BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

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

POST-HEARING BRIEF OF AT&T MISSOURI

"NON-PROPRIETARY"

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I. SUMMARY OF ARGUMENT

All of AT&T Missouri's[1] "non-impairment" designations are true to the counting methodology prescribed by the FCC's *Triennial Review Remand Order*[2] ("*TRRO*") and rules. Staff, which conducted its own investigation supported by sworn CLEC verifications, concurs that "all of the wire centers identified by AT&T [Missouri] meet the non-impaired criteria as defined in the TRRO for interoffice dedicated transport and loops."[3] Consequently, the Commission should approve all of AT&T Missouri's non-impairment designations.[4]

The Commission should reject the incorrect counting methodologies advanced by NuVox, XO and McLeod ("the CLECs"), especially since virtually all of AT&T Missouri's designations are undisputed. Thus, even though the CLECs raise a few issues with how AT&T Missouri went about counting business lines and fiber-based collocators ("FBCs"), virtually every designated wire center would still satisfy the FCC's rules even under the CLECs' tests.[5] In the few instances where the designation is disputed, Staff rightly agrees that the Commission should rule in AT&T Missouri's favor.[6]

Key Business Line Count Issues (Issues A1-A3). The first business line count issue is whether the count of business lines should include "all UNE loops" (as AT&T Missouri has done) or only "some UNE loops" (i.e., only UNE-L lines used to provide switched service to business end users). The answer comes from the plain language of the FCC's rule (47 C.F.R. §

[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri").
[2] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005) ("*TRRO*"), *aff'd*, Covad Comms. Corp. v. FCC, 450 F.3d 528 (D.C. Cir. 2006) ("Covad")..
[3] Exh. 21 (Scheperle Direct), at 2; *see also*, Tr. 122 ("The Staff's testimony recommends that the Commission approve AT&T Missouri's designation of non-impaired wire centers."); Tr. 125-126 ("Staff agrees that AT&T Missouri has correctly designated these wire centers as non-impaired.").
[4] AT&T Missouri designated several Missouri wire centers as "non-impaired" for purposes of certain loop and transport network elements. The designations were made effective March 11, 2005 (the effective date of the *TRRO*), and were updated on December 16, 2005, and December 29, 2006, to reflect voluntary commitments made in connection with the AT&T and BellSouth mergers, respectively.
[5] As Staff's Counsel correctly noted, "[t]he CLEC Coalition disputes only two of those designations." Tr. 125.
[6] *See*, note 3, *supra*.

51.5), which expressly states that "[t]he number of business lines in a wire center shall include . . . *all* UNE loops." (emphasis added). The *TRRO* (¶ 105) likewise states that the count shall include "UNE-loops," without any qualification. Staff correctly agrees that the plain language of the FCC's rule and order are dispositive. Indeed, two of the CLEC parties here (NuVox and XO) admitted before the FCC that the rule "counts *all* UNE-L lines provided to CLECs" and that "*[a]ll* UNE-L lines are included . . . regardless of whether they are used to serve business or residential customers."[7] Moreover, the vast majority of state commissions – and both of the two courts – that have addressed the issue have ruled in favor of AT&T Missouri's position.

The next issue is whether, in the case of a digital (e.g., high-capacity) loop, the business line count should include "each" 64 kbps-equivalent channel (as AT&T Missouri maintains), or only some of those channels (as the CLECs argue). The plain language of the FCC's rule states that ILECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loop as one "business line."[8] The FCC even provided an illustration, stating that a DS1 loop would be counted as 24 business lines. Thus, NuVox, XO and other CLECs admitted before the FCC that *"the [FCC's] treatment of digital access lines"* includes the *"64 kbps-equivalent"* rule under which *"a DS1 is counted as 24 'lines;' a DS3 is counted as 672 'lines,' etc."*[9] Likewise, in their appeal of the *TRRO* to the D.C. Circuit Court of Appeals, the CLECs admitted that "the final rule established by the FCC for counting business lines *is based on capacity, e.g.*, a DS3 counts as 672 lines" and proceeded (unsuccessfully) to challenge the rule.[10] The FCC itself confirmed to the Court of Appeals that "[t]he Commission's test *requires* ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24

[7] Exh. 18 (Chapman Rebuttal), Att. CAC-1, at 15. (emphasis added).
[8] 47 C.F.R. § 51.5 (emphasis added).
[9] Exh. 18 (Chapman Rebuttal), Att. CAC-1, at 11. (emphasis added).
[10] Exh. 20 (Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Opening Brief of CLEC Petitioners and Intervenor in Support, filed July 26, 2005), at 20. (emphasis added).

business lines, not one."[11] Finally, the overwhelming weight of state commission decisions (and the only court decision on point) have agreed with AT&T Missouri and rejected the same arguments that the CLECs make here.

The last business line count issue is whether, in the initial wire center designations effective March 11, 2005 (the effective date of the *TRRO*), it was appropriate for AT&T Missouri to use the most recent ARMIS 43-08 report available at that time (the April 2004 report). The CLECs argue that the April 2005 report should be used, hoping to capitalize on the reduction in ILEC retail and UNE line counts. However, that report did not even exist when the FCC's rules took effect on March 11, 2005. Moreover, it would be illogical to use reductions in AT&T Missouri's business lines – which confirm that competition is working and that CLECs are not impaired – as a reason for finding impairment.

Alternatively, the CLECs say that AT&T Missouri can use the April 2004 report, but they want AT&T Missouri to *miscount* the data in the report by using the line counts it gave to the FCC *before* the *TRRO* came out. Those initial counts did not reflect the FCC's above-described digital equivalence rule (because that rule had not yet been issued). The CLECs' proposal is a blatant attempt to end-run the FCC's digital-equivalence rule and should be rejected.

