the two collocations, but rather the combined transmission path created by the cross-connect in conjunction with the leased fiber transport. Nevels Rebuttal at 10-11. As Mr. Nevels explained, "the collo-to-collo connection is just a small segment of an uninterrupted transmission route that leaves the wire center; in other words, [Mr. Gillan] fails to view the transmission facility as a whole." Mr. Nevels illustrated this point in Attachment MN-1 to his rebuttal testimony, which shows that the transmission facility operated by the cross-connected carrier runs from point A to point J and thus both terminates in and leaves the wire center. Nevels Rebuttal at 11-12. This combined facility is what is "comparable" to fiber.

The Ohio Commission agreed with this analysis. "[I]n evaluating the 'comparable transmission facility' to the fiber cable in dispute, we evaluate the facility as a whole, and not the coaxial cable section that cross-connects the equipment of one collocator to the fiber facility of

the other FBC." *Ohio Wire Center Order* at 8. As the Ohio Commission explained, in the dedicated transport context, the FCC defines a "route" as a transmission path that may exist between wire center or switch "A" and wire center or switch "Z," and that may pass through one or more intermediate wire centers or switches along the way ("X"). In light of this FCC rule, the FCC "clearly views a circuit taking the route 'A-X-Z' as a single circuit that originates from point 'A' and terminates at point 'Z', not terminating at optronics used at point 'X.' Similarly, . . . we find that the transport circuit used by collocator 'A' terminates at the 'collocator A' collocation arrangement, and not at the optronics located at 'collocator B' site." *Id.* at 14; *see also* 47 C.F.R. § 51.319(e). The same analysis applies here.

c. The CLECs' reliance on footnote 292 of the *TRRO* is misplaced.

The CLECs' optronics argument relies heavily on footnote 292 of the *TRRO*, where the FCC stated that the FBC count should include situations "when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC." *TRRO*, ¶ 102 n.292. The FCC there cited paragraph 408 and associated footnotes from the *TRO*, which had held that "when a company acquires dark fiber, but not lit fiber, from another carrier on a long term IRU or comparable basis, that facility should be counted as a separate, unaffiliated facility." *TRO*, ¶ 408 n.1263 (cited at *TRRO*, ¶ 102 n.292). In light of these statements, Mr. Gillan contends that a cross-connected carrier on a collo-to-collo arrangement could count as an FBC only "when that second carrier has installed the optronics and obtained the underlying dark fiber under an IRU." Gillan Direct at 26.

The CLECs' position fails because it is not reflected in the actual rule adopted in the *TRRO*. Rule 51.5 requires that the collocator "operate[] a fiber-optic cable or comparable

transmission facility that . . . is owned by a party *other than the incumbent LEC* or any affiliate of the incumbent LEC." 47 C.F.R. § 51.5 (emphasis added). At the same time, the rule provides that "[d]ark fiber *obtained from an incumbent LEC* on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable." (Emphasis added). In other words, the FCC's rule requires one to look for an "indefeasible right of use" only when (1) the fiber is dark, rather than lit, and (2) the dark fiber is "obtained from an incumbent LEC." In all other cases (such as lit fiber owned by a CLEC), it does not matter whether an IRU exists. All that matters is whether the fiber or other transmission facility is "owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC" – which is the case for the collo-to-collo arrangements at issue here. Paragraph 102 of the *TRRO* supports this conclusion when the FCC states that for "purposes of our analysis, we define fiber-based collocation 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." *TRRO*, ¶ 102 (emphasis added). *Any* fiber that is not owned by AT&T Missouri or an affiliate is "non-incumbent LEC fiber-optic cable," and the same is true for a comparable transmission facility. As the Ohio Commission held, "we find no requirement [in Rule 51.5] that the collocator must obtain the fiber, or comparable facilities it does not own, as a dark fiber on an IRU basis from a third party facility provider. In other words, we find that, under the FCC's FBC definition, the collocator can lease lit fiber from a party other than the ILEC." *Ohio Wire Center Order* at 13.

The CLECs' approach also conflicts (again) with the FCC's decision to adopt "the most objective criteria possible." *TRRO*, ¶ 99. Mr. Gillan suggests that it was actually the FCC's intent to require that AT&T Missouri identify the ownership and leasing arrangements for competitive fiber and comparable facilities in order to determine whether any two carriers are

engaged in an IRU. Far from being information possessed by the ILEC, however, this information is "possessed entirely by a span of competitive LECs" and is "not easily verifiable." The FCC rejected the use of any such data. *TRRO*, ¶ 99.

