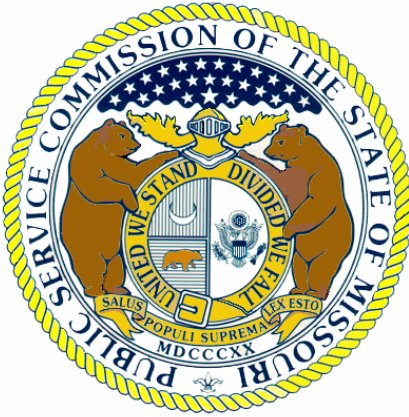


**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**



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

REPORT AND ORDER

Issue Date: March 31, 2008

Effective Date: April 10, 2008

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APPEARANCES

Timothy P. Leahy, Leo J. Bub and Robert J. Gryzmala, SBC Missouri, One AT&T Center, Room 3516, St. Louis, Missouri 63101. Attorneys for Southwestern Bell Telephone, LP, d/b/a AT&T Missouri

Mary Ann (Garr) Young, William D. Steinmeier, P.C., 2031 Tower Drive, Post Office Box 104595, Jefferson City, Missouri 65110. Attorney for McLeodUSA Telecommunications Services, Inc.

Bill Magness, Casey, Gentz & Magness, LLP, 98 San Jacinto Blvd., Suite 1400, Austin, Texas 78701. Attorney for McLeodUSA Telecommunications Services, Inc., NuVox Communications of Missouri, Inc., and XO Communications Services, Inc.

William K. Haas, Deputy General Counsel, Missouri Public Service Commission, Post Office Box 360, Jefferson City, Missouri 65102. Attorney for the Staff of the Missouri Public Service Commission.

REGULATORY LAW JUDGE: **Kennard L. Jones, Judge**

REPORT AND ORDER

Background

In determining whether certain unbundled network elements will be made available by incumbent local exchange companies (ILECs) to competitive local exchange companies (CLECs), the Telecommunications Act requires the Federal Communications Commission to consider whether an ILEC's failure to provide such access to a CLEC would impair the CLEC's ability to provide the services it seeks to offer.¹ In 2005, the FCC released its Triennial Review Remand Order (*TRRO*)² exercising its duties under the Act. The *TRRO* is an attempt by the FCC to label certain wire centers as non-impaired; meaning, that there are sufficient opportunities in a wire center such that a CLEC's ability to do business through that wire center is not impaired without access to the ILEC's UNEs. In trying to make this determination, the FCC looks to the number of business lines and fiber-based collocators as indicators of the amount of activity in the wire center. The more activity, the more opportunity there is for the CLEC to do business. If there is insufficient activity, then the wire center is impaired and the ILEC must provide unbundled network elements.

AT&T Missouri responded to the FCC's *TRRO* by interpreting the FCC rules and the *TRRO* and, through that interpretation, listing wire centers that are not impaired. In doing so, AT&T applied the definitions of "business line" and "fiber-based collocator." NuVox Communications of Missouri, Inc. and other CLECs that have intervened in this matter, disagree with AT&T's interpretation of these definitions and the resulting characterization of

¹ 47 U.S.C Section 251(d).

² *In the Matter of Unbundled Access to network Elements*, WC Docket No. 04-313 and *Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338. (*TRRO*).

certain wire centers as non-impaired.³ The parties seek the Missouri Public Service Commission's guidance in this regard and have presented a number of issues for the Commission to resolve.

"Business-Line" Definition Issues

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."⁴

The first business line issue is: **Should the business line count include all UNE-L lines or only UNE-L lines used to provide switched service to business end users?**

Both the Staff of the Commission and AT&T argue that the definition of business line includes UNE-L lines used to serve residential customers. This conclusion is premised on the fact that the clause "plus the sum of all UNE loops connected to that wire center", underlined above, is not modified by the word "business." They argue that the absence of

³ The identification of these wire centers is highly confidential.

⁴ 47 C.F.R. §51.5.

the word “business” shows that the FCC’s intent was to include residential UNE-loops connected to a wire center.

As further evidence of the FCC’s intent, AT&T points out that in the *TRRO* the FCC states in part at paragraph 105:

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. We adopt this definition of business lines because it fairly represents the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs.

Staff and AT&T point out that although “UNE-P” is modified by the word “business” “UNE-loops” is not, arguing therefore that the FCC intended to include residential and business “UNE-loops” in the definition of “business line.”