Key Fiber-Based Collocation Issues (Issues B1-B3). The first FBC issue is whether a carrier that cross-connects to interoffice fiber in another carrier's collocation space must actually own the optronics for that fiber in order to "operate" it and thus count as a FBC. The answer is no. First, no such requirement appears in the FCC's definition (47 C.F.R. § 51.5) or in the *TRRO*. Second, cross-connected collocators operate the transmission facility (consisting of the cross-connect plus the leased fiber or fiber capacity) by controlling the use and characteristics of

[11] Exh. 19 (Chapman Surrebuttal), 6-7, *citing*, Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Brief for Respondents FCC and United States of America, filed September 9, 2005, at 75.

that transmission path in many ways. Finally, a collo-to-collo arrangement is similar to Verizon's Competitive Alternate Transport Terminal ("CATT") arrangement, which the *TRRO* (¶ 102) said qualifies as fiber-based collocation. Thus, Staff "agrees with AT&T Missouri that the cross-connected carrier 'maintains a collocation arrangement' and 'operates a fiber-optic cable or comparable transmission facility' within the meaning of FCC Rule 47 CFR 51.5 even if that carrier does not provide the optronics for that fiber."[12]

The related issue of whether a DS3 (or greater) capacity transmission facility is "comparable" to fiber should be answered in the affirmative. A minimum DS3 transmission capacity is the same as that used by fixed wireless collocation arrangements, which the *TRRO* (¶ 102) said count as fiber-based collocation.

Finally, the Commission should reject NuVox's claim that it is not an FBC. NuVox presented no evidence that it was not an FBC in March 2005, following AT&T Missouri's on-site physical inspection which revealed that NuVox was then an FBC. In any case, in the only wire center where NuVox's status conceivably could make a difference on non-impairment, NuVox's argument fails because (a) NuVox's discovery responses to Staff confirm that it was a FBC in 2005, and (b) and even if NuVox were not counted in this wire center, NuVox identified another carrier to be counted in its place, thus keeping the non-impairment count there intact.

The Four Remaining Issues. The Commission should conclude that AT&T Missouri correctly designated 14 wire centers as "Tier 1" effective March 11, 2005, as Staff recommends.[13] (Issue C). Only one CLEC (NuVox) denies that it qualifies as an FBC, but for the reasons earlier noted, its claim is without merit.

[12] Staff's Prehearing Brief, at 3.
[13] Staff's Prehearing Brief, at 4-5.

The Commission should also determine that AT&T Missouri properly updated its March 11, 2005 list in December, 2005, by eliminating the "pre-merger AT&T" collocations from the FBC list, as Staff recommends.[14] (Issue D). No CLEC disputes that AT&T Missouri correctly removed all of those collocations, which reduced the number of Tier 1 wire centers from 14 to 9 on a prospective basis.

The Commission should also conclude that AT&T Missouri correctly designated the Chestnut, Ladue and McGee wire centers as non-impaired under the criteria for DS3 loops, as Staff recommends.[15] (Issue E). Each designation followed AT&T Missouri's having properly applied the FCC's rules, as explained above. The only disputed wire center is Ladue, and the CLECs would prevail on Ladue only if they could convince the Commission to adopt their flawed business line counting methodology.

Finally, the Commission should approve the March 11, 2005, wire center designations as applicable until December, 2005, as Staff recommends,[16] i.e., it should not attempt to "backdate" the December 2005 merger commitment that the FCC is solely responsible for interpreting and enforcing. (Issue F). SBC/AT&T's merger commitment (which moved 5 wire centers from Tier 1 to Tier 2) was prospective and does not alter the status of any wire center *prior to* the effective date of the merger. Had the FCC intended the commitment to be retroactive, it would have said so. But it did not, nor has the FCC since sought to enforce the commitment retroactively. Moreover, backdating the commitment would be thoroughly inconsistent with the *TRRO*, which plainly states that once a wire center passes the non-impairment thresholds it can never go back and be reclassified as impaired, regardless of future events.[17]

[14] Staff's Prehearing Brief, at 5-6.
[15] Staff's Prehearing Brief, at 6.
[16] Staff's Prehearing Brief, at 6-7.
[17] Exh. 18 (Chapman Rebuttal), at 4-5; *see also*, 47 C.F.R. §§ 51.319(a)(4)(i), 51.319 (a)(5)(i), 51.319 (e)(3)(i)(ii).

II. AT&T MISSOURI'S WIRE CENTER DESIGNATIONS

In its original designations effective March 11, 2005, AT&T Missouri determined that three wire centers satisfied the FCC's non-impairment thresholds for DS3 loops[18] and that 14 wire centers qualified as "Tier 1" under the FCC's rules for dedicated transport.[19] As a result of the SBC/AT&T merger, AT&T committed to the FCC to stop counting pre-merger AT&T as an FBC starting December 16, 2005.[20]

Under these revised designations, five wire centers moved from Tier 1 to Tier 2. In sum, starting December 16, 2005, three wire centers were "non-impaired" for DS3 loops; 9 wire centers qualified as Tier 1 wire centers, and 5 wire centers qualified as Tier 2 wire centers.[21] AT&T Missouri made additional revisions effective December 29, 2006 to implement commitments made to the FCC in connection with the AT&T/BellSouth merger, but none affected the ultimate classification of any wire center; all retained the same designation they had as of December 16, 2005.[22]

As noted earlier, virtually all of AT&T Missouri's wire center designations are undisputed; that is, for most wire centers the parties' disputes do not affect the bottom-line classification. Tables 1 and 2 below summarize each of the wire centers at issue in the case. Disputed wire centers are highlighted. Table 1 shows the results for dedicated transport, while Table 2 shows the results for high-capacity loops.[23]

[18] Exh. 16 (Chapman Direct), at 15 & Ex. CAC-1 (HC)).
[19] Exh. 16 (Chapman Direct), at 16-17 & Ex. CAC-1 (HC).
[20] Exh. 18 (Chapman Rebuttal), at 4.
[21] Exh. 16 (Chapman Direct), at 17-18 & Ex. CAC-2 (HC).
[22] Exh. 16 (Chapman Direct), at 19 & Ex. CAC-3 (HC).

[23] The data in Tables 1 and 2 are taken from Exh. 16 (Chapman Direct), at 15-19 and Exhs. CAC-1 (HC), CAC-2 (HC), and CAC-3 (HC), and Exh. 21 (Scheperle Direct), at 5-9, 14-15.