* * *

In short, a cross-connected carrier in a collo-to-collo arrangement obtains transmission capacity from another carrier, but it has dedicated use of that capacity and controls everything else on its own. The nature of the transmission path and the control that the cross-connected carrier exercises meet any reasonable definitions of "operate," "terminate," and "leave."

2. How should the term "comparable transmission facility" be defined?

Although the FCC used the term "fiber based collocator," its test is actually "agnostic as to the medium used to deploy an alternative transmission facility." *TRRO*, ¶ 102. The FCC explained that it was important to remain agnostic because "a technologically neutral test better helps us to capture the actual and potential deployment in the marketplace than would a wireline-specific test." *TRRO*, ¶ 102 n.295. Thus, the FCC's definition includes any carrier that "operates a fiber-optic cable *or comparable transmission facility*." 47 C.F.R. § 51.5 (emphasis added). The issue here is whether any transmission facility with a capacity of DS3 or greater qualifies as a "comparable transmission facility." It does.

In discussing transmission facilities that are "comparable" to fiber, the FCC used fixed wireless collocation as an example. *TRRO*, ¶ 102. The FCC stated that "[b]ecause fixed-wireless carriers' collocation arrangements may not literally be fiber-based, but nevertheless signal the ability to deploy transport facilities, we include fixed-wireless collocation arrangements at a wire center if the carrier's alternative transmission facilities both terminate in and leave the wire center." *TRRO*, ¶ 102. Collo-to-collo arrangements deserve the same

treatment. A fixed wireless arrangement would typically provide a carrier with a minimum of DS3 level transport. Nevels Direct at 9. By analogy, then, a collo-to-collo arrangement that likewise provides the cross-connected carrier with a minimum of DS3 level transport is "comparable" to fiber as well. And if a fixed wireless arrangement with DS3 or greater transmission capacity is deemed to reflect sufficient revenue opportunity for a CLEC to be "comparable" to fiber, then so too would a collo-to-collo arrangement. As Mr. Nevels explained, use of a facility with such a large capacity signals a CLEC's commitment to that wire center and its conclusion that "significant revenue opportunities" exist in the wire center to support such deployment. Nevels Direct at 8-9. The fact that such opportunities exist and multiple CLECs have already invested in high-capacity facilities to a wire center shows a lack of impairment in that wire center.

The CLECs, however, claim that a combination of a DS3 coaxial cable and fiber cannot be "comparable" to fiber because a facility can only be comparable to fiber if it is able to carry three DS3's worth of capacity. Gillan Direct at 27. That view eviscerates the "agnostic" approach in the FCC's rule and unlawfully reads the "comparable to fiber" concept right out of the FCC's rule.

First, the CLECs do not dispute that a fixed-wireless arrangement is comparable to fiber, even though it may have only a single DS3 capacity rather than three DS3s. Yet they do not (and cannot) explain why it is proper to count fixed wireless arrangements that provide DS3 level transmission but exclude other arrangements that provide the same level of transmission.

Second, the smallest facility with three DS3's of capacity is an OC3, and an OC3 is *always* made of fiber. Nevels Rebuttal at 5. Thus, under the CLECs' definition, the only facility that could ever be "comparable" to fiber (other than fixed wireless) would be another fiber

facility. The CLECs' definition renders the FCC's specific reference to a "comparable transmission facility" meaningless.

Third, the FCC knew the limits of coaxial cable when it promulgated its rules, but did not exclude it as a potential "comparable transmission facility." To the contrary, the FCC's discussion of "comparable transmission facilities" contemplates that arrangements including coaxial cable could fall within the definition of "comparable transmission facility." The FCC also made clear that fixed-wireless facilities are just an example of "comparable transmission facilities," meaning that there could be others. *Id.*

3. Should NuVox be counted as a Fiber-based Collocator in the locations specified by AT&T Missouri?

When AT&T Missouri conveyed to the FCC the wire center designations it made as of March 11, 2005, the effective date of the TRRO, AT&T Missouri identified NuVox as an FBC in **_____** wire centers. Chapman Direct, Ex. CAC-1 (HC). NuVox takes issue with its having been identified as an FBC in these wire centers. Chapman Direct, Atts. CAC-2 (HC), CAC-3 (HC).

