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

AT&T MISSOURI'S POST-HEARING REPLY BRIEF

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I. SUMMARY OF ARGUMENT

(A) The CLECs' "digital equivalence" arguments should be rejected. They are directly contrary to the plain language of the FCC's *Triennial Review Remand Order* ("*TRRO*")[1] and accompanying rule, which unambiguously states that "each" voice-grade equivalent "shall" be counted "as one line." Moreover, the CLECs openly admitted to both the FCC and the D.C. Circuit Court of Appeals that the FCC's Business Line rule requires that counts be based on capacity, not actual usage. Staff agrees that AT&T Missouri correctly applied the FCC's rule, and the only two federal courts to have passed on the issue (Michigan and Texas) and nearly every state commission to have passed on the issue have reached the same result.

(B) The CLECs' "collo-to-collo" arguments similarly disregard the FCC's *TRRO*, which counts CLECs having "less traditional collocation arrangements" as Fiber-Based Collocators and does not require collocators to provide the optronics for the fiber they use. The key point is that collo-to-collo arrangements use fiber or comparable transmission facilities that constitute "alternatives outside the incumbent LEC's network" and reflect revenue opportunities for CLECs, just as traditional collocation arrangements do. Again, Staff agrees that AT&T Missouri correctly applied the FCC's rule.

(C) The CLECs' post-hearing hearsay objection to AT&T Missouri's March, 2005, designation of "pre-merger AT&T" as a Fiber-Based Collocator in five wire centers should be rejected. The objection is far too late, and in any event, it is without merit. Thus, the Commission should approve the separate wire center list identifying pre-merger AT&T as a Fiber-Based Collocator applicable to the period from March 11 to December 16, 2005, as Staff recommends.

[1] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533 (2005) ("*TRRO*"), *aff'd*, Covad Communications Co. v. FCC, 450 F.3d 528 (D.C. Cir. 2006).

II. THE COMMISSION SHOULD REJECT THE CLECS' "DIGITAL EQUIVALENCE" ARGUMENTS.

The CLECs' brief addresses only one of the business line issues presented by the parties, i.e., Issue A(2): "Should the Business Line count for digital UNE-L be based on the loop's capacity or the loop's usage?" The CLECs' arguments, however, are refuted by the plain language of the FCC's rule and the *TRRO*, and by their own unequivocal admissions to both the FCC and the D.C. Circuit Court of Appeals (which affirmed the *TRRO*). The Commission should thus conclude, as Staff recommends, that "[t]he Business Line Count for digital UNE-L should be based on the loop's capacity."[2]

The CLECs first argue that their methodology stems from the FCC's "determination" that only lines actually "used" to provide switched services should count as Business Lines.[3] This claim is without merit for several reasons, as AT&T Missouri has shown.[4] The supposed "determination" comes from the first sentence of the FCC's rule, 47 C.F.R. § 51.5, which provides that "[a] business line is an incumbent LEC-owned switched access line used to serve a business customer."

The CLECs' argument fails, however, because the first sentence of the rule simply defines what an individual business line is. The issue presented here -- how to count the aggregate number of business lines in a wire center -- is governed by the remainder of the rule. The second sentence of the rule expressly states that "[t]he number of business lines in a wire center *shall* [include] . . . *all* UNE loops." (emphasis added). If the first sentence of the rule actually created conditions or qualifiers that all lines must meet in order to be counted as Business Lines, then *only* "incumbent LEC-owned switched access line[s]" could be counted.

[2] Staff's Post-Hearing Brief ("Staff's Brief"), at 4.
[3] CLEC Coalition's Initial Post-Hearing Brief ("CLECs' Brief"), at 6.
[4] Post-Hearing Brief of AT&T Missouri ("AT&T Missouri's Brief"), at 7-13.