Table 1: Summary of Dedicated Transport Designations

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

***** Denotes the five wire centers that were reclassified from Tier 1 to Tier 2 upon application of the SBC/AT&T merger commitment (to exclude collocations by pre-merger AT&T Corp.), effective December 16, 2005. As to these, the CLECs present no "non-impairment designation" issues, only a claim that the December 29, 2005, designations should be made retro-active to and prevail over the March 11, 2005, designations.

Table 2: Summary of High-Capacity Loop Designations

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

For the few wire centers where the ultimate designation is in dispute, Staff recommends that the Commission find in favor of AT&T Missouri.[24] And as shown below, Staff and AT&T Missouri are correct.

III. ARGUMENT

A. Business Line Count Issues

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

[24] Exh. 21 (Scheperle Direct), at 13, 15.

The business line count should include all UNE-L lines. FCC rule 47 C.F.R. § 51.5 unequivocally mandates that the number of business lines in a wire center shall "equal the sum of all incumbent LEC business switched access lines, plus the sum of *all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." (emphasis added). The CLECs, however, contend that the rule must be interpreted as referring only to *some* UNE loops, *i.e.*, those that are specifically determined (by complex investigation and/or litigation) to serve business customers.[25] The CLECs' position is refuted by the plain language of the rule, the FCC's explanation of the rule and the intent behind it, NuVox's and XO's admissions, and the decisions of numerous state commissions.

The plain language of the FCC's rule begins and ends the analysis. The phrase "all UNE loops" means just what it says – *all* UNE loops must be counted as "business lines."[26] If more were needed, the structure of the sentence referring to "all UNE loops" confirms that the FCC meant what it said. In the sentence of Rule 51.5 that defines how lines are to be computed, the FCC used the word "business" as a qualifier for the separate component of "incumbent LEC business switched access lines" but conspicuously did not use any qualifier before "UNE loops."

Similarly, the FCC's *TRRO* (¶ 105) states that the count includes "UNE-loops" without any limitation or qualification. In full, the FCC's discussion explains that the rule is based on the sum of "ARMIS 43-08 *business* lines [i.e., the incumbent's lines serving its business customers], plus *business* UNE-P, plus UNE-loops." (emphasis added). Thus, the FCC used "business" as a qualifier where it explicitly chose to include it, but not with respect to the UNE loops at issue

[25] Exh. 1 (Gillan Direct), at 13.
[26] Exh. 16 (Chapman Direct), at 24-25; Exh. 21 (Scheperle Direct), at 12.

here. In classic understatement, the CLECs' own witness agreed at the hearing that the FCC's discussion in paragraph 105 would "be reflective of" the FCC's intent.[27]

The language of the rule is so plain that NuVox and XO (and other CLECs) admitted to the FCC that the rule requires all UNE loops to be counted as "business lines." In their March 28, 2005, Petition for Reconsideration ("PFR") of the *TRRO* regarding the business line rule, NuVox, XO and several other CLECs admitted that the FCC's rule "counts *all* UNE-L lines provided to CLECs" and that "*[a]ll* UNE-L lines are included . . . regardless of whether they are used to serve business or residential customers."[28] Despite the CLECs' unequivocal request to change (not clarify) this rule, the FCC has not changed a word of it.

The CLECs now want this Commission to do what the FCC would not -- rewrite the FCC's rule and disregard the FCC's unambiguous mandate that "[t]he number of business lines in a wire center shall include . . . all UNE loops." They incorrectly contend that a plain reading of the FCC's formula would conflict with the FCC's statement in the first sentence of Rule 51.5, which states that "[a] business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC." But there is no conflict at all. By its plain terms, the first sentence of the Rule addresses the entirely separate issue of what an *individual* "business line" is.[29] The issue here – how to count "[t]he number of business lines" (plural) "in a wire center" – is fully answered by the second sentence of the rule, which requires that "all UNE loops" be counted.

Moreover, counting all UNE loops is consistent with the FCC's intent to rely only on objective, reported data in order to create an easily administered rule. The FCC knew well that

[27] Tr. 263.
[28] Exh. 18 (Chapman Rebuttal), Att. CAC-1, at 15 (emphasis added).
[29] *See also*, Exh. 18 (Chapman Rebuttal), at 16-17.

its definition of "business lines" would not produce an exact count; however, its goal was not perfection but practicality. In the FCC's words, "[w]e are acutely aware of the need to base any test we adopt here on the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis."[30] The FCC therefore chose to rely only on data that is objective, verifiable, readily available, and already reported by incumbent LECs for other purposes.[31]

Conversely, the CLECs' proposal is directly contrary to the FCC's intent of practicality. It is undisputed that AT&T Missouri does not know – much less report – the use to which a CLEC may put a UNE loop:

> When we're providing a loop, all we're providing is a bare connection between our wire center and an end user address. The CLEC can then put over and transmit over that loop whatever they want. They can provide business service over that loop. They can provide residential. To the extent the loop will support it, they can put a switched service or a non-switched service. We really don't know what they're putting over that loop. We don't have any records that indicate it's a residential loop or a business loop or it's being used for switched or non-switched or how it's used. We only know what the loop is, what type of loop we provided, what its capacity is, that sort of thing.[32]

Thus, the CLECs would require the Commission, AT&T Missouri, and other parties to rely on data that is held by individual CLECs – an approach the FCC expressly rejected, because CLECs have no incentive to provide data that may support removal of ILECs' unbundling duties, and because any data they did provide would not be the kind that is regularly gathered and reported for other purposes and would therefore require subjective interpretation, leading to complex and costly disputes.[33] As Staff correctly pointed out, "[i]f the CLEC definition is

[30] *TRRO*, ¶ 99.
[31] TRRO, ¶¶105, 108.
[32] Tr. 191; *see also*, Tr. 213 (Staff agrees that "AT&T Missouri wouldn't know how the CLEC actually uses that particular loop."); Exh. 18 (Chapman Rebuttal), at 17 ("AT&T Missouri does not have the data that would be necessary to implement the CLECs' proposed interpretation.").
[33] *TRRO*, ¶¶ 157-159 & n. 442.

