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SOUTHWESTERN BELL TELEPHONE, L.P. d/b/a
AT&T MISSOURI

CASE NO. TO-2006-0360

REBUTTAL TESTIMONY

OF

CAROL CHAPMAN

Public Version

Dallas, Texas

BEFORE THE PUBLIC SERVICE COMMISSION

OF THE STATE OF MISSOURI

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

AFFIDAVIT OF CAROL A. CHAPMAN

STATE OF TEXAS)
) SS
COUNTY OF DALLAS)

I, Carol A. Chapman, of lawful age, being duly sworn, depose and state:

1. My name is Carol A. Chapman. I am presently an Associate Director – Wholesale Customer Care for Southwestern Bell Telephone, L.P.
2. Attached hereto and made a part hereof for all purposes is my rebuttal testimony.
3. I hereby swear and affirm that my answers contained in the attached testimony to the questions therein propounded are true and correct to the best of my knowledge and belief.

Carol A. Chapman

Subscribed and sworn to before this 25 day of April, 2007.

Blake A Wright
Notary Public

My Commission Expires: Oct 28, 2008

BLAKE ALDREDGE WRIGHT
NOTARY PUBLIC STATE OF TEXAS
COMMISSION EXPIRES:
OCTOBER 28, 2008

REBUTTAL TESTIMONY OF CAROL CHAPMAN

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REBUTTAL TESTIMONY OF MARVIN NEVELS

ON BEHALF OF AT&T MISSOURI

I. INTRODUCTION

Q: PLEASE STATE YOUR NAME?

A: My name is Carol A. Chapman.

Q: ARE YOU THE SAME CAROL A. CHAPMAN WHO FILED DIRECT TESTIMONY IN THIS PROCEEDING?

A: Yes.

II. PURPOSE OF TESTIMONY

Q: WHAT IS THE PURPOSE OF YOUR REBUTTAL TESTIMONY?

A: The purpose of my Rebuttal Testimony is to respond to the Direct Testimony of CLEC witness, Joseph Gillan[1] and the Direct Testimony of Missouri Public Service Commission Staff witness, Michael S. Scheperle.[2] I have no general disputes with Mr. Scheperle's testimony. Mr. Scheperle supported AT&T Missouri's methodology for the Business Line count and recommended that the Commission adopt AT&T Missouri's currently effective wire center designations. The only flaw in Mr. Scheperle's testimony is not an error, but an oversight. As explained below, Mr. Scheperle's testimony did not address the wire center designations that were applicable prior to the application of pertinent merger commitments made in connection with the SBC/AT&T merger.

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[1] Direct Testimony of Joseph Gillan on Behalf of the CLEC Coalition, TO-2006-0360 ("Gillan Direct").

[2] Missouri Public Service Commission utility Operations Division, Direct Testimony of Michael S. Scheperle, NuVox Communications of Missouri, Inc. Case No. TO-2006-0360 ("Scheperle Direct").

The majority of my Rebuttal Testimony is focused on my response to Mr. Gillan's Direct Testimony. As I explain below, Mr. Gillan's proposals on Business Line counts are directly contrary to the clear direction provided by the FCC in the *TRRO*. I also address the parties' factual disputes and methodological disputes on Fiber-based Collocators. My testimony will demonstrate that AT&T Missouri has applied the FCC's rules correctly and that the Commission should adopt AT&T Missouri's wire center designations without modification.

Q: HOW IS YOUR TESTIMONY ORGANIZED?

A: I have organized my testimony to first address general issues applicable to the wire center designations. The first of these general issues is covered in my response to Mr. Scheperle's Direct Testimony. While I do not disagree with any of Mr. Scheperle's conclusions, I do point out an area he did not address in his testimony, relating to the timing of the application of the wire center merger commitment associated with the SBC/AT&T merger. The second general issue I address concerns the CLECs' support of subjective, outcome-based methods for determining the appropriate wire center designations. The FCC was crystal clear on this point. The non-impairment thresholds the FCC established rely on objective, readily obtainable data that is already in the possession of the ILECs. The CLECs' proposals stray from this clear directive.

My discussion of the general issues is followed by my testimony on specific Business Line disputes. In this portion of my testimony, I identify each area of dispute related to the Business Line count and then provide testimony addressing each area of dispute.

After my testimony on the Business Line count disputes, I address the disputes concerning the Fiber-based Collocator counts. Again, I identify each area of dispute and then address each dispute separately.

III. GENERAL RESPONSE TO MR. SCHEPERLE'S DIRECT TESTIMONY

Q: DO YOU HAVE ANY GENERAL COMMENTS REGARDING MR. SCHEPERLE'S DIRECT TESTIMONY?

A: Yes. I generally support and agree with Mr. Scheperle's Direct Testimony. Mr. Scheperle correctly supported AT&T Missouri's methodology for the Business Line count and recommended that the Commission adopt AT&T Missouri's currently effective wire center designations.[3] I agree with his conclusions.

Q: DO YOU HAVE ANY CONCERNS REGARDING MR. SCHEPERLE'S DIRECT TESTIMONY?

A: Only one. Mr. Scheperle's Direct Testimony addresses the wire center designations as they stand today after the application of AT&T Missouri's commitments to the FCC in connection with the SBC/AT&T merger and the AT&T/BellSouth merger. Mr. Scheperle's Direct Testimony does not address the designations that were applicable prior to the SBC/AT&T merger. Prior to that merger, AT&T Missouri's wire center designations simply reflected the requirements established by the FCC in the *TRRO*. These are the designations that applied (and were used by AT&T Missouri in its business relationships with wholesale customers) before the merger commitments took effect. In order to ensure that these wire centers are handled correctly, the Commission must assess

[3] *See* Scheperle Direct generally and at p. 15.

the wire center designations as of the effective date of the *TRRO* (March 11, 2005) *prior* to the application of the SBC/AT&T merger commitment (effective on December 16, 2005) which resulted in the exclusion of Fiber-based Collocation arrangements affiliated with the pre-merger AT&T.

Q: CAN YOU EXPLAIN FURTHER?

A: Yes. On the effective date of the *TRRO*, March 11 2005, SBC and AT&T were not affiliated companies. As a result, pre-merger AT&T Fiber-based Collocation arrangements were properly counted as Fiber-based Collocators. However, effective December 16, 2005, in compliance with an SBC/AT&T merger commitment, AT&T Missouri modified the wire center list. This modification was done on a prospective basis, because the merger commitment was only prospective (not retroactive), and therefore had no bearing on any transition-related activity (including the billing of transitional rates) that occurred prior to the modification. It is important for the Commission to recognize the prospective nature of AT&T Missouri's merger commitment in order to preclude unnecessary disputes concerning billing and transition-related activity for the period between March 11, 2006 and December 16, 2006. This merger commitment reads as follows:

> Within thirty days after the Merger Closing Date, SBC/AT&T shall exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment pursuant to section 51.319(a) and (e) of the Commission's rules. SBC/AT&T shall file with the Commission, within thirty days of the Merger Closing Date, revised data or lists that reflect the exclusion of AT&T collocation arrangements, as required by this condition.

As the language above clearly indicates, this merger commitment was not effective until *after* the SBC/AT&T merger was complete.

Q: ARE THERE ANY ADDITIONAL METHODOLOGICAL QUESTIONS THAT THE COMMISSION NEEDS TO CONSIDER IN ORDER TO MAKE THIS DETERMINATION?

A: No. The only difference between the updated December 16, 2005 wire center designations and the original March 11, 2005 designations is that the March 11, 2005 designations include the Fiber-based Collocation arrangements belonging to pre-merger AT&T. As explained in my Direct Testimony, there are five instances in which the exclusion of the pre-merger AT&T's Fiber-based Collocation arrangements resulted in a re-designation of a wire center from Tier 1 to Tier 2. In addition to adopting the currently effective wire center designations (as updated for the merger commitments), the Commission should also rule that those five wire centers were properly designated as Tier 1 wire centers between March 11, 2005 and December 16, 2005.

IV. THE FCC PRECLUDES SUBJECTIVE INTERPRETATIONS OF THE BUSINESS LINE AND FIBER-BASED COLLOCATOR DEFINITIONS IN THE *TRRO*

Q: IS THE CLECS' OVERALL APPROACH TO APPLYING THE FCC'S BUSINESS LINE AND FIBER-BASED COLLOCATOR DEFINITIONS CONSISTENT WITH THE FCC'S DISCUSSION OF THESE DEFINITIONS?

A: No. Throughout his testimony, Mr. Gillan advances a subjective analysis meant to convince the Commission to adopt recommendations that suit the CLECs' desired outcome on the issues, instead of employing the straightforward implementation

requirements of the *TRRO* and the FCC's implementing rules.[4] The FCC emphasized throughout its discussion of the Fiber-based Collocator and Business Line definitions in the *TRRO* that it was creating a set of objective criteria that would be easy to implement because they rested on readily available, verifiable data.[5] The CLECs' subjective approach, by contrast, is reminiscent of the approach taken in the unbundling rules in the *TRO*, which generally required state commissions to make subjective judgments regarding impairment and to rely on CLEC data that was difficult to obtain and verify. After the D.C. Circuit vacated those rules, the FCC designed its new rules in the *TRRO* to avoid those sorts of problems and eliminate any reliance on CLEC-provided or subjective data.[6] The FCC noted that it was "acutely aware of the need to base any test we adopt here on the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis."[7] Thus, Mr. Gillan's proposal that the Commission base its wire center determinations on a subjective analysis -- instead of the objective criteria stated in the FCC's rules -- is directly contrary to the unbundling framework established by the FCC in the *TRRO* and approved by the United States Court of Appeals for the D.C. Circuit when it upheld the *TRRO* rules on appeal.

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4 See, for example, Gillan Direct at pp. 4-9, 18-22.
5 See, for example, *TRRO* at ¶¶ 99, 105, 108.
6 *TRRO* at ¶¶ 99, 108, 157-58, 169.
7 *TRRO* at ¶ 99 (emphasis added).

Q: HOW DID THE FCC DESCRIBE THE OBJECTIVE CRITERIA IT ESTABLISHED FOR DETERMINING IMPAIRMENT FOR HIGH-CAPACITY LOOPS AND DEDICATED TRANSPORT?

A: The FCC repeatedly emphasized its intent to create objective standards that would be easy for state commissions to implement. Specifically, the FCC adopted "a proxy approach that, unlike the *Triennial Review Order* triggers, relies on objective criteria to which the incumbent LECs have full access, is readily confirmable by competitors, and makes appropriate inferences regarding potential deployment."[8] The FCC further stated that "the tests we adopt rely on data regarding the number of business lines and fiber-based collocators in a wire center, which are objective and readily available."[9] The FCC found that "as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes"[10] and that "[f]iber-based collocation also stands out as one of the most objective indicia of competitive deployment available to us."[11]

Q: WHY ARE THESE FCC FINDINGS PARTICULARLY IMPORTANT IN THIS CASE?

A: It is crystal clear that the FCC's definitions of Business Line and Fiber-based Collocator are based on purely objective criteria. The FCC has already performed the subjective, policy analysis to determine the instances in which carriers are impaired without access to high-capacity loops and dedicated transport and then established tests that would use

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8 *TRRO* at ¶ 108.

9 *TRRO* at ¶ 161.

10 *TRRO* at ¶ 105.

11 *TRRO* at ¶ 99.

objective criteria to implement its policy determinations. State commissions have been given the authority to implement those *objective* standards, not, as the CLECs propose,[12] to adopt different standards that would require subjective analysis or reliance on CLEC-provided data. The Commission should simply apply the criteria as set forth by the FCC in its rules and in the discussion of those rules in the text of the *TRRO*. The remainder of my Rebuttal Testimony will focus on the specific requirements of the FCC's rules.

V. BUSINESS LINE COUNT DISPUTES

a. Identification of Issues

Q: HAVE YOU IDENTIFIED THE BUSINESS LINE ISSUES IN DISPUTE BASED ON YOUR READING OF MR. GILLAN'S DIRECT TESTIMONY?

A: Yes. I have identified the Business Line count disputes and have provided a brief summary of each dispute below.

1. The first area of dispute, and probably the most critical, concerns the manner in which UNE-L lines are counted.[13] AT&T Missouri's position is that both the definition of Business Line in the FCC's rule and the text of the *TRRO* unequivocally require that *all* UNE-L lines be included in the Business Line count regardless of how the CLEC chooses to use the loop.[14] The CLECs' position is that only UNE-L lines that are used to provide switched service to business end users may be included in the business line count. As I explain in more detail in my rebuttal of the CLECs' position below, the CLECs' position is directly

[12] *See, e.g.*, Gillan Direct, at pp. 8, 20.

[13] For purposes of this testimony, the term UNE-L includes both stand-alone UNE loops and UNE loops that are part of an EEL or commingled arrangement. The term UNE-L does not include UNE loops provided in conjunction with AT&T Missouri switching (UNE-P).

[14] *See* 47 C.F.R. § 51.5 (definition of "Business Line"); *TRRO* at ¶ 105.

contrary to the FCC's rule and the text of the *TRRO*. Furthermore the CLECs interpret the definition of Business Line in a manner that would require the use of subjective, CLEC-provided data that AT&T Missouri does not possess and cannot verify – precisely what the FCC rejected.

2. The second business line dispute is closely tied to the first. AT&T Missouri's position is that the FCC requires that all UNE-L lines be included in the business line count, regardless of use, and that the same treatment applies to digital UNE-L lines. In other words, the FCC's Business Line rule requires that digital equivalency for UNE-L lines should be calculated based on the loop's digital capacity and not on the individual CLEC's use of the loop. The CLECs, however, contend that only UNE-L loops used to provide switched-based service to business end users should be included in the business line count and, therefore, only digital capacity used by the CLEC to provide switched service to a business customer should be counted. As with the first dispute discussed above, the CLECs' interpretation is contrary to the plain language of the FCC's rule and relies on data that is not available to AT&T Missouri and that is not readily verifiable.

3. The third business line dispute concerns the "vintage" of data that should be used to support the wire center designations made by AT&T Missouri as of the effective date of the *TRRO*. AT&T Missouri's position is that the business line counts must be based on the most current business line data available to AT&T Missouri at the time the *TRRO* went into effect (March 11, 2005). The most

current data available to AT&T Missouri at any given time is determined by the most recent ARMIS 43-08 filing. At the time of designation, the most current ARMIS 43-08 filing was the April 2004 filing, which reflects December 2003 billing data. The CLECs' position on this issue is not clear. The CLECs claim that more recent business line data should be used but do not propose the use of any particular vintage of data. I believe that, based on their outcome-based approach, the CLECs do not want to finalize their position until they determine which data would provide the most favorable result.

4. The fourth business line dispute concerns the CLECs' proposal suggesting that the Commission ignore the requirements of the FCC's rule defining Business Lines[15] by using the line count that was filed with the FCC in December of 2004 (prior to the issuance of the *TRRO*). Mr. Gillan dubs this proposal a "simple solution." But it is no solution at all, because it does not comply with the FCC's rule. As I will explain below, after the December 2004 submission, the FCC's *TRRO* rules specifically directed that business line counts account for digital equivalency. The line counts that AT&T (then SBC) provided to the FCC in December 2004 (before the issuance of the *TRRO*) did not apply digital equivalency calculations to UNE lines. Although AT&T Missouri and the CLECs do not agree on how the FCC's Business Line definition should be interpreted, both parties do agree that the rule requires the calculation of digital equivalency

[15] *See* 47 C.F.R. § 51.5 (definition of "Business Line").

for UNE lines. The Commission cannot adopt a Business Line count that does not comply with the FCC's rule.

b. Business Line Count Dispute 1 – Should the Business Line count include all UNE-L lines or be limited to UNE-L lines used to provide switched service to business end users?

Q: WHAT IS THE BASIS OF THIS DISPUTE?

A: As I explained in my Direct Testimony, the FCC's Business Line rule and the *TRRO* clearly require that all UNE-L lines be included in the Business Line count. AT&T Missouri is not permitted to exclude UNE-L lines from the Business Line count based on the type of service provided or the type of customer served. Despite the FCC's clear instructions on this issue, however, the CLECs claim that UNE-L lines may be included in the Business Line count *only if* the UNE-L is used to provide a switched service for a business customer. This is directly contrary to the FCC's rule on counting Business Lines in 47 C.F.R. § 51.5 (which states that "all UNE loops" are to be counted as business lines), as well as paragraph 105 of the *TRRO*, which explains that all "UNE-loops" count as business lines, not just "business" UNE loops.

Q: HAS THE COMMISSION'S STAFF INDICATED ITS POSITION ON THIS ISSUE?

A: Yes. Mr. Scheperle correctly recognized that both the FCC's rule and the text of the *TRRO* require that *all* UNE-L lines be included in the business line count.[16] Mr. Scheperle's Direct Testimony on this point supports AT&T Missouri's interpretation of the Business Line rule.

[16] Scheperle Direct at p. 12.

Q: IS AT&T MISSOURI'S INTERPRETATION OF THE FCC'S DEFINITION OF "BUSINESS LINE" BASED ON A READING OF THE ENTIRE DEFINITION?

A: Yes. Mr. Gillan claims that AT&T Missouri's "application of the FCC definition is based on reading isolated components of the definition, while ignoring other requirements."[17] This is not the case. AT&T Missouri (unlike Mr.Gillan) has considered the FCC's definition of Business Line[18] in its entirety, as well as the FCC's discussion of the definition in the *TRRO*.

Q: CAN YOU EXPLAIN WHAT THE FCC'S DEFINITION OF BUSINESS LINE REQUIRES?

A: Yes. The FCC's definition is:

> *Business line.* A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC. The number of business lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. Among these requirements, business line tallies:
>
> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services,
>
> (2) shall not include non-switched special access lines,
>
> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."[19]

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17 Gillan Direct at p. 14.

18 47 C.F.R. § 51.5 (definition of "Business Line").

19 47 C.F.R. § 51.5 (definition of "Business Line").

In the first sentence of the definition, the FCC explains what a business line is. A business line is "an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC."

As explained in the first phrase of the second sentence ("The number of business lines in a wire center shall equal . . ."), the rest of the definition explains the calculations that must be performed to determine the number of business lines in a wire center. It requires that the business line count be calculated to include:

- "the sum of all incumbent LEC business switched access lines"
- "plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements"

As noted above, the first group of lines that must be counted are "incumbent LEC business switched access lines." An "incumbent LEC business switched access line" is simply a line utilizing AT&T Missouri-owned switching that is used to provide service to a business customer. ILEC-owned business switched access lines include retail business lines, resale business lines, UNE-P business lines and (to the extent such lines exist) UNE-P replacement business lines. As I show below, this interpretation is supported by paragraph 105 of the *TRRO*.

After the ILEC-owned business switched access lines are counted, the second group of lines that must be counted are "UNE loops connected to that wire center."[20] The rule expressly requires that "all" such UNE loops be included in the business line count.[21]

At first glance when looking at the two bullets above, it may appear that UNE-P lines could potentially be counted in either category. UNE-P lines qualify for the first category because they are ILEC-owned switched access lines. If UNE-P lines are counted under this category, only business UNE-P lines would be counted. On the other hand, a UNE-P line could theoretically be considered "UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." If UNE-P lines were included in this second category, *all* UNE-P lines would be counted.