UNE-L lines would necessarily be excluded (because the ILEC doesn't own the switch used on a UNE-L line).[5] Surely, the FCC did not intend for these two sentences in its rule to contradict one another or for the general definition provided in the first sentence to nullify the specific instruction of the second sentence. Rather, as the Kansas Commission correctly found, "there is no conflict between the first and second sentences" because "[t]he FCC defined the term ["Business Line"] in the first sentence and then, in the second sentence, provided the means by which business lines would be counted."[6] The Michigan federal court agreed, determining that the Michigan Commission erred because it "confuse[d] the definition of a business line with the procedure used for counting a business line as specified in the governing regulation."[7]

The CLECs' argument also ignores the requirement in the FCC's rule that "each" voice-grade equivalent "shall" be counted "as one line." The Texas federal court found the same argument advanced by the CLECs here to be "without merit," based on its determination that the requirement "is unqualified and suggests no exceptions or limitations" and that "[t]he [Texas Commission's] holding that each 64 kbps-equivalent shall be counted as one business line is supported by both the text of the [FCC's] regulation and the intent expressed in the *Triennial Review Remand Order*."[8]

The FCC's rule is so clear that the CLECs themselves admitted two years ago that the FCC's rule requires counting based on capacity, not usage. They first admitted to the FCC that its rule includes the "*64 kbps-equivalent*" provision under which "*a DS1 is counted as 24 'lines;'*

[5] Exh. 18 (Chapman Rebuttal), at 17.
[6] In re Complaint Regarding Wire Center UNE Declassifications, Docket No. 06-SWBT-743-COM, Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, June 2, 2006, at 26.
[7] Michigan Bell Telephone Company, Inc. v. Michigan Public Service Commission, et al., Case No 06-12374 (E.D. Mich. May 8, 2007), Opinion and Order, at 5; *see also, id.*, at 6 ("If the FCC wanted to include only business switched-access lines, it would have said so. The Court declines to transform the unambiguous phrase 'all UNE loops' to mean only some UNE loops.").
[8] Logix Communications L.P. v. Public Utility Commission of Texas, Case No. A-06-CA-548-SS, (W.D. Tx. November 6, 2006), Order, at 7.

a DS3 is counted as 672 'lines,' etc."[9] They next admitted to the D.C. Circuit Court of Appeals that "the final rule established by the FCC for counting business lines *is based on capacity*, e.g., a DS3 counts as 672 lines."[10] Their brief ignores these admissions, and it also omits that the FCC itself confirmed to the Court of Appeals that "[t]he Commission's test *requires* ILECs to count business lines on a voice grade equivalent basis. In other words, a DS1 loop counts as 24 business lines, not one."[11] This Commission should reject summarily the CLECs' requests that this Commission undo the FCC's rule and the CLECs' own binding admissions.

Furthermore, even apart from the foregoing legal considerations, a fundamental practical consideration also precludes substituting the CLECs' proposed manner of counting business lines for the methodology prescribed by the FCC. No Business Line counts could realistically be made were the CLECs' interpretation adopted -- at least not without elongated, tortuous discovery from CLECs whose self-interest would act as a disincentive to respond. That is because, as AT&T Missouri previously explained:

> 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.[12]

Staff concurs that "AT&T Missouri does not know whether a CLEC is using the full bandwidth"[13] and the CLECs' own witness admitted that AT&T Missouri has "no idea what's going over [UNE loops]."[14] Thus, the CLECs' proposal is not based on readily available data

[9] Exh. 18 (Chapman Rebuttal), Att. CAC-1, at 11 (emphasis added).
[10] Exh. 20 (Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Opening Brief of CLEC Petitioners and Intervenor in Support, filed July 26, 2005, at 20). (emphasis added).
[11] Exh. 19 (Chapman Surrebuttal), 6-7, *citing*, Covad Communications Co. et al. v. FCC, Case No. 05-1095, (D.C. Cir.), Brief for Respondents FCC and United States of America, filed September 9, 2005, at 75.
[12] Exh. 18 (Chapman Rebuttal), at 17; *see also*, AT&T Missouri's Brief, at 10, 13.
[13] Staff's Brief, at 4, *citing*, Exh. 16 (Chapman Direct), at 27.
[14] Tr. at 271.

and could not be easily administered either by AT&T Missouri or this Commission.[15] On this point, there is no dispute.