adopted, AT&T would not have information readily available on how each CLEC uses its UNE loops"; thus, the CLEC proposal "would contradict the idea that the business line count is an objective set of data that incumbent LECs already have created and also would contradict the idea that the business line count is a simplified ability to obtain the necessary information."[34]

The vast majority of state commissions have enforced the plain language of the FCC's rule in the manner suggested by Staff and AT&T Missouri, and have rejected the arguments the CLECs make, including Alabama, California, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Mississippi, Ohio, South Carolina, Texas, Utah and Washington, D.C., as shown on Judge's Exhibit A. Moreover, the only two federal courts to have ruled on this issue have also ruled in favor of the plain reading proposed by Staff and AT&T Missouri.[35]

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

The FCC's "digital equivalence" rule expressly requires that the business line count for digital UNE-L be based on the loop's capacity, not its usage. This issue is just as straightforward as the first. It centers on how to count "business lines" for "UNE loop" facilities that have the capacity to serve more than one line.

The FCC's rule easily resolves this dispute, because it states in unambiguous terms that business line tallies "*shall* account for ISDN and other digital access lines by counting *each* 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and

[34] Exh. 21 (Scheperle Direct), at 12.

[35] Logix Communications L.P. v. Public Utility Commission of Texas, Case No. A-06-CA-548-SS, (W.D. Tx. November 6, 2006, Order ("Logix Order"), at 4-6 ("[T]he PUCT's decision that all UNE loops in a wire center should be counted to establish the number of business lines in that wire center is correct."). The order has been appealed to the Fifth Circuit Court of Appeals; *see also*, Michigan Bell Telephone Company, Incorporated, d/b/a AT&T Michigan v. Michigan Public Service Commission, et al., Case No 06-12374 (E.D. Mich. May 8, 2007), Opinion and Order, at 5 ("If the FCC wanted to include only business switched-access lines, it would have said so. The Court declines to transform the unambiguous phrase "all UNE loops" to mean only some UNE loops.").

therefore to 24 'business lines.'"[36] The FCC's rule is unqualified and contains no exceptions or limitations. The rule is not, as the CLECs suggest, merely that each 64 kbps-equivalent *might* be counted as a "business line" depending on other factors (which could be evaluated only through protracted litigation over subjective, CLEC-provided data), but rather that "each" equivalent "*shall*" be treated as "one business line" no matter what.

AT&T Missouri fully disclosed to the FCC that its non-impairment designations are based on the digital equivalence methodology mandated by in the *TRRO*. In response to an FCC letter dated February 4, 2005 (the same day the *TRRO* was released), AT&T reported that the business line data it was then submitting to the FCC was "adjusted for 64 kbps-equivalents."[37] The FCC has never challenged or questioned AT&T's implementation of the rule.

Further, the CLECs' position is refuted, once again, by admissions made elsewhere by NuVox, XO and other CLECs. In their PFR of the *TRRO* filed with the FCC, they acknowledged that *"the [FCC's] treatment of digital access lines"* includes the *"64 kbps-equivalent"* rule under which *"a DS1 is counted as 24 'lines;' a DS3 is counted as 672 'lines,' etc."*[38] Likewise, in their appeal of the *TRRO* to the D.C. Circuit, they admitted that "the final rule established by the FCC for counting business lines *is based on capacity*, *e.g.*, a DS3 counts as 672 lines" and proceeded to challenge the rule (unsuccessfully).[39] The FCC itself confirmed to the Court of Appeals that "[t]he Commission's test *requires* ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[40]

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[36] 47 C.F.R. § 51.5. (emphasis added).
[37] Exh. 18 (Chapman Rebuttal), Att. CAC-2, at n. 2..
[38] Exh. 18 (Chapman Rebuttal), Att. CAC-1, at 11. (emphasis added).
[39] Exh. 20 (Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Opening Brief of CLEC Petitioners and Intervenor in Support, filed July 26, 2005), at 20. (emphasis added).
[40] Exh. 19 (Chapman Surrebuttal), 6-7, *citing*, Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Brief for Respondents FCC and United States of America, September 9, 2005, at 75. (emphasis added).

Counting UNE loops according to their full digital equivalency also is consistent with the FCC's intent to "rel[y] on objective criteria to which the incumbent LECs have full access" and that is reported and can be verified by others.[41] AT&T Missouri knows the type and number of high-capacity loops it has leased to CLECs, and thus knows the number of 64 kbps-equivalents on these loops. However, as with all other UNE loops, AT&T Missouri does not separately identify how a CLEC uses a high-capacity loop or each 64 kbps-equivalent on that loop or what type of customers it serves on that loop; nor can it, since the data are maintained by CLECs.[42] By contrast, the CLECs' proposal to exclude 64 kbps-equivalents from the "business line" counts would require parties and state commissions to engage in extensive discovery directed to every CLEC to determine whether each CLEC is actually using each 64 kbps-equivalent to provide service and, if so, whether it is being used to provide business or residential service, data or voice service, and switched or non-switched service. The delay, expense, and complexity of trying to obtain, analyze, and verify such data from dozens of CLECs is exactly what the FCC wanted to avoid.[43] Finally, the vast majority of state commissions – and the only court – to reach the issue have agreed with Staff and AT&T Missouri and rejected the same arguments that the CLECs make here, including Alabama, Florida, Illinois, Kansas, Ohio, South Carolina, Texas and Utah, all of which are reflected in Judge's Exhibit A. [44]

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

The Commission should conclude that, in making its March 2005 designations, AT&T Missouri properly relied on the April 2004 ARMIS 43-08 report, which reflects data as of

[41] *TRRO*, ¶ 108.
[42] Exh. 16 Chapman Direct), at 27.
[43] *TRRO*, ¶¶ 93, 99, 105, 108, 157-159.
[44] *See also*, Logix Order, November 6, 2006, at 7 ("The PUCT's holding that each 64 kbps-equivalent shall be counted as one business line is supported by both the text of the [FCC's] regulation and the intent expressed in the [*TRRO*].").