For several reasons, the Commission should conclude that AT&T Missouri's identification was correct in all instances. Moreover, even if the Commission should conclude otherwise, the "Tier" designations attached to these wire centers would not change in any respect whatsoever even had NuVox been incorrectly identified in any of them. Each wire center meets the pertinent counting tally for the wire center's classification irrespective of NuVox's presence as an FBC in the wire center.

As an important preliminary matter, NuVox's claim, even were it successful, could perhaps affect one wire center designation (and only for the period from March 11 through December 16, 2005), but would in no way alter the remaining wire center designations.

Chapman Rebuttal at 64. The first of these wire centers, **_____ _____**qualified as a Tier 1 wire center because of the presence of **___** FBCs (the Tier 1 test being at least 4 FBCs or 38,000 business lines). NuVox's removal as an FBC would not disqualify the wire center as a Tier 1 wire center as of March 11, 2005, because the FBC count would still be at least 4. Moreover, the later removal of the pre-merger AT&T affiliate FBCs did not alter this wire center's Tier 1 designation. The second, **_____ _____,** likewise qualified as a Tier 1 wire center because of the presence of **___** FBCs. NuVox's removal as an FBC would not disqualify the wire center as a Tier 1 wire center as of March 11, 2005, because the FBC count would still be at least 4. Similarly, removal of the pre-merger AT&T affiliate FBCs did not alter this wire center's Tier 1 designation.

NuVox's claim -- even as applied to the only wire center whose designation could conceivably change even if NuVox were to prevail, **_____.** -- is without merit. Moreover, NuVox's argument, if successful, could have consequences only during the period from March 11, through December 16, 2005, not thereafter [21]

First, NuVox provided no evidence suggesting that NuVox was not, in fact, properly identified as an FBC in any wire center, much less the only wire center whose designation might be affected by NuVox's claim. Chapman Rebuttal 63-64. NuVox had been identified as an FBC on the strength of physical, on-site inspections showing that NuVox had a collocation arrangement in place that met the physical requirements necessary to be classified as an FBC. Chapman Rebuttal 65-66. NuVox does not challenge this evidence. Instead, in October, 2006, it merely stated in response to Staff's inquiries that it "dispute[s] AT&T's classification of that

[21] This wire center qualified as a Tier 1 wire center because of the presence of **___** FBCs. Chapman Direct, Ex. CAC-1 (HC). That designation was later reduced to a Tier 2 designation due to excluding pre-merger AT&T as an FBC. The wire center also qualified as a Tier 2 wire center on the independent ground of a sufficient business line count. Chapman Direct, Exs. CAC-2 (HC), CAC-3 (HC).

[sic] NuVox is a fiber-based collocator" in the wire centers AT&T Missouri had identified.[22] But the FCC has thus made abundantly clear that the relevant question is not whether a CLEC *is* a fiber-based collocator in the locations identified by AT&T Missouri, but whether the CLEC *was* a fiber-based collocator in those locations as of the effective date of the *TRRO*. NuVox does not dispute its identification as an FBC as of March 11, 2005 and, for this reason alone, AT&T Missouri's having done so remains unchallenged.

Second, NuVox's own description of its collocation arrangement in the **_____ _____** wire center (*see*, Scheperle Direct, Sch. 2C-28-29 (HC)) qualifies it as an FBC under FCC Rule 51.5. NuVox meets each of the following requirements of the FBC Fiber-based Collocator rule: NuVox is not affiliated with AT&T Missouri or any of the other FBCs in the wire center; NuVox maintains a collocation arrangement with active electrical power; NuVox operates a fiber-optic cable that terminates at the collocation arrangement within the wire center and leaves the wire center; and NuVox's transmission facility is not owned by AT&T Missouri or an affiliate of AT&T Missouri. Chapman Rebuttal at. 69-70. In addition, the arrangement qualifies even under NuVox's more limited view of what constitutes a sufficient FBC arrangement. Chapman Rebuttal at 71; Gillan Direct at 24. Its having entrusted another party to perform certain work on its behalf merely fortifies its own status as an FBC. Chapman Rebuttal at 69-70.

Third, if the Commission were to conclude that NuVox should not have been counted as an FBC because of the role of the third party named by NuVox, the consequence would merely be that the third party named should be regarded as an FBC in NuVox's stead, once again demonstrating that NuVox's claim has no consequence as a practical matter. NuVox admits that

[22] See, Scheperle Direct, Sch. 2C-28 (HC). The affidavit provided by NuVox in October, 2006, was in response to Staff's inquiry made of the CLECs which AT&T Missouri had identified as FBCs,

HC

"it is likely that **_____** does qualify as a fiber-based collocator" in the wire center. *See*, Scheperle Direct, Sch. 2C-29 (HC).

