BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Application of NuVox Communications of Missouri, Inc. for an Investigation into the Wire Centers that AT&T Missouri Asserts are Non-Impaired Under the *TRRO*.	)))))	Case No. TO-2006-0360

CLEC COALITION'S PRE-HEARING BRIEF

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PRE-HEARING BRIEF

COME NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), NuVox Communications of Missouri, Inc. ("NuVox") and XO Communications Services, Inc. ("XO") (collectively referred to as the "CLEC Coalition") and file their Pre-Hearing Brief in accordance with the procedural order entered in this case.

I. INTRODUCTION

This case presents disputes over the application of the FCC's unbundling rules issued in the *Triennial Review Remand Order* ("*TRRO*") in 2005.[1] In particular, the disputes center on the FCC's rules for when high capacity loop and dedicated interoffice transport unbundled network elements ("UNEs") will no longer be available from AT&T Missouri. The issue is of critical importance to the members of the CLEC Coalition. When a loop or transport route needed to serve a customer is no longer available as a UNE, AT&T Missouri has the freedom to charge a much higher rate that falls largely within its control. In the *TRRO*, the FCC noted its concerns that if UNEs are removed from a market prematurely, the ILEC may be able to use pricing

[1] *In the Matter of Unbundled Access to Network Elements*, WC Docket No. 04-313 and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, (*rel*. February 4, 2005) (hereafter "*TRRO*").

flexibility to create a "price squeeze" that "poses grave risks to competition."[2] For Missouri CLECs, the stakes are high as the Commission considers how to apply the FCC's rules limiting unbundling.

The FCC rules establish criteria by which "impairment" is to be judged. The rules are set forth on a wire center-by-wire center basis. The FCC permitted incumbent carriers like AT&T (then SBC) to file lists of the wire centers that they contended should be subject to "no impairment" for various UNEs under the FCC's rules. At the same time, the FCC ordered that if disputes arose regarding the incumbents' estimations, CLECs could "challenge the incumbent's estimates in the context of section 252 interconnection agreement disputes" and "the state commissions should resolve the parties' differences."[3]

The disputes between the Parties fall into three general categories. First, the Parties' "methodology" disputes focus on the proper interpretation and application of the FCC's definitions of the terms "Fiber-Based Collocator" and "Business Lines" in the *TRRO*. (These are addressed in relation to Issues (A) and (B) on the Issues List.) Second, the Parties' "application" disputes center on the wire center-by-wire center impact of the FCC's rules as applied to the facts in Missouri. (These issues are addressed in relation to Issues (B) and (C) on the Issues List.) Third, AT&T Missouri raised, for the first time in its testimony, a dispute concerning the impact of a merger condition adopted by the FCC in 2005 on the wire center designations in Missouri. (This issue is addressed in relation to Issue (F) on the Issues List.)

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[2] *Id.* at ¶ 59: "In the absence of UNEs, incumbent LECs would, in some metropolitan statistical areas (MSAs), have the ability to set the price of their direct competitors' critical wholesale inputs (e.g., tariffed end-user channel termination and dedicated transport offerings). Specifically, we believe that the freedom associated with the pricing flexibility regime would pose grave risks to competition if we were to foreclose UNE access where tariffed alternatives provide an alternate means of competitive entry. An incumbent in that situation would have substantial incentive to raise prices to levels close to or equal to the associated retail rate, creating a "price squeeze" and foreclosing competition based on use of the tariffed wholesale input."

[3] *TRRO*, ¶ 100.

Before addressing the specific issues, the CLEC Coalition will address two overarching points. First, AT&T Missouri urges that the Commission may skirt specific aspects of the FCC's rules in the name of "administrative simplicity."[4] AT&T relies on language in the *TRRO* stating the FCC's intention to rely on "objective and readily available facts" in making impairment determinations. The CLEC Coalition agrees that the FCC intended its rules to be implemented in a manner that did not require the complex data gathering inherent in the FCC's earlier *Triennial Review Order*. In fact, the recommendations CLEC Coalition witness Mr. Gillan makes do rely on publicly available data (except that data classified as highly confidential). Notably, AT&T Missouri, the CLEC Coalition, and Commission Staff all made complete recommendations on the methodology and application of the FCC's rules in this proceeding – without a large amount of discovery or numerous days of hearings. Nothing the CLEC Coalition has recommended in this case has or will cause the administrative problems contemplated by the FCC.

When the FCC told the industry to use ARMIS data and UNE loop counts already submitted to the FCC as the basis for identifying Business Lines, it settled disputes about what the core source of impairment data should be. That data must be utilized, however, as a way of measuring whether lines are Business Lines as defined in the FCC's Rule. Nowhere in the *TRRO* does the FCC say that compliance with its Rules is limited by the availability of particular data. The reason for that is simple: the FCC did not want to sanction ILECs or CLECs ignoring selected portions of its Rules by claiming the relevant data was not available to properly conduct the required impairment analysis. The record demonstrates that, as Mr. Gillan testified with regard to AT&T's arguments regarding the Business Line rule, the problem is not with data availability or administrative convenience, but with "AT&T Missouri's claim that the only

[4] *See, e.g.*, Direct Testimony of Carol A. Chapman on Behalf of AT&T Missouri ("Chapman Direct") at 3.

administratively convenient way to interpret and apply the FCC's [rule] is to ignore the full requirements of the FCC rule."[5] In several areas, AT&T Missouri seeks to gloss over clear requirements in the FCC's rules by asserting that it would simply be too hard to get the supporting data. As demonstrated by Mr. Gillan's testimony, the necessary data to correctly apply the FCC's rules *is* available, and supports the recommendations he makes on behalf of the CLEC Coalition.

Moreover, AT&T Missouri's own filings are inconsistent about what data is "readily available." For example, AT&T Missouri insists that data on the number of business lines from 2003 should provide the basis for the Commission's determinations. That data, according to AT&T, is "readily available," in large part because it was used for other purposes, including FCC ARMIS filings. When the CLEC Coalition asked for the very same data set from 2004 – data that should have been compiled in the same way if AT&T's assertions are correct – AT&T Missouri strongly objected. AT&T asserted that the 2004 data had not been "compiled" in the same manner as the 2003 data, and that AT&T Missouri needed ten to fourteen days to put the information together.[6] In addition, the manner in which AT&T Missouri claims the FCC rules require digital UNE Loops to be counted is contrary to the way AT&T reports the same loops in its "readily available" annual FCC Form 477 Reports.[7] In sum, AT&T Missouri's "administrative convenience" arguments appear to be little more than a convenient excuse to avoid the parts of the FCC's rules AT&T does not want to apply.

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5 Rebuttal Testimony of Joseph Gillan on Behalf of the CLEC Coalition ("Gillan Rebuttal") at 8.

6 *See* AT&T Missouri's Response To NuVox/XO's Supplemental Motion To Compel Responses To Discovery Requests, at 8 (April 16, 2007) ("AT&T Missouri emphasizes that it has not compiled, either as of December 31, 2004, and/or as of December 31, 2005, the business line data it had earlier compiled as of December 31, 2003.")

7 *See* Gillan Rebuttal at 10.

Second, AT&T Missouri frequently criticizes the CLEC Coalition's proposed methodology for the Business Line rule as "outcome-oriented" and contrary to the FCC's intent. As always, it is instructive to review the facts. It is undisputed that the FCC based its impairment test for business lines on business line data received from the Bell Operating Companies ("BOCs") including AT&T (then SBC). The data the FCC reviewed provided the basis for the numerical business line thresholds it chose to use in determining impairment. When one applies the competing methodologies to the FCC data and compares the results to the actual data reviewed by the FCC, the methodology proposed by the CLEC Coalition "produces results significantly closer to the data reviewed by the FCC (and which the FCC relied upon to establish its non-impairment thresholds) than the methodology AT&T Missouri recommends."[8] Across the board, AT&T Missouri's methodology produces estimates that dramatically inflate the number of business lines. There is nothing more "outcome-oriented" than that approach. The CLEC Coalition urges the Commission to look past AT&T's rhetoric and focus on the facts and the text of the FCC's *TRRO* and rules.

[8] Gillan Rebuttal at 27. The comparison is depicted in Mr. Gillan's HC Exhibit JPG-8, which is attached hereto as Attachment 1.

II. DISCUSSION OF DISPUTED ISSUES

ISSUE A: BUSINESS LINE COUNT ISSUES

The FCC's "Business Line" definition[9] consists of four sentences. The fundamental dispute between the Parties is over how those sentences should be interpreted. According to CLEC Coalition witness Mr. Gillan, "[t]he most important step in applying the [Business Line] definition is recognizing that all four sentences must be read together and applied in a manner that is internally consistent."[10] This approach is consistent with basic principles of statutory construction, which call on the Commission to give effect to all – not just some – provisions of a regulation or statute. This approach is also consistent with the FCC's prior determinations that its rules must be "read in conjunction with the rest of the Order." *TSR Wireless, LLC v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11177-78, ¶ 20-21 (2000). *See also Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002) (court placed a limitation on an apparently unambiguous FCC rule by imposing limits derived from accompanying text).

The testimony demonstrates, however, that AT&T Missouri advocates reading each sentence in isolation, and giving effect only to parts of the FCC's definition. AT&T Missouri's interpretation results in a methodology for counting Business Lines that will dramatically inflate

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9 *See* 47. C.F.R. § 51.5:

> "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. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"

10 Direct Testimony of Joseph Gillan on Behalf of the CLEC Coalition ("Gillan Direct") at 10.

the number of Business Lines claimed at each wire center for non-impairment purposes under the *TRRO*. Furthermore, although the FCC relied upon the Bell Operating Companies' (BOCs') counts of business lines submitted in December 2004 when creating the criteria that determine whether a wire center is non-impaired, AT&T Missouri applied its reading of the FCC's definition, not the method it used in submitting its business line counts to the FCC, when it classified wire centers after the *TRRO* was issued. Thus, there is no question that the method used by AT&T in classifying Missouri wire centers is inconsistent with the data it provided to the FCC and on which the FCC relied.

The CLEC Coalition offers an interpretation of the Business Line definition that gives weight to each of the requirements for counting a line as a Business Line that the FCC incorporated in the *TRRO*. The Coalition proposes a relatively simple resolution of the disputes in this cause regarding the count of Business Lines. Coalition witness Mr. Gillan proposes that the Commission require AT&T Missouri to use the business line counts that it submitted to the FCC in December 2004 (based on 2003 data). As Mr. Gillan testified: "If the FCC's adopted business line definition is the same as the definition used for the data AT&T provided the FCC, then the Commission cannot run afoul of the FCC's definition by using the very data analyzed by the FCC in the *TRRO*."[11]

If the Commission chooses not to order a recount of AT&T Missouri Business Lines using the data the FCC relied upon, Mr. Gillan also proposes a straightforward means by which AT&T can use data readily at hand that provides a more accurate accounting of Business Lines than AT&T's proposals. Mr. Gillan's proposal comports with the FCC's definition and (1) does not count all residential UNE loops as if they were business lines; and (2) does not count all non-

[11] Gillan Rebuttal at 4.

switched lines and un-used lines on DS1 loops by multiplying every DS1 (whether it otherwise qualifies as a "Business Line" under the FCC's definition or not) by 24.

Issue A(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 Business Line count should include only those switched access lines used to serve business customers. To interpret the FCC's rule otherwise would be inconsistent with its terms.