December 31, 2003. There is no dispute that this was the most recent ARMIS 43-08 report available at the time the *TRRO* became effective (March 11, 2005).[45] The FCC plainly stated that its rules "shall take effect on March 11, 2005."[46] The FCC's order is equally plain that incumbents are to include "ARMIS 43-08 business lines" in counting business lines.[47] Plainly, then, the use of that report was permitted by – indeed, compelled by – the FCC.

The CLECs nonetheless suggest that AT&T Missouri should use the April 2005 reports, which were not filed until weeks after the *TRRO* took effect. However, it would have made no sense for the FCC to require ILECs to use the April 2005 report, which was unavailable on the *TRRO*'s effective date. Under the CLECs' approach, the FCC's rules for high-capacity loops and transport could not have "take[n] effect on March 11, 2005."[48] The CLECs' position is also inconsistent with the FCC's rules expressly stating that once a wire center crosses the FCC's non-impairment thresholds it cannot later be called "impaired."[49] These rules give finality and certainty to ILECs and competitors alike, irrespective of fluctuations – up or down – over time.

The Commission should also reject the CLECs' alternative proposal, which would purport to use the April 2004 ARMIS data that AT&T Missouri used – but would *miscount* the data by using the line counts that ILECs originally provided to the FCC during the *TRRO* proceedings, before the *TRRO* was issued. The fatal flaw in their proposal is that those original counts did not reflect the FCC's subsequent, mandatory, rule directing ILECs to account for the "digital equivalence" of high-capacity loops.[50] The Commission should reject the CLECs'

[45] Exh. 16 (Chapman Direct), at 12; Exh. 18 (Chapman Rebuttal), at 33.
[46] *TRRO*, ¶ 235.
[47] *TRRO*, ¶ 105.
[48] *TRRO*, ¶ 235.
[49] 47 C.F.R. § 51.319(a)(4)(i) (DS1) & (a)(5)(i) (DS3) (loops); 47 C.F.R. § 51.319(e)(3)(i), (ii) (dedicated transport).
[50] Exh. 18 (Chapman Rebuttal), at 10, 39-40.

"simple solution" for the same reason that it should reject the CLECs' arguments on digital equivalency.

B. Fiber-Based Collocator ("FBC") Issues

The second proxy for determining non-impairment is the number of FBCs in a wire center. The FCC defined fiber-based collocation to include CLEC collocation arrangements that use "non-incumbent LEC fiber-optic cable" as well as "less traditional collocation arrangements" that use facilities "comparable" to fiber.[51] Examples of such "less traditional" collocation arrangements include fixed wireless collocation and Verizon's CATT arrangement, which allows one collocated carrier to lease transport capacity from another.[52] As with business lines, the FCC defined an FBC in a manner that is easy to administer and based on data that are objective, readily verifiable, and possessed by incumbents.[53]

AT&T Missouri's FBC identifications rest on physical on-site inspections.[54] The results of these inspections (as of March 11, 2005) are reported in AT&T Missouri's testimony, as are the number of FBCs and the Tier designation for each wire center.[55] AT&T updated the results in December, 2005, to remove FBCs affiliated with "pre-merger" AT&T, pursuant to an SBC/AT&T merger commitment. The results of this update -- including a shift of 5 wire centers from Tier 1 to Tier 2 -- are likewise in the record.[56] AT&T Missouri next updated its designations in December, 2006, pursuant to an AT&T/BellSouth merger commitment to

[51] 47 C.F.R. § 51.5; *TRRO*, ¶ 102.
[52] *TRRO*, ¶ 102.
[53] *TRRO*, ¶¶ 99-102.
[54] Exh. 12 (Nevels Direct), at 6-7.
[55] Exh. 15 (Chapman Direct), at 8-9 & CAC-1 (HC).
[56] Exh. 15 (Chapman Direct), at 9 & CAC-2 (HC).

temporarily exclude "collo-to-collo" arrangements from its FBC counts. This update did not change the non-impairment designations for any wire centers.[57]

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

Yes -- a cross-connected carrier in a collo-to-collo arrangement "operates" a transmission facility that is comparable to fiber even if it does not provide the optronics. The word "operate" is typically defined to mean "control" or "run."[58] Although the cross-connected carrier in a collo-to-collo arrangement does not supply the optronics for the fiber, it still has an independent, fully functioning network, complete with a separate collocation arrangement and its own telecommunications equipment, and thus "operates" the transport facility.[59] Indeed, the cross-connected carrier *must* "operate[]" the transmission facility in order to employ its own network equipment to complete its customers' calls.[60] As Mr. Nevels explained, the cross-connected carrier obtains an end-to-end transmission path that terminates in its collocation arrangement and leaves the wire center.[61] For that transmission path to function, the carrier must control it in many different ways:

- it tests and operates its own multiplexing equipment;
- it can turn the arrangement on and off;
- it determines the capabilities of the transmission that it uses, as well as the "operating characteristics" of that transmission path;
- it attempts to ensure that the transmission quality of the end-to-end transmission path meets (and continues to meet) its desired standards;
- it makes engineering and market entry determinations in deciding the transmission capacity required to meet the demands of its network; and

[57] Exh. 15 (Chapman Direct), at 9 & CAC-3 (HC). AT&T Missouri notes that the Commission's decision on the FBC issues will have no immediate impact on which wire centers are non-impaired, since the two wire centers with collo-to-collo arrangements meet the FCC's thresholds even without counting both carriers in those arrangements. Exh. 12 (Nevels Direct), at 7, 10.
[58] Exh. 18 (Chapman Rebuttal), at 53.
[59] Exh. 12 (Nevels Direct), at 14-15; Exh. 14 (Nevels Rebuttal), at 7-8; Exh. 18 (Chapman Rebuttal), at 53-54.
[60] Exh. 14 (Nevels Rebuttal), at 7; Exh. 18 (Chapman Rebuttal), at 53-54.
[61] Exh. 14 (Nevels Rebuttal), at 10.

- it monitors the use of the comparable transmission facility to determine if and when network modifications and augments are needed.[62]

Given these facts, that collocator is "operat[ing]" the transmission path and qualifies as an FBC.

