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

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KENNARD L. JONES, Presiding,
17 REGULATORY LAW JUDGE.

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CONNIE MURRAY,
19 COMMISSIONER.

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1 P R O C E E D I N G S

2 JUDGE JONES: Let's go on the record. This
3 is Hearing No. TO-2006-0360, in the matter of the
4 application of NuVox Communications of Missouri,
5 Incorporated, for an investigation into the wire centers
6 that AT&T Missouri asserts are non-impaired under the
7 TRRO.

8 My name is Kennard Jones. I'm the judge
9 presiding over this matter. At this time we'll take
10 entries of appearances, beginning with AT&T.

11 MR. GRYZMALA: Good morning, your Honor.
12 Bob Gryzmala on behalf of Southwestern Bell Telephone, LP,
13 doing business as AT&T Missouri, One AT&T Center,
14 Room 3516, St. Louis, Missouri 63101.

15 MR. BUB: And, your Honor, Leo Bub, also
16 for AT&T Missouri at the same address. Thank you.

17 JUDGE JONES: Thank you. And from the CLEC
18 Coalition?

19 MS. YOUNG: Thank you, Judge. Mary Ann
20 Young with William D. Steinmeier, PC, appearing on behalf
21 of McLeod USA Telecommunications Services, Inc. And with
22 us today also is Bill Magness, who will be conducting the
23 majority of the hearing on behalf of the CLEC Coalition.
24 I'll let Mr. Magness enter his appearance.

25 JUDGE JONES: Mr. Magness?

1 MR. MAGNESS: Thank you, your Honor. My
2 name is Bill Magness, Casey, Gentz & Magness, LLP,
3 98 San Jacinto Boulevard, Suite 1400, Austin, Texas 78701,
4 and we're here representing the CLEC Coalition, which is
5 composed of McLeod USA Telecommunications Service, Inc.,
6 NuVox Communications of Missouri, Incorporated, and XO
7 Communications Services, Inc.

8 JUDGE JONES: Thank you.

9 MS. YOUNG: If I may pass along, Carl
10 Lumley, who represents NuVox and XO, was not able to be
11 here this morning.

12 JUDGE JONES: Thank you. From the Staff of
13 the Commission?

14 MR. HAAS: Good morning. William K. Haas
15 appearing on behalf of the Staff of the Public Service
16 Commission. My address is Post Office Box 360, Jefferson
17 City, Missouri 65102.

18 JUDGE JONES: Thank you, Mr. Haas. And
19 yesterday the Office of Public Counsel filed a Notice of
20 Non-Participation, so that would explain their absence
21 today.

22 As we spoke off the record earlier,
23 exhibits will be marked for the CLECs Nos. 1 through 10,
24 for AT&T 11 through 20, and for Staff 21 through 30. And
25 it is right at ten o'clock now. We will go ahead and

1 start with -- are there any other preliminary matters
2 anyone wants to discuss, anyone aware of? Seeing no
3 raising of the hand, we'll start with opening statements,
4 beginning with the CLECs, and you can either do it from
5 there or you can do it from the podium, wherever you feel
6 most comfortable.

7 MR. MAGNESS: Your Honor, we're happy to go
8 first. We had -- in the procedural order or the schedule
9 we had them going first. It doesn't matter to me.

10 JUDGE JONES: With opening statements?

11 MR. MAGNESS: Yes.

12 JUDGE JONES: What difference does it make?

13 MR. MAGNESS: It doesn't make any
14 difference to me.

15 JUDGE JONES: Okay. Whatever you-all want
16 to do. Whoever wants to go first can go.

17 MR. GRYZMALA: Go ahead, Bill.

18 JUDGE JONES: It would seem like the CLECs
19 would go first. You-all brought this matter before us,
20 right? Why had you-all decided AT&T would go first?

21 MR. MAGNESS: To be perfectly honest, I'm
22 not real sure why we went that way. As we discussed it, I
23 think one of the things here is AT&T had originally put
24 forward the wire center list, which is now in dispute, and
25 it's that wire center list that we're challenging and that

1 Staff investigated. So that may have had to do with it.

2 JUDGE JONES: Will it matter to the
3 substance of your case at all? I don't want to make
4 you-all change your plan.

5 MR. GRYZMALA: No.

6 MR. MAGNESS: No, I don't think so. We're
7 happy to go.

8 JUDGE JONES: Go right ahead.

9 MR. MAGNESS: Your Honor for the record
10 again, my name is Bill Magness. I'm here representing
11 McLeod USA Telecommunications Service, Inc., NuVox
12 Communications of Missouri, Inc. and XO Communications
13 Services, Inc.

14 In this case, the Commission is faced with
15 another implementation task of an FCC order; that is, the
16 Triennial Review Remand Order. And you have seen a rather
17 enormous amount of briefing already in the prehearing
18 briefs as well as a lot of testimony concerning what that
19 FCC order means and how it should be implemented. A
20 number of states have taken up this issue already and have
21 dealt with some of these issues in different ways,
22 frankly.

23 The issue is very critical to NuVox, McLeod
24 and XO, and I think all CLECs in Missouri, because the
25 bottom line is that what the FCC was doing was saying

1 there are UNEs that have been available since the Telecom
2 Act passed, and in certain places those are not going to
3 be available anymore for carriers to provide high-capacity
4 loops, that is DS1 or DS3 loops, and transport at the DS1
5 and DS3 level.

6 For the companies I represent, using DS1
7 loops along with their own switching and other equipment
8 as well as using those transport routes is fundamental to
9 their businesses. They provide primarily services to the
10 smaller business market, and the use of those loops and
11 that transport is critical to them.

12 So the fact of whether that loop is going
13 to be priced at a TELRIC rate as a UNE or the TELRIC
14 offering is no longer available and the price goes up
15 substantially is of critical importance to their ability
16 to serve. Most of these companies -- all three of these
17 companies provide services using an arrangement known as
18 an EEL, an enhanced extended link, which involves the use
19 of the UNE combination of loops and transport to provide
20 their services to small businesses primarily.

21 So when a transport route or a loop route
22 become delisted, the impact is either they have to get it
23 somewhere else or they have to pay what is a much, much
24 higher rate that AT&T would charge if they're not required
25 to offer it as UNEs.

1 Now, in this FCC order, there's no dispute
2 from us, I think from anyone, that the FCC did remove a
3 number of unbundled network elements from the list of what
4 had to be provided. But to put it in context, what the
5 FCC was doing was saying, we want to take an approach that
6 says where we can really find the CLECs are no longer
7 impaired, the CLECs -- there's enough competition out
8 there, vibrant competition that we can count on there
9 being loops and transport being made available from other
10 sources, those are the areas where we're willing to take
11 UNEs off the list of what's available.

12 It was a very targeted approach. In fact,
13 they targeted the approach specifically to wire centers,
14 that is the central office or wire center area, there are
15 several of which in every city. And they were very clear
16 about what circumstances under which wire centers would
17 come off the list for different unbundled elements. And
18 there are different tests for when DS3 higher level
19 transport is no longer available as a UNE versus DS1
20 transport, different tests for when DS3 loops or DS1
21 loops.

22 And the primary focus is, DS1 loops and DS1
23 transport have to meet higher standards, there have to be
24 more assurances of competition because those are so
25 fundamental to the business plan of some of these CLECs.

1 And as you've seen in the briefs and in the testimony, the
2 FCC laid out tests that relied on business lines and it
3 relied on fiber-based collocators.

4 And what the FCC was saying is, we can't
5 say, that is we, the FCC, are not determining that in a
6 particular wire center we can say for certain whether
7 there is enough competition. They didn't do a competition
8 test. That isn't the indicator that they decided to use.
9 They decided that if there were a sufficient number of
10 business lines served in a wire center area and there were
11 a sufficient number of fiber-based collocators in that
12 wire center area, that that was an indicator, a proxy, the
13 words they used, of there being sufficient competition.

14 Just to put this in context, I'm going to
15 read you one part of that FCC order. It's paragraph 93.
16 They said, we've weighed carefully a variety of actual
17 competitive indicia for determining impairment and
18 determined that the best and most readily administered
19 indicator of the potential for competitive deployment is
20 the presence of fiber-based collocators in a wire center.
21 We also determined that business line density in a wire
22 center is a useful tool to infer where carriers are likely
23 to have collocated with fiber and thus a measure of where
24 competitors are capable of duplicating the incumbent LEC's
25 network. Both of these measures constitute proxies for

1 where sufficient revenue opportunities exist to justify
2 the high fixed and sunk cost of transport deployment.

3 The reason I read that paragraph to you is,
4 it's important to remember as we debate what these terms
5 mean, what it was they were trying -- the FCC was trying
6 to accomplish by using these as proxies. The presence of
7 fiber-based collocators and a high number of business
8 lines was to show where competitors are capable of
9 duplicating the incumbent LEC's network.

10 And in further paragraphs in the order, for
11 example in paragraph 161, 167, I won't read those to you,
12 but you'll find references to the FCC saying, if there are
13 enough fiber-based collocators there and there's enough
14 business line density there, we can be pretty confident,
15 even though we don't know for certain, we can be confident
16 enough that there are CLECs actually laying their own
17 fiber and building fiber rings in these locations.

18 And a fiber ring is important because it
19 can provide transport between places, and if a fiber ring
20 is in a downtown area, it's a lot easier, less -- more
21 economically possible for a CLEC to build a lateral fiber
22 off that ring to serve, to provide its own loops.

23 So what they were trying to measure was,
24 are people out there in this wire center, are they
25 building their own loops? Are they building their own

1 transport routes? And they figured that a fiber-based
2 collocator is somebody who is doing that. And if there's
3 enough business -- but even if there are fiber-based
4 collocators, we also want to look at business lines. Is
5 there enough business line density that we feel confident
6 that there's enough business out there, enough as the FCC
7 said in paragraph 93, enough revenue opportunities to
8 justify the high fixed and sunk costs of transport
9 deployment? Because the FCC recognized in a lot of places
10 it's simply not economic, and where it's not economic the
11 CLECs remain impaired.

12 That's what the FCC was trying to measure,
13 and their confidence in their proxies depended on those
14 proxies being implemented, looked at and implemented in a
15 way that actually tests what they meant to be testing.

16 Now, our concern, if I can state it in one
17 generality, with the way that AT&T has interpreted these
18 rules and produced its list is that in counting business
19 lines the way they have, and in counting fiber-based
20 collocators the way they have, not only do we believe it's
21 legally inconsistent with what the FCC said in its rules,
22 but it's functionally inconsistent with what the FCC was
23 trying to achieve.

24 Let me explain that in the context of both
25 of those rules. On business lines, as I mentioned, the

1 FCC was looking for locations where there is business line
2 density that can produce revenue opportunities that are
3 sufficient to justify building your own transport or your
4 own loops. And if you look at paragraph 103 of the FCC's
5 order, they note carefully that it is business lines
6 they're talking about. Measuring all lines does not
7 produce a very good estimate of how much revenue
8 opportunity there is because the revenue opportunities are
9 more significant in the business market.

10 The last sentence in paragraph 103 they
11 note, further, business lines are a more accurate
12 predictor than total lines because transport deployment
13 largely has been driven by the high bandwidth and service
14 demands of businesses, particularly in areas where
15 business locations are highly concentrated.

16 When they said business lines, they
17 actually meant business lines. It's not simply a debate
18 about what the words in the rule say, but the entire
19 purpose of using business lines and rejecting the use of
20 all lines was a focus on business line density.

21 Now, there are three separate disputes on
22 the business line issue that we've identified in the
23 issues list. One is about basically what I just
24 mentioned, the use of all lines versus just the business
25 lines. That is when you count UNE loops. Is the FCC

1 asking state commissions as they implement the rule, and
2 AT&T as it does its counting, to count everything that can
3 sweep in things that aren't business lines, or to focus on
4 business lines, which is the entire focus of the reason
5 they came up with the proxy in the first place and what's
6 in the rule?

7 The second issue is one about the way in
8 which the rule is interpreted, which would have -- would
9 provide AT&T, frankly, an opportunity to increase the
10 business line counts dramatically. And, of course, if you
11 increase the business line count dramatically, your
12 chances of having a UNE picked off the list increase
13 dramatically.

14 This issue is one that comes at the very
15 end of the FCC's rule. That is at -- it's 47 CFR 51.5
16 where the business line definition is provided. They
17 define what a business line is supposed to be and what's
18 supposed to count, what's not. And then at the end they
19 say, when you're counting these business lines, among the
20 requirements that we've already identified, if you run
21 into a DS1, that can -- I'll just read it so I won't
22 misstate it.

23 Says, among these requirements business
24 line tallies, and one of the -- Part 3, shall account for
25 ISDN and other digital access lines by counting each

1 64 kilobit per second equivalent as one line. For
2 example, a DS1 line corresponds to 24 64 kilobit per
3 second equivalents and, therefore, to 24 business lines.

4 Now, this example of how you do this if you
5 run into a DS1 line, a digital line that has -- that can
6 be counted as 24, wasn't an instruction to ignore
7 everything else in the rule. It wasn't an instruction to
8 just take anything that is a DS1 and count it as 24
9 because everything else in the business line rule
10 indicates you're really just supposed to count lines.

11 In fact, when the FCC counts business
12 switched access lines for the incumbents in its ARMIS
13 reports that you see referenced in the briefs and in the
14 FCC's order, that's how they're done. Let me give you an
15 example of how this works. If you're serving a small
16 business, for example, and they buy a DS1, they could be
17 serving 24 switched business access lines.

18 But in the real world it's much more likely
19 that they're serving some combination of business switched
20 access lines and using the rest for non-switched data.
21 That bandwidth capacity is being used for a mix of
22 switched access lines and non-switched data, and the FCC
23 is talking about counting business switched access lines.

24 And the rule does not require anyone to
25 ignore the fact that that's the case. In fact, this may

1 sound somewhat familiar, and the Commission looked at this
2 issue in Case TO-2004-0207. There was an issue in that
3 case about the extent to which DS1 or digital capacity was
4 used to serve voice or data, and the Commission's finding
5 was, it is a reasonable cutoff point to say that on
6 average 11 lines are being used for business switch
7 services, and the rest is being used for data.

8 So if you want to look at reality, and it
9 was even -- there was testimony from SBC witnesses back
10 then that CLECs are using these DS1 lines and are only
11 serving a few voice lines on it. And yet now that they
12 have an opportunity, they think, to count all 24, they're
13 seizing on it, and it simply doesn't reflect reality.

14 A very recent decision from the Oregon
15 Commission came out March 20th recognized this point.
16 We've quoted it in the brief. Let me just say, it most
17 closely reflects current real world circumstances, to not
18 count what might be used but count what's actually being
19 used. And Mr. Gillan's testimony provides a way to do
20 that. The Commission has ruled on the issue before as to
21 what's an appropriate threshold for finding what is
22 business switched access lines.

23 The last issue is what data should be used,
24 what vintage of data that is. And this is another issue
25 where I think the Oregon Commission's admonition that in

1 ruling on these issues the state commission should look at
2 what reflects current real world circumstances has another
3 application.

4 The business line standards, the criteria,
5 the 38,000 business lines or 60,000 business lines, those
6 were picked by the FCC after they reviewed data they
7 requested from the Bell operating companies, including
8 former SBC, now AT&T. They said, give us information on
9 business lines, and it became a very important input to
10 what the FCC decided.

11 They relied on that -- that data was
12 vintage 2003 at that time. That was the most recent
13 available when the TRRO came out. They relied on that
14 data to set the thresholds. That's what the FCC seemed to
15 understand were the proper thresholds given the business
16 line density data they've been provided by the BOCs.

17 Now, in the FCC's order, when they set the
18 business line thresholds, they also pointed to -- and this
19 is in paragraph 105, Footnote 303. They said, as you
20 prepare this stuff, they pointed to the ARMIS instructions
21 for gathering business line data for 2004, which would be
22 when the next year's was going to be available.

23 So the FCC itself didn't indicate that it
24 was beholden to the use of this 2003 data. In fact, they
25 pointed to the 2004 instructions. But AT&T has taken the

1 position that the 2003 data is the only data that can be
2 used, but not the 2003 data as the FCC reviewed it, the
3 actual numbers that the FCC relied on when it set the
4 thresholds. Rather, they want to take the 2003 data, run
5 it through their interpretation of the business line rule,
6 and then use that.

7 Well, not surprisingly, given the business
8 interests involved, that number is a lot higher than what
9 the number looked like when the FCC ruled. Their
10 interpretation of the business line rule drives that
11 number up. They want to base it on 2003 data, but not
12 exactly the same information, the same numbers the FCC
13 looked at.

14 Now, the CLECs' suggestion here is, or
15 primary suggestion is use the 2004 data because it's more
16 updated. It more closely reflects current reality. And
17 as Mr. Gillan's testimony points out, it's direct at
18 page 19, there have been significant decreases, there's
19 been a 26 percent decline in the amount of unbundled
20 network element loop or UNE-L lines since 2003, a
21 44 percent decline in UNE-P, a 3 and a half percent
22 decline in the ILECs' business switched access lines.

23 The line numbers have been coming down
24 since 2003. So if you use 2003, you're looking at a high
25 tide of business line numbers. Using 2004 gets us closer

1 to the reality. And as I say, there is nothing in the FCC
2 order that prohibits the Commission from using more
3 updated data. There is a federal court case that has
4 reviewed this issue. States have come out different ways.
5 Federal court case in Michigan that just -- I brought
6 copies of it. It just came out, I believe, last Friday,
7 in which the Michigan Commission was affirmed for holding
8 that the 2004 data could be used. The federal court said
9 there's nothing in the FCC's order that insists 2003 data
10 be used. This is also consistent with what the Oregon
11 Commission decided month before last.

12 Now, I'll tell you, there are -- many
13 states have gone the other way on these business line
14 issues. A number have. But on the other hand, as I
15 mentioned, Oregon, North Carolina. There's an ALJ
16 decision which has been sitting for a while, not affirmed
17 by the Commission, but an ALJ decision in Oklahoma which
18 agrees with the CLEC Coalition position.

19 The court cases that have dealt with this,
20 the Michigan case affirmed the CLEC position on the
21 vintage of the data. It went with AT&T on the -- whether
22 they can use all UNE loops. And a Texas case also went
23 with AT&T on that issue as well, as well as the digital
24 equivalency issue. So the court decisions are rather
25 mixed. The state commission decisions are mixed. And we

1 would ask the Commission to look at this, exercise your
2 judgment, and take -- make the decision that reflects,
3 No. 1, what the FCC was looking for in the first place
4 with business line density, and No. 2, what most closely
5 reflects reality.

6 On the fiber-based collocator issues, the
7 record in prior state commission hearings is somewhat
8 different. AT&T correctly points out the Ohio Commission
9 agreed with them on their primary position on fiber-based
10 collocator, but their position's been rejected by Texas,
11 New Hampshire, Kansas, Michigan, Illinois, the same
12 Oklahoma ALJ report.

13 In fact, in the former BellSouth states
14 this was not even an issue, this dispute we have here,
15 because BellSouth didn't even try to interpret the rule in
16 the same way when the issues were disputed there. And the
17 Michigan decision that I mentioned recently affirmed the
18 Michigan Commission's decision to reject AT&T's position
19 on fiber-based collocator.

20 There's a very good reason why almost
21 across the board this position's been rejected. As I said
22 earlier, what the FCC was looking for is -- a fiber-based
23 collocator is someone who is providing an alternative to
24 transporter loops. Their existence provided evidence to
25 the FCC that there was enough activity in that wire center

1 that it was getting people an economic bases to build
2 their own transport, build their own loops.

3 Now, most every carrier, most every CLEC
4 carrier, competitive carrier will collocate, put its
5 equipment in the central office of the incumbent. That's
6 often done. But the FCC didn't say count every collocater
7 that's in a central office, because they weren't trying to
8 figure out if there was enough economic justification for
9 collocation. They were trying to figure out if there was
10 enough economic justification for people to go out and lay
11 their own fiber in those areas.

12 And so they said, we want to look at
13 collocators, but we want to look at fiber-based
14 collocators because if people are out there putting fiber
15 in, then that indicates to us that there is economic
16 justification for duplicating the AT&T transport network,
17 that there's enough economic justification for going out
18 and building rings in these cities that laterals can be
19 built off to big buildings to provide a duplicate system
20 of loops. That's what they were trying to find.

21 And I'll tell you that the Michigan federal
22 court in finding that the Michigan Commission was correct
23 in rejecting AT&T's argument cited paragraph 96, paragraph
24 98, paragraph 161 of the FCC's order noting that the AT&T
25 argument doesn't tell you anything about whether in a

1 particular wire center a CLEC can surmount the high cost
2 of fiber deployment. Why is that? Because here's what
3 the collo to collo cross connect argument contends. It
4 contends that if there is a collocation and there's --
5 let's say a legitimate fiber-based collocator. We
6 wouldn't argue with it. Nobody would argue with it.
7 There's collocation. There's fiber coming in and out.
8 That CLEC's terminating fiber. The fiber's coming in and
9 out of the office. No problem. We all agree that's a
10 fiber-based collocator.

11 But then you've got another collocator that
12 has equipment in the central office, but it doesn't have
13 any of its own transport network, but it wants to buy --
14 it wants to ride on the network of that other carrier,
15 just like collocated carriers may want to buy transport
16 from SBC, from AT&T, or lease loops. They've decided, I'm
17 not going to lease from AT&T. I'm going to lease from
18 this new guy. They connect their equipment to that fiber,
19 and they're permitted to lease a service, a DS3 transport
20 service, a DS1 transport service, a loop. That carrier is
21 providing something for them, a service. All that that
22 second collocator has is a cross connect into their
23 transport network.

24 The existence of that CLEC doesn't tell
25 this Commission anything about whether there's enough

1 competitive activity to justify a number of fiber networks
2 being built. Remember, the FCC didn't say it was enough
3 that there's one more. They said in order to really
4 justify eliminating unbundling, there needs to be four or
5 three, depending on the different services.

6 So in AT&T's world, there could be one
7 fiber-based collocater, three other carriers using its
8 services and hooked up to it, and that qualifies as four
9 fiber-based collocaters. It's really -- it's a daisy
10 chain. And I think to put it in some context, I flew in
11 from Texas. When I drove to the airport, I was operating
12 my car. No dispute. When I got on the plane, I wasn't
13 operating the plane. I was riding on the plane.

14 Similarly, the FCC rule says, if you are a
15 fiber-based collocater, you have to operate the fiber
16 cable. Well, the carrier isn't operating the fiber cable
17 that leaves the wire center and goes out into the world.
18 They're using it. They're riding on it. They're leasing
19 it. But when that cable breaks, do they have to go out in
20 the rain and fix it? No. They call the landlord. They
21 call the owner. They say, we had a fiber break. You've
22 got to fix that.

23 If they decide -- if they attract a big new
24 customer, and they have a one-year lease for DS1 capacity
25 and they say, let's crank that up to DS3 tomorrow, well,

1 the guy who owns the cable can go, wait a minute. We've
2 got a contract. If you want to renegotiate your lease,
3 you want to renegotiate what you're purchasing from me,
4 we'll talk about it, but you can't just crank up the
5 capacity.

6 AT&T has to argue that anybody who uses
7 competitive fiber is operating it, and it becomes a rather
8 abstruse argument on what the word operate means, which
9 obviously we'll talk about in cross. But I think the
10 common sense solution, and I think the one that the
11 Michigan federal court and most state commissions have
12 reached is that is not operation.

13 I don't operate the Southwest Airlines
14 flight because I'm riding on it. Yeah, I get the -- I've
15 got power. I can transport myself from Austin to
16 St. Louis. That doesn't mean I'm operating the airplane.
17 I have a right to a seat. I can buy an upgrade. That
18 doesn't mean I'm operating the airplane.

19 The collocated CLEC who is just cross
20 connected to someone else's services not operating that
21 fiber cable.

22 And the argument -- another argument on
23 fiber-based collocators which is in service of the
24 collocated cross connect argument is that the FCC said you
25 don't just have to look at fiber, you can look at a

1 comparable transmission facility. That can qualify. If
2 you look at the FCC's order, they said, you know, there
3 may be fixed wireless that should qualify here. For
4 example, if someone has found a way to, instead of
5 building a competitive transport network using fiber, they
6 can do it with a fixed wireless device attached to the
7 wire center, go get them tiger. That's a great way to
8 deploy. We want to see that. So that can qualify, too.

9 Well, AT&T has taken that and said,
10 actually, they mean any -- anything that basically
11 connects the cross connected collocater to the guy who
12 really has the fiber. Usually those kind of connections
13 are made with coaxial cable, which has a maximum capacity
14 of DS3. The kind of fiber transport networks we're
15 talking about go up to OC192, which is a whole lot bigger
16 than DS3. There's really no comparison.

17 And yet they want to say, well, that jumper
18 that goes from his collocation to his collocation so he
19 can ride that fiber, that's a comparable transmission
20 facility to fiber that runs around the city. They're
21 really comparable. Well, they have to say that because
22 it's the only way they can make the daisy chain work.
23 It's the only way they can link the guy who's really got
24 the network to the guy who doesn't and try to make the guy
25 who doesn't running -- he's running a transmission path.

1 It simply doesn't work.

2 The final issue on the fiber-based
3 collocator is the question of whether NuVox, one of the
4 members of the CLEC Coalition, is a fiber-based
5 collocator. The reason NuVox was signaled out I think as
6 a special issue is, as in many of these issues in this
7 case, the real fights are at the borders.

8 For example, if there is a wire center in
9 St. Louis that has -- and I'm just -- I'm not telling you
10 any confidential information. I'm making a hypothetical.
11 If it has 12 fiber-based collocators and we contend that
12 the fiber-based collocation argument they're making should
13 reduce that number by two, it's still got 10. It's still
14 going to come off the UNE list. No dispute.

15 But the difficulty is where you're at that
16 borderline between if you have three fiber-based
17 collocators versus four. If there's four there, that
18 means the CLEC can no longer get DS1 transport, which, as
19 I mentioned at the beginning, is one of the critical
20 inputs to the EEL arrangement that they use to serve small
21 business. So where it's close, that's where you see the
22 fight. There's an office where it's close involving
23 NuVox.

24 AT&T's only allegation about NuVox being a
25 fiber-based collocator is that it qualifies because of

1 this cross connect argument. So if you believe the cross
2 connect argument, which we urge you not to, that's the
3 basis for their argument. NuVox filed an affidavit in
4 response to Staff's investigation, said we're not a
5 fiber-based collocater. We're cross connected. We use
6 competitive fiber there, but we don't -- we don't operate
7 a fiber cable.

8 NuVox's affidavit said there was a carrier
9 who they used there. That carrier is not named. If the
10 Commission wants to find that carrier, about which there's
11 no other evidence, but based on that affidavit, if they
12 want to find that carrier counts instead of NuVox,
13 there's -- Mr. Cadieux' affidavit from NuVox is very
14 straightforward about it. But there was no other
15 investigation of that carrier as to whether they qualify
16 or not.

17 But NuVox itself is not a fiber-based
18 collocater in any case because they are nothing else than
19 connected over to that other carrier.

20 Now, there's one other issue -- well,
21 there's three other issues on the issues list. They have
22 to do with the specific wire center designations, and all
23 these methodology questions I've been discussing, all
24 these disagreements we have about how you apply the rule
25 have various impacts on the counts. And we filed with our

1 brief Mr. Gillan's Exhibit JPG-9 which provides to you our
2 view of here's what AT&T identified, here's how it should
3 be corrected, and here's what the outcome should be. And
4 there were changes in, particularly in transport. There
5 were a lot of offices where even if you implement the
6 correct methodology, it's not going to change that the
7 UNEs go away.

8 But it's critically important going forward
9 and for this first approved state approved list that the
10 Commission approve an appropriate methodology. So those
11 issues feed into this question of are the lists AT&T came
12 up with appropriate. And our contention is they are not
13 appropriate given the methodological errors, and like
14 several states have done, particularly on fiber-based
15 collocators, AT&T should be sent back to the drawing board
16 to correct that error and only then should the list be
17 approved.

18 But there's another issue that's arisen,
19 and it only arose after AT&T filed its testimony in this
20 case, and that is whether there should be approval of
21 several wire center lists. And in the states in which the
22 CLEC Coalition has been involved in these cases, the issue
23 is, is the AT&T wire center list approved or not? Should
24 it be corrected? As I mentioned, in most of the states
25 fiber-based collocator, it's got to be corrected, in some

1 cases business line it needs to be corrected, but that's
2 the question.

3 Here, though, for the first time that we're
4 aware of, there's a request to approve an old list and a
5 current list, and here's why. In March of 2005, the FCC
6 issued its order, or the effective date of its order is
7 March 2005, and AT&T put out a nationwide list that said,
8 okay, we've counted. Here's all the fiber-based
9 collocator -- well, they didn't say that actually.

10 They didn't tell us who the fiber-based
11 collocators were. We didn't get the business line
12 numbers. They just issued a list that said, here's all
13 the Tier 1 wire centers, here's all the Tier 2 wire
14 centers, and here's all the Tier 3 wire centers based on
15 our counting.

16 That was before we knew that they were
17 doing this collo to collo cross connect business. That's
18 before we knew exactly how they'd interpreted the rule,
19 because these state commission cases that have actually
20 fleshed out the facts in the interpretations hadn't been
21 tried yet. But that list came out. That list was never
22 approved in Missouri.

23 Then in December of 2005, AT&T and SBC
24 merged, finalized their merger. That merger had been
25 announced, I think, near the end of the year before, but

1 the merger was finalized in December 2005. AT&T and SBC
2 had to get approval from the FCC for the merger. There
3 were a lot of people saying there's anti-competitive
4 effects of AT&T -- AT&T's one of the biggest competitors
5 out there. They're going to merge with SBC, and that's
6 going to be a bad thing.

7 Well, one of the things the FCC
8 incorporated into its order and stated, and it's cited in
9 our brief, that they took comfort from in approving the
10 merger was a voluntary commitment that SBC made that when
11 it identified fiber-based collocators, it wasn't going to
12 identify old AT&T collocations anymore.

13 That was a big deal, because AT&T was a
14 large competitor, AT&T had a lot of legitimate fiber-based
15 collocations, and so when those came off the list, it
16 substantially changed the wire center list for TRRO
17 purposes. And the FCC adopted that as part of their
18 order. So AT&T issued a new list in December of 2005 to
19 make those changes.

20 Now, that list, just to give this in
21 shorthand, that had nine Tier 1 wire centers on it for
22 Missouri. That is when the AT&T collocations were
23 removed. The previous list had 12. So it shows there was
24 a significant impact of taking the old AT&T off the list.
25 We went from 9 wire centers -- or rather from 12 wire

1 centers that are Tier 1, which means no DS1 transport for
2 CLECs, down to 9.

3 Now, I certainly thought as NuVox initiated
4 this case and McLeod and XO joined the case that we were
5 talking about, what we were disputing here was the list
6 that came out in December 2005. That was what AT&T called
7 its updated wire center list. That's what it was
8 claiming, where it was claiming there was no impairment
9 after that merger was completed.

10 When Staff did its investigation, which --
11 and they sent out affidavits to all the CLECs that had
12 been identified as fiber-based collocators, did a good
13 investigation that yielded a lot of data that's been very
14 critical to the case, they investigated the December 2005
15 list that had those nine Tier 1 wire centers.

16 In its testimony, however, AT&T says, well,
17 no, we need to go back and we need to have our first list
18 approved, the list that still has AT&T -- old AT&T
19 collocations listed, which remember now, those now belong
20 to new AT&T. And the FCC's fiber-based collocator rule
21 makes one thing real clear. You can't count two if
22 they're affiliated with each other. You certainly can't
23 count fiber-based collocation that's owned by the
24 incumbent.