Recognizing that their proposal is unworkable, the CLECs ask the Commission to ignore actual usage and employ an arbitrary "11:1 conversion ratio."[16] But this does not cure the weakness in the CLECs' proposal; it only aggravates it. AT&T Missouri exhaustively detailed the reasons why the CLECs' "factor" approach should be dismissed.[17] First and foremost, had the FCC intended that a utilization factor should be applied, it would have prescribed one.[18] Yet, it did not, and nowhere in the FCC's *TRRO* is there otherwise any room for counting UNE-L lines based on "usage," whether actual, presumed, or borrowed from another state regulatory proceeding. Moreover, the Commission's prescribing a utilization factor here -- when the FCC did not do so -- would lead to the type of "extensive and litigious [state] proceedings that followed the issuance of the *Triennial Review Order*,"[19] which is precisely what the FCC intended to avoid.

The CLECs' second claim is that their methodology is consistent with ARMIS reporting instructions.[20] But AT&T Missouri refuted this claim, which rests on the CLECs' erroneous assumption that AT&T Missouri treats lines it provides to CLECs differently than lines it provides to retail customers. The identity of the end user's provider (whether a CLEC or AT&T Missouri) has *no* bearing on the manner in which the line is counted. The *only* consideration that is relevant in counting business lines is the actual *offerings* that AT&T Missouri is selling in a given wire center.[21] As one example, AT&T Missouri explained that both its retail services and

[15] *TRRO* at ¶¶ 105, 108, 158-159.
[16] CLECs' Brief, at 5.
[17] Exh. 18 (Chapman Rebuttal), at 27-30.
[18] *See also*, Exh. 18 (Chapman Rebuttal), at 30.
[19] *TRRO* at ¶ 108.
[20] CLECs' Brief, at 6.
[21] Exh. 18 (Chapman Rebuttal), at 24.

CLEC resold services are counted in the same way pursuant to the ARMIS 43-08 reporting guidelines. AT&T Missouri counts each line based on the service that AT&T Missouri has provisioned to 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 the CLEC. And, the same is true for UNE-L. AT&T Missouri counts the offering (and associated bandwidth) that it actually provides to the CLEC.[22] The CLECs' ARMIS-related claim has no basis in fact and should be rejected.

The CLECs' third claim is that employing digital equivalence "generates results that are significantly different than what the FCC had before it when it set the impairment thresholds in the *TRRO*."[23] This claim disregards the requirements of the FCC's rule and has gotten no traction at the FCC. As AT&T Missouri explained,[24] had the FCC intended in its *TRRO* issued on February 4, 2005, to somehow "freeze" the Business Line counts at the levels the BOCs had reported in December, 2004 (which did not account for digital equivalence, because the FCC's rule for digital equivalence had not yet been issued), it certainly could have said so. However, it did not. Instead, on the very same date as the FCC issued the *TRRO*, the Chief of its Wireline Competition Bureau asked AT&T to "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 non-impairment thresholds for DS1 and DS3 loops."[25]

When AT&T responded two weeks later, on February 18, 2005, with the *TRRO* then in hand, it expressly confirmed that the December, 2004, data "did not account for voice grade

[22] Exh. 18 (Chapman Rebuttal), at 24-25.
[23] CLECs' Brief, at 6.
[24] Exh. 18 (Chapman Rebuttal), at 44-45.
[25] Exh. 18 (Chapman Rebuttal), Att. CAC-3 (February 4, 2005 letter from Jeffrey J. Carlisle, Chief, Wireline Competition Bureau).

equivalents for the UNE lines" and that the data provided on February 18, 2005, was "adjusted for 64 kbps-equivalents."[26] In short, at least three weeks before the effective date of the *TRRO*, AT&T Missouri openly and fully informed the FCC that it had applied the FCC's digital equivalence rule exactly as it is written.[27] The FCC has never suggested that this approach did not fully comply with the *TRRO*.