The CLECs claim that there can be only one FBC that "operates" any fiber transmission facility and that it can only be the carrier supplying the optronics. But nothing in the FCC's rule or the *TRRO* says that. Nor did the FCC say that a collocator must own the fiber, control the speed of the fiber, or run optronics equipment to be counted as an FBC. The FCC's silence is not surprising, for carriers frequently "operate" networks composed of both their own facilities and facilities that they obtain from third parties. Indeed, the *TRRO* assumes that not all FBCs will deploy their own facilities, and expressly acknowledges that some fiber-based collocators will use inputs from other competing carriers.[63]

Moreover, the CLECs admit that their approach would require the connecting carrier to own the fiber transmission facility.[64] The FCC rule and *TRRO* have no such requirement. Instead, the *TRRO* merely requires a fiber-based collocator to "*operate[]* a fiber-optic cable or comparable transmission facility," and counts instances where the interoffice facilities are owned by another party, such as in Verizon's CATT arrangement. The only mention of an "ownership" qualification is that the facility cannot be owned by the ILEC or an affiliate.[65] Otherwise, the facility can be owned by anyone.

The CLECs' "optronics" test also fails because it relies on data that ILECs do not possess and cannot readily obtain.[66] The FCC allowed ILECs to count FBCs via physical inspections of central offices. When making such inspections and standing outside the collocation cages (as it

[62] Exh. 14 (Nevels Rebuttal), at 7-8; Exh. 18 (Chapman Rebuttal), at 53-54.
[63] *See*, *TRRO*, ¶ 28 ("our inferences regarding the potential for deployment are based on the characteristics of markets where actual deployment has occurred, which presumes that competitive LECs will use reasonably efficient technologies and take advantage of existing alternative facilities deployment where possible").
[64] Exh. 1 (Gillan Direct), at 23, 25.
[65] *TRRO*, ¶ 102; 47 C.F.R. 51.5.
[66] *TRRO*, ¶ 99.

must), however, AT&T Missouri has no way of knowing whether collocated CLECs cross-connected to another CLEC have their own optronics.[67] As a result, there is no way to implement the CLECs' "optronics" test by using objective, verifiable data possessed by ILECs.

The CLECs' related claim -- that a cross-connected carrier in a collo-to-collo arrangement does not operate a transmission facility that "terminates" or "leaves" the wire center -- fails for similar reasons.[68] The "comparable" transmission facility here is not just the cross-connect between the two collocations, but rather the combined transmission path created by the cross-connect in conjunction with the leased fiber transport.[69] This combined facility is what is used to transport traffic and is undeniably "comparable" to fiber. In this regard, the Commission should rule in favor of AT&T Missouri's position, as did the Ohio Commission, which stated: "[I]n evaluating the 'comparable transmission facility' to the fiber cable in dispute, we evaluate the facility as a whole, and not the coaxial cable section that cross-connects the equipment of one collocator to the fiber facility of the other FBC."[70] Relying in part on the FCC's determination that a transport route may pass through one or more intermediate wire centers or switches along the way, the Ohio commission reasoned that the FCC "clearly views a circuit taking the route 'A-X-Z' as a single circuit that originates from point 'A' and terminates at point 'Z', not terminating at optronics used at point 'X.' Similarly, . . . we find that the transport circuit used

[67] Exh. 14 (Nevels Rebuttal), at 9 (AT&T Missouri "cannot tell -- standing outside the collocation cage -- whether a carrier has optronics in that cage or is connecting to optronics in another CLEC's cage.").
[68] Exh. 3 (Gillan Rebuttal), at 17.
[69] Exh. 14 (Nevels Rebuttal), at 10-12 & MN-1.
[70] *Ohio Wire Center Order*, at 8.

by collocator 'A' terminates at the 'collocator A' collocation arrangement, and not at the optronics located at 'collocator B' site."[71] The same analysis applies here.[72]

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

The Commission should hold that any transmission facility having a capacity of at least DS3 qualifies as a "comparable transmission facility." Alluding to fixed wireless arrangements, the FCC defined an FBC in a manner that is "agnostic as to the medium used to deploy an alternative transmission facility," reasoning that "a technologically neutral test better helps us to capture the actual and potential deployment in the marketplace than would a wireline-specific test."[73] Applying this approach, the FCC found that fixed wireless arrangements count as fiber-based collocation because even though "fixed-wireless carriers' collocation arrangements may not literally be fiber-based, [they] nevertheless signal the ability to deploy transport facilities."[74] A fixed wireless arrangement typically provides a carrier with a minimum of DS3 level transport.[75] By analogy, a collo-to-collo arrangement that likewise provides the cross-connected carrier with a minimum of DS3 level transport is "comparable" to fiber as well. The two also share the attribute that use of a facility with such a large capacity signals a CLEC's commitment to that wire center and its business determination that "significant revenue opportunities" exist in the wire center to support such deployment.[76]

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[71] *Ohio Wire Center Order*, at 14; *see also*, 47 C.F.R. § 51.319(e).

[72] As AT&T Missouri explained in its Pre-Hearing Brief (at 43-45), the CLECs' reliance on footnote 292 of the *TRRO* – which, they claim, requires a cross-connected carrier to have an indefeasible right of use ("IRU") in the fiber it leases -- is likewise misplaced. Rule 51.5 requires that the collocator "operate[] a fiber-optic cable or comparable transmission facility that . . . is owned by a party *other than the incumbent LEC* or any affiliate of the incumbent LEC." 47 C.F.R. § 51.5 (emphasis added). At the same time, the rule provides that "[d]ark fiber *obtained from an incumbent LEC* on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable." (Emphasis added). In other words, the FCC's rule requires one to look for an "indefeasible right of use" only when (1) the fiber is dark, rather than lit, and (2) the dark fiber is "obtained from an incumbent LEC." In all other cases (such as lit fiber owned by a CLEC), it does not matter whether an IRU exists.

[73] *TRRO*, ¶ 102, n. 295.

[74] *TRRO*, ¶ 102.

[75] Exh. 12 (Nevels Direct), at 9.

[76] *TRRO*, ¶ 101; Exh. 12, (Nevels Direct), at 8-9.