For two reasons, it is clear that only business UNE-P lines—and not all UNE-P—should be counted. First, the FCC's rule instructs the parties to count ILEC *business* switched access lines. And second, the FCC's explanation of this definition in paragraph 105 of the *TRRO* clarifies that only business UNE-P lines should be counted ("The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus *business* UNE-P, plus UNE-loops") (emphasis added). Therefore, the only interpretation that does not double count UNE-P lines and that remains consistent with the text of the *TRRO* is that UNE-P lines must be counted in the same manner as all other ILEC-owned

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[20] Per the requirements of the rule, the Business Line count must include both stand-alone UNE-L lines and UNE-L lines that are part of an EEL combination.

[21] 47 C.F.R. § 51.5 (definition of "Business Line').

switched access lines, that is, only business UNE-P lines should be included in the business line count.

Looking at the second bullet, the rule's language clearly answers the question of which UNE loops should be counted. Simply put, the rule requires ILECs to count "*the sum of all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." (Emphasis added.) The rule could not be more clear in requiring the inclusion of all stand-alone UNE-L lines. Moreover, based on the rule's mandate to count loops provisioned in combination with other unbundled elements, the rule also requires the inclusion of all UNE-L lines that are part of an EEL arrangement. Once again, this interpretation of the rule is supported by the FCC's discussion in paragraph 105 of the *TRRO*.

The next section of the rule ("Among these requirements, business line tallies . . .") goes on to provide additional detail on how to count the business lines. The rule provides instruction that business lines:

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

The first requirement modifies that part of the instructions relating to AT&T Missouri's switched access lines (requiring "the sum of all incumbent LEC business switched access lines"). It clarifies that the count should be limited to only include lines "connecting *end-user customers* with *incumbent LEC end-offices* for switched services." (Emphasis added.) This precludes the inclusion of lines providing premise-to-premise services and AT&T Missouri company lines in the business line count. AT&T Missouri complied with this requirement.

The second requirement makes it clear that non-switched *special access* lines should *not* be included in the business line count. AT&T Missouri complied with this requirement.

The final instruction requires that digital access lines be converted to their voice grade equivalents and provides the specific mathematical calculation for doing so. AT&T Missouri complied with this requirement.

Q: CAN THE FIRST SENTENCE OF THE BUSINESS LINE DEFINITION BE READ TO APPLY TO THE COUNTING METHODOLOGY FOR UNE-L LINES, AS MR. GILLAN SUGGESTS?[22]

A: No. Mr. Gillan claims that the first sentence of the Business Line definition establishes conditions for calculating the number of Business Lines in a wire center.[23] Such an interpretation creates internal conflict within the definition. The first sentence of the definition of "Business Line" reads as follows: "A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent

[22] Gillan Direct at pp. 11-14.

[23] Gillan Direct at p. 11.

LEC itself or by a competitive LEC that leases the line from the incumbent LEC."[24] If, as Mr. Gillan suggests, this sentence creates conditions that all lines must meet to be counted as Business Lines, then *only* ILEC-owned switched access lines may be included in the Business Line count. By definition, a switched access line includes loop facilities and switching. An ILEC-owned switched access line includes an ILEC-owned loop and *ILEC-owned switching*. No UNE-L line qualifies as an "incumbent LEC-owned switched access line" because the incumbent does not own the switch used on a UNE-L line. If the first sentence of the business line definition is read as a qualifier for the rest of the definition, as Mr. Gillan proposes, the rule falls apart. Under his qualifier approach, the definition would *prohibit the inclusion* of all UNE-L lines in the first sentence but then *require the inclusion* of all UNE-L lines in the second sentence.

Q: EVEN ASIDE FROM THESE DEFICIENCIES IN THE CLECS' PROPOSED INTERPRETATION, AS A PRACTICAL MATTER, COULD AT&T MISSOURI DETERMINE THE CORRECT BUSINESS LINE COUNT USING THE CLECS' PROPOSED INTERPRETATION?

A: No. AT&T Missouri does not know if a CLEC is using a particular UNE loop to serve a business end user or a residential end user. Furthermore, AT&T Missouri does not know if a CLEC is using a particular UNE loop to provide a switched service or a non-switched service (or, for that matter, any service at all). AT&T Missouri does not have the data that would be necessary to implement the CLECs' proposed interpretation.

[24] 47 C.F.R. § 51.5 (definition of "Business Line").

Q: DOES MR. GILLAN PROVIDE ANY SUGGESTION AS TO HOW AT&T MISSOURI WOULD DETERMINE BUSINESS LINE COUNTS IF THE CLECS' PROPOSAL WERE ADOPTED?

A: No. Although Mr. Gillan proposes that the Commission interpret the FCC's Business Line rule to require AT&T Missouri to exclude UNE-L lines that are used to provide either residential service or non-switched service from the business line count, he fails to provide any suggestion as to how such an interpretation would be implemented. Mr. Gillan also fails to explain how his proposal can be reconciled with the FCC's clear statements indicating that AT&T Missouri already possesses all of the data needed to determine Business Line counts.[25]

Q: DESPITE THEIR INTERPRETATION ARGUMENTS ADVANCED HERE, HAVE XO AND NUVOX (TWO OF THE THREE CLECS MR. GILLAN REPRESENTS) PREVIOUSLY ACKNOWLEDGED THAT AT&T MISSOURI'S INTERPRETATION OF THE FCC'S BUSINESS LINE RULE IS CORRECT?

A: Yes. XO and NuVox previously interpreted the FCC's business line rule to require that *all* UNE-L lines be included in the business line count and that digital UNE-L lines be counted based on the full capacity of the loop. XO and NuVox, along with several other carriers, filed this interpretation in a Petition for Reconsideration with the FCC asking that the FCC change, among other things, its rule on business lines.[26] In that filing XO and NuVox unequivocally stated that the FCC "counts *all UNE-L lines provided to CLECs*. This would include UNE loops used for non-switched access purposes, such as

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[25] *TRRO* at ¶¶ 105, 108.

[26] *See* In the Matter of Unbundled Access to Network Elements Review of Section 251 Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Petition for reconsideration (March 28, 2005) ("XO/NuVox Petition for Reconsideration") attached as Rebuttal Exhibit CAC-1. XO and NuVox are two of the CLECs that sponsored this petition.

Internet access or local private lines."[27] XO and NuVox went on to state that the FCC "separately counts business access lines and residential lines in the ARMIS data. All UNE-L lines are included, however, *regardless of whether they are used to serve business or residential customers.*"[28] In short, XO and NuVox agreed that the FCC's rule, as written, requires that all UNE-L loops be counted as business lines. XO and NuVox asked the FCC to change those plain requirements, but the FCC has not granted their Petition and has not changed a word of its rules or the *TRRO*. Thus, the rule stands as written – and as these CLECs correctly construed it.

Q: HAVE OTHER STATE COMMISSIONS REJECTED THIS INTERPRETATION OF THE FCC'S BUSINESS LINE RULE?

A: Yes. Numerous state commissions have interpreted the FCC's rule in the same way as has AT&T Missouri: I quote from a few leading examples below.

> **California:** "Since the FCC uses the phrase 'UNE loops' in both the discussion and in its rule," rather than adding "business" as a qualifier, "we must assume that that is exactly what the FCC meant. . . . [T]he FCC's language is clear that all UNE loops are to be included in the count." *California TRO/TRRO Order* at 10-11, 2006 WL 238404, at *5.
>
> **Illinois:** "The phrase 'all UNE loops' encompasses residential customers and non-switched services." *Illinois TRO/TRRO Order* at 30, 2005 WL 3359097, at *26.
>
> **Indiana:** "The FCC's rule, 47 C.F.R. § 51.5, defines 'business lines' to include all UNE loops connected to a wire center at issue, regardless of the type of customer served." *Indiana TRO/TRRO Order* at 16, 2006 WL 618004, at *12.
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> **Kansas:** "The FCC's requirement of counting all UNE loops in a wire center is unqualified." *Kansas Wire Center Order* at ¶ 56, 2006 WL 2360900, at *11.

[27] XO/NuVox Petition for Reconsideration at 15. (Emphasis added.)

[28] XO/NuVox Petition for Reconsideration at 15. (Emphasis added. Footnotes omitted.)

"The second sentence of the [FCC's business-line] rule is eminently easy to understand – follow the instructions and compliance with the rule will be assured." *Kansas Wire Center Reconsideration Order* at ¶ 24, 2006 WL 2794797, at *24.

Ohio: "The FCC has clearly stated that all UNE loops connected to the wire center should be counted as part of the business line density in determining wire center non-impairment for high capacity loops and transport." *Ohio TRO/TRRO Order* at 16, 2005 WL 3018712; *Ohio Wire Center Order* at ¶ 28, 2006 WL 1540270, at *13.

Washington, D.C.: "Because the definition of business line includes all UNE loops attached to a wire center, [it] appears that residential lines would be included in the definition of 'business line.'" *Washington, D.C. TRO/TRRO Order*, 2005 WL 3541003, at *15.

Q: HOW SHOULD THE COMMISSION RESOLVE THIS ISSUE?

A: The Commission should rule that AT&T Missouri must continue to include all UNE-L lines in its business line count as required by the *TRRO* and implementing rules.

c. Business Line Count Dispute 2 – Should the digital equivalency for digital UNE-L lines be calculated based on the loop's capacity or on the loop's usage?

Q: WHAT IS THE BASIS OF THIS DISPUTE?

A: This dispute is essentially the same as Business Line Count Dispute 1 (which UNE-L lines should be included in the business line count).[1] The only difference between the two issues is that Dispute 1 concerns which UNE-L lines should be counted and Dispute 2 concerns what *portion* of digital UNE-L lines should be counted. The parties' positions on the issue are essentially the same as well. As noted above, the FCC's definition of Business Line requires that the Business Line count "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1

line corresponds to 24 64 kbps-equivalents, and therefore to 24 'business lines.'"[29] Both parties agree that the rule requires that digital UNE-L lines be calculated based on 64 kbps-equivalency. However, while AT&T Missouri believes that the rule requires that all digital UNE-L lines be counted as Business Lines, the CLECs propose that only digital UNE-L lines used to provide switched access service to a business customer be counted as Business Lines.[30]

Q: HAS THE COMMISSION STAFF INDICATED ITS POSITION ON THIS ISSUE?

A: Mr. Scheperle's Direct Testimony supports AT&T Missouri's position in that Mr. Scheperle indicates his belief that AT&T Missouri counted business lines correctly.[31] In addition, as noted above, Mr. Scheperle clearly indicates that the Business Line definition requires that *all* UNE-L lines be included in the business line count, regardless of use. As noted above, the CLECs' position on digital equivalency is simply an extension of their position that certain UNE-L lines should be excluded from the business line count.

Q: WHAT IS THE GIST OF THE CLECS' PROPOSAL?

A: Essentially, the CLECs propose that digital equivalent lines for UNE-L should not be included in the business line count unless the specific digital equivalent line is used to provide switched service to a business customer. The CLECs claim that their goal is to exclude the portion of any digital UNE-L line that was used to provide residential service

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29 47 C.F.R. § 51.5 (definition of "Business Line").

30 Gillan Direct at pp. 11, 14-15.

31 Scheperle Direct at p. 12

or non-switched service or that is not in active use. To implement this proposal, the CLECs recommend that the Commission apply a utilization factor to all UNE-L lines.[32]

Q: HAS MR. GILLAN DESCRIBED AT&T MISSOURI'S POSITION ON THIS ISSUE ACCURATELY?

A: No. Mr. Gillan claims that AT&T Missouri seeks to count each digital UNE-L at its "maximum potential capacity."[33] This is not the case. AT&T Missouri does not count digital UNE-L lines based on "potential capacity," maximum or otherwise. Consistent with the FCC's directive, AT&T Missouri calculates digital equivalency for UNE-L lines based on the *actual loop capacity* requested by the CLEC and provided by AT&T Missouri. A given loop facility may have the potential to support additional capacity. AT&T Missouri does not count based on that potential. AT&T Missouri only counts based on the actual loop capacity provided to the CLEC. Thus, for example, if a CLEC leases a DS1 loop, which has the capacity for 24 64-kbps equivalents, AT&T Missouri counts it as 24 business lines, precisely as the FCC's rule requires.

Q: IS MR. GILLAN'S POSITION ON THIS ISSUE CONSISTENT WITH THE PLAIN LANGUAGE OF THE FCC'S BUSINESS LINE RULE?

A: No. Mr. Gillan claims that the FCC's business line rule does not direct AT&T Missouri to count each channel in a high capacity circuit as a business line.[34] Although he admits that the rule requires AT&T Missouri to "account for ISDN and other digital access lines

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32 Gillan Direct at pp. 20-21.

33 For example, *see* Gillan Direct at p. 14.

34 Gillan Direct at p. 15.

by counting each 64 kbps-equivalent as one line,"[35] he then claims that this portion of the rule only requires that the 64 kbps equivalent be treated as "one line" but *does not* require that the 64 kbps equivalent be counted as a "business line."[36] Mr. Gillan's interpretation ignores the next sentence of the rule. The relevant portion of the rule, when read as a whole, requires that the business line tallies "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to *24 'business lines.*"[37] The rule does not merely state that a DS1 line equates to 24 "lines" that must then be evaluated on a line-by-line basis to decide which of the 24 lines to include in the business line count, as Mr. Gillan claims. Instead, the rule specifically states that a DS1 line equates to 24 *business lines*.

Q: WHAT THEORY DOES MR. GILLAN USE FOR AVOIDING THE EXPRESS LANGUAGE OF THE FCC'S RULE?

A: Mr. Gillan suggests that UNE-L lines must be counted in the same manner as AT&T Missouri retail lines.[38] This concept is contrary to the FCC's rule and the *TRRO*. It also demonstrates how unsupportable the CLECs' position is on this issue. The only way that AT&T Missouri could make the type of determination necessary to treat these two offerings (AT&T Missouri retail lines and UNE-L lines) identically would be if each and every facility-based CLEC provided AT&T Missouri with the equivalent of ARMIS 43-08 data broken down by wire center for all of their UNE-L customers. This interpretation

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35 Gillan Direct at p. 12.

36 Gillan Direct at pp. 13-14.

37 47 C.F.R. § 51.5 (definition of "Business Line") (emphasis added).

38 Gillan Direct at pp. 13, 15-16.

is about as far from being easily administrable as can be and directly conflicts with the FCC's decision not to have its rule depend on any CLEC-provided data or line-by-line analysis.[39] Mr. Gillan's contention that the FCC intended the criteria for AT&T Missouri's retail lines to be identical to the criteria for counting UNE-L lines is unfounded and directly contrary to the FCC's discussion of the matter.

Q: IS MR. GILLAN'S COMPARISON OF AT&T MISSOURI'S COUNTING METHODOLOGY FOR AT&T MISSOURI RETAIL LINES AND CLEC LINES ACCURATE?

A: No. Mr. Gillan states that the ARMIS 43-08 reporting requirements do "not permit AT&T Missouri to count empty circuits or data circuits."[40] He also states that the same treatment applies whether the end user is served by an ILEC or a CLEC.[41] Mr. Gillan implies that AT&T Missouri treats lines provided to CLECs differently than AT&T Missouri retail lines. This is not the case. The identity of the end user's provider does not have *any* bearing on the manner in which the line is counted. The *only* factor that is relevant to the business line count is the actual *offerings* that AT&T Missouri is selling in a given wire center.

For example, AT&T Missouri's retail services and CLEC resale services are counted pursuant to the ARMIS 43-08 reporting guidelines. Resold CLEC lines are counted using the same methodology as AT&T Missouri retail lines. For each of these services, AT&T Missouri counts each line based on the service that AT&T Missouri has provisioned to

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39 *TRRO* at ¶¶ 105, 108.,158-59.

40 Gillan Direct at p. 16 (emphasis omitted).

41 Gillan Direct at pp. 13, 16.

the requesting customer (the end user or the reselling CLEC). The same is true for UNE-P. AT&T Missouri counts UNE-P based on the business UNE-P lines that it actually provides to requesting CLECs. The same approach applies for UNE-L: AT&T Missouri counts the offering (and associated bandwidth) that has been provided to its customer, the CLEC.

Q: HOW DOES THIS WORK IN PRACTICE?

A: AT&T Missouri simply considers the offering that it has provided to its customer, whether that customer is a retail end user or a CLEC. For example, in the ARMIS 43-08 counts, if AT&T Missouri has provided a retail or resale customer with a full DS1 line, AT&T Missouri will count the DS1 as 24 equivalent lines as required by the ARMIS 43-08 reporting rules. If AT&T Missouri has provided a retail or resale customer with a single voice-grade line that simply happens to be provisioned over a larger DS1 facility, AT&T Missouri will only count the single line. The same is true for UNE Loops. If AT&T Missouri has provided a full DS1 loop to a requesting CLEC, AT&T Missouri will count that loop as 24 equivalent lines. If AT&T Missouri has provided a single voice-grade loop to a CLEC, but has provisioned that loop over a DS1 facility, AT&T Missouri will only count the voice-grade loop it has provided.

Q: DOES AT&T MISSOURI HAVE ACCESS TO THE DATA NECESSARY TO DETERMINE THE PORTION OF A UNE-L DIGITAL ACCESS LINE THAT A CLEC IS CURRENTLY USING?

A: No. AT&T Missouri leases UNE loops -- not portions of UNE loops. AT&T Missouri therefore does not know, and could not know without extensive discovery and reliance on

unverifiable, CLEC-provided data, what portion of a digital UNE-L line is used to provide switched service to business customers.

Q: IS IT LOGICAL FOR THE FCC TO INCLUDE ALL UNE-L LINES (AND ASSOCIATED CAPACITY) IN ITS BUSINESS LINE COUNTS?

A: Yes. To the extent business lines are being used as an indicator of the revenue opportunities available to facility-based CLECs,[42] it makes sense to count all of the existing facility-based competition in the wire center and to consider the total revenue potential for the entire loop. Obviously, a facility-based carrier is receiving revenue for all services provided over a UNE-L line, whether those services are switched or non-switched. Furthermore, the FCC has indicated its desire to base impairment determinations on easily verifiable information that is readily available to the ILEC. In regard to UNE-L lines, the only way to accomplish this would be to either include all UNE-L lines or to exclude all UNE-L lines. The FCC chose to count all UNE-L lines. In this respect, the Business Line rule and the text of the *TRRO* are clear: all UNE-L lines must be included in the Business Line count.

Q: HOW DID XO AND NUVOX INTERPRET THE DIGITAL EQUIVALENCY PORTION OF THE FCC'S BUSINESS LINE RULE IN ITS FILING WITH THE FCC?

A: Both XO and NuVox (two of the three CLECs represented by Mr. Gillan) recognized that under the Business Line definition, the FCC "count[s] DS1s and other digital lines on a per 64 kbps-equivalent basis."[43] XO and NuVox further noted that the "64 kbps-

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[42] *See TRRO* at ¶¶ 43, 94-95, 103.

[43] XO/NuVox Petition for Reconsideration at p. 11.

equivalents rules counts every *DS1 provided by CLECs as 24 business lines.*"[44] The interpretation of the rule that XO and NuVox filed with the FCC is consistent with the methodology applied by AT&T Missouri, but is inconsistent with its own position here as set forth in Mr. Gillan's Direct Testimony.