25 So as of today, that first list is

1 complete -- is based on wire centers where old AT&T is
2 listed as a fiber-based collocater. And they're asking
3 for approval of that first list, which was never
4 investigated by the Commission. It was not subject to the
5 approval process. But the reason they want that one
6 approved is, they say in their testimony, that, well,
7 there was that period before the merger closed when we
8 ought to get paid extra, we ought to be able to charge
9 special access higher rates for that period before the
10 merger closed.

11 Well, the merger condition said, in
12 identifying fiber-based collocators AT&T will no longer
13 identify the old AT&T ones. Now, think about that for a
14 minute. Remember the FCC relied on this in its merger
15 approval. The day that merger closed, AT&T, old AT&T and
16 SBC were affiliates. They were the same company
17 essentially the day the merger closed in December 2005.
18 They couldn't count AT&T anymore going forward.

19 And yet they say that their merger
20 commitment only has prospective effect. Well, the rule
21 itself precluded them from counting them going forward.
22 So seems like it needed to be the list that already
23 existed, the ones that they put out before the merger.

24 When they put their new list in December
25 after the merger they said, here's our updated list. It

1 reflects the merger commitment. And it took those old
2 ones off.

3 So this has been postured so far as, well,
4 we just -- for that nine-month period between March and
5 December, we need -- we need to get back those wire
6 centers on the list. Problem is, your Honor, when we saw
7 the surrebuttal testimony, which was filed after we filed
8 our briefs, it appears that Ms. Chapman, AT&T's witness,
9 is saying that those 12, those are Tier 1 wire centers,
10 present tense.

11 And it raised the concern that we had not
12 had until this time that perhaps what AT&T is really
13 asking is that you approve the old wire center list
14 because it's going to be the new wire center list when the
15 merger condition expires at the end of this year. That
16 what AT&T is actually asking you to do in approving the
17 old list is creating a situation where you've approved
18 that old list with 12 Tier 1 wire centers that all
19 include -- that don't all include, but many of which
20 include old AT&T collocations.

21 The merger condition had a two-year limit
22 on it. I think most assume that we were operating from
23 the new list from now on, but it appears that maybe AT&T
24 has a different view, and that when you approve the old
25 list you're actually in the process of approving a list

1 that applies after the merger condition, which would allow
2 them to add back in AT&T collocations that have belonged
3 to the new AT&T now for two years.

4 And if there is anything that would not
5 reflect reality, it would be that. This issue has
6 posed -- not this specific issue, but the issue of whether
7 AT&T and SBC should be counted together was posed to the
8 Georgia Commission back in 2005 before the merger closed,
9 and they said, wait a minute. We're not going to make a
10 finding that is contrary to reality.

11 And in establishing multiple lists, that is
12 what this Commission would do. So we urge you, as other
13 states have done, to produce one list and a list that's
14 based on AT&T's updated December 2005 list, not just
15 because there's a springing back, but there's a potential
16 springing forward that would make the list reflect reality
17 even less than it does now and, in fact, give AT&T a
18 reason to say, a state commission has approved our old
19 list. The state commission must agree that we can use
20 that list once the merger condition's over.

21 That is a very large concern for us, not
22 only in Missouri, but in other states, and we urge you to
23 reject it. Thank you, your Honor.

24 JUDGE JONES: Thank you, Mr. Magness.
25 Mr. Gryzmala?

1 MR. GRYZMALA: Thank you, your Honor.

2 Before I get started, if you don't mind, I have a set of
3 illustrative exhibits I'd like to provide the Bench, which
4 illustrate the points that I will be making in opening.
5 All of these are referenced in the testimony of our
6 witnesses. May I approach?

7 JUDGE JONES: Yes. Yes, you may.

8 MR. MAGNESS: Your Honor, I'm not sure
9 we've ever seen the first one in testimony. I think at
10 least all the information, but the map I don't --

11 MR. GRYZMALA: I stand corrected, your
12 Honor. I represented that all of these are in evidence.
13 What is in evidence is all of them technically except the
14 first page. What is in evidence with respect to the first
15 page is that there are 14 wire centers involved in this
16 case. This is merely illustrative of the particular wire
17 centers so that we can identify geographically where they
18 are and how they relate to the rest of AT&T Missouri's
19 wire centers.

20 JUDGE JONES: You mean this first page?
21 Just the first page?

22 MR. GRYZMALA: Yes, your Honor.

23 JUDGE JONES: And what you're saying is the
24 remaining pages are referenced in testimony?

25 MR. GRYZMALA: Yes.

1 JUDGE JONES: Do you have a problem with
2 him just using this for illustrative purposes?

3 MR. MAGNESS: Well, your Honor, I guess on
4 the first page I'm not sure because I'm not sure why
5 there's all these other areas of the state listed that are
6 not the wire centers. I mean, there must be some factual
7 point that he hopes to make about what's on this map that
8 was never made in testimony.

9 JUDGE JONES: He's not going to make any
10 factual points during his opening statement, and this
11 hasn't been offered for evidence either. So I don't -- if
12 you've got a problem with it, make -- make your point
13 whenever he comes across something that you find
14 objectionable.

15 MR. MAGNESS: Okay. Thank you, your Honor.

16 MR. GRYZMALA: Thank you, your Honor,
17 Commissioner Murray. Good morning. My name is Bob
18 Gryzmala. I represent AT&T Missouri in this case. In a
19 nutshell, I want to take the opportunity to summarize our
20 position in this matter.

21 We ask the Commission to approve the
22 methodology we used to implement the FCC's February 2005
23 TRRO, Triennial Review Remand Order, and we ask the
24 Commission to approve the resulting designations we made
25 of wire centers meeting the FCC's non-impairment

1 thresholds for transport and high-capacity loops. That is
2 what we are asking the Commission to do.

3 By way of background, I just want to set
4 this stage if I may, as did Mr. Magness, for our view of
5 why this case is important and why we ask the Commission
6 to rule as we do. As you know, the federal law, the
7 Telecommunications Act conditions a CLEC's access to UNEs
8 at depressed wholesale TELRIC rates on the concept of
9 impairment.

10 Section 251 directs the FCC to consider
11 whether in determining whether a UNE shall remain
12 available to a CLEC on an unbundled basis to consider
13 whether the failure to provide access to that network
14 element would impair the ability of the telecommunications
15 carrier to provide the services they seek to provide.

16 In other words, if a CLEC is impaired or
17 would be impaired in its ability to provide service
18 without having access to the UNE, here loop and transport
19 is what we're talking about, then the CLEC has a federal
20 right to access to that element at a low TELRIC rate, not
21 market based as it were.

22 The FCC struggled for years to implement
23 that concept, and after ten years and three remands from
24 the D.C. Circuit Court of Appeals and the United States
25 Supreme Court, came out with what it determined would be a

1 bottom line. It endeavored to settle and end a decade of
2 litigation over the concept of impairment and what it
3 endeavored to do in the past. The D.C. Circuit said the
4 fourth try is the charm, in those words, and affirmed the
5 TRO last year.

6 The FCC's order is very straightforward.
7 It adopts objective numerical counting tests to identify
8 non-impairment. That is when a reasonably efficient CLEC
9 can compete without access to the ILEC's UNEs like loop
10 and transport, either by building their own facilities, by
11 leasing them from someone else, or from purchasing them
12 from the ILEC, albeit not at TELRIC rates but at
13 commercial market-based rates.

14 The FCC's counting tests have thresholds or
15 triggers, as Mr. Magness explained, that govern when
16 access to high-capacity DS1 and DS3 loops and dedicated
17 transport is no longer required. These counting tests
18 simply count, as Mr. Magness correctly conveyed, the
19 number of business lines in a wire center and the number
20 of fiber-based collocators in a wire center.

21 The premise is that certain levels of
22 fiber-based collocations and/or business lines in a wire
23 center signal sufficient revenue opportunities to require
24 a CLEC to deploy their own network. Took ten years for
25 that signal to get across, and it got sent across in this

1 order.

2 Mr. Magness cited paragraph 93 of the
3 order. I don't have it with me immediately, but you will
4 see immediate reference to that, the reference to
5 sufficient revenue opportunities and duplicating the
6 ILEC's network.

7 Now, I want to step aside for just a moment
8 because Mr. Magness mentioned the fact that this issue is
9 very critical, this case is very critical to his and all
10 CLECs. I want to be careful to couch that in its proper
11 framework. The three CLECs which comprise this coalition
12 are not a substantial number of CLECs in the state of
13 Missouri.

14 Frankly, the TRO didn't give the CLECs all
15 they want, they had wanted. They did not -- the FCC's TRO
16 didn't give the ILECs all they want. ILECs wanted lower
17 non-impairment thresholds as a general rule. CLECs wanted
18 higher thresholds, higher triggers.

19 The FCC made the call it made, and AT&T
20 Missouri's implementation of this order will not at all
21 injure any of the coalition of three CLECs in this case,
22 though they may insinuate otherwise. The FCC's rules took
23 effect on March 11, 2005, given the FCC's decision after
24 multiple remands and reminders from the D.C. Circuit that
25 they take effect promptly.

1 AT&T Missouri applied the FCC's rules and
2 based on the numeric counts designated several wire
3 centers and associated routes as non-impaired effective as
4 of the effective date of the TRRO, which is March 11, all
5 based on the latest information that AT&T Missouri had at
6 that time.

7 The Commission Staff has determined based
8 upon its own over 50 Data Requests to my company and its
9 independent investigation and CLEC verification through
10 affidavits, sworn affidavits through CLECs across the
11 state, that, quote, all of the wire centers identified by
12 AT&T meet the non-impaired criteria as defined in the TRRO
13 for interoffice dedicated transport and loops, end of
14 quote.

15 Now, the CLECs argue that we implemented
16 the counting tests wrong, but it is they who are wrong.
17 Their arguments attempt to end run an FCC order they do
18 not like and to fuzzy up what is otherwise a
19 straightforward counting exercise, and we will show you
20 examples.

21 And the reason is simple, for the same --
22 Mr. Magness made the point that we at AT&T Missouri have
23 every incentive to drive up the counts because the result
24 is to declare more loops non-impaired, more routes
25 non-impaired. They would like to lower the counts so as

1 to have fewer routes declared non-impaired, so as to have
2 fewer loops declared non-impaired.

3 Let's talk about the counting test for just
4 a moment. To determine whether -- to determine whether a
5 wire center is non-impaired for purposes of loops, the FCC
6 established a conjunctive test. The wire center must have
7 a minimum of business lines and they must have a minimum
8 number of fiber-based collocators in that wire center.
9 It's both. For example, the test for DS3 loops, of which
10 we have three wire centers in this case, is four
11 fiber-based collocators and 38,000 lines. You've got to
12 ring both bells.

13 For dedicated transport, the test is a
14 disjunctive test, however, an either/or test. The wire
15 center must have either a certain minimum number of
16 business lines or a certain minimum number of FBC, as it
17 were, fiber-based collocators. As an example, for a
18 Tier 1 wire center, there must be at least four FBCs or
19 38,000 lines.

20 Let's talk about the wire centers in this
21 case. The very first item I conveyed to you is just to
22 give you a visual of what wire centers we're talking about
23 here. The wire centers meeting the FCC's non-impairment
24 thresholds which we identified are 14 in all among the
25 over 200 AT&T wire centers in the state. All 14 are in

1 dense business districts in Missouri, eight in
2 St. Louis, three in Springfield and three in Kansas City.
3 As a -- these are the wire centers to which AT&T applied
4 its counting methodology.

5 The second item I have is basically the
6 designations that were made by AT&T Missouri, and I'll try
7 to get through this briefly, but the upshot of this is
8 that there are 14 wire centers that AT&T Missouri
9 designated as non-impaired for transport purposes. It is
10 important to --

11 MR. MAGNESS: Your Honor, I object. Is
12 this Table 1? I can't see it.

13 MR. GRYZMALA: Yes, sir.

14 MR. MAGNESS: There are five offices --
15 four offices rather that are listed as no dispute.

16 MR. GRYZMALA: Can I present my opening
17 argument? I haven't made --

18 JUDGE JONES: I told him if he had a
19 problem with what you were doing, he could object, so I'm
20 going to let him.

21 MR. MAGNESS: Any factual allegation that
22 those offices are not in dispute is incorrect and not
23 supported by the evidence. So using this as a
24 demonstrative is -- I mean, we want at least a right to
25 respond if they're going to be allowed to use it, because

1 it's not correct.

2 MR. GRYZMALA: Your Honor, may I respond?

3 JUDGE JONES: To what he just said? Yes,
4 you may.

5 MR. GRYZMALA: This is in direct testimony
6 of Ms. Carol Chapman. It's subject to cross-examination.

7 JUDGE JONES: Well, in that case, why are
8 we looking at it now to look at it again?

9 MR. GRYZMALA: We can do without. It just
10 helps explain what the evidence will show.

11 JUDGE JONES: Let's see the evidence when
12 we see it.

13 MR. GRYZMALA: Okay. We believe that our
14 evidence will show, and it's important for the Commission
15 to note, that even under the test that the CLECs advance,
16 they would not dispute the 13 of the 14 Tier one wire
17 centers which we designate as non-impaired for transport
18 purposes on March 11, 2005 were properly designated at
19 that time.

20 To Mr. Magness' point just now, there are
21 five wire centers which were designated as Tier 1, not to
22 get ahead of myself, there are 5 of 14 that were
23 designated as Tier 1 in March of 2005 which were
24 redesignated, upgraded, updated to Tier 2 because they
25 were -- because of a commitment made to the FCC that we

1 would, as Mr. Magness indicated, no longer count them as
2 fiber-based collocators.

3 As I told you in the transport test, you
4 have to have a -- rather, you have to have a number of
5 collocators or business lines. If you have insufficient
6 business lines, you have to look to the fiber-based
7 collocators. If your fiber-based collocator count drops
8 from four to three, as it did as a result of the AT&T
9 merger, that caused the update in December. That is the
10 five which Mr. Magness is referring to just now.

11 I would again insist that our evidence will
12 show that 13 of 14 of these wire centers are not in
13 dispute with regard to whether they met in March of 2005
14 the FCC's non-impairment test for transport.

15 Even as to the lone wire center with
16 respect to transport, there was some discussion about
17 NuVox. Mr. Magness presents this as a collo to collo
18 cross connect dispute. We do not view the NuVox fact
19 pattern in the lone wire center involved for transport as
20 being a cross connect collo to collo dispute. We believe
21 it is a legitimate fiber-based collocator.

22 I want to turn briefly to the three wire
23 centers and only three of all of the wire centers in this
24 state that were designated for DS3 loop impairment
25 purposes. No wire centers have been deemed impaired for

1 DS1 loop purposes. Of these three for DS3 loop purposes,
2 there is Kansas City McGee, St. Louis Ladue, St. Louis
3 Chestnut. Two of these three offer absolutely no dispute,
4 whether under our view of the methodology employed or the
5 CLECs' view of the methodology employed. Putting it
6 crassly, using our numbers or their numbers, it doesn't
7 matter. Two of the three are undisputedly remaining
8 non-impaired for purposes of DS3 loop.

9 The only one which is an issue or could be
10 an issue were this Commission to buy the CLECs' business
11 line argument, would be St. Louis Chestnut. We believe
12 that should not happen, that all 14 transport designations
13 should be sustained, and that all three DS3 loop
14 designations should be sustained.

15 The issue -- the issues, and I'll try to be
16 brief and get through them relatively quickly. We, as
17 Mr. Magness pointed out, have exhaustive and comprehensive
18 briefs on the subject, but there are a few highlights that
19 we want to point out.

20 With regard to the issue, do you count all
21 UNE lines or do you count only business lines? The rule
22 says what the rule says. AT&T counted all UNE lines. The
23 rule says that we are to add -- well, let me strike that.
24 I'll read exactly what the rule says. The number of
25 business lines in a wire center, Rule 51.5, shall equal

1 the sum of all incumbent LEC business switched access
2 lines -- notice the word business there, and here's the
3 key point -- plus the sum of all UNE loops connected to
4 that wire center. Do you see the word business before
5 business -- before UNE loops? I don't.

6 AT&T Missouri did the math required by the
7 FCC, counted all UNE loops, but the CLECs say we should
8 have only counted business loops. The rule doesn't say
9 that. Paragraph 105 of the TRRO doesn't say that. And
10 frankly, it's important to note that NuVox and XO have
11 already admitted to the FCC that all means all in trying
12 to get the FCC to reverse its decision, and this
13 Commission should hold them to it.

14 In our testimony we cited the March 2005
15 Petition for Reconsideration that NuVox and XO filed with
16 the FCC, and in this excerpt -- whoops. Wrong board. In
17 this excerpt from their Petition for Reconsideration filed
18 March 28th, 2005, just a couple of weeks after the TRO
19 became effective, about six weeks after the FCC issued it,
20 certain adjustments inflate the ARMIS line counts. All
21 UNE lines are included regardless of whether they are used
22 to serve business or residential customers.

23 There's no lack of clarity in that rule.
24 Had there been, the FCC might have filed a petition for
25 clarification, tell us that the rule didn't mean what we

1 think it means. They knew exactly what it meant, and they
2 tried to convince the FCC to change it. They knew what
3 the rule required and they didn't like it.

4 It has been two years since the CLECs filed
5 that request, and the FCC has not changed a word. And
6 under the FCC's rules, 1.429 of the 47 CFR, an order of
7 the Commission remains in effect notwithstanding the
8 pendency of a petition for reconsideration. That is the
9 law.

10 This Commission should not accept the
11 CLECs' argument intended to end run the FCC's rule by
12 rewriting it. That's not playing by the rules. Finally,
13 to our knowledge, while Mr. Magness generally used the
14 word, I think, mixed when he talked about state commission
15 rulings on this point, to our knowledge, 12 of 14 state
16 commissions who have faced the issue have ruled in our
17 favor. All UNE-L means all UNE-L.

18 Mr. Magness has cited the Commission --
19 Michigan Commission as one of two commissions that went
20 his way, as it were. Last week the United States District
21 Court for the Eastern District of Michigan turned that
22 around, too. Federal District Court, Honorable Marianne
23 Battani wrote, with regard to the CLECs' interpretation,
24 quote, this interpretation ignores the plain language of
25 the regulation. If the FCC wanted to include only

1 business switched access lines, it would have said so.
2 The court declines to transform the unambiguous phrase all
3 UNE loops to mean only some UNE loops. Further support,
4 et cetera, et cetera.

5 That's not the only Federal District Court
6 decision. To my knowledge, there were only two. The
7 other is the Federal District Court in Austin, Texas,
8 where the Honorable Sam Sparks affirmed the Texas PUC's
9 ruling on the subject in favor of AT&T. UNE-L means all
10 UNE-L. The Commission should so hold.

11 Now, should the business line count for
12 digital UNE-L based on loops capacity or the way its
13 actually used? Clearly the rule requires a count based on
14 capacity. First, it says that business line tallies,
15 quote, shall account for ISDN and other digital lines by
16 counting each 64 kilobit per second equivalent as one
17 line. Shall means shall. Mandatory, directive language.
18 The rule says what it says.

19 Second, we told the FCC what we did, and
20 the FCC accepted it. Mr. Magness pointed out that prior
21 to the issuance of the TRRO, we and the other Bell
22 operating companies gave the FCC certain information. And
23 after, only after the TRRO was issued was it made plain
24 that the FCC required a capacity-based measurement,
25 sometimes called digital equivalency.

1 On the very same day that the TRRO was
2 issued, February 4th, 2005 -- and this is in the evidence
3 we will show to the Commission -- the FCC wrote us, on
4 February 4th the commission released its Triennial Review
5 Remand Order, et cetera, et cetera. We ask that you
6 provide to the bureau, the Wireless Bureau, or the
7 Wireline Competition Bureau, a list identifying which wire
8 centers in your company's operating area --

9 MR. MAGNESS: Excuse me, your Honor.
10 Mr. Gryzmala, where is this in the evidence?

11 MR. GRYZMALA: This would be rebuttal
12 Attachment CAC-3 of Ms. Chapman.

13 MR. MAGNESS: Thank you.

14 MR. GRYZMALA: Letter from Jeffery Carlyle,
15 chief of the Wireline Competition Bureau at the FCC, to
16 SBC.

17 And we responded on February 18, and we
18 made two things very clear on February 18. We pointed out
19 firstly -- well, I will read the footnote. It's
20 important. The wire center business line data includes,
21 et cetera, et cetera, et cetera, quote, adjusted for
22 64 kilobit per second equivalence.

23 SBC's December 7 and December 10, 2004
24 filings used different criteria that did not account for
25 voice grade equivalence for the UNE lines. So we told the

1 FCC two things: What we gave you pre-TRRO did not include
2 digital equivalency or capacity. In other words, a DS1 is
3 24 lines, not 1. But this data does. We were above
4 board, candid, and we told the FCC. The FCC accepted that
5 data and has never directed us to reverse course.

6 Third, the FCC confirmed, as we report in
7 Chapman surrebuttal, the FCC itself confirmed to the
8 D.C. Circuit Court of Appeals when it defended its
9 decision before a three-judge panel of that circuit, in
10 their brief filed that its test requires digital
11 equivalency. There is no question what this rule means.

12 In its Petition for Reconsideration that
13 the CLECs filed at the FCC, again, indicated in our
14 testimony, they knew what this rule meant. In fact, they
15 knew it so well that they called this the most egregious
16 over-counting of business lines. A DS1 is counted as 24
17 lines, a DS3 is counted as 672 lines, et cetera. Once
18 again, there's no lack of clarity here. The CLECs simply
19 want you to rewrite the rule, and we ask that you not do
20 that.

21 Issue -- last issue on the business line
22 count, on what vintage of data should the business line
23 counts rely? We used the December 2003 ARMIS, what's
24 called ARMIS business line data that was reported to the
25 FCC in April 2004, which was available to us when the TRRO

1 was issued in February of 2005. We also used December 31,
2 2003 data or line counts, excuse me, for the remaining
3 business tallies for consistency.

4 And because you can't go back in a time
5 capsule, our identifications of the fiber-based
6 collocators that were built on physical onsite inspections
7 occurred then. So is there a disconnect? Yeah, kind of,
8 sort of, because the line data that we relied on was the
9 last available reported data, December '03. Whereas, the
10 fiber-based collocation inspections were conducted in
11 February of 2005 because you can't go back in time to
12 December '03. The focus is what was available when the
13 FCC's order was adopted.

14 Now, CLECs argue that the Commission can
15 use the December 2003 line counts that AT&T Missouri used,
16 but they're basically saying, well, we like that, but we
17 don't like all of it. We like the 2003 data, but they
18 want you to miscount it by not applying the FCC's
19 capacity, digital equivalency requirement in the rule. We
20 just talked about that, and for the reasons I discussed
21 that should be rejected.

22 So one of their two alternatives to the
23 line count methodology ought to be rejected out of hand on
24 that basis alone. It doesn't comply with the FCC's rule
25 which plainly requires digital equivalency. A DS1 counts

1 as 24 lines, end of story, not 1. And there's nothing in
2 the order at all, and Mr. Magness didn't cite anything in
3 the order at all that would justify the use of some, call
4 it what you want, fill factor, ratio, 11 to 1. I don't
5 know where it comes from, but the bottom line is it's not
6 in the FCC's order. He didn't tell you it was.

7 There was a reminder about TO-2004-0207.
8 Do we really want to go there again? That was a tortuous
9 exercise. That was a decision in which the D.C.
10 Circuit -- or rather the FCC, remember, delegated the
11 cases, the heavy lifting to the states, and it generated a
12 mess, discovery, fights, squabbles, building by building
13 analysis. That's what the TRO is meant to stop. So
14 whatever the Commission may have looked at back in the
15 0207 case, which was superseded by the TRO in any event,
16 is not appropriate any longer.

17 The other alternative that the CLECs would
18 like you to consider is to use December 2004 data because
19 it reflects economic reality or -- that was reported in
20 April 2005, but that report didn't even exist when the
21 FCC's rules took effect on March 11. And candidly, AT&T
22 Missouri was entitled to make the designations it made on
23 March 11 particularly after the Wireline Competition
24 Bureau writes you and says submit your list on February 4,
25 which we did on February 18. Plainly the FCC did not

1 require us and other Bell operating companies to use data
2 that was not even available at the time.

3 I want to turn briefly to the fiber-based
4 collocation issues. Frankly, Mr. Magness is probably a
5 bit sharper on that than I am. Mr. Nevels of our
6 companies provides succinct, thorough testimony on the
7 fiber-based collocation issues, and I urge you to consider
8 that testimony carefully. But there are a couple of
9 highlight items I want to bring to your attention.

10 No. 1, as I mentioned earlier, we did
11 physical, onsite, eyeballs meet the cage inspections of
12 the collocation sites for each of the sites that we
13 referred to in our testimony. There's no suggestion
14 anyone else has actually done that.

15 Another point that's undisputed, the FCC's
16 order specifically includes both traditional and less
17 traditional collocation arrangements. We submit the cross
18 connect arrangements between two CLECs should be counted.
19 The collocater who has chosen to connect to another
20 collocater in the same office has the same ability to
21 execute a business plan and to compete with ILECs as does
22 the other collocater. And notwithstanding Mr. Magness'
23 suggestion otherwise to the effect that the other carrier
24 has none of its own transport equipment, we beg to differ.
25 Mr. Nevels points out what equipment and what investment

1 was made.

2 Staff agrees with AT&T Missouri that the
3 cross-connected carrier maintains a collocation
4 arrangement within the FCC's rules, operates a fiberoptic
5 cable or comparable transmission facility within the FCC's
6 rule even if that carrier does not provide the optronics
7 for that fiber. We think that's important.

8 We also think it's important to consider
9 the realities. If this Commission is prepared to hold
10 otherwise, that as Mr. Magness says, this rule that the
11 FCC implemented, adopted, if the rule that the FCC adopted
12 does not include a daisy chain of CLECs, is that what the
13 Commission here wants to sanction, an opportunity to end
14 run once again an FCC rule that effectively says when
15 there's sufficient revenue opportunities in a wire center
16 you ought to be made to duplicate the ILEC's network
17 yourself?

18 Do you really want to sanction gamesmanship
19 by allowing a daisy chain of various collocators to
20 partner and thereby evade by artificially depressing the
21 fiber-based collocator counts in that wire center? That
22 is not a proper outcome. That is not a proper outcome.

23 And I will suggest to you that even if you
24 were to rule otherwise, which we do not think you should,
25 that does not pertain to the NuVox arrangement which

1 Mr. Magness referred to.

2 And two quick points with regard to NuVox.
3 We do not regard that as a cross connect arrangement. We
4 regard that as a fiber-based collocation arrangement for
5 the reasons effectively that Mr. Gillan in his own
6 testimony said qualifies as a fiber-based collocation
7 arrangement.

8 Moreover, as Mr. Magness pointed out -- and
9 I don't know that he finished it. I was wanting to hear
10 what he would say. He said, if the Commission wants to
11 find that the other carrier -- remember, this is a deal
12 where NuVox has partnered with somebody. Well, our point
13 is, if NuVox fingered other carrier, identified another
14 carrier, and we know who it is, and I can also report to
15 you that it was not a carrier that was originally
16 identified on our list, so it would be a new carrier, the
17 count remains the same. The number of fiber-based
18 collocators remains the same. The designation remains the
19 same.

20 How should the term comparable transmission
21 facility be defined? Again, this may be addressed in
22 Mr. Nevels' cross by Mr. Magness with a flurry of charts
23 and diagrams, but the bottom line here is that this is a
24 transmission level issue. And your Honor and
25 Commissioner, our position is and the evidence shows that

1 it's reasonable to rely on a DS3 transmission level as the
2 entry level for a comparable transmission facility under
3 the FCC's rule.

4 The CLECs would like a minimum level, if I
5 understand their testimony completely, of three DS3s as
6 the test, but that's inconsistent with the specific
7 so-called fixed wireless example the FCC used. It should
8 be rejected.

9 Should NuVox be counted as a fiber-based
10 collocater in the locations specified by AT&T Missouri,
11 the last fiber-based collocater issue? Our answer is
12 unequivocally yes for the reasons I just told you. That
13 arrangement is an FBC, and even if it is not, another
14 carrier qualifies.

15 Issue C is whether the 14 wire centers
16 designated as Tier 1 effective March 11, 2005 were
17 correctly identified. I explained that they -- the
18 evidence shows that they were correctly identified. Staff
19 agrees that all were correctly identified in accordance
20 with the rules. One CLEC denies it qualified as a
21 fiber-based collocater. I just addressed that. It should
22 be dismissed. The Commission we respectfully submit
23 should approve all 14. And even if that explanation were
24 bought, none of the other 13 are impacted at all.

25 Issue D is did we properly update the

1 March 11 list in December 2005? The merger commitment
2 says what the merger commitment says. I think Mr. Magness
3 got it partly right when he said, SBC made a volun-- I was
4 trying to write -- SBC made a voluntary commitment that it
5 wouldn't identify AT&T companies anymore. Elsewhere, SBC
6 will no longer count affiliated collocators. Pretty well
7 gives you a clue as to what really happened here. It is
8 prospective. Will no longer count. Will no longer
9 identify.

10 The bottom line here is that, as a
11 condition of the merger between the SBC companies and
12 AT&T, a number, a number of voluntary commitments were
13 made by the company. The FCC called them conditions to
14 its approval to the merger, but the fact of the matter is
15 that the conditions were made on a prospective basis.
16 They became effective only upon the issuance of the FCC's
17 December 5, 2005 merger approval order.

18 And there is no dispute, to my knowledge,
19 that we did not properly eliminate the pre-merger AT&T
20 companies from the fiber-based collocator list. It's been
21 a while since I looked at this because it hasn't really
22 been an issue, but I think I would recall like TCG
23 St. Louis, TCG Kansas City, those folks were removed.
24 That's the reason why the Tier 1 wire center count went on
25 the transport side from 14 down to 9, because those five

1 were kicked out, dropping four fiber-based collos down to
2 three, making them Tier 2.

3 No one contests that we moved all these
4 entities properly, and we have indicated each and every
5 one of them in Ms. Chapman's attachments to her testimony,
6 her March 16 -- the rather March 16 -- strike that. I
7 can't get it right -- the March 11, 2005 designations,
8 then the December 16, 2005 designations. All of those
9 carriers were identified. They were named in HC
10 testimony. No one suggested we didn't do the job properly
11 by removing those who should have been removed. Staff
12 agreed that these five were properly designated.

13 So the answer to that question is yes, we
14 properly updated the list. That was the only question
15 that was asked, and we answered it and no one suggests
16 otherwise.

17 Second to last issue, did AT&T Missouri
18 correctly identify the three wire centers -- recall Kansas
19 City McGee, St. Louis Chestnut, St. Louis Ladue -- as
20 non-impaired under the criteria for DS3 loops? The answer
21 is yes. These are wire centers that become non-impaired
22 for DS3 loop purposes if they have at least four
23 fiber-based collocators and at least 38,000 business
24 lines.

25 Subject to the actual evidence which I

1 don't have in front of me, I think Kansas City McGee has
2 10 or 11 collocators. It ain't even close. These wire
3 centers, at least two of the three have 50,000 lines. It
4 ain't even close.

5 There is one in play, as it were, and I
6 think I mentioned that that would be Chestnut, and that is
7 in play only if you adopt the CLECs' view of the proper
8 methodology for business line counts. We submit that
9 should not happen. Ergo, not just two, but all three of
10 those designations should be affirmed.