In sum, the Commission should conclude that NuVox was a Fiber-based Collocator on March 11, 2005 in each wire center where AT&T Missouri has identified it as such. Furthermore, the Commission should rule that NuVox's FBC arrangements were properly included in the FBC counts for each of the **_____** wire center designations at issue in this proceeding. If, however, the Commission agrees with NuVox's position that it should not have been counted as an FBC, the Commission should nevertheless approve AT&T Missouri's FBC count for the **_____** wire center based on NuVox's admission that another carrier likely qualifies as an FBC.[23]

C. March 2005 Designations: Did AT&T Missouri correctly identify these fourteen wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities?

In March 2005, AT&T Missouri identified 14 wire centers as Tier 1 wire centers. Chapman Direct, Ex. CAC-1 (HC). To be in Tier 1 a wire center must have at least four fiber-based collocators *or* at least 38,000 business lines, or be a tandem switching location with no line-side switching facilities but nevertheless serves as a point of traffic aggregation accessible by CLECs. 47 C.F.R. § 51.319(e)(3). The question is whether AT&T Missouri properly classified these wire centers.

AT&T Missouri did properly classify these wire centers as Tier 1. As shown above, AT&T Missouri properly applied the FCC's definitions of business lines and fiber-based collocators in making its wire center designations. Moreover, these designations would be correct even if the Commission disagreed with AT&T Missouri on whether both carriers in a

[23] The same conclusion would hold for the **_____** wire center. *See*, Scheperle Direct, Sch. 2C-28-29 (HC).

HC

collo-to-collo arrangement count as fiber-based collocators, for none of the 14 wire centers in Tier 1 needed to count both such carriers to meet the Tier 1 threshold.

Staff analyzed nine of the 14 wire centers based on both AT&T Missouri's data and discovery obtained from CLECs and agreed that those nine wire centers all qualify for Tier 1. Scheperle Direct at 5-8 & Schedules 2A-C. Staff did not analyze the remaining five wire centers under the Tier 1 criteria because, as will be discussed below, they were later reclassified to Tier 2 as a result of a merger commitment. Nevertheless, there is no doubt that those other five wire centers also met the Tier 1 criteria as of March 11, 2005. The only reason those wire centers were reclassified to Tier 2 in December 2005 is that SBC and AT&T committed to the FCC to stop counting pre-merger AT&T as a fiber-based collocator once SBC and AT&T merged. Chapman Rebuttal at 4. Prior to the merger, however, AT&T's CLEC entities met all the criteria for fiber-based collocators, including being unaffiliated with SBC Missouri, and therefore were properly classified as fiber-based collocators until the SBC-AT&T merger condition took effect. *Id.* at 3. Indeed, several state commissions, including Indiana, Michigan, and Ohio, addressed this issue while the SBC-AT&T merger was pending and held that pre-merger AT&T collocations did count as fiber-based collocations. Order on Reconsideration, *In re Remaining Portions of the Triennial Review Order*, 2006 WL 1519976, *2 (Ind. Util. Reg. Comm'n, Mar. 8, 2006) (AT&T had to be removed as an FBC only "as of December 16, 2005"); Order, *Establishment of Terms and Condition of an Interconnection Agreement Amendment*, 2005 WL 3018712, Issue 4 (Ohio Pub. Utils. Comm'n, Nov. 9, 2005); Order, *In re SBC Michigan*, 2005 WL 2291954, *8 (Mich. Pub. Serv. Comm'n, Sept. 20, 2005) ("the Commission will not find that AT&T is an affiliate of SBC until the merger is complete"). Accordingly, the five wire

centers affected by the SBC-AT&T merger condition were properly classified as Tier 1 between March 11, 2005 and December 16, 2006.

D. December 2005 Designations: Has AT&T Missouri correctly identified these five wire centers as non-impaired under the Tier 2 wire center criteria for dedicated interoffice transport facilities?

As just discussed, in December 2005 AT&T Missouri identified five wire centers as Tier 2 wire centers. Chapman Direct at 9 & Ex. CAC-2 HC; Chapman Rebuttal at 4. To be in Tier 2 a wire center must have at least three fiber-based collocators *or* at least 24,000 business lines. 47 C.F.R. § 51.319(e)(3). The question is whether AT&T Missouri properly classified these wire centers.