Q: MR. GILLAN PROPOSES THAT DIGITAL EQUIVALENCY FOR UNE-L LINES BE DETERMINED THROUGH THE APPLICATION OF A UTILIZATION FACTOR. IS THE CLECS' PROPOSAL ON THIS ISSUE CLEAR?

A: No. To begin with, the proposal is contrary to the plain language of the FCC's rule, which requires "each" 64 kbps-equivalent to be counted as a business line, not just some percentage.

Second, the proposal is contrary to the FCC's determination that its Business Line rule is to rely on objective, readily verifiable data that ILECs already report for other regulatory purposes. A utilization factor would not meet any of these requirements. To the contrary, it would require extensive, expensive state-by-state litigation over the proper factors for each digital loop type, precisely what the FCC wanted to avoid. As explained in more detail in my Direct Testimony, the FCC stated that its unbundling framework was "based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market."[45] The FCC described the wire center thresholds as objective,[46] simple to apply, [47] and noted that the

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[44] XO/NuVox Petition for Reconsideration at p. 13. (Emphasis added.)

[45] *TRRO* at ¶ 234 (emphasis added).

[46] *TRRO* at ¶¶ 108, 161.

thresholds relied on data possessed by and readily available to ILECs.[48] The FCC explained that the approach it chose would "significantly reduce the burdens of implementing the standard in comparison with the extensive and litigious proceedings that followed the issuance of the *Triennial Review Order*." [49] The establishment of a subjective utilization factor would have the opposite effect.

In its discussion of business line counts, the FCC provided crucial guidance that should put to rest any dispute over the meaning of the definition. In paragraph 105 of the *TRRO,* the FCC explained that its business line definition was based on objective criteria and depended upon data already submitted by the ILECs -- ARMIS 43-08 business line data, UNE-P business lines counts, and UNE loop counts. The FCC noted that it chose not to use evidence that might have provided a more complete picture but would have been difficult to obtain and verify. In short, the FCC's own description of the business line definition clearly does not contemplate the type of subjective approach proposed by Mr. Gillan.

Third, and further proof of why a utilization factor is subjective and improper, the CLECs cannot even articulate a clear proposal. In one place, Mr. Gillan appears to propose the use of an 11:1 DS1 utilization rate be applied for DS1 UNE-L lines; however, he also

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47 *TRRO* at ¶¶ 93, 105.

48 *TRRO* at ¶ 108

49 *TRRO* at ¶ 108.

discusses a 50% utilization rate, but does not explain how the 50% DS1 utilization rate correlates to the 11:1 DS1 utilization rate.[50]

Fourth, Mr. Gillan's proposal is incomplete. He does not provide any support (or apparently any proposal) for the utilization rate that would apply for other digital UNE-L lines (such as 2-wire digital loops and DS3 loops).

Q: ARE MR. GILLAN'S REFERENCES TO THE COMMISSION'S ECONOMIC CROSS-OVER DETERMINATIONS FROM THE *TRO* PROCEEDINGS RELEVANT HERE?[51]

A: No. To begin with, the FCC's unbundling rules do not allow for any type of "utilization factor." However, even if the FCC had permitted the use of a utilization factor, which it did not, the economic cross-over point for DS1 loops is not interchangeable with the actual average utilization for DS1 loops. The purpose of the economic cross-over determination was to decide the point at which it would be more economical to provision voice lines over a DS1 loop instead of individual voice-grade loops. In other words, the Commission previously determined that if a carrier was providing 11 voice grade lines *or more,* it would be more economical to provision those voice grade lines over a DS1 loop than to provision each line individually. If anything, this determination establishes the *minimum* number of lines that would typically be provisioned over a DS1 loop. It does not establish an average as Mr. Gillan's testimony implies. In fact, one would expect the average to be higher.

Q: DO YOU HAVE ANY ADDITIONAL COMMENTS REGARDING THE UTILIZATION OPTION MR. GILLAN DESCRIBES?

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50 Gillan Direct at p. 20.
51 Gillan Direct at pp. 19-20.

A: Yes. To begin with, had the FCC intended to require that a utilization factor be applied to the UNE-L lines in the business line count, one would expect the FCC would have made some mention of a utilization factor (and explained how the utilization factor would be calculated) in the *TRRO*. It did not. This is a critical flaw in Mr. Gillan's argument. Had the FCC intended that a utilization factor be applied, then the only way to avoid the type of "extensive and litigious proceedings that followed the issuance of the *Triennial Review Order*"[52] would be to provide clear instructions regarding the application of the utilization factor. ILECs do not know how a CLEC is utilizing the high-capacity UNE-L lines provided. As a result, the establishment of any utilization factor would require either an extensive discovery process or the establishment of some sort of proxy. The establishment of a proxy factor is also bound to lead to disputes regarding the appropriate number. The FCC's silence on this topic, coupled with the FCC's express pronouncement that its methodology be based upon objective and readily obtainable facts, can only reasonably mean that the FCC did not contemplate the use of a utilization factor.

Q: HAVE OTHER STATE COMMISSIONS SUPPORTED THE APPLICATION OF DIGITAL EQUIVALENCY USED BY AT&T MISSOURI?

A: Yes. I have represented the AT&T ILEC position on this issue in all of the wire-center related proceedings in AT&T's pre-BellSouth merger thirteen states. To date, every one of the state commissions that has ruled on this issue in those proceedings has ruled in

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[52] *TRRO* at ¶ 108.

favor of the digital equivalency approach supported by AT&T Missouri in this proceeding. For example:

> **Texas:** The Commission finds that AT&T Texas's counting and reporting of UNE-L capacity complies with the FCC's definition of a business line in 47 C.F.R §51.5 as well as the FCC's specific instruction on reporting such lines found in ¶105 of the *TRRO*, described in Issue 1A, *supra*. The Commission notes that two-wire switched digital access lines have a capacity of two 64 kb circuits, therefore, each switched two-wire switched digital line used to provide business service should be counted as two business lines as directed in 47 C.F.R. §51.5(3).[53]
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> **Kansas:** "NuVox also claimed that the rule does not direct an incumbent LEC to count each channel in a high capacity facility as a 'business line.' The Commission finds this claim to be without any merit whatsoever. . . . If the FCC had intended to limit each 64 kbps-equivalent as NuVox suggested, it would not have stated that a DS1 line corresponds to 24 'business' lines. The Commission concludes that the FCC plainly and unambiguously stated its intentions: each 64 kbps-equivalent shall be counted as a LEC-served business line for purposes of its impairment analysis." *Kansas Wire Center Order* at ¶ 58, 2006 WL 2360900, at *10.
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> **Ohio:** "The Commission rejects the CLEC Coalition's proposal to exclude unused capacity and capacity used for residential services on high capacity UNE-L lines. . . . To the contrary, the FCC has explicitly stated that ILECs shall account for high capacity digital access lines by counting each 64 kbps-equivalent as one line." *Ohio Wire Center Order*, ¶ 28, 2006 WL 1540270, at *13.
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> **Illinois:** "IBT's original December 2004 business line count submission to the FCC predated the definition of business lines in §51.5, which mandates the inclusion of digital equivalency. IBT subsequently submitted a business line count to the FCC based upon the business line definition in §51.5 that requires inclusion of digital equivalency. Accounting for digital equivalency increased the total number of business lines significantly and results in the reclassification of various wire centers. Any ambiguity contained within the TRRO as to whether digital equivalency is proper, is resolved by the FCC's enactment of §51.5. Section 51.5 changed the methodology of how business lines were to be computed by including digital equivalency.

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[53] Texas Wire Center Order at 33. AT&T Texas' proposal for the "counting and reporting of UNE-L capacity" was the same as AT&T Missouri's proposal in this proceeding.

"Accordingly, IBT's initial and future wire center designations should be calculated consistent with § 51.5."[54]

Q: HOW SHOULD THE COMMISSION RULE ON THIS ISSUE?

A: The appropriate determination on this issue is clear. The FCC clearly requires that all UNE-L lines be included in the Business Line count (regardless of use) and that the Business Line count "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to *24 'business lines.*"[55]

d. Business Line Count Dispute 3 – Should the Business Line counts supporting the wire center designations rely on the most recent data available to AT&T Missouri at the time of designation or more recent data?

Q: WHAT IS THE NATURE OF THE DISPUTE ON THE "VINTAGE" OF DATA THAT SHOULD BE USED FOR THE BUSINESS LINE COUNTS?

A: The dispute concerns whether the data that is used for the business line count should be the data that was available at the time the wire center designations in question went into effect (March 11, 2005), or data that did not become available until later. AT&T Missouri's position on this issue is clear, logical, and easy to apply. The data that should be used is the most recent data available at the time the designations were made. The CLECs' proposal, on the other hand, is not clear. Mr. Gillan has indicated that he believes that more recent data should be used; however, he appears to be waiting to see which year's data produces a more favorable result before making a concrete

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54 Illinois Wire Center Order (ICC docket 06-0029) at p. 9.
55 47 C.F.R. § 51.5 (definition of "Business Line") (emphasis added).

recommendation.[56] Any such results-based approach is contrary to the FCC's directive to use *objective* data.

Q: WHAT VINTAGE OF DATA SHOULD BE USED FOR THE BUSINESS LINE COUNTS?

A: The only workable approach is to use the most recent data available at the time the wire center designations were made, that is, on the effective date of the *TRRO* (March 11, 2005). This is precisely what AT&T Missouri has done and what AT&T Missouri has proposed should be done for any future designations. As I explained in my Direct Testimony, the most recent ARMIS 43-08 data available on the effective date of the *TRRO* was the December 2003 data originally filed with the FCC on or about April 1, 2004.

Q: COULD AT&T MISSOURI HAVE USED MORE RECENT BUSINESS LINE DATA AT THE TIME THE ORIGINAL WIRE CENTER DESIGNATIONS WERE MADE?

A: No. AT&T Missouri does not track ARMIS 43-08 data throughout the year. Rather, AT&T Missouri only compiles ARMIS 43-08 data as necessary to comply with AT&T Missouri's annual filing obligations. Although AT&T Missouri does use other types of line count data throughout the year, other types of line count data (for example, the data used in quarterly earning statements) is *not* ARMIS 43-08 data and is not consistent with the methodology required under the FCC's definition Business Line and therefore cannot be used for the purpose of determining impairment. The wire-center specific ARMIS 43-08 business line data that complies with the FCC's definition is only available on an

[56] Gillan Direct at p. 17.

annual basis at some time after April 1 of each year. That is the data AT&T Missouri used and the data on which the Commission should rely.

Q: WOULD THE USE OF DATA THAT DOES NOT COMPLY WITH THE ARMIS 43-08 REQUIREMENTS CREATE ADDITIONAL CONCERNS?

A: Yes. The ARMIS 43-08 report is an established report with publicly available reporting guidelines. The use of data taken directly from the ARMIS 43-08 report minimizes the potential for dispute. On the other hand, if AT&T Missouri were to compile business line data using a different process that the standard process for the ARMIS 43-08 reports, disputes concerning AT&T Missouri's reporting methodology are almost guaranteed, leading to the kind of extensive state-by-state litigation the FCC wanted to avoid.

Q: WHY HAS AT&T MISSOURI TAKEN THE POSITION THAT THE MOST RECENT DATA AVAILABLE AT THE TIME OF DESIGNATION MUST BE UTILIZED?

A: This approach is required by the FCC's unbundling rules for high-capacity loops and dedicated transport. The FCC determined that once a wire center meets the thresholds for non-impairment, the non-impairment status cannot be reversed. The FCC reiterated this principle four times in its rules:

As to DS1 loops:

> Subject to the cap described in paragraph (a)(4)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators. *Once a wire center exceeds both of these thresholds, no future DS1 loop unbundling will be required in that wire center.*[57]

[57] 47 C.F.R. § 51.319(a)(4)(i) (emphasis added).

As to DS3 loops:

> Subject to the cap described in paragraph (a)(5)(ii), an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators. *Once a wire center exceeds both of these thresholds, no future DS3 loop unbundling will be required in that wire center.*[58]

As to dedicated interoffice transport:

> Tier 1 wire centers are those incumbent LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both. Tier 1 wire centers also are those incumbent LEC tandem switching locations that have no line-side switching facilities, but nevertheless serve as a point of traffic aggregation accessible by competitive LECs. *Once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.*[59]
>
> And
>
> Tier 2 wire centers are those incumbent LEC wire centers that are not Tier 1 wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business lines, or both. *Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.*[60]

Based on the FCC's rules, the question is whether the thresholds were met as of the effective date of the *TRRO* or whenever a designation is made—not whether the thresholds continue to be met on an ongoing basis.

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58 47 C.F.R. § 51.319(a)(5)(i) (emphasis added).
59 47 C.F.R. § 51.319 (e)(3)(i) (emphasis added).
60 47 C.F.R. § 51.319 (e)(3)(ii) (emphasis added).

Q: WHAT ARGUMENTS HAS MR. GILLAN MADE TO SUPPORT THE USE OF A LATER VINTAGE OF BUSINESS LINE DATA?

A: Mr. Gillan suggests that wire center designations should rely on line count data and collocator data from the same time period.[61] In other words, Mr. Gillan appears to propose that if the business line count relies upon December 2003 data, the fiber-based collocator count must also rely upon December 2003 inspections. This proposal is unworkable.

Q: WHAT IS ONE OF THE PRACTICAL CONCERNS ASSOCIATED WITH THIS CONCEPT?

A: Because the business line data is only available annually, the CLECs' proposal would create an artificial limitation on the frequency of AT&T Missouri's wire center updates. An artificial limitation serves no valid purpose and is contrary to the FCC's rules. In Case No. TO-2005-0336, the M2A successor arbitration proceeding, the Commission adopted language that permits AT&T Missouri to make updates to its wire center designation without limitation.[62] In light of the fact that ARMIS 43-08 data is only available annually, the CLECs' proposal would prevent AT&T Missouri from making updates more often than once a year. While business line data is only available annually, fiber-based collocation arrangements can be added at any time. AT&T Missouri must

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[61] Gillan Direct at pp. 17-18.

[62] See, Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A"), Final Arbitrator's Report, June 21, 2005, Section III, pp. 17-18. Specifically, the Commission observed that then SBC Missouri's non-impaired wire center language was attached as Exhibit 1 to its post-hearing brief filed on June 7, 2005, and ruled that "[t]he language submitted by SBC Missouri as Exhibit 1 to its brief shall be included in the agreement." The operative language in Exhibit 1 states that "[t]he parties recognize that wire centers that are not currently designated as meeting the FCC's non-impairment thresholds referenced above, may meet those thresholds in the future. In the event that a wire center that is not currently designated as meeting one or more of the FCC's non-impairment thresholds, meets one or more of these thresholds at a later date, SBC MISSOURI may add the wire center to the list of designated wire centers."

have the ability to make new designations when a wire center meets the non-impairment thresholds, as required in the Commission-approved language.

Q: ASIDE FROM THE DESIGNATION FREQUENCY ISSUE DISCUSSED ABOVE, ARE THERE OTHER TIMING CONCERNS WITH MR. GILLAN'S PROPOSAL?

A: Yes. Mr. Gillan's proposal (that the Fiber-based Collocator count used for the updates be based on data pulled from the same time period as the business line data) is not reasonable from a logistical perspective. As explained in my Direct Testimony and the Direct Testimony of Mr. Nevels, AT&T Missouri's Fiber-based Collocator counts are based on physical inspections. One of the key factors that AT&T Missouri uses to determine which wire centers will be physically inspected is the business line count data. The ARMIS 43-08 reports rely on December line count information. The wire-center level business line count data that will be used for any updates is not available until after the federal filing around April 1 of each year. (The aggregate state-wide data is filed with the FCC in April. Additional work must be performed to disaggregate the business lines at a wire center level.) Because of the additional work that must be performed to disaggregate the data at a wire center level, AT&T Missouri will typically not have all of the information necessary to determine likely wire centers until after May of each year. If AT&T Missouri identifies a wire center that may meet the non-impairment thresholds based on the business line counts that become available in May, it is not logical to require AT&T Missouri to in effect go back in time to December of the previous year to perform physical inspections of wire centers that are concurrent with the business line data. Mr.

Gillan's proposal would hinder AT&T Missouri's ability to effectively identify wire centers that meet the FCC's Fiber-based Collocator thresholds.

Q: IS THE BUSINESS LINE COUNT TREND DESCRIBED BY MR. GILLAN RELEVANT TO THE ISSUE AT HAND?[63]

A: No. Business line count trends are not relevant to the issue of how business lines should be counted. In light of this fact, I did not perform a detailed review of the accuracy of the numbers provided by Mr.Gillan; however, I will note that access line loss is often an indicator of increases in intermodal competition. Indeed, one of the reasons the FCC chose to establish threshold criteria that, once met, could not be reversed is that more and more customers are being served by services that do not rely on AT&T Missouri's local network. If the initial wire center determinations were made using more recent data than the data upon which the FCC relied, then such determinations would also need to consider any increase in intermodal competition beyond the levels that the FCC reviewed when making its impairment determinations.

In addition, Mr. Gillan's theory is illogical on its face. His view is that the decrease in AT&T Missouri business lines should lead to *more* unbundling. Obviously, though, AT&T Missouri's losses are a sign of *more* competition from outside AT&T Missouri's network, which shows even more that CLECs do not need unbundled access.

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[63] Gillan Direct at pp. 18-19.

Q: HOW SHOULD THE COMMISSION RESOLVE THIS ISSUE?

A: The Commission should rule that AT&T Missouri must use the most recent data available at the time a wire center designation is made. In this case, that would be the most recent data available as of March 11, 2005, the effective date of the *TRRO*.

e. Business Line Count Dispute 4 – Is the Commission required to follow the requirements established in the FCC's Business Line definition, or may the Commission opt to adopt the CLECs' proposed "simple solution"?

Q: WHAT IS AT&T MISSOURI'S POSITION ON MR. GILLAN'S PROPOSED "SIMPLE SOLUTION"?

A: AT&T Missouri's position is already "simple": the Business Line count must follow the requirements established by the FCC in its definition of Business Line.[64] Mr. Gillan, by contrast, suggests that the Commission can choose to use the Missouri line counts that AT&T (then SBC) provided to the FCC *prior* to the issuance of the *TRRO* instead of determining the appropriate Business Line counts required under the FCC's final rule. The line counts that Mr. Gillan proposes be used do not comply with the requirements of the FCC's rule – which was issued after the line counts were provided. Put simply, these line counts are do not comply with the FCC's rules and may not be used to determine the wire center designations.

Q: DOES MR. GILLAN ATTEMPT TO GLOSS OVER THIS FUNDAMENTAL FLAW IN HIS PROPOSAL?

A: Yes. On page 8 of his Direct Testimony, Mr. Gillan appears to be trying to side-step this issue. Mr. Gillan claims that he is not recommending that the Commission use a different definition of Business Line than the one adopted by the FCC; however, Mr. Gillan

[64] 47 C.F.R. § 51.5 (definition of "Business Line).

immediately proceeds to suggest that the Commission do just that. In fact, Mr. Gillan devotes a significant portion of his testimony on this issue to providing arguments as to why he believes the Commission should not apply the FCC's Business Line definition.