11 Should the Commission approve a separate
12 wire center list applicable to the period between March
13 '05 and December '05? That's the last issue, and we
14 submit that the Commission should.

15 Let's be candid about this. It's been a
16 couple of years since the TRRO was issued. For whatever
17 reason -- we didn't bring this case, but for whatever
18 reason we're kind of at the last of the train. We're
19 somewhat sort of like the caboose. I mean, you've heard
20 states like flying all over the place, Florida, Ohio,
21 Texas. I don't know why we're the last. I didn't bring
22 this case. My company didn't bring this case.

23 But what's clear is that we made
24 designations on March 11, 2005. What's clear is that we
25 were required to do separate designations in December '05

1 because of the commitment that we made to the FCC to no
2 longer count pre-merger AT&T as it were collocations. And
3 yes, it does matter because some of those five wire
4 centers that move from one list to another list, there are
5 rate consequences involved. But there's no question but
6 in our view that the evidence shows those five wire
7 centers met Tier 1 when they were first designated in
8 March. That's the important point.

9 In essence, what the CLECs want to do is
10 have the Commission find that the merger-related revisions
11 were retroactive, meaning that in March we could not count
12 pre-merger AT&T collocations even though nobody disputes
13 at that time that they fully satisfied the FCC's rule.

14 Had the FCC intended this commitment to be
15 retroactive, it would have said so. The FCC and my
16 company does not negotiate merger commitments or voluntary
17 commitments in a vacuum. They're very, very detailed,
18 very nitty-gritty minded things. If the FCC had any clue
19 or if we had any clue that that was to be retroactive,
20 you'd find it in the order. It's not there. And it's
21 highly unlikely they meant to do that anyway.

22 We cited in the rules that -- and they're
23 in Chapter 51, I think it's 319, for loop transport Tier 1
24 to Tier 2, that once a wire center becomes non-impaired,
25 in other words it finds its way on a list like Kansas City

1 McGee, it remains non-impaired forever.

2 Okay. Now, do you think given those rules,
3 and there are four of them, applies to the loops,
4 transport, to Tier 1 to Tier 2, across the board, once
5 you've -- that wire centers ends up on a non-impaired
6 list, it's nonreversible, irreversible.

7 Now, given that background, do you think
8 that the FCC would have intended merger commitments to be
9 retroactive without having said so? It knows what it says
10 in the TRRO. This is a UNE commitment. It's a loop --
11 it's a transport commitment. It's a fiber based
12 collocation commitment to which 551.319 clearly applies.

13 And finally on that point, and I'm done
14 with that point, the FCC's never sought to enforce these
15 on a retroactive basis. When we submitted the list, we
16 submitted the list in December of 2005. We submitted
17 another list in December of 2006 post BellSouth merger,
18 which do not change the designations here, but it is
19 important for clarity that the Commission approve both the
20 methodology that we employed implementing the FCC's order
21 and the resulting wire center designation list.

22 I want to end by emphasizing what I believe
23 is important from a very high level here. The FCC made a
24 purposeful attempt to end years and years of litigation
25 and fighting over what impairment means. It spoke. In

1 the plainest of terms it said count the noses, and we did.
2 CLECs don't like the results, but they went to the FCC
3 knowing full well what those results were and said, please
4 turn them around. This is terrible. Please turn that
5 around. This is terrible.

6 Well, you don't do that before a federal
7 agency and then come to a state commission and say, we
8 really didn't tell the FCC what we thought the rules
9 meant, so rewrite them for us.

10 The final point is with regard to
11 Staff. It was difficult having sometimes to work through
12 all the responses for the plus 50 Data Requests that they
13 generated, but we gave them the information. They did an
14 independent investigation. They secured affidavits from
15 CLECs far more than just NuVox and McLeod.

16 And on the basis of that investigation,
17 they, a neutral party in the matter, concluded that we
18 properly designated our wire centers. That should speak
19 volumes.

20 Thank you, your Honor. Thank you,
21 Commissioner.

22 JUDGE JONES: Thank you, Mr. Gryzmala.
23 Mr. Haas, do you have an opening statement?

24 MR. HAAS: Your Honor, I too will have an
25 illustrative exhibit that I would like to hand out and

1 refer to in my opening statement.

2 JUDGE JONES: Okay.

3 MR. HAAS: Good morning. Let me start my
4 opening statement by telling you where I will finish. The
5 Staff's testimony recommends that the Commission approve
6 AT&T Missouri's designation of non-impaired wire centers.

7 As you have heard from Mr. Magness and
8 Mr. Gryzmala, the FCC's Triennial Review Remand Order
9 relieves an incumbent local exchange carrier, such as AT&T
10 Missouri, from certain unbundling obligations if certain
11 non-impairment triggers are met. The non-impairment
12 triggers count the number of business lines and/or the
13 number of fiber-based collocators on a wire center basis.

14 I have provided the Bench with a handout
15 that sets forth the non-impairment criteria being applied
16 in this case. The non-impairment criteria for dedicated
17 interoffice transport for Tier 1 is that the wire center
18 must have four or more fiber-based collocators or 38,000
19 or more business lines or be a tandem switching location.

20 The non-impairment criteria dedicated
21 interoffice transport for Tier 2 is that the wire center
22 must have three fiber-based collocators or 24,000 or more
23 business lines. The non-impairment criteria for DS3 loops
24 is that the wire center must have four or more fiber-based
25 collocators and 38,000 or more business lines.

1 The general issues in this case are what
2 counts as a business line, what counts as a fiber-based
3 collocator, and what vintage of data should be used for
4 the initial count. The implementing regulations of the
5 TRRO are located at Part 51 of Title 47 of the Code of
6 Federal Regulations.

7 FCC Rule 47 CFR 51.5 states in part, the
8 number of business lines in a wire center shall equal the
9 sum of all incumbent LEC business switched access lines
10 plus the sum of all UNE loops connected to the wire
11 center, including UNE loops provisioned in combination
12 with other unbundled elements.

13 The CLEC Coalition asked the Commission to
14 ignore the clear language of the rule and to count only
15 business UNE loops instead of counting all UNE loops as
16 the rule directs.

17 FCC Rule CFR 51.5 goes on to state that
18 business line tallies shall account for ISDN and other
19 digital access lines by counting each 64 KBPS equivalents
20 as one line. For example, DS1 line corresponds to 24
21 64 KBPS equivalents and therefore to 24 business lines.

22 The CLEC Coalition asks the Commission to
23 ignore the clear language of this rule and count a DS line
24 as 11 business lines instead of counting a DS line as 24
25 business lines as directed by the rule.

1 FCC Rule 47 CFR 51.5 defines a fiber-based
2 collocator in part as any carrier unaffiliated with the
3 incumbent LEC that maintains a collocation arrangement and
4 an incumbent LEC wire center with active electrical power
5 supply and operates a fiberoptic cable or comparable
6 transmission facility that terminates at a collocation
7 arrangement within the wire center, leaves the incumbent
8 LEC wire center premises, and is owned by a party other
9 than the incumbent LEC or any affiliate of the incumbent
10 LEC.

11 The CLEC Coalition asks the Commission to
12 read into this rule a requirement that one unaffiliated
13 carrier cannot lease from another unaffiliated carrier
14 part of the transmission facility and still meet the
15 definition of a fiber-based collocator.

16 The TRRO took effect in March 2005. AT&T
17 Missouri used business line counts from December 2003 to
18 make its wire center designations. Staff agrees that the
19 December 2003 line counts were the correct line counts for
20 the initial counts because they were the latest data
21 available at the time of the designations.

22 The more specific issues are whether AT&T
23 Missouri had correctly designated 14 wire centers as
24 non-impaired under the Tier 1 criteria for dedicated
25 interoffice transport facilities, whether AT&T Missouri

1 then correctly identified five of those wire centers
2 following the AT&T/SBC merger as non-impaired under the
3 Tier 2 criteria, and whether AT&T Missouri correctly
4 designated three wire centers as non-impaired for DS3
5 capacity loops.

6 The CLEC Coalition disputes only two of
7 those designations. The CLEC Coalition disputes AT&T
8 Missouri's designation of the Springfield Tuxedo wire
9 center as non-impaired under the Tier 2 criteria, and
10 disputes AT&T Missouri's designation of the Ladue wire
11 center as non-impaired for DS3 capacity loops.

12 The CLECs' dispute with these designations
13 stems from it counting a DS line as 11 business lines
14 instead of as 24 business lines as directed by the FCC's
15 rule. As discussed above, the non-impairment criteria
16 looked not only at the number of business lines but also
17 at the number of fiber-based collocators in a wire center.

18 AT&T Missouri provided Staff with a list of
19 CLECs that it considered to be collocated in the
20 designated wire centers. The Staff mailed letters
21 requesting a verified response from those CLECs. The CLEC
22 could either agree or could dispute that it is a
23 fiber-based collocator in a particular wire center.

24 Relying upon these responses and AT&T's
25 Missouri business line count, Staff agrees that AT&T

1 Missouri has correctly designated these wire centers as
2 non-impaired. Thank you.

3 JUDGE JONES: Thank you, Mr. Haas.
4 Mr. Gryzmala, you have something?

5 MR. GRYZMALA: Your Honor, just to clarify
6 one point, to clear the record, I believe I referenced
7 St. Louis Chestnut, and I apologize. It is St. Louis
8 Ladue, as the one in dispute.

9 JUDGE JONES: Okay. Thank you.

10 MR. GRYZMALA: Thank you.

11 JUDGE JONES: I was intending on taking a
12 lunch break at noon, which means 25 minutes from now.
13 With that in mind, let's go ahead and go with the first
14 witness according to you-all's list, AT&T is to go first;
15 is that correct?

16 MR. MAGNESS: Yes, sir.

17 MR. GRYZMALA: Your Honor, if I may?
18 Before I face that issue with Mr. Nevels' testimony, I'd
19 like to mark and offer into evidence the handout I
20 submitted to you this morning as AT&T Missouri Exhibit
21 No. 11. Recall we have the order of 11 through 20. And I
22 would like to offer that into evidence at this time.

23 (EXHIBIT NO. 11 WAS MARKED FOR
24 IDENTIFICATION.)

25 MR. MAGNESS: I'd object, your Honor.

1 JUDGE JONES: Why?

2 MR. MAGNESS: Your Honor, we object, No. 1,
3 because the map about which Mr. Gryzmala made statements
4 in his opening is not provided in the testimony, or the
5 representations it makes are not provided in the
6 testimony.

7 Table 1, as we noted during the opening
8 statement, we believe is incorrect and is contradicted by
9 testimony that will be in the record from Mr. Gillan, and
10 this doesn't add anything to what Ms. Chapman or other
11 AT&T witnesses have already testified, and we believe it's
12 factually incorrect.

13 JUDGE JONES: Let's talk about each one of
14 these, because you're objecting for different reasons to
15 each one of these sheets is what I'm gathering.

16 MR. MAGNESS: Yes, sir.

17 JUDGE JONES: The first one you're
18 objecting to because it's not in the testimony?

19 MR. MAGNESS: Yes, sir. It was not in the
20 testimony, and Mr. Gryzmala makes statements about the --
21 certainly the number of wire centers and the identity of
22 the wire centers are in the testimony, but this
23 formulation of it in this map was not brought into
24 testimony.

25 JUDGE JONES: What's wrong with the map? I

1 mean, I don't see what's right or wrong with it, to be
2 honest with you. I don't see why it even matters. Why
3 does it matter, Mr. Gryzmala, that we have --

4 MR. GRYZMALA: I don't want to belabor the
5 proceedings, your Honor. The map was merely intended to
6 identify as the evidence shows what 14 wire centers are
7 involved for loop and transport. It was merely
8 illustrative. That's all it was meant to do.

9 JUDGE JONES: Well, I'll sustain the
10 objection to the map. That's not admitted. Now, the wire
11 center list, you agree with this -- you disagree with this
12 factually, right?

13 MR. MAGNESS: The second page is called
14 wire center common slash CLLI table. I don't have an
15 objection to that. It's the --

16 JUDGE JONES: The third page?

17 MR. MAGNESS: -- Table 1, summary of
18 dedicated transport designations, is essentially
19 supplemental testimony. Makes a representation about the
20 CLEC Coalition's position in that last column called
21 disputed which is incorrect, and --

22 JUDGE JONES: That's not your position?

23 MR. MAGNESS: No. Those are disputed.

24 JUDGE JONES: Mr. Gryzmala?

25 MR. GRYZMALA: That may be, but that's not

1 the test for whether it should be submitted into evidence.
2 Whether it's disputed or not has nothing to do with it.
3 It is in testimony.

4 JUDGE JONES: His point is that you
5 misstated the CLECs' position.

6 MR. MAGNESS: There's no foundation for it,
7 your Honor. I mean, he presents it in an opening
8 statement, which is not factual testimony, making
9 representations about what the -- trying to summarize the
10 factual testimony but making misrepresentations about
11 what's in the factual testimony. This isn't evidence, and
12 it shouldn't be admitted as such.

13 JUDGE JONES: Is this in the evidence
14 already?

15 MR. GRYZMALA: Your Honor, you'd think I'd
16 be able to find it by now, I've been given enough time.

17 JUDGE JONES: Is it necessary that you find
18 it to know whether it's in the evidence?

19 MR. GRYZMALA: I'll withdraw that. I'll
20 withdraw the DS3 loop one as well which follows, which is
21 the next one, the FCC's rule if I'm correct, unless I'm
22 incorrect.

23 JUDGE JONES: Well, we don't need that in
24 evidence.

25 MR. GRYZMALA: That's correct, we don't

1 need that in evidence.

2 MR. MAGNESS: Okay. And then this Petition
3 for Reconsideration, I'd object. These are incomplete
4 experts, and, in fact, it's already duplicative of what is
5 in the testimony. The excerpts they wanted to provide to
6 the Commission are already provided as an attachment to
7 Ms. Chapman's testimony, and the document itself is not
8 evidence. She testifies about what she thinks that
9 document means.

10 JUDGE JONES: Is a complete petition
11 attached to her testimony?

12 MR. GRYZMALA: Yes, your Honor. The
13 attachment is rebuttal, Chapman rebuttal Attachment CAC-1.
14 It is the entirety. But I wanted to offer the evidence
15 because the purpose of that demonstrative exhibit was to
16 focus upon the passage among the -- among the 25, 26 pages
17 instead of having to --

18 JUDGE JONES: Well, I don't mind reading
19 the pages. If these are out of context, they could in
20 some way slant.

21 MR. GRYZMALA: That could conceivably be.

22 JUDGE JONES: And this brief, is that
23 also --

24 MR. GRYZMALA: That is cited in
25 Ms. Chapman's surrebuttal at pages, I believe -- hang on

1 just a moment, please -- 6 and 7. The quote appears at 6
2 and 7.

3 JUDGE JONES: Just this quote, though, but
4 not --

5 MR. GRYZMALA: No. Well, yeah. The whole
6 brief was not attachment. The entirety of the FCC's brief
7 to the D.C. Circuit was not attached, correct.

8 MR. MAGNESS: Well, your Honor, again, it's
9 duplicative in that it's already in the testimony.
10 Second, this one very clearly is slanted and we think is a
11 misrepresentation of the entirety of that brief, but
12 that's an issue that could be addressed on cross if needs
13 to be. This is not additional evidence.

14 JUDGE JONES: Okay. I'll sustain the
15 objection on that. So we're down to this CLLI table.
16 Just by calling it a CLLI table, I'm reluctant to admit
17 it.

18 MR. GRYZMALA: We'll withdraw that. Thank
19 you, your Honor. I just wanted to clarify that.

20 JUDGE JONES: Are you ready to present your
21 first witness, Mr. Gryzmala?

22 MR. GRYZMALA: Thank you, your Honor.

23 MARVIN NEVELS testified as follows:

24 DIRECT EXAMINATION BY MR. GRYZMALA:

25 Q. Good morning, Mr. Nevels.

1 A. Good morning.

2 Q. Would you state your full name for the
3 record, please.

4 A. Marvin Nevels.

5 Q. And by whom are you employed, Mr. Nevels?

6 A. I am employed by AT&T.

7 Q. And did you cause to be prepared in this
8 case direct --

9 MR. HAAS: Your Honor, I don't believe the
10 witness has been sworn yet.

11 JUDGE JONES: I'm sorry. Would you please
12 raise your right hand, Mr. Nevels. Thank you, Mr. Haas.

13 (Witness sworn.)

14 JUDGE JONES: Thank you, sir. You don't
15 have to repeat those first several questions, by the way.

16 MR. GRYZMALA: Thank you.

17 BY MR. GRYZMALA:

18 Q. I do believe I recall asking, I don't know
19 if you gave me an answer, did you cause to be prepared in
20 this case direct testimony, Mr. Nevels?

21 A. Yes, I did.

22 Q. And do you have a -- may I ask the court
23 reporter kindly if we could give Mr. Nevels a copy of that
24 direct testimony as it was marked as an exhibit?

25 (EXHIBIT NOS. 12, 13HC AND 14 WERE MARKED

1 FOR IDENTIFICATION BY THE REPORTER.)

2 BY MR. GRYZMALA:

3 Q. The court reporter has handed you,
4 Mr. Nevels, what has been marked as Exhibit 12. Is that
5 the direct testimony you prepared?

6 A. Yes, it is.

7 Q. Do you have any changes or corrections to
8 that testimony?

9 A. No, I do not.

10 Q. If I were to ask you the same questions
11 today as you caused to be filed on March 30th, would the
12 answers be the same?

13 A. Yes, they would.

14 MR. GRYZMALA: With that, your Honor, I
15 would like to offer Exhibit 12, Mr. Nevels' direct
16 testimony, into evidence.

17 JUDGE JONES: Does he have two pieces of
18 testimony, one public and one highly confidential?

19 MR. GRYZMALA: Yes. And we would offer the
20 highly confidential as Exhibit 12, and the nonproprietary
21 version as Exhibit 13.

22 THE REPORTER: Actually, I have them marked
23 opposite. The nonproprietary is 12.

24 MR. GRYZMALA: Start again. 12 for the HC,
25 13 for the nonproprietary.

1 JUDGE JONES: How are they marked again?

2 Direct nonproprietary is what?

3 THE REPORTER: 12.

4 JUDGE JONES: And the HC is 13.

5 THE REPORTER: Yes.

6 JUDGE JONES: And no changes to either?

7 THE WITNESS: That is correct, sir.

8 JUDGE JONES: Mr. Magness, any objection?

9 MR. MAGNESS: No, your Honor.

10 JUDGE JONES: Exhibits 12 and 13 are
11 admitted into the record.

12 (EXHIBIT NOS. 12 AND 13 WERE RECEIVED INTO
13 EVIDENCE.)

14 BY MR. GRYZMALA:

15 Q. And I would like to ask you then,
16 Mr. Nevels, did you likewise cause to be filed in this
17 matter rebuttal testimony on April 27?

18 A. Yes.

19 Q. And you have that testimony before you as
20 well?

21 A. Yes, I do.

22 Q. Do you have any changes or corrections to
23 that testimony?

24 A. No, I do not.

25 Q. If I were to ask you the questions, those

1 questions today that are presented in your prefiled
2 testimony filed on April 27, would your answers be the
3 same?

4 A. That is correct.

5 MR. GRYZMALA: With that, your Honor, I'd
6 like to offer into evidence Mr. Nevels's rebuttal
7 testimony as Exhibit 14. It is nonproprietary. There
8 were not two versions.

9 JUDGE JONES: Thank you. Any objection,
10 Mr. Magness?

11 MR. MAGNESS: No, your Honor.

12 JUDGE JONES: Exhibit 14 is admitted into
13 the record.

14 (EXHIBIT NO. 14 WAS RECEIVED INTO
15 EVIDENCE.)

16 MR. GRYZMALA: With that, I have nothing
17 further and would tender the witness for
18 cross-examination, your Honor.

19 JUDGE JONES: Mr. Magness, you may proceed
20 with cross, keeping in mind that you have 15 minutes so
21 we'll have to break and come back for your cross, assuming
22 you have more than 15 minutes of cross.

23 MR. MAGNESS: I may.

24 CROSS-EXAMINATION BY MR. MAGNESS:

25 Q. Good morning, Mr. Nevels.

1 A. Good morning, Mr. Magness.

2 Q. Mr. Nevels, I think Mr. Gryzmala said you
3 may be facing a flurry of diagrams. I just want you to
4 look at one. That's your Attachment MN-1, which I believe
5 is attached to your rebuttal testimony. Just let me know
6 when you have that before you.

7 A. I do have that in front of me.

8 Q. Okay. Now, as we look at Attachment MN-1,
9 just to be sure we've got it in context, the big box that
10 is depicted here is representative of a wire center
11 central office building; is that correct?

12 A. That is correct.

13 Q. So that would be the incumbent central
14 office or wire center building where these collocations
15 are located, correct?

16 A. That is correct.

17 Q. And the line that you have labeled J has it
18 coming in through an entrance manhole and then through a
19 cable vault, and you have that labeled as fiberoptic
20 cable; is that correct?

21 A. That is correct.

22 Q. And just to see if -- look at these things
23 and see if we can make sense of this, I'll show them all
24 around and ask you, because I know in your testimony you
25 said you have familiarity with these collocations, if you

1 could just answer a few questions about these. In the
2 context in the -- not used in your home, but in telecom
3 context, you recognize this as something that could be
4 used in the context of providing fiber into a building
5 (indicating)?

6 A. Protective sheathing, yes.

7 Q. And you called it?

8 A. Protective -- it looks to be protective
9 sheathing.

10 Q. And when you say protective sheathing, that
11 is -- what would you say this is (indicating)?

12 A. That --

13 Q. You can look at it more closely if you need
14 to.

15 A. Can you bring it over?

16 Q. Sure.

17 A. Thank you.

18 Q. And the item that's in a black casing, what
19 do you call that?

20 A. It appears to be a piece of -- actually,
21 several fibers located in the sheath.

22 Q. And the sheath is -- would it be correct to
23 characterize that as a fiber cable?

24 A. That is correct.

25 Q. And then the cable goes inside the

1 protective covering?

2 A. That is correct.

3 Q. And you might have more than one cable
4 inside a covering of that size?

5 A. It is possible, yes.

6 Q. So that's fiber cable. Now, then, that
7 last item, which is the very thin smallest of those, how
8 would you identify that?

9 A. It appears to be a single strand of fiber.

10 Q. And so when we -- actually, let me ask you
11 to turn in to your testimony. It will be your direct at
12 page 14. We're going to go back to your diagram, so don't
13 lose it. But you go to direct at page 14, I just want to
14 be sure we're all talking about the same thing, basically.
15 At line -- I guess it says 314 on mine. You say, a single
16 fiberoptic cable leaving an AT&T Missouri wire center may
17 contain several hundred fiber strands. Is that a correct
18 reading?

19 A. Yes, it is.

20 Q. Okay. So the cable, the fiber cable that
21 you identified here is one of those that may contain
22 several hundred fiber strands; is that correct?

23 A. That is correct.

24 Q. So inside here, those several -- there's
25 several things in here bundled in, and those would be

1 fiber strands?

2 A. That is correct.

3 Q. Now, if we could go back to your diagram.

4 So that fiber cable is what you have depicted as J coming
5 into the central office in your Attachment MN-1?

6 A. That is correct.

7 Q. In the typical situation for an AT&T wire
8 center, when AT&T is bringing fiber in and out, would you
9 put in just one fiber cable or would you tend to put in
10 more or less?

11 A. Typically we would run in more than one
12 fiber cable.

13 Q. And in the FCC's rule at 47 CFR 51.5, and I
14 believe you have it reprinted in your testimony at some
15 point, but I think we're all familiar with it by now,
16 where it says fiber-based collocater is any carrier
17 unaffiliated with the incumbent LEC that maintains a
18 collocation arrangement in a incumbent LEC wire center
19 with active electrical power supply and operates a
20 fiberoptic cable or comparable transmission facility.

21 So it's the fiberoptic cable like you've
22 identified that you're talking about operating?

23 A. That is correct.

24 Q. Okay. Just to pick that back up, this
25 little strand of fiber, how do you operate a strand of

1 fiber? I mean, it's not pumping enormous amounts of data
2 right now as I hold it. How do you operate a strand of
3 fiber?

4 A. Well, I think one of the key concerns and
5 issues that we have that we differ on, the CLECs and
6 ourselves, are we basically have a difference of opinion
7 in the term operates and how it's defined. And we believe
8 that a carrier is able to operate a transmission facility
9 if they are able to realize a transmission path from their
10 collocation arrangement out of the wire center. And we
11 believe that that is fully in line with what the FCC meant
12 when it stated operates a fiberoptic cable.

13 Q. Okay. I understand that's your position.
14 I'm just asking you, though, how do you make this do
15 something? How do you operate a fiberoptic cable? Do you
16 plug it into the wall or what do you do?

17 A. No. Basically, you would use it as a
18 transmission path.

19 Q. How do you light it up? Do you know?

20 A. Well, that's a different question, how do
21 you light it up.

22 Q. Okay.

23 A. Basically, to light it up you would have
24 optronics connected to that to push the traffic across
25 that path.

1 Q. Okay. And when the fiber meets the
2 optronics, is that where it terminates?

3 A. That could be one point of termination.

4 Q. Can a single fiber terminate more than
5 once?

6 A. In our scenario, in our understanding of
7 the term operate and what it's meant, yes, it can.

8 Q. No, no. I asked can it terminate in more
9 than one place, just as an engineering matter?

10 A. Well, see, the difference in regards to
11 looking at the actual fiber and in looking at the
12 transmission path in determining a comparable transmission
13 facility, yes, that fiber would terminate once. However,
14 the transmission path which is in question here does go
15 beyond that collocator to the connecting collocator,
16 therefore making a complete transmission path for that
17 second collocator.

18 Q. I understand the legal position. I'm just
19 trying to get at the factual question of can this -- can a
20 fiber strand terminate more than one place?

21 A. And once again we also have a disagreement
22 on the term terminate.

23 Q. Well, I think you just told me it
24 terminates in one place, but then there's this idea of the
25 transmission path and it does other stuff. The one

1 question I asked you was, does it terminate more than
2 once?

3 A. In terms of lighting the fiber, it would
4 terminate once.

5 Q. Okay. So when the rule talks about
6 operates a fiberoptic cable, this is a fiberoptic cable,
7 or comparable transmission facility that terminates at a
8 collocation arrangement within the wire center, that
9 fiberoptic cable, which is your J in your -- back on your
10 diagram, kind of, you know, the big cable, that's got --
11 that's got to terminate, right, at the collocation?

12 A. That is correct. However, if we look at
13 the language that we are referring to, which is 51.5, and
14 for reference point -- for a reference point, in my direct
15 testimony it is on page 5.

16 Q. Uh-huh.

17 A. It does state, and operate -- operates a
18 fiberoptic cable or comparable transmission facility. And
19 what we are putting on the table, AT&T in regards to
20 collocation to collocation cross connected carriers, is
21 that we are looking at a comparable transmission facility
22 that leaves the wire center and that the connected carrier
23 controls and operates.

24 Q. Okay. I guess I just -- I'm trying to
25 understand as this fiber cable comes in --

1 A. You're referring to my document?

2 Q. Let's set aside the comparable transmission
3 facility for a second. Okay? I've heard your position on
4 that a few times. We'll talk about that. I'll give you a
5 shot. Don't worry.

6 But just focusing on the fiberoptic cable,
7 the fiberoptic cable terminates on your diagram, I guess
8 as you said before, it's got to hit the FOT, the
9 fiberoptic terminal, the optronics, in order to do
10 anything, right, to be more than just glass?

11 A. That is where it is lit, yes, sir.

12 Q. Okay. So the fiberoptic cable terminates
13 at a wire center, leaves the incumbent LEC wire center
14 premises. Okay. That's the next requirement in the rule.
15 And J does leave the incumbent LEC wire center premises,
16 right?

17 A. That is correct.

18 Q. Okay. And is owned by a party other than
19 the incumbent LEC. So the fiber that's coming in that
20 actually goes out into the world, that one comes in and
21 out, but it terminates in that Collocation No. 1, doesn't
22 it?

23 A. It originally terminates in Collocation
24 No. 1, correct.

25 Q. Okay. So without the comparable

1 transmission facility -- or let's say the comparable
2 transmission facility wasn't in the rule. Collocator
3 No. 2 is not a fiber-based collocator because the fib--
4 it's not a carrier that brings fiber in and out. It's not
5 a carrier that terminates. So if -- comparable
6 transmission facility is what brings Collocator No. 2 into
7 your view of fiber-based collocator; is that fair?

8 A. Yes, that is fair.

9 Q. Okay. And I'll say, I think -- and correct
10 me if I'm wrong, but I think a view of the testimony is
11 the CLECs nor Staff nor AT&T disagree that Collocator
12 No. 1 would be a fiber-based collocator?

13 A. That is correct.

14 Q. Okay. Now, the line that you have depicted
15 that connects Collocation No. 1 to Collocation No. 2 on
16 your attachments is not fiber, right, it's coaxial cable?

17 A. Actually, it could be fiber, but for the
18 sake of this scenario, it is coaxial cable.

19 Q. Now, looking again at J, does AT&T ever
20 send out into the interoffice network, out into the world
21 beyond the wire center, do you ever put coaxial cable as
22 what would be J or do you always use fiber?

23 A. We would always use fiber in that scenario.

24 Q. Why is that?

25 A. Well, coaxial does not have -- has certain

1 distance limitations, and once again, we would use fiber
2 in long haul scenarios. However, depicted in this picture
3 we don't show coaxial being used as an interoffice
4 scenario. We show it being used as a collocation to
5 collocation cross connect.

6 For a short distance, where we could
7 realize DS3 capacity and both connecting carriers, the
8 connecting carrier and the original collocater depicted on
9 my diagram as Collocator No. 1 and Collocator No. 2 both
10 have the ability to realize DS3 transmission out of this
11 wire center.

12 Q. Okay. So in order to satisfy the test for
13 transport or loops, it's AT&T's position that it's
14 sufficient if you rely on a comparable transmission
15 facility which is not one that AT&T would ever use outside
16 its own office?

17 A. Well, actually, we do not in my testimony
18 or any other testimony that we provided state that coaxial
19 by itself is a comparable transmission facility. What we
20 do state is, coaxial via a collocation to collocation
21 cross connect used in conjunction with the fiber of the
22 first collocater creates a complete transmission path
23 that's at a DS3 level or above that leaves the wire center
24 that allows the connecting collocater to realize the same
25 business plans as the other collocater, Collocator No. 1.

1 Q. What if Collocator No. 1's business plan is
2 to sell its own fiber capacity to other carriers, to
3 become a substitute for AT&T, how does it replicate -- how
4 does it allow Collocator No. 2 to replicate that business
5 plan?

6 A. I don't understand your question. Could
7 you rephrase it?

8 Q. Let's say I'm Collocator No. 2 and I have
9 bought DS3 transport from AT&T for years. Okay?

10 A. Okay.

11 Q. Collocator No. 1 is now in there and he's
12 built his own fiber transport network in St. Louis, let's
13 say, and he comes to me and he says, you've got to get off
14 AT&T, man. I can give you a better deal.

15 A. Okay.

16 Q. I can give you DS3 transport same places
17 they go and I'll sell it to you cheaper.

18 A. Okay.

19 A. Now, how is it Collocator No. 2, sitting
20 there without a fiber transport network, can replicate the
21 business plan that Collocator No. 1 bought himself when he
22 laid all that fiber in the ground?