The CLECs' last claim is that their view more accurately portrays a so-called "marketplace reality,"[28] but that view cannot trump the FCC's *TRRO* and accompanying rules. As the Texas federal court found when rejecting the CLECs' usage-based business line counting approach, "data on actual end use is not readily verifiable by the FCC, nor is it objective. The FCC has rejected such a detailed approach, recognizing that 'although it may provide a more complete picture,' the evaluation of such data would be unworkable."[29]

In summary, the CLECs' claims notwithstanding, the Commission should conclude that the business line count for digital UNE-L must be based on the loop's capacity, not on the loop's usage. This would be in keeping with the plain meaning of the FCC's *TRRO* and accompanying rules, and it would be entirely consistent with the admissions that the CLECs made at the FCC and in the Court of Appeals, with the FCC's own view expressed to that Court, and with rulings made by the Texas and Michigan federal courts and a multitude of other state commissions.[30] It would also be consistent with the undisputed fact that AT&T Missouri does not know how CLECs actually use UNE loops.

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[26] Exh. 18 (Chapman Rebuttal), Att. CAC-2, at n. 2.
[27] Exh. 19 (Chapman Surrebuttal), at 6.
[28] CLECs' Brief, at 7.
[29] Logix Communications L.P. v. Public Utility Commission of Texas, Case No. A-06-CA-548-SS, (W.D. Tx. November 6, 2006), Order, at 7, *citing*, TRRO, ¶ 105; *see also*, Michigan Bell Telephone Company, Inc. v. Michigan Public Service Commission, et al., Case No 06-12374 (E.D. Mich. May 8, 2007), Opinion and Order, at 6 ("If the FCC wanted to include only business switched-access lines, it would have said so. The Court declines to transform the unambiguous phrase 'all UNE loops' to mean only some UNE loops.").
[30] AT&T Missouri's Brief, at 11-13.

III. CLECS UTILIZING "COLLO-TO-COLLO" CROSS-CONNECT ARRANGEMENTS QUALIFY AS FIBER-BASED COLLOCATORS.

The Commission should conclude that the definition of a Fiber-Based Collocator ("FBC") includes CLECs with "collo-to-collo" cross connect arrangements. Staff agrees.

The CLECs argue that a cross-connected CLEC cannot "operate" the fiber cable or a comparable transmission facility unless it provides the optronics to light it. However, the functions which a collo-to-collo carrier performs constitute "operating" the fiber facility in every practical sense. The connecting carrier designs the transmission facility, including the type and quantity of its own facilities to place in its collocation arrangement (as well as the type and capacity of the cross-connect facility that it will use); decides what traffic it will route on the facility; controls the equipment that enables the traffic to be aggregated and transmitted over the facility; places actual traffic onto the facility; ensures that the transmission quality meets its desired standards; monitors/tests the facility to determine if and when network modifications and augments are needed; tests its facility from its collocation arrangement to the other end of the circuit in a distant location; and, can "turn off" the system by terminating either the cross-connect facility or the lease.[31] Given these facts, and that the cross-connected CLEC "makes engineering and market entry decisions" in determining both its transmission capacity needs and the means to meet these needs,[32] the Staff correctly concludes that the CLEC "need not own optronics in order to 'operate' a transmission facility."[33]

Furthermore, AT&T Missouri's and Staff's view is entirely consistent with the FCC's conclusion that a finding of impairment or non-impairment depends on whether CLECs are able

[31] Exh. 18 (Chapman Rebuttal), at 53-54; Exh. 14 (Nevels Rebuttal), at 7.
[32] Staff's Brief, at 5, *citing*, Exh. 14 (Nevels Rebuttal), at 7.
[33] Staff's Brief, at 4.

to deploy alternative transport facilities in pursuit of potential revenue opportunities.[34] Cross-connected CLECs both deploy and operate their transmission facilities, and enjoy the same revenue opportunities as CLECs with traditional collocation arrangements.[35] Put another way, "they have the ability to realize the same business plan to serve the end users."[36] And it is that fact, not technical ownership of optronics, that justifies counting these collocators toward a finding of non-impairment.

Given these considerations, it is no surprise that the CLECs' argument against counting collo-to-collo cross connect arrangements finds no support in either the *TRRO* or the FCC's accompanying rules. Indeed, the CLECs point to nothing in the *TRRO* stating that a collo-to-collo carrier cannot be regarded as an FBC. In addition, they point to nothing in the *TRRO* supporting their implicit premise that the Verizon CATT arrangement represents the outer limits of what can rightfully be regarded as an FBC.