Q: YOU STATED THAT THE LINE COUNTS THAT AT&T (THEN SBC) PROVIDED TO THE FCC IN DECEMBER OF 2004) DO NOT COMPLY WITH EITHER PARTY'S INTERPRETATION OF THE BUSINESS LINE DEFINITION ESTABLISHED BY THE FCC IN THE *TRRO*. PLEASE EXPLAIN FURTHER.

A. The Missouri line counts that AT&T (then SBC) provided the FCC in December of 2004 reflected ARMIS 43-08 business lines from December 2003 (as reported on or around April 1 of 2004), plus UNE-P business lines from December 2003, plus all UNE-L lines from December 2003. The data that supports the line counts provided to the FCC is identical to the data that supports AT&T Missouri's current Business Line count. However, although the data itself is the same and appropriate for use in determining the Business Line count, the FCC's subsequently-issued definition of "Business Line" requires a modification to the *calculations applied* to this data.

In December of 2004, AT&T (then SBC) understood the categories of data that should be provided, but did not understand that the FCC expected AT&T to perform a calculation for digital equivalency for UNE lines.[65] As a result, while AT&T's December 2004 filing utilized the *data* that would later be required under the FCC's Business Line definition, it did not reflect the correct Business Line count because it did not properly account for digital equivalency on UNE lines. From AT&T Missouri's perspective, the only change that should apply to the December 2004 line counts is the calculation of

[65] Digital equivalency was provided for the ARMIS 43-08 business lines (retail and resale lines) because the ARMIS 43-08 rules contain provisions for calculating digital equivalency.

digital equivalency required by the FCC's rule. The tables below summarize the differences between the line count provided to the FCC prior to the issuance of the *TRRO* in December of 2004 and each parties' interpretations of the requirements of the Business Line rule:

COMPARISON TO CLEC INTERPRETATION OF BUSINESS LINE RULE		
AT&T's December 2004 line count filing	**The CLEC Coalition's interpretation of the requirements of the FCC's Business Line rule in this proceeding[66]**	**Is the methodology consistent?**
ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted.	Only lines used to provide service to business customers should be counted.[67]	No. The December 2004 filing counted all UNE-L lines (including UNE-L lines, if any, that were used by CLECs to provide to residential customers).
ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted.	Only lines used to provide switched services should be counted.[68]	No. The December 2004 filing counted all UNE-L lines (including UNE-L lines, if any, that were not used to provide a switched service).
All UNE-L lines were counted.	There is no requirement that all UNE loops be counted.[69]	No. All UNE-L lines were counted in the December 2004 filing.

[66] As noted elsewhere, XO and NuVox's interpretation of the requirements of the FCC's Business Line rule in the XO/NuVox Petition for Reconsideration differs significantly from the position they are taking here. XO and NuVox's prior interpretation is more consistent with AT&T Missouri's interpretation and also precludes the use of the line counts proposed in Mr. Gillan's "simple solution."

[67] Gillan Direct at p. 12.

[68] Gillan Direct at p. 12.

[69] Gillan Direct at p. 15.

COMPARISON TO CLEC INTERPRETATION OF BUSINESS LINE RULE		
AT&T's December 2004 line count filing	**The CLEC Coalition's interpretation of the requirements of the FCC's Business Line rule in this proceeding[66]**	**Is the methodology consistent?**
December 2003 data was used.	December 2003 data should not be used.[70]	No. The December 2004 filing was based on 2003 data, which was the most current business line data available at the time of filing.
No digital equivalency was calculated for UNE-L lines.	Digital equivalency for digital UNE-L lines should be calculated based on the capacity actually used to provide switched access service to business customers (not the capacity provisioned by AT&T Missouri).[71]	No. The business line counts filed by AT&T in December 2004 did not include any digital equivalency calculation for UNE-L lines.

A comparison of the methodology used for AT&T's December 2004 filing with the FCC and the methodology proposed by AT&T Missouri in this proceeding is provided in the table below:

[70] Gillan Direct at pp. 17-18.

[71] Gillan Direct at p. 13.

COMPARISON TO AT&T MISSOURI'S INTERPRETATION OF BUSINESS LINE RULE		
AT&T's December 2004 business line filing	**AT&T Missouri's interpretation of the requirements of the FCC's Business Line rule**	**Is methodology consistent?**
ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted.	ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted	Yes. The methodology is identical.
ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted.	ARMIS 43-08 business lines, UNE-P business lines and all UNE-L lines were counted.	Yes. The methodology is identical.
All UNE-L lines were counted.	All UNE-L lines were counted.	Yes. The methodology is identical.
December 2003 data was used.	December 2003 data was used.	Yes. Both instances used December 2003 data, which was the most current business line data available at the time of filing.
No digital equivalency was calculated for UNE-L lines.	Digital equivalency for digital UNE-L lines were calculated by counting each 64 kbps-equivalent as one line as required in the FCC's business line definition.[72]	No. The business line counts filed by AT&T in December 2004 did not include any digital equivalency calculation for UNE-L lines.

Q: DO YOU HAVE AN OPINION AS TO WHY MR. GILLAN HAS SUGGESTED THAT THE COMMISSION ADOPT BUSINESS LINE DATA THAT CLEARLY DOES NOT COMPLY WITH HIS OWN UNDERSTANDING OF THE FCC'S RULE?

A: Yes. It appears that Mr. Gillan's primary objective is *not* to comply with the FCC's rule but to persuade the Commission to approve a methodology that provides the *lowest*

[72] 47 C.F.R. § 51.5 (Definition of "Business Line").

business line count possible by recommending a methodology that does not include digital equivalency calculations for UNE lines.

Q: DOES AT&T MISSOURI (OR THE COMMISSION) HAVE THE OPTION OF SIMPLY USING THE MISSOURI LINE COUNTS THAT AT&T (THEN SBC) FILED WITH THE FCC IN DECEMBER 2004, AS PROPOSED BY MR. GILLAN?

A: No. AT&T Missouri and the Commission must comply with the rules established by the FCC. The FCC's business line rule clearly requires that AT&T Missouri account for digital lines (including UNE-L lines) by counting each 64 kbps-equivalent as one line.

Q: IS THE FCC AWARE OF THE DIFFERENCE BETWEEN THE BUSINESS LINE COUNTS AT&T MISSOURI RELIED UPON FOR THE WIRE CENTER DESIGNATIONS AND THE MISSOURI LINE COUNTS CONTAINED IN AT&T'S DECEMBER 2004 FCC FILING?

A: Yes. AT&T (then SBC) notified the FCC of this fact shortly after the issuance of the *TRRO* and before the order became effective. [73] AT&T also filed updated business line count information with the FCC that reflected the required digital equivalency calculations. The FCC has known for more than two years that the data that AT&T provided in December 2004 did not account for voice grade equivalents for the UNE lines and that AT&T's business line counts have since been adjusted to do so. Although the FCC is aware of the differences between the December 2004 business line counts and the business line counts upon which the current wire center designations are based, the FCC has not changed its business line thresholds, nor has it required AT&T to adjust its data to change the digital equivalency factor.

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[73] *See* Ex Parte Letter dated February 18, 2005, to Mr. Jeffrey J. Carlisle, Chief, FCC Wireline Competition Bureau from Mr. James C. Smith of AT&T at 1, fn. 2. The letter, without attachments, is Attachment CAC-2 hereto.

Q: HAVE CLECS REQUESTED THAT THE FCC MODIFY THE BUSINESS LINE REQUIREMENTS IN ITS RULES?

A: Yes. As explained above, on March 28, 2005, XO and NuVox, along with other CLECs, petitioned the FCC to reconsider its digital equivalency rule. In its petition, XO and NuVox noted that the FCC's business line definition required that the entire digital UNE-L line be counted based on digital equivalency, regardless of whether the entire loop was used to provide switched access service to business customers. XO and NuVox argued that the FCC should modify the business line definition, in part, because of concerns regarding the manner in which the rule requires UNE-L lines to be counted. XO and NuVox suggested that the business line definition either be modified to rely solely on ARMIS 43-08 data or, alternatively, to count UNE-L lines based on how the CLEC actually used the loop.[74] Although the XO/NuVox Petition for Reconsideration was filed over two years ago, the FCC has not modified its rules. At the time XO and NuVox filed their Petition for Reconsideration with the FCC, XO and NuVox recognized that unless the FCC's rule was changed, business lines would need to be calculated in the manner proposed in this docket by AT&T Missouri. The Commission should reject XO's and NuVox's proposal now to impose requirements that are contrary to what they themselves recognized the FCC requires.

Q: HAS THE FCC PROVIDED ANY INDICATION THAT IT DID NOT KNOW WHICH WIRE CENTERS WOULD ACTUALLY MEET ITS NON-IMPAIRMENT CRITERIA AT THE TIME IT RELEASED THE *TRRO*?

A: Yes. On the day the FCC issued the *TRRO* (February 4, 2005), the FCC's Wireline Competition Bureau issued a letter to AT&T (then SBC) requesting that AT&T provide

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[74] XO/NuVox Petition for Reconsideration at 16-17.

the FCC with a list of the wire centers that met the impairment criteria established in the *TRRO*. Specifically, the FCC asked that AT&T "provide the Bureau a list identifying by Common Language Location Identifier (CLLI) code which wire centers in your company's operating areas satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport, and identifying by CLLI code the wire centers that satisfy the nonimpairment thresholds for DS1 and DS3 loops."[75] I do not believe that the FCC would have requested such a list unless it anticipated that AT&T might need to make adjustments to the business line count and/or fiber-based collocator counts previously provided to the FCC in order to ensure that these counts complied with the requirements of the FCC's new rules.

Q: DOES MR. GILLAN'S TESTIMONY ACCURATELY REPESENT AT&T ARKANSAS AND AT&T INDIANA'S PREVIOUS POSITIONS?[76]

A: No. Mr. Gillan's testimony grossly misrepresents the AT&T ILECs' prior positions on this issue. All of the AT&T ILECs in the pre-merger SBC territory have taken the exact same position on the business line issues in each state. In each of the instances referenced by Mr. Gillan, the discussion had to do with what types of lines should be included in the Business Line count.

Q: WAS THE LANGUAGE CITED BY MR. GILLAN FROM OTHER AT&T ILEC PROCEEDINGS RELATED TO THE ISSUE OF DIGITAL EQUIVALENCY?[77]

A: No. In each of the cites referenced by Mr. Gillan, the issue at hand was whether the business line count should rely on *all* UNE-L lines or *only* those UNE-L lines used to

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[75] See February 4, 2005 letter from Jeffrey J. Carlisle, Chief, Wireline Competition Bureau which is provided as Rebuttal Exhibit CAC-3 (footnotes omitted).

[76] Gillan Direct at pp. 5-7.

[77] Gillan Direct at pp. 5-7.

provide switched service to business customers. In each case, the AT&T ILEC's position was that the data used for the business line count must include all UNE-L lines as required by the rule, the text of the *TRRO* and as noted in AT&T's December 2004 filing. In short, Mr. Gillan's references to previous filings made in Indiana and Arkansas are taken completely out of context. The testimony and associated briefing in each instance related to whether or not business lines should be counted based on ARMIS 43-08 business lines, plus business UNE-P lines, plus UNE-L lines as they were in December 2004 and as described in the *TRRO*.

Q: HOW SHOULD THE COMMISSION RESOLVE THIS ISSUE?

A: The Commission should reject the CLECs' proposal to use line counts that are not compliant with the requirements contained in the FCC's Business Line rule.

VI. FIBER-BASED COLLOCATOR DISPUTES

f. Identification of Issues

Q: HAVE YOU IDENTIFIED THE FIBER-BASED COLLOCATOR ISSUES IN DISPUTE BASED ON YOUR READING OF MR. GILLAN'S TESTIMONY?

A: Yes. I have identified the Fiber-based Collocator count disputes and have provided a brief summary of each dispute below:

1. The first Fiber-based Collocator dispute concerns the instances in which a connecting carrier in a collo-to-collo arrangement should be counted as a Fiber-based Collocator. AT&T Missouri's position is simple: the connecting carrier should be counted if the resulting arrangement provides the connecting carrier with non-AT&T Missouri

provided interoffice transport out of the wire center, using fiber facilities or a transmission facility that is comparable to fiber. AT&T Missouri's position is consistent with the FCC's determination in the *TRRO* that the definition of Fiber-based Collocator is technologically neutral. The CLECs' position, on the other hand, essentially limits the definition of Fiber-based Collocator to instances in which the CLEC has provisioned its own fiber (or fiber obtained on an IRU basis). The CLECs' position is not supported by the *TRRO*.

2. The second Fiber-based Collocator dispute is closely related to the first. This dispute concerns the type of arrangements that qualify as "comparable" to fiber under the definition of Fiber-based Collocator.[78] AT&T Missouri bases its position on the FCC's discussion of comparable transmission facilities in paragraph 102 of the *TRRO* (including footnote 295). The FCC specifically found that fixed-wireless arrangements are comparable to fiber for purposes of the definition and that the test should be technologically agnostic. Based on the FCC's analysis, AT&T Missouri has taken the position that any arrangement that provides transmission capabilities similar to a fixed-wireless arrangement, that is, at least DS3 transmission capabilities, must be considered a comparable transmission facility. The CLECs' suggest that the minimum transmission capability that can be considered as "comparable" to fiber is OC-3 level transmission. The CLECs' position cannot be reconciled with the FCC's discussion of comparable transmission facilities.

[78] 47 C.F.R. § 51.5 (definition of Fiber-based Collocator).

3. Mr. Nevels addresses the above two issues from a network perspective. The third issue, which I alone will address, is whether NuVox should be counted as a Fiber-based Collocator in the wire centers identified by AT&T Missouri. AT&T Missouri's designations are based on physical inspections. The CLECs have not provided any evidence suggesting that NuVox was not a Fiber-based Collocator in the specified locations as of March 11, 2005. Furthermore, NuVox's response to Staff's query on this issue provides further support for AT&T Missouri's position.

Q: HOW DO THE FIBER-BASED COLLOCATOR DISPUTES IMPACT THE CURRENT WIRE CENTER DESIGNATIONS?

A: It does not appear that any of the methodological disputes impact any of the wire center designations. The Commission's determinations on the methodological issues will only impact future wire center determinations. The factual dispute regarding NuVox would affect, at most, only one of the wire center designations.

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

Q: WHAT IS THE NATURE OF FIBER-BASED COLLOCATOR DISPUTE 1?

A: This dispute, which Mr. Nevels addresses from a network perspective, concerns whether a connecting carrier in a collo-to-collo arrangement may be counted as a Fiber-based Collocator (if the carrier also meets all of the rest of the requirements of the FCC's definition). The CLECs' position is that the connecting carrier in a collo-to-collo arrangement may only be counted if the carrier is connecting to fiber that leaves the wire

center and the carrier lights the fiber with its own optronics. AT&T Missouri's position is that a connecting carrier counts as a Fiber-based Collocator if the transmission path the carrier establishes out of the wire center is comparable to fiber (see FBC Dispute 2) and the carrier also meets the other requirements of the FCC's rule.[79]

Q: DO YOU HAVE ANY GENERAL COMMENTS REGARDING MR. GILLAN'S TESTIMONY ON THE DEFINITION OF "FIBER-BASED COLLOCATOR"?[80]

A: Yes. Mr. Gillan's testimony on this issue appears to be based on the false premise that the FCC's instructions require each Fiber-based Collocator to possess a distinct and separate transport network that does not share any physical components with another carrier.[81] The FCC's definition describes Fiber-based Collocation not in terms of a "distinct" facility but simply as a "fiber-optic cable or comparable transmission facility" that terminates at a collocation arrangement in a wire center, leaves the wire center and is owned by a party other than AT&T Missouri (or an AT&T Missouri affiliate). Contrary to this clear definition, Mr. Gillan attempts to impose additional qualifications.

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[79] I should note that because of AT&T's merger commitment on this issue associated with the AT&T/BellSouth merger, effective December 29, 2006, AT&T Missouri will not count this type of collo-to-collo arrangement, even if the Commission adopts AT&T Missouri's position on this issue, until the expiration of the merger commitment.

[80] Gillan Direct at pp. 22-27.

[81] Gillan Direct at p. 23.

Q: DO THE *TRRO* AND IMPLEMENTING RULES SUPPORT MR. GILLAN'S CLAIM THAT EACH FIBER-BASED COLLOCATOR MUST USE A DISTINCT TRANSPORT FACILITY?[82]

A: No. The *TRRO* contains no such directive. Moreover, while some Fiber-based Collocators may build their network using components provided by other carriers, each carrier that AT&T Missouri counted has its own network.

Q: WHAT TYPES OF ARRANGEMENTS SHOULD BE COUNTED AS FIBER-BASED COLLOCATORS?

A: The FCC's definition of Fiber-based Collocator is clear that any unaffiliated carrier that has a collocation arrangement with active power in a given wire center must be counted if it operates a fiber-optic cable or comparable facility that does the following:

- Terminates at a collocation arrangement in the wire center;
- Leaves the wire center premises; and
- Is not owned by the ILEC (unless dark fiber is provided by the ILEC on an IRU basis).

This is the standard that determines whether a carrier is a Fiber-based Collocator. All carriers meeting the standard are Fiber-based Collocators and must be counted.[83] I

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[82] Gillan Direct at p. 23.

[83] If two or more carriers that are affiliated with each other both qualify as Fiber-based Collocators in a single wire center, only one of the affiliated carriers may be counted for that wire center.

explain how the disputed types of collo-to-collo arrangements meet these requirements below.

Q: WHAT TYPES OF COLLO-TO-COLLO ARRANGEMENTS WOULD BE COUNTED UNDER THIS DEFINITION?

A: As explained in my Direct Testimony and in the Direct Testimony of Mr. Nevels, in order for a collocation arrangement to be counted as a Fiber-based Collocation by AT&T Missouri, a fiber-optic cable or a comparable transmission facility must be terminated at the collocation arrangement of the collocator in question. Thus, in a collo-to-collo situation, AT&T Missouri only considers the connected CLEC if the connection, and the resulting end-to-end comparable transmission facility, is at least at the DS3 level. In addition, AT&T Missouri does not consider arrangements that rely upon fiber facilities provided by AT&T Missouri or carriers that are affiliated with AT&T Missouri or another Fiber-based Collocator in the wire center. Collocation arrangements that do not meet these standards are not counted as Fiber-based Collocators.

Q: DOES THE CONNECTING CARRIER IN A COLLO-TO-COLLO ARRANGEMENT OPERATE A FIBER-OPTIC CABLE?

A: Although there are instances where a connecting carrier would operate the fiber-optic cable, the connecting carrier in the collo-to-collo arrangements identified as Fiber-based Collocators operates *either* a fiber-optic cable *or* a comparable transmission facility as required by the FCC's definition of Fiber-based Collocator.[84]

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[84] 47 C.F.R. §51.5 (definition of "Fiber-based Collocator).

Q: WHAT DOES A FIBER-BASED COLLOCATOR OPERATE IN INSTANCES WHERE THERE IS A DS3 OR HIGHER LEVEL COLLO-TO-COLLO CONNECTION TO A FIBER-BASED COLLOCATOR?