23 A. Well, actually, I don't think it was
24 intentional, but I think your question kind of supports
25 the argument that we've been making before, that

1 Collocator No. 1 can actually go out and replicate AT&T's
2 network and then provide that to other carriers. Now,
3 Collocator No. 2 in entering into an agreement with
4 Collocator No. 1 would acquire via the DS3 the capacity
5 that they would need to run their business. That's the
6 key. They're not going to make an arrangement with
7 Collocator No. 1 unless they can get capacity necessary to
8 run their business. Now --

9 Q. I'm sorry. I have to stop you there just
10 for a second. The thing is, though, I used to buy DS3
11 from AT&T. Now I've got this one guy, not four, one let's
12 say, offering me the same thing.

13 A. Okay.

14 Q. I'm not offering interoffice fiber capacity
15 to other people. I'm just buying a service that I used to
16 buy from him from him. How am I -- how is Collocator
17 No. 2 replicating the business plan? He hasn't spent --
18 he hasn't created his own network.

19 A. The FCC in putting forward the fiber-based
20 collocator measurement decided that when an office had
21 four fiber-based collocators, four collocators that were
22 able to go out and have a fiber facility or a comparable
23 facility that leaves a wire center, they have a
24 collocation arrangement and it's powered, once we can get
25 to the point of having four of those and they're not on

1 AT&T's network, that would meet the litmus test of that
2 office not being impaired.

3 Q. Okay.

4 A. Collocator No. 2 has the ability to -- in
5 leasing the fiber collo to collo cross connect, they have
6 the ability to realize the same business plan to serve the
7 end users that Collocator No. 1 has. And that's what
8 we're saying here. We're not saying resell and resell
9 again in a central office. We're saying Collocator No. 2,
10 the connecting collocator, can realize the same business
11 plan. They can go out and provide data to the people of
12 Missouri, just like Collocator No. 1 can. They can
13 provide phone service via that relationship they have with
14 Collocator No. 1.

15 Q. Let me give you an example. Collocator
16 No. 2 buys DS3 level transport from AT&T.

17 A. Okay.

18 Q. Collocator No. 2 says, I'm tired of that.
19 I'm going to buy it from Collocator No. 1 because he's got
20 his own transport network. I'm going to buy DS3 from him.
21 Okay?

22 A. Okay.

23 Q. Now there's a big new customer downtown
24 St. Louis. Somebody relocates. Mr. Stevenson brings the
25 company back. Somebody relocates. Collocator No. 1 goes,

1 I have my network. I want to offer OC192 to that guy. I
2 tonight offer high, high level. Collocator No. 2 bought a
3 DS3. Doesn't he have to go back to Collocator No. 1 and
4 go, you know, I know I have a DS3, but I really want to
5 crank it up a little, I want to buy something bigger, so
6 how about we negotiate a new contract? I mean, are they
7 really in the same position as far as business plan goes?

8 A. What's very important that we understand in
9 regards to the scenario that you just put on the table is
10 if we go -- and I think we need to first look at the
11 Verizon CATT arrangement. Now, the Verizon CATT
12 arrangement is a competitive alternate transport terminal.
13 It was listed and identified by the FCC as a comparable
14 transmission facility.

15 With the Verizon CATT arrangement, a
16 third-party provider would bring in a pipe or bring in a
17 cable as we've seen, actually would bring in several
18 cables and they sell, they splice off of that and they
19 sell, shall I say they lease capacity to other carriers.
20 So let's just say, for example, that third-party provider
21 comes in with a pipe and there's Collocator No. 1,
22 Collocator No. 2. They will send capacity to Collocator
23 No. 1. They'll send capacity to Collocator No. 2 via
24 fiber.

25 Now, in that scenario, just as the scenario

1 we just looked at, if Collocator No. 2 all of a sudden has
2 a big account come through, Mizzou decides that they want
3 to do something and they want that account, if they don't
4 have the appropriate capacity, they have to go back to
5 that third party and get additional capacity, just like
6 this scenario.

7 A second point I'd like to bring out is if
8 we go to Gillan's testimony for a moment --

9 Q. Wait. No, we can't, because I want to get
10 back to the question. Now, does AT&T provide a CATT
11 arrangement?

12 A. No, we do not provide a CATT arrangement.

13 Q. How many fiber-based collocators did you
14 identify in Missouri that used a CATT arrangement?

15 A. We don't have the CATT arrangement in
16 Missouri.

17 Q. Okay. So the CATT -- doesn't the CATT
18 arrangement involve dark fiber?

19 A. Yes, it does.

20 Q. Okay. So that means it's fiber like this,
21 no optronics attached. I've got to put some optronics on
22 it to make it operate, right? I've got to make it go.

23 A. With dark fiber, yes, you do.

24 Q. Okay. But Collocator No. 2 here, he
25 doesn't care about optronics. He's just buying capacity,

1 right? He says, I'm going to buy DS3. I don't have to
2 buy optronics. I don't have to build a network. I'm
3 buying a service.

4 A. Well, just as I mentioned with the Verizon
5 CATT arrangement, we are in both scenarios looking at a
6 leasing arrangement where two companies have made a
7 decision, in the Verizon CATT arrangement scenario as well
8 as in this scenario, to lease as opposed to buy capacity
9 and use that to complete their network.

10 Q. Mr. Nevels, since the Verizon CATT
11 arrangement isn't going on here, then I really kind of
12 wanted to focus on the one that is, which is this guy
13 that's just running a coax over to a guy with a real
14 network and leasing capacity. Now, how does that
15 replicate the business plan of the carrier who's built a
16 transport network?

17 A. First, I'd like to state that, yes, you are
18 correct, the Verizon CATT arrangement is not in Missouri,
19 and the FCC, in providing the ruling that they provided,
20 gave us the Verizon CATT arrangement as one example of
21 what a comparable transmission facility may look like.
22 They did not identify and go over every scenario, but they
23 did in their wisdom provide us that.

24 What we're putting on the table in regards
25 to our collocation to collocation cross connect scenario

1 is just a derivation of that that we feel fits in the line
2 with the Verizon CATT arrangement. And, your Honor, if I
3 am allowed to go to Gillan's testimony, which covers that
4 same issue of the collocation to collocation cross
5 connects, I can show that in certain scenarios Gillan and
6 the CLEC Coalition do agree that these types of scenarios
7 do count.

8 JUDGE JONES: It would probably be better
9 for your counsel to walk you through that on redirect.

10 THE WITNESS: Thank you.

11 BY MR. MAGNESS:

12 Q. Well, I mean where Mr. Gillan talks about
13 it, he's talking about a situation where --

14 JUDGE JONES: Well, now, if you want to
15 talk about it --

16 MR. MAGNESS: Well, I'll talk to him about
17 it. I'll ask him about it. I'll ask him, because I think
18 what you're saying is that that is a situation --

19 JUDGE JONES: Well, before you say what you
20 think he's saying, why don't you just say what you want to
21 say in regard to that testimony?

22 THE WITNESS: Thank you, your Honor. In
23 Gillan's rebuttal testimony, page 17, line 17 I will read,
24 as I explained in my direct testimony, in the unique event
25 that a CLEC leases dark fiber under an -- and I'm turning

1 the page -- an IRU and then lights the fiber with its own
2 optronics, it may be considered a fiber-based collocator.

3 So in the scenario that Gillan has put on
4 the table, we both are in agreement, AT&T and the CLEC
5 Coalition, that there is a scenario -- there's two
6 scenarios with collocation to collocation cross connects.
7 The first one involves Collocator No. 1 running fiber into
8 its cage and then, without that fiber touching the
9 fiberoptic terminal, a collocation to collocation cross
10 connect is made to a second collocator.

11 And Gillan states in his testimony, and I
12 do agree with him, that in that scenario the collocator to
13 collocator cross-connected carrier and the other carrier
14 should both count.

15 BY MR. MAGNESS:

16 Q. So we're in violent agreement that if there
17 was a CATT arrangement in Missouri or if there was an
18 arrangement where the CLEC provided its own optronics,
19 which is what Mr. Gillan described, that would qualify as
20 a fiber-based collocator.

21 But what I've been asking you about for
22 quite some time is not that. I'm just asking about plain
23 old Collocator No. 2 who does not have its own optronics.

24 A. Well, I think, if I recall correctly, the
25 question was collocation to collocation cross connects and

1 that they would not count, and this is an example of a
2 scenario where, yes, they would count, and this is also --

3 Q. No, sir. Collocator No. 2, that's the
4 question I'm asking about. Collocator No. 2 doesn't
5 provide its own optronics, does it?

6 A. Collocator No. 2 does not provide its own
7 optronics.

8 Q. Okay. So Collocator No. 2 is running a
9 coaxial cable to connect to Collocator No. 1's network,
10 right?

11 A. That is correct.

12 Q. Okay. Now, if there were two more people
13 doing exactly what Collocator No. 2 is doing, we'd have
14 four fiber-based collocators in that office under your
15 theory, right?

16 A. If the other two -- if there were four, and
17 they're all connecting to Collocator No. 1, for clarity,
18 and they're all receiving DS3 service or above and they're
19 controlling that transmission path from their collocation
20 arrangement, leaving the wire center, it's not provided by
21 AT&T, yes, I do agree all four of those would count.

22 Q. Okay. And on this issue of -- you
23 mentioned several times the transmission paths?

24 A. Correct.

25 Q. Okay. And when you talk about a

1 transmission path, you mean that even though the big fiber
2 that comes in the office, the fiber cable terminates at
3 Collocation No. 1, that actually you need to look at the
4 full transmission, the complete transmission path that can
5 go over to Collocator No. 2, right?

6 A. That is correct.

7 Q. Where is that term complete transmission
8 path in the rule?

9 A. Well, once again, in your interpretation of
10 the word terminates --

11 Q. No, sir. Where is -- where are those words
12 in the FCC's rule? Are they in the FCC's rule that
13 defines a fiber-based collocator?

14 A. It does define a fiber-based collocator
15 using two parts, and the second part, as I referenced
16 earlier, is or a comparable transmission facility, which
17 this would fall under.

18 Q. But that's not the words I asked you about.
19 I asked you about complete transmission path.

20 A. Those words in that exact lineup are not
21 listed in the order.

22 Q. Okay. So you've still got to operate the
23 fiberoptic cable or the comparable transmission facility,
24 but your contention is as long as you hook up to somebody
25 who does it, that takes you all the way out of the office,

1 you qualify, right?

2 A. Yes, I do. I think --

3 Q. Okay. Let me ask you a couple more things.

4 MR. MAGNESS: 15 more minutes?

5 JUDGE JONES: Sure.

6 BY MR. MAGNESS:

7 Q. Just a couple of things. on the
8 inspections that AT&T conducted --

9 A. Uh-huh.

10 Q. -- you weren't involved in those
11 personally, right?

12 A. Correct.

13 Q. Okay. And I believe at page 6 of your
14 direct, line 139 and 40, you're describing those
15 inspections, and you note that AT&T Missouri personnel
16 determined whether each identified carrier's collocation
17 arrangement in each of the identified wire centers, one,
18 had a fiber-based entrance facility that leaves the AT&T
19 Missouri premises and that terminates to the carrier's
20 collocation arrangement, correct?

21 A. That is correct.

22 Q. Okay. And then it says secondly you looked
23 at active power supply, that is electric power, in such
24 arrangements. So again, what you looked at when you were
25 checking, you looked at basically did they have a J in

1 your diagram, your Attachment MN-1, did they have entrance
2 manhole, entrance facility that goes in and terminates to
3 the collocation arrangement, right?

4 A. That was the first step, yes. That's
5 correct.

6 Q. Okay. And then I think in order to
7 complete -- well, in order to support the collocation to
8 collocation cross connect argument, I think as
9 Mr. Gryzmala put it you put eyeballs to the cage, that is
10 you looked at the collocation cages, right?

11 A. That is correct.

12 Q. Okay. Now, in your rebuttal testimony, at
13 page 9 -- it's page 9, line 19, you say, when AT&T
14 Missouri conducts a physical inspection of a central
15 office for fiber-based collocators, it cannot tell
16 standing outside the collocation cage whether a carrier
17 has optronics in a cage or is connecting to optronics in
18 another CLEC's cage. In fact, we cannot tell what goes on
19 inside the cages at all. All we see is a facility
20 connecting the cages, which we can determine to be DS3 or
21 higher.

22 So in order to establish this collo to
23 collo argument, you have to -- you have to look at the
24 cages, but here you say you don't really know what's going
25 on inside those cages. So why don't you just look at the

1 first thing you did in the inspection? I guess I'm at a
2 loss where you say, we don't know what's going on inside
3 those cages, and yet the only way you can support your
4 argument is to make an assertion about what's going on
5 inside those cages.

6 A. I actually disagree with the picture you've
7 painted in regards to looking at the two separate, my
8 direct and my rebuttal. In the direct I state that we are
9 able to through our physical inspection first identify a
10 fiber-based collocater by having a fiber cable that enters
11 their collocation arrangement, that they have power as
12 well and that that fiber leaves the facility.

13 The second thing that we are able to do is,
14 via a physical inspection, an eyeballing of the
15 collocation areas, we are able to identify if there is a
16 collocation to collocation cross connect running from one
17 collocation cage to another.

18 In my rebuttal testimony, I accurately
19 state that we do not have the ability to go into each
20 collocation arrangement and see what's going on within
21 those collocation arrangements. However, we do have the
22 ability to see if there's a cable running from one to
23 another.

24 Q. Well, then how do you know you didn't count
25 any that used CATT arrangements?

1 A. Once again, we don't have CATT
2 arrangements.

3 Q. But you said, I believe in your rebuttal,
4 that you offer something that's an awful lot like a CATT
5 arrangement, so that --

6 A. Right, which is a cable that's running
7 across, which we have identified as a collocation to
8 collocation cross connect.

9 Q. But does it include the dark fiber or is
10 that fiber that's just -- or is that coax that's running
11 over to the --

12 A. Whenever we were able to go out and
13 identify a collocation to collocation cross connect, we
14 were looking to see, once again, if there was a cross
15 connect via one collocater and another collocater. That
16 could have been coaxial. That could have been fiber.

17 We were unable to identify exactly if there
18 were optronics on one end or the other. However, we were
19 able to accurately identify if there was a collocation to
20 collocation cross connect between two carriers.

21 Q. Okay. The last thing I want to ask you
22 about is if you could go to page 7 of your rebuttal.
23 We're talking about how this cross-connected carrier, not
24 a CATT arrangement type carrier, but just this guy who has
25 the DS3 coax cross connect, how he operates the whole

1 fiberoptic cable. You said at line 11, Collocator No. 2
2 has multiplexing equipment that aggregates traffic and
3 transmits it over a coaxial cable at a DS3 level of
4 transmission.

5 Why does that mean they have control of the
6 fiber cable? I mean, doesn't multiplexing equipment just
7 basically tell the signals where to go?

8 A. The statement that you read basically goes
9 back to the argument that we made prior to this and in
10 this testimony is that it does not go to an analysis of
11 the coaxial connection. It does not go to an analysis of
12 the piece that they're getting from Collocator No. 1.

13 What we have to look at in its entirety is
14 the entire transmission path that that connecting
15 collocator is able to get and they're able to leave the
16 wire center with and they're able to run their business
17 across that. They've made an investment of having
18 multiplexors to carry their traffic and other pieces of
19 equipment, their collocation arrangement they've paid for,
20 the space, the power necessary to complete a transmission
21 across an entire path that leaves a wire center and that
22 falls within the threshold of being a fiber-based
23 collocator.

24 Q. Mr. Nevels, are you aware of anybody who
25 intentionally goes to the trouble of buying

1 telecommunications equipment, multiplexors, other
2 equipment, putting it in a collocation cage, renting that
3 space and then not connecting it to the outside world?

4 A. Actually, that would fall outside the
5 parameters of collocation.

6 Q. Doesn't make any sense, does it?

7 A. It does not.

8 Q. So everybody who collocates connects to
9 somebody because somebody's got to take them out of the
10 wire center, right?

11 A. Everyone who collocates, they do connect to
12 someone. But once again, if a collocator gets into an
13 agreement with another collocator, they're going to that
14 second collocator so that they can provide them a specific
15 service that they don't have currently, and that also
16 makes business sense as well.

17 Q. So that they -- they lease a service. They
18 get a service from them. Let's say in my original example
19 they used to lease that same DS3 transport from AT&T,
20 right?

21 A. Uh-huh.

22 Q. Now they lease it from Collocator No. 1.
23 They operate the Collocator No. 1 transport network. Back
24 when they leased the same service from AT&T, did they
25 operate the AT&T network?

1 A. In terms of the way we defined operate,
2 AT&T, yes, we consider they operate the entire
3 transmission path that they've acquired from AT&T or, in
4 your scenario, Collocator No. 1.

5 Q. You know, when I pick up my phone at home,
6 I'm in charge of the whole transmission path, right? It
7 goes through the loop. I tell it where to go. I dial
8 that number. Am I operating the AT&T network?

9 A. I think you're making a phone call at that
10 point.

11 Q. But am I operating the AT&T network?

12 A. I don't see that as being operating.

13 Q. How's it any different? I've got a
14 complete transmission path. I can determine when I make
15 the call. I can determine who I call. I can determine
16 long distance or local. I've got a lot of power. Why is
17 that any different from what you're saying about a
18 cross-connected CLEC?

19 A. I think you made the same argument in your
20 analogy of your flight from Texas; is that correct?

21 Q. I'm actually interested in this one because
22 I just don't understand what the difference is. I mean,
23 if you're saying that I operate the AT&T network in the
24 way that the FCC was considering operate a fiberoptic
25 cable, then I just -- I'm -- is that what you're

1 contending?

2 A. No, that is not what I'm contending.

3 Q. Okay.

4 A. Your analogy does not fully the cover the
5 scenario in which we're looking at. The accurate analogy
6 in this scenario would probably be if you were another
7 company that decided to provide service, phone service,
8 and you were actually able to label and brand that service
9 under your own name and you were able to sell that service
10 to third parties.

11 You have the ability to charge exactly what
12 you would like to charge for that service. You have the
13 ability to decides if you're going to offer long distance
14 or no. You have all of the control to realize your
15 business plan and actually compete with AT&T if that's who
16 you're getting the phone service from. I think that's a
17 better analogy.

18 Q. What if the cable breaks?

19 A. Well, going back to the Verizon CATT
20 arrangement --

21 Q. We're not in the Verizon CATT arrangement.

22 A. Well, we're --

23 MR. MAGNESS: You're I just -- I've asked
24 every way I know how to not speak about the Verizon CATT
25 arrangement.

1 JUDGE JONES: What if the cable breaks?

2 THE WITNESS: The Verizon CATT

3 arrangement --

4 JUDGE JONES: What happens if the cable
5 breaks?

6 THE WITNESS: If the cable breaks in this
7 scenario, you would have to go back to AT&T. In the
8 Verizon CATT arrangement, if the cable breaks, you would
9 have to go back to the third-party vendor, the exact same
10 thing, and have them repair it. So it's exactly the same
11 scenario that you would have with the Verizon CATT
12 arrangement, one of the examples provided by the FCC of
13 what a comparable transmission facility would be.

14 BY MR. MAGNESS:

15 Q. But since the Verizon CATT is irrelevant in
16 Missouri, if the -- if I am buying DS3 transport from
17 Collocator No. 1 instead of from AT&T, don't I still rely
18 on Collocator No. 1 to fix problems with the cable if that
19 cable breaks?

20 MR. GRYZMALA: Your Honor?

21 JUDGE JONES: Mr. Gryzmala.

22 MR. GRYZMALA: I'm going to object to the
23 form of the question. There's no evidence in the record
24 that the CATT arrangement is irrelevant to Missouri. In
25 fact, the evidence was that it is not existent in

1 Missouri. Mr. Nevels has indicated merely the FCC pointed
2 that as a specific example. I object to the form of the
3 question.

4 JUDGE JONES: I don't even think under your
5 question you need to make reference to Verizon, do you?

6 MR. MAGNESS: I'll rephrase my question.

7 BY MR. MAGNESS:

8 Q. Since that arrangement does not exist and
9 we're really talking about the Collocator No. 2
10 arrangement in Exhibit -- or Attachment MN-1, if you are
11 leasing a service from Collocator No. 1, a DS3 service of
12 a fixed capacity, same thing you used to lease from AT&T,
13 and the fiber breaks, isn't it Collocator No. 1 who owns
14 the fiber that's got to go out and fix it?

15 A. That is correct.

16 Q. Okay. And just one last thing. I just
17 want to be clear on this thing about operating the
18 network. If I pick up the phone and create a complete
19 transmission path to someone in St. Louis when I'm making
20 a phone call, I've created a complete transmission path
21 and I control when that call -- I can turn that call off.
22 I can turn it back on by dialing again. You don't like me
23 using the term operate for that, right?

24 A. That is an inaccurate analogy, in my
25 opinion, of this scenario.

1 Q. But it's okay to have that version of
2 operate for the cross-connected CLEC, right? You have a
3 real specific view of how the word operate works, right?

4 A. I think both parties have an opinion of
5 what the term operate is and how it's defined, and I think
6 we are clear that we differ on that. And I don't think
7 your analogy fits what we are saying operates means in
8 this scenario.

9 MR. MAGNESS: Thank you, Mr. Nevels.

10 THE WITNESS: Thank you.

11 JUDGE JONES: It's 25 after. We're going
12 to take a break. I realized in your-all's pleading that
13 Staff was to go first. I'm assuming that was so that the
14 CLECs would have the benefit of Staff's cross. Is that
15 correct?

16 MR. HAAS: The Staff has no questions for
17 this witness.

18 JUDGE JONES: You won't have questions.
19 That worked out just fine. It's about 25 after. We will
20 go ahead and break for lunch, and let's reconvene at 1:35.
21 Give you a little more time, little more than an hour for
22 those of you from out of town.

23 Mr. Magness, did you want to say saying?

24 MR. MAGNESS: Never mind. Sorry.

25 JUDGE JONES: With that, then, we'll stand

1 in intermission.

2 (A BREAK WAS TAKEN.)

3 (EXHIBIT NOS. 1 THROUGH 4 WERE MARKED FOR
4 IDENTIFICATION BY THE REPORTER.)

5 JUDGE JONES: It looks like everyone has
6 returned from lunch, and we will now go back on the record
7 with Case No. TO-2006-0360. Mr. Nevels is testifying.
8 We've had cross from the CLEC Coalition. Staff has
9 indicated they do not wish to cross. I suppose at this
10 time is when the Bench is supposed to ask questions. I'll
11 try to think of some questions to ask, then.

12 QUESTIONS BY JUDGE JONES:

13 Q. Okay. Let me be sure, Mr. Nevels. You are
14 testifying on the issue of the definition of fiber-based
15 collocators, whether that includes collo to collo
16 arrangements?

17 A. That is correct.

18 Q. If you have a collocator that's not
19 providing any service, I guess that would be dark fiber, I
20 guess, wouldn't it? They're collocating, but they're not
21 sending anything out?

22 A. Well, actually, all collocators would be
23 sending something out. If they're colocated, they're
24 serving a need somewhere in that area. So all collocators
25 would be serving a need. However, all collocators may not

1 have a fiber coming into their collocation arrangement
2 that leaves the wire center.

3 Q. And that's the one we want to count?

4 A. Actually, what we want to count is the
5 scenario where you have one collocater that has a fiber
6 coming in, and that's identified by the FCC as a
7 fiber-based collocater because they have a fiberoptic
8 terminal -- I'm sorry -- fiberoptics that terminate in
9 their arrangement and not leave the wire center, that's
10 automatically counted. That's not disputed by anyone here
11 today.

12 The scenario we're trying to count is in a
13 scenario where there's another carrier and they've decided
14 to connect to that first carrier via collocation to
15 collocation connection and, therefore, use that capacity
16 to make a complete transmission facility that leaves the
17 wire center.

18 So, yes, they may have some other business
19 plans in that central office, but to access that fiber and
20 to leave the facility with a different type of business, a
21 DS3 level or above business, they have a collocation to
22 collocation cross connect.

23 Q. Are both of those, the one who's renting,
24 so to speak, and the landlord, are both of them sending
25 signals out?

1 A. Yes, they are.

2 Q. Okay.

3 A. They're sending traffic out.

4 Q. Traffic?

5 A. Correct.

6 Q. Does it have to be business traffic or does
7 it matter?

8 A. Actually, both carriers would make a
9 determination on exactly who they serve and how they serve
10 them.

11 Q. I guess you're not testifying on that issue
12 anyway, are you?

13 A. Not the business line, no. Just the --

14 Q. Okay. And you're also testifying on the
15 comparable transmission facility and that definition?

16 A. Yes, sir.

17 Q. And an example is the Verizon whatever it
18 is. What is it?

19 A. Competitive alternate transport terminal.
20 The Verizon CATT arrangement was provided by the FCC as
21 one of several examples of what a comparable transmission
22 facility might look like. Another one that they provided
23 was fixed wireless where a carrier, instead of having
24 fiber, could use fixed wireless to transmit out of that
25 wire center, and that's just yet another example provided

1 by the FCC.

2 Q. Okay. Our Staff suggested the Commission
3 doesn't even need to define this. Do you have any opinion
4 about that?

5 A. Well, we've identified no carriers that are
6 collo to collo cross connected that would affect the
7 counts that we've provided today to this Commission.
8 However, we understand that as we go forward we may have
9 more collo to collo connections popping up, and we feel
10 that the Commission should, in looking forward, address
11 this issue so as we go forward and designate different
12 offices this issue is covered and addressed appropriately.

13 Q. I'm thinking that whatever offices are
14 identified now, it's identified now forever according to
15 what Mr. Gryzmala said.

16 A. Yeah, that is correct, but as we go
17 forward, we may identify new offices. We may have a
18 scenario where we do have a collocation to collocation
19 cross connect, and based upon that, if we know that it
20 counts, we can go and appropriately identify that, hey,
21 this office now counts and we need to identify that one
22 and it is not impaired.

23 So going forward, we would like to have
24 this issue resolved so we can go and make accurate
25 determinations on exactly what does count and what does

1 not count as a fiber-based collocator.

2 Q. And is it your understanding, then, that
3 the CLECs also would say that you-all don't have a current
4 dispute about a particular wire center where this is an
5 issue?

6 A. If I'm not mistaken, the CLECs have
7 identified in their -- I think they've identified three
8 offices that are in question, and in one of the offices
9 they have identified the question, the issue in question
10 as being a collocation to collocation cross connect issue.
11 We have identified that as a true fiber-based collocator
12 issue. So we are in disagreement on that one office.

13 Q. But that office doesn't have to do with the
14 definition of a comparable transmission facility?

15 A. In our opinion, that office has nothing to
16 do with the definition of a comparable transmission
17 facility.

18 Q. Okay. I'll talk to the CLECs' witness
19 about that further. And now from opening statements, I
20 heard conflicting remarks from the attorneys on this
21 issue. When the Commission defines or decides whether or
22 not a fiber-based collocator should include that
23 description in this -- in this issue, will we also be
24 deciding whether NuVox should be counted?

25 A. Well, once again, the issue in regards to

1 NuVox that's in question, we can clearly show that that is
2 not a comparable transmission facility issue. I think the
3 issue at hand is the fact that the arrangement may not be
4 the arrangement of NuVox, but I think Mr. Gillan -- I'm
5 sorry -- Mr. Gryzmala, my lawyer, put in his opening brief
6 and discussed the fact that if NuVox is not counted as a
7 true fiber-based collocater, the other party that they've
8 identified should be accurately counted as a fiber-based
9 collocater, not a comparable transmission facility
10 collocater, a fiber based collocater that actually has a
11 fiber terminating in their collocation arrangement, and
12 that either/or, one of those two should count.

13 But in counting either NuVox or the other
14 company that was named, the count for that office would be
15 met. The threshold would be met of four fiber-based
16 collocaters, thus deeming that office non-impaired.

17 Q. Okay. I understood some of what you said,
18 but I'm going to ask my question a different way and see
19 if you say the same thing.

20 The question before the Commission is, does
21 the definition of fiber-based collocater include collo to
22 collo arrangements in which the connecting carrier
23 establishes service without providing optronics for fiber
24 that leaves the wire center. If the Commission says no to
25 that question, will we also be saying no to this question:

1 Should NuVox be counted as a fiber-based collocater in the
2 location specified by AT&T?

3 A. And my answer to that is no, because that
4 is not a comparable transmission facility issue. In
5 AT&T's opinion, that is an actual fiber-based collocater
6 who has a cable terminating in its arrangement that leaves
7 the wire center. NuVox has stated that it is not their
8 arrangement; however, it is an arrangement of another
9 carrier that we did not initially count that would now
10 count. That would gives us the threshold that we would
11 need for non-impairment in this office.

12 I have a diagram that may help you
13 understand that. It was provided by Gillan in his direct
14 testimony, page 24, if I'm not mistaken. Let me verify
15 that. Yeah, that is correct, page 24. Are you --

16 Q. Just a minute.

17 A. Thank you.

18 Q. Page 24 of your rebuttal?

19 A. I'm sorry. Of Gillan's, Mr. Gillan's
20 direct testimony. Page 24 of Mr. Gillan's direct
21 testimony. And I would also like to reference to assist
22 us --

23 Q. Okay. And you want to direct us to what
24 now?

25 A. Further direct us to Schedule 2C, which is

1 marked highly confidential, and I will not discuss
2 anything that's highly confidential, just --

3 Q. What's it attached to, or is it attached to
4 his testimony?

5 A. Actually, this is provided by Mr. Cadieux.

6 MR. GRYZMALA: Your Honor, if I may
7 interject. I think he's referring to the testimony of
8 Mr. Scheperle, direct testimony of Mr. Scheperle. But,
9 you know, similar questions can be directed to
10 Ms. Chapman, too, as the primary witness on the NuVox
11 matter.

12 BY JUDGE JONES:

13 Q. Let's just deal with this -- since I have
14 Gillan's testimony in front of me, you mean this box with
15 the CLEC fiber, CLEC collocation?

16 A. That is correct.

17 Q. Okay. Walk me through that.

18 A. In the scenario in question, we have a CLEC
19 fiber, as you see on this diagram, entering a collocation
20 arrangement. The scenario at hand is that, as you see,
21 the FOT, which is the fiberoptic terminal, we have that
22 fiber terminating at this fiberoptic terminal. Now, NuVox
23 is in this -- in this collocation cage, they're stating
24 that they do not own that fiberoptic terminal. However,
25 someone else does own that fiberoptic terminal.

1 So we're saying that if you look at this
2 arrangement which shows a fiber entering a collocation
3 cage and terminating to a fiberoptic terminal, the first
4 threshold of a fiber-based collocater, operates a
5 fiberoptic cable, is met in this scenario. This scenario
6 is shown by Mr. Gillan has accepted, and this is the way
7 AT&T sees the issue at question with the office that we're
8 looking at. So this isn't a comparable transmission
9 facility issue. It's an issue in determining exactly in
10 this CLEC collocation arrangement who owns what. And once
11 again, NuVox has stated that they believe the other
12 carrier should be counted.

13 So I don't know if you count NuVox, I don't
14 know if you count the other carrier, but in either
15 scenario one of them gets counted and gives us the four
16 count, and that gets to the threshold of fiber-based
17 collocation and non-impairment in this office.

18 Q. You're saying it doesn't matter which one
19 is counted; if one is counted, then there are four
20 fiber-based collocators?