On the contrary, the FCC expressly stated in paragraph 102 of the *TRRO* that FBCs could include "less traditional collocation arrangements *such as* Verizon's CATT fiber termination arrangements." In other words, the FCC included <u>all</u> "less traditional collocation arrangements" in its FBC definition, and merely referred to the Verizon CATT arrangement as but <u>one example</u>. Collo-to-collo arrangements should be treated the same way, as they too are examples of "less traditional collocation arrangements."[37] In fact, in the same paragraph of the *TRRO*, the FCC approvingly cites footnote 1257 of its earlier *Triennial Review Order ("TRO")*, which specifically refers to cross connect arrangements:

> Collocation may be in a more traditional collocation space or fiber can be terminated on a fiber distribution frame, or the like, to which any other competing

[34] TRRO, ¶¶ 101-102.
[35] Exh. 14 (Nevels Rebuttal), at 6-12.
[36] Tr. at 148.
[37] Tr. at 182.

> carrier collocated in that central office can obtain a cross-connect under nondiscriminatory terms. (citations omitted). Our impairment analysis recognizes alternatives outside the incumbent LEC's network regardless of the authority under which they came to exist. (emphasis added).

Thus, it is irrelevant that AT&T Missouri "[doesn't] have the [Verizon] CATT arrangement in Missouri."[38] Such an arrangement is only one example within the universe of "less traditional collocation arrangements" that represent "alternatives outside the incumbent LEC's network."[39] Another example is the collo-to-collo arrangement, which is closely analogous to the CATT arrangement in the ways that count -- in each case, two FBCs share facilities that constitute alternatives outside the incumbent LEC's network, allowing both FBCs to access revenue opportunities. Such alternatives count toward demonstrating that CLECs are not impaired without their having unbundled access to the ILEC's transport facilities. As such, the collo-to-collo carrier should be regarded as an FBC.

CLECs argue that the FCC's reference to an IRU (in which the cross connecting lessee of dark fiber lights the fiber) provides support for their view that a collocator must own the optronics which light the fiber in order to qualify as an FBC. However, they are wrong again.[40]

First, the FCC simply requires that any ILEC-owned (or ILEC affiliate-owned) fiber facility be excluded unless the fiber has been provided on an IRU basis.[41] However, any fiber *not* owned by the ILEC (or an affiliate) is *always* considered -- regardless of how the fiber has

[38] CLECs' Brief, at 9.
[39] *TRRO*, ¶102; *TRO*, n. 1257.
[40] Exh. 18 (Chapman Rebuttal), at 55-59.
[41] Exh. 12 (Nevels Direct), at 17.

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.[42]

Second, the CLECs' argument relies on concepts superseded by the *TRRO*. While the *TRO* rules and the *TRRO* rules both provide that fiber leased by a CLEC on an IRU basis is treated as if it were owned by that CLEC, the rules are otherwise very different, and deliberately so. [43] The *TRO* only counted instances where the competing carrier deployed *its own* transport facilities, whereas the *TRRO* abandons any ownership requirement. Rather, the *TRRO* counts all instances where the fiber (or comparable facility) is *not owned by the incumbent LEC*. A collo-to-collo cross connected CLEC is such an instance.

The CLECs' attempted analogy also fails because a collo-to-collo arrangement involves leasing of *lit* fiber capacity, not *dark* fiber capacity -- as the CLECs note, "[the cross connected CLEC] does not have its own optronics equipment" and it "does not light any fiber."[44] That being the case, even if the CLECs' reliance on the FCC's IRU discussion were pertinent (which it is not), it would provide no cover to the CLECs because they cannot make the link between a carrier's leasing of dark fiber on an IRU basis (in which the lessee lights the fiber) and the collo-to-collo carrier's leasing of lit fiber (in which the lessor lights the fiber).