A: From a high level, there are two ways a collo-to-collo arrangement can meet the "operate" criteria. In instances where the connection between the two collocation arrangements is fiber that connects to a dark fiber entrance facility, the CLEC with the collo-to-collo connection would operate a fiber facility that terminates in its collocation arrangement and leaves the wire center. Mr. Gillan agrees that this type of arrangement does qualify as a Fiber-based Collocator.[85] In instances where the collo-to-collo connection is coaxial cable or fiber that does not connect to dark fiber, the CLEC with the collo-to-collo connection would be operating the comparable transmission facility that it created using the collo-to-collo connection and transport capabilities obtained from the other carrier.

Q: PLEASE EXPLAIN IN MORE DETAIL HOW THE CONNECTING CLEC IN A COLLO-TO-COLLO ARRANGEMENT OPERATES THE COMPARABLE TRANSMISSION FACILITY IT HAS CREATED.

A: A generally accepted dictionary meaning for the word "operate" is "[t]o control the functioning of; [to] run." *The American Heritage Dictionary of the English Language*, p. 1268 (3d ed. 1992). A connecting carrier in a collo-to-collo arrangement runs the comparable transmission facility it has created and controls its functionality when it creates a comparable transmission facility by combining network components of its own with transmission capacity leased from another carrier in a collo-to-collo arrangement. Specifically, the connecting carrier must 1) design the comparable transmission facility;

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[85] Gillan Direct at p. 25.

2) decide upon the type and quantity of its own facilities to place in its collocation arrangement and deploy accordingly; 3) engage in any negotiations required to obtain rates, terms and provisions for leased components that are suitable for the carrier's desired network design; 4) decide what traffic it will route on the comparable transmission facility; 5) control the equipment that enables the traffic to be aggregated and transmitted over the comparable transmission facility; 6) place desired traffic onto the transmission facility; 7) ensure that the transmission quality of the end-to-end transmission facility meets (and continues to meet) its desired standards; 8) make engineering and market entry determinations in deciding the transmission capacity required to meet, and continue to meet, the demands of its network; and 9) monitor the use of the comparable transmission facility to determine if and when network modifications and augments are needed. These are just some of the activities that a connecting carrier performs while operating the comparable transmission facility that it has created. These activities are key to the operation of the comparable transmission facility and must be performed by the *connecting* carrier -- not the carrier from whom the connecting carrier has chosen to lease transmission capacity.

Q: COULD BOTH CARRIERS IN A COLLO-TO-COLLO ARRANGEMENT ACT AS ALTERNATIVE TRANSPORT PROVIDERS?

A: Yes. AT&T Missouri only considered configurations capable of supporting transmission out of the wire center at a minimum of DS3 level. If a carrier has deployed the network capabilities necessary to support DS3 level transport out of the wire center, it could

choose to provide DS1 transport to other carriers. A carrier with higher capacity capabilities could provide additional offerings.

Q: DO THE COLLO-TO-COLLO ARRANGEMENTS COUNTED BY AT&T MISSOURI INVOLVE COMPARABLE TRANSMISSION FACILITIES THAT LEAVE THE WIRE CENTER?

A: Yes. In order to be considered a Fiber-based Collocator, a carrier must have access to a transmission facility that *leaves* the wire center and that is *fiber* or *comparable to fiber*. As such, a carrier with a collo-to-collo connection to another carrier will *not* be considered to be a Fiber-based Collocator *unless* that collo-to-collo connection provides the carrier with the ability to either directly access a fiber entrance facility that leaves the wire center or create a network that is comparable to fiber that leaves the wire center. The facility that terminates at the carrier's collocation arrangement is a comparable transmission facility that leaves the wire center.

Q: WHAT IS YOUR CONCERN REGARDING MR. GILLAN'S TESTIMONY ON THE SUBJECT OF IRUs AND FIBER OWNERSHIP?

A: In one part of his Direct Testimony, Mr. Gillan appears to claim that the FCC requires AT&T Missouri to determine the actual ownership of fiber that it considers; however, on an earlier page of his testimony, Mr. Gillan admits that this is not the case.[86] To the extent Mr. Gillan is suggesting that AT&T Missouri must determine the ownership of non-AT&T Missouri fiber, that is directly contrary to the FCC's Fiber-based Collocator definition and the text of the *TRRO*. The FCC's Fiber-based Collocator definition only

[86] Gillan Direct at p. 25.

requires that AT&T Missouri ensure that it does not consider fiber that is owned by AT&T Missouri or an AT&T Missouri affiliate unless that fiber was offered to a non-affiliated carrier on an IRU basis.[87] As the FCC noted, "unlike information regarding Fiber-based Collocation, the information necessary to implement the previous self-deployment triggers was possessed entirely by a span of competitive LECs and was not easily verifiable."[88]

Q: MR. GILLAN SUGGESTS THAT THIS POSITION IS SUPPORTED BY THE *TRRO*.[89] IS THIS TRUE?

A: No. In paragraph 102 of the *TRRO*, the FCC states that for "purposes of our analysis, we define fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center."[90] Obviously, any fiber that is not owned by AT&T Missouri is "non-incumbent LEC fiber-optic cable." However, in spite of the clear language in the FCC's definition and in the text of the *TRRO*, Mr. Gillan appears to suggest that a footnote that describes an exception to the FCC's prohibition against counting ILEC-owned fiber actually creates an obligation to determine the ownership of non-ILEC fiber-optic cable.

Q: WHAT DOES THE FOOTNOTE SAY?

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87 47 C.F.R. § 51.5; *TRRO* at ¶ 102.

88 *TRRO* at ¶ 99.

89 Gillan Direct at pp. 24-26.

90 *TRRO* at ¶ 102 (footnotes omitted).

A: Footnote 292 of the *TRRO* simply states the following:

> We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities. *Triennial Review Order*, 18 FCC Rcd at 17231-32, para. 408 & nn. 1263, 1265.

Q: DOES THIS FOOTNOTE HAVE ANY BEARING ON THE APPLICATION OF THE FIBER-BASED COLLOCATOR COUNT FOR FIBER THAT IS OWNED BY A NON-INCUMBENT CARRIER?

A: No. The Fiber-based Collocator definition simply requires that any ILEC-owned (or ILEC affiliate-owned) fiber be excluded unless that fiber has been provided on an IRU basis. Any fiber that is not owned by the ILEC (or an affiliate) is always considered -- regardless of how the fiber had been provided. Put simply, non-ILEC-owned fiber is counted whether the carrier using the fiber owns the fiber, leases the fiber, or has obtained the fiber on an IRU basis. On the other hand, ILEC-owned (or ILEC-affiliate owned) fiber does not count unless that fiber has been provided on an IRU basis. Nothing in the footnote referenced by Mr. Gillan suggests otherwise. The footnote simply requires that fiber-facilities provided on an IRU basis (whether by AT&T Missouri or another carrier) be counted for the analysis. The footnote does not create a new ownership requirement.

Q: WHAT ABOUT THE CITES TO THE *TRO* REFERENCED IN THE FOOTNOTE?

A: The footnote in question cites to provisions in the *TRO* in which the FCC discussed the concept of IRU as it applied to the competitive transport triggers. The concept of how

the IRU test would apply is the same in the *TRRO* and the *TRO*. In both situations, if a carrier obtains the facility on an IRU basis, it is treated as if that carrier actually owned the facility. However, what Mr. Gillan fails to explain in his testimony is that the applicability of the IRU test is different in the *TRRO* than in the *TRO*. The ownership requirements from the *TRO* to which Mr. Gillan refers have been vacated. The Fiber-based Collocator rule established subsequently in the *TRRO* only requires that the fiber-optic cable or comparable facility be "owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph."[91] Mr. Gillan refers to the now-vacated rule that the FCC established for the competitive transport triggers in the *TRO,* which required that in order to be counted, the competing provider had to have "deployed its own transport facilities" and those facilities "may use dark fiber facilities that the competing provider has obtained on a long-term, indefeasible-right of use basis and that it has deployed by attaching its own optronics to activate the fiber."[92] While the treatment of IRUs within the *TRO* rules and the *TRRO* rules is the same (i.e., fiber leased by a CLEC on an IRU basis is treated as if it were owned by that CLEC), the ownership requirements in those rules are very different; the *TRO* only counted instances where the competing carrier had deployed *its own* transport facilities, whereas the *TRRO* counts all instances where the fiber (or comparable facility) is *not owned by the incumbent LEC*. The *TRO* rules which required a CLEC-by-CLEC determination of fiber ownership were vacated and replaced by the *TRRO* rules.

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[91] 47 C.F.R. § 51.5. Note that the rule goes on to provide the exception that "Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable."

[92] Vacated *TRO*, 47 C.F.R. 51.319(e)(2)(i)(A)(1). *See also* vacated *TRO*, 47 C.F.R. § 51.319(e)(1)(ii)(A); § 51.319(e)(2)(i)(B)(1).

Q: DOES THE PORTION OF THE FCC'S DEFINITION OF FIBER-BASED COLLOCATOR DEALING WITH FIBER PROVIDED ON AN IRU BASIS PROVIDE FURTHER SUPPORT FOR AT&T MISSOURI'S POSITION ON COLLO-TO-COLLO ARRANGEMENTS?

A: Yes. The FCC's definition of Fiber-based Collocator requires that the fiber or comparable transmission facility in a Fiber-based Collocation must be "owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph." The rule then goes on to state that "Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable." There are two key points here. First, the only *lit* fiber the FCC excludes is lit fiber provided by the ILEC. Second, the only time the FCC required an IRU was in instances where the ILEC provided the fiber. If the FCC intended to exclude all fiber provided as lit fiber (as is the case in a collo-to-collo arrangement in which the CLEC does not light the fiber that leaves the wire center), and only allow dark fiber provided on an IRU basis, it could have easily done so. As it is, the rule clearly reflects the FCC's awareness that fiber may be provided as dark fiber or lit fiber. In spite of this awareness, the rule only requires the use of dark fiber in instances where the fiber has been provided by the ILEC.

Q: HOW SHOULD THE COMMISSION RULE ON THIS ISSUE?

A: The Commission should rule that AT&T Missouri may count collo-to-collo arrangements, subject to its merger commitments, as long as those arrangements meet the requirements of the FCC's definition of Fiber-based Collocator, including the

requirement that the carrier operate a fiber-optic cable, or comparable transmission facility, that leaves the wire center.

ii. Fiber-based Collocator Dispute 2 – How should the term "comparable transmission facility" be defined?

Q: MR. GILLAN CLAIMS THAT DS3 TRANSMISSION CAPABILITY IS NOT COMPARABLE TO FIBER.[93] IS HIS POSITION CONSISTENT WITH THE FCC'S DETERMINATIONS IN THE *TRRO*?

A: No. Mr. Gillan does not dispute the fact that fixed-wireless arrangements may support only a single DS3 or the fact that the FCC specifically stated that fixed-wireless collocation arrangements are considered to be comparable to fiber.[94] The FCC has already determined that fixed-wireless arrangements do count as comparable transmission facilities. AT&T Missouri's position is simply that any other transmission facility with similar transmission capabilities must count as well.

Q: DOES THE FCC DESCRIBE COMPARABLE TRANSMISSION FACILITIES IN TERMS OF THE POTENTIAL CAPACITY?

A: No. The FCC declared that fixed wireless arrangements should be counted simply because these arrangements "signal the ability to deploy transport facilities."[95] The FCC established a *functional* requirement, not a *capacity* requirement. Nevertheless, AT&T Missouri conservatively adopted a DS3 minimum standard to be consistent with the one comparable arrangement described by the FCC.

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93 Gillan Direct at p. 27.

94 *TRRO* at ¶ 102.

95 *TRRO* at ¶ 102.

Q: HAS THE FCC PREVIOUSLY RECOGNIZED TRANSMISSION FACILITIES THAT CONSIST OF MORE THAN ONE TYPE OF TRANSMISSION MEDIA AND INCLUDE TRANSMISSION EQUIPMENT?

A: Yes. AT&T Missouri looked at the capacity of a particular facility when determining whether the facility in question is comparable to fiber. AT&T Missouri considers an end-to-end transmission path to be a facility. The FCC rules support this approach. The FCC's rules currently use the term "transmission facility" to describe facilities that consist of more than one transmission media and that include transmission equipment apart from the transmission equipment at the facility's termination point. For example, the FCC's unbundling rules describe the Hybrid Loop as "a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant."[96] Therefore, a local loop may consist of more than one transmission media. The FCC described a Local Loop as "a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises."[97] The Local Loop definition goes on to note that the local loop transmission facility includes various electronics and equipment "used to establish the transmission path to the end-user customer premises." As the FCC's definitions in the Local Loop and Hybrid Loop rules demonstrate, a "transmission facility" may be made up of a combination of many things including, but not limited to, fiber optic cable, copper wire, cable, electronic equipment, and optronics that are required to provide a transmission path. It is common knowledge that multiple hybrid loops may be provisioned, in part, over a single fiber strand. Although multiple

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[96] 47 C.F.R. § 51.319(a)(2).

[97] 47 C.F.R. § 51.319(a).

hybrid loops may share a single fiber strand, the FCC recognized that each hybrid loop is a separate transmission facility.

Q: IS COAXIAL CABLE, IN AND OF ITSELF, COMPARABLE TO FIBER?

A: No. AT&T Missouri has not identified any circumstances in which a coaxial cable, in and of itself, would be considered comparable to fiber-optic cable. However, a transmission facility that is comparable to fiber *may* include an intraoffice coaxial cable connection. In order to be considered a "comparable transmission facility," the facility in question must be capable of supporting at least DS3 level transmission out of the wire center. This means that the facilities inside the wire center *and* the facilities leaving the wire center must be capable of supporting DS3 or greater transmission. For example, a coaxial cable would *not* be considered a comparable transmission facility if the coaxial cable were the facility leaving the wire center. However, a network consisting of a short coaxial cable connection within the wire center and fiber facilities exiting the wire center would be capable of supporting DS3 level transmission out of the wire center and would be considered.

Q: HOW SHOULD THE COMMISSION RULE ON THIS ISSUE?

A: The Commission should follow the FCC's directive that establishes that the Fiber-based Collocator definition is technologically agnostic. The Commission should rule that any arrangement that provides transmission capabilities similar to those of a fixed-wireless arrangement (*i.e.*, an arrangement that supports DS3 or greater transmission out of the wire center) must be considered a comparable transmission facility.

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

Q: MR. GILLAN STATES THAT NUVOX HAS DENIED THAT IT IS A FIBER-BASED COLLOCATOR IN ANY WIRE CENTER IN MISSOURI.[98] DO YOU HAVE ANY COMMENTS REGARDING THIS STATEMENT?

A: Yes. Although it would be informative to know whether NuVox *is currently* a fiber-based collocator at any wire center in Missouri, the relevant question is whether NuVox *was* a fiber-based collocator in the wire centers identified by AT&T Missouri as of March 11, 2005.

Q: DID MR. GILLAN DISPUTE THAT NUVOX WAS A FIBER-BASED COLLOCATOR IN THE WIRE CENTERS IDENTIFIED BY AT&T MISSOURI AS OF MARCH 11, 2005?

A: No. Mr. Gillan does not provide any evidence suggesting that NuVox was not, in fact, a fiber-based collocator in the wire centers identified by AT&T Missouri on March 11, 2005.

Q: WHY IS THIS A RELEVANT CONSIDERATION?

A: As I noted earlier in my Rebuttal Testimony, the FCC's non-impairment thresholds for high-capacity loops and interoffice dedicated transport emphasize that once the non-impairment thresholds have been met, the finding is permanent. For example, the FCC's DS3 loop rule states that once a wire center exceeds both of the pertinent thresholds, "*no future DS3 loop unbundling will be required in that wire center.*"[99] The FCC has thus

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[98] Gillan Direct at p. 28.

[99] 47 C.F.R. § 51.319(a)(5) (emphasis added). *See* similar language in 47 C.F.R. § 51.319(a)(4) (DS1 Loops) and 47 C.F.R. § 51.319(e)(3)(i-ii) (Tier 1 and Tier 2 designations).

made abundantly clear that the relevant question is not whether NuVox *is* a fiber-based collocator in the locations identified by AT&T Missouri, but whether NuVox *was* a fiber-based collocator in those locations as of the effective date of the *TRRO*.

Q: MR. GILLAN STATES THAT NUVOX HAS DENIED THAT IT IS A FIBER-BASED COLLOCATOR IN MISSOURI. IS HIS ANALYSIS OF THE IMPACT OF THIS DENIAL ACCURATE?[100]

A: No. Mr. Gillan claims that excluding NuVox (and Birch) from the Fiber-based Collocator counts "does not change the wire [center] classifications in Missouri."[101] This is not true. As I explained above and in my Direct Testimony, the wire center designations were modified based on commitments made in conjunction with the SBC/AT&T merger; however, those modifications did not go into effect until December 16, 2005. Between March 11, 2005 and December 16, 2005, the wire center designations must be based solely on the requirements established by the FCC in the *TRRO*. It is important for the Commission to rule on the March 11, 2005 designations in addition to the currently effective designations. Assuming that the Commission upholds AT&T Missouri's Business Line counts, excluding NuVox from the Fiber-based Collocator counts will not impact any of the post SBC/AT&T merger designations. Excluding NuVox from the Fiber-based Collocator counts does, however, impact one of wire center designations applicable between March 11, 2005 and December 16, 2005.

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100 Gillan Direct at p. 28.
101 Gillan Direct at p. 28.

Q: ARE THERE OTHER SIGNIFICANT OMISSIONS IN MR. GILLAN'S TESTIMONY?

A: Yes. Although Mr. Gillan represents NuVox, Mr. Gillan provided absolutely no explanation as to why NuVox believes that is should not be counted as a fiber-based collocator in the wire centers identified by AT&T Missouri. In my experience, disputes concerning the identification of a particular carrier have typically been based on one of two issues: the proper counting methodology or the vintage of data that should be considered. To the extent the dispute concerns methodology, the Commission's determinations in this proceeding should resolve any dispute. Since Mr. Gillan did not explain why NuVox has claimed that it is not a fiber-based collocator in the locations designated by AT&T Missouri, I will briefly address common areas of dispute.

Q: DOES THIS OMISSION CREATE A PROBLEM?

A: Yes. AT&T Missouri provided a detailed description of its process for identifying each Fiber-based Collocator. Mr. Gillan, on the other hand, disputes AT&T Missouri's identification of one of the CLECs he represents (NuVox), but fails to indicate the reason for the dispute.

Q: ARE YOU CONFIDENT THAT NUVOX WAS A FIBER-BASED COLLOCATOR IN THE LOCATIONS IDENTIFIED BY AT&T MISSOURI AS OF MARCH 11, 2005?

A: Yes. As explained in the testimony of Mr. Nevels, AT&T Missouri performed physical inspections of each of the wire centers identified as meeting one or more of the FCC's non-impairment thresholds. NuVox was only identified as a fiber-based collocator in instances where AT&T Missouri's physical, on-site inspection showed that NuVox had a

collocation arrangement in place that met the physical requirements necessary to be classified as a fiber-based collocator.

Q: IS IT POSSIBLE THAT NUVOX WAS A FIBER-BASED COLLOCATOR ON MARCH 11, 2005 BUT IS NO LONGER A FIBER-BASED COLLOCATOR TODAY?

