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 APPLICATION FOR REHEARING AND/OR RECONSIDERATION

AT&T Missouri[1] respectfully submits this Application for Rehearing and/or Reconsideration of the Commission's March 31, 2008, Report and Order ("R&O"), pursuant to Commission Rule 2.160 (4 CSR 240-2.160).

I. SUMMARY

In its R&O, the Commission correctly decided many issues presented to it for decision, based on sound legal and prudential considerations. For example, the Commission validated AT&T Missouri's interpretation and implementation of the *TRRO's* Business Line Definition; its rulings are in lockstep with virtually every state commission, and every federal court, to have considered the definition.[2] The Commission also wisely declined the CLECs' invitation to interpret AT&T's merger commitments made to the FCC in connection with the SBC/AT&T merger.

Likewise, the Commission approved virtually all of the Fiber-Based Collocator ("FBC") identifications AT&T Missouri had made in March, 2005, when the TRRO became effective. Consequently, AT&T Missouri's Application focuses on just two ultimate conclusions reached by the R&O in applying the *TRRO's* FBC Definition, and asks that the Commission rehear and/or reconsider them.

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[1] Southwestern Bell Telephone Company, d/b/a AT&T Missouri ("AT&T Missouri").

[2] *See*, Judge's Exhibit A, Other State Decisions -- Business Line Definition, filed July 23, 2007 (citing decisions by the Alabama, California, District of Columbia, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Michigan, Mississippi, Ohio, South Carolina, Texas and Utah state commissions); *see also*, letters filed on August 17, 2007 (citing the decision of the Indiana Commission), October 4, 2007 (citing the decision of the United States District Court for the Eastern District of Michigan), November 8, 2007 (citing the decision of the Arkansas Commission) and March 26, 2008 (citing the decisions of the United States Court of Appeals for the Fifth Circuit and the Oregon Commission).

First, AT&T Missouri requests that the Commission, upon rehearing and/or reconsideration -- and based upon the undisputed evidence -- conclude that the **_____** wire center was properly designated in March, 2005, as a Tier 1 wire center. It is clear that either NuVox[3] or the carrier named by it was a Fiber-Based Collocator ("FBC") *at that time*. Thus, the FBC count in that wire center should remain 4 (not just 3) and the wire center should retain its Tier 1 (not just Tier 2) status with respect to AT&T Missouri's March, 2005 list of non-impaired wire center designations. *See*, R&O, pp. 14, 16 (regarding Issues B(3) and C)). Such a conclusion would sustain the Tier 1 designations of all of the 14 wire centers designated as Tier 1 by AT&T Missouri, not just 13 of 14, as the R&O concluded. R&O, p. 16.

Second, AT&T Missouri requests that the Commission, upon rehearing and/or reconsideration, conclude that the definition of an FBC includes collo-to-collo arrangements. *See*, R&O, p. 12 (regarding Issue B(1)). Such a conclusion would faithfully implement the *TRRO* and be in keeping with the most recent federal court ruling on the issue.[4]

II. AT&T MISSOURI PROPERLY DESIGNATED THE **_____ _____** WIRE CENTER AS A TIER 1 WIRE CENTER IN MARCH, 2005.

AT&T Missouri's evidence showed that, in March, 2005 (when the *TRRO* became effective and AT&T Missouri submitted its wire center "non-impairment" designations to the FCC), it identified 4 FBCs -- three CLECs and pre-merger AT&T -- in the **_____ ** wire center. This designation thus made **_____** one of the 14 wire centers which AT&T Missouri designated as Tier 1 wire centers.[5] However, in passing on that March, 2005 list, the Commission concluded that "the **_____** wire center should not be included as

[3] NuVox Communications of Missouri, Inc. ("NuVox").

[4] XO Communications Services, Inc. v. The Ohio Bell Telephone Co., Case No. 2:07-cv-500, Opinion and Order, March 18, 2008 (S.D. Ohio).

[5] This wire center qualified as a Tier 1 wire center because of the presence of four FBCs. Exh. 15 (Chapman Direct), CAC-1 (HC), at 2 (referencing **_____** and pre-merger AT&T). The wire center was later reclassified and designated a Tier 2 wire center, due to AT&T's having excluded pre-merger AT&T as an FBC, which reduced the FBC count from 4 to 3 effective in December, 2005. Exh. 15 (Chapman Direct), CAC-2 (HC), at 2.

a Tier 1 wire center." R&O, p. 15. It did so solely because of two determinations: first, that one collocation arrangement there, involving NuVox, was a "collo-to-collo" arrangement (R&O, p. 14), and second, that "a collo-to-collo arrangement does not satisfy the definition of [an FBC]." R&O, p. 12. These determinations consequently reduced the FBC count on the March, 2005 list from 4 to 3, thus reducing the **_____** wire center to Tier 2 status.[6]

These determinations are incorrect, because they do not square with the undisputed evidence related to the facts existing in March, 2005, which facts are undisputed. Moreover, *even if* the arrangement were merely a collo-to-collo arrangement which the Commission ruled cannot be an FBC (and which, as discussed later, AT&T Missouri maintains does constitute an FBC), still that would necessarily mean that *one* CLEC should count as an FBC -- that is, either NuVox or **_____** -- not that *neither* would count, a consequence that not even the CLECs themselves advanced.