Staff and AT&T also emphasize the FCC’s intent that the data relied on be objective and readily available to ILECs.⁵ In this regard, AT&T reports to the FCC the total number of UNE loops but does not separately identify and report the number of UNE loops used to serve business customers. Further, AT&T does not have information on whether the CLECs use UNE loops for business or residential customers.⁶

The CLECs argue that the definition of business line does not include UNE-loops used to serve residential customers. Pointing to the first clause in the definition, the CLECs note that the definition of a business line is one that “is an incumbent LEC-owned switched access line used to serve a business customer.” The CLECs argue that the rest of the definition builds on this clause and that if the FCC intended UNE-loops serving residential customers to be included in the definition of “business line” it would not have, in the first sentence, restricted business lines to those used to serve a business customer.

⁵ *TRRO*, pars. 93 and 161.

⁶ Chapman Direct, page 26, lines 1-5.

Findings of Fact

This issue requires no findings of fact. It requires only the Commission's interpretation of the law and of the FCC's intent as expressed through the *TRRO*.

Conclusion of Law

Between the two arguments presented on this issue, the Commission is most persuaded by that of Staff and AT&T. In both the definition of "business line" and in the FCC's *TRRO*, the phrase "UNE-loop" is not modified by the word "business." This is true, despite that "switched access lines", in the definition, is modified by the word "business", as is "UNE-P, in the *TRRO* paragraph. It is therefore the FCC's intent that UNE-loops serving both business and residential customers be included when counting "business lines."

Also weighing in AT&T's favor is the FCC's intent that the information on business lines be objective and readily available. AT&T knows the capacity of the lines sold to CLECs. If it is something other than voice grade, then AT&T might assume the line is serving a business. However, as discussed during the hearing, a voice grade line might also serve a business.⁷ It follows that the distinction between a business loop and one that serves a residential customer will blur at times. As pointed out by AT&T, it was the FCC's intention that an approach be adopted that "relies on objective criteria to which the incumbent LECs have full access, is readily available by competitors"⁸ Further, the FCC discourages the "loop-by-loop" evaluations that would be necessary to determine whether a loop serves a business or residential customer.⁹

⁷ Tr. page 192, line 9 through page 193, line 13.

⁸ *TRRO* par. 108.

⁹ *TRRO* par. 159.

Finally, as pointed out by AT&T, if the language in the definition is unambiguous then the Commission must interpret it in its plain and ordinary meaning.¹⁰ The disputed language specifically states that “all UNE-loops” be included in the count of business lines. In light of the above, the Commission concludes that UNE-loops serving residential customers are included in the business line count.

The second issue under the business line definition is: **should the business line count for digital UNE-L be based on the loop’s capacity or on the loop’s usage?**

The following portion of the FCC definition of a “business line” governs this issue:

Among these requirements, business line tallies:

(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.’¹¹

Generally, Staff and AT&T argue that the last sentence in this section of the definition means that a DS1 line equals 24 business lines. Their position is premised on the same arguments above; that the FCC intended that the business-line count be objective and readily available and that the plain language of the rule dictates that a digital line be counted according to its capacity. On the other hand, the CLECs argue that this sentence is not an absolute instruction that a DS1 line be counted as 24 business lines but rather that a DS1 line contains, for example, 24 64 kbps lines. They posit that all circuits on the DS1 line must be connected to an end-user business customer and provide switched services to count as 24 business lines. The CLECs emphasize that if all other

¹⁰ *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241 (1989).

¹¹ See Footnote 4.

requirements in the definition are met, then only those lines that are actually being used will be counted.

The CLECs go on to argue that AT&T's position ignores whether the lines are being used to provide switched business service to end users. This, the CLECs premise, is out of step with reality. Pointing to this Commission's findings,¹² the CLECs note that of the 24 available lines on a DS1 facility, approximately 11 are typically used to provide the switched voice service. Hence, the CLECs argue the FCC intends that these 11 lines be counted under the business line rule because this better reflects real-world usage.

The CLECs go on to point out that the Public Utility Commission of Oregon concluded that unused capacity should not be included in the definition of business lines because the phrase "used to serve," in the first sentence of the business line definition, precludes that result.¹³ Further, the North Carolina Public Utility Commission¹⁴ and an Arbitrator in Oklahoma¹⁵ also reached this conclusion.

Discussion

AT&T and Staff emphasize that it is the FCC's intent that data gathered for purposes of counting business lines be objective and readily available. When AT&T leases a digital line to a CLEC, AT&T has no idea whether or in what manner those lines are being used. Therefore, to count the actual lines used would require AT&T to verify information provided

¹² Commission Case No. TO-2004-0207, Order Establishing Geographic Markets and Enterprise Market Cutoff (Feb 24, 2004).