AT&T Missouri did properly classify these wire centers as Tier 2. As shown above, AT&T Missouri properly applied the FCC's definitions of business lines and FBCs in making its wire center designations. Moreover, these designations would be correct even if the Commission disagreed with AT&T Missouri on whether both carriers in a collo-to-collo arrangement count as FBCs, for none of the five wire centers in Tier 2 needed to count both such carriers to meet the Tier 2 threshold. Furthermore, Staff analyzed these five wire centers based on both AT&T Missouri's data and discovery obtained from CLECs and agreed that those wire centers all qualify for Tier 2. Scheperle Direct at 9-10, 12-13 & Schedules 2A and 4. Specifically, Staff found that four of the wire centers met the Tier 2 criteria based on the number of fiber-based collocators; the fifth (**_____**) may or may not have met the fiber-based collocation threshold (based on lack of responses by CLECs, Scheperle Direct at 9), but nevertheless met the business-line threshold. Scheperle Direct at 12-13. **_____

_____

_____**

HC

E. March 2005 Designations: Did AT&T Missouri correctly identify these three wire centers as non-impaired under the criteria for DS3 capacity loops?

In March 2005 AT&T Missouri identified three wire centers as non-impaired for DS3 loops. Chapman Direct Ex. CAC-1 HC. Wire centers are non-impaired for DS3 loops if they have at least four fiber-based collocators *and* at least 38,000 business lines. 47 C.F.R. § 51.319(a)(5)(i). The question is whether AT&T Missouri correctly classified these wire centers.

AT&T Missouri did correctly classify these wire centers. As shown above, AT&T Missouri properly applied the FCC's definitions of business lines and fiber-based collocators in making its wire center designations. Moreover, these designations would be correct even if the Commission disagreed with AT&T Missouri on whether both carriers in a collo-to-collo arrangement count as fiber-based collocators, for none of these three wire centers needed to count both such carriers to meet the relevant threshold. Furthermore, Staff analyzed these three wire centers based on both AT&T Missouri's data and discovery obtained from CLECs and agreed that those wire centers all qualify as non-impaired. Scheperle Direct at 15 & Schedules 5, 6A-C, and 7.

F. Should the Commission approve a separate wire center list applicable to the period between March 2005 and December 2005?

After the *TRRO* came out, AT&T Missouri (then SBC Missouri) promptly applied the FCC's new rules to determine which wire centers were non-impaired as of March 11, 2005 (the effective date of the *TRRO*). Chapman Direct at 8. Following those rules to the letter, SBC Missouri counted the pre-merger AT&T CLEC's collocations as fiber-based collocations, since they met every requirement of the FCC's rule, including that AT&T be unaffiliated with SBC Missouri. Chapman Rebuttal at 4. As noted above in Issues C and D, however, AT&T Missouri later updated its wire center designations on a prospective basis as of December 16, 2005 to

implement a commitment that SBC and AT&T made to the FCC in the SBC-AT&T merger proceeding. *Id.* at 3. AT&T Missouri updated its list so as to no longer continue counting the pre-merger AT&T's collocations as fiber-based collocations. *Id.* at 4. The effect of that prospective update is discussed under Issues C and D and the updated wire center designations are reflected in Ms. Chapman's direct testimony, at Attachments CAC-1 (HC) and CAC-2 (HC).

Because there are differences between the list of non-impaired wire centers under the law as it stood on March 11, 2005 and the law as it stood after SBC and AT&T made their merger commitment and the merger was closed, AT&T Missouri has asked the Commission to approve the wire center list that was in effect between March 11, 2005 and December 16, 2005. *Id.* at 4-5. The CLECs, however, want the Commission to find that the merger-related revisions to the list were *retroactive* to March 11, 2005, meaning that AT&T Missouri could not count pre-merger AT&T collocations even though no one disputes that at the time they fully satisfied the FCC's rule. Gillan Rebuttal at 15-16. That is nonsense.