The task before the Commission regarding the Business Line definition is to approve a methodology for the calculation of Business Lines that complies with the requirements established by the FCC in the *TRRO* and the rules the FCC adopted at the same time. The FCC's definition of "Business Line" is not a model of clarity; AT&T Missouri responds to this lack of precision by urging the Commission to ignore certain aspects of the FCC's rule while exalting others. Rather, as the Coalition's witness Mr. Gillan testified, "[a] more rational reading of the definition is one where each sentence builds upon another so that, in order to be counted, a business line must satisfy *each* of the requirements in the definition (and not just satisfy a single sentence while conflicting with others.)"[12] This approach requires attention to each sentence of the Business Line definition.

The first sentence of the Business Line definition states:

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.

This sentence establishes two basic conditions for finding that a line qualifies as a "Business Line": (1) only *business* lines (as opposed to residential) are to be counted; and (2) whether the line should be counted is not affected by whether it is served by AT&T or by a CLEC leasing the line from AT&T.

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[12] Gillan Direct 11.

These two conditions comport with the FCC's rationale for using business lines as a proxy for competitive activity. In the *TRRO*, the FCC found that "the record shows a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center."[13] The "revenue opportunities" referenced by the FCC arise primarily from the competitors' ability to serve a large number of business customers in the particular wire center. The FCC made clear that it did not intend the Business Line definition to include *all* lines, but rather only those *business* lines that would provide a useful proxy for determining where significant revenue opportunities may exist. This distinction is explicit in *TRRO* ¶ 103:

> Business line density also is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities, despite the fixed and sunk costs of deployment. … Further, business lines are a more accurate predictor than total lines because transport deployment largely has been driven by the high bandwidth and service demands of businesses, particularly in areas where business locations are highly concentrated.

The FCC understood that it was the "business" characteristic of particular lines that made them worth counting in the impairment analysis for high-capacity loops and high-capacity interoffice transport.

Having established that Business Lines are to include only *business* lines served by ILECs or by CLECs leasing loops from an ILEC, the FCC then elaborates further on how those loops should be counted in the second, third, and fourth sentences of the definition:

> The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
>
> (1) *shall include only* those access lines connecting end-user customers with incumbent LEC end-offices for switched services,

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[13] *TRRO* ¶ 43 (emphasis supplied).

(2) *shall not include* non-switched special access lines,

(3) *shall account* for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."[14]

Nothing in these counting instructions overrides the directive in the first sentence of the Business Line definition, *i.e.*, *only* lines used to serve businesses are to be counted. All the further instructions must be read to support the overall process of counting the business lines that the FCC found to be a proxy for likely competitive activity for switched services in a wire center. As the Michigan Public Service Commission ruled:

> The Commission finds that the first sentence of the FCC's rule defining business lines requires that, to be counted as a business line, the line must serve a business customer. The remaining portion of the definition presumes serving a business customer and clarifies that any loop, whether UNE-P, UNE-L, or leased line will be counted when it serves a business customer.[15]

The second sentence in the definition identifies which lines served by ILECs and CLECs should be candidates for meeting the Business Line criteria. It makes clear that "incumbent LEC switched access lines" qualify. In the *TRRO*, the FCC further specified that ILEC switched access line data should be the "objective set of data that incumbent LECs already have created for other regulatory purposes,"[16] namely, the ARMIS reports filed by the ILECs annually with the FCC. For purposes of counting leased loops, the FCC also looked to "the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other

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[14] 47 C.F.R. § 51.5 (emphasis supplied).

[15] Michigan Public Service Commission, Case No. U-14447, *In the Matter, on the Commission's Own Motion, To Commence A Collaborative Proceeding To Monitor and Facilitate Implementation of Accessible Letters Issued By SBC Michigan and Verizon*, Order, at 9 (Sept. 20, 2005) (emphasis supplied).

[16] *TRRO* ¶ 105.

unbundled elements."[17] But, as noted above, these UNE loops must fit the basic criteria of "Business Lines" stated in the first sentence of the definition.

A UNE loop that is not "used to serve a business customer," as required in the definition's first sentence, does not qualify and cannot qualify. If it were sufficient simply to be a UNE loop, irrespective of the customer served, then not only is the first sentence of the definition rendered meaningless, but the FCC's underlying concept — that *business* lines are an indicator that competitive revenues are sufficient to prompt the deployment of high-capacity loops — is violated as well.

Looking at lines served by UNE-P provides a useful example of how the first and second sentences are to be read together. If the second sentence of the Business Line definition is read in isolation from the first sentence, then all UNE-P lines would be counted because they are all "UNE loops connected to [a] wire center." In the text of the *TRRO*, however, the FCC made clear that this is not the case, noting that the Business Line tallies should include only "business UNE-P."[18] The text of the Order and the Rules makes clear that the FCC was not expanding the Business Line definition to include lines *not* used to serve business customers, which is the overarching requirement established by the first sentence of the definition.[19]

The third sentence of the Business Line definition includes further guidance on what should and should not be included in "business line tallies." The first requirement is that the Business Line count must include only those lines connecting end-users to ILEC end-offices for "switched services." That includes voice services, for example, but excludes dedicated lines

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17 47 C.F.R. § 51.5.

18 *TRRO* ¶ 105.

19 In this instance, there is no conflict between the FCC's Order and its Rule. Rather, the text of the Order sheds light on what might otherwise be an ambiguity or conflict within the wording of the Rule itself (*i.e.*, whether the Business Line definition in the Rule is intended to include "non-business" UNE loops).

used only to provide high-speed data. Importantly, the "switched services" limitation also excludes unused circuits on a high-capacity facility (such as a DS1 or DS3 loop). Notably, the FCC's ARMIS reporting instructions, which AT&T follows when it reports business lines, include a definition of "switched business lines" that does not permit AT&T Missouri to count circuits not used for switched services when it reports its own switched business line totals to the FCC.[20]

The second requirement is that the business line count "shall not include non-switched special access lines." This requirement prohibits ILECs from counting special access lines leased to CLECs that are used for non-switched services. This requirement again emphasizes the FCC's point that Business Lines should include only those lines providing *switched* services to end-user customers. The definition makes this the rule both for lines provided by ILECs and by CLECs. The definition does not permit ILECs to count *all* CLEC leased lines as Business Lines if such a count would include non-switched (or non-business) lines.

The third requirement stated in the definition's third sentence is that, when accounting for ISDN and other digital access lines, ILECs should count "each 64 kbps-equivalent as one line." This comports with the fact that digital facilities may include a number of DS0 "POTS"-level 64 kbps lines. The fourth sentence of the definition provides an example that shows how the third requirement could be applied: "For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'" This sentence is not, as AT&T Missouri contends, an unconditional directive requiring that the maximum potential capacity of high-speed

[20] Gillan Rebuttal at 10. Mr. Gillan provided information showing that the instructions for ARMIS 43-08 data collection – like the FCC's business line definition here – make clear that AT&T Missouri may count only those lines connecting end-user customers with their end offices for switched services. *See* Exhibit JPG-5 (Gillan) (FCC's "Instructions for Local Telephone Competition and Broadband Reporting Form (FCC Form 477), at page 7.

digital services be counted, without regard to whether any of the other, i.e., any of the threshold, requirements are satisfied.[21]

AT&T Missouri's testimony demonstrates that it chooses to ignore certain aspects of the FCC's Business Line definition and adds undue emphasis to other aspects of the definition. AT&T's methodology will inevitably increase the number of Business Lines in its wire centers well beyond what the FCC contemplated when it adopted the *TRRO*. This is certainly true in the current count, which far exceeds the counts in the data before the FCC, as well as the estimates in Mr. Gillan's testimony.[22] The overreaching aspects of AT&T's interpretation of the Business Line definition can be seen by tracking how it would apply the definition – using the same sentence-by-sentence approach used above to summarize the Business Line definition.

First, as discussed above, the very first sentence of the FCC's definition requires that only lines used to serve *business customers* should be counted.[23] The AT&T methodology, however, would count residential lines served by CLECs using UNE loops. AT&T's justification for counting residential lines as business lines provides a good example of the selective nature of AT&T's application of the Business Line definition.

AT&T claims that residential lines may be included because the Business Line definition references the sum of all UNE loops connected to that wire center. That reference to "all UNE loops," however, comes after the definition's statement that only loops serving business customers are to be counted. Standing alone, a directive to count "all UNE loops" would certainly include lines serving both residential and business customers. In the context of the

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21 Gillan Direct at 14.

22 *See* Gillan Rebuttal at Exhibit JPG-7.

23 The first sentence of the Business Line definition states:

"A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."

Business Line definition, however, such an interpretation is unreasonable. In contrast, AT&T admits that "all UNE loops" does not include UNE-P (the combination of UNE loop and switching) used to serve business – even though the definition does not include that exclusion.

This interpretation is inconsistent with the FCC's framework. It would not be rational for the FCC to deliberately exclude UNE-P lines used to serve residential customers, while simultaneously requiring ILECs to include in their count UNE-L lines used to serve residential customers. The FCC's impairment analysis for loops and transport is calibrated to assess the potential for competitive deployment of high-capacity loops and interoffice transport to serve the "high bandwidth and service demands of businesses … where business locations are highly concentrated."[24] AT&T's interpretation of the Business Line definition would add residential loops to that equation, skewing the proxy analysis the FCC established and should not be adopted.

AT&T references language in the text of the Order to support its claim that the FCC intended non-business UNE-P to be counted.[25] The Order gives AT&T no cover on this point: while "business UNE-P" is mentioned specifically in ¶ 105, that paragraph and the ones preceding it (the paragraphs vouching for the validity of the "business line density" proxy as a measure of impairment) *all* discuss counting only business lines.

AT&T's willingness to set aside the definition's requirement that only business lines count as Business Lines infects its interpretation of the second and third sentences of the definition.[26] AT&T treats the first sentence of the definition as if it were a meaningless

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24 *TRRO* ¶ 103.

25 *See TRRO* ¶ 105.

26 Those sentences provide:

"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

introduction rather than the core requirement giving meaning to the requirements that follow it. AT&T reads the FCC's direction to count "all UNE loops" as if it were totally unrelated to the first sentence's admonition that only lines serving businesses are to be counted, and removed from the FCC's discussion in the *TRRO* as to its purpose for using business lines to determine where non-impairment exists. The result is that when AT&T counts Business Lines for wire center classification it is *not* counting lines that serve business customers.

Second, AT&T Missouri fails to comply with the FCC's requirement that only lines connected for "switched services" be included, and that "non-switched special access lines" be excluded from the Business Line count. AT&T *does* include only switched business lines when counting its own lines. As noted above, ARMIS data calls on ILECs to provide data on their own "switched business lines," a category that excludes unused capacity on high-capacity loops and circuits dedicated to data service.[27] When AT&T accounts for UNE loops, however, it makes no attempt to calculate or even estimate the number of lines actually used to provide switched services.

AT&T Missouri does not believe it must take any steps to ensure that only switched services are counted in its Business Line count, even though the FCC's Business Line definition unequivocally requires that Business Lines include only those used to provide switched services to business customers. AT&T Missouri's rationale for ignoring these significant requirements of the Business Line definition is indefensible. AT&T repeatedly falls back on the language in the *TRRO* that describes the Business Line and Fiber-Based Collocator definitions as being based on

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> center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line."

[27] *See* Gillan Direct at 16.