Finally, the CLECs gain nothing by focusing myopically on the "jumper cable," which may be "coaxial cable," and noting that AT&T Missouri does not generally use such cable as an

[42] Exh. 18 (Chapman Rebuttal), at 57. As the Ohio Commission correctly noted: "Pursuant to the definition of FBC in 47 C.F.R. §51.5, we find no requirement that the collocator must obtain the fiber, or comparable facilities it does not own, as a dark fiber on an IRU basis from a third party facility provider. In other words, we find that, under the FCC's FBC definition, the collocator can lease lit fiber from a party other than the ILEC. Therefore, no requirement exists that the collocator has to own the optronics used to light the fiber transmission facility." In the Matter of the Petition of XO Communications, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Non-Impaired, Case No. 05-1393-TP-UNC, Finding and Order, June 6, 2006, at 13 (finding no. 13).
[43] Exh. 18 (Chapman Rebuttal), at 58.
[44] CLECs' Brief, at 11.

inter-office transmission facility.[45] AT&T Missouri has not proposed that a coaxial cable be considered an inter-office transmission facility comparable to fiber. All that matters is that, under the FCC's rule, a coaxial cable, when connected to a fiber facility in a collo-to-collo arrangement, constitutes a comparable transmission facility that is terminated in and leaves the wire center. The "comparable" transmission facility here is not just the cross-connect, but rather, the combined transmission path created by the cross-connect in conjunction with the leased fiber transport.[46] In other words, the Commission should consider the "whole," and not just a "piece part."

This is the realistic way to view less traditional collocation arrangements. The Ohio Commission, for example, carefully considered the "coaxial cable" issue (and other FBC arguments) and applied the proper analytical approach: "[I]n evaluating the 'comparable transmission facility' to the fiber cable in dispute, we evaluate the facility as a whole, and not the coaxial cable section that cross-connects the equipment of one collocator to the fiber facility of the other FBC."[47]

This Commission should likewise reject the CLECs' artificial and unduly narrow view. The design, architecture, deployment and maintenance of a collo-to-collo cross-connect arrangement, as well as the significant revenue opportunities afforded to the CLEC which enters the market on this basis, is not represented either by a mere "jumper cable" or the "little strand of fiber" the CLECs' counsel held in his hand during the hearing of this case, but rather, by the transmission facility as a whole used by the CLEC.[48]

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[45] CLECs' Brief, at 13.
[46] AT&T Missouri's Brief, at 18-19; Exh. 14 (Nevels Rebuttal), at 10-12 & MN-1.
[47] In the Matter of the Petition of XO Communications, Inc. Requesting a Commission Investigation of Those Wire Centers that AT&T Ohio Asserts are Non-Impaired, Case No. 05-1393-TP-UNC, Finding and Order, June 6, 2006, at 8 (finding no. 10).
[48] Tr. at 139.

IV. AT&T MISSOURI PRESENTED SUBSTANTIAL AND COMPETENT EVIDENCE THAT IT CORRECTLY DESIGNATED "PRE-MERGER AT&T" AS A FIBER BASED COLLOCATOR FROM MARCH 11 TO DECEMBER 16, 2005.

The CLECs claim that important facts "emerged at hearing" regarding five wire centers designated by AT&T Missouri as Tier 1 wire centers from March 11 to December 16, 2005.[49] The CLECs first assert they learned then that Staff's verification efforts did not directly confirm the pre-merger AT&T as an FBC in those five wire centers (i.e., Bridgeton, Kirkwood, Parkview, Prospect and Tuxedo) and they contend that there is no evidence "aside from AT&T's unreliable hearsay testimony" to support the Tier 1 classification of these five wire centers in March, 2005. These assertions are groundless.

The Commission should first reject summarily the CLECs' hearsay objection. The CLECs never objected to any of AT&T Missouri's pre-filed testimony that the Regulatory Law Judge admitted into evidence, much less the portions conveying the basis for AT&T Missouri's having determined that "pre-merger AT&T" was an FBC in these wire centers. It was self-evident from the pre-filed testimony and attachments that AT&T Missouri counted pre-merger AT&T as an FBC in those wire centers, and it was equally evident from Staff's pre-filed testimony that Staff did not obtain a verification from pre-merger AT&T.[50] Thus, the CLECs waived any objection they may have had. It is well-established in Missouri case law that hearsay testimony may be properly considered if no objection is made to the admission of the

[49] CLECs' Brief, at 15.