SBC/AT&T's merger commitment, which took effect on the date the merger closed, operates only prospectively.[24] Thus, since AT&T Corp. then was unaffiliated with SBC Missouri, its CLEC's collocations were properly included as fiber-based collocation arrangements. That is to say, the commitment does not alter the status of any wire center *prior to* the effective date of the merger, and any potential true-up (however remote, given the very few wire center designations impacted by this proceeding) must accordingly be calculated without

[24] As the FCC noted, "[u]nless otherwise specified herein, the Conditions described herein shall become effective 10 business days after the Merger Closing Date." In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, Memorandum Opinion and Order, 20 FCC Rcd 18290 (2005). Appendix F. (emphasis added). The merger commitment states as follows: "Within thirty days after the Merger Closing Date, SBC/AT&T shall exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment pursuant to section 51.319(a) and (e) of the Commission's rules. SBC/AT&T shall file with the Commission, within thirty days of the Merger Closing Date, revised data or lists that reflect the exclusion of AT&T collocation arrangements, as required by this condition." Id. (emphasis added).

reference to the merger commitment. The pre-merger AT&T collocations met every requirement of the FCC's rule and therefore demonstrated the ability of CLECs to invest in and deploy their own facilities, which is the reason for using fiber-based collocation as a proxy for non-impairment. *TRRO*, ¶ 96. The Commission must reject the CLECs' claim that the SBC-AT&T merger commitment must be applied retroactively. Chapman Rebuttal at 4-5. Doing so would be flatly inconsistent with the commitment made. Moreover, the FCC has not sought to enforce the commitment retroactively, and the Commission should not disturb that matter uniquely entrusted to the federal agency responsible for approving the SBC/AT&T merger.

Furthermore, applying "retroactivity" is inconsistent with the FCC's having held that wire center designations are one-time events. In other words, once a wire center passes the non-impairment thresholds it can never go back and be reclassified as impaired, regardless of future events. 47 C.F.R. § 51.319(e)(3). The only reason some wire centers were reclassified here is a voluntary merger commitment by SBC and AT&T, not because of any change in the non-impairment rules, much less a retroactive one. Accordingly, to comply with the law and common sense and avoid backward-looking billing disputes, the Commission should approve AT&T Missouri's wire center list that was in place between March 11, 2005 and December 16, 2006.

IV. CONCLUSION

For all the reasons set forth above, AT&T Missouri respectfully requests that the Commission approve its three designations of non-impaired wire centers (i.e, March 11, 2005, December 16, 2005 and December 29, 2006).

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE, L.P.
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WIRE CENTER COMMON NAME/CLLI TABLE

WIRE CENTER CLLI CODE	WIRE CENTER NAME
KSCYMO02	Kansas City (Hiland)
KSCYMO05	Kansas City (Westport)
KSCYMO55	Kansas City (McGee)
SPFDMOMC	Springfield (McDaniel)
SPFDMOTE	Springfield (Temple tandem)
SPFDMOTU	Springfield (Tuxedo)
STLSMO01	St. Louis (Chestnut)
STLSMO05	St. Louis (Jefferson)
STLSMO07	St. Louis (Parkview)
STLSMO08	St. Louis (Prospect)
STLSMO21	St. Louis (Ladue)
STLSMO27	St. Louis (Creve Coeur)
STLSMO41	St. Louis (Kirkwood)
STLSMO42	St. Louis (Bridgeton)

Missouri Wire Center Supporting Data
as of
March 11, 2005

WIRE CENTER SUMMARY DATA ** ** Denotes Highly Confidential				
Wire Center	**Carrier Name**	**Collocator Threshold Met**	**Business Line Threshold Met**[1]	**Impairment Designation**
KSCYMO02	** **	Four or more	** **	Tier 1
KSCYMO05	** **	Four or more	** **	Tier 1
KSCYMO55	** **	Four or more	** **	DS3 Loop Tier 1
SPFDMOMC	** **	Four or more	** **	Tier 1
SPFDMOTL	Tandem switching location	N/A	N/A	Tier 1
SPFDMOTU	** **	Four or more	** **	Tier 1
STLSMO01	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO05	** **	Four or more	** **	Tier 1
STLSMO07	** **	Four or more	** **	Tier 1
STLSMO08	** **	Three or more	** **	Tier 1
STLSMO21	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO27	** **	Four or more	** **	Tier 1
STLSMO41	** **	Four or more	** **	Tier 1
STLSMO42	** **	Four or more	** **	Tier 1

[1] Detailed information for business line counts is provided in a separate table below.