"objective" data in possession of the incumbent LECs. The FCC undoubtedly expressed its view that the impairment criteria adopted in the *TRRO* are more easily administered than the "triggers" for impairment adopted in the *TRO*. Moreover, there is no debate that the FCC relied on data from the BOCs when judging where to set its impairment thresholds for Business Lines and Fiber-Based Collocators. What the FCC *did not* do, however, is permit its Rules to be evaded based on a claim that a BOC does not have all the necessary data at its fingertips.

In addition, AT&T witness Ms. Chapman reads the rule in a novel manner that defines "switched access line" to include an ILEC loop and ILEC-owned switching.[28] There is no such definition of the term in the *TRRO*, nor does Ms. Chapman cite anything in the *TRRO* that supports her view. She opines that the FCC's use of the term "incumbent LEC business switched access line" must necessarily exclude UNE-L lines because the ILEC does not own the switch to which the loop is connected. This is nonsense: a "switched" access line is a line that is connected to a switch – the concept does not distinguish based on the ownership of the switch. A UNE loop owned by the ILEC is no less an "ILEC switched access line" if it is connected to a CLEC switch or an ILEC switch. The distinction Ms. Chapman attempts to draw is one that makes no difference, and one that could only be imagined by one deeply committed to avoiding the application of the limitations on Business Line counts in the FCC rule.

AT&T Missouri relies on *Logix Comms. L.P. v. Public Utility Comm'n of Texas,* Case No. A-06-CA-548-SS (W.D. Tex. Nov. 6, 2006), as supporting its interpretation of the FCC's definition of a Business Line. The Commission should note that the decision, which is not binding on the Commission, misapplies the principles of statutory construction. There, the court parsed the Business Line definition and concluded that the FCC must have intentionally left out

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[28] Chapman Rebuttal at 16-17.

the word "business" in the second sentence when it said "UNE loops." Slip Op. at 4. Rather than reading the entire definition in a logical manner that conformed to the FCC's analytical foundation, the court seized on an isolated sentence. This approach is contrary to the basic principle that a statute or rule must be interpreted as a whole, making every effort not to interpret a provision in a manner that renders other provisions inconsistent, meaningless, or superfluous. *See Casey's General Stores v. City of West Plains*, 9 S.W.3d 712, 717 (Mo. App. 1999), *citing State v. Meggs*, 950 S.W.2d 608, 610 (Mo. App. 1997).

Issue A(2): Should the Business Line count for digital UNE-L be based on the loop's capacity or on the loop's usage?

Pursuant to the terms of the FCC's rule, the Business Line count for digital UNE-L should be based on the actual, real world usage of the loop, just as the FCC counts digital loops in ARMIS data. A line must be otherwise identified as "Business Line" under the FCC's rules before the question of whether it is delivered over a DS1 facility becomes relevant. As Mr. Gillan testified, the example in the fourth sentence of the Business Line definition is not an absolute instruction that requires all UNE loops, much less every 64 kbps channel be counted as a Business Line.[29] It does not require that each circuit on a DS1 line be counted as a *Business Line* merely because it is delivered over a DS1 facility. Rather, whether such a 64 kbps equivalent "line" constitutes a "Business Line" depends on whether it satisfies the remaining criteria of the FCC's definition. If all circuits on an ILEC DS1 line are connected to an end-user business customer, are providing switched services, and the services are provided by either the ILEC or a CLEC leasing the facility, *then*, applying the third requirement, the DS1 line counts as 24 Business Lines under the FCC's definition. The mere fact that an ILEC DS1 is connected to

[29] Gillan Direct at 15.

an end-user served by a CLEC leasing the DS1 facility does not qualify the DS1 as 24 Business Lines unless the other qualifications in the Business Line definition are satisfied.

The fact that the definition provides an *example* of how the analysis might count a DS1 is not the same as defining all DS1s as 24 business lines. Had the FCC wanted all high capacity services to qualify as "Business Lines", it could have easily simplified the definition to say so. But the FCC did not. It directed that each 64-kbps equivalent be considered one line, and then directed that other criteria – most specifically, that the line be used to provide switched access line service to a business customer – determine whether each "line" should be considered a Business Line for purposes of impairment analysis.[30]

AT&T insists that every digital loop be counted based on the maximum number of lines it can support, irrespective of its actual use. By misapplying the last sentence of the definition, AT&T asserts that *all* digital loops (*e.g.*, ISDN, DS1 and DS3) be counted at their maximum potential loop capacity. AT&T contends that the Business Line definition requires it to count all high-speed digital facilities at their *maximum potential capacity* – that is, by the maximum number of voice grade lines the facility *could* support – without regard to whether the lines are being used to provide switched business line service to end users. AT&T reads the last sentence of the Business Line definition to sanction its counting circuits that do not provide switched access line service – indeed, they may not be providing *any* service at all – as Business Lines.

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[30] Mr. Gillan, based on his experience reviewing data in the former BellSouth region testified that:

> "[i]n proceedings in the Southeast, BellSouth has freely admitted that ARMIS 43-08 only permits an ILEC to count activated 64 kbps channels. *See*, for instance, Direct Testimony of BellSouth witness Pamela Tipton before the Georgia Public Service Commission, Docket No. 19341-U, page 31: 'ARMIS 43-08 line counts only include provisioned or 'activated 64 kbps channels that ride high capacity digital lines. For example, if a switched DS1 Carrier System had eighteen (18) 64 kbps channels provisioned as business lines for a customer, the ARMIS 43-08 would count only 18 business lines.'"

See Gillan Direct at 16, n.19.

There is no indication in the text of the *TRRO*, or in its definition, that the FCC intended for this criteria to reverse the prior two.

The most significant problem with AT&T Missouri's position is that it requires the Commission to interpret the FCC's *TRRO* as being out of step with reality. As the Commission determined in a 2004 Order, high-speed digital loop capacity is typically used to provide a mix of voice and data services – and almost never used to provide only switched voice service.[31] In fact, it was AT&T (then SBC) witnesses who made exactly that point in the 2004 proceeding.[32] As Mr. Gillan testifies, the Commission's 2004 Order, SBC's testimony underlying it, and similar data gathered in other states demonstrate a marketplace reality: of the 24 available lines on a DS1 facility, approximately only 11 are typically used to provide the switched voice services the FCC intends be counted in the "Business Line" rule.[33] Counting every DS1 as 24 lines has no nexus to reality, and the FCC's rule should not be interpreted to embrace such a result.

Other state commissions reviewing precisely this issue have opted to interpret the rule as proposed by the CLEC Coalition here – in a manner that comports with marketplace reality. For example, in the most recent ruling on the issue, the Public Utility Commission of Oregon ruled as follows, based on the same rationale proposed by the CLEC Coalition here:

> With respect to whether lines "used to serve" should include spare capacity, including DS1 equivalents for the purpose of calculating line counts and consequent wire center eligibility, the [Oregon] Commission is again asked to divine the FCC's intentions. … [A] simple reading of the phrase "used to serve" precludes counting spare – i.e., unused – capacity either in individual lines or equivalents. This interpretation is not only reasonable; <u>it most closely reflects current, real world circumstances</u> and is most consistent with our policy of

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31 *See* Case No. TO-2004-0207, Order Establishing Geographic Markets and Enterprise Market Cutoff (Feb. 24, 2004).

32 *Id.*, Testimony of Gary Fleming on Behalf of SBC Missouri (Phase I), at 23-24 (Dec. 18, 2003).

33 Gillan Direct at 19-21.

> promoting robust competition in the offering of telecommunications services to the public.[34]

The Oregon PUC noted its concurrence with a similar ruling by the North Carolina Public Utilities Commission regarding BellSouth's wire center designations:

> In determining the number of business lines, it is inappropriate for BellSouth to expand its count of its switched access business lines to count full system capacity. The number of switched business access lines reported in Automated Reporting Measurement Information System (ARMIS) should be used. In addition, it is inappropriate for BellSouth to include residential unbundled network element – loop (UNE-L) lines in the count of business lines. Further, it is inappropriate for BellSouth to expand its count of high-capacity UNE-L to count full-system capacity.[35]

The Arbitrator in the Oklahoma proceeding took the same position, and recommended that AT&T "re-file its Business Line data in way that addresses the infirmities in AT&T's application of the Business Line definition." The Arbitrator adopted the same recommendations Mr. Gillan makes here, finding that "[t]hese corrections would overcome the major problems with AT&T's methodology, and would take into account all the requirements of the FCC's Business Line definition in the *TRRO*."[36]

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[34] Oregon Public Utility Commission, Docket UM 1251, *In the Matter of Covad Communications Company; Eschelon Telecom of Oregon, Inc.; McLeodUSA Telecommunications Services, Inc.; and XO Communications Services, Inc. Request for Commission Approval of Non-Impairment Wire Center List*, Order at 9 (March 20, 2007).

[35] North Carolina Public Utilities Commission, Docket No. P-55, Sub 1549, *Proceeding To Consider Amendments To Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due To Changes Of Law*, Order Concerning Changes of Law, p. 8, ¶ 5 (March 1, 2006).

[36] Oklahoma Corporation Commission, Cause No. PUD 200600034, *Complaint of Southwestern Bell Telephone, L.P. d/b/a AT&T Oklahoma Against NuVox Communications of Oklahoma, Inc., Regarding Wire Center UNE Declassifications*, Report of the Arbitrator, at 30 (May 15, 2006). The Oklahoma Commission has not yet ruled on the Arbitrator's Report.

Issue A(3): On what vintage of data should the Business Line counts supporting the wire center designations rely?

The Commission should base its Business Line counts on the 2003 ARMIS business line data that the FCC used to formulate its impairment criteria. The business line count that the FCC relied upon in the *TRRO* (and which was the basis for its impairment findings) was based on data provided by AT&T Missouri (the SBC) and other Bell Operating Companies in December 2004 (reflecting line counts as of December 2003).[37] As AT&T has stated before another state commission, "the FCC deemed the data sufficient to assess non-impairment," when it conducted its "dry run" of the business line criteria in the *TRRO*, and the FCC "told the world it expected the same calculations in practice."[38] Given that there is no doubt that the FCC relied on this data when setting the impairment thresholds for high capacity loops and transport, the Commission could rely on the same data in this initial wire center determination.[39]

AT&T also supports use of 2003 data, but only if the data is adjusted to reflect AT&T Missouri's (incorrect) interpretation of the Business Line rule. As the evidence shows, AT&T's suggested combination of 2003 data and its misapplication of the rule *substantially increases* the Missouri Business Line count over what the FCC had before it when it approved the *TRRO*. It is difficult to imagine this is what the FCC had in mind: it carefully crafted the various impairment thresholds based on the data before it. AT&T contends that in spite of that, the FCC ultimately approved a Business Line rule that significantly inflated line counts – resulting in more findings of "no impairment" than the FCC could have contemplated based on the data before it.

If the Commission chooses to use the 2003 ARMIS data that was before the FCC when it approved the *TRRO*, it should not permit AT&T Missouri to re-calculate the results. If, on the

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37 *TRRO* ¶ 114, n.322.

38 Gillan Direct at 5, quoting an AT&T brief in the Indiana wire center proceeding.

39 Gillan Direct at 8.

other hand, the Commission chooses to use more recent data (such as 2004 ARMIS data), the data should be reviewed using the CLEC Coalition's recommended methodology. Mr. Gillan's testimony provides Business Line counts that use the 2003 and 2004 data (in HC Exhibits JPG-7 and JPG-9).