The CLECs' claim -- that comparability is reached only where a facility has a "minimum of three DS3s' worth of capacity" -- would eviscerate the FCC "agnostic" approach and read "comparable" out of the rule. The smallest facility with three DS3's of capacity is an OC3, and an OC3 is always made of fiber.[77] Thus, the CLECs' view is that the only thing "comparable" to fiber is more fiber, reducing the FCC's rule to a meaningless, non-technology agnostic tautology. Further, under the CLECs' proposal, the very example of a comparable technology provided by the FCC (fixed wireless arrangements) would not qualify, since it does not provide at least three DS3s' worth of capacity. Yet, the CLECs do not dispute that a fixed-wireless arrangement is comparable to fiber. There is no reason to treat DS3 arrangements containing coaxial cable and interoffice fiber differently.

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

NuVox's claim -- even as applied to the only wire center whose designation could conceivably change even if NuVox were to prevail, **_____.** -- is without merit. Moreover, NuVox's argument, if successful, could have consequences only during the period from March 11, through December 16, 2005, not thereafter. [78]

First, NuVox provided no evidence suggesting that NuVox was not, in fact, properly identified in March, 2005, as an FBC in any wire center. NuVox had been identified as an FBC on the strength of physical, on-site inspections showing that NuVox had a collocation arrangement in place that met the physical requirements necessary to be classified as an FBC.[79] It is completely irrelevant that, in October, 2006, NuVox stated that it "dispute[s] AT&T's

[77] Exh. 14 (Nevels Rebuttal), at 5.
[78] This wire center qualified as a Tier 1 wire center because of the presence of **____** FBCs. Exh. 15 (Chapman Direct), CAC-1 (HC). That designation was later reduced to a Tier 2 designation due to excluding pre-merger AT&T as an FBC. The wire center also qualified as a Tier 2 wire center on the independent ground of a sufficient business line count. Exh. 15 (Chapman Direct), CAC-2 (HC), CAC-3 (HC); Exh. 21 (Scheperle Direct), at 13.
[79] Exh. 18 (Chapman Rebuttal), at 65-66.

classification of that [sic] NuVox *is* a fiber-based collocator."[80] The question is not whether a CLEC *is* a fiber-based collocator in the locations identified by AT&T Missouri, but whether the CLEC *was* a fiber-based collocator as of the effective date of the *TRRO*. NuVox does not dispute AT&T Missouri's having properly identified it as an FBC as of March 11, 2005 and, for this reason alone, AT&T Missouri's having done so remains unchallenged.

Second, NuVox's own description of its collocation arrangement in the **_____ _____** wire center makes it a prototypical FBC arrangement (not merely a "comparable transmission facility") for purposes of FCC Rule 51.5.[81] NuVox meets each of the following requirements of the FBC rule: it is not affiliated with AT&T Missouri or any of the other FBCs in the wire center; it maintains a collocation arrangement with active electrical power; it operates a fiber-optic cable that terminates at the collocation arrangement within the wire center and leaves the wire center; and its transmission facility is not owned by AT&T Missouri or an affiliate of AT&T Missouri. In addition, the arrangement qualifies even under NuVox's more limited view of what constitutes a sufficient FBC arrangement. The fact that it has entrusted another party to perform certain work on its behalf merely fortifies its own status as an FBC. [82]

Third, even if the Commission were to conclude that NuVox should not have been counted as an FBC because of the role of the third party named by NuVox, the third party named should be regarded as an FBC in NuVox's stead, meaning that NuVox's claim has no consequence on the non-impaired status of that wire center. NuVox admits that "it is likely that **_____** does qualify as a fiber-based collocator" in the wire center.[83]

[80] See, Exh. 21 (Scheperle Direct), Sch. 2C, at 28 (HC). (emphasis added).
[81] Tr. 174-176, 223-224.
[82] Exh. 18 (Chapman Rebuttal), at. 69-71; Tr. 174-176, 223-224.
[83] Exh. 21 (Scheperle Direct), Sch. 2C, at 29 (HC).

HC

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

Yes -- AT&T Missouri correctly identified all 14 wire centers as Tier 1 wire centers in March, 2005.[84] As shown above, AT&T Missouri properly applied the FCC's definitions of business lines and fiber-based collocators in making its wire center designations. Moreover, these designations would stand even if the Commission were to disagree that both carriers in a collo-to-collo arrangement count as fiber-based collocators, because none of the 14 wire centers in Tier 1 needed to count both such carriers to meet the Tier 1 threshold.[85]

Staff supports AT&T Missouri's position, based on its own investigation, in which it "mailed letters requesting affidavit verification from all CLECs identified by AT&T [Missouri] as fiber-based collocators" and it asked each CLEC "to confirm or deny that it is a fiber-based collocator in the specified wire center."[86] Based on its independent review, Staff concludes that "[p]rior to application of the SBC/AT&T merger commitments [in December, 2005], thirteen of the fourteen wire centers were correctly identified as non-impaired because they have four or more fiber-based collocators. The fourteenth wire center, Springfield Temple, meets the definition for a tandem switching center location; thus it was also correctly identified as non-impaired."[87]

There is no doubt that the five wire centers later re-classified as Tier 2 wire centers met the Tier 1 criteria as of March 11, 2005. Prior to the merger, the pre-merger AT&T CLECs met

[84] To be in Tier 1 a wire center must have at least four fiber-based collocators *or* at least 38,000 business lines, or be a tandem switching location with no line-side switching facilities but nevertheless serves as a point of traffic aggregation accessible by CLECs. 47 C.F.R. § 51.319(e)(3).
[85] Exh. 12 (Nevels Direct), at 7, 10.
[86] Staff's Prehearing Brief, at 5.
[87] Staff's Prehearing Brief, at 5. It is immaterial that Staff did not separately confirm whether the five "old AT&T designations were based on this collo-to-collo connect [arrangement]." Tr. 208. AT&T Missouri testified that it identified two coaxial cross connected facilities which were connected to another carrier's fiber facility, and neither involved pre-merger AT&T. Exh. 12 (Nevels Direct), at 15-16. AT&T Missouri's evidence was unrebutted.