[50] See, Exh. 16 (Chapman Direct), at 13, 30; Exh. 12 (Nevels Direct), at 6-7; Exh. 21 (Scheperle Direct), Sch. 2C-1 through 2C-50. Thus, CLECs cannot be heard to complain that they only learned at the hearing of a basis for a hearsay objection, since AT&T Missouri had spoken to its collocation inspections in its Direct Testimonies pre-filed on March 30. If CLECs truly believed they had a valid hearsay objection available to them, they should have objected to (or moved to strike) the evidence, thus affording AT&T Missouri an opportunity to then and there respond. They did neither.

testimony.[51] Moreover, the Administrative Procedure Act requires that "all probative evidence received without objection in a contested case *must* be considered in administrative hearings."[52] Because AT&T Missouri's evidence was received without objection, it is far too late for the CLECs to object now.

Furthermore, the CLECs' hearsay objection is as wrong as it is untimely. AT&T Missouri's testimony confirmed FBCs on the strength of physical, on-site inspections of each of the identified Missouri wire centers. That evidence is not only substantial and competent, it also is undisputed.[53] While Staff did not directly confirm the pre-merger AT&T collocations, Staff's verification process nevertheless corroborates AT&T Missouri's own inspection process. The CLECs have not challenged either the veracity of any of the sworn verifications supporting Staff's conclusions or any other aspect of the process Staff used which put AT&T Missouri's designations fully to the test. This extensive body of unimpeached corroborating evidence further supports the accuracy and veracity of AT&T Missouri's own evidence regarding the pre-merger AT&T FBCs. Staff likewise concludes that these 14 wire centers were all "correctly identified as non-impaired" and that the five targeted by the CLECs were "properly re-classified."[54]

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[51] Concord Publishing House, Inc. v. Cape Mississippi Development, Inc., 916 S.W. 2d 186, 195 (Mo. 1996); Mills v. Federal Soldiers Home, 549 S.W. 2d 862, 867 (Mo. banc 1977). This is, of course, in keeping with the principle that "[a] rule of evidence not invoked is waived." State ex rel. 807, Inc. v. Saitz, 425 S.W. 2d 96, 100 (Mo. 1968).

[52] Concord Publishing House, Inc. v. Cape Mississippi Development, Inc., 916 S.W. 2d 186, 196 (Mo. 1996) (emphasis added), *citing,* § 536.070(8). Section 536.070(8) states, in pertinent part: "Any evidence received without objection which has probative value shall be considered by the agency along with the other evidence in the case.").

[53] Exh. 16 (Chapman Direct), at 13, 30; Exh. 12 (Nevels Direct), at 6-7. Likewise undisputed is AT&T Missouri's testimony that its wire center designations identified only two collo-to-collo arrangements, that neither involved pre-merger AT&T, and that neither had any effect on the wire centers designated by AT&T Missouri, because "the number of fiber based collocators remaining in each wire center would still be sufficient to satisfy the FCC's rules." Exh. 12 (Nevels Direct), at 15-16. The CLECs' witness acknowledged that there were "two instances where AT&T Missouri counted cross-connected carriers." Exh. 3 (Gillan Rebuttal), at n. 42.

[54] Staff's Brief, at 6-7.

In sum, *if* the CLECs had a viable hearsay objection to make with respect to AT&T Missouri's supporting evidence (to which AT&T Missouri would have been entitled to respond), they have long since waived it. The results of Staff's verification efforts, included in its March, 2007, Direct Testimony, are likewise unimpeached and corroborate the authenticity and veracity of all of AT&T Missouri's FBC designations, including the five that the CLECs target at this thirteenth hour. Thus, the Commission should approve the separate wire center list identifying pre-merger AT&T as a Fiber-Based Collocator, applicable to the period from March 11 to December 16, 2005, as Staff recommends.[55]

V. CONCLUSION

For all the reasons set forth above and in AT&T Missouri's Initial Post-Hearing Brief, AT&T Missouri respectfully requests that the Commission approve its three designations of non-impaired wire centers (i.e., March 11, 2005, December 16, 2005 and December 29, 2006).

Respectfully submitted,

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[55] Staff's Brief, at 8.

CERTIFICATE OF SERVICE

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