Mr. Gillan's recommendation is simple: "My primary recommendation is that the Commission adopt the wire center list in Confidential Exhibit JPG-7 (which is based on the same wire center data as the FCC relied upon). Alternatively, the Commission should adopt the CLEC methodology and the wire center list in Confidential Exhibit JPG-9 (2004). Although the methodologies and time period differ, adopting either recommendation produces the same initial wire center list."[40]

There is no reason to believe that the FCC considers the data submitted by the BOCs in the *TRRO* proceeding to be so "wrong" that it cannot be used to make the initial determination of non-impaired wire centers, which is the issue before this Commission in this complaint. AT&T Missouri argues that adopting the data the FCC relied on would be improper because this case will set the methodology to be followed in future cases. The Commission has the authority in this case, however, to expressly rule that its decision to adopt the 2003 data applies exclusively to the initial designation of non-impaired wire centers, and to establish the methodology to be applied in future cases based on updated data. That approach will resolve the disputes before the

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[40] Gillan Rebuttal at 29. Mr. Gillan's recommendation is straightforward and, if one reads it, obviously not based on, as Ms. Chapman alleges "which data would provide the most favorable result." Chapman Rebuttal at 10. Ms. Chapman's relentless mud-slinging in her rebuttal testimony is simply not consistent with the facts. The CLEC Coalition could not finalize its Business Line counts and final recommendation until the Regulatory Law Judge forced AT&T Missouri to provide the relevant data in discovery. As long as AT&T Missouri held back the necessary information, the CLECs were not able to formulate a reliable count of Business Lines.

Commission regarding AT&T Missouri's initial designation of "non-impaired" wire centers in Missouri.

ISSUE B: "FIBER-BASED COLLOCATOR" ISSUES

The evidence shows that the Parties agree that there are various collocation configurations that qualify carriers as "Fiber-Based Collocators" under the *TRRO* and the FCC's Rules. The configurations which the Parties agree constitute Fiber-Based Collocators are represented in CLEC Coalition witness Mr. Gillan's Exhibit JPG-6 (the configurations labeled as CLEC A and CLEC B). The arrangement depicted in JPG-6 as CLEC C represents the disputed "collo-to-collo cross-connect" arrangement.

The resolution to the Fiber-Based Collocator disputes discussed below have an impact on AT&T Missouri's wire center designations in two ways. First, the resolution of this issue will affect the designation of the Springfield Tuxedo (SPFDMOTU) wire center. One of the CLEC collocations that AT&T Missouri uses to push the Tuxedo wire center into a higher tier relies on the disputed collo-to-collo cross-connect arrangement that does not meet the FCC's "Fiber-Based Collocator" standards. Second, the outcome affects future designations made by AT&T Missouri. As part of its merger with BellSouth, AT&T agreed not to base Fiber-Based Collocator determinations on the collo-to-collo cross-connect argument at issue here. That merger commitment expires forty-two (42) months after the merger's closing date. Therefore, if AT&T Missouri's methodology is not corrected in this proceeding, AT&T will continue to misidentify Fiber-Based Collocators in the future. The methodology dispute should be resolved now so that AT&T, CLECs, and the Commission do not have to revisit the issue when AT&T's merger commitment expires.

Issue B(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?

No, and all state commissions but one that have addressed the issue have reached this same conclusion.

In addressing this dispute, it is helpful to begin by examining the background of the FCC's determinations regarding criteria for establishing impairment under the 1996 Act.

1. The FCC's impairment analysis focused on Fiber-Based Collocators because their presence in a wire center indicates the potential for competitive deployment of high-capacity interoffice transport circuits and fiber rings.

The task faced by the FCC following the D.C. Circuit's decision in *USTA II*[41] was to examine again its policies and the factual circumstances in which it would find that CLECs are impaired without access to the ILECs' high-capacity transport circuits and high-capacity loops. In the *TRRO* impairment analysis, the FCC looked at the various approaches suggested by ILECs and by CLECs to determine where the "impairment" standard of Section 251 of the Act is met, but what the FCC chose to use was various combinations of the number of "Fiber-Based Collocators" and the number of "Business Lines" associated with each ILEC wire center. In the final analysis, while the FCC could not cite to conclusive evidence of non-impairment in particular markets, it found that the presence of Fiber-Based Collocators and Business Lines at prescribed thresholds provided a reasonable "proxy" for existing or potential deployment of competitive alternatives for high-capacity loops and interoffice transport.

The FCC summarized its views on using these two indicia in *TRRO* ¶ 93 (footnotes omitted):

> We have weighed carefully a variety of actual competitive indicia for determining impairment and determine that the best and most readily administered indicator of

[41] *United States Telecom's Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

> the potential for competitive deployment is the presence of fiber-based collocators in a wire center. We also determine that business line density in a wire center is a useful tool to infer where carriers are likely to have collocated with fiber, and thus, a measure of where competitors are capable of duplicating the incumbent LEC's network. Both of these measures constitute proxies for where sufficient revenue opportunities exist to justify the high fixed and sunk costs of transport deployment.

When it established the proxies for competitive alternatives, the FCC recognized that its regulatory "line-drawing" would not produce a precise determination of when CLECs were not impaired without access to high-capacity transport and loops as UNEs. In the context of discussing the high-capacity loop impairment test, the FCC stated:

> While the evidence does not (and could not) reveal a precise, immutable relationship between actual and potential deployment of high-capacity loops on the one hand, and the numbers of business lines and fiber-based collocators on the other hand, we adopt these proxies because they best minimize and balance any under-inclusiveness and over-inclusiveness. … As the Commission has recognized in the past, and as courts have agreed, our selection of specific criteria is not an exact science, and the Commission may exercise line-drawing discretion when rendering determinations based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.[42]

The key to understanding why the FCC drew the lines it did in the *TRRO* thus requires not only a reading of the specific tests for de-listing wire centers, but also an understanding of what the FCC said those tests are designed to measure. The FCC was looking for *indicators* of the existence of competitive alternatives and *indicators* of the potential for competitive alternatives to exist in the future.

As it explained in numerous paragraphs in the *TRRO*, the number of Fiber-Based Collocators in a wire center is intended to serve as an indicator not just of the presence of competitive fiber deployment in a single wire center, but also as an indicator of the existence of fiber rings connecting multiple wire centers (for transport) and providing opportunities for constructing short fiber laterals to particular buildings (for loops). The FCC's definition of a

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[42] *TRRO* ¶ 169 (footnotes omitted).

Fiber-Based Collocator thus is a product of its analysis of impairment for both high-capacity loops and transport. To understand the definition, therefore, the Commission reviews how the FCC concluded that fiber-based collocations indicated the existence and potential for competitive alternatives to both high-capacity loops and transport.

The FCC recognized that the presence of one carrier's fiber-based collocation at one ILEC wire center, standing alone, offers no proof that the carrier could offer a competitive interoffice transport route to another wire center across town.[43] The FCC found, however, that "those competing carriers that deploy fiber and collocate do so in multiple incumbent LEC wire centers within core business areas, thus increasing the chances that competitive transport facilities exist connecting many incumbent LEC wire centers."[44] Thus, the presence of several carriers with fiber-based collocations in a wire center indicates that the wire center is one that houses competitors who are likely to be collocated elsewhere in the same vicinity. The more such collocators there are in any particular wire center, the FCC's reasoning goes, the more likely it is that one of those collocators is also collocated across town and, in turn, the more likely it is that a competitively provided transport route is available between wire centers, or that one of the collocated carriers can potentially expand its network to provide competitive transport.

The FCC also uses the presence of carriers with fiber-based collocations to identify "non-impaired" wire centers for high-capacity loops. The FCC's discussion of loop impairment focuses on the presence of such collocators as an indicator that fiber facilities are prevalent enough to provide CLECs meaningful opportunities to build out loop plant through the construction of fiber rings and laterals from that ring to individual buildings. In discussing its

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43 *See TRRO* ¶ 96.

44 *TRRO* ¶ 97 (footnotes omitted).

decision to use the presence of carriers with fiber-based collocations as an indicator that CLECs are not impaired and need not rely upon ILEC-provided high-capacity loops, the FCC stated:

> [W]e find that the presence of fiber-based collocations in a wire center service area is a good indicator of the potential for competitive deployment of fiber rings.
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> * * *
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> Thus, high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely.[45]

Throughout the high-capacity loop impairment discussion in the *TRRO*, the FCC emphasizes that the presence of carriers that have fiber-based collocations in a wire center is used as a proxy in impairment analysis because it *indicates* the deployment of "fiber rings" from which competitors could economically construct fiber cable laterals to serve individual buildings in the vicinity of a particular wire center. Similarly, in the interoffice transport context, the FCC finds the presence of a number of fiber-based collocations important as an *indicator* of where competitive fiber rings have been, or have the potential to be, constructed between ILEC wire centers. Further, this explains how the FCC utilizes the wire center tiers to de-list interoffice transport. Because the FCC is utilizing this approach as a proxy for matching central office pairs, a particular route does not get de-listed unless both end points of the interoffice transport route meet the minimum tier threshold, *i.e.*, Tier 2 for DS3 interoffice transport or Tier 1 for DS1 interoffice transport.

In sum, the FCC's use of the presence of fiber-based collocators is not so much concerned with what is happening *inside* particular ILEC central offices as it is with what the presence of these collocators indicates about the alternative networks that have been or

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[45] *TRRO* ¶ 167 (footnotes omitted).

economically could be deployed between ILEC central offices and from ILEC central offices to end user customer premises.

2. The FCC's Fiber-Based Collocator Definition and other *TRRO* provisions make clear that only collocation arrangements in which a carrier operates the optronics for fiber leaving the wire center count as a Fiber-Based Collocator.

When read in the context of the *TRRO* as discussed above, the FCC's definition of a Fiber-Based Collocator provides clear direction on which collocation arrangements qualify to be counted when the ILECs classify their wire centers. Given the FCC's purposes for choosing the presence of Fiber-Based Collocators as one of the two non-impairment criteria, the FCC could not have conceived of counting collocators who do not possess lit fiber that leaves the ILEC wire center.[46] A collocator that has no fiber of its own (and therefore does not *operate* it), but is simply buying a fiber-based service (*e.g.,* DS3 transport service) from a carrier to whom it cross-connects at a collocation site does not meet the criteria the FCC had in mind for "Fiber-Based Collocators." The presence of a collocated carrier that is using leased lit capacity via a cross-connect does not establish an inference that the carrier has, or would, deploy "fiber rings," nor does it indicate that the carrier has, or would, deploy a competitive transport route between the wire center where the collocator resides and any other wire center.[47]

Counting a collocated carrier as a Fiber-Based Collocator is only consistent with the FCC's reasoning (*i.e.,* that Fiber-Based Collocators can be a proxy for actual or potential competitive facilities deployment) if the collocators that are included in the ILECs' counts actually *operate* fiber facilities that are capable of providing competitive interoffice transport or high-capacity loops to other carriers. The ability to transmit voice and data over another carrier's

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

[47] Gillan Direct at 24.

fiber network indicates nothing about the existence of actual or potential deployment of competitive facilities.[48]

The FCC defined the term "Fiber-Based Collocator" in its Rules accompanying the *TRRO*,[49] and provided further guidance on what it meant by the term in *TRRO* ¶ 102. What is obvious from the definition is that the FCC *did not* intend an ILEC to count every carrier unaffiliated with the ILEC that had installed a collocation arrangement within a wire center. In fact, when AT&T asked the D.C. Circuit Court of Appeals to remand portions of the *TRRO*, AT&T contended that the FCC's tests did not remove enough high-capacity loop and interoffice transport unbundling, in part because the "Fiber-Based Collocator" test is too restrictive.[50] AT&T recognized in its legal pleadings that the tests were designed only to remove unbundling in specific instances where the FCC's criteria were met. In its testimony in this case, however, AT&T Missouri applies the Fiber-Based Collocator test so broadly that it would sweep in nearly every collocated CLEC, merely because the CLECs purchase services from Fiber-Based Collocators, not because they "terminate" and "operate" fiber-optic cables themselves. The

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48 Gillan Rebuttal at 18-19.