21 A. That is correct. And once again, you don't
22 see in the diagram a collocation to collocation
23 connection. You see a fiber terminating to an FOT, which
24 is the exact same scenario that's discussed by NuVox, and
25 that's the scenario in question. That's why I was stating

1 it's not a comparable transmission facility issue. It's
2 more of a determination of when this fiber terminates, is
3 it NuVox that owns the FOT or is it someone else? And
4 irregardless, in both scenarios one would count, and that
5 would give us the threshold.

6 Q. Okay. Do you know anything about the
7 merger of SBC and AT&T?

8 A. I know a little bit about that in regards
9 to how it affected me, but in regards to fiber-based
10 collocation, I wouldn't have anything to do with that.

11 Q. So that merger and that agreement doesn't
12 have any relevance to this issue?

13 A. Correct.

14 Q. Okay. Now, you and Mr. Magness went round
15 and round and round about what it means to operate
16 something. What does it mean to you to be an operator, to
17 operate the line or facility?

18 A. Basically, the definition that I understand
19 in regards to operate is, in regards to this case, is the
20 scenario where one individual has the ability to realize
21 an entire business plan, to realize service from one end
22 point to another. Mr. Magness gave the example of a phone
23 call. Once again, a phone call in our definition does not
24 meet the parameters of operate. Now, if you were -- once
25 again, I stated in my -- earlier today, that if you were a

1 phone company and you received services and then you were
2 able to sell those services under your own name, you would
3 be operating a network.

4 Another analogy that Mr. Magness used in
5 his opening was about an airline and that he flew here and
6 he sat on the plane and he was not operating that plane.
7 We don't contend that he was operating that plane. We
8 also don't believe that that's an appropriate analogy in
9 regards to operating.

10 To set up a spinoff from his airplane
11 analogy, I think the appropriate analogy for operate is if
12 me, I went out and I leased an entire plane from, let's
13 just say Southwest Airlines, and in leasing that plane, I
14 am operating that plane in that I get to determine how
15 many people ride on that plane, I get to determine if I
16 want to put packages on that plane instead of putting
17 people on that plane. I can charge whatever I want to
18 charge for that plane as far as seats are concerned. I
19 have full control to determine what goes on that plane. I
20 have full control to brand that plane under my own name
21 and sell services from that plane. I have full control of
22 that plane.

23 Once again, I am leasing that plane, I am
24 operating that plane, I am controlling what goes on in
25 that plane and what goes on and off of that plane. And I

1 think that further goes to what we believe operates.

2 Q. When you say you're leasing, do you mean
3 you're -- are you flying the plane, too?

4 A. Actually, I could actually put my own
5 pilots on there. I could decide to fly higher. I could
6 decide to fly lower. Once I've leased that plane from
7 Southwest Airline, I have the control of that. Now --

8 Q. What I'm getting from what operate means is
9 that somebody owns some fiber going out and somebody else
10 uses it, and if -- in that case, who -- can two -- can two
11 companies operate fiber?

12 A. Well, in the example of the Verizon CATT
13 arrangement, you have a scenario where a third party owns
14 the fiber and they lease the fiber to another party. So
15 there are scenarios where one company would own fiber and
16 they would lease excess capacity to other companies.

17 Q. Who operates the fiber in that --

18 A. In our opinion, the operator is the end
19 user of that fiber, the one that's able to put their
20 business plan, their transmission facilities across that.

21 Q. Not the owner?

22 A. In the Verizon CATT arrangement, it was
23 determined that if an owner came in with fiber and split
24 it up and gave it to three or four different carriers,
25 that each carrier would be operating a fiber-based

1 facility.

2 JUDGE JONES: Okay. I don't have any other
3 questions. Mr. Magness, do you have some recross?

4 MR. MAGNESS: No, your Honor.

5 JUDGE JONES: Redirect, Mr. Gryzmala?

6 REDIRECT EXAMINATION BY MR. GRYZMALA:

7 Q. Just a couple questions, Mr. Nevels as --

8 A. Thank you.

9 Q. -- the judge handled most of what I might
10 have covered.

11 You were asked a series of questions about
12 operating as Mr. Magness and His Honor drew your attention
13 to. I want to be clear on this. Does the FCC's rule
14 require that a fiber-based collocater operate fiberoptic
15 cable?

16 A. No. The FCC's rule does not in determining
17 a fiber-based collocater limit it to operating a
18 fiberoptic cable. They also provide language on a
19 comparable transmission facility that could be used by a
20 carrier in lieu of them having the fiberoptic cable coming
21 into their arrangement.

22 MR. GRYZMALA: May I approach, your Honor?

23 JUDGE JONES: Yes, you may.

24 BY MR. GRYZMALA:

25 Q. Please direct His Honor and -- Judge Jones'

1 attention to the portion of the rule which provides for
2 what you just testified to.

3 A. You want me to read it from what's --

4 Q. Well, I handed you a lot.

5 A. I will read from the actual rule, and it
6 states, a fiber-based collocater is any carrier
7 unaffiliated with the incumbent LEC that maintains a
8 collocation arrangement in an incumbent LEC wire center
9 with active electrical power supply and operates a
10 fiberoptic cable or comparable transmission facility.

11 Q. So the operative phrase there would be or
12 comparable transmission facility?

13 A. That is correct.

14 Q. Okay. You also pointed to a couple of
15 examples in which the FCC intended to reach both the
16 traditional and less traditional carrier collocation
17 arrangements, and you referred to the CATT arrangement and
18 fixed wireless; is that correct?

19 A. That is correct.

20 Q. Are those -- is it your testimony that the
21 FCC specifically noted those examples in the TRRO?

22 A. That is correct.

23 MR. GRYZMALA: May I approach, your Honor?

24 JUDGE JONES: Yes.

25 BY MR. GRYZMALA:

1 Q. I'll represent to you, Mr. Nevels, I just
2 gave you a copy of a brief portion of the TRRO. It would
3 be paragraph 102. I would like you to study that and
4 identify any language that would be pertinent to that
5 point.

6 A. I will read from the document. We define
7 fiber-based collocation as a competitive carrier
8 collocation arrangement with active power supply that has
9 a non-incumbent LEC fiberoptic cable that both terminates
10 at the collocation facility and leaves the wire center.

11 We find that the collocation arrangement
12 may be obtained by competing carriers either pursuant to
13 contract tariff or, where appropriate, Section 251(c) (6)
14 of the Act, including less traditional collocation
15 arrangements such as the Verizon CATT fiber termination
16 arrangements.

17 Because fixed wireless carriers'
18 collocation arrangements may not literally be fiber based,
19 but nevertheless signal the ability to deploy transport
20 facility, we include fixed wireless collocations
21 arrangements at a wire center if the carrier's alternate
22 transmission facilities both terminate in and leave the
23 wire center.

24 JUDGE JONES: That sounds like a decision
25 from another body. What is that that you gave him?

1 MR. GRYZMALA: Paragraph 102 of the TRRO,
2 your Honor.

3 BY MR. GRYZMALA:

4 Q. And in that passage, the FCC recognized
5 that fixed wireless collocation arrangements may not
6 literally be fiber-based?

7 A. Actually, they would not.

8 Q. But they count?

9 A. They do count, yes.

10 Q. And the FCC also indicated that, among the
11 less traditional, it says, including less traditional
12 arrangements such as, which means that the CATT
13 arrangement is not the end of the universe of less
14 traditional, correct?

15 A. That's correct.

16 Q. Others may qualify?

17 A. That is correct.

18 MR. GRYZMALA: That's all I have. Thank
19 you.

20 JUDGE JONES: Thank you, Mr. Nevels. You
21 may step down.

22 THE WITNESS: Thank you, your Honor.

23 JUDGE JONES: Mr. Gryzmala, you can call
24 your next witness.

25 MR. GRYZMALA: Your Honor, I would call

1 Ms. Carol Chapman.

2 (Witness sworn.)

3 CAROL CHAPMAN testified as follows:

4 DIRECT EXAMINATION BY MR. GRYZMALA:

5 Q. Would you state your name for the record,
6 please.

7 A. Carol A. Chapman, C-h-a-p-m-a-n.

8 Q. And, Ms. Chapman, are you the same witness
9 who caused to be prepared in this case direct testimony,
10 both highly confidential and nonproprietary, and rebuttal
11 testimony, both highly confidential and nonproprietary,
12 and surrebuttal, which is solely nonproprietary?

13 A. Yes, I did.

14 Q. Okay. Let me start, are there any
15 corrections to your direct testimony that would be
16 appropriate?

17 A. Yes, I have one. On page 1, lines 5
18 through 21 describing my employment, I have since changed
19 positions at AT&T, so this now would be describing my
20 previous position up until April 1st of this year.

21 Q. This testimony was submitted on March 30 in
22 prefiled form. So the day after -- I forget how many days
23 are in March, but as of April 1, you took on new
24 employment?

25 A. That is correct.

1 Q. So it's no longer accurate? It was
2 accurate when prepared, but no longer accurate today?

3 A. That is correct.

4 Q. And if I asked you, forgive me. I didn't
5 hear it. What is your title?

6 A. My new title is Senior Project Manager for
7 AT&T Video Services.

8 Q. With that correction, would you have any
9 other corrections to your direct testimony?

10 A. No, I would not.

11 Q. Let's move to the rebuttal, and I will
12 direct your attention to the affidavit you filed.

13 A. Yes.

14 Q. Would there be any corrections to the
15 affidavit you filed in association with that rebuttal?

16 A. Yes, there would be one correction. I did
17 not catch the -- that my title was on here, and so on
18 Item No. 1 listed on the affidavit, instead of saying I am
19 presently an Associate Director of Wholesale Customer Care
20 for Southwestern Bell Telephone, LP, it should read, I am
21 presently a Senior Project Manager for AT&T Video
22 Services.

23 Q. Thank you. Are there any other corrections
24 that you would like to make at this time to your rebuttal?

25 A. Yes, just one. On page 20, at the top of

1 the page there are several cites to various rulings in
2 different jurisdictions. I had not intended to include
3 anything but the cases that I was actually directly
4 involved in and inadvertently included the reference to a
5 decision from Washington, D.C., and I was going to strike
6 that.

7 It's on lines 12 through 15, and I just was
8 striking that because I was not a witness in that case. I
9 wanted to limit this to the cases in which I was actually
10 a witness, and I am in all the other ones that are listed
11 here.

12 Q. There are no other changes to your
13 rebuttal?

14 A. No. That was all.

15 Q. Do you have any corrections or changes to
16 offer to your surrebuttal?

17 A. No, I did not.

18 Q. With that, if I were to ask you the same
19 questions as are presented in your direct, your rebuttal
20 and your surrebuttal today, would your answers be the
21 same, subject to your corrections?

22 A. Yes, they would.

23 MR. GRYZMALA: Your Honor, with that, I
24 would propose to offer into evidence Ms. Chapman's direct
25 testimony HC as 15, nonproprietary as 16, rebuttal HC as

1 17, rebuttal not proprietary as 18, and surrebuttal as 19.

2 JUDGE JONES: Any objections?

3 MR. MAGNESS: No objection, your Honor.

4 JUDGE JONES: Exhibits 15, 16, 17, 18 and
5 19 are admitted into the record.

6 (EXHIBIT NOS. 15, 16, 17, 18 AND 19 WERE
7 MARKED FOR IDENTIFICATION AND RECEIVED INTO EVIDENCE.)

8 MR. GRYZMALA: With that, I have no further
9 questions. I'll tender the witness. Thank you.

10 JUDGE JONES: Thank you. This time we're
11 going to go in the right order. Do we have
12 cross-examination from the Staff of the Commission?

13 MR. HAAS: Staff has no questions for this
14 witness.

15 JUDGE JONES: CLEC Coalition?

16 MR. MAGNESS: Yes, your Honor.

17 CROSS-EXAMINATION BY MR. MAGNESS:

18 Q. Good afternoon, Ms. Chapman.

19 A. Good afternoon.

20 Q. Ms. Chapman, when do the merger conditions
21 associated with the AT&T/SBC merger expire?

22 A. I would have to look. It's actually in the
23 merger order. I know that the merger commitment for the
24 AT&T/SBC merger related to merger -- it's hard to say all
25 this -- related to this case had to go into effect within

1 30 days of the merger effective date, although some of
2 that same merger commitment is also carried forward in one
3 of the BellSouth merger commitments.

4 So as far as the exclusion of AT&T
5 collocation cages or collocation arrangements, that would
6 actually go through the end of the BellSouth merger
7 commitment, similar merger commitment, which I believe was
8 a 42-month commitment, but I would have to -- I'd actually
9 have to look at the order to determine the actual start
10 and end date.

11 Q. Okay. So just to be clear on that one
12 point, the exclusion of the former AT&T collocations
13 you're saying would extend as long as the BellSouth merger
14 commitments extend?

15 A. That is correct, because the BellSouth
16 merger commitments also included that exclusion, the
17 exclusion of former AT&T collocation arrangements. So
18 those would be excluded for the duration of that
19 commitment even if the first one expired.

20 Q. For example, if in March 2005 when you
21 submitted a wire center list, prepared a wire center list,
22 there was a particular wire center that you designated as
23 Tier 1.

24 A. Okay.

25 Q. Then in December of 2005, after the AT&T

1 merger, SBC/AT&T merger, that wire center became a Tier 2
2 because the old AT&T collocation was no longer listed.

3 A. Well, it is still a Tier 1 under the
4 provisions of the TRRO, but per our commitment under the
5 merger commitment, we reclassified voluntary for the
6 duration of the commitment as a Tier 2.

7 Q. Let me just finish the example.

8 A. I'm sorry. I thought you were finished.

9 Q. Okay. Let's say there was one you
10 classified Tier 1.

11 A. Yes.

12 Q. Then you submitted a list that included it
13 as Tier 2 after the merger because of the merger
14 commitment. Okay?

15 A. The December 16th updated list?

16 Q. 2005 list, correct.

17 A. Okay.

18 Q. On the date when the merger commitments
19 expire, is it AT&T's position that that wire center is a
20 Tier 1?

21 A. Well, it's our position that it's currently
22 a Tier 1 under the rules. We would not -- on the date
23 that the AT&T/SBC merger commitment expires, nothing
24 happens because we still have the BellSouth merger
25 commitment. So there would be no change as far as

1 effective for the CLECs.

2 Q. On the date that the BellSouth/AT&T merger
3 commitment expires, is it AT&T's position that that is
4 then a Tier 1?

5 A. Legally it is. Whether or not AT&T would
6 seek to have it revert back, I don't know that that
7 decision has been made. But legally, yes, because legally
8 under the TRRO, the provisions of the rule, the law, it is
9 a Tier 1. We agreed to make it not a Tier 1 for a limited
10 time period. So yes, you would go to what it is under the
11 law, but like I said, I don't know that a decision has
12 been made to try to reclassify it back to what it -- what
13 it should have been under the original designation at that
14 time.

15 MR. MAGNESS: Okay. Your Honor, that's all
16 I have. Thank you.

17 QUESTIONS BY JUDGE JONES:

18 Q. Ms. Chapman, your testimony concerns the
19 business line count in this formula; is that correct?

20 A. It actually concerns both issues. I cover
21 everything in my testimony. I don't cover the network
22 side of the fiber-based collocation issues, but I cover
23 pretty much everything else. Yes, I do cover the business
24 lines, and I cover that NuVox question that you were
25 asking about earlier. That's in my testimony as well.

1 Q. Okay. And it seems, then, the issue has to
2 do with, in the business line definition, the phrase plus
3 the sum of all UNE loops connected to that wire center.
4 Is that where the dispute lies?

5 A. Yes. I see that as the key dispute of the
6 business line.

7 Q. Are there other disputes in that
8 definition?

9 A. There's the dispute of how you calculate
10 digital, the digital equivalency, but I see that as tied
11 to the phrase you count all UNEs because basically the
12 CLECs propose that for all UNE loops you don't count them
13 unless they're being used to provide switched service to a
14 business customer, and then they're also applying that
15 same logic on the digital equivalency, that you should
16 only count the portion of a digital loop used to provide
17 switched service to a business customer. So it's -- I see
18 it as really the same issue, but there's two aspects to
19 it.

20 Q. Is there any other -- is there any service
21 other than switched service?

22 A. There could potentially be, yeah, a
23 non-switched data type service that a CLEC could be
24 providing.

25 Q. To a business customer?

1 A. Yes, they could be providing a non-switch
2 service to a business customer or a residential customer.

3 Q. Can UNEs -- do UNE loops include
4 residential customers?

5 A. Yes. When we provide -- we provide
6 basically just a facility. When we're providing a loop,
7 all we're providing is a bare connection between our wire
8 center and an end user address. The CLEC can then put
9 over and transmit over that loop whatever they want. They
10 can provide business service over that loop. They can
11 provide residential. To the extent the loop will support
12 it, they can put a switched service or a non-switched
13 service.

14 We really don't know what they're putting
15 over that loop. We don't have any records that indicate
16 it's a residential loop or a business loop or it's being
17 used for switched or non-switched or how it's used. We
18 only know what the loop is, what type of loop we provided,
19 what its capacity is, that sort of thing.

20 Q. Would the requirements for capacity be
21 different for business, between business and residential
22 use?

23 A. Well, typically you would expect business
24 customers to maybe want to use higher capacity facilities.
25 Whereas, a residential customer, they're typically going

1 to want maybe a line for just phone calls, that sort of
2 thing. They may want Internet connection or things of
3 that nature, so they may have some data loops.

4 A business customer may have a higher
5 capacity need. They may want to transmit, you know, large
6 amounts of data to whoever, depending on what type of
7 business it is. So depending on the type of business, you
8 might see more data with a business customer.

9 Q. Well, now, you said you don't know what
10 they're doing with those loops, right?

11 A. That is correct. We just know what we're
12 selling.

13 Q. You know the capacity of the loop?

14 A. That's right. We know if we sold them a
15 voice grade loop or if we sold them a DS1 loop or a DS3
16 loop, but we don't know once we handed it off to the CLEC
17 what they're doing with the loop.

18 Q. If it's a voice grade loop, I'm taking that
19 to be lower than both DS1 and DS3; is that correct?

20 A. That's correct. That would just be a basic
21 analog loop like you would use, you know, at home to talk
22 on the phone. It would count as one line under the rule.

23 Q. Would you use -- would you use a voice
24 grade loop for a business?

25 A. Yes, you could use voice grade, depending

1 on the type of business. Particularly a smaller business
2 would typically have some voice grade lines at that
3 business.

4 Q. You mean like a sole proprietor, for
5 instance?

6 A. Right. Like if you had you a restaurant or
7 something like that, they're typically going to have just
8 a landline or something like that. Now, if you have a
9 larger business, they may have a DS1 or DS3 that they
10 break off into different uses. But smaller businesses in
11 particular are typically going to have voice grade loops,
12 and larger businesses will often have them as well. They
13 may have a mixture.

14 Q. Do both parties agree that that example,
15 that restaurant you're -- is that a business --

16 A. Yes.

17 Q. -- under this definition? Both parties
18 agree to that?

19 A. I believe so. I don't know the definition
20 of actual -- of what constitutes a business itself is in
21 dispute. It's whether or not the FCC's rules requires
22 that we count all UNE loops, all the standalone loops
23 regardless of how they're used.

24 Q. The reason I ask that question is if --
25 let's assume that this all UNE loops means all business

1 UNE loops.

2 A. Okay.

3 Q. And the end user -- the end user customer
4 is a restaurateur.

5 A. Uh-huh.

6 Q. Then that would be included in this
7 definition of a business line?

8 A. It would be. I wouldn't know how to
9 determine that I should include them or not based on the
10 data that I have, but yes, theoretically you would include
11 them because they are business.

12 Q. So it's not the capacity of the loop that's
13 relevant, then, it's how it's used?

14 A. Under the dispute, that's correct. It's
15 whether or not the loop or the capacity of the loop is
16 being used to serve, provide switched service to a
17 business customer or not. Our position is that's
18 irrelevant. The FCC said you count all UNE loops, period.
19 They said it in the rule, and they said it in
20 paragraph 105 of the order.

21 And the CLECs' position is that you don't
22 count all loops, you count only some of the loops, the
23 ones that are used to provide switched service to business
24 customers.

25 Q. You said that you only count the ones that

1 are used to provide switched service to business
2 customers?

3 A. That's what the CLECs' position is, unless
4 you go with their simple --

5 Q. That's not what the FCC said?

6 A. That's correct.

7 Q. And that's not what AT&T is saying either?

8 A. No, it's not.

9 Q. On this issue of the loop capacity and loop
10 usage --

11 A. Uh-huh.

12 Q. -- my general understanding is that the FCC
13 is trying to determine how much activity is going on in a
14 wire service in order to determine whether or not it
15 should be non-impaired.

16 A. I think that's generally correct. The
17 business lines help you determine the potential for
18 revenue. A large number of business line would suggest
19 there's more potential business there that a CLEC could
20 profit off of. Whereas, a smaller number would show less
21 potential revenue.

22 Q. So is it the revenue or the -- or the
23 activity? Because if -- I don't know that this is
24 possible or not, but if a wire center has all residential
25 use coming through it, then it's going to have less

1 revenue than it does if it were all business?

2 A. I think that's correct. You typically
3 aren't going to be able to make as much money off of
4 residential customers.

5 Q. Let's see. How can I put this? So if a
6 wire center is being used only for residential at full
7 capacity, every wire is being used, there's no dark fiber,
8 every loop, every everything is being used, that pretty
9 much says nothing else can go in there, right? There's no
10 room for anything else to happen?

11 A. Well, it's going to depend, because, I
12 mean, I guess you're saying that every -- all our
13 facilities are being used if we had -- then that would be
14 true, although I don't believe -- we don't build our
15 network that way. We allow for spares and so forth in our
16 network.

17 Q. Well, now your spares are being used.

18 A. So all our spares are being used. Then
19 that would -- yeah. If it was all being used for
20 residential service, then all the revenue at that wire
21 center that could be served off of our network would be
22 represented by those residential lines.

23 Q. Okay. Now, take a different wire center
24 that's not to full capacity.

25 A. Okay.

1 Q. But there are only business lines coming
2 through there, but there's room for something else.

3 A. Okay.

4 Q. Is the FCC in their order concerned, then,
5 that if there's room for more activity in there, then it
6 should be non-impaired, or it shouldn't be non-impaired
7 rather if there's room for more activity? I'm trying to
8 draw a distinction between revenue and activity.

9 A. And I think it's not so much whether or not
10 there's potential for more. It's what's there, what is
11 there currently. If there's currently enough business
12 lines in there to meet one of those thresholds, then it's
13 non-impaired. If it could grow, then it's not -- it may
14 be non-impaired now, but let's say two years from now, you
15 know, new business development goes up and it increases
16 the business line count in that wire center. It may
17 become non-impaired at a later date if it's growing.

18 Q. And you're trying -- I know you're
19 answering your question in such a way as to support your
20 position that capacity is the issue rather than usage.
21 I'm trying to get to the FCC's intention. Is it their
22 intention -- in other words, are these thresholds set
23 where they are to reflect revenue or activity that's going
24 through the wire center?

25 A. Well, I think both. The way I read the

1 FCC's discussion of the business line count is they're
2 looking at the current activity in that wire center as a
3 means of determining currently available revenues in that
4 wire center.

5 And so whether those -- currently those
6 revenues may be going to AT&T or they may be going to
7 NuVox or they may be going to XO or they may be split
8 among the three of us, but all that business line activity
9 that's currently there is going to represent revenues that
10 any new competitor would have a potential to come in and
11 try to get business from.

12 Q. Well, voice grade isn't even considered in
13 this situation, is it?

14 A. It is. It's just that a voice grade line
15 is going to count on a one per one basis. For each -- for
16 each voice grade line that is in place in that wire
17 center, it's going to count for one line. And that's
18 going to happen under the ARMIS piece, the ARMIS 4308, and
19 that's going to include our retail and resale lines,
20 business lines. Our UNE-P lines are the same way. If
21 it's a voice grade line, we count one of those business
22 lines. And then on the UNE-L side we count each voice
23 grade loop as a line.

24 Q. Okay. So your answer assumes that plus the
25 sum of all UNE-P loops includes voice grade lines?

1 A. Yes. The UNE-P -- for UNE-P, you would
2 count all business UNE-P lines, and that would include
3 voice grade, which is a -- which is going to probably be
4 the majority of the UNE-P lines is the voice grade lines.
5 But for UNE-P it's only going to be business line because
6 those are switched access lines, ILEC switched access
7 lines. And we would only count business UNE-P, business
8 retail lines, business resale lines.

9 So for anything that we're providing the
10 switching for, we would only count it if it's a business
11 line, and it's only for the UNE-L lines, the lines where
12 we're not providing the switching, it's being handed off
13 to the CLEC at their collocation that we would count all
14 of those lines.

15 Q. And your reason for saying that the
16 business line counts should include the loop's capacity
17 rather than usage is because of possible future needs?

18 A. Well, it's just because of what the rule
19 says. The rule, first it says to count all UNE loops, and
20 then it also says that for digital loops you count them
21 based on their --

22 Q. KBPS?

23 A. Yeah, kilobits per second capacity, and
24 they gave the example of how you would calculate that for
25 a DS1 line. That would equal 24 for one DS1. And so

1 that's what we based it on is simply what's in the rule.

2 Q. Okay. Now, would you agree with this
3 statement: A business line is -- or a business line
4 includes the sum of all UNE-P loops connected to that wire
5 center?

6 A. The business line count? No. It would
7 only include -- since UNE-P is a switched access line, it
8 would only include the business UNE-P lines, and that's
9 what's in paragraph 105 as well of the TRRO.

10 JUDGE JONES: All right. I don't have any
11 other questions. Any recross, Mr. Magness?

12 MR. MAGNESS: I'm sorry, your Honor. No.
13 No, sir.

14 JUDGE JONES: Redirect? Mr. Gryzmala,
15 redirect?

16 REDIRECT EXAMINATION BY MR. GRYZMALA:

17 Q. Just a couple of questions, Ms. Chapman. I
18 believe you were asked something about the subject of, if
19 I heard correctly, whether merger conditions or merger --
20 strike that.

21 I believe you were asked a question about
22 whether voluntary commitments made in connection with the
23 SBC/AT&T merger would be extended in some fashion by
24 commitments likewise made in the AT&T/BellSouth merger.
25 Do you remember that general discussion?

1 A. Yes, I do.

2 Q. Would you agree that the actual order of
3 the FCC approving the BellSouth merger and having the
4 conditions and voluntary commitments in it would provide
5 the definitive ruling on that subject?

6 A. Oh, absolutely, yes. It has all the
7 timelines.

8 Q. And what conditions applied, which ones
9 didn't, it's all there?

10 A. That's correct.

11 Q. And just one other thing. I just want to
12 talk about briefly that restaurant scenario. Let's just
13 say if the definition of a business line for hypothetical
14 purposes were confined to include only -- I'm sorry. If
15 the definition of a UNE line, UNE line were confined to
16 only business UNE lines, let's just assume that for --

17 A. Let me make sure. Are you saying the
18 definition -- the UNE lines that you count in the business
19 line count only includes business UNE?

20 Q. Yes. Thank you.

21 A. Okay.

22 Q. Thank you. Let's just assume that for a
23 moment. That's not our position, you agree?

24 A. I do agree that that's not our position.

25 Q. Let's assume that for just a moment. Let's

1 say the CLEC took that line and sold it to a pizzeria or
2 rather provided telephone service to a pizzeria over that
3 single voice grade line.

4 A. Okay.

5 Q. Now, would AT&T have any information as to
6 whether the CLEC actually provided service over that line
7 to a business or a residence?

8 A. No. We would not have any way of knowing
9 if we should count that line under that definition, under
10 the definition that would exclude loops used to provide
11 residential service. We wouldn't know if we should count
12 that line or not because our records don't show how a CLEC
13 uses the loop once we provide it to them. Only the CLEC
14 is aware of that.

15 Q. And let's say the pizzeria owner lives
16 upstairs.

17 A. Okay.

18 Q. And above his restaurant, and so that there
19 are two lines involved, one that goes to the pizzeria
20 downstairs and one that goes to his apartment upstairs,
21 and the CLEC provides service to both points over a UNE
22 loop, over a UNE line.

23 A. I'm assuming two loops?

24 Q. Yeah, two loops.

25 A. Okay.

1 Q. AT&T Missouri would not know that either
2 one of them or both were either residence or business,
3 correct?

4 A. That's right. Under the CLECs' proposed
5 interpretation of the rule, we would only count one of
6 those two lines, but we wouldn't have any way of
7 determining which of the -- that that was the case.

8 Q. To your recollection in any of the
9 decisions that have been decided on by the state
10 commissions, has that lack of information by AT&T Missouri
11 to how the use is -- how the loop is actually put, how the
12 line is actually put a factor in their analysis?

13 A. Well, yes, because the FCC specifically
14 noted in the TRRO that the ILECs had all the information
15 already in their possession, in fact were already
16 reporting that data. All of the information necessary to
17 implement the FCC's business line rule was already in the
18 ILECs' possession. State commissions have recognized that
19 fact and used that as one of the reasons why they rejected
20 proposals like the one presented by the CLECs here today.

21 MR. GRYZMALA: That's all I have. Thank
22 you, your Honor.

23 JUDGE JONES: Thank you. You may step
24 down, Ms. Chapman.

25 MR. MAGNESS: Your Honor, could we have

1 just a moment? I just want to ask counsel for PSC a
2 question.

3 JUDGE JONES: Sure. What's up? What's
4 going on?

5 MR. MAGNESS: Your Honor, Mr. Gillan will
6 not be able to be here tomorrow. We tad talked about
7 taking him out of order. I just was consulting with
8 counsel for Staff. I don't think we need to. I think we
9 can proceed. I just wanted to be sure.

10 JUDGE JONES: Okay. Staff, call your first
11 witness.

12 MR. HAAS: Staff calls Michael Scheperle.

13 (Witness sworn.)

14 (EXHIBIT NO. 21 AND 22 WERE MARKED FOR
15 IDENTIFICATION BY THE REPORTER.)

16 MICHAEL SCHEPERLE testified as follows:

17 DIRECT EXAMINATION BY MR. HAAS:

18 Q. Mr. Scheperle, will you please state your
19 name for the record.

20 A. Michael S. Scheperle, S-c-h-e-p-e-r-l-e.

21 Q. And are you the Michael Scheperle that has
22 prepared direct testimony for filing in this case?

23 A. Yes.

24 Q. Do you have any additions or corrections to
25 that testimony?

1 A. No.

2 Q. And if I asked you the questions that are
3 in that testimony, would your answers be the same today?

4 A. Yes, they would.

5 Q. And are those answers true to the best of
6 your knowledge, information and belief?

7 A. Yes.

8 MR. HAAS: Your Honor, Mr. Scheperle's
9 direct testimony has been marked as 21NP and 22HC, and I
10 move for its admission.

11 JUDGE JONES: Any objections?

12 MR. MAGNESS: No, your Honor.

13 JUDGE JONES: Exhibit 21 and Exhibit 22 are
14 admitted into the record.

15 (EXHIBIT NO. 21 AND 22HC WERE RECEIVED INTO
16 EVIDENCE.)

17 MR. HAAS: I tender the witness for
18 cross-examination.

19 JUDGE JONES: Cross-examination from AT&T?

20 MR. GRYZMALA: No questions, your Honor.

21 JUDGE JONES: Cross-examination from the
22 CLEC Coalition?

23 CROSS-EXAMINATION BY MR. MAGNESS:

24 Q. Good afternoon, Mr. Scheperle.

25 A. Good afternoon, Mr. Magness.

1 Q. I really only have questions about one area
2 of your testimony, and I think if you went to page 5 of
3 your direct, just let me know when you have it there.