A: Yes. In my experience in wire center proceedings like this one in other states, I am aware of a number of instances in which carriers that were fiber-based collocators in a particular wire center in March of 2005 are no longer fiber-based collocators in those wire centers today.

Q: PLEASE EXPLAIN FURTHER.

A: There are a number of reasons why a carrier that initially qualified as a fiber-based collocator in a particular wire center might not still be considered a fiber-based collocator in that wire center today. Two of the most common reasons I have seen are changes to affiliate relationships and transfers of assets between carriers (e.g., sales).

Q: PROVIDE AN EXAMPLE OF HOW THE TIME OF WIRE CENTER DESIGNATION RELATES TO AFFILIATE RELATIONSHIPS.

A: Affiliate relationships between carriers change over time. The affiliate relationship that must be considered for wire center designations is the affiliate relationship that was in place at the time of wire center designation. For example, in March of 2005 MCI and Verizon were not affiliated carriers. As such, those two carriers could have both been counted as fiber-based collocators in a single wire center for a March 11, 2005 wire center designation. Today, however, MCI and Verizon *are* affiliated carriers. If new

wire center designations were made today, MCI and Verizon could not both be counted as Fiber-based Collocators in the same wire center. The affiliate status that matters is the affiliate status at the time the non-impairment thresholds are met.

Q: PROVIDE AN EXAMPLE OF HOW THE TRANSFER OR SALE OF ASSETS MAY IMPACT THE FIBER-BASED COLLOCATOR COUNTS.

A: Carriers may choose to transfer or sell some of their assets to another carrier. Some asset transfers will impact whether a particular carrier that qualified as a Fiber-based Collocator as of March 11, 2005 continues to do so today. For example, in order to qualify as a Fiber-based Collocator in a particular wire center, the carrier must have a collocation arrangement with active power and operate a fiber-optic cable or comparable transmission facility. If a carrier transferred some of its collocated equipment to another carrier, it might no longer meet this standard. In some cases, such a transfer results in a new carrier qualifying as a Fiber-based Collocator. In others, the transfer results in a reduction in the number of Fiber-based Collocators in the wire center. In either case, such a transfer of assets will not impact whether or not the original carrier should have been counted as a Fiber-based Collocator for the original wire center designation. The transfer of assets will only impact whether or not that carrier may qualify as a Fiber-based Collocator for future designations.

Q: ARE THERE OTHER CHANGES THAT MAY IMPACT A CARRIER'S ONGOING QUALIFICATION AS A FIBER-BASED COLLOCATOR?

A: Yes. I have not attempted to provide a comprehensive list of changes that could impact a carrier's qualification for inclusion as a Fiber-based Collocator for future designations.

Some of these changes could include a redesign of the carrier's network or decommissioning of a collocation arrangement. Any such changes will be relevant for future wire center designations, but do not impact the accuracy of AT&T Missouri's current wire center designations.

Q: ASIDE FROM THESE TIME CONSIDERATIONS, ARE THERE OTHER FACTS THAT SUPPORT AT&T MISSOURI'S IDENTIFICATION OF NUVOX AS A FIBER-BASED COLLOCATOR?

A: Yes. For purposes of this part of my testimony, I will focus only on the wire center where NuVox's inclusion or exclusion as a Fiber-based Collocator has an impact on the wire center designations. The only wire center where NuVox's classification impacts the designations is ** ** Although NuVox has not provided any evidence whatsoever regarding its status as a Fiber-based Collocator on of March 11, 2005 (the effective date of the *TRRO*), NuVox's response to Staff's query on this point provides strong support to AT&T Missouri's Fiber-based Collocator count.

Q: WHAT RESPONSE DID NUVOX PROVIDE TO STAFF ON THIS ISSUE?

A: In regard to the wire center noted above, NuVox responded, as Mr. Gillan claims, that it is not a Fiber-based Collocator.[102] However, a review of NuVox's reasoning on this point shows that the arrangement in question is a Fiber-based Collocation arrangement and should be counted.

[102] Gillan Direct at p. 28.

HC

Q: WHY DOES NUVOX CLAIM IT IS NOT A FIBER-BASED COLLOCATOR IN THE REFERENCED WIRE CENTER?

A: In its response to Staff's query, NuVox admits that it **_____

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Q: WHAT IS YOUR CONCLUSION AFTER READING NUVOX'S RESPONSE?

A: Based on NuVox's response, it is clear that NuVox is currently a Fiber-based Collocator in the wire center referenced above. NuVox meets each of the following requirements of the Fiber-based Collocator rule[103]

- NuVox is not affiliated with AT&T Missouri or any of the other Fiber-based Collocators in the wire center;

[103] 47 C.F.R. § 51.5 (definition of "Fiber-based Collocator").

HC

- NuVox maintains a collocation arrangement with active electrical power;
- NuVox operates a fiber-optic cable that terminates at the collocation arrangement within the wire center and leaves the wire center; and
- NuVox's transmission facility is not owned by AT&T Missouri or an affiliate of AT&T Missouri.

Q: DOES NUVOX DISPUTE THAT IT MEETS THE FOUR REQUIREMENTS LISTED ABOVE?

A: NuVox does not dispute that its collocation arrangement meets each of these four requirements; however, in spite of this, NuVox claims that it is not the party that met the requirements. In other words, NuVox does not dispute that the collocation arrangement in question is a Fiber-based Collocation arrangement. NuVox merely claims that it is not the carrier that should be identified as the Fiber-based Collocator associated with that arrangement

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_____ ** Based on these facts, willingly acknowledged by NuVox, the arrangement in question is undoubtedly a Fiber-based Collocation arrangement.

HC

Q: IF THIS IS TRUE, WHY DOES NUVOX STILL CLAIM IT SHOULD NOT BE CONSIDERED A FIBER-BASED COLLOCATOR IN THIS WIRE CENTER?

A:** _____

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_____** As I explained above, the FCC does not require that a carrier own their own fiber or obtain dark fiber on an IRU basis in order to be considered a Fiber-based Collocator. The *only* requirement in that regard is that the fiber in question *not* belong to AT&T Missouri *unless* it is dark fiber provided on an IRU basis. As long as the fiber does not belong to AT&T Missouri, ownership is irrelevant. **

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HC

VII. CONCLUSION

Q: WHAT IS THE BOTTOM LINE ON THIS ISSUE?

A: NuVox provides no evidence that undermines AT&T Missouri's determination that it was, in fact, a Fiber-based Collocator as of March 11, 2005. Indeed, NuVox presents no evidence on the matter whatsoever. Whether NuVox is *currently* a Fiber-based Collocator is of no consequence. Moreover, based on NuVox's *own affidavit*, the physical arrangement in question *is* a Fiber-based Collocation arrangement under either party's interpretation of the Fiber-based Collocator rule.[104] Finally, if NuVox is not counted as a Fiber-based Collocator in this wire center today for the reasons cited by NuVox in its affidavit, the carrier identified by NuVox in that affidavit would be counted as a Fiber-based Collocator in NuVox's stead. Thus, the Fiber-based Collocator count remains the same, and the associated wire center designations remain the same.

Q: HOW SHOULD THE COMMISSION RULE ON THIS FACTUAL DISPUTE?

A: The Commission should rule that NuVox was a Fiber-based Collocator on March 11, 2005 in each wire center where AT&T Missouri has identified it as such. Furthermore, the Commission should rule that NuVox's Fiber-based Collocation arrangements should be included in the Fiber-based Collocator counts for the wire center designations as issue in this proceeding. If, however, the Commission agrees with NuVox's position that it should not be counted as a Fiber-based Collocator, the Commission should nevertheless approve AT&T Missouri's Fiber-based Collocator count for the ** ** wire

[104] 47 C.F.R. § 51.5 (definition of Fiber-based Collocator).

HC

center based on NuVox's admission that another carrier, which is not included in AT&T Missouri's Fiber-based Collocator count for this wire center, does qualify as a Fiber-based Collocator.

Q: DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?

A: Yes.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

PETITION FOR RECONSIDERATION

Birch Telecom, Inc.
BridgeCom International, Inc.
Broadview Networks
Eschelon Telecom, Inc.
NuVox Communications, Inc.
SNiP LiNK, LLC
XO Communications, Inc.
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SUMMARY

Joint Petitioners urge the Commission on reconsideration to make the following modifications to the rules and policies adopted in the Order on Remand ("*TRRO*") in this proceeding.

DS1 caps: The Commission should eliminate the cap on the number of DS1 transport circuits that a requesting carrier may obtain on a route.

EEL eligibility criteria: In the *TRRO*, the Commission, for the first time adopts a direct prohibition on the use of UNEs exclusively for the provision of long distance services. This new rule, which the Commission stated "already prevent[s]" most special access circuits from being converted to UNEs, has another, more far reaching effect not discussed in the *TRRO*. This rule directly prohibits the use that its EEL rules were designed to restrict, namely the use of UNE combinations to replace long distance special access circuits. The Commission's rule thus renders the EEL eligibility criteria wholly unnecessary and, to the extent that the criteria preclude services for which the Commission otherwise finds impairment, contrary to Section 251 of the Act. Therefore, on reconsideration, the Commission should eliminate the EEL-specific criteria in favor of application of its impairment criteria to the individual network elements that comprise an EEL.

Business line counts: The FCC's line count rules systematically overstate the presence of facilities based competition in the wire centers. The Commission should clarify or revise its rules to eliminate the overcount of DS1 and DS3 UNEs caused by the counting of 24 business lines for each DS1 of capacity. In addition, other adjustments to the ARMIS reporting criteria inflate the number of business lines counted for the impairment criteria. The Commission should eliminate these adjustments and require incumbent LECs to report business lines using solely the ARMIS criteria, which are uniform, closely scrutinized and more readily

verifiable than the line count methodology described in the *TRRO*. If it does not use ARMIS criteria exclusively, the Commission should permit CLECs to report actual voice switched access lines as a replacement for the adjustments that are made.

FCC transport impairment criteria: The FCC arbitrarily subjects its transport impairment test to a more lenient standard than is used for unbundled loops. As a result, as many as 40 percent of the Tier 1 transport wire centers are found erroneously to be non-impaired. On reconsideration, the Commission should require both the designated number of business lines and the presence of the specified number of fiber based collocators in order to conclude that requesting carriers are not impaired on a transport route.

Definition of affiliated carrier: The *TRRO* states that fiber based collocator counts should not include collocation by affiliates of the ILEC, and that collocations maintained by two or more affiliates should be counted as one collocator. At the time the Commission made these rulings, the possibility that the largest ILECs would acquire the two largest facilities based CLECs was not contemplated. However, the recent agreements by SBC to acquire AT&T and by Verizon to acquire MCI fundamentally change the competitive landscape and require the Commission to re-examine the basis on which it evaluates impairment for high capacity loops and transport. The changes necessary as a result of this seismic shift are far reaching, but the Commission can begin to address these changes by immediately re-examining the definition of fiber based collocator used in the rules. Because the collocator counts are supposed to identify locations where competitive facilities exist, and where unaffiliated carriers can maintain facilities without reliance on the incumbent LEC, the acquisitions of AT&T and MCI require the Commission to exclude AT&T and MCI facilities from its analysis by counting those carriers as affiliates of the respective incumbent LECs. The Commission should therefore amend its

definition of fiber based collocator to state that a company will be considered an ILEC affiliate if it has a pending application with the FCC that would, if approved, result in the company satisfying the definition of affiliate provided in Section 3 of the Act.

Changes in circumstances: The *TRRO* rules fail to account for material changes in circumstances, such as the recent agreements by the largest IXCs to be acquired by incumbent LECs. The *TRRO* unjustifiably "freezes" a finding of non-impairment once certain criteria are met, even if subsequently those criteria cease to be met. This one-sided analysis flatly contradicts the impairment analysis required by Section 252 of the Act. Therefore, on reconsideration, the Commission should permit periodic revisions to account for changes establishing impairment as well as non-impairment.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
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Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	

PETITION FOR RECONSIDERATION

Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, Inc. (collectively, "Joint Petitioners"), pursuant to 47 C.F.R. §1.429, by their attorneys, respectfully petition the Federal Communications Commission ("FCC" or "Commission") for reconsideration of certain aspects of its *Order on Remand* ("*TRRO*"),[1] released on February 4, 2005 in the above-captioned proceedings.

In this petition, Joint Petitioners seek clarification or correction of a number of aspects of the unbundling rules adopted in the *TRRO*. In so doing, Joint Petitioners seek to harmonize the Commission's rules with the objectives stated in the *TRRO*, and to revise or eliminate rules that are unsupported by the record or serve no legitimate purpose in light of other Commission findings. Joint Petitioners wish to make clear, however, that they believe many aspects of the *TRRO* are unlawful, contrary to Section 251 of the Act or otherwise arbitrary and capricious. Joint Petitioners expect that other parties may seek appellate review of these aspects

[1] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

of the Commission's decision. Nothing herein should be construed as agreement that the Commission's rules are lawful. To the contrary, Joint Petitioners reserve all rights to contest the FCC rules as intervenors in any appeals that may be filed. This petition is submitted solely to correct errors that are present in the analysis used by the Commission.

DISCUSSION

I. THE COMMISSION SHOULD ELIMINATE THE CAP ON DS1 DEDICATED TRANSPORT

At the outset, it is not clear just what cap the FCC adopted for DS1 transport. In the text of the order, the Commission held, "[o]n routes for which we determine that there is no unbundling obligation for DS3 transport, but for which impairment exists for DS1 transport, we limit the number of DS1 transport circuits that each carrier may obtain on that route to 10 circuits."[2] Based on this statement, the DS1 transport cap would apply only where requesting carriers were found to be non-impaired for DS3 transport. That is, there would be no limit on DS1 transport on any route where DS3s remained a UNE (*i.e.*, where competitors face impairment in the provision of DS3s).[3] Although the Commission does not say this explicitly, it appears that the rationale for such a limit would be to maintain consistency with the finding of non-impairment for DS3 transport. That is, a limit of 10 DS1s per route is "consistent with the pricing efficiencies of aggregating traffic,"[4] and therefore apparently stands for the point at which a requesting carrier would transition to DS3 transport facilities, where it would no longer face impairment.

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2 *TRRO* at ¶128 (emphasis added)

3 For example, a CLEC could order DS1s without a cap on routes between two Tier 3 wire centers, between a Tier 2 wire center and a Tier 3 wire center, and between a Tier 1 wire center and a Tier 3 wire center. On each of these routes, DS3 transport remains available as a UNE.

4 *Id.*

Some ILECs have taken the position that the Commission limited DS1 transport on all routes, regardless of whether the Commission found impairment or non-impairment for DS3 transport. Verizon, for example, filed tariff revisions in many of its states that would limit CLECs to 10 DS1s on any route. When challenged by CLECs on this point, Verizon contended that paragraph 128 of the *TRRO* conflicts with the rule as it appears in Appendix B.[5] Rule 51.319(e)(ii)(B) provides that "[a] requesting telecommunications carrier may obtain a maximum of ten unbundled DS1 dedicated transport circuits on each route where DS1 transport is available on an unbundled basis."[6] The rule, as interpreted by Verizon, caps DS1 transport on every DS1 route, regardless of whether impairment is found for DS3 transport. If this were the Commission's intent, however, paragraph 128 of the *TRRO* would have no meaning. At a minimum, the Commission should correct the ILECs' misinterpretation and clarify its intent in adopting the DS1 transport rule.

A. There Is No Rational Basis for the DS1 Transport Cap

Regardless of whether the DS1 cap applies to all transport routes or only some routes, there is simply no rational basis for the DS1 transport cap.

If the cap applies to all routes, as Verizon has contended, it is overbroad and irrational.[7] There does not appear to be any legitimate reason to limit DS1 transport on every

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5 *See, e.g., Reply Comments of Verizon New York in Support of its Tariff Filing Implementing the Triennial Review Remand Order*, NY PSC Case No. 05-C-0203, March 8, 2005, at ¶ 2 (arguing that paragraph 128 conflicts with rule 51.319(e)).

6 *TRRO* at p. 150; 47 C.F.R. §51.319(e)(ii)(B) (emphasis added).

7 Further, a rule adopted without any explanation would be arbitrary and capricious for that reason alone. *See Johnson v. Ashcroft*, 286 F.3d 696, 700 (3d Cir. 2002), *quoting Fertilizer Inst. v. Browner*, 163 F.3d 774, 778 (3d Cir. 1998) ("[a]lthough an agency can change or adapt its policies, it acts arbitrarily if it departs from its established precedents without 'announcing a principled reason' for the departure."); cf. *Communications and Control, Inc. v. FCC*, 374 F.3d 1329 (D.C. Cir. 2004) *citing PanAmSat Corp v. FCC*, 198 F.3d 890, 897 (D.C. Cir. 1999), *quoting Graceba Total Communications, Inc. v. FCC*,

route. Indeed, without any explanation from the Commission, it is hard to imagine the rationale that could possibly be offered for limiting on every route in the nation the quantity of UNEs that a requesting carrier can obtain. No such limit applies for DS0 loops, for example, even though higher capacity loops are available in some locations and not available in others.

Moreover, if the DS1 transport cap applied in this way, it would conflict with the DS3 transport cap. Rule 51.319(e)(iii)(B) provides that "a requesting telecommunications carrier may obtain a maximum of 12 unbundled DS3 dedicated transport circuits on each route where DS3 dedicated transport is available on an unbundled basis." If requesting carriers can obtain 12 DS3s -- the equivalent of 336 DS1s of capacity -- on a single transport route, there is no basis for limiting carriers to 10 individual DS1 circuits on that same route. While the Commission has acknowledged that it engaged in "in an act of line-drawing" with respect to the DS3 cap[8], a line that permits fewer DS1 capacity transport circuits than DS3 transport circuits is patently irrational.

If the DS1 transport cap is intended to apply only where DS3 transport has been de-listed, as paragraph 128 states, the cap is inappropriate. Paragraph 128 justifies a cap on the ground that it "is consistent with pricing efficiencies of aggregating traffic."[9] In support of this assertion, the Commission cites to three comparisons of DS1 and DS3 UNE prices, concluding that it is efficient to substitute DS3 transport for multiple DS1s.[10] The Commission's reasoning

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115 F. 3d 1038, 1041 (D.C. Cir. 1997)("[w]e do not ordinarily consider agency reasoning that 'appears nowhere in the [agency's] order'").

8 *TRO* at ¶388.

9 *TRRO* at ¶ 128.

10 *Id.* at n. 358. The Commission's price comparison assumes that DS3 UNEs are available. Yet, where the Commission finds non-impairment for DS3 transport, the ILECs' UNE obligation ends, and the DS3 rate comparison no longer is valid. A more appropriate comparison would compare the DS1 UNE rate to a non-UNE rate for DS3 transport.

is insufficient. While it may be that a DS3 UNE is cheaper than multiple DS1s at a certain crossover point, it does not follow that this price difference alone dictates whether to use DS1 or DS3 transport. For most CLECs, DS1 transport is used for circuits that are dedicated to an individual customer. They are not multiplexed, and do not aggregate traffic among multiple users. DS3 transport, on the other hand, typically is used to aggregate traffic from multiple customers, and may carry different types of services at the DS1 level (e.g., voice, data, private lines, etc.). DS3 transport is most often used by carriers that are collocated at one or both wire centers on the routes. If a carrier were to substitute a DS3 for multiple DS1 transport links, it would be required to install multiplexing equipment at both ends of the route or purchase multiplexing from the ILEC or another source. In addition, it likely would need to collocate at both ends of the route, an expensive and time consuming endeavor. As a result, it does not necessarily follow that it will be more efficient to substitute a DS3 simply because the carrier has a specified number of DS1 circuits.