49 *See* 47 C.F.R. § 51.5:

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

50 AT&T (then SBC) complained to the D.C. Circuit that: "SBC estimates that, in its serving area, the DS1 [transport] criteria are satisfied for only 0.6% of possible routes between wire centers between the same LATAs; the DS3 [transport] criteria are only satisfied for 1.75% of those routes." *U.S. Telecom Ass'n v. FCC*, Nos. 00-1012, *et al.*, ILECs' Motion To Govern Future Proceedings, filed with the U.S. Court of Appeals for the D.C. Circuit on January 4, 2005, at page 9.

expansive nature of AT&T Missouri's current interpretation of the FCC's Order is evident when the Commission compares what AT&T told the D.C. Circuit about the *TRRO* with what AT&T Missouri now says qualifies as "non-impaired" under the *TRRO*.

As Coalition witness Mr. Gillan testified, the FCC's definition of a Fiber-Based Collocator contemplates a one-on-one relationship between the number of such collocators and distinct transport facilities.[51] The FCC's definition requires that a collocator that is a Fiber-Based Collocator must operate a fiber-optic cable (or comparable transmission facility) that both terminates at a collocation arrangement within the wire center and leaves the wire center.[52]

Only one carrier can "operate" and "terminate" a fiber-optic cable. When the FCC determined that before a collocator in a wire center can be counted as a Fiber-Based Collocator it must operate and terminate fiber-optic cable, the FCC was identifying a particular sort of carrier, namely a carrier that has control of its own network transmission facilities that run through a particular wire center. As Mr. Gillan explained:

> Fiber optic networks "terminate" where fiber strands terminate into optronics equipment that determine system capacity. As an engineering fact, any individual fiber strand will terminate <u>once and only once</u> in a wire center, because only one set of optronics (also known as fiber optic terminating equipment) can be installed on a fiber. Moreover, the carrier that installs the optronics equipment is the carrier that "operates" the fiber-optic cable, because it is this carrier that determines the capacity of the system and its operating characteristics.[53]

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

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51 Gillan Direct at 23.

52 *Id.* at 23.

53 *Id.* at 23-24 (footnote omitted).

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

By contrast, a carrier purchasing a service, such as DS3 transport, from another carrier is doing neither of these things; it is obtaining capacity on fiber-optic cable but it cannot be said to be operating or terminating the cable. Carriers who do not have fiber-optic cable facilities leaving a wire center often lease capacity on the fiber facilities of carriers who operate their own fiber rings. When a carrier purchases services from an alternative transport provider and cross-connects to the provider's collocation arrangement, it does not "operate" the facility that leaves the wire center any more than it would "operate" interoffice transport services obtained from AT&T Missouri as either special access or UNE dedicated transport.[54] AT&T Missouri does not suggest that a CLEC is "operating" interoffice facilities when it orders transport services from AT&T as UNEs or tariffed special access. It is AT&T that "operates" the facility; the CLEC just obtains transmission capacity. In this situation, the CLEC has a contractual right to use a certain amount of capacity at a certain price, but the CLEC has no right to perform maintenance on the facility, no right to reconfigure it, no right to expand its capacity (*e.g,*. from a DS3 to an OC-3), and no right to replace the facility in whole or in part. The cross-connected carrier is in the same position with respect to the provider to which it is cross-connected and from which it is purchasing interoffice transport service.

AT&T Missouri contends that carriers who merely lease services from carriers that both are Fiber-Based Collocators should also be counted under the FCC's definition, even though

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[54] Gillan Direct at 23-25.

these cross-connected carriers do not terminate fiber that enters and leaves the wire center.[55] The FCC's Fiber-Based Collocator rule, however, requires that a Fiber-Based Collocator "operates a fiber-optic cable or comparable transmission facility that (1) terminates at a collocation within the wire center."[56] The carrier who does nothing more than purchase services from a carrier operating a fiber-optic cable cannot be said to be the carrier that terminates the fiber-optic cable. That cable, by definition, *terminates* in one place and *is terminated* by one carrier. It is the Fiber-Based Collocator that is responsible for the fiber-optic cable coming into and leaving the office (CLEC B in Mr. Gillan's Exhibit JPG-6) that is terminating the fiber-optic cable.

AT&T Missouri also contends that the ability to use multiplexing equipment to aggregate traffic and transmit voice and data over another carrier's fiber constitutes "operation" of a fiber facility or a "comparable transmission facility."[57] But, AT&T's interpretation of what it means to "operate" makes no sense, and it uses the concept of "comparability" in a context the FCC did not intend.

AT&T Missouri offers two examples that it contends demonstrate how a carrier merely purchasing services "operates" fiber or a comparable transmission facility, but neither of these examples substantiates the argument that such carriers are Fiber-Based Collocators. First, AT&T suggests that the cross-connected carrier may, if its cross-connect is fiber and if it *ultimately connects* to a dark fiber entrance facility, be "operating" that dark fiber.[58] AT&T Missouri witness Ms. Chapman uses the term "connects" with no explanation; her example reveals nothing about whether the cross-connected carrier has any right to attach optronics to light the

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55 AT&T Missouri contends that "non-ILEC owned fiber is counted whether the carrier using the fiber owns the fiber, leases the fiber, or has obtained the fiber on an IRU basis." Chapman Rebuttal at 57.

56 47 C.F.R. § 51.5 ("Fiber-Based Collocator" definition).

57 Nevels Rebuttal at 7-9.

58 Chapman Rebuttal at 53 (emphasis supplied).

dark fiber entrance facility and determine its capacity (*e.g.*, DS3 or OC-12). If Ms. Chapman is referring to an arrangement whereby one carrier invests in its own optronics to light a strand of fiber it obtains from another carrier, that arrangement is typically an IRU and in that circumstance the carrier that has an IRU is expressly recognized by the FCC in the *TRRO* as a Fiber-Based Collocator.[59] (If the dark fiber were obtained from AT&T, it would have to be as a service, because AT&T does not provide access to fiber through IRU arrangements.) The IRU arrangement is not an example of a cross-connected carrier purchasing services and it adds nothing to explain AT&T's determination that all cross-connected carriers "operate" a fiber cable or comparable transmission facility.

Ms. Chapman's second example of a carrier purchasing services purportedly "operating" a fiber cable or a comparable transmission facility, confuses and muddies the concept of "operation" with "comparable transmission facility" in an attempt to convince the Commission that having a transmission path that leaves the wire center on fiber makes a carrier a "Fiber-Based Collocator."[60] This is the same argument made by AT&T witness Mr. Nevels.[61] That is, what both these AT&T witnesses contend is that the cross-connected carrier, by virtue of its coaxial or fiber connection to a Fiber-Based Collocator, has a configuration capable of supporting transmission out of the wire center. AT&T's reasoning is as follows: a carrier who has a cross-connect to a Fiber-Based Collocator "operates" fiber or "operates" a comparable transmission facility under these circumstances, because if one looks at the whole transmission path from the point where the cross-connected carrier is located to the point where the other carrier's fiber exits, one sees that the cross-connected carrier's transmissions go out over fiber.

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59 *TRRO* at ¶ 102, referencing *TRO* ¶ 408 and fns.1263 and 1265.

60 Chapman Rebuttal at 52-54.

61 Nevels Rebuttal at 6-9.

But, sending transmissions of voice and data signals is not "operation." Using a transmission path to place a call is not "operation."

AT&T creates novel definitions of what the words "operate" and "comparable transmission facility" mean in the industry, concluding that any connections that transmit at a DS3 level or higher enable a cross-connected carrier to transmit voice and data out of a wire center in a manner comparable to what the Fiber-Based Collocator can do. AT&T's interpretation of the FCC's words is contrary to the very foundation of the FCC's impairment analysis and the FCC's statements that it was basing its impairment decisions on its finding that the presence of a threshold number of Fiber-Based Collocators is an indicator that CLECs have competitive alternatives available to them. AT&T cites to a standard definition of the term "operate" in its testimony, yet it ignores the very essence of the definition.[62] It argues that when a CLEC buys a service, it is operating the transmission facility of which the coaxial cross-connect is a part, because the CLEC has multiplexing equipment that it uses to aggregate traffic, it transmits that traffic, and it makes "engineering and market entry determinations in deciding whether and when to lease fiber-optic cable capacity, the amount of fiber-optic cable capacity, and the type of cross-connect facility" to use. These decisions do not rise to the level of "control" with respect to fiber, because they are the types of decisions a CLEC makes when it buys and uses any service, such as special access, from AT&T; they are not the decisions made by a carrier that owns and operates it own network.

Paragraph 135 of the *TRRO* is instructive as to the FCC's reasoning and what "control" of fiber means. There the FCC stated that a CLEC can operate more efficiently when it operates dark fiber transport than when it is merely using lit transport because when the CLEC operates

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62 *See* Chapman Rebuttal at 53.

dark fiber itself, the CLEC "engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber."[63] This discussion by the FCC is fully consistent with the testimony provided by Mr. Gillan: "The FCC's definition of fiber-based collocator (and relevant text) makes clear that only carriers' operating networks should be counted, not carriers obtaining services."[64] This is the precise point made by the FCC in ¶ 135. And, the FCC codified this point in its rule by utilizing the word "operate."

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

The *TRRO*'s Fiber-Based Collocator definition requires that the purported Fiber-Based Collocator operate and terminate fiber-optic cable or comparable transmission facilities that leave the ILEC wire center. For the reasons discussed above, the collocator who is merely cross-connected to a legitimate Fiber-Based Collocator does not – merely because of the cross-connection – itself qualify as a Fiber-Based Collocator. Under the terms of the FCC's definition and its analysis in the *TRRO*, therefore, certain collocation arrangements qualify a carrier as a Fiber-Based Collocator and others do not.

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63 *TRRO* at ¶ 135.

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

Turning to the collocation arrangements depicted in Exhibit JPG-6 to Mr. Gillan's Rebuttal,[65] the evidence demonstrates that the collocation arrangement depicted for "CLEC B" undoubtedly constitutes an arrangement under which CLEC B is a Fiber-Based Collocator. In that arrangement, CLEC fiber enters and leaves the wire center and terminates to CLEC B's Fiber Optic Terminal ("FOT"). In the Exhibit JPG-6 diagram the fiber cable passes through a Fiber Cross-Connect Panel ("FXP") after entering the wire center, but as Mr. Gillan explained in his testimony, the termination of the fiber occurs at the FOT. The FOT is where the optronics equipment is installed on the fiber-optic cable, transforming it from strands of glass into lit fiber capable of delivering bandwidth. CLEC B's optronics equipment dictates the network capacity the lit fiber will be able to deliver to CLEC B.