4 A. I have it.

5 Q. Okay. In the Tier 1 wire center
6 investigation, you state at line 21 that AT&T identified
7 nine wire centers as Tier 1 wire centers. Was the Staff's
8 investigation of Tier 1 wire centers based on this
9 designation of nine wire centers?

10 A. Yes, it was.

11 Q. And then subsequently the issue arose
12 concerning five other wire centers, correct?

13 A. Correct.

14 Q. Okay. And just to put them in the record
15 to be sure we're talking about the same thing, those five
16 wire centers are Springfield, Tuxedo, Parkview, Prospect,
17 Kirkwood and Bridgeton; is that correct?

18 A. That is correct.

19 Q. And those are five that AT&T has said were
20 identified in March 2005 but were not -- but were removed
21 from the list before this nine that you investigated
22 were -- their subsequent list? I'm not sure I said that
23 very clear. Let me try again.

24 Originally in March 2005, those five wire
25 centers were listed as a group of 14?

1 A. That is correct.

2 Q. Okay. The --

3 A. Fourteen Tier 1 wire centers.

4 Q. The nine wire centers that you investigated
5 in this case did not include those five wire centers?

6 A. When I sent out the affidavit verification,
7 I had listed them as Tier 2, but I think from the
8 difference between Tier 1 and Tier 2 designations, Tier 2
9 has like fiber-based collocators, it would have three and
10 Tier 1 would have four or more.

11 So by the CLEC verification, if there was
12 four and four came back that they were fiber-based
13 collocators, I mean, it would still -- and then they had
14 taken off AT&T, the CLECs, then it would go down to
15 Tier 2, but it would still -- including AT&T, it would
16 have been four at that time which would have been a
17 Tier 1 designation.

18 Q. And did you send any verifications to AT&T
19 to confirm that those old AT&T collocations they
20 identified were fiber-based collocators?

21 A. No, I did not.

22 Q. Do you have -- is there any evidence in the
23 record either way about whether those old AT&T
24 designations were based on this collo to collo cross
25 connect, that is AT&T's position that those should count

1 as fiber-based collocators?

2 A. Not in my testimony.

3 Q. Okay. So none of the -- none of the data
4 Staff gathered addressed the specific question of whether
5 the old AT&T collocations were properly designated as
6 fiber-based collocators for purposes of the FCC's rule; is
7 that correct?

8 A. That is correct. I did get verification
9 through Data Requests from -- from SBC, and they did have
10 on some of those lists that AT&T was listed, but I did not
11 go to AT&T and specifically ask if they were a fiber-based
12 collocator.

13 Q. Well, is there -- is there evidence that's
14 submitted with your testimony that's an SBC response on
15 behalf of AT&T which it now owns? I'm trying to
16 understand. You said SBC told you that those AT&T --

17 A. I -- I had -- I have seen it in a DR that
18 they were included on an original list.

19 Q. Uh-huh.

20 A. Then I'm --

21 Q. Beyond the fact that they were included on
22 an original list, is there any verification like you
23 sought from all the other CLECs that says they qualify for
24 the following reason?

25 A. No.

1 MR. MAGNESS: Okay. All right. Your
2 Honor, that's all I have. Thank you.

3 JUDGE JONES: Thank you.

4 QUESTIONS BY JUDGE JONES:

5 Q. I'm going to ask you a similar question
6 that I asked Ms. Chapman. Does a business line include
7 UNE loops?

8 A. Yes. And when you say UNE loops, there is
9 a difference there. I mean, under I think it's paragraph
10 105 of the TRRO, it talks about UNE-P business lines, so
11 only the business lines for UNE-P would count, but then it
12 goes on to state that all what I call UNE-L lines count
13 also.

14 Q. What's a UNE-P line? What's the P stand
15 for?

16 A. It's a platform.

17 Q. Platform?

18 A. And basically it's where the CLECs get a
19 UNE, but SBC or AT&T is providing the switching for it.

20 Q. Are there residential UNE-Ps?

21 A. There is residential UNE-Ps, but they're
22 not included in the count. It's very specific that --

23 Q. They do exist though, is what I'm asking?

24 A. They do exist, but it only -- from
25 paragraph 105, it says that only business UNE-Ps should

1 count.

2 JUDGE JONES: Okay. That's all I have. Do
3 we have any redirect from Staff?

4 MR. BUB: Your Honor, before Staff, don't
5 we get a chance at recross based on your questions?

6 JUDGE JONES: I'm sorry. Sure, you do. Go
7 right ahead.

8 MR. BUB: Thank you, your Honor.

9 RECROSS-EXAMINATION BY MR. BUB:

10 Q. Mr. Scheperle, I'd just like to follow up
11 on a couple of questions that Judge Jones had having to do
12 with how you count the business lines. It's correct that
13 the FCC has provided a specific rule saying how you do
14 that counting; is that correct?

15 A. That is correct.

16 Q. What's that rule? If it would help you,
17 page 10 of your testimony --

18 A. Okay.

19 Q. -- you cite it.

20 A. The rule is 47 CFR 51.5.

21 Q. Okay. And within that rule, does it give a
22 mathematical formula of how you go about doing the
23 counting?

24 A. Yes, it does.

25 Q. And that appears in the fourth line of that

1 rule?

2 A. Yes, it does, the start of it.

3 Q. I'd like you to go through each element
4 that we're supposed to count and I'd like to ask questions
5 about each element so we're clear about what you count and
6 what you don't count.

7 The first part, the number of business
8 lines in a wire center shall equal the sum of, and the
9 first element is, all incumbent LEC business switched
10 access lines. Taking that phrase, all incumbent LEC
11 business switched access lines, can you tell us what that
12 is, what that represents?

13 A. By definition, that's the AT&T retail
14 lines, or sometimes it's referred to as ARMIS 4308 lines.

15 Q. To back up, when you're talking about an
16 AT&T retail line, that would be the line that AT&T
17 Missouri, the ILEC, might sell to that pizza parlor we've
18 been talking about?

19 A. That is correct.

20 Q. And that ARMIS report is an FCC report that
21 all LECs, like AT&T Missouri, have to report each year to
22 the FCC about how many lines that they sell themselves?

23 A. That is correct.

24 Q. Okay. So that's that first element. Then
25 we go on further, plus the sum of all UNE loops. Can you

1 tell us what a UNE loop is?

2 A. Well, a UNE loop is a loop that the CLEC
3 would purchase from AT&T as an unbundled network element,
4 and there's different ones. There's a UNE-P, which is a
5 UNE platform where AT&T would provide the switching. You
6 have UNE-L. You have UNE-L analog lines. You have UNE-L
7 digital lines. And you have DS1 and DS3 UNE-Ls also.

8 Q. And we're talking about the UNE loops.
9 You're just talking about the line portion of that, not
10 the switch; is that correct?

11 A. Right. The only time the switch would
12 enter in is --

13 Q. The UNE-P?

14 A. -- is UNE-P, but we're still talking about
15 a loop, yes.

16 Q. Okay. Now, let's go through the math
17 again. What we count is first the incumbent LEC's retail
18 business switched access lines, right?

19 A. That is correct.

20 Q. That's when AT&T sells a business line to
21 the pizza parlor?

22 A. Correct.

23 Q. And that's, as we see here, a business
24 switched access line?

25 A. Correct.

1 Q. The rule says that?

2 A. Yes.

3 Q. The next thing you add is the UNE-P

4 business switched access lines?

5 A. That is correct, and that would not include

6 any UNE-P residential lines.

7 Q. Then you're also adding the sum of all UNE

8 loops; is that correct?

9 A. Correct.

10 Q. And when they say all UNE loops, what does

11 that mean to you?

12 A. Well, all UNE loops means all business and

13 residential lines. It means all UNE loops basically.

14 Q. AT&T Missouri knows how many loops it might

15 sell to a CLEC; would that be your understanding?

16 A. Yes.

17 Q. But AT&T Missouri wouldn't know how the

18 CLEC actually uses that particular loop?

19 A. That is correct.

20 Q. And it's the CLEC that adds the switch to

21 the loop to provide service, not AT&T; is that your

22 understanding?

23 A. Yes, for UNE-L.

24 Q. Okay. The rule also talks about the 24

25 64 KBPS equivalents, what's that all about?

1 MR. MAGNESS: Your Honor, I'm going to
2 object at this point because I think that, No. 1, it's
3 beyond the scope of questions you had at this point. I
4 think up to now Mr. Bub has been reviewing what you
5 already asked Mr. Scheperle. In that sense, it's
6 cumulative, but it covers the area. We're now on a
7 different part of the rule that wasn't subject to your
8 inquiry and is beyond the scope.

9 JUDGE JONES: You agree with him, right?

10 MR. BUB: I think that's right. I think I
11 did go a little bit farther.

12 JUDGE JONES: Objection sustained.

13 MR. BUB: Those are all the questions we
14 had, your Honor.

15 JUDGE JONES: Redirect?

16 MR. HAAS: No questions, your Honor.

17 JUDGE JONES: Mr. Scheperle, you may step
18 down.

19 Moving right along to the CLEC Coalition
20 witness.

21 (Witness sworn.)

22 JUDGE JONES: Thank you. You may be
23 seated.

24 JOSEPH GILLAN testified as follows:

25 DIRECT EXAMINATION BY MR. MAGNESS:

1 Q. Good afternoon. Mr. Gillan, please state
2 your name and business address for the record.

3 A. Joseph Gillan, P.O. Box 7498,
4 Daytona Beach, Florida 32116.

5 Q. And are you the same Joseph Gillan who
6 caused to be filed testimony on behalf of the CLEC
7 Coalition in this case?

8 A. Yes.

9 Q. And did that testimony include direct
10 testimony along with Exhibits JPG-1 through JPG-4?

11 A. Yes.

12 Q. Did you file rebuttal testimony?

13 A. Yes.

14 Q. And did that rebuttal testimony also
15 include JPG-5 through JPG-9?

16 A. Yes.

17 Q. If I asked you the same questions that are
18 asked in your prefiled testimony today, would your answers
19 be the same?

20 A. Yes.

21 Q. Do you have any changes you want to make to
22 your testimony?

23 A. No.

24 MR. MAGNESS: Your Honor, Mr. Gillan's
25 testimony has been marked as, Mr. Gillan's direct

1 testimony is CLEC Exhibit 1. CLEC Exhibit 2 is the HC
2 exhibits. CLEC Exhibit 3 is Mr. Gillan's rebuttal, and
3 CLEC Exhibit 4 is the HC exhibits to Mr. Gillan's
4 rebuttal. We would request that CLEC Exhibits 1 through 4
5 be admitted at this time.

6 JUDGE JONES: Any objection to Exhibits 1,
7 2, 3 and 4?

8 MR. GRYZMALA: No objection, your Honor.

9 JUDGE JONES: Exhibits 1, 2, 3 and 4 are
10 admitted.

11 (EXHIBIT NOS. 1 THROUGH 4 WERE RECEIVED
12 INTO EVIDENCE.)

13 JUDGE JONES: I need to ask you, though,
14 you referred to just the exhibits as HC attached to those
15 testimonies?

16 MR. MAGNESS: Yes, sir. Mr. Gillan's --
17 the body of Mr. Gillan's testimony, none of that is HC.
18 All of the HC information was kept in the exhibits.

19 JUDGE JONES: Okay. Great. Thanks. Any
20 cross-examination from Staff?

21 MR. HAAS: Yes, your Honor.

22 CROSS-EXAMINATION BY MR. HAAS:

23 Q. Good afternoon. Mr. Gillan, would you
24 please turn to page 10 of your direct testimony.

25 A. Yes.

1 Q. And would you read aloud the last two
2 sentences of the FCC's definition of business line where
3 it lists what should be included in the business line
4 tallies?

5 A. The last two lines?

6 Q. Sentences.

7 A. The last two sentences. Among these
8 requirements, business line tallies shall include only
9 those access lines connecting end users with incumbent LEC
10 end offices for switched services, shall not include
11 non-switched special access lines, three, shall account
12 for ISDN and other digital access lines by counting each
13 64 kilobit per second equivalent as one line. For
14 example, a DS1 line corresponds to 24 64 kilobits per
15 second equivalents and, therefore, to 24 business lines,
16 quotes around the words business lines.

17 Q. If you need to, please turn to page 21 of
18 your direct testimony and to Schedule JPG-3 where you
19 present what you describe as the corrected business line
20 counts for 2003.

21 A. Yes.

22 Q. The 2003 line counts that you are revising
23 are the line counts that AT&T Missouri submitted to the
24 FCC after the issuance of but before the effective date of
25 the TRRO; is that correct?

1 A. Yes. That is the only data AT&T would
2 provide us at that point.

3 Q. In your calculation, do you count a DS1
4 line as 11 business lines?

5 A. No. I count it as 24 lines, but as
6 business lines, I'm only counting them as 11. That's the
7 distinction between what I believe to be a full reading of
8 the definition and the way AT&T and evidently the Staff
9 have read the FCC's rule. The FCC does not define in
10 its -- it gives an example of a DS1 can correspond to 24
11 business lines, but its definition only says that a
12 64 kilobit channel is a line.

13 Now, there's no disagreement that it's a
14 line, but the definition tells you to go count business
15 lines. And so the difference between us is, of those
16 lines that are in a DS1, which of those can reasonably be
17 said to satisfy the full definition of a business line,
18 which includes these other requirements which you had me
19 read, and which started out saying, among these
20 requirements, the tally shall only include lines
21 connecting end user customers with incumbent LEC end
22 offices for switched services and shall not include
23 non-switched special access lines.

24 Those requirements have to be satisfied,
25 and if you simply take a DS1, which does consist of 24

1 lines, and you call them all business lines, you violate
2 those provisions in this definition because it would be
3 almost never the case that a DS1 would include only lines
4 connecting end user customers with incumbent LEC end
5 offices for switched services.

6 And the rule specifically prohibits you, it
7 says, shall not include non-switched special access lines.
8 So that's why I use 11 to 1, to recognize that you're
9 prohibited from counting lines used for non-switched
10 services.

11 Q. Please turn to page 27 of your rebuttal
12 testimony and to Schedule JPG-8. There you suggest that
13 the business line counts provided to the FCC could be used
14 directly to reach impairment/non-impairment findings. And
15 the line counts that you're talking about at that
16 testimony are the line counts that AT&T submitted to the
17 FCC before the FCC had issued the TRRO; is that correct?

18 A. Correct. It's the line counts that the FCC
19 relied upon when it established its thresholds. It's the
20 line counts that are referenced in paragraph 105 of the
21 TRRO. What happened is they -- the ILECs gave the FCC
22 data that the FCC looked at to come up with where the
23 break points would be, and then the ILECs came back later
24 with completely different information.

25 And the issue before this Commission is,

1 hey, if the information that the ILECs -- the number of
2 business lines that the ILECs are now claiming exist are
3 materially different than the line counts they showed the
4 FCC when the FCC came up with its -- when they came up
5 with the break points, what is their explanation for that,
6 is it reasonable, and is there a -- and is it because
7 they're reading the definition correctly or is it because
8 they're reading the definition incorrectly, and that's why
9 they're now counting so many more business lines than what
10 they told the FCC they had and which the FCC relied upon
11 when it adopted its decision.

12 Q. In this line count that AT&T provided to
13 the FCC, a DS1 line would have been counted as one
14 business line; is that correct?

15 A. Yes.

16 Q. Please turn to page 28 of your rebuttal
17 testimony and to Schedule JPG-9 where you present your
18 business line counts using 2004 data. In your calculation
19 using the 2004 data, you count a DS1 line as 11 business
20 lines; is that correct?

21 A. Yes, for the explanations I gave in my
22 direct testimony as to why that's a much better and, in
23 fact, commission-adopted estimate of what -- how many of
24 the lines in a DS1 would be used to provide switched
25 services to a business customer versus non-switched

1 services.

2 Q. I want you to assume that the Missouri
3 Commission decides that a DS1 line should be counted as
4 24 business lines, and I want you to assume that the
5 Missouri Commission decides to use the 2003 data. Would
6 there be any of the line counts still remaining in issue
7 for other reasons?

8 A. Okay. I just want to make sure we're
9 saying the same thing. You're asking me if the Commission
10 ruled against the CLECs on every issue, would there still
11 be any issues left that the CLECs disputed? And the
12 answer is no. After you rule against us on all the things
13 that we've recommended, we will have lost.

14 Q. Let's assume -- let's assume instead,
15 though, what if the Commission uses the 2004 data but
16 decides to go with counting a DS1 line as 24 business
17 lines, are there any of the line counts that would still
18 be in issue?

19 A. If you were to do that, then the business
20 line count that you would use would come from the column
21 labeled AT&T on JPG-9, which would be 2004 data applying
22 the AT&T methodology, which would be to count as business
23 lines capacity that in my view, but in your assumption
24 does not, violates the FCC rule because you would be
25 counting lines that are not used to provide switched

1 service. But if you decided to count lines that way, the
2 numeric calculation appears on JPG-9.

3 Q. And that numeric calculation passes the
4 threshold for business line counts?

5 A. Yes. I mean, if you inflate these enough,
6 they pass everything, and that's what you basically say.

7 Q. AT&T Missouri has counted NuVox as a
8 fiber-based collocater in certain wire centers; is that
9 correct?

10 A. Yes.

11 Q. And have you been able to review Staff
12 witness Scheperle's HC Schedule 2C, pages 28 and 29, which
13 is the NuVox response?

14 A. I have seen the NuVox response, yes.

15 Q. And do you have that with you or do you
16 need a copy?

17 A. I would like to have a copy. If you're
18 going to ask me a question, I would like to have a copy.

19 Q. In NuVox' response, NuVox explains why it
20 believes it should not be counted as a fiber-based
21 collocater; is that correct?

22 A. Yes.

23 Q. And then NuVox also states that it is
24 likely that another carrier does qualify as a fiber-based
25 collocater; is that correct?

1 A. Yes.

2 Q. Did AT&T Missouri count that other carrier
3 as a fiber-based collocater in those wire centers?

4 A. Not to my knowledge.

5 Q. If either NuVox or the other carrier, but
6 only one of the two is counted as a fiber-based collocater
7 in these wire centers, then the criteria for the presence
8 of fiber-based collocaters is met, isn't it?

9 A. In those two, yes. But we would still --
10 here's the problem. As the judge has clearly observed,
11 there's a significant difference of opinion as to how this
12 should be interpreted. On a going-forward basis there are
13 going to be other wire centers that come up and other
14 disputes.

15 So it would still matter to us how the
16 Commission resolves it. Even in this instance, which one
17 of these carriers you count may -- if you count one of
18 them, you may not ultimately change the classification. I
19 mean, I could foresee -- under the way AT&T counts things,
20 I could see them coming back and trying to count both of
21 them, you know.

22 If for some reason NuVox were to decide to
23 establish a different collocation arrangement, under
24 AT&T's methodology, suddenly there will be two fiber-based
25 collocaters where today they're saying it's okay because

1 there's only one, even though nothing material will have
2 changed.

3 So it doesn't change -- it may not change
4 the ultimate classification of those two wire centers, but
5 it certainly changes people's understanding of how the
6 regulatory environment here will be interpreted.

7 MR. HAAS: Thank you. That's all my
8 questions.

9 JUDGE JONES: Any cross-examination from
10 AT&T?

11 MR. BUB: Yes, your Honor. Thank you, your
12 Honor.

13 CROSS-EXAMINATION BY MR. BUB:

14 Q. Good afternoon, Mr. Gillan. My name is Leo
15 Bub. I'm a lawyer with AT&T Missouri.

16 I understand from your testimony that
17 you're testifying in this case as a consultant for McLeod
18 USA, NuVox and XO Communications. Is my understanding
19 correct?

20 A. Yes.

21 Q. And you're not an employee of any of those
22 three CLECs; is that right?

23 A. That's correct.

24 Q. You have your own consulting practice that
25 specializes in the telecom area, right?

1 A. Yes.

2 Q. And the last time you were actually an
3 employee of a telecom company was your employment with
4 US Switch; is that right?

5 A. Yes.

6 Q. And that was from sometime in 1985 through
7 the end of 1986?

8 A. Yes.

9 Q. And it was at that time you started your
10 own consulting practice?

11 A. Yes.

12 Q. Would it be a correct observation that you
13 testify predominantly on behalf of competitive carriers as
14 opposed to incumbent local exchange companies?

15 A. Yes, although I have testified on behalf of
16 incumbent local exchange carriers.

17 Q. It certainly would be correct to say with
18 respect to the impairment proceedings conducted on the
19 TRRO, that you're testifying only on behalf of CLECs,
20 though, right?

21 A. Do you mean the wire center classification
22 proceedings under the TRRO?

23 Q. Yes.

24 A. Okay. Yes.

25 Q. I'd like to move to your direct testimony

1 and ask you some questions about the business line
2 definition. Specifically I'd like to focus on your
3 Schedule JPG-1, pages 4 and 5. Do you have it with you,
4 from your testimony?

5 A. My direct testimony?

6 Q. Yes, sir.

7 A. Isn't JPG-1 my resume?

8 Q. Yes, it is.

9 A. I do not have that with me.

10 MR. BUB: Thank you, Bill.

11 BY MR. BUB:

12 Q. Specifically what I'm looking at is -- it
13 begins on page 4, and that's a summary of your expert
14 testimony and affidavits in domestic regulatory
15 proceedings. Are you with me?

16 A. Yes.

17 Q. Looking through the list of cases in which
18 you've testified, appears that you've testified in several
19 other state wire center impairment cases?

20 A. Yes.

21 Q. And the first case listed is the one that
22 we're involved now before the Missouri Commission,
23 Case TO-2006-0360; is that right?

24 A. Yes.

25 Q. And then down maybe about eight lines,

1 there's the Indiana wire center impairment case?

2 A. Yes.

3 Q. Okay. That's Cause 42986, right?

4 A. Yes.

5 Q. And that Indiana case in which you
6 testified, is it correct that the Indiana Utility
7 Regulatory Commission hasn't yet issued an order?

8 A. That's my understanding.

9 Q. You're aware, though, that the Indiana
10 Commission in a prior case did issue a decision on the
11 business line definitional issue in dispute that's
12 contrary to your position in this case?

13 A. I wouldn't say that. I think that's
14 actually an example of sort of the bait and switch
15 argument that AT&T adopted in Indiana. In Indiana, in a
16 case that I was not involved in, you told the Commission
17 that they should not count -- that they had to count
18 residential UNE lines because that was how you did it in
19 the data you gave the FCC in December of 2004.

20 And then in the second proceeding where
21 they haven't issued a decision, you told the Indiana
22 Commission that -- that the Commission should ignore how
23 you calculated the data in December of 2004 in deciding
24 how to interpret the FCC decision.

25 So I wouldn't call that first decision as

1 contrary to my position because had -- the Commission
2 there never saw both sides of AT&T's argument coming out
3 of its mouth at the same time. It wasn't told both at the
4 same time, look at how we calculated this information when
5 we gave it to the FCC in December of 2004, and at the same
6 time telling the Commission, whatever you do, don't look
7 at how we calculated this data when we gave it to the FCC
8 in December of 2004.

9 MR. BUB: Your Honor, may I approach the
10 witness?

11 JUDGE JONES: Yes.

12 BY MR. BUB:

13 Q. Mr. Gillan, what I'm handing you is the
14 State of Indiana Utility Regulatory Commission's decision
15 in Cause 42857. This is the decision you're referencing,
16 right?

17 A. I believe so.

18 Q. I'd like you to look at page 14 at the
19 bottom where it says -- and I've highlighted it in your
20 copy -- the CLECs offer a proposal they believe as a
21 matter of common sense and plain English would limit the
22 definition of business lines to lines purchased by
23 business customers in a manner consistent with the first
24 sentence of the FCC's definition of business lines whereby
25 SBC would only be able to count as business lines UNE

1 loops that provide switched access. Do you see that
2 quote?

3 A. Yes, I do.

4 Q. And that's also your position in this case;
5 is that right?

6 A. Yes. But, you know, I really think that
7 this record would be useful if you took all of Issue 3 and
8 the judge looked at all of it, because this is where SBC
9 has had its cake and is now trying to eat it, too.

10 Q. Okay.

11 A. Because you told the Indiana Commission --

12 Q. Excuse me, Mr. Gillan. I'd like to ask the
13 questions. My only question to you was, that's your
14 position in this case? And you've answered the question,
15 yes, it is. Now, you can go -- this is -- the way we do
16 it in Missouri is I get to ask the questions.

17 JUDGE JONES: Don't explain procedure to
18 the witness. Go ahead and ask your next question.

19 MR. BUB: Thank you, your Honor.

20 BY MR. BUB:

21 Q. I'd like you to turn to the next page 15
22 under Section 2, commission discussion and findings. Four
23 lines from the bottom it says, the two disputes here
24 concern the definition of business lines. Specifically,
25 should the definition include all UNE loops or should it

1 exclude, one, UNE loops used to serve residential
2 customers and/or, two, UNE loops used to provide
3 non-switched services. SBC Indiana says that the answer
4 is decisive yes in the case of both disputed definitions
5 because the FCC expressly directed for this purpose
6 business lines includes all, with emphasis on the word
7 all, UNE loops. The Indiana Commission then says, we
8 agree and so find. You see that quote, right?

9 A. Let's read the whole quote. Let's read the
10 whole quote and then I can --

11 Q. You see those words?

12 A. I've seen it. It says immediately
13 thereafter --

14 JUDGE JONES: Just a moment, Mr. Gillan. I
15 realize that his job is to try to trick you and your job
16 is to not answer his question. My job is to make all this
17 happen, though. So he asked you if you see the quote.
18 Either you see it --

19 THE WITNESS: I see the quote.

20 JUDGE JONES: -- or you're blind and you're
21 looking at it and you don't.

22 THE WITNESS: Your Honor, I see the quote.

23 JUDGE JONES: If you have a problem with
24 it, it's up to your attorney to deal with that. You just
25 have to tell him whether you see it or not. And he sees

1 it.

2 MR. BUB: Thank you, your Honor.

3 BY MR. BUB:

4 Q. That specific finding by the Commission is
5 contrary to your recommendation in this case; is that
6 right?

7 A. I'm not sure that's true.

8 MR. BUB: Okay. Your Honor, what I'd like
9 to do is, just to make sure we have the whole thing so
10 there's no dispute about us trying to pull the wool over
11 anybody's eyes, what I'd like to do is ask the Commission
12 to take administrative notice of that entire proceeding.

13 JUDGE JONES: What is that?

14 MR. BUB: It is the Indiana Utility
15 Regulatory Commission Order in cause -- it's a
16 January 11th, 2006 Order in Cause 42857, and it's also the
17 case that we cited at page 24 of our brief.

18 JUDGE JONES: Do you have a copy of it?

19 MR. BUB: He has my copy of it?

20 JUDGE JONES: Was that your only copy?

21 MR. BUB: At this point it is, but I do
22 have it in electronic format, and I can provide it to
23 everybody when I get back to the office.

24 JUDGE JONES: Is there any objection to
25 that being admitted into evidence?

1 MR. BUB: I don't know if we need it into
2 evidence. With administrative notice, I just -- that way
3 people can cite to it, and if we want to make it an
4 exhibit --

5 JUDGE JONES: We'll do it that way, but I
6 do want a copy of it, though.

7 MR. BUB: Okay. I don't have any objection
8 to making it an exhibit.

9 MR. MAGNESS: If we're putting it in as
10 administrate notice and just noticing that it exists so
11 people can go find it, I have no objection to that.

12 JUDGE JONES: I don't want to have to go
13 find it. I want somebody to give me a copy of it.

14 MR. MAGNESS: No, no. Have a copy of it.
15 I think having it as evidence is troubling since we
16 haven't gotten a chance to review it or anything like
17 that. But administrative notice, I have no objection.

18 JUDGE JONES: We'll go that route.

19 MR. BUB: My understanding with that, just
20 to make sure we're square on it, that we'd be able to cite
21 the rulings in our briefs, and we do that as a matter of
22 course.

23 JUDGE JONES: Okay.

24 MR. BUB: We'll make sure everyone gets a
25 copy.

1 BY MR. BUB:

2 Q. You also testified, Mr. Gillan, in a wire
3 center impairment proceeding in Ohio; is that correct?

4 A. Yes.

5 Q. Okay. And that was Case No. 05-1393TPUNC?
6 It's on your --

7 A. Yes. I'm just -- I'm trying to remember
8 whether it was testimony or whether or not it was really
9 something -- a written document that was attached to
10 comments. I do not believe we had -- I don't believe that
11 there was a hearing.

12 Q. So you gave like an affidavit maybe?

13 A. I can't recall the form.

14 Q. But in some form you gave --

15 A. Yes.

16 Q. -- some type of written testimony?

17 Is it correct the Public Utility Commission
18 of Ohio disagreed with your recommendation for defining
19 the term business line?

20 A. Yes.

21 MR. BUB: Your Honor, we'd like to do the
22 same thing with that decision, we'd also like to have
23 administrative notice. And what that is, it's the Public
24 Utility Commission of Ohio decision from June 6, 2006, and
25 it can be found at 2006 Ohio PSC Lexus 347, and I'll make

1 sure that everyone gets a copy of that.

2 JUDGE JONES: Okay.

3 BY MR. BUB:

4 Q. You also testified in a wire proceeding --
5 wire center impairment proceeding in Illinois; is that
6 correct?

7 A. Yes.

8 Q. And that was Case No. 06-0029?

9 A. Yes.

10 Q. Okay. And you testified on behalf of a
11 group of CLECs that called themselves CLEC Coalition?

12 A. I think they called themselves that.

13 Q. Okay. Is it correct that the Illinois
14 Commerce Commission disagreed with your recommendation on
15 the digital equivalency issue?

16 A. I don't recall.

17 MR. BUB: Your Honor, may I approach the
18 witness?

19 JUDGE JONES: Yes, you may.

20 BY MR. BUB:

21 Q. Mr. Gillan, I've handed you the Illinois
22 Commission's December 6, 2006 Order in that case. At
23 page 9 under paragraph 3D, the Illinois Commission states,
24 and this is under their Commission analysis and
25 conclusion, second paragraph, IBT, which I take is

1 Illinois Bell Telephone's original December 2004 business
2 line count submission to the FCC predated the definition
3 of business lines in Section 51.5 which mandates the
4 inclusion of digital equivalency. IBT subsequently
5 submitted a business line count to the FCC based on
6 business line definition in 51.5 that requires inclusion
7 of digital equivalency. Accounting for digital
8 equivalency increased the total number of business lines
9 significantly and resulted in reclassification of various
10 wire centers.

11 Any ambiguity contained within the TRRO as
12 to whether digital equivalency is proper is resolved by
13 the FCC's enactment of Section 51.5. Section 51.5 changed
14 the methodology of how business lines were to be computed
15 by including digital equivalency. Accordingly, IBT's
16 initial and future wire center designations should be
17 calculated consistent with 51.5.

18 Do you see that quote?

19 A. Yes.

20 Q. And that ruling is contrary to your
21 recommendation in this case, isn't it?

22 A. No. No. There's no question that you
23 measure this on digital equivalency, that the question
24 then is which of those digital equivalents do you count?
25 So that is not inconsistent.

1 Q. I'd like you to go down to page 10,
2 paragraph 4D under Commission analysis and conclusion.
3 There the Commission says, the Commission agrees with IBT
4 and Staff that this issue was disposed of in Docket
5 05-0442 and should not again be decided here. In Docket
6 05-0442 we concluded that business lines that provision
7 non-switched access should be included in business line
8 counts. CLECs' position is based on the premise that we
9 cannot include non-switched access lines in business line
10 counts if we depart from our conclusion in Docket 05-0442
11 that business lines must be counted in the same manner as
12 they were in the data IBT submitted to the FCC in December
13 2004. Do not depart from that conclusion. In Docket
14 05-0442 we held that IBT correctly included non-switched
15 access lines in business line counts.