B. Application Of A DS1 Transport Cap To DS1 EELs Would Undermine The Use Of EELs

DS1 transport is used most often in connection with a DS1/DS1 EEL. In such a configuration, the CLEC purchases a UNE loop and UNE transport (where impairment exists) in order to serve a particular customer located at a point beyond the CLEC's network. The EEL, like its name implies, is in this configuration an "extended loop." As such, it already is subjected to the loop impairment rules, include the limit on the number of DS1 loops that can be obtained at a particular customer location. If the dedicated transport cap also were to apply to these EELs, it would substantially undermine the availability of non-multiplexed DS1 EELs.

The Commission has previously found that EELs are efficient network arrangements which extend the reach of requesting carriers' networks, save collocation space

and reduce collocation costs, thereby allowing carriers to serve customers they otherwise may be unable to serve.[11] The Commission has also found that EELs promote innovation by allowing carriers to offer advanced services over those combinations.[12] Application of the DS1 dedicated transport cap to DS1/DS1 EELs will undermine the Commission's goal of promoting this form of facilities-based competition.

If the transport cap applied, it would render the DS1 loop cap superfluous. If a requesting carrier were limited to 10 DS1 transport circuits per route, then it would not be able to provision more than 10 DS1/DS1 EELs to customers served by any given wire center. This in effect would limit the requesting carrier to 10 DS1 loops in the entire wire center, rather than 10 loops per customer location. No reading of impairment could justify limiting requesting carrier to only 10 DS1 EELs per wire center, however. Indeed, if this restriction applied, the primary benefits of EELs would be lost. Carriers would have to establish hundreds of additional collocations, at significant time and expense. Incumbent LECs may again face the possibility of collocation exhaust, as carriers would be forced to replace their efficient EEL arrangements with loop plus collocation arrangements instead.

One solution to this problem would be to eliminate the cap on DS1 dedicated transport when a requesting carrier provides non-multiplexed DS1 EELs. That is, an order for a non-multiplexed DS1 EEL would be subject to any caps applicable to DS1 loops. It should not also be subject to a cap on the number of transport arrangements available.

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11 *TRO* at ¶576.

12 *Id.*

II. THE COMMISSION SHOULD ELIMINATE THE EEL ELIGIBILITY CRITERIA

A. Reconsideration of the EEL Eligibility Criteria is Appropriate

In the *TRO*, the Commission adopted new eligibility criteria for CLECs seeking to obtain access to EELs. These eligibility criteria consisted of a series of "architectural" requirements intended to ensure that a requesting carrier used EELs to provide a "significant amount of local service" over the facility. In *USTA II*, the court did not vacate this determination, but it remanded the eligibility criteria for the Commission's consideration in light of the court's vacatur of the "qualifying services" requirement.[13]

In the *TRRO*, the Commission re-adopted the EEL eligibility criteria without change. The Commission specifically noted that it "[did] not disturb" its EEL rules and declined "to make any changes [to the EEL rules] at this time."[14] Further, the Commission considered the certification and auditing rules governing access to EELs and decided to retain those requirements.[15]

These decisions to re-adopt the EEL architectural criteria are appropriate for reconsideration at this time.

B. The *TRRO* Removed the Need for the EEL Eligibility Criteria

In the *TRRO*, the Commission for the first time adopts a direct prohibition on the use of UNEs exclusively for the provision of long distance services.[16] This new rule, which the Commission stated "already prevent[s]" most special access circuits from being converted to

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13 *USTA II*, 359 F.3d at 590-93 (remanding EEL rules for further consideration in light of the court's order.

14 *TRRO* at nn. 244, 644.

15 *Id.* at n. 659.

16 *TRRO* at ¶ 36.

UNEs, has another, more far reaching effect not discussed in the *TRRO*. This rule directly prohibits the use that its EEL rules were designed to restrict, namely the use of UNE combinations to replace long distance special access circuits. The Commission's rule thus renders the EEL eligibility criteria wholly unnecessary and, to the extent that it precludes services for which the Commission otherwise finds impairment, renders the rules contrary to Section 251 of the Act. Therefore, on reconsideration, the Commission should eliminate the EEL-specific criteria in favor of application of its impairment criteria to the individual network elements that comprise an EEL.

At the time the EEL eligibility criteria were first adopted, they were justified as necessary to protect against the substitution of special access used by IXCs to provide long distance services.[17] In the *TRO*, the Commission concluded that additional EEL eligibility criteria were necessary to prevent "gaming" by providers of non-qualifying services.[18] The Commission explained that by "gaming" it meant "the case of *a provider of exclusively non-qualifying service* obtaining UNE access in order to obtain favorable rates or otherwise engage in regulatory arbitrage." (emphasis added).[19] The non-qualifying service to which the Commission referred was long distance service.

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17 *See, In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Supplemental Order Clarification, CC Docket No. 96-98 (rel. June 2, 2002) ("*Supplemental Order Clarification*") at ¶2 *citing, UNE Remand Order* at ¶¶485-489 (concerns that universal service could be harmed if we were to allow interexchange carriers to use the incumbent's network without paying their assigned share of the incumbent's costs normally recovered through access charges).

18 *TRO* at ¶591.

19 *Id.* (the Commission determining that it was "under no obligation to make any changes to them at this time").

In response to the *USTA II* remand, the Commission has now prohibited directly the use of any UNE to provide exclusively long distance service.[20] This rule eliminates the need for an EEL eligibility standard in addition to Rule 51.309(b). The Commission confirmed as much when it denied ILEC requests to prohibit all conversions of special access to UNEs.[21] In paragraph 230 of the *TRRO*, the Commission stated that "the rules we adopt today already prevent the use of UNEs...where carriers would use them exclusively to provide long distance services or mobile wireless services."[22] This finding, the Commission ruled, means that the special access circuits that the ILECs cited "are therefore largely shielded already from potential conversion to UNEs."[23] These same conclusions show that the EEL eligibility criteria are superfluous and should be eliminated.

C. Retention of the EELs Eligibility Criteria Harms Requesting Carriers

Continued retention of the EEL eligibility criteria harms requesting carriers. The criteria are detailed, multi-part "architectural" restrictions which assume a certain configuration for the CLEC's provision of service. These criteria, though intended to be an improvement over the "intrusive [and] unworkable" safe harbor restrictions,[24] still present significant compliance issues.

Joint Petitioners note that they have not yet agreed on contractual revisions implementing the architectural restrictions. Negotiations to implement these rules have led to significant disputes as to the language appropriate to implement the Commission's rules. These

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20 *TRRO* at ¶ 36; 47 C.F.R. §51.309(b).

21 *See TRRO* ¶ 230.

22 *Id.*. (emphasis added)

23 *Id.*.

24 *See USTA II*, 359 F.3d at 591 (characterizing the Commission's replacement of the safe harbor rules).

contractual disputes are only the beginning of the costs that are imposed by the continued application of any EEL-specific eligibility criteria. Application of the rules will impose costs on carriers and ILECs alike in terms of ordering procedures and audits of possible compliance. Indeed, some of the Joint Petitioners already have expended considerable resources in audits initiated by incumbent LECs. Although those audits have not identified any use of EELs for exclusively long distance services, the audits have diverted company resources and imposed substantial cost. If this past practice is a guide, compliance with the architectural criteria also will carry significant burdens for ILECs and CLECs alike.

Moreover, the EEL criteria at best were designed to prevent the use of UNEs for long distance service. Now that this use has been prohibited directly, the criteria either are entirely unnecessary (preventing the same uses that Rule 51.309(b) prevents) or act to prevent the use of UNEs in ways for which requesting carriers are impaired. In either instance, the criteria serve no legitimate purpose and should be eliminated.

III. THE LINE COUNT RULES ERRONEOUSLY OVERSTATE THE NUMBER OF BUSINESS LINES IN A WIRE CENTER

The *TRRO* makes extensive use of business line counts in its analysis of impairment for loops and transport. The Commission reasoned that business line density "is an administrable proxy for determining where significant revenues are available sufficient for competitors to deploy transport facilities."[25] It defined a "business line" for these purposes as ARMIS 43-08 business lines, plus business UNE-P, plus UNE loops.[26]

Although the Commission used ARMIS rules as the starting point for its business line counts, the rules adjust ARMIS data in ways that erroneously inflate the number of business

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25 TRRO ¶ 103; *see id.* at ¶ 161 (loops).

26 *Id.* at ¶ 105.

lines reported in each wire center. These errors in turn overstate the number of wire centers that meet one or more of the FCC's impairment criteria and result in greater restrictions on UNE availability than are warranted.

A. The Commission Erred by Counting DS1s and other Digital Lines on a per 64 kbps-equivalent basis

The most egregious over counting of business lines results from the Commission's treatment of digital access lines. Rule 51.5 states that business line tallies "shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line." Thus, a DS1 is counted as 24 "lines;" a DS3 is counted as 672 "lines," etc.

This seemingly innocuous adjustment has had a profound impact on the ILECs' claimed lists of non-impaired wire centers. For example, on December 8, 2004, BellSouth reported business lines to the Commission using the ARMIS methodology.[27] In that filing, BellSouth reported 3 wire centers with greater than 60,000 business access lines.[28] On February 18, 2005, however, BellSouth reported wire centers using the new methodology described in the *TRRO*.[29] In that filing, the number of wire centers exceeding 60,000 business access lines skyrocketed to 24.[30] Whereas BellSouth previously listed its largest wire center as having 81,282 business lines, its post-*TRRO* list identifies this wire center as having 152,484 lines – an

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27 Letter from Bennett L. Ross, BellSouth, to Marlene H. Dortch, WC Docket No. 04-313, filed Dec. 7, 2004, *corrected by errata*, Dec. 10, 2004.

28 *Id.* at Att. 1, p. 1. The three central offices were reported to have business line counts of: 81,282, 64,906, and 63,929 lines.

29 Letter from Bennett L. Ross, BellSouth, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, filed February 18, 2005.

30 *Id.* at Ex. 1. The wire centers exceeding 60,000 lines are indicated by an "X" in the column marked "High Capacity Loops: No Impairment for DS1." After numerous inquiries from CLECs, BellSouth provided comparisons of its December 7 and February 18 filings. *See* BellSouth Carrier Notification, SN 91085065, March 11, 2005 ("March 11 Notification").

increase of over 71,000 lines.[31] In all, 30 of the wire centers reported by BellSouth doubled or more than doubled in size between the December 7 filing and the February 18 wire center list.[32]

Now, we understand that the degree of this inflation may have been overstated. In an *ex parte* letter filed with the Commission on March 23, BellSouth states that it "recently discovered an error in the mathematical formula that was used to count retail digital access lines on a per 64 kbps-equivalent basis."[33] BellSouth admits that as a result of this error, the number of business lines was overstated and "thus the wire centers meeting the Commission's nonimpairment thresholds were not correctly identified."[34] This mathematical error is not explained, nor is the magnitude of the incorrect identification disclosed by BellSouth. Moreover, although it asserts that the mathematical error did not affect the count of UNE-L loops, BellSouth offers no explanation of the methodology used to count such loops.

BellSouth is not the only ILEC whose line counts are inflated by the 64 kbps-equivalents rule. SBC also filed lists that include an inordinate quantity of UNE-L lines.[35] SBC

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31 *March 11 Notification* at Att. 2 (WC CLLI ATLNGACS (Courtland Street)).

32 *March 11 Notification* at Att. 2. The wire centers that doubled in line counts were: ATLNGAPP, BRHMALMT, CHRLNCCA, CLMASCSN, DNWDGAMA, GNVLSCDT, JCSNMSCP, JCVLFLCL, MIAMFLGR, NRCRGAMA, SMYRGAPF, ATLNGASS, BTRGLAGW, CHMBGAMA, SHPTLAMA, SVNHGABS, ATHNGAMA, CHRLNCLP, CHRLNCRE, CHRLNCUN, JCVLFLSM, MACNGAMT, NDADFLGG, BRHMALOX, KNNRLABR, LKCHLADT, LLBNGAMA, MNPLSCES, MTGMALDA, and NSVLTNBW.

33 Letter from Bennett L. Ross, BellSouth, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, March 23, 2005 ("March 23 Error Notification").

34 *Id.*

35 *See* Letter from James C. Smith, SBC, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, February 18, 2005. SBC claimed 207 wire centers meeting the Tier 1 threshold for dedicated transport and 108 wire centers meeting the Tier 2 transport threshold. *Id.* at Att. A and B. It also claimed 28 wire centers meeting the DS1 loop thresholds and 82 wire centers meeting the DS3 loop thresholds. *Id.* at Att. C and D.

made limited supporting data available to CLECs.[36] That data is designated as confidential, so Joint Petitioners will avoid disclosing the details of its analysis here. However, based on counsel's review of the data, we estimate that 43 percent of the Tier 1 loop wire centers (12 of the 28 claimed) and 25 percent of the Tier 1 transport wire centers (53 of 207) are claimed to meet the threshold solely as a result of the 64 kbps-equivalents rule.

1. The 64 kbps-equivalents rules is inaccurate.

The 64 kbps-equivalents rules counts every DS1 provided by CLECs as 24 business lines. This assumption dramatically overstates the number of business lines served by CLECs.

First 24 "lines" represents the maximum number of channels supported by a DS1. Few, if any, DS1s will utilize all of the available channels for voice grade switched access lines. Some channels are used for signaling and control functions for the traffic. Some channels are used for data services such as Internet bandwidth. Some DS1s are not channelized at all, or contain multiple unused channels.

Moreover, the 64 kbps-equivalents rule assumes that a DS1 UNE always is used for switched access services. Yet, CLECs can and do use DS1 UNEs for non-switched private line services. CLECs also sometimes use a full DS1 UNE to provide Internet bandwidth, which also is not a switched access service. Such services are not to be included in the business line

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36 SBC claimed that its supporting data was subject to the protective order in this proceeding, and that the data was "copy prohibited" material. *See* Letter from Thomas F. Hughes, SBC, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket No. 04-313, March 3, 2005. Therefore, parties had to examine the data at the offices of SBC's outside counsel. Counsel was prohibited by SBC from making any copies for later examination, thereby making it harder to analyze the data provided.

counts at all, according to the definition contained in Section 51.5 of the rules.[37] But, the 64 kbps-equivalents rule results in the inclusion of these "lines" when provided by a CLEC over UNE facilities.

2. The ARMIS rules do not count digital lines using the 64 kbps-equivalents rule.

For ARMIS reporting purposes, the Commission does not use the 64 kbps-equivalents rule. In the "main access line" category, ARMIS instructions require reporting carriers to identify both analog and digital switched access lines they provide to end users. The count of digital switched access lines includes "digital switched access lines provided over 64 kbps, 56 kbps or ISDN B channels or other equivalent communications channels that are circuit-switched and can carry either voice or data." Notably, this definition excludes channels that are not circuit-switched and channels that carry data only. Further, BellSouth confirms that ARMIS requires the reporting of activated channels only; unactivated channel capacity is not counted for ARMIS purposes.[38]

3. Carriers may not assess end user charges using the 64 kbps-equivalents rule.

The 64 kbps-equivalents rule also is not used as a means to bill end user charges. For example, in the case of the subscriber line charge, the Commission's rules permit carriers to assess a multi-line SLC on customers receiving ISDN PRI services. The multi-line SLC is capped at a maximum of 5 lines, even though these services can carry up to 24 64 kbps-

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37 47 C.F.R. § 51.5 ("business line tallies (1) shall include only those access lines connecting end user customers with incumbent LEC end offices for switched services, (2) shall not include non-switched special access lines ...").

38 *March 11 Notification*, at n.3 ("For ARMIS reporting purposes, the FCC requires an adjustment factor be applied to Basic Rate and Primary Rate ISDN lines. However, no similar adjustment factor is applied to other digital switched access lines for purposes of ARMIS reporting *and only activated capacity for such digital lines is reported in ARMIS*") (emphasis added).

equivalent channels.[39] The same limitation applies to Primary Interexchange Carrier Charges ("PICCs") for these services.[40] Similarly, the Commission's proposed new Form 525, which will be used for the reporting of end user lines served by eligible telecommunications carriers ("ETCs"), proposes that carriers report ISDN PRI circuits as 5 lines.[41]

B. Other Adjustments Also Inflate the ARMIS Line Counts

In addition to the 64 kbps-equivalents rule, other adjustments made, or the elimination of ARMIS adjustments, act to increase the number of business lines counted for purposes of the impairment tests. First, the ARMIS rules exclude non-switched retail lines,[42] but the Commission counts all UNE-L lines provided to CLECs. This would include UNE loops used for non-switched access purposes, such as Internet access or local private lines. Second, the Commission separately counts business access lines and residential lines in the ARMIS data.[43] All UNE-L lines are included, however, regardless of whether they are used to serve business or residential customers. According to the FCC's most recent Form 477 data, 65 percent of CLEC lines are used to serve residential and small business customers.[44] The ILEC line counts erroneously include UNE-L lines that are used to serve residential customers.

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39 *See* 47 C.F.R. § 69.104(p). ISDN BRI service is limited to one SLC. *Id.*

40 47 C.F.R. § 69.153(d). For Centrex lines, local exchange carriers may assess no more than 9 PICCs. *Id.*, § 69.153(e).

41 FCC Form 525, Instructions (draft) at 8 (limiting Column 31, multi-line business lines, to the number of lines assessed end user common line charges pursuant to 47 C.F.R. § 69.104).

42 FCC Report 43-08 – Report Definition, December 2004, at 18 (limiting lines reported to switched access lines).

43 *Id.* at 21. Rule 51.5 counts only business access lines for the impairment criteria.

44 FCC Local Competition Data, December 2004 release (data as of June 30, 2004) at Table 11.

C. The Commission Should Compute Lines Based only on ARMIS Methodology

As shown above, the Commission's adjustments to ARMIS data substantially inflate the number of business access lines reported in each wire center. Solutions to these errors would require the Commission to adopt new proxies, to consider new data sources or to obtain additional information from ILECs and/or CLECs. Any of these solutions could require the collection of extensive new evidence and may require additional procedures before the Commission could implement a correction.

All of that could be avoided, however, if the Commission eliminates the reliance on non-ARMIS data to obtain business access line counts. The Commission should eliminate the erroneous adjustments and require incumbent LECs to report business lines using solely the ARMIS criteria. This solution furthers the Commission's goal of using easy to administer proxies to analyze impairment. The ARMIS data are collected and reported using uniform rules, have been closely scrutinized by the Commission for over a decade and as a result are more predictable than the adjustments made by the Commission. Further, the ARMIS data are more readily verifiable by CLECs than the line count methodology described in the *TRRO*. If the Commission were to use ARMIS data, CLECs could quickly and easily verify that information by comparing it to other reported data using the same methodology.