The arrangement depicted for CLEC A in Exhibit JPG-6 is a configuration that the Parties agree also constitutes a Fiber-Based Collocator. This is the "dark fiber IRU" arrangement. In this configuration, the fiber-optic cable owned by CLEC B enters and leaves the wire center, but when it reaches the FXP, some strands of fiber are sent to the collocation of CLEC A. The fibers actually terminate at the FOT equipment installed by CLEC A, giving CLEC A control over the transmission speeds and other characteristics of the fiber. Since CLEC A in this instance determines whether and at what capacity the fiber terminated at its FOT is lit, CLEC A "operates" the fiber-optic cable that it has obtained under an IRU from the owner of the fiber cable, CLEC B.

In this example, CLEC A has invested in optronics equipment at its collocation, and has the ability to control the capabilities of the fiber-optic cable. Under the terms of a fiber IRU (and to qualify as an IRU), CLEC A must have the right to particular fiber strands owned by CLEC B

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[65] Gillan Rebuttal at 17-18 and Exhibit JPG-6. For the Commission's convenience, Exhibit JPG-6 (Gillan) is attached hereto as Attachment 2.

that leave the ILEC premises. Such rights must include the right to install CLEC A's optronics on the fiber and to control the capacity at which the fiber operates.

The collocation arrangement that obviously does not qualify as a Fiber-Based Collocator under the FCC's definition is that depicted in Exhibit JPG-6 as CLEC C. In this scenario, CLEC C does not bring fiber-optic cable into the wire center, and does not operate any fiber-optic cable that leaves the wire center. CLEC C does not terminate fiber to its own FOT, and thus does not "operate a fiber-optic cable or comparable transmission facility" for purposes of the Fiber-Based Collocator definition. Rather, CLEC C is merely cross-connected via an intraoffice coaxial cable to CLEC B's collocated multiplexing equipment ("MUX"). This cross-connection permits CLEC C to utilize services purchased from CLEC B – services made available by virtue of CLEC B's operation and termination of its own fiber-optic cable.

CLEC C neither owns, operates, nor terminates any fiber-optic cable or comparable transmission facility. CLEC C has not invested in its own optronics equipment; it is not capable of lighting fiber at a FOT in its own collocation space. CLEC C relies on CLEC B for transport services utilizing CLEC B's fiber capacity. The cross-connection makes those services available to CLEC C; the cross-connection *does not* transform CLEC C into a carrier capable of terminating and operating the fiber cable that it utilizes. CLEC C is a collocator, but it definitely is not a "*Fiber-Based* Collocator" as defined by the FCC in the *TRRO*.

The upshot of AT&T's counting methodology is that it results in counting a single competitive fiber network multiple times. AT&T's interpretation of the *TRRO* amounts to a claim that any collocated carrier who purchases services utilizing a non-AT&T carrier's fiber facilities is an "operator" of those fiber facilities. But that claim is as farfetched as asserting that when a traveler buys an airline ticket to a destination it is the traveler who "operates" the plane.

The traveler obtains the ability to get from point A to point B, but he cannot determine the size or the configuration of the aircraft on which he flies or be in charge of repairing the aircraft if a problem arises.

A carrier purchasing services who had obtained, for example, DS3 transport from a Fiber-Based Collocator would not be able to obtain a different service using the fiber-optic cable without obtaining the Fiber-Based Collocator's permission. Just as a CLEC purchasing a UNE transport route from AT&T cannot increase its capacity or otherwise change the service without AT&T's permission (and likely an increase in price), a CLEC purchasing services from a competitive Fiber-Based Collocator does not have control over use of the fiber-optic cable because the CLEC purchasing the services does not "operate" the fiber-optic cable.

The fact that a Fiber-Based Collocator has one (or even several) other collocators cross-connected to it does not provide any indication of the substantial competition the FCC found is necessary to justify non-impairment. Take, for example, a situation in which there is only one carrier in a wire center that has fiber cable terminating in its collocation arrangement and entering and leaving the wire center, and the collocator has cross-connected to it three other carriers. AT&T Missouri contends that under these facts a wire center would have four fiber-based collocators. AT&T takes this position even though only one fiber cable is entering and leaving the wire center, and even though only one carrier has a fiber-optic terminal that controls the bandwidth; under these facts AT&T de-lists that wire center for UNEs. But if that one true Fiber-Based Collocator goes bankrupt (or is acquired by AT&T), the only competitive source of fiber-based transport or loops disappears. It would be absurd to count collocators as Fiber-Based Collocators when they are themselves dependent on the legitimate Fiber-Based Collocator who actually operates and terminates the fiber for provision of alternative fiber capacity.

There is nothing in the *TRRO* that approves AT&T's approach to counting Fiber-Based Collocators. Not surprisingly, every state commission but one in which the "collo-to-collo cross-connect" issue has been in dispute has rejected AT&T's position. The state commissions in Illinois, Kansas, Michigan, New Hampshire, and Texas, and a pending Arbitrator's Report in Oklahoma, have all rejected AT&T's position on Fiber-Based Collocators. Only the Ohio state commission (which agreed with AT&T on all disputed issues) affirmed AT&T's position. Moreover, in the nine states in the former BellSouth region, the ILEC did not even attempt to claim "cross-connected" collocators qualify as Fiber-Based Collocators.

The Michigan Public Service Commission specifically rejected SBC Michigan's attempt to count single networks multiple times. In a September 2005 decision, the Michigan PSC ruled that:

> The arrangement in which one CLEC cross connects to the facilities of another CLEC that is a fiber-based collocator does not increase the number of fiber-based collocators for purposes of this analysis. See 47 C.F.R. 51.5. Contrary to SBC's arguments, the issue is not ownership, but rather control and operation of fiber facilities. There is no support for finding that this arrangement includes fiber to the collocation cage of the CLEC that cross-connects to the CLEC that does control and operate fiber facilities.[66]

The Public Utilities Commission of New Hampshire rejected that interpretation of the term "operate" that AT&T advances here, finding that "to operate a [fiber] cable, a CLEC must be able to control not only the lighting of the fiber within it, but a broader range of functions, such as the placement, capacity and configuration of the cable itself."[67]

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[66] *In the Matter, on the Commission's Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Michigan Public Service Commission Docket U-14447, Order at 11 (September 20, 2005) ("*Michigan Order*").

[67] DT 05-083 *Verizon New Hampshire Wire Center Investigation* and DT 06-012, *Verizon New Hampshire Revisions to Tariff 84*, Order Classifying Wire Centers and Addressing Related Matters, Order No. 24,598, (March 10, 2006) at 37.

The Texas Public Utility Commission also firmly rejected AT&T Texas' attempt to count cross-connected carriers as "Fiber-Based Collocators."

> The Commission finds that in order for a collocated carrier's equipment to operate a fiber-optic cable or comparable transmission facility that leaves the wire center, the collocator's fiber-transmission equipment must be directly connected to that transmission facility and cannot be routed through (e.g. cross-connected to) an unaffiliated carrier's collocated equipment located in the same central office. [68]

The Kansas Commission concluded that AT&T "incorrectly interpreted the FCC's fiber-based collocator rule and the FCC's fiber-based collocator intentions and determinations as contained in the *TRRO*. … [AT&T's] fiber-based collocator count is fatally flawed … ."[69] The CLEC Coalition urges the Commission to reach a similar conclusion in this proceeding.

Issue B(2): How should the term "comparable transmission facility" be defined?

AT&T Missouri's position on what constitutes a "comparable transmission facility" is also in error. The FCC's use of "comparable transmission facility" must be read consistently with the rest of the Fiber-Based Collocator definition. In the definition, the "fiber-optic cable or comparable transmission facility" qualifies if it terminates within the wire center and "leaves the incumbent LEC wire center premises." The FCC contemplated that the Fiber-Based Collocator's fiber-optic cable would be leaving the wire center to become part of a fiber ring or other transport network that offered competitive alternatives to CLECs. In ¶ 102 of the *TRRO*, the FCC noted that a fixed-wireless carrier could qualify as a Fiber-Based Collocator "if the carrier's alternative transmission facilities both terminate in and leave the wire center." The FCC

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[68] *Post Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, Docket No. 31303, Order Approving Methodology to Determine AT&T Texas Wire Centers Which are Non-Impaired (April 7, 2006) ("*Texas Wire Center Order*") at 13-14.

[69] Kansas Corporation Commission, Docket No. 06-SWBT-743-COM, *Complaint of Post-Interconnection Dispute Resolution Between Southwestern Bell, L.P. and NuVox Communications of Kansas, Inc. Regarding Wire Center UNE Declassifications*, Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, at 11 (June 2, 2006).

reasoned that, while fixed-wireless carriers do not use fiber-optic cable as a transmission medium, the operation and termination of their facilities in a wire center "signal the ability to deploy transport facilities."[70]

In ¶ 93 of the *TRRO* moreover, the FCC's discussion reinforces the clear meaning of the definition; that is, that the FCC adopted the presence of Fiber-Based Collocators (and the presence of Business Lines) for the purpose of identifying proxies that would indicate the existence of alternative transport deployment, not merely collocation deployment. The FCC concluded that these two criteria are "proxies for where sufficient revenue opportunities exist to justify *the high fixed and sunk costs of transport deployment."* (Emphasis supplied.) While the collocation arrangement provides the terminus point for the transport route, it is the fact that carriers have deployed multiple alternative transport facilities on which CLECs could rely that is the operative factor in the FCC's proxy approach.[71]

AT&T Missouri's argument that cross-connected carriers are using a "comparable transmission facility" would require the Commission to reach the flawed conclusion that intra-office coaxial cabling may count as a "comparable transmission facility" under the Fiber-Based Collocator definition. AT&T is forced to deal with coaxial cable since most of the cross-connections between legitimate Fiber-Based Collocators and collocators who purchase services

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[70] *TRRO* ¶ 102. The FCC's example of fixed wireless being a potential "comparable transmission facility" is an example of a technology that, by definition, would be interoffice in nature, *i.e.* leaving the wire center.

[71] In the *TRO*, in *factual* findings not questioned by the *USTA II* decision, the FCC noted evidence that the cost of deploying underground fiber-optic cable for alternative loops or transport routes ranges from $100,000 to $300,000 per mile. The FCC also recognized that the monthly operating costs of competitive interoffice transport facilities are associated primarily with the cost of transport fiber cable rings, not with collocations at the end points. It was clear that the FCC found that "Fiber-Based Collocators" are those that have overcome the high costs of deploying fiber rings – not simply CLECs who have collocated and purchased transport services that do not require such deployment. *See TRO* ¶¶ 371, 382, and accompanying footnotes.

from the Fiber-Based Collocators (the cross-connected CLECs) are made using coaxial cable rather than fiber-optic cable.

The evidence shows that a distance limitation of approximately 900 feet exists when coaxial cable is used for DS3 level transmission, and AT&T admits it uses coaxial cable for connections *within* the wire center, where distance-sensitivity is not an issue.[72] Yet, AT&T contends that coaxial cross-connects inside a wire center between a carrier purchasing services and a legitimate Fiber-Based Collocator constitute "a comparable transmission facility" under the FCC's definition that permits the purchasing carrier to be transformed into a second Fiber-Based Collocator.