16 Do you see that quote?

17 A. Yes.

18 Q. And that's also contrary to your
19 recommendation in this case, isn't it?

20 A. No. No. This is a product of the unique
21 procedural stature in Illinois. What this says is that
22 the Commission had already reached its decision in a prior
23 proceeding in which I was not involved. Okay. And so
24 what happened in Illinois and what was happening in
25 Indiana is you went before these commissions and you told

1 them to count lines the way you counted it in the data
2 that you gave the FCC in December of 2004, and the
3 commissions accepted your arguments. And one of my
4 recommendations in this case is, hey, we're going to use
5 2003 data, which that was, then count it exactly the way
6 you gave at the FCC.

7 Then a separate issue about digital
8 equivalency in Illinois shows up in a different docket,
9 and in that docket you were telling the Commission, the
10 Illinois Commission, forget how we calculated it in the
11 data in December 2004. The FCC rules changed everything.
12 Count it a different way.

13 What this represents is the procedural
14 whipsaw that the CLECs found themselves in. You won, but
15 using an argument in an old case that we couldn't get the
16 Commission to revisit, and then the Commission bought the
17 reverse of your argument in this second case on the
18 digital equivalency.

19 But my position was, you either do it
20 entirely consistent with the rule, which you start with
21 2004 data and you apply all parts of the rule, or -- which
22 means I'm not inconsistent with the first finding of the
23 Commission, or if you go backwards and you use 2003 data,
24 you calculate it the way you did it when you gave the data
25 to the FCC, which is consistent with your old position.

1 My problem is you never marry those
2 positions inside one proceeding in Illinois. So even
3 though I agreed with you half the time in both
4 proceedings, you only won -- you know, you won on your
5 half in both sides even though the positions were in
6 conflict.

7 Q. And you asked the Commission in Illinois to
8 fix that, didn't you, to count it your way?

9 A. Yes, I that what -- and what the finding
10 was wasn't that the position was wrong, which is my point,
11 only that they weren't going to open it up again, it was
12 decided in the prior one. And part of that goes to, there
13 were agreements struck between the parties as to what was
14 and what was not going to be an issue between the cases.

15 So I don't -- I mean, I do not read that
16 second finding you had showed me where they don't reach
17 the issue basically as a ruling on the merits one way or
18 the other.

19 Q. It's correct that you asked them to revisit
20 it, though, isn't it?

21 A. Technically, no, because the parties I
22 was --

23 Q. You asked them --

24 A. No, because the parties I was representing
25 were under stipulation that they couldn't revisit it. It

1 was more complicated than that.

2 Q. So you didn't ask them to revisit that?

3 A. As I tried to answer, procedurally the
4 clients I represented were not in a position to ask them
5 to revisit it. We were trying to point out that there was
6 an inconsistency in AT&T's position between two
7 proceedings.

8 Q. Would it be correct to say you were
9 pointing out that you were getting whipsawed?

10 A. I don't think I used the whipsawed rule. I
11 think it's correct to say, at the end of the day, you were
12 able to make these conflicting arguments in two different
13 proceedings and win in both of them as isolated
14 proceedings, which means that my clients lost.

15 MR. BUB: Your Honor, again, for fullness
16 of the record, we'd like to ask the Commission to take
17 administrative notice of this decision so the whole thing
18 will be before you.

19 JUDGE JONES: Certainly.

20 BY MR. BUB:

21 Q. Let's move on to Oklahoma. You also
22 testified in the wire center impairment proceeding there,
23 did you not?

24 A. Yes.

25 Q. And that was the case Mr. Magness referred

1 to as one where the Oklahoma Corporation Commission ruled
2 your way on the business line issue; is that correct? I'm
3 sorry. There was a --

4 A. Right.

5 Q. -- an arbitrator's recommendation?

6 A. There's an arbitrator's recommended
7 decision that rules in our favor, but my understanding is
8 that recommended decision has not been ruled on by the
9 Commission.

10 Q. It's also correct that AT&T Oklahoma took
11 exceptions to that --

12 A. Yes.

13 Q. -- recommendation?

14 A. Yes.

15 Q. And so both the exceptions and the proposed
16 order are under advisement by the Commission itself?

17 A. Yes. That's my understanding.

18 Q. And we're still waiting for a decision from
19 the Commission?

20 A. Yes. That's my understanding.

21 Q. Okay. You also testified in a wire center
22 impairment proceeding in Kansas; is that correct?

23 A. Yes.

24 Q. Okay. And that was Docket 06SWBT743-COM?

25 A. Yes.

1 Q. And you testified on behalf of NuVox in
2 that case; is that right?

3 A. Yes.

4 Q. It's correct that the Kansas Corporation
5 Commission disagreed with your recommendations concerning
6 the business line definition in that case?

7 A. Yes, and ruled in our favor on fiber-based
8 collocator. It's probably -- we'll short circuit this to
9 just say, typically AT&T loses on its fiber-based
10 collocator interpretation. Typically CLECs don't -- lose
11 on the business line interpretation. There have been some
12 states where the CLECs have won both. I think there's
13 been one state or one or two states that you've won both.
14 That's basically how it has generally shaped out over
15 these states.

16 MR. BUB: Your Honor, we'd like to ask the
17 Commission to take administrative notice of the Kansas
18 Corporation Commission decision that we've been
19 discussing. That was a June 2nd, 2006 decision, and that
20 can be found at 2006 Kansas PUC Lexus 664. Again, we'll
21 provide copies.

22 JUDGE JONES: Thank you.

23 BY MR. BUB:

24 Q. You also testified in Arkansas, is that
25 right, in the wire center impairment case?

1 A. Yes.

2 Q. And there's still no decision in that
3 proceeding as well?

4 A. That's my understanding.

5 JUDGE JONES: Mr. Bub, most of your
6 questions over the last ten minutes or so have been
7 whether or not he testified in past proceedings and what
8 the result was.

9 MR. BUB: Yes, your Honor. Do you think I
10 can short circuit this by --

11 JUDGE JONES: Well, I'll tell you what I'm
12 thinking about doing. Both parties have presented cases,
13 whether they be administrative or judicial, or I should
14 say Article 3 or Article 1 cases, that either support
15 their position or support the other's position. Why don't
16 the two of you get together and make a list of all the
17 cases, tell me what they decided, and whether they were --
18 are they decided, where they're pending, if they were
19 decided, whether they support your position on the collo
20 to collo or the business line. Just do that and just
21 submit it.

22 Now, that's only if you don't have a point
23 to going through this. If you're like, you know, going to
24 surprise him with some kind of question at the end that
25 shows that he doesn't know what he's talking about, you

1 can go ahead and ask all your questions. Otherwise, I'd
2 rather you-all just get together and do that.

3 MR. BUB: The point of this whole line of
4 cross-examination was to point out that on a business line
5 issue, in the large majority of cases the state public
6 utility commissions have gone our way, as Mr. Gillan's
7 testified.

8 I think with that acknowledgement, that we
9 would be certainly satisfied with the Commission taking
10 administrative notice of the decisions. And what I was
11 doing, I was going through the list of cases where he had
12 testified. So we can -- and what I expected to do with
13 that was then use that in briefing.

14 JUDGE JONES: To make it easy -- because
15 the Commissioners like this sort of thing, and that's who
16 I'm primarily thinking of. To make it easy, though, if
17 you-all can get together and make a type of matrix of it
18 like that, and we'll call it Exhibit A, Judge's Exhibit A.

19 MR. BUB: We can do that.

20 JUDGE JONES: Okay.

21 THE WITNESS: I think I misspoke, though,
22 when I said a couple of states had ruled their way on both
23 issues. I don't think that's true, actually. I think
24 only Ohio has accepted their --

25 JUDGE JONES: It doesn't matter. They're

1 going to submit something that tells me the truth of that.

2 MR. BUB: And we'll get you the decisions
3 to support it as well.

4 BY MR. BUB:

5 Q. I'd like to move to a different subject,
6 and this is the Petition 0for Reconsideration that your
7 clients NuVox and XO filed, along with other CLECs, at the
8 FCC on March 28, 2005, and this was an attachment to AT&T
9 Missouri witness Carol Chapman's rebuttal testimony. It
10 was Attachment CAC-1. Do you have that?

11 A. No.

12 Q. Okay. You're aware of that petition,
13 though, aren't you?

14 A. Yes, although I think it's more correct to
15 characterize it as Petition for Reconsideration or
16 Clarification.

17 Q. Mr. Gillan, I've just handed you that
18 petition. Could you tell us what the title is?

19 A. Well, the title on the front page is
20 Petition for Reconsideration.

21 Q. And this Petition for Reconsideration was
22 directed at certain rules and policies that the FCC
23 adopted in the TRRO proceeding; is that correct?

24 A. Yes.

25 Q. And it's correct that in the case we're

1 trying now before the Missouri Commission, your clients
2 are taking the position that the FCC's line counting rules
3 only allow the counting of UNE-L lines that are used to
4 serve business customers, and that UNE loops serving
5 residential customers and for non-switched services can't
6 be counted; is that right?

7 A. Yes. I mean, it's clear that the rule has
8 ambiguity. The rule can be interpreted different ways by
9 the very nature of what you're saying and what we're
10 saying. If you need the entire rule, it doesn't let you
11 do that. If you read parts of the rule like you do, you
12 believe that you're licensed to do it.

13 Q. Okay.

14 A. That's why they asked for clarification.
15 And they make clear in the body of this that they're
16 asking for either revision or clarification, not -- it
17 isn't a defined, hey, the rule lets you do this. You have
18 to change it. It's written more on the lines of the rule
19 can be interpreted to let you do this, to count them in
20 these ways, and you shouldn't permit the ILECs to do it.

21 Q. My question was, I correctly stated your
22 position in this case, though, right, your interpretation
23 of the rule?

24 A. Yes.

25 Q. Okay. This filing was prepared by the

1 Kelley, Drye & Warren law firm, wasn't it?

2 A. That's what it says, yes.

3 Q. And that's a large and well-respected D.C.
4 law firm; is that right?

5 A. It's a large law firm. I don't actually
6 rank them.

7 Q. Okay. NuVox and XO's lawyers could have
8 titled it a Petition for Clarification or in the
9 Alternative for Reconsideration, couldn't they?

10 A. Yes.

11 Q. And you've seen such pleadings filed at the
12 FCC and at the state commission level, haven't you?

13 A. Yes.

14 Q. And it's accurate to say that NuVox, XO and
15 the other CLECs in this Petition for Reconsideration took
16 the position that the FCC's line counting rules were
17 erroneous; isn't that right?

18 A. I don't think you can say it that way. I
19 think if you read the entire thing and recognize that it
20 started -- it starts out and says, we want you to either
21 revise or clarify these rules, it's not the world's best
22 written document, I'll acknowledge, but it does clearly
23 start out and indicate that it is a request for revision
24 or clarification.

25 I mean, if you look at page -- if you look

1 at page 3 when they're summarizing it under business line
2 counts, the first sentence would paint the world the way
3 you want to characterize it. If you only read the first
4 sentence, it makes it sound like the FCC rules produce
5 incorrect outcomes. But if you read both in the next
6 sentence, it says the Commission should clarify or revise
7 its rules.

8 Q. Okay. Then if you read the next sentence
9 it says, the Commission should eliminate these adjustments
10 and require the incumbent LECs to report business lines
11 solely using the ARMIS criteria, right?

12 A. Well, you didn't read the next sentence
13 correctly, but if you read it correctly, quite frankly, it
14 doesn't even make sense because it's referring to
15 adjustments to ARMIS, and none of the disputes involving
16 how the business lines are calculated actually go to
17 ARMIS.

18 So I recognize that there's a sentence
19 there that talks about the ARMIS reporting requirements,
20 but it's not clear to me, quite frankly, what they were
21 talking about in that context because there are no
22 disputes, as I understand it, in terms of how the -- other
23 than the time period, what the information from the ARMIS
24 report is supposed to be used for.

25 Q. Let's go to page 10, if we could,

1 Section III, Roman III, which is titled the line count
2 rules erroneously overstate the number of business lines
3 ina wire center. Are you with me?

4 A. Yes.

5 Q. The bottom of the paragraph it says,
6 although the Commission used ARMIS rules as a starting
7 point for its business line counts, the rules adjust ARMIS
8 data in ways that erroneously inflate the number of
9 business lines reported in each wire center. These errors
10 in turnovers state the number of wires that meet one or
11 more of the FCC's impairment criteria and result in
12 greater restrictions on UNE availability than are
13 warranted. Do you see that?

14 A. I see the sentence, but we both know that
15 the Commission's rules don't do anything to the ARMIS
16 data. So -- other than pointing out that the pleading has
17 a statement in it that is -- that is factually incorrect
18 under what I'm testifying to or under what you're
19 testifying to, that's all that says. It makes a statement
20 that doesn't make any sense to me because there are no
21 adjustments to ARMIS data in the FCC rules. You don't
22 think so and I don't think so.

23 Q. Let's go on to page 13, if we can.

24 JUDGE JONES: Mr. Bub, I hate to interrupt
25 you, but we've been going now for a straight two hours. I

1 want to give the court reporter time to relax.

2 MR. BUB: Absolutely.

3 JUDGE JONES: So we're going to take a
4 five-minute break, and we're going to get back right to
5 where you started.

6 MR. BUB: Thank you, your Honor.

7 (A BREAK WAS TAKEN.)

8 JUDGE JONES: Looks like everyone is back.
9 Let's go back on the record.

10 MR. BUB: Thank you, your Honor.

11 BY MR. BUB:

12 Q. Where we left off, Mr. Gillan, is on
13 page 13.

14 A. Yes.

15 Q. There's a paragraph, a heading one,
16 64 KBPS equivalence rule is inaccurate. This PFR,
17 Petition for Reconsideration states, the 64 kilobits per
18 second equivalence rule counts every DS1 provided by CLECs
19 as 24 business lines. This assumption dramatically
20 overstates the number of business lines served by CLECs.
21 Do you see that?

22 A. I see that. You corrected the typo in it,
23 which I assume they appreciate, but yeah.

24 Q. And then a little further down it says,
25 moreover, the 64 KBPS equivalent rule assumes that a DS1

1 UNE always is used for switched access services. Then it
2 says, yet CLECs can and do use DS1 UNEs for non-switched
3 private line services. CLECs also sometimes use a full
4 DS1 UNE to provide Internet bandwidth which also is not a
5 switched access service. Such services are not to be
6 included in the business line counts at all according to
7 the definition contained in Section 51.5 of the rules, but
8 the 64 kilobits per second equivalent rule results in the
9 inclusion of these lines when provided by a CLEC over UNE
10 facilities.

11 That's not your client's position in this
12 case on what the FCC rules require, though, is it?

13 A. Well, first of all, I don't believe it's
14 their position that the rules necessarily require it in
15 here as opposed to them describing the inconsistencies in
16 the rule that they wanted to see clarified. I mean, the
17 statement is true and it's in my testimony. Look at the
18 rule. The rule says what it says. The rule tells you you
19 cannot count some things. The rule tells you you should
20 count things. You -- if you read one sentence, it tells
21 you to count it. The very next sentence tells you don't
22 count it. It requires judgment. They ask that the
23 Commission clarify it.

24 Q. Go to page 26, the very bottom line
25 conclusion. There the -- there these petitioners request

1 that the Commission reconsider the rule, right? They're
2 asking it to be changed; is that correct?

3 A. Well, the bottom line conclusion sentence
4 does say that, and in a petition that addresses, what,
5 seven things or something, but earlier when it introduces
6 the section on business line, it specifically indicates
7 that it's to revise or clarify. But the document says
8 what the document says, how inartfully it does it.

9 Q. You're also aware that your clients, along
10 with several other CLECs, asked the United States Court of
11 Appeals for the D.C. Circuit to review various rulings in
12 the FCC's TRRO order; is that correct?

13 A. Yes.

14 MR. BUB: Your Honor, may I approach the
15 witness?

16 JUDGE JONES: Yes.

17 BY MR. BUB:

18 Q. Mr. Gillan, I've handed you the Opening
19 Brief of CLEC Petitioners and Intervenor in Support in
20 Case No. 05-1095 and consolidated cases before the United
21 States Court of Appeals for the District of Columbia
22 Circuit Court, and this brief was filed July 26, 2005, and
23 it was filed on behalf of a large number of CLECs,
24 including, as you'll see on the front, NuVox, XO, and
25 you'll find those under the Kelley Drye signature block,

1 and then on the second page McLeod, and they're under the
2 Swidler Berlin signature block.

3 With your extensive involvement in the TRRO
4 and various states across the country, I assume that
5 you're aware of this appeal that was taken?

6 A. Generally. I'm more aware of the switching
7 section than I am anything else, yes.

8 Q. The only part that I'm interested in is
9 actually on page 20. But you see that this document, this
10 brief was prepared again by the Kelley, Drye & Warren firm
11 in D.C.?

12 A. Well, no, we don't know that. We just know
13 that among -- they're one of the law firms that
14 represented some of the companies that signed this. We
15 don't know who prepared it.

16 Q. We don't know who wrote it. Okay. Fair
17 enough. And in this they represent XO and NuVox? At
18 least you can verify that.

19 A. Yes.

20 Q. Then on the second page, Swidler Berlin
21 appears to represent your client, McLeod?

22 A. Yes.

23 Q. Let's go to page 20, and that's the page
24 I'm interested in. Seven lines down, after Footnote 16,
25 it says, the ILEC-supplied data relied upon in setting the

1 thresholds counted each UNE loop as one business line
2 regardless of capacity, e.g. a DS3 loop counted as one
3 business line, whereas the final rule established by the
4 FCC for counting business lines is based on capacity, e.g.
5 a DS3 counts as 672 business lines. And then it cites
6 47 CFR Section 51.5.

7 And then it claims that using one
8 methodology to set impairment thresholds and a different
9 broader methodology for determining whether those
10 thresholds are met is irrational. Do you see that in this
11 petition?

12 A. Yes.

13 Q. Okay. And that's not your client's
14 position on the FCC rules in this case, is it?

15 A. Actually, it is. One of the things I
16 pointed out is that -- actually, there's nothing here
17 that's not consistent. What I pointed out was that the
18 FCC set thresholds looking at data. One of the ways the
19 Commission should look at which of our competing
20 interpretations is a more reasonable reading of the rule
21 is to compare it to the data the FCC used when it set the
22 thresholds. If our methodology produces results more
23 closely to those that the FCC adopted, it would to me say
24 it's more rational.

25 Q. That's what you want the Commission to do

1 in this case? That's how you read the rule in this case,
2 right?

3 A. No. What we're talking about now is
4 whether or not as a -- what I understood you to ask me was
5 whether or not it makes sense to establish thresholds
6 looking at the world one way and then change it and then
7 look at the world a completely different way when you go
8 to implement it, and the brief says that's irrational. I
9 would agree with it. That's irrational. There's no
10 inconsistency at all in our reaction to that.

11 Q. And what's irrational, though, what the
12 CLECs in this case in the petition are saying is that the
13 FCC's rule, now using a different methodology, digital
14 equivalency is what we're talking about, is irrational.
15 They're challenging that. They want that to be changed.
16 Doesn't it reflect the CLECs' understanding at the time of
17 what that rule means?

18 A. No. I think to be -- to be fair, what this
19 represents is the CLECs' understanding of your
20 interpretation of the rule. They point out -- if you look
21 at Footnote 18, they point out that that interpretation of
22 the rule is internally inconsistent. But it was certainly
23 known by them that that was the ILEC interpretation of the
24 rule and they were -- and they were criticizing it.

25 Q. What this document, what the CLEC

1 petitioners are challenging, though, is it not the FCC's
2 rule? FCC's the defendant in this proceeding, is it not?

3 A. Yes, but in -- and in -- and in criticizing
4 it, though, they were -- as you do in appeals, I mean,
5 come on. I'm not a lawyer, but I've been around enough to
6 watch. When you're appealing something and you know your
7 opponent has a very hard core position, you use that as
8 the straw man to attack instead of the agency.

9 We both know that the way this ends up is
10 the FCC goes up to the court and says, look, there's an
11 issue of fact here about whether the ILECs are calculating
12 this correctly, and that issue of fact has not been
13 decided by the FCC and, therefore, this point shouldn't --
14 isn't ripe for resolution. So the way the whole appeal
15 ends is with the FCC telling the court, there's an issue
16 of fact here that we haven't ruled on.

17 Q. You'd agree that what's being challenged by
18 your clients is the FCC's rule?

19 A. My understanding of the law is that's the
20 legal posture of it, yes, and they pointed out that the
21 rule was internally inconsistent, and they presented it
22 the way you were interpreting it.

23 MR. BUB: Your Honor, I'd like to get this
24 marked, please, as an exhibit.

25 JUDGE JONES: Looks like that will be your

1 Exhibit 20.

2 (EXHIBIT NO. 20 WAS MARKED FOR
3 IDENTIFICATION BY THE REPORTER.)

4 MR. BUB: Your Honor, I'm going to need to
5 provide additional copies. I don't have sufficient copies
6 right now.

7 JUDGE JONES: What is it? Describe what it
8 is.

9 MR. BUB: Yes, sir. It's the Opening Brief
10 of CLEC Petitioners and Intervenor in Support that was
11 filed July 26, 2005 before the United States Court of
12 Appeals for the District of Columbia Circuit Court in
13 Cause No. 05-1095 and consolidated cases, and the caption
14 of that case is Covad Communications Company, et al,
15 Petitioners vs. Federal Communications Commission and
16 United States of America, Respondents.

17 JUDGE JONES: This is a CLEC brief?

18 MR. BUB: Yes, it is.

19 JUDGE JONES: It's marked as Exhibit 20.

20 MR. BUB: And we'd like to offer it into
21 evidence at this time.

22 JUDGE JONES: Any objection?

23 MR. MAGNESS: No.

24 JUDGE JONES: Exhibit 20 is admitted into
25 the record.

1 MR. BUB: And we will provide copies.

2 (EXHIBIT NO. 20 WAS RECEIVED INTO
3 EVIDENCE.)

4 MR. BUB: The final thing, your Honor, I'd
5 like to go back to the Illinois Commerce Commission
6 decision that we talked about earlier with Mr. Gillan.
7 With your permission, there's one thing I think we do need
8 to correct about that.

9 JUDGE JONES: Okay.

10 BY MR. BUB:

11 Q. Mr. Gillan, I'm going to give you back
12 your -- or the Order in Illinois Commerce Commission
13 Cause 06-0029. Remember we were talking that you said you
14 weren't asking -- the CLECs in that case weren't asking
15 the Illinois Commerce Commission to reexamine the
16 methodology used to calculate business lines? We found a
17 passage in this I'd like you to review and see if you want
18 to change your answer.

19 It's correct that the -- it's correct that
20 the CLECs in that case were asking the Illinois Commerce
21 Commission to reexamine the methodology used to calculate
22 business line counts; is that correct?

23 A. That's not clear -- what I understood your
24 question to be and what that says don't allow me to make
25 that judgment. I thought -- I was understanding your

1 question to be were the CLECs asking the Commission to
2 revisit a decision they made in a prior case. Okay. And
3 my understanding in that case is, that they were precluded
4 from asking the Commission to go back and re-- and address
5 a decision they made in a prior case. The use of the word
6 there reexamine doesn't tell me one way or the other
7 whether it is referring to the decision in the prior
8 docket.

9 Q. Let's do it this way. It's correct that
10 this reflects that the CLECs were insisting that if the
11 Commission allows Illinois Bell Telephone to count
12 business lines in a manner different than submitted to the
13 FCC, then Illinois Bell Telephone must reexamine the
14 methodology used to calculate business line counts to
15 ensure that UNE loops are counted in a manner that
16 complies with the full definition of business lines in
17 51.5. Does that correctly state the position that the
18 CLECs were taking in that proceeding?

19 A. It correctly says what that says, but what
20 I hear that to say is nothing different than what I'm
21 recommending here, which is if you -- if you use 2003
22 data, just use the same 2003 data that the FCC used. If
23 you don't, then you have to come back in and look at the
24 methodology that AT&T is proposing.

25 That uses the word reexamine versus

1 examine, but I don't attach any particular significance to
2 the word reexamine versus examine, other than it might not
3 be well drafted. I don't believe it refers to going back
4 and revisiting decisions from the prior docket, which is
5 what I was referring to.

6 Q. But you'd agree that what CLECs asked in
7 Illinois is the same thing that you're asking the Missouri
8 Commission to do here as far as how you count it?

9 A. Yes, but there's -- there's a significant
10 procedural difference between the issues that were open
11 for discussion in Illinois and the ones that are here.
12 I'm just not able to break them all down in some flowchart
13 to give you a full description of them. It was a
14 complicated -- a much more complicated proceeding in
15 Illinois by virtue of the way some of the questions got
16 split into two proceedings.

17 Q. So the way -- the methodology that you
18 proposed in the Illinois case, the Illinois Commission
19 didn't adopt?

20 A. It is my understanding -- based on what
21 I've read, it is my understanding they did not adopt it,
22 but it appeared to me in reading that order that the
23 rationale was that because it would -- they thought it
24 would require them to go back and revisit decisions from
25 the prior docket, which the parties had agreed not to do.

1 Whatever the fine line was that they were
2 trying to walk on that procedural question, as I read that
3 order, it looks like they tripped over that line, the
4 CLECs.

5 Q. Seems to me when CLECs insist that the
6 Commission allows Bell to count business lines in a manner
7 different than submitted to the FCC, and Bell must
8 reexamine the methodology, seems to me that the CLECs are
9 asking for the methodology to be reexamined. They didn't
10 seem to be constrained by prior agreements.

11 A. You apparently are unencumbered by being in
12 that docket and, therefore, will read that one sentence in
13 the way you want to. I'm just trying to explain to you
14 that that docket was procedurally very complicated.

15 Q. I guess one thing we can agree that this
16 document will speak for itself. We're taking
17 administrative notice of it, so it says what it says?

18 A. Whatever it says, it says, yes.

19 MR. BUB: Thank you. Thank you, your
20 Honor. That's all the questions we have.

21 JUDGE JONES: Thanks.

22 QUESTIONS BY JUDGE JONES:

23 Q. I'm not going to take much time at all. Do
24 you have a copy of the FCC's Order, Order on Remand?

25 A. I'm sorry. The TRRO?

1 Q. Yes.

2 A. Yes, sir.

3 Q. Can you look at paragraph 105?

4 A. Yes.

5 Q. And you've read that paragraph?

6 A. Yes.

7 Q. Do you think this paragraph lends more

8 explanation to what the FCC's intention was when defining

9 a business line?

10 A. I think it gives you a little guidance. I

11 don't think it actually gives you the guidance that AT&T

12 attributed to it. For instance, I think you have to read

13 the definition, and in some sense it helps you unpack the

14 definition, but it doesn't add to it or substitute to it.

15 As you pointed out, the definition says count all UNE

16 loops, right, that one sentence of it does.

17 If you read that one sentence in isolation,

18 it says count all UNE loops. But even they didn't count

19 all UNE loops. They -- for UNE-P, they counted business

20 UNE loops, but then for other UNEs they counted all the

21 UNE loops.

22 Q. Who is they now?

23 A. AT&T. All right.

24 Q. Well --

25 A. And AT&T points to this sentence to say,

1 this tells us we're only supposed to count UNE-P, but if
2 you read that entire sentence, what the FCC is doing is
3 simply describing the data they had in front of it, which
4 was, if you start at the beginning, the BSA wire center
5 data that we analyzed which had the ARMIS plus business
6 UNE-P plus UNE loops. Nevertheless, they passed -- the
7 sentence in the rule just says count all UNE loops. Now,
8 I think --

9 Q. Read the next sentence.

10 A. Okay. If I could finish that thought. I
11 think there are other parts of the definition that
12 prohibit you from counting business loops, and those are
13 the parts of the definition that they want to ignore. But
14 yes, and then I think the rest of it is very important,
15 because if you read everything leading up to this, it is
16 clear that the entire framework is on the assumption that
17 business lines are the proxy for the revenue in a wire
18 center, and it's the revenue in that wire center that
19 you're going to use to judge impairment. So you're using
20 business lines, not residential lines, not --

21 Q. Maybe I should be more specific. Read the
22 next sentence out loud.

23 A. I'm sorry. We adopt this definition of
24 business lines because it fairly represents the business
25 opportunities in a wire center, including business

1 opportunities already being captured by competing carriers
2 through the use of UNEs.

3 Q. Okay. Who is we in that sentence?

4 A. We is the FCC.

5 Q. Okay. Now, if they adopt that definition,
6 would that be reflective of their intention of their
7 definition 51.5?

8 A. Yes.

9 Q. Now, in this definition, it describes the
10 business lines as having to add business UNE-Ps and then
11 plus UNE loops.

12 A. That's actually where I would disagree with
13 you. The prior sentence is not the definition. When they
14 say, we adopt this definition of business lines, they are
15 adopting the definition that's in 51.5, but this sentence
16 itself is not the definition. It does -- it helps you
17 understand the definition.

18 Q. That sentence does?

19 A. Yes.

20 Q. Okay. Now, if that sentence helps me
21 understand the definition -- and I should add that the
22 definition doesn't have anything about UNE-Ps, does it?

23 A. No. See, the definition itself -- the
24 definition itself as I read it takes you to the same place
25 because the very first sentence said, defines a business

1 line not surprisingly as a line used to serve a business
2 customer. So that was why -- that would be why you would
3 only count business UNE-P.

4 Q. I understand that. But my point is, is
5 although UNE-Ps isn't mentioned in the definition in 51.5,
6 it is in the FCC's attempt to explain what their intention
7 is?

8 A. Yes, but it actually is in the definition.
9 It's just not in a form that you recognize.

10 Q. Okay.

11 A. If you go to the second line of -- the
12 second sentence in the definition, where it says, the
13 number of business lines in a wire center shall equal the
14 sum of all incumbent LEC business switched access lines --

15 Q. Right.

16 A. -- plus the sum of all UNE loops connected
17 to that wire center. And then the last phrase is,
18 including UNE loops provisioned in combination with other
19 un-- with other unbundled elements.

20 Q. Right.

21 A. UNE-P is a combination of a UNE loop
22 provisioned in combination with other unbundled elements.
23 So the FCC's last phrase -- last clause there in the
24 definition includes UNE-P.

25 Q. All right. Now, in paragraph 105 -- or I

1 should say in the definition, 51.5, the word business does
2 not appear before UNE loops in the clause to which you
3 just referred?

4 A. That's true, but --

5 Q. Why does it -- why does it appear in
6 paragraph 105?

7 A. Okay. Well, I believe that it does appear
8 in the definition in a way that affects this, but in 105
9 the reason --

10 Q. Well, wait a minute. Before you say that,
11 it doesn't appear in the definition. The word business is
12 not before UNE loops as it is --

13 A. Correct.

14 Q. -- in paragraph 105.

15 A. Correct.

16 Q. That's my question.

17 A. Okay. If you look on paragraph 105, the
18 FCC is describing the data that the local telephone
19 companies gave them and that they set the thresholds on.
20 The data that the local telephone companies gave them had
21 these components: ARMIS 4308, plus business UNE-P, plus
22 UNE loops, counted one to one.