all the criteria for fiber-based collocators, and therefore, were properly classified as FBCs and remained so until the SBC-AT&T merger condition took effect.[88] Indeed, several other state commissions, including Indiana, Michigan, and Ohio, addressed this issue while the SBC/AT&T merger was pending and held that pre-merger AT&T collocations did count as FBCs.[89]

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

Yes -- AT&T Missouri correctly identified the 5 wire centers as Tier 2 wire centers in December, 2005, for the reasons discussed in Issue C, above.[90] And, once again, these designations would be correct even if the Commission were to disagree with AT&T Missouri on whether both carriers in a collo-to-collo arrangement count as FBCs, for none of the five wire centers in Tier 2 needed to count both such carriers to meet the Tier 2 threshold. Furthermore, Staff analyzed these five wire centers based on both AT&T Missouri's data and discovery obtained from CLECs and agreed that those wire centers all qualify for Tier 2.[91]

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

Yes -- AT&T Missouri correctly identified these three wire centers as non-impaired for DS3 capacity loops in March, 2005.[92] As shown above, AT&T Missouri properly applied the FCC's definitions of business lines and fiber-based collocators in making its wire center

[88] Exh. 18 (Chapman Rebuttal), at 4.
[89] Order on Reconsideration, *In re Remaining Portions of the Triennial Review Order*, 2006 WL 1519976, *2 (Ind. Util. Reg. Comm'n, Mar. 8, 2006) (AT&T had to be removed as an FBC only "as of December 16, 2005"); Order, *Establishment of Terms and Condition of an Interconnection Agreement Amendment*, 2005 WL 3018712, Issue 4 (Ohio Pub. Utils. Comm'n, Nov. 9, 2005); Order, *In re SBC Michigan*, 2005 WL 2291954, *8 (Mich. Pub. Serv. Comm'n, Sept. 20, 2005) ("the Commission will not find that AT&T is an affiliate of SBC until the merger is complete").
[90] Exh. 15 (Chapman Direct), at 9 & CAC-2 HC; Exh. 18 (Chapman Rebuttal), at 4. To be in Tier 2 a wire center must have at least three fiber-based collocators *or* at least 24,000 business lines. 47 C.F.R. § 51.319(e)(3).
[91] Exh. 21 (Scheperle Direct), at 9, 13 & Schedules 2A and 4; Staff's Prehearing Brief, at 5.
[92] Chapman Direct Ex. CAC-1 HC. Wire centers are non-impaired for DS3 loops if they have at least four fiber-based collocators and at least 38,000 business lines. 47 C.F.R. § 51.319(a)(5)(i).

designations. As noted, the CLECs would prevail only in the case of the Ladue wire center even if their competing counting methodology were adopted (which it should not be). Additionally, AT&T Missouri's designations would be correct even if the Commission disagreed with AT&T Missouri on whether both carriers in a collo-to-collo arrangement count as fiber-based collocators, for none of these three wire centers needed to count both such carriers to meet the relevant threshold. Finally, Staff analyzed these three wire centers based on both AT&T Missouri's data and discovery obtained from CLECs and agreed that those wire centers all qualify as non-impaired.[93]

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

Yes -- the SBC/AT&T merger commitments were prospective and may not be made retroactive. As has been noted in Issues C and D, in March, 2005, the FBCs of pre-merger AT&T's CLECs were properly counted, but these designations were updated on a prospective basis as of December 16, 2005 to no longer continue counting the pre-merger AT&T's collocations as fiber-based collocations.[94] Because there are differences between the list of non-impaired wire centers under the law as it stood on March 11, 2005 (due to the *TRRO*) and the law as applied to the post-merger AT&T following the close of the merger (due to the merger commitment) and the merger was closed, AT&T Missouri has asked the Commission to approve the wire center list that was in effect between March 11, 2005 and December 16, 2005.[95]

Consistent with the principle that substantive laws only operate prospectively,[96] the merger commitment likewise operates only on a prospective basis.[97] Holding otherwise would

[93] Exh. 21 (Scheperle Direct), at 15 & Schedules 5, 6A-C, and 7.
[94] Exh. 16 (Chapman Direct), CAC-1 (HC) and CAC-2 (HC).
[95] Exh. 16 (Chapman Direct), at 4.
[96] In the Matter of the Investigation of the State of Competition in the Exchanges of Southwestern Bell Telephone Company, Case No. TO-2001-467, Report and Order on Remand, January 25, 2007, at 30, *citing*, Pierce v. State Dept. of Social Services, 969 S.W. 2d 814, 822-823 (Mo. App. W.D. 1998).

mean that AT&T Missouri could not count pre-merger AT&T collocations even though no one disputes that at the time they fully satisfied the FCC's rule.[98] Had the FCC intended to make the commitment retroactive, it would have done so. To the contrary, the FCC has not sought to enforce the commitment retroactively. The Commission should not disturb that matter uniquely entrusted to the federal agency solely responsible for approving the SBC/AT&T merger and solely responsible for interpreting and enforcing the commitment. The arguments should thus be required to press their arguments before the FCC, not here.

Furthermore, applying retroactivity would be inconsistent with the FCC's decision that once a wire center passes the non-impairment thresholds it can never go back and be reclassified as impaired, regardless of future events.[99] The only reason some wire centers were reclassified here is a voluntary merger commitment, not because of any change in the non-impairment rules, much less a retroactive one. To, comply with the law and common sense, and to avoid backward-looking billing disputes, the Commission should approve AT&T Missouri's separate non-impaired wire center list that was in place between March 11, 2005 and December 16, 2006.

IV. CONCLUSION

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

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[97] As the FCC noted, "[u]nless otherwise specified herein, the Conditions described herein shall become effective 10 business days *after* the Merger Closing Date." In re SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290, App. F (2005) (emphasis added). The merger commitment states: "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 . . . . . 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." Id. (emphasis added).

[98] Exh. 18 (Chapman Rebuttal), at 4-5; Exh. 3 (Gillan Rebuttal), at 15-16.

[99] 47 C.F.R. §§ 51.319(a)(4)(i), 51.319 (a)(5)(i), 51.319 (e)(3)(i)(ii).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on July 23, 2007.


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