DETAILED BUSINESS LINE COUNT DATA ** ** Denotes Highly Confidential											
WIRE CENTER	**ARMIS 43-08 Business Lines**	**2-Wire Analog Business UNE-P Lines**	**DS1 Business UNE-P Lines[2]**	**2-Wire Digital UNE-P Business Lines[3]**	**TOTAL Business UNE-P[4]**	**2-Wire Analog UNE-L Lines**	**DS1 UNE-L Lines[5]**	**DS3 UNE-L Lines[6]**	**2 Wire Digital UNE-L Lines[7]**	**TOTAL UNE-L[8]**	**TOTAL BUSINESS LINES**
KSCYMO02						** **					
KSCYMO05						** **					
KSCYMO55	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOMC	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOTL	**TANDEM**										
SPFDMOTU	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO01	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO05						** **					
STLSMO07	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **

[2] This column reflects the actual number of DS1 business UNE-P lines, not the voice grade equivalent for the lines.
[3] This column reflects the actual number of 2-wire Digital business UNE-P lines, not the voice grade equivalent for the lines.
[4] In calculating the business UNE-P voice grade equivalent totals, AT&T Missouri counted each 2-wire analog business UNE-P line as one (1) line, each 2-wire Digital business UNE-P line as two (2) voice grade equivalent lines, and each DS1 business UNE-P as 24 voice grade equivalent lines.
[5] This column reflects the actual number of DS1 UNE-L lines, not the voice grade equivalent for the lines.
[6] This column reflects the actual number of DS3 UNE-L lines, not the voice grade equivalent for the lines.
[7] This column reflects the actual number of 2-wire Digital UNE-L lines, not the voice grade equivalent for the lines.
[8] In calculating the UNE-L voice grade equivalent totals, AT&T Missouri counted each 2-wire analog UNE-L line as one (1) line, each 2-wire Digital UNE-L as two (2) voice grade equivalent lines, each DS1 UNE-L line as 24 voice grade equivalent lines, and each DS3 UNE-L line as 672 voice grade equivalent lines.

STLSMO08					** **						
STLSMO21	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO27					** **						
STLSMO41					** **						
STLSMO42					** **						

Updated Missouri Wire Center Supporting Data as of December 16, 2005 (per SBC/AT&T merger commitment)

WIRE CENTER SUMMARY DATA ** ** Denotes Highly Confidential				
Wire Center	**Carrier Name**	**Collocator Threshold Met**	**Business Line Threshold Met**[1]	**Impairment Designation**
KSCYMO02	** **	Four or more	** **	Tier 1
KSCYMO05	** **	Four or more	** **	Tier 1
KSCYMO55	** **	Four or more	** **	DS3 Loop Tier 1
SPFDMOMC	** **	Four or more	** **	Tier 1
SPFDMOTL	Tandem switching location	N/A	** **	Tier 1
SPFDMOTU	** **	Three or more	** **	Tier 2
STLSMO01	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO05	** **	Four or more	** **	Tier 1
STLSMO07	** **	Three or more	** **	Tier 2
STLSMO08	** **	Three or more	** **	Tier 2
STLSMO21	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO27	** **	Four or more	** **	Tier 1
STLSMO41	** **	Three or more	** **	Tier 2

[1] Detailed information for business line counts is provided in a separate table below.

WIRE CENTER SUMMARY DATA ** ** Denotes Highly Confidential				
Wire Center	**Carrier Name**	**Collocator Threshold Met**	**Business Line Threshold Met**[1]	**Impairment Designation**
STLSMO42	** **	Three or more	** **	Tier 2

DETAILED BUSINESS LINE COUNT DATA **__** Denotes Highly Confidential											
WIRE CENTER	**ARMIS 43-08 Business Lines**	**2-Wire Analog Business UNE-P Lines**	**DS1 Business UNE-P Lines[2]**	**2-Wire Digital UNE-P Business Lines[3]**	**TOTAL Business UNE-P[4]**	**2-Wire Analog UNE-L Lines**	**DS1 UNE-L Lines[5]**	**DS3 UNE-L Lines[6]**	**2 Wire Digital UNE-L Lines[7]**	**TOTAL UNE-L[8]**	**TOTAL BUSINESS LINES**
KSCYMO02						** **					
KSCYMO05						** **					
KSCYMO55	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOMC	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOTL	**TANDEM**										
SPFDMOTU	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO01	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO05						** **					
STLSMO07	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **

[2] This column reflects the actual number of DS1 business UNE-P lines, not the voice grade equivalent for the lines.
[3] This column reflects the actual number of 2-wire Digital business UNE-P lines, not the voice grade equivalent for the lines.
[4] In calculating the business UNE-P voice grade equivalent totals, AT&T Missouri counted each 2-wire analog business UNE-P line as one (1) line, each 2-wire Digital business UNE-P line as two (2) voice grade equivalent lines, and each DS1 business UNE-P as 24 voice grade equivalent lines.
[5] This column reflects the actual number of DS1 UNE-L lines, not the voice grade equivalent for the lines.
[6] This column reflects the actual number of DS3 UNE-L lines, not the voice grade equivalent for the lines.
[7] This column reflects the actual number of 2-wire Digital UNE-L lines, not the voice grade equivalent for the lines.
[8] In calculating the UNE-L voice grade equivalent totals, AT&T Missouri counted each 2-wire analog UNE-L line as one (1) line, each 2-wire Digital UNE-L as two (2) voice grade equivalent lines, each DS1 UNE-L line as 24 voice grade equivalent lines, and each DS3 UNE-L line as 672 voice grade equivalent lines.

STLSMO08	** **										
STLSMO21	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO27	** **										
STLSMO41	** **										
STLSMO42	** **										

Updated Missouri Wire Center
Supporting Data as of
December 29, 2006
(per AT&T/BellSouth merger commitment)

WIRE CENTER SUMMARY DATA

** ** Denotes Highly Confidential

Wire Center	Carrier Name	Collocator Threshold Met	Business Line Threshold Met[1]	Impairment Designation
KSCYMO02	** **	Four or more	** **	Tier 1
KSCYMO05	** **	Four or more	** **	Tier 1
KSCYMO55	** **	Four or more	** **	DS3 Loop Tier 1
SPFDMOMC	** **	Four or more	** **	Tier 1
SPFDMOTL	Tandem switching location	N/A	N/A	Tier 1
SPFDMOTU	** **	Three or more	** **	Tier 2
STLSMO01	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO05	** **	Four or more	** **	Tier 1

[1] Detailed information for business line counts is provided in a separate table below.

WIRE CENTER SUMMARY DATA

** ** Denotes Highly Confidential

Wire Center	Carrier Name	Collocator Threshold Met	Business Line Threshold Met[1]	Impairment Designation
STLSMO07	** **	Three or more	** **	Tier 2
STLSMO08	** **	Three or more	** **	Tier 2
STLSMO21	** **	Four or more	** **	DS3 Loop Tier 1
STLSMO27	** **	Four or more	** **	Tier 1
STLSMO41	** **	Three or more	** **	Tier 2
STLSMO42	** **	Three or more	** **	Tier 2

DETAILED BUSINESS LINE COUNT DATA ** ** Denotes Highly Confidential											
WIRE CENTER	**ARMIS 43-08 Business Lines**	**2-Wire Analog Business UNE-P Lines**	**DS1 Business UNE-P Lines[2]**	**2-Wire Digital UNE-P Business Lines[3]**	**TOTAL Business UNE-P[4]**	**2-Wire Analog UNE-L Lines**	**DS1 UNE-L Lines[5]**	**DS3 UNE-L Lines[6]**	**2 Wire Digital UNE-L Lines[7]**	**TOTAL UNE-L[8]**	**TOTAL BUSINESS LINES**
KSCYMO02						** **					
KSCYMO05						** **					
KSCYMO55	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOMC	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
SPFDMOTL	**TANDEM**										
SPFDMOTU	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO01	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO05						** **					
STLSMO07	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **

[2] This column reflects the actual number of DS1 business UNE-P lines, not the voice grade equivalent for the lines.
[3] This column reflects the actual number of 2-wire Digital business UNE-P lines, not the voice grade equivalent for the lines.
[4] In calculating the business UNE-P voice grade equivalent totals, AT&T Missouri counted each 2-wire analog business UNE-P line as one (1) line, each 2-wire Digital business UNE-P line as two (2) voice grade equivalent lines, and each DS1 business UNE-P as 24 voice grade equivalent lines.
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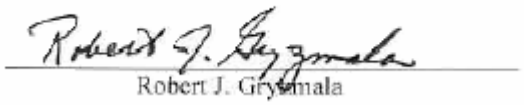
[8] In calculating the UNE-L voice grade equivalent totals, AT&T Missouri counted each 2-wire analog UNE-L line as one (1) line, each 2-wire Digital UNE-L as two (2) voice grade equivalent lines, each DS1 UNE-L line as 24 voice grade equivalent lines, and each DS3 UNE-L line as 672 voice grade equivalent lines.

STLSMO08					** **						
STLSMO21	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **	** **
STLSMO27					** **						
STLSMO41					** **						
STLSMO42					** **						

CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on May 7, 2007.



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