23 The definition doesn't exactly track this,
24 but I believe that when you read the definition all the
25 way, and this is why I would argue that the -- that

1 there's still a business line requirement that applies to
2 UNE loops is that it's in the first sentence when the
3 commission says, a business line is an incumbent LEC owned
4 switched access line used to serve a business customer
5 whether by the incumbent LEC itself or by a competitive
6 LEC that leases the line from the incumbent LEC.

7 So that's that last part of the phrase in
8 the first sentence where it says, or by a competitive LEC
9 that leases the line from the incumbent LEC, that's
10 referring to UNEs, and it's identifying that it must be
11 used to serve a business customer.

12 The reason -- and this is, I think,
13 important. The reason the word business appears in front
14 of switched access line there in the second sentence,
15 which seems to be causing some of the concern, says the
16 number of business lines in a wire shall equal the sum of
17 all incumbent LEC business switched access lines, and then
18 it has UNE loops and the others but it doesn't keep the
19 business.

20 The word business switched access line is a
21 defined term in ARMIS, and I have it attached to my -- my
22 testimony. When the Commission uses the phrase business
23 switched access line in that context, they are making a --
24 what I interpret it to be is a specific direction that you
25 use the thing in ARMIS that is called business switched

1 access line, which I believe you can see easily on
2 Exhibit -- to my direct testimony, it should be Exhibit
3 JPG-2, and it's on the second page where the upper
4 right-hand corner it says page 21 of 27.

5 These are the ARMIS instructions, and then
6 you see, okay, there is a category in ARMIS called
7 business switched access lines, and then it breaks down
8 how you calculate it. So that was how -- that was why I
9 was saying that paragraph 105 ties back to this rule.
10 Paragraph 105 talks about the ILECs giving them
11 information that is collected in ARMIS, but the rule
12 doesn't say ARMIS, but it does use a category in ARMIS
13 that is a defined category.

14 That's how I think the Commission wrote a
15 rule that said, okay, we want ARMIS, plus we want all the
16 loops, including the loops used in combination, but I
17 don't believe when they say that they mean all of them
18 without reference to anything else.

19 I think you have to read the -- and this is
20 the dispute. We argue you have to read the sentence in
21 front and the sentence behind to read the full definition,
22 because the sentence in front says business and the
23 sentence behind is the one that says shall include --
24 shall only include switched services and shall not include
25 non-switched services.

1 Q. So the data that was given to the FCC by
2 the BOC, BOC wire center data referenced in paragraph 105
3 included the ARMIS lines --

4 A. Yes.

5 Q. -- business UNE-Ps and all the UNE loops?

6 A. Yes.

7 Q. Okay. Now, and it's your contention only
8 business -- only UNE loops that serve end users that are
9 businesses should be counted?

10 A. Yes, that's our position, but I -- it's
11 important for you to understand, there's almost no UNE
12 loops here used to serve anything but business. I've not
13 proposed any adjustment. There's been a lot of talk in
14 this room about whether it should be only to serve a
15 business or not serve a business. But for all practical
16 purposes, I've accepted the idea that all of these UNE
17 loops are used to serve businesses because --

18 Q. All of what UNE loops?

19 A. All of the UNE loops that they counted,
20 because there's virtually no competitive activity where
21 somebody buys a loop and uses it to serve someone other
22 than a business customer. So there's not really --

23 Q. So if they're all being -- in the real
24 world, if they're all being used to serve businesses, what
25 are we arguing about?

1 A. The argument goes to the third sentence in
2 the definition where it says you are prohibited from
3 counting non-switched lines, and a great deal of the
4 capacity on these UNE loops is used to serve non-switched
5 lines. That's what the actual dispute is in this case.
6 They count it if it exists, and we are arguing, no, the
7 rule -- that next sentence that says, among these
8 requirements, you can only count it if it's used to
9 provide switched service, you can't count it if it's
10 provide non-switched service, that's a big deal. That is
11 what -- that's the argument. Even though nobody presented
12 it, really talked about it that way, that's really the
13 numeric problem here.

14 Q. Well, that's certainly not an issue on the
15 issues list.

16 MR. MAGNESS: Your Honor, I believe it is.
17 It's under the business line issue, it's separated out
18 into three different issues. This is the digital
19 equivalency issue. I believe it's No. 2. The first one
20 is this question whether you count all the UNE loops. The
21 second one is this question of whether you count what's in
22 use or what the capacity is.

23 JUDGE JONES: And that goes to non-switched
24 special access lines?

25 MR. MAGNESS: Yes, it does.

1 JUDGE JONES: Let him answer.

2 THE WITNESS: Yes. The bottom line -- the
3 bottom line problem here is that when a CLEC buys a
4 high-capacity UNE loop, we recognize it has the capability
5 of carrying 24 lines, but our argument is it's not -- it
6 is not typically used to carry switched service across all
7 24. Typical usage is basically around 50/50.

8 And this Commission had already reached a
9 decision in another docket that said, on average we're
10 going to think -- we're going to look, based on some data,
11 that the typical high-capacity DS1 is used for 11 business
12 lines and then the rest is for non-switched purposes.

13 That's what we used. That's where we got
14 that data, and that's -- and the source of our argument is
15 this third sentence in the rule that prohibits them from
16 counting non-switched lines. You know, quite frankly, in
17 a nutshell, that's the -- that's the whole case in terms
18 of business lines focus is right there.

19 BY JUDGE JONES:

20 Q. Are non-switched special access lines a
21 subset of UNE loops?

22 A. No. A UNE loop can be used that way. A
23 non-switched line is typically thought of as a data line.
24 Okay. If I buy a high-capacity DS1 loop, a UNE loop, I
25 could make it into 24 business lines, but most business

1 customers want a mix of business lines and then data.

2 A good rule of thumb is -- not just a good
3 rule of thumb. I've seen data over and over again that
4 supports the Commission's earlier finding that one of
5 these DSIs would be used typically for around 11 business
6 lines and then the rest would be data, and that's why
7 we're saying the Commission can't take all 24 and treat
8 them as business lines without violating the second
9 sentence because that's not the typical use.

10 Q. It was AT&T's testimony earlier that they
11 lease those loops and they have no idea what's going over
12 them. Is that true, from your point of view?

13 A. Yes. This is -- this is a process. They
14 have no idea what's going over them. They could be zero
15 business lines or -- so you have to ask --

16 Q. Or it could be 24?

17 A. Or it could be 24, or it could be what it
18 normally is, something in the middle.

19 Q. We're not asked to do what's normal. We're
20 asked to do what is, right?

21 A. True. But we do agree with AT&T that the
22 FCC did not require that this be precise, but we're
23 disagreeing that it can be -- that it should be based on
24 an extreme reading. In our view, assuming that the thing
25 is used entirely for business lines is an extreme reading.

1 Quite frankly, that's the case, your Honor. There is no
2 way for them to know with precision the split.

3 We've had states go our way, so we know it
4 can be done. Right? We -- I mean, North Carolina ruled
5 in our favor. Oregon ruled in our favor. There's the
6 proposal in Oklahoma. Here we had the advantages of a
7 Commission decision that already looked basically at the
8 question we're trying to answer, what is a reasonable look
9 at how much of this capacity is business line?

10 And then we compared our results to the
11 data that the FCC looked at when it came across these
12 thresholds, and we showed that our interpretation produces
13 results much more consistent to the data -- the data the
14 FCC looked at than SBC's. And that's why we're
15 recommending you adopt our interpretation.

16 Q. So it's not that UNE loops aren't included,
17 it's just what percentage of them are?

18 A. Correct, your Honor.

19 Q. And you're just guessing at how much that
20 should be, just as they are?

21 A. No. No. No. We're not -- first of all,
22 we know their answer is wrong because as a practical
23 matter nobody does what they're suggesting.

24 Q. How do you know that?

25 A. I've been doing this for 20 years, and I

1 know people don't configure their networks that way.
2 However, a more empirically proven analysis, and I -- this
3 is laid out in the testimony. First of all, the
4 Commission basically answered this question in a prior
5 docket. So the Commission has an analysis based on
6 evidence a couple of years ago, and quite frankly, in that
7 case, AT&T wanted to count the number of business lines at
8 4. Now there are 24. In that case there were 4. The
9 Commission came in at 11 in that proceeding.

10 I've looked at in every single BellSouth
11 state when we went through this process, BellSouth
12 actually provided the split for all of its customers. For
13 all the customers that it uses a high-capacity loop to
14 provide service to, they gave us how many of their lines
15 were being used to carry voice versus some other purpose.
16 We had it for every single state. And it all comes out in
17 a relatively narrow range of around 40 to 50 percent of
18 the capacity is used for business line services and the
19 rest is used for something else.

20 And then there was a CLEC who provided
21 testimony in Oklahoma that -- it's in my -- it's in my
22 testimony. I think they said their experience was on
23 average 10. I've talked to CLECs about this utilization
24 all over the country for a variety of purposes, and it's
25 always somewhere in this 8 to 12 range is the way carriers

1 package their services to sell it to end users as a mix of
2 business lines and data.

3 It's why the business line -- I think that
4 there's enough evidence clearly in this record and the
5 Commission already reached a decision to do it in a
6 reasonable way, and when you look at the effect of AT&T's
7 assumption, an assumption that they've provided no
8 evidence for either. I mean, they just say it's got to be
9 24 because they don't know. They increased the business
10 line count in some of these wire centers by 40 percent.
11 It's an enormous -- it's an enormous bump.

12 So it's something that it's useful for the
13 Commission to try and do a better job of even if it knows
14 it can't do a perfect job because it's perfectly wrong to
15 do it AT&T's way.

16 JUDGE JONES: Okay. That's a good place to
17 stop. I don't have any other questions. Any recross? I
18 don't see any.

19 MR. BUB: I was waiting for Bill.

20 JUDGE JONES: From anyone.

21 MR. HAAS: No questions.

22 MR. BUB: I just had a couple, your Honor.

23 JUDGE JONES: Go right ahead.

24 MR. BUB: If it's okay, I'll just do it
25 from right here.

1 RE CROSS-EXAMINATION BY MR. BUB:

2 Q. Mr. Gillan, you had indicated -- talked
3 about the rule with Judge Jones. You're talking about the
4 third sentence that prohibits counting of non-switched
5 lines. Isn't it -- doesn't the rule actually prohibit
6 counting of non-switched special access lines?

7 A. Yes, but any line that is non-switched that
8 goes from a wire center out to a customer premise is
9 called special access. So to me the fact that it includes
10 the word special access doesn't add anything.

11 Q. AT&T Missouri doesn't unbundle special
12 access lines, though, does it? That's a service it sells,
13 special access?

14 A. You know, I know that you have a service
15 that you call special access or there's -- no. You don't
16 have a service that you call special access really, but
17 there's a category of type of circuit that is called
18 special access.

19 The fact that you have those doesn't mean
20 it's unique to AT&T. CLECs have lines that are non-switch
21 that go to customers as well. Just like a switched access
22 line isn't a term that refers only to AT&T, any access
23 line that goes to a switch is a switched access line.
24 That's a generic label.

25 Q. And it's correct, though, that

1 AT&T Missouri isn't asking that its special access service
2 lines are to be counted here; is that correct?

3 A. That's correct. You are only asking that
4 the CLEC special access lines be counted.

5 Q. The loops, right, the UNE-L loops?

6 A. That the CLECs use as special access, yes.
7 And I just don't see anything in the definition that tells
8 you that it's acceptable for you to treat your lines
9 differently than their lines. In fact, the first sentence
10 suggests that you're supposed to treat them the same
11 whether by the incumbent LEC or by competitive LEC.
12 Sounds to me as though that's not supposed to be a factor.

13 Q. Mr. Gillan, the last thing I want to follow
14 up on is you've been discussing with the judge about how
15 AT&T and I guess the other ILECs when the FCC was
16 establishing its thresholds, submitted ARMIS data the
17 first time that counted a loop one by one basically
18 without the digital equivalency, correct?

19 A. You counted loops one by one, but that's
20 not ARMIS data.

21 Q. Okay. You counted loops one by one.
22 That's the data we presented to the FCC?

23 A. Yes.

24 Q. And it's your testimony that that's what
25 the FCC used to set its thresholds?

1 A. That's your testimony and our testimony.

2 Q. After that was done, then the rule with
3 digital equivalency was issued by the FCC; is that
4 correct?

5 A. Yes.

6 Q. It was after that rule was submitted that
7 AT&T sent another data submission to the FCC that
8 incorporated that digital equivalency of the one digital
9 UNE loop equalled 25 -- I'm sorry -- 24 business lines?

10 A. No. It equals one -- 24 lines. Okay. All
11 it says is 1 DS1 equals 24 lines. It does have an example
12 that uses the word business lines, but it doesn't define
13 it as 24 lines.

14 Q. It was after that --

15 A. As 24 business lines.

16 Q. -- rule change that AT&T Missouri, I guess,
17 as well as the other AT&T entities, resubmitted that
18 original data that incorporated that digital equivalency
19 1 to 24 ratio, right?

20 A. You submitted data for that same year that
21 incorporated 24 to 1, yes.

22 Q. To the FCC?

23 A. Yes.

24 Q. And it's your understanding the FCC has
25 never told AT&T Missouri that that was wrong?

1 A. They've never told you it was wrong. They
2 never told you it was right. We both agree that a rule
3 came out after you gave the FCC that data. What we're
4 saying is that that rule where it has changes required
5 that you subtract some things and permitted you to add
6 some things. You read this rule, only the part that says
7 you can add. You never read the rule where it says
8 subtract.

9 Q. That was two years ago that we made this
10 submission to the FCC, right?

11 A. Yes.

12 Q. And we haven't heard anything since from
13 them?

14 A. That is true. You know what? You're not
15 going to. The FCC made it very clear that disputes
16 involving how this all works out is going to be worked out
17 in front of the states in proceedings like this.

18 Q. So it's your testimony if the FCC thought
19 that that was wrong, they wouldn't do anything about it?

20 A. No. It's my testimony that the FCC issued
21 the TRRO, got it affirmed, and left its implementation to
22 the states, beginning, middle and end of the story.
23 They're not going back in to do any fine tuning to its
24 decisions. They're -- I mean, we all are aware that the
25 FCC orders over the past ten years have not been a model

1 of clarity, and the process of working them through to
2 implementation has been, for all practical purposes, left
3 to the states in proceedings like this. It's the process
4 that they feel comfortable with. I don't believe that
5 it's fair at all to attribute them not saying something to
6 you as anything other than business as usual.

7 MR. BUB: Thank you, your Honor. Those are
8 all the questions we have. Thank you, Mr. Gillan.

9 JUDGE JONES: Redirect? Mr. Gryzmala, did
10 you have some?

11 MR. GRYZMALA: No.

12 JUDGE JONES: Redirect.

13 REDIRECT EXAMINATION BY MR. MAGNESS:

14 Q. Mr. Gillan, if we could turn first to the
15 business line definition, some of the questions that you
16 got, particularly from the judge. What role in
17 calculating business lines does this last example play? I
18 think AT&T's testimony says, well, you know, they make us
19 count it that way. They make us count every single one as
20 24. Why do you disagree with that?

21 A. I think the role it plays is injecting all
22 this confusion. It's a -- it's what -- your Honor, to be
23 honest, it's what makes this such a difficult discussion.
24 If that wasn't there at all, then it would be pretty clear
25 that the re-- actually, I think it is absolutely clear

1 that the restrictions in that third sentence apply to
2 everything, because it says among these requirements, and
3 I think that means that this shall only count those used
4 for switched service, shall not count. It is very
5 straightforward. And then it gives an instruction that's
6 not unusual. It says, shall account for ISDN or other
7 access lines by counting each 64 kilobit equivalent as one
8 line. That's standard industry treatment. You count them
9 as one line, so it has 24 lines.

10 But the question is, how many of those are
11 business lines? In ARMIS there's the same set of
12 instructions. In ARMIS it tells the ILEC, count
13 high-speed facilities and their digital equivalency, but
14 they don't go count a DS1 to one of their customers as
15 24 business lines. They look inside it to see how many
16 are actually used for switched service, and they only
17 count that percentage as business lines.

18 So I believe that this -- up until that
19 point, it's internally consistent and it mirrors the way
20 ARMIS tells the ILEC to count its own facilities. So it
21 really sets up a very simple structure of CLEC and ILEC
22 are treated the same. Same set of rules apply to both.
23 The ILEC gets its data from ARMIS. The ILEC has to put
24 this other data together because they don't report it in
25 ARMIS.

1 Then they give an example. It is true that
2 that example can be true. I mean, it is only an example.
3 If all of it is used for business line, if all of the
4 lines satisfy the requirements above, the among these
5 requirements, it's used for switched services, it's used
6 to serve a business customer, then the example would be
7 true.

8 But it doesn't mean that because it's true
9 in one example that it's true in every example, and that's
10 how AT&T has interpreted the example. They've interpreted
11 it to be a waiver of all the requirements in the rule that
12 apply to that sentence. If it's a DS1, you count it at
13 24. Actually, they didn't even do that, because what the
14 example says, a DS1 line corresponds to 24 kilobit
15 equivalents. It doesn't say a DS1 UNE loop. It says a
16 DS1 line. Right?

17 Well, in theory, if you were to -- that
18 would imply that their DS1s should also be counted at 24,
19 but they don't, because they know that they're supposed to
20 go get it from ARMIS and ARMIS doesn't let them do it.
21 They just try to do it to the CLEC lines.

22 Q. I want to ask you as we're talking about
23 application of the rule to turn your attention to JPG-8,
24 an exhibit to your rebuttal testimony that Mr. Haas had
25 you take a look at, in which there are comparisons of

1 business line counts between what the BOCs gave to the FCC
2 versus AT&T's and the CLEC Coalition's competing proposals
3 in this proceeding.

4 And clarify one thing before we go to
5 JPG-8. JPG-3 in your direct, I think you mentioned this
6 when Mr. Haas asked, that was not a complete
7 recommendation, and you made a more complete one in
8 rebuttal; is that correct?

9 A. Yes.

10 Q. And we find that those numbers are
11 reflected in JPG-8?

12 A. Well --

13 Q. The business line numbers?

14 A. No. They would be in 7 and 9. 8 is
15 actually a comparison of -- if you use the CLEC
16 methodology, which we recommend you do using 2004 data,
17 but if you did it for 2003 data so we'd have everything
18 for the same year, that's what that comparison is, and it
19 shows the CLEC lines for every wire center being above the
20 lines that the FCC looked at when it set the thresholds,
21 but they're not as far above as the AT&T business lines.

22 Q. And so JPG-9, if the Commission wanted to
23 look at the recommendation based on 2004 data and your
24 application of the business line rule, that includes those
25 business line tallies, correct?

1 A. Correct.

2 Q. And based on this discussion of the rule
3 that you had with Judge Jones and Mr. Haas and Mr. Bub,
4 could you describe in producing those numbers the steps
5 you took to comply with each sentence of this rule when
6 you came up with your recommendation?

7 A. Well, yes. Yes. I used -- starting at the
8 second line, says the number of business lines in a wire
9 center shall equal the sum of all incumbent business
10 switched access lines, which I interpret to be business
11 switched access lines as calculated according to the ARMIS
12 instructions for 2004, which were cited by the FCC, plus
13 the sum of all UNE loops connected to that wire center,
14 which I took, including UNE loops provisioned in
15 combination with other unbundled network elements, which
16 would be UNE-P.

17 It did not include residential UNE-P
18 because I interpreted the first sentence to say it has to
19 be a business customer. I did not worry about the other
20 UNE loops connected to residential customers because, as a
21 practical matter, that business strategy exists only in a
22 couple of states. Most states you don't have to fret
23 about it because there just aren't enough UNE loops
24 connected to residential customers for it to matter.

25 So then the next step is, you hit the third

1 sentence, which is very specific. It begins with, among
2 these requirements, which I interpret to mean these
3 requirements apply to ILEC lines and CLEC lines. There's
4 no -- there's nothing there that indicates that there's a
5 distinction. And it says, among the requirements to
6 satisfy this definition, you shall include only those
7 access lines connected to end user customers with
8 incumbent LEC end offices for switched services. You
9 cannot include those for non-switched services.

10 And you're supposed to look at digital
11 access lines in a 64 kilobit fashion. So I did look at
12 all the high-capacity lines by their potential capacity,
13 but then I used the Commission's prior decision of
14 11 business lines per DS1 to split that between how much
15 of that capacity would be considered business line and how
16 much of that -- and satisfy this and how much of it would
17 be considered non-switched special access, in which case
18 it has to be excluded from this definition. And that's
19 how I ended up with it.

20 Q. I just had a few other questions. First,
21 on this clarification/reconsideration petition Mr. Bub
22 talked to you about, do you still have a copy of that?

23 A. Yes.

24 Q. Just quickly, if you could turn to page
25 Roman numeral 3 in the beginning in the summary.

1 A. Yes.

2 Q. You mentioned in response to his questions
3 that it was your understanding the CLECs were looking for
4 clarification as well as reconsideration. Will you look
5 under the business line counts. Isn't it correct there's
6 a sentence says, the Commission should clarify or revise
7 its rules to eliminate the overcount regarding the 24
8 business line issue?

9 A. Yes. Yes.

10 Q. And, in addition, if you look at page -- I
11 suppose it's page 1 of the actual petition. Follows the
12 Roman numeral pages, and the second full paragraph, in
13 this petition, joint petitioners seek clarification or
14 correction of a number of aspects of the unbundling rules
15 adopted in the TRRO. Is that a correct reading?

16 A. Yes.

17 Q. And, I mean, is it these actual words from
18 the text that led to your conclusion that they were
19 seeking clarification?

20 A. Yes, that and I also remember when -- the
21 time period this was written. I didn't review it. I
22 didn't write it. But when the ILECs first came back and
23 gave the FCC after the order these line counts that AT&T
24 wants to claim as some sort of acceptance, when BellSouth
25 filed theirs, there was a math error in it. Okay. And I

1 think all the lines got -- they either got multiplied --
2 there was a decimal point put in the wrong place, and so
3 all BellSouth's business lines were either 10 times or
4 100 times larger than they were supposed to be under any
5 interpretation. It was a simple math error.

6 So there was this -- there's this giant
7 concern when all of a sudden this local telephone company
8 shows up, files these numbers that appear to indicate they
9 have more business lines than all the businesses on the
10 east coast, and, you know, there was -- people thought, oh
11 my gosh, what on earth are the ILECs doing? So I don't
12 offer that as justification. I'm just trying to give some
13 historical context for the tone of the environment.

14 Q. You mentioned, too, when Mr. Bub was
15 discussing this issue of the CLEC brief, that the FCC
16 actually said that the issue around the business line
17 counts was not ripe for consideration in that court case.
18 Could you tell us what you mean by that?

19 A. Yes. This actually is partially a response
20 to Ms. Chapman's testimony where she made a big deal about
21 how the FCC characterized its rule in that brief. But
22 when I read the whole FCC brief, what was clear to me was
23 that the FCC was basically telling the court, look, the
24 ILECs filed this data. The CLECs say it's calculated
25 wrong. This is an open issue of fact in front of the

1 agency and, therefore, it's not ripe for review.

2 So far from AT&T's characterization that
3 the FCC has somehow blessed its numbers, it actually went
4 so far as to tell the court this is an issue of fact
5 that's open. Therefore, don't you address this appeal.

6 Q. I'll just say, one that for whatever
7 reason, as I think you mentioned before, the FCC decided
8 not close, the FCC didn't rule on it either way?

9 A. Correct. We all know that the FCC has
10 moved on to other things and left this to the states. I
11 also point on that appeal, and again, I'm not a lawyer, I
12 was sort of surprised to see all those names because I was
13 under the impression that if you file something labeled a
14 petition for reconsideration, you can't appeal the same
15 issue at the FCC.

16 So it's not clear to me that all of those
17 parties are actually all appealing all elements on that
18 brief. I mean, there's a whole bunch of parties in that
19 brief, and there's a whole bunch of issues in that brief,
20 and if I recall, the court directed that all the
21 parties -- that the CLECs had to consolidate all their
22 appeals.

23 But it's not clear. I don't know one way
24 or another whether or not all of the parties on that brief
25 are actually appealing all of the issues in that brief

1 because I thought standard practice was you couldn't go
2 back to the agency and to the court.

3 Q. Finally, on the -- there were a number of
4 state decisions that Mr. Bub reviewed with you. I don't
5 want to go over many of those but just wanted to note on a
6 few. He mentioned the Texas decision. You were involved
7 there, correct?

8 A. Yes.

9 Q. And there AT&T was making the same claims.

10 MR. BUB: Your Honor, I don't think we
11 reached Texas. I would object to this line of questions.
12 I think it's beyond my cross-examination. I think I
13 stopped way short of Texas.

14 BY MR. MAGNESS:

15 Q. Okay. Kansas, I don't know if it's short
16 of Texas. It's north of Texas.

17 MR. BUB: I did do Kansas.

18 BY MR. MAGNESS:

19 Q. In Kansas, AT&T was proposing the same
20 methodology and arguments on the fiber-based collocater
21 issue as they are here; is that correct?

22 A. Yes.

23 Q. And your recommendation was the same as it
24 is here?

25 A. Yes.

1 Q. And the Kansas Commission adopted your
2 recommendation, right?

3 A. Yes. Every Commission has rejected AT&T
4 except for Ohio, to my understanding, on the fiber-based
5 collocater question.

6 Q. And in the -- were you involved -- Mr. Bub
7 brought up your resume and where you've testified on this
8 issue and various places. In the BellSouth states, did
9 the former BellSouth, now AT&T, even assert that collo to
10 collo arrangements qualified as fiber-based collocators?

11 A. No.

12 Q. And were you involved in all of the cases
13 in the BellSouth region?

14 A. Yes.

15 MR. MAGNESS: That's all I have, your
16 Honor.

17 JUDGE JONES: Thank you. You may step
18 down.

19 THE WITNESS: Thank you.

20 JUDGE JONES: You-all don't want to make
21 closing arguments, do you?

22 (No response.)

23 JUDGE JONES: Okay. The transcript will be
24 here, I believe is it seven business days? June 1st. How
25 soon after June 1st do you-all want to file briefs? Do

1 you even want to file post-hearing briefs?

2 MR. GRYZMALA: Your Honor, I'll just speak.
3 I don't know that it's customary, and I wouldn't want to
4 put any pressure on the court reporter to get this done in
5 seven days of the hearing. If it's a little longer,
6 that's fine.

7 Subject to Mr. Magness' whims, I would
8 submit 30 days following receipt of the transcript, if
9 that's acceptable, simultaneous briefs, one shot, no
10 reply, by all parties.

11 JUDGE JONES: Mr. Magness?

12 MR. MAGNESS: Your Honor, I have no whims.
13 Mr. Gryzmala, how many days after transcript were you
14 suggesting?

15 MR. GRYZMALA: Thirty. And I say that
16 because of some planned vacation, your Honor, that I --
17 and other commitments on cases. I have a couple cases
18 with Mr. Haas that we need to brief, at least one that I
19 know of.

20 MR. MAGNESS: I'd suggest if we're going to
21 do another brief, that we at least get a brief reply
22 opportunity.

23 JUDGE JONES: Does it matter to you,
24 Mr. Gryzmala?

25 MR. GRYZMALA: No. If Mr. Magness insists,

1 that's fine.

2 MS. YOUNG: July 1st is a Sunday.

3 JUDGE JONES: July 1st is a Sunday? Then
4 file it on Monday.

5 MR. MAGNESS: July 2nd.

6 JUDGE JONES: You-all know the rule with
7 Saturday, Monday and holidays. It's the following
8 business day afterwards that whatever is due is due. So
9 you don't mind filing a reply brief to your brief.

10 MR. GRYZMALA: No.

11 JUDGE JONES: Both of you file reply
12 briefs. Okay.

13 MR. GRYZMALA: Absolutely.

14 MR. BUB: Simultaneous reply briefs. What
15 about a page limit on the reply brief?

16 JUDGE JONES: I can tell you all now your
17 first briefs weren't brief. Staff's brief was the only
18 one that was brief. I read them both, but I had to take
19 them home and read them. And given the fact that they are
20 as voluminous as they are, I wouldn't suspect that your
21 post-hearing briefs need to be that long.

22 MR. MAGNESS: We could do say a 25-page
23 limit. That would make the title of the brief more
24 descriptive.

25 JUDGE JONES: Mr. Gryzmala?

1 MR. GRYZMALA: 25 on the opening or reply?

2 On the opening? That's fine.

3 JUDGE JONES: And the reply something less?

4 MR. MAGNESS: 15?

5 MR. GRYZMALA: 25 and 15 is fine. But I am
6 more concerned about just the timing, your Honor. Bill,
7 if it's all right, say 30 days after the transcript is
8 delivered on the opening brief, 15 days on the reply
9 thereafter. Does that sound fair?

10 MR. MAGNESS: Yeah. 4th of July week.
11 Maybe 2nd, July 20th?

12 MR. GRYZMALA: I don't want to fix a date.
13 I don't have my calendar with me.

14 JUDGE JONES: Don't forget that I'm still
15 getting this on the record so I don't have to take notes
16 later.

17 MR. MAGNESS: I think the 30 days after is
18 fine. Why don't we say business days so the July 4th
19 holiday doesn't count, just like it was a Saturday or
20 Sunday, and we ought to be fine.

21 MR. GRYZMALA: I'd say 30 calendar days.
22 The Commission's rules take care of that. If the timeline
23 drops on Saturday, Sunday or Holiday, it moves to the
24 following business day.

25 JUDGE JONES: Yeah. And then 15 days after

1 that reply briefs?

2 MR. GRYZMALA: Right.

3 JUDGE JONES: Do you-all have any other
4 post-hearing matters you'd like to talk about? Mr. Bub?

5 MR. BUB: The matrix that you asked --

6 JUDGE JONES: Yes.

7 MR. BUB: -- Mr. Magness and us to work on
8 together, if for some reason we can't agree on a
9 particular, do we file something?

10 JUDGE JONES: How can you not agree on what
11 is history? We're talking about decisions from other --

12 MR. BUB: As we saw on the stand, there may
13 be different interpretations of history.

14 JUDGE JONES: Well, I mean, we're talking
15 about decisions of other tribunals, correct?

16 MR. BUB: You just want bottom line?

17 JUDGE JONES: If you-all are unable to
18 agree, just say that. Just say what you look and he can
19 say what he thinks and we'll go from there.

20 Anything else?

21 MR. GRYZMALA: For clarification
22 timing-wise, when will we be expected to submit the
23 matrix?

24 JUDGE JONES: When you want to.

25 MR. GRYZMALA: That's fine.

1 MR. MAGNESS: How about no later than the
2 date of the first brief? We don't have to reply to each
3 other's matrix.

4 MR. GRYZMALA: No later than the date on
5 which the opening brief would be due.

6 JUDGE JONES: Fine. With that, then, we'll
7 go off the record.

8 WHEREUPON, the hearing of this case was
9 concluded.

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1 C E R T I F I C A T E

2 STATE OF MISSOURI)
3 COUNTY OF COLE) ss.

4 I, Kellene K. Feddersen, Certified
5 Shorthand Reporter with the firm of Midwest Litigation
6 Services, and Notary Public within and for the State of
7 Missouri, do hereby certify that I was personally present
8 at the proceedings had in the above-entitled cause at the
9 time and place set forth in the caption sheet thereof;
10 that I then and there took down in Stenotype the
11 proceedings had; and that the foregoing is a full, true
12 and correct transcript of such Stenotype notes so made at
13 such time and place.

14 Given at my office in the City of
15 Jefferson, County of Cole, State of Missouri.

16

17 Kellene K. Feddersen, RPR, CSR, CCR
18 Notary Public (County of Cole)
My commission expires March 28, 2009.

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