¹³ Oregon Public Utility Commission, Docket UM 1251, *In the Matter of Covad Communications Company; Eschelon Telecom of Oregon, Inc.; McLeodUSA Telecommunications Services, Inc.; and XO Communications Services, Inc. request for Commission Approval of Non-Impairment Wire Center List* (March 20, 2007).

¹⁴ North Carolina Public Utilities Commission, Docket No. P-55, Sub 1549, *Proceeding To Consider Amendments To Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law* (March 1, 2006).

¹⁵ Oklahoma Corporation Commission, Cause No. PUD 200600034, *Complaint of Southwestern Bell Telephone, L.P. d/b/a AT&T Oklahoma Against NuVox Communications of Oklahoma, Inc., Regarding Wire Center UNE Declassification* (May 15, 2006)

by the CLECs. The FCC notes that CLECs have little incentive to provide this information to regulators when evaluating impairment.¹⁶

The CLEC's argument of using the average of 11 lines used per digital loop, as found in the previous Commission docket,¹⁷ is unreasonable in that it still does not reflect the actual lines used. This issue does not contemplate using an estimate of the number of lines used in a digital loop but rather the actual number of lines or the capacity of the loop.

Findings of Fact

This issue requires no findings of fact. It requires only the Commission's interpretation of the law and of the FCC's intent as expressed through the *TRRO*.

Conclusion of law

The Commission concludes that the business line count for digital UNE-L shall be based on the loop's capacity rather than the actual usage. Although the Commission recognizes that the first sentence in the definition of "business line" contains the phrase "used to serve", a count of each used line in the loop is not practicable and it is not the FCC's intention that such a count be made.¹⁸

The final issue under business line counts is: **On what vintage should the business line counts supporting the wire center designations rely?**

ARMIS 43-08 refers to periodic reports ILECs file with the FCC. In April 2004 AT&T filed this report, which reflected data as of December 31, 2003. Based on the reports filed by ILECs, the FCC formulated its wire center impairment criteria.

¹⁶ *TRRO*, par. 158.

¹⁷ See footnote 11.

¹⁸ *TRRO* par. 157-159.

Both AT&T and Staff suggest that the data from December 2003, reflected in the April 2004 report to the FCC, should be the vintage. Both point out that this was the most recent data available upon the effective date of the *TRRO*, which was March 11, 2005. The CLECs also agree that the December 2003 data should be used. However, the CLECs contend that AT&T's application of the business line definition substantially increases the business line count over what the FCC had in mind when it relied on the data.

Discussion

All parties agree that the December 2003 ARMIS 43-08 data should be used. The CLEC's opposition is premised on the arguments presented under the "business line" definition. In other words, the CLECs argue that if the Commission agrees with the CLECs with regard to the business line definitions, then the December 2003 data should be used. However, if the Commission agrees with AT&T and Staff on the business line definition issues, then the CLECs argue that data from 2004 should be used. AT&T argues that the December 2004 data was made available to the FCC in April 2005, after the effective date of the *TRRO*. AT&T therefore reasons that it is unreasonable to rely on data that was not before the FCC when issuing the *TRRO*.

Although it may be true that settling on the ARMIS 2003 data and ruling in favor of AT&T and the business-line issues will result in more wire centers being unimpaired, the analysis of these two issues is independent. This Commission will not premise its legal analysis of the business-line definition on what vintage of data is used. Nor will the Commission make a finding on the issue of vintage in light of the conclusions made under the business-line issue.

Finding of Fact

Based on the above discussions, the Commission finds that the December 2003 ARMIS 43-08 data shall be the vintage upon which the business line counts supporting the wire center designations rely.

Conclusion of Law

There is no law upon which the issue rests. Hence, this issue does not require the Commission to make any conclusion of law.

Fiber-based Collocator Issues

The first issue under the Fiber-based Collocator issues is: **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?**

Background

The FCC defines fiber-based collocators as follows:

Any carrier, unaffiliated with the ILEC, that maintains a collocation arrangement in an ILEC wire center, with active electric power supply, and operates a fiber-optic cable or comparable transmission facility that

(1) Terminates at a collocation arrangement within the wire center;

(2) Leaves the ILEC wire center premises; and

(3) Is owned by a party other than the ILEC or any affiliate of the ILEC, except as set forth in this paragraph. Dark fiber obtained from an ILEC on an indefeasible right of use basis shall be treated as non-ILEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliated is defined by 47 U.S.C. 153(1) and any relevant interpretation in this Title.¹⁹

Both parties agree that a “collo-to-collo” arrangement is one where a carrier connects to a second carrier collocating with, or leasing space from, the ILEC. The parties, however, do

¹⁹ 47 C.F.R. §51.5.

not agree that the arrangement where a second carrier, connecting to the carrier collocated with the ILEC, constitutes a fiber-based collocation. More specifically, the parties do not agree on what it means to “operate” a system or what constitutes a “comparable transmission facility.”