Moreover, this solution would avoid the errors such as those recently disclosed by BellSouth. In its March 23 letter to Jeff Carlisle, BellSouth disclosed that it had discovered an "error in the mathematical formula" used to convert ARMIS data to count retail digital access lines.[45] The cause and extent of this mathematical error is unknown at this time. However, if the Commission were to eliminate its adjustments entirely, the computation that BellSouth was

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[45] *March 23 Error Notification* at 1.

making would not have been necessary, and, more importantly, CLECs would not be required to examine and verify BellSouth's methodologies.

If it does not use ARMIS criteria exclusively, the Commission should permit CLECs to report actual voice switched access circuits as a replacement for the adjustments that are made. This process could be modeled on other instances of data exchange between carriers, such as occurred in the payphone compensation context for calls routed by facilities-based carriers to switch-based resellers. For a time under those rules, facilities-based carriers required their reseller customers to report the number of completed calls that resulted from the call attempts transferred by the facilities-based carrier to the reseller. Using that as a model, the ILEC could report to each CLEC the number of UNE-L lines that are provided to the CLEC by wire center. The CLEC then could identify the number of channels that were used to provide voice switched access services in those wire centers. If a CLEC failed to report, the ILEC would be permitted to use a Commission-approved proxy for the number of lines served using these loops. Such a system, though it imposes a burden on the CLEC, would be preferable to the gross over counting that results from the Commission's use of the 64 kbps-equivalents rule and other adjustments.

IV. ONLY A TEST THAT REQUIRES A MINIMUM NUMBER OF FIBER COLLOCATORS AND A MINIMUM NUMBER OF BUSINESS LINES, AS THE LOOP TESTS REQUIRE, CAN ACCURATELY CAPTURE THE EXISTENCE OR NON-EXISTENCE OF IMPAIRMENT FOR DEDICATED TRANSPORT

The Commission is fundamentally inconsistent in its treatment of inference-based proxies for the unbundling of loops and transport. With respect to dedicated transport, the Commission establishes a test that permits a finding of non-impairment based on either (a) a certain number of fiber based collocators or (b) a certain number of business lines in the wire center. Rule 51.319(e)(3)(i) establishes "Tier 1" wire centers for transport as "those incumbent

LEC wire centers that contain at least four fiber-based collocators, at least 38,000 business lines, or both."[46] Similarly, Rule 51.319(e)(3)(ii) provides that "Tier 2 wire centers are those incumbent LEC wire centers that that are not Tier I wire centers, but contain at least 3 fiber-based collocators, at least 24,000 business line, or both."[47] In other words, satisfaction of either criterion will be enough to find non-impairment.

The Commission took the opposite approach to the same question with respect to unbundled loops. The Commission's loop impairment test "requires both a minimum number of business lines served by a wire center and the presence of a minimum number of fiber based collocators to show that requesting carriers are not impaired."[48] The FCC explained that "high business line counts and the presence of fiber-based collocators, when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely."[49]

The Commission acknowledges this disparity in treatment between loops and transport. But, its rationale for distinguishing between the two is self-contradictory. In the case of transport, the Commission explained that "[a]lthough in many instances, wire centers will satisfy or fail to satisfy both [the collocator and business line] thresholds, we conclude that applying these measures in a disjunctive tandem [*i.e.*, either fiber based collocators or business

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46 47 C.F.R. §51.319(e)(3)(i).

47 47 C.F.R. §51.319(e)(3)(ii).

48 *Id.* at ¶168 (emphasis added). *See* 47 C.F.R. §51.319(a)(4)(i) ("an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS1 loop on an unbundled basis to any building not served by a wire center with at least 60,000 business lines and at least four fiber-based collocators"); *see also* 47 C.F.R. §51.319(a)(5)(i) ("an incumbent LEC shall provide a requesting telecommunications carrier with nondiscriminatory access to a DS3 loop on an unbundled basis to any building not served by a wire center with at least 38,000 business lines and at least four fiber-based collocators").

49 *Id.* at ¶167.

lines] will better capture actual and potential deployment that any single measure."[50] It relies squarely on the potential deployment rationale as the reason for rejecting proposals to analyze transport in the conjunctive (i.e., requiring both collocators and business lines). Under these tests, the Commission claimed, "the ability to capture wire centers with a high potential for competitive entry would be lost."[51]

In the case of unbundled loops, on the other hand, the Commission does not claim that its test fails to account for potential deployment. In fact, it claims that it *must* require both fiber based collocators and a minimum number of business lines precisely because it needs to capture the potential for loop deployment. The Commission explained that both fiber based collocators and business lines were required for its loop test because the alternative, a disjunctive test (where either one would sufficient) "would not account for both revenue opportunities and the scope of deployment of fiber rings, and therefore would deny unbundling where carriers are impaired...."[52]

Ultimately, a transport test that looks at either fiber-based collocators or business lines, but not both in tandem, cannot adequately predict where requesting carriers are not impaired. As the Commission explained in discussing its loop test, either element in isolation fails to consider all of the factors affecting impairment. A high number of collocators but few business lines may indicate that the wire center "does not itself offer revenues sufficient to justify competitive deployment of high capacity loops."[53] Alternatively, a high number of

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50 *TRRO* at ¶ 94.

51 *Id.* at n. 266.

52 *Id.*

53 *Id.* ¶ 168.

business lines but few fiber based collocators suggests the presence of another factor impeding deployment, such as high costs or the lack of suitable facilities in the area.[54]

The same is the case for transport. A high number of fiber collocators may only indicate that the wire center is close to rights of way or close to other wire centers. It does not say anything about the level of demand for transport to or from that office.[55] A high number of business lines may indicate potential revenue or a potential need for transport, but it does not address whether other factors such as access to rights of way or the cost of deploying fiber impair a CLEC's ability to deploy the needed facilities. This is entirely consistent with the impairment factors the Commission identified for dedicated transport. In the *Triennial Review* proceeding, the Commission found that among the substantial fixed and sunk costs associated with deploying transport were collocation costs, the cost of fiber, the cost of burying fiber or attaching the fiber to poles, the cost of optronics and the cost of obtaining rights of way.[56] As the Commission explained, each of these factors can vary based on the individual situation.[57] Not surprisingly, therefore, the combination of these factors is not captured solely by the presence of fiber based collocators or the existence of a specified number of business lines in a wire center.

Finally, it is not true that a conjunctive test ignores potential deployment. In the context of transport, the Commission seems to believe that business lines alone represent the potential for deployment of transport. But this is not the case. For one thing, the RBOC data submitted to the Commission showed that at levels approximating the FCC's 38,000 line and

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54 *Id.*

55 More importantly, since the Commission did not require that collocators be "matched" in the wire centers, it could indicate an entirely separate ring that is not connected to other wire centers with the minimum number of collocators.

56 *TRO*, ¶ *371.*

57 *Id.*

24,000 line thresholds, a significant number of wire centers still did not have multiple fiber based collocators.[58] Yet, as the Commission recognized with respect to loops, the potential for deployment depends upon a combination of both revenue opportunities and the scope of other facilities already deployed in the area.[59] A test that examines both factors in tandem is the only test that can assess whether it is both desirable and possible to deploy facilities to the wire center.

Indeed, as a result of the Commission's arbitrary "line drawing,"[60] as many as 40 percent of the Tier 1 transport wire centers are found erroneously to be non-impaired. This estimate is based on a review of the evidence submitted on a confidential basis by SBC, which is discussed above. Upon review of the backup data, 76 of the 207 wire centers (36.7 percent) alleged by SBC to meet the Tier 1 transport thresholds qualify solely based on a number of facilities-based collocators; these 76 each have fewer than the threshold number of business access lines. If other RBOC data are consistent with the SBC data, as many as 40 percent of the transport wire centers may qualify solely because the FCC erroneously required satisfaction of only one of its two criteria for determining non-impairment.

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58 *TRRO*, ¶ 114. This estimate itself proved to overstate the presence of facilities based collocators. As the RBOC filings after the *TRRO* demonstrated, most of the RBOCs counted fiber-based collocations in their December submissions, not fiber-based collocators. *See, e.g.*, Letter from Susanne A. Guyer, Verizon, to Jeffrey J. Carlisle, Chief, Wireline Competition Bureau, WC Docket 04-313, February 18, 2005 at 1 ("Verizon has amended its count ... to reflect the number of providers rather than the number of collocation arrangements"). Multiple collocations by the same or affiliated carriers thus inflated the data on which the Commission relied.

59 *TRRO*, n. 266.

60 *Id* at ¶169 ("...the Commission may exercise line-drawing discretion when rendering determinations based on agency expertise, our reading of the record before us, and a desire to provide an easily implemented and reasonable bright-line rule to guide the industry.").

V. THE COMMISSION SHOULD REVISE ITS DEFINITION OF FIBER BASED COLLOCATORS TO EXCLUDE ENTITIES THAT HAVE AN AGREEMENT TO BE ACQUIRED BY OR MERGE WITH AN ILEC

At the time the record was compiled in the *Triennial Review Remand*, the possibility of merger agreements like those entered into by AT&T and MCI were not on the radar screen. The *TRRO* established fiber-based collocation as a factor in determining impairment for loops and for transport. A fiber based collocator was defined as any carrier, unaffiliated with the incumbent LEC that maintains a collocation arrangement and meets certain other criteria demonstrating the deployment of non-ILEC fiber to the collocation.[61]

A. The Recent AT&T and MCI Merger Agreements Fundamentally Alter the Landscape of Competitive Facilities Deployment

The *TRRO* states that fiber based collocator counts should not include collocation by affiliates of the ILEC, and that collocations maintained by two or more affiliates should be counted as one collocator.[62] At the time the Commission made these rulings, the possibility that the largest ILECs would acquire the two largest facilities based CLECs was not contemplated. However, the recent agreements by SBC to acquire AT&T and by Verizon to acquire MCI fundamentally change the competitive landscape and require the Commission to re-examine the basis on which it evaluates impairment for high capacity loops and transport. The changes necessary as a result of this seismic shift are far reaching, but the Commission can begin to address these changes by immediately re-examining the definition of fiber based collocator used in the rules.

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61 47 C.F.R. § 51.5 (definitions); *see TRRO* ¶ 102.

62 47 C.F.R. § 51.5 (definition of fiber based collocator).

B. The Commission's Definition of Affiliate must be Broadened to Include Agreements to Merge as well as Consummated Mergers

The Commission is obligated to take this changed circumstance into account now, and to revise its impairment findings accordingly. The Commission has ruled that affiliates of the incumbent LEC should not count toward the number of fiber based collocators in a wire center. The Commission should further clarify that, in the case of a carrier that has entered into a binding agreement to merge with, acquire or otherwise affiliate with an incumbent LEC, that carrier will be considered an affiliate for purposes of the rule.

This clarification is consistent with the manner in which the Commission treats affiliations in other contexts under its rules. For example, under the competitive bidding rules, AT&T and MCI would be considered ILEC affiliates. Section 1.2110 of rules counts agreements to merge as having a present effect:

> Affiliation arising under stock options, convertible debentures and agreements to merge. Except as set forth in paragraph (c)(2)(ii)(A)(2) of this section, stock options, convertible debentures and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures and agreements are generally treated as though the rights held thereunder had been exercised.[63]

For similar reasons, the AT&T and MCI agreements should constitute a present affiliation under the impairment rules.

The Commission's impairment findings emphasize that its objective in counting fiber based collocators is to identify competitive facilities that are available in the market or potentially could be built. For example, the Commission stated that, it in establishing its DS1 loop impairment test it looked to "whether it is likely that other competitive carriers have already

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63 47 C.F.R. § 1.2110(c)(5)(v).

deployed or will deploy such high-capacity facilities to buildings throughout the wire center serving area, thus making DS1-level use of those deployed facilities potentially viable."[64] As a result of the merger agreements, the Commission can no longer assume that AT&T and MCI facilities are competitive facilities in the market. These facilities no longer will need to be supported solely by competitive services that they could offer to customers in the market. Thus, they become unlike the facilities that CLECs must use to provide service, which must be supported only by the business that CLECs can provide in competition with the ILEC. Further, the assumption that these facilities are available to competitors no longer is valid. Instead, these facilities will become like any other ILEC facility – available only at ILEC-controlled rates and terms.

Because the collocator counts are supposed to identify locations where competitive facilities exist, and where unaffiliated carriers can maintain facilities without reliance on the incumbent LEC, the acquisitions of AT&T and MCI require the Commission to exclude AT&T and MCI facilities from its analysis by counting those carriers as affiliates of the respective incumbent LECs. The Commission should therefore amend its definition of fiber based collocator to state that a company will be considered an ILEC affiliate if it has a pending application with the FCC that would, if approved, result in the company satisfying the definition of affiliate provided in Section 3 of the Act.

VI. THE COMMISSION MUST REVISE ITS IMPAIRMENT ANALYSES TO REFLECT CHANGES, WHETHER THEY INDICATE IMPAIRMENT OR NON-IMPAIRMENT

The *TRRO* fails to account for material changes in circumstances, such as the recent agreements by the largest IXCs to be acquired by incumbent LECs. Failing to account for

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64 *Id.*

such significant changes in the telecommunications industry will have a material adverse effect upon requesting carriers' ability to obtain access to ILEC UNEs. The impact will be most evident if the Commission permits Verizon and SBC to count the fiber-based collocations of MCI's and AT&T's local exchange affiliates and then "freeze" such counts before it completes its acquisitions of the carriers.

The *TRRO* unjustifiably "freezes" a finding of non-impairment once the transport criteria are met, even if subsequently those criteria cease to be met. In the *TRRO*, the Commission held that

> once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center.[65]

This one-sided analysis flatly contradicts the impairment analysis required by Section 251(d)(2) of the Act. Therefore, on reconsideration, the Commission should (1) treat agreements to become affiliated the same as actual affiliate as of the time the agreement is made and (2) should permit periodic revisions to account for changes establishing impairment as well as non-impairment.

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65 47 C.F.R. § 51.319(e)(3)(i); *see also id.* § 51.319(3)(ii) (Tier 2 transport).

CONCLUSION

In light of the foregoing, Joint Petitioners request that the Commission reconsider those aspects of the *TRRO* provided for herein.

Respectfully submitted,

By: _____

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February 18, 2005

VIA ELECTRONIC SUBMISSION
Mr. Jeffrey J. Carlisle
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Memorandum of Ex Parte Presentation
WC Docket 04-313, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers

Dear Mr. Carlisle:

In response to your February 4, 2005 letter, SBC is submitting a list of wire centers[1] that meet the non-impairment thresholds established by the Commission in the *Triennial Review Remand Order*. Specifically, A - D attachments identify offices that meet the criteria[2] established by CFR § 51.319:

- Attachment A includes a list of CLLI codes for Tier 1 wire centers that contain at least four fiber based collocators, at least 38,000 business lines, or both. It also includes tandem switching locations that have no line side switching facilities. Pursuant to CFR § 51.319(e)(2)(ii) and CFR § 51.319(e)(2)(iii) there is no impairment for DS1 and DS3 transport on routes connecting these wire centers.
- Attachment B includes a list of CLLI codes for Tier 2 wire centers that contain at least three fiber based collocators, at least 24,000 business lines, or both and are not included as Tier 1 wire centers. Pursuant to CFR § 51.319(e)(2)(iii) there is no impairment for DS3 transport on routes connecting these wire centers and on routes connecting these wire centers with any of the Tier 1 wire centers identified in Attachment A.

[1] As defined in CFR § 51.5 - A wire center is the location of an incumbent LEC local switching facility containing one or more central offices.

[2] The wire center business line data includes retail business, resale, and coin lines from the 2003 ARMIS 43.08 report and UNE-P business lines, stand alone UNE loops, and EELs adjusted for 64 kbps-equivalents. SBC's December 7 and December 10, 2004 filings used different criteria that did not account for voice grade equivalents for the UNE lines (CFR § 51.5). SBC also performed a physical inventory of CLEC fiber collocation pursuant to the guidelines provided by the Commission's order in wire centers meeting these criteria.

- Attachment C includes a list of CLLI codes for wire centers that meet the non-impairment threshold for DS1 loops. These wire centers contain at least four fiber based collocators and at least 60,000 business lines. Pursuant to CFR § 51.319(a)(4) there is no impairment for DS1 loops in these wire centers.
- Attachment D includes a list of CLLI codes for wire centers that meet the non-impairment threshold for DS3 loops. These wire centers contain at least four fiber based collocators and at least 38,000 business lines. Pursuant to CFR § 51.319(a)(5) there is no impairment for DS3 loops in these wire centers.

Additionally, you requested information on Tier 3 wire centers as defined by the Commission pursuant to CFR § 51.319(e)(3)(iii). Those wire centers are contained in Attachment E to this letter.

SBC provides this information publicly to assist the Commission as it moves forward in the implementation of the new rules.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter and the attachments are being electronically filed. I ask that this letter be placed in the files for the proceedings identified above.

Please call me should you have any questions.

Sincerely,

/s/ James C. Smith

CC: Michelle Carey
Tom Navin
Jeremy Miller
Ian Dillner

Federal Communications Commission
Washington, D.C. 20554

February 4, 2005

Via Facsimile and First Class Mail

James C. Smith
Senior Vice President
SBC
1401 I Street, N.W., Suite 1100
Washington DC 20005

Re: Unbundled Access to Network Elements, WC Docket No. 04-313; Review of Section 251 Unbundling Obligations for Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Mr. Smith:

On February 4, 2005, the Commission released its *Triennial Review Remand Order*, adopting rules governing the unbundling obligations of incumbent LECs regarding, among other things, dedicated transport and high-capacity loops.[1] In crafting impairment thresholds for these elements that relied on readily ascertainable, quantitative criteria, the Commission sought to facilitate prompt implementation of its revised rules, and to minimize disputes regarding the scope of an incumbent LEC's unbundling obligations in any particular case. The Bureau is mindful of the need for certainty within the industry regarding the scope of unbundling obligations. Such certainty depends on the timely incorporation of the *Triennial Review Remand Order*'s fact-dependent rules into revised interconnection agreements. To this end, we ask that you provide the Bureau a list identifying by Common Language Location Identifier (CLLI) code [2] which wire centers in your company's operating areas satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport, and identifying by CLLI code the wire centers that satisfy the nonimpairment thresholds for DS1 and DS3 loops.[3] We ask that you submit this information into the above-referenced dockets by February 18, 2005.

The Bureau believes that this information will expedite the implementation of the Commission's rules implementing the Act. I thank you in advance for your prompt reply to this request.

Sincerely,

/s/

Jeffrey J. Carlisle
Chief, Wireline Competition Bureau

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[1] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand (*Triennial Review Remand Order*).

[2] The CLLI code is an eight character code that identifies a particular wire center.

[3] *Id.* at para. 120 (defining Tier 1 wire centers); *id.* at para. 126 (defining Tier 2 wire centers); *id.* at para. 131 (defining Tier 3 wire centers); *id.* at para. 185 (defining wire center nonimpairment threshold for DS3 loops); *id.* at para. 189 (defining wire center nonimpairment threshold for DS1 loops); *see also id.*, App. B, 47 C.F.R. §§ 51.319(a)(4)(i), (a)(5)(i), (e)(3).