The FCC's analysis in the *TRRO* and its definition of a Fiber-Based Collocator support counting transmission media that are comparable to fiber-optic cable that *leaves* the wire center and provides a potential alternative source of transport *outside the wire center*. That is why *TRRO* ¶ 102, as discussed above, references fixed-wireless networks as an example of a non-fiber-based transmission medium that would qualify as comparable: its comparability is based on the fact that fixed-wireless networks leaving a wire center "signal the ability to deploy transport facilities."[73]

The use of coaxial cable within the wire center that AT&T claims as "comparable" fails this test. As Mr. Gillan testified:

> It is useful to understand that the transmission facility that must be "comparable" to fiber must be comparable as an inter-office transmission facility. After all, it is the fiber cable that <u>leaves the wire center</u> that the alternative transmission facility must be comparable to. In this regard, I am unaware of any interoffice fiber facility that operates at less than OC-3 (3 DS3) speeds, with OC-12 capacity being far more common. Consequently, at a minimum, in order for a transmission facility to be considered comparable to fiber-optic cable, it must at least be

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72 Gillan Rebuttal at 21.

73 *TRRO* ¶ 102.

> capable of carrying 3 DSs of capacity, outside, at typical interoffice distances (several miles).[74]

AT&T Missouri argues that because coaxial cable will support "up to" a DS3 level of capacity over short distances, it becomes a "comparable transmission facility" to fixed wireless technology that AT&T testifies will "typically begin at DS-3 level transmission capabilities."[75] What AT&T ignores is that the level of fixed wireless goes up from a DS-3, all the way to substantial OC-*x* levels. In addition, AT&T Missouri ignores its own testimony that a typical fiber optic network leaving an AT&T wire center has the capability to carry up to the equivalent of 3,840 DS-3s.[76] It also ignores the FCC's factual findings that, based on industry data, a carrier would not typically deploy fiber optic transport facilities "below the OC-12 levels of capacity."[77] As such, a facility that only would be able to generate a maximum of one DS3 cannot be considered "comparable" for purposes of the FCC's rule.

Mr. Gillan's testimony presents a more realistic measure of when a transmission facility may be considered "comparable" to fiber-optic cable: "it must *at least* be capable of carrying 3 DS3s of capacity, outside the central office, at typical interoffice distances (*i.e.*, several miles)."[78] This comparability standard more accurately reflects the reality of how inter-office transmission facilities are deployed.

At bottom, AT&T's "coaxial comparability" arguments are nothing more than a misdirection play in support of AT&T's broader, and even more fundamentally flawed, position that all "cross-connected collocators" constitute Fiber-Based Collocators as defined in the *TRRO*.

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74 Gillan Direct at 27.

75 Nevels Direct at 9.

76 Gillan Rebuttal at 22-23, citing Nevels Direct at 14.

77 *Id.* at 24.

78 Gillan Rebuttal at 27.

AT&T does not contend that coaxial cable "leaves" the wire center, but it must somehow convince the Commission to include the coaxial cable because the coaxial cable is used to connect a collocator without its own fiber to a legitimate Fiber-Based Collocator. The collo-to-collo daisy chain on which AT&T's argument relies falls apart if the cross-connection medium is not a "comparable transmission facility." AT&T's position on this issue is thus a factually unsupportable argument in service of a legally untenable position.[79]

Issue B(3): Should NuVox be counted as a Fiber-based Collocator in the locations specified by AT&T Missouri?

No. AT&T Missouri's position that NuVox should be counted as a Fiber-Based Collocator ("FBC") is based entirely on its flawed position that "collo-to-collo cross-connects" qualify any collocated CLEC as a FBC under the FCC's rules. As discussed at length above, AT&T's legal position is incorrect. If the Commission correctly determines that more than a cross-connect is required to qualify a collocation arrangement as a FBC, then the NuVox issue becomes moot.

AT&T Missouri focuses significant attention on the NuVox issue for one reason. Ms. Chapman's testimony makes clear that AT&T sees an opportunity to try to squeeze one more "non-impaired" wire center out of Missouri if only it can keep all the FBCs it designated in a particular wire center on the approved list.[80] AT&T's problem, however, is that NuVox filed a

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[79] The Texas Commission recognized the relationship of the "coaxial comparability" and "collo-to-collo cross-connect" issues in rejecting AT&T's arguments. It concluded that "any collocation arrangement that uses coaxial cable as a transmission medium that leaves the wire center does not qualify as a fiber-based collocation arrangement. Moreover, any fiber-based collocation arrangement that uses coaxial cable to cross-connect that arrangement to any transmission medium (including fiber-optic cable) whether directly or indirectly does not qualify as a fiber-based collocation arrangement." *Texas Wire Center Order* at 19-20.

[80] *See* Chapman Rebuttal at 64. It is important to note that even if AT&T Missouri is correct about NuVox being a FBC, it still makes no difference to the ultimate wire center designations because in the same office AT&T relies on counting an "old AT&T" collocation as a FBC. As discussed with regard to

detailed affidavit stating why it is definitively not a FBC. The NuVox affidavit is included in Mr. Scheperle's testimony for Staff, at Schedule 2C, page 28-30 (Affidavit of Edward J. Cadieux). Mr. Cadieux's affidavit makes clear that the NuVox collocation arrangement does not qualify as a FBC because NuVox does not operate fiber that enters and leaves the wire centers in question.

AT&T Missouri attacks the NuVox affidavit by stating that it does not verify whether NuVox was a FBC on March 11, 2005 – it only verifies the collocation's current status. Ms. Chapman goes on to speculate that perhaps NuVox changed its collocation arrangement since 2005, or maybe there is another FBC in the wire center that should be counted if NuVox is not included.[81] AT&T's arguments fail for three reasons.

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

Second, while AT&T Missouri asserts that the NuVox affidavit offers "no proof" that NuVox was not a FBC in 2005, AT&T is comfortable with all the other CLEC FBC verifications obtained by Staff that support AT&T's position. None of those verifications date back to March 2005, but AT&T never complains about the Staff and Commission relying on them as proof of the nature of CLEC collocation arrangements. It is only when a CLEC testifies to a fact that makes AT&T uncomfortable that it protests about the CLEC affidavits.

Issue (F) below, the SBC/AT&T merger conditions do not allow today's AT&T Missouri to count yesterday's AT&T collocation arrangements as FBC.

[81] Chapman Rebuttal at 65-68.

Third, Mr. Cadieux's affidavit provides the only testimony in this proceeding from a witness with actual knowledge of NuVox's collocation arrangements. While Ms. Chapman can speculate from her office in Dallas about what NuVox's Missouri collocation arrangements might be, Mr. Cadieux submitted a sworn affidavit based on actual knowledge of his company's network.[82] Moreover, AT&T Missouri presents no direct evidence contradicting any of Mr. Cadieux's statements.

This dispute highlights the fact that neither Ms. Chapman nor Mr. Nevels have actual knowledge of the NuVox collocation arrangements – or of any of the collocation arrangements that they allege qualify as FBC. When asked in her testimony why she is so confident that AT&T correctly identified NuVox as a FBC, Ms. Chapman responds: "As explained in the testimony of Mr. Nevels, AT&T Missouri performed physical inspections of each of the wire centers identified as meeting one or more of the FCC's non-impairment thresholds."[83] None of the AT&T personnel who actually performed the "physical inspections" provided testimony in this proceeding. AT&T's proof is based on a daisy chain of hearsay supported by witnesses who have no actual knowledge of the facts. That is why Staff's factual investigation of AT&T's claims is so critical in this case: it provides direct information from the companies alleged to operate the collocation arrangements at issue.

Mr. Cadieux's affidavit provides the only factual evidence directly addressing NuVox's status as a FBC. The affidavit makes clear that unless the Commission adopts AT&T's "collo-to-collo cross-connect" theory, NuVox does not qualify as a FBC.

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[82] Mr. Cadieux's affidavit was filed as part of Mr. Scheperle's direct testimony. Affidavits from companies like NuVox formed the basis for Mr. Scheperle's recommendations. If the Commission seeks additional facts on this issue, Mr. Cadieux will be available at hearing to respond to questions.

[83] Chapman Rebuttal at 65.

ISSUE C: In March 2005, AT&T Missouri identified fourteen wire centers (Hiland, Westport, McGee, Springfield McDaniel, Springfield Temple, Chestnut, Jefferson, Ladue, Creve Coeur, Springfield Tuxedo, Parkview, Prospect, Kirkwood, and Bridgeton) as Tier 1 wire centers. The non-impairment criteria for dedicated interoffice transport facilities for a Tier 1 wire center is that the wire center has at least four fiber-based collocators or at least 38,000 business access lines, or is a tandem switching location with no line-side switching facilities but serving as a point of traffic aggregation accessible by CLECs. 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?

No. AT&T over-counted the number of wire centers qualifying as Tier 1. As discussed in detail above, AT&T Missouri's proposed methodology for implementing the FCC's Business Line and Fiber-Based Collocator criteria incorrectly inflates the counts for both criteria. Staff witness Mr. Scheperle's concurrence in AT&T's flawed methods led him to affirm every designation made by AT&T. CLEC Coalition witness Mr. Gillan presented a recommendation for the appropriate Business Line and Fiber-Based Collocator counts that corrects the errors built into AT&T Missouri's calculations.[84] For ease of reference, Mr. Gillan's calculations (HC Exhibit JPG-9) are attached to this brief as Attachment 1.

As Mr. Gillan's calculation shows, not all changes in the number of Business Line or Fiber-Based Collocators ("FBC") in a wire center affect the classification of the wire center. For example, if the AT&T list showed a wire center having seven (7) FBC and the corrected data shows there are only five (5), that change is immaterial to the determination of whether the office meets the FCC standard based on there being more than three (3) or four (4) FBC in that wire

[84] Mr. Gillan's re-calculation is found at HC Exhibit JPG-9 (Gillan) to Mr. Gillan's Rebuttal Testimony, which is attached hereto as Attachment 3. As Mr. Gillan explains in his testimony, HC Exhibit JPG-9 assumes the Commission chooses to use 2004 data to calculate Business Lines. If the Commission chooses 2003 data, Mr. Gillan's HC Exhibit JPG-7 (Gillan) presents corrected numbers based on that data. As Mr. Gillan's testimony explains, while there is some difference between the results using 2003 and 2004 data, the differences do not result in additional wire centers meeting the FCC's criteria for de-listing high-capacity loops or transport.

center. Where an error in AT&T's calculations affects the "bottom line" question of whether AT&T Missouri's designation changes the availability of unbundled loops or transport, it is depicted in the columns of HC Exhibit JPG-9 labeled "Transport Tier" and "Loop Unbundling."

AT&T's list incorrectly identifies five (5) wire centers as Tier 1 wire centers:

- Springfield Tuxedo (SPFDMOTU)
- Parkview (STLSMO07)
- Prospect (STLSMO08)
- Kirkwood (STLSMO41)
- Bridgeton (STLSMO42)

Four of these wire centers should be classified as Tier 2. The AT&T miscalculation that requires a change in each of these classifications is based on identifying as FBC certain collocation arrangements operated by pre-merger AT&T. This issue is discussed in detail with regard to Issue (F) below.

The Springfield Tuxedo (SPFDMOTU) wire center should be classified as a Tier 3 wire center. Springfield Tuxedo has two (2) verified FBC, rather than the four (4) identified by AT&T. One of the misidentified FBC is pre-merger AT&T. This misidentification of AT&T is discussed with regard to Issue (F) below. The other misidentified FBC is NuVox Communications of Missouri, Inc. AT&T continues to list NuVox as a FBC in this wire center in spite of the fact that NuVox demonstrated in its affidavit in response to Staff's Discovery Requests that it does not qualify as a FBC at Springfield Tuxedo. The misidentification of NuVox is discussed in detail with regard to Issue (B)(3) above.