AT&T argues that a carrier may operate a system as a carrier collocating with another by sending transmission through that other carrier’s fiber optic terminal over a fiber cable that goes out of the wire center.²⁰ AT&T also argues that the “collo-to-collo” arrangement might be considered a “comparable transmission facility” if the effect of the connection from the second carrier to the carrier collocating with the ILEC allows the second carrier to send out traffic that is the technical equivalent of fiber-optic cable.

The CLECs emphasize the importance that each fiber-based collocater represents a distinct transport facility terminating in and leaving the wire center. The CLECs further argue that fiber-optics networks “terminate” where fiber strands terminate into optronic equipment that determines system capacity.²¹

Discussion

The definition of a fiber-based collocater shows that the phrase “comparable transmission facility” is an alternative to fiber-optic cable terminating in, and leaving, the wire center. Any comparable facility must then also terminate in, and leave, the wire center.

A collo-to-collo arrangement does not satisfy this requirement. The carrier connecting to the collocated carrier has a facility that begins and terminates within the wire

²⁰ Nevels Direct, page 10, lines 218-222.

²¹ Gillan Direct, page 23, lines 4-5, lines 18-19 and 21-22.

center.²² AT&T argues that the facility does not actually terminate within the wire center but leaves the wire center over the collocated carrier's facility; thus, satisfying the definition. The Commission does not agree with this rationale. Hence, under AT&T's position, the second listed requirement in the definition is not satisfied; that the fiber-optic cable or comparable transmission facility leave the wire center. The FCC, in its *TRRO*, indicates that the focus of determining an arrangement in a fiber-based collocation is whether the transmission facility both terminates in and leaves the wire center.²³ The collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center.

Findings of Fact

This issue presents only a legal question. There need be no factual findings in order to resolve this issue.

Conclusion of Law

The Commission concludes that a collo-to-collo arrangement does not satisfy the definition of a fiber-based collocator.

The second issue under the fiber-based-collocation issues is: **How should the term, "comparable transmission facility," be defined?**

The term "comparable transmission facility" appears in the above definition of a fiber-based collocator. Staff argues that the Commission need not define this term. Rather, that it should be undertaken on a case-by-case basis.²⁴ AT&T's witness testified that AT&T has "identified no carriers that are collo-to-collo cross connected that would

²² Nevels Rebuttal, Attachment MN-1.

²³ *TRRO*, par. 102.

²⁴ Staff prehearing brief, page 4.

affect the counts that we've provided today to this Commission."²⁵ The witness went on to state that there may be more collo-to-collo connections and that the Commission should address this issue now so that the companies understand what the Commission's interpretation will be on a going-forward basis. During a discussion of whether NuVox should be counted as a fiber-based collocator in a wire center, the CLEC's witness stated that it is necessary, on a going-forward basis for people to understand how classifications will be interpreted by this Commission.²⁶

Discussion

The wire center classifications, as they are determined in this order, will remain as such. Given the permanency of the classifications, the Commission concludes that it is unnecessary for it to define the term "comparable transmission facility" until that question is put squarely before it with a real, rather than hypothetical, conflict to resolve. However, consistent with the discussion under the issue of collo-to-collo connections not meeting the definition of a fiber-based collocator, the Commission emphasizes that a comparable transmission facility must terminate in, and leave the wire center.

The final issue under "fiber-based collocator" issues is: **Should NuVox be counted as a fiber-based collocator in the locations specified by AT&T Missouri?**

Attached to the direct testimony Staff's witness Michael Scheperle, is an affidavit of Edward Cadieux, Senior Regulatory Counsel for NuVox. In this document, Mr. Cadieux describes NuVox's collo-to-collo arrangement in three AT&T wire centers.²⁷ These are the

²⁵ Tr. page 170, lines 2-7.

²⁶ Tr. page 223, line 4 – page 224 line 6.

²⁷ The identification of these wire centers is highly confidential.

wire centers specified by AT&T. In all three instances, Mr. Cadieux indicates that none of the facilities owned by NuVox leaves the wire center.

In its post-hearing brief, AT&T makes the same arguments it made under the issue of whether a collo-to-collo arrangement should count as a fiber-based collocator. Specifically, AT&T states that, “NuVox’s own description of its collocations arrangement in [one] wire center makes it a prototypical arrangement (not merely a ‘comparable transmission facility’) for purposes of FCC Rule 51.5.” AT&T goes on to state that NuVox operates fiber-optic cable that terminates in and leaves the wire center.²⁸ This is inconsistent with Cadieux’s statement. As discussed above, the Commission concludes that a transmission facility must terminate in and leave the wire center.

Finding of Fact

NuVox’s arrangements do not satisfy the requirement that a transmission facility both terminate in and leave the wire center. NuVox is therefore not a fiber-based collocator in those wire centers.

Conclusion of Law

Consistent with the Commission’s above conclusions, NuVox’s arrangements are that of collo-to-collo facilities. The Commission has previously concluded that collo-to-collo arrangements are not included in the definition of fiber-based collocator. The Commission again concludes that because NuVox’s arrangements are collo-to-collo arrangements NuVox shall not be counted as a fiber-based collocator.

²⁸ AT&T post-hearing brief, page 21.

Remaining Issues

Issue: In March of 2005, did AT&T correctly identify 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities?

Tier 1 wire centers are those ILEC wire centers that contain at least four fiber-based, at least 38,000 business lines, or both.²⁹ Attached to the direct testimony of AT&T's witness, Carol Chapman, is a list of 14 wire centers dated March 11, 2005. All of the wire centers are designated as Tier 1 wire centers. The Commission notes that in a particular wire center,³⁰ NuVox is listed as a fiber-based collocator. Also, in that center AT&T denotes 24,000 or more business lines. Having less than 38,000 business lines, it appears that AT&T has included this wire center on its list because the center has 4 or more fiber-based collocators.

Above, the Commission found that NuVox arrangements in several wire centers should not be counted as a fiber-based collocation. In two of those wire centers there are sufficient fiber-based collocators, without including NuVox, to be listed as a Tier 1 wire center. In one, however, without including NuVox, the wire center will have less than 38,000 business lines and only three fiber-based collocators. In this case, the wire center should not be included as a Tier 1 wire center.

Finding of Fact

The Commission therefore finds that AT&T did not correctly identify 14 wire centers as non-impaired under the Tier 1 wire center criteria for dedicated interoffice transport facilities.

²⁹ 47 C.F.R. §51.319(e)(3)(i).

³⁰ The identification of the wire center is highly confidential.

Conclusion of law

In order to resolve this issue the Commission must necessarily conclude, as it has done in previous issues, that collo-to-collo arrangements are not included in the definition of a fiber-based collocator and that one of the 14 wire centers was incorrectly identified as non-impaired.

Issue: As a result of a commitment arising from the merger of SBC and AT&T, has AT&T correctly identified five wire centers as non-impaired under the Tier 2 wire center criteria for dedicated interoffice transport facilities?

The Commission concludes that because this issue involves interpretation of a merger agreement approved by the FCC, the parties should seek interpretation of the agreement from the FCC.

Issue: Did AT&T, in March of 2005, correctly identify three wire centers as non-impaired for DS3 capacity loops.

The standard for non-impairment for DS3 capacity loops is that the wire center has at least 38,000 business lines *and* at least four fiber-based collocators. This is different than the impairment criteria for Tier 1 wire centers in that both the business line and fiber-based-collocator count must be satisfied. Under the Tier 1 criteria only one or the other must be met.

The CLECs argue in their prehearing brief that AT&T did not correctly identify one wire center because the wire center does not have over 38,000 business lines. The Commission has concluded above that AT&T and Staff's interpretation of the business line definition is correct. The CLECs' argument therefore fails under this issue.

Finding of Fact

The Commission finds that AT&T has correctly identified, in March of 2005, three wire centers as non-impaired for DS3 capacity loops.

Conclusion of Law

The Commission has concluded above, and here concludes, that UNE-loops serving residential customers is included in the definition of a business line.

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

The CLECs argue that the merger agreement precludes a separate list. Staff points out that the list was updated as a result of the merger. Whether the merger agreement requires the list to be applied retroactively necessitates interpretation of the merger agreement approved by the FCC. As previously noted by the Commission, the parties may seek interpretation of the merger agreement from the FCC.

Having made the above conclusions and findings of fact, the Commission issues the following order.

IT IS ORDERED THAT:

1. Unbundled network elements shall be made available to competitive local exchange carriers as is consistent with the Commission's conclusions and findings in this Report and Order.

2. This order shall become effective on April 10, 2008.
3. This case may be closed on April 11, 2008.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read 'Colleen M. Dale', is positioned above the printed name.

Colleen M. Dale
Secretary

(S E A L)

Davis, Chm., Murray, Appling, and
Jarrett, CC., concur;
Clayton, C., dissents;
and certify compliance with the
provisions of Section 536.080, RSMo.

Dated at Jefferson City, Missouri,
on this 31st day of March, 2008.