ISSUE D: As a result of a merger commitment associated with the SBC/AT&T merger, in December 2005, AT&T Missouri re-classified five of these wire centers (Springfield Tuxedo, Parkview, Prospect, Kirkwood and Bridgeton) as Tier 2 wire centers. The non-impairment criteria for dedicated

interoffice transport facilities for a Tier 2 wire center is that the wire center has at least three fiber-based collocators or at least 24,000 access lines. 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 noted above, four of the five wire centers are identified correctly as Tier 2 in AT&T Missouri's designation:

- Parkview (STLSMO07)
- Prospect (STLSMO08)
- Kirkwood (STLSMO41)
- Bridgeton (STLSMO42)

The Springfield Tuxedo (SPFDMOTU) wire center should be classified as a Tier 3 wire center. Springfield Tuxedo has two (2) verified Fiber-Based Collocators, rather than the four (4) identified by AT&T.[85]

ISSUE E: In March 2005, AT&T Missouri identified three wire centers (McGee, Chestnut and Ladue) as non-impaired for DS3 capacity loops. The non-impairment criteria for DS3 capacity loops is that the wire center has at least four collocators and at least 38,000 business lines. Did AT&T correctly identify these three wire centers as non-impaired under the criteria for DS3 criteria loops?

No. AT&T incorrectly identified one of these wire centers as meeting the non-impairment criteria for DS3 loops. The Ladue (STLSMO21) wire center does not have over 38,000 Business Lines, as depicted in Mr. Gillan's Exhibit JPG-9. AT&T over-count of Business Lines in the Ladue (STLSMO21) wire center accounts for its inclusion on the list of wire centers in which AT&T Missouri is no longer required, pursuant to the *TRRO*, to provide

[85] *See* HC Exhibit JPG-9 (Gillan)

DS3 UNE loops. AT&T Missouri correctly identified the McGee (KSCYMO55) and Chestnut (STLSMO01) wire centers as unimpaired for DS3 UNE loops.

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

No. The companies in the CLEC Coalition have been involved in state commission wire center designation proceedings in numerous AT&T states, and are not aware of any state commission approving a separate wire center list for March-December 2005, as AT&T Missouri requests here.[86] There is a good reason why this Commission should not be the first to do so: AT&T Missouri's proposal is contrary to its own commitment to the FCC to exclude pre-merger AT&T collocations from its counts of Fiber-Based Collocators ("FBC").

As discussed above with regard to Issue B, for a carrier to count as a FBC under the FCC's rules, the carrier must be "unaffiliated with the incumbent LEC."[87] For example, the merger of SBC and AT&T was completed in December 2005. Once that merger was complete, any fiber-based collocation operated by the pre-merger AT&T would no longer count for *TRRO* purposes, because pre-merger AT&T had become "affiliated with" (in this case, merged into) the ILEC formerly known as SBC. If the Commission was counting FBC today – or any day after the SBC merger with AT&T became effective – pre-merger AT&T collocations could not be counted as FBC because they are owned by an ILEC, *i.e.*, the "new AT&T."

In this case, the disputed issue is how to treat pre-merger AT&T FBC for the period between the Effective Date of the *TRRO* in March 2005 and the consummation of the

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[86] Until AT&T Missouri filed its direct testimony, the parties did not have notice that it would insist on advocating for multiple lists. For example, Staff's investigation of the AT&T Missouri wire center designations was based entirely on the most recent updated list that incorporates changes based on the SBC/AT&T merger. *See* Scheperle Direct at 5-7 (Staff's investigation was based only on the wire center list that included nine (9) alleged Tier 1 wire centers, not the earlier list that identified fourteen (14) Tier 1 wire centers.)

[87] 47 C.F.R. § 51.5 (definition of "Fiber-Based Collocator").

SBC/AT&T merger in December 2005. This should not even be an issue, however, because of a merger commitment SBC made to the FCC as part of the SBC/AT&T merger. During the FCC proceedings to approve the SBC/AT&T merger, SBC made a voluntary commitment regarding FBC counts that became part of the FCC's Order approving the merger.

SBC and AT&T voluntarily agreed not to identify AT&T as a FBC, and to file a revised data regarding this revision within thirty days of the completion of the merger. The FCC's Order approving the merger described the merger condition this way: SBC and AT&T "commit to 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."[88] The FCC adopted the commitments by SBC and AT&T as formal conditions to the approval of the merger.[89] In its Order approving the merger, the FCC stated that it took "comfort" that the merger would not have anti-competitive effects based in part on the "voluntary commitments which the Applicants [SBC and AT&T] have made relating to unbundled network elements," including the voluntary commitment to remove AT&T FBC from wire center lists.

On December 16, 2005, the new AT&T filed a revised list of wire centers with the FCC, pursuant to the merger condition approved by the FCC. In its compliance filing, AT&T stated:

> By this submission, AT&T Inc., on behalf of its affiliates ("AT&T"), updates its list of wire centers and their status under the Commission's high capacity loop and transport unbundling rules adopted in the TRRO. In accordance with the Commission's order approving the merger of SBC Communications Inc. and AT&T Corp., AT&T has modified its list to exclude fiber-based collocation

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88 FCC WC Docket No. 05-65, *In the Matter of SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, FCC Rcd 18290, 18317, ¶ 51 (*rel.* Nov. 17, 2005) ("*SBC/AT&T Merger Order")*.

89 *Id.* at 18291, ¶ 2 ("[W]e note that the Applicants [SBC and AT&T] have offered certain voluntary commitments. Because we find these commitments will serve the public interest, we accept them and adopt them as conditions of our approval of the merger.")

> arrangements established by AT&T or its affiliates in identifying wire centers in which AT&T claims there is no impairment pursuant to section 51.319 (a) and (e) of the Commission's rules. [90]

The list accurately embodied the merger condition requiring that pre-merger AT&T collocations not be counted as FBC. The "updated" list of wire centers became the new operative listing for purposes of determining impairment in SBC/AT&T wire centers. The December 2005 filing remained the operative AT&T list until the closing of the AT&T/BellSouth merger, which embodied additional merger conditions affecting the counts of FBC.[91]

In this case, AT&T Missouri now claims that the Commission should still approve -- and allow it to bill carriers -- based on the *pre-merger* list that includes collocations that were owned by the "old" AT&T before the merger. AT&T witness Chapman opines that "the merger commitment was only prospective (not retroactive), and therefore had no bearing on any transition-related activity (including the billing of transitional rates) that occurred prior to the modification" of the wire center list to reflect the merger condition.[92] Based on this reading of the merger condition, AT&T Missouri claims that it can bill CLECs higher rates for the period from March 2005 to December 2005, the period after the Effective Date of the *TRRO* and before the closing of the SBC/AT&T merger.

This view is incorrect, and its adoption would eviscerate the merger condition adopted by the FCC. The condition is "prospective" only in the sense that it required AT&T to file, "within 30 days of the Merger Closing Date, revised data or lists that reflect the exclusion of AT&T

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[90] FCC WC Docket No. 05-65, *In the Matter of SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Letter to FCC from Brian Benison, AT&T Associate Director – Federal Regulatory, Dec. 16, 2005. (The AT&T letter to the FCC, without attachments, is filed herewith as Attachment 4).

[91] The BellSouth merger conditions have no direct impact on the disputed issue discussed in this section.

[92] Chapman Rebuttal at 4.

collocation arrangements, as required by this condition."[93] The "AT&T collocation arrangements" to be "excluded" from the data and lists were those arrangements that appeared on previous lists that were owned by pre-merger AT&T. That is why the December 16, 2005 letter to the FCC said that it "updated" the AT&T wire center list in order to comply with the FCC's Order approving the merger. Moreover, there is nothing in the language of the SBC/AT&T commitment, or the FCC's description of it in the Order approving the merger, that supports the notion that it has only "prospective" effect.

If the merger condition was "only prospective," as Ms. Chapman claims, it also would be totally meaningless. Once the SBC/AT&T merger closed, all pre-merger AT&T collocations became owned by the post-merger SBC/AT&T ILEC. If there had been no merger condition, new AT&T could not count old AT&T collocations as FBC because the merger resulted in those collocations being owned by an ILEC. As noted above, for a carrier to count as a FBC under the FCC's rules, the carrier must be "unaffiliated with the incumbent LEC."[94] The post-merger SBC/AT&T could never have counted old AT&T collocations as FBC "prospectively."

If the merger condition is to have any meaning, it must apply to exclude collocation arrangements that SBC had identified as FBC *before the merger*, when AT&T was not affiliated with SBC. The FCC, by affirmatively making SBC/AT&T's voluntary commitment to exclude old AT&T FBC a condition of the merger approval, certainly thought the commitment had meaning. The condition would not give the FCC "comfort" that anti-competitive effects would

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[93] The merger conditions appear in Appendix F of the *SBC/AT&T Merger Order*. The condition provides: "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."

[94] 47 C.F.R. § 51.5 (definition of "Fiber-Based Collocator").

be mitigated if all it did was require SBC/AT&T to count post-merger FBC in accordance with the FCC's rules. The upshot of Ms. Chapman's interpretation, however, is that AT&T sold the FCC the sleeves from its vest.[95]

Moreover, even if the merger condition permitted such backward-looking wire center designations, the Commission should not adopt a FBC list that does not reflect reality. AT&T asks the Commission to permit it, in 2007, to charge CLECs higher rates for a period in 2005 based on the existence of old AT&T collocations that now belong to new AT&T. The new AT&T asks the Commission to willfully miscount FBC – and in the process to affirm the notion that competition is vibrant enough to justify non-impairment findings based on the existence in 2005 of collocations owned by a former competitor who gave up and merged with it. In ruling on a similar issue regarding how to count old AT&T and SBC collocations, the Georgia Pubic Service Commission held:

> It appears contrary to the intent of the *TRRO* essentially to miscount the number of fiber-based collocators currently in existence because the number was different as of the time that the FCC order took effect. For these reasons, the Commission will apply the definition of "fiber-based collocators" set forth in the *TRRO* and federal rules to the circumstances as they exist currently.[96]

AT&T Missouri's position in this proceeding asks the Commission to both ignore "circumstances as they exist currently," and to ignore the plain meaning of the SBC/AT&T merger condition.

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[95] It is notable that AT&T did not advance this argument in other states where the wire center designation cases were litigated while its merger to BellSouth was still pending before the FCC. Now that the BellSouth merger is closed, AT&T appears prepared to reveal its true view of its previous merger commitments.

[96] Georgia Public Service Commission, Docket No. 19341-U, *Generic Proceeding to Examine Issues Related to BellSouth Telecommunication, Inc's. Obligations to Provide Unbundled Network Elements*, Order on Remaining Issues, at 21 (Feb. 7, 2006).

The CLEC Coalition urges the Commission to adopt a single, up-to-date list of wire centers. AT&T Missouri's request for multiple wire center lists is nothing more than a cynical attempt to squeeze more revenue out of CLECs by "temporarily" eliminating UNEs for a nine month period in 2005. Approval of the March 2005 wire center list would permit AT&T Missouri to evade the purpose of the merger condition it supposedly voluntarily agreed to in order to consummate the SBC/AT&T merger.

III. CONCLUSION

For all the reasons stated, the CLEC Coalition respectfully requests that the Commission rule consistently with the recommendations presented by the CLEC Coalition on the issues on the Issues List filed in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served upon the attorneys for all parties on the following list by U.S. Mail, fax, or email on this 7th day of May, 2007.

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