AT&T Missouri's evidence showed that 4 FBCs were identified in the wire center in March, 2005 on the strength of a physical, on-site inspection showing that each collocation arrangement there met the physical requirements necessary to be classified as an FBC.[7] AT&T Missouri has found nothing in the record even remotely suggesting that its evidence is disputed. The R&O, however, relied on a NuVox affidavit submitted on October 13, 2006, over a year and a half later, in which NuVox's affiant stated: "I dispute AT&T's classification of that [sic] NuVox *is* a fiber-based collocator."[8]

NuVox's "present-tense" assertion does not counter AT&T Missouri's evidence of the facts as they existed in March, 2005, when the *TRRO* became effective and when AT&T Missouri's wire

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[6] Regardless of the number of FBCs in the wire center, at a minimum it qualified as a Tier 2 wire center on independent grounds of first, a sufficient number of FBCs (*see*, note 5, *supra*), and second, a sufficient number of business lines. Exh. 15 (Chapman Direct), CAC-1 (HC), at 2 (reflecting a count of "24,000 or more"); *see also*, Exh. 21 (Scheperle Direct), at 13 ("Staff agrees that the Springfield Tuxedo wire center meets the business line threshold of 24,000 or more business lines and is properly classified as a Tier 2 wire center.").

[7] Exh. 18 (Chapman Rebuttal), at 65-66.

[8] Exh. 21 (Scheperle Direct), Sch. 2C, at 28 (HC). (emphasis added).

center designations were assembled and reported to the FCC. The question is not whether NuVox presently *is* a fiber-based collocator (or rather, given today's date, whether NuVox "was" an FBC as of October 26, 2006) in the locations identified by AT&T Missouri, but whether the CLEC *was* an FBC in March, 2005, when the *TRRO* became effective. In short, there is no basis in the NuVox affidavit to discount AT&T Missouri's evidence directed to March, 2005.

Furthermore, even if the Commission had a basis on which to find that the statements in the NuVox affidavit were directed to a period eighteen months earlier (i.e., the timeframe of March, 2005), and even if it is correct that NuVox should not have been counted as an FBC then because of NuVox's identification of **_____** and the Commission's view that a collo-to-collo arrangement does not constitute an FBC, still that would not justify declining to count *either* CLEC as an FBC, which the R&O did.

The whole point of the CLECs' "collo-to-collo" argument is to ensure that only one FBC is counted in any collo-to-collo arrangement or, stated another way, to avoid what the CLECs call "double-counting." For example, their expert challenged "AT&T Missouri['s] claim[] that it may count any carrier that is cross-connected to a *legitimate* [FBC.]"[9] He emphasized elsewhere that the FCC's requirement means "that only *one* [FBC] per network may be counted."[10] The Commission likewise has never suggested that a collo-to-collo arrangement ignore *every* CLEC involved in the arrangement. Even while the Commission ruled that a collo-to-collo arrangement does not qualify as an FBC, still the Commission acknowledged that "[t]he collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center" and is an FBC. R&O, p. 12. Consequently, even if NuVox should not have been counted as an FBC as of March, 2005, then **_____** should nevertheless have been regarded as the fourth FBC existing in

[9] Exh. 3 (Gillan Rebuttal), at 16. (emphasis added).
[10] Exh. 3 (Gillan Rebuttal), at 20. (emphasis added).

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the **_____** wire center as of March, 2005.[11] No other result would recognize, as the CLECs acknowledge, that in a collo-to-collo arrangement, there is always *one* collocator whose arrangement is a *legitimate* FBC.

III. THE DEFINITION OF A FIBER-BASED COLLOCATOR INCLUDES COLLO-TO-COLLO ARRANGEMENTS.

The Commission concluded that a "collo-to-collo arrangement does not satisfy the definition of an FBC." R&O, p. 12. It found that the "[t]he collocated carrier operating the fiber-optic terminal operates the transmission path out of the wire center" but that the carrier cross-connected to the collocated carrier does not do so. R&O, p. 12. The R&O does not explain precisely why the cross-connected carrier in a collo-to-collo arrangement cannot be regarded as operating a transmission path out of (or which leaves) the wire center. The evidence clearly shows that such a carrier *does* operate such a facility. Thus, it should be counted as an FBC.

AT&T Missouri demonstrated that the cross-connected carrier in a collo-to-collo arrangement operates the transport facility that leaves the wire center.[12] As Mr. Nevels explained, the cross-connected carrier clearly exercises the requisite functions and control tantamount to operating an end-to-end transmission path that terminates in its collocation arrangement and leaves the wire center.[13] For example, the cross-connected carrier:

- tests and operates its own multiplexing equipment;
- can turn the arrangement on and off;
- determines the capabilities of the transmission that it uses, as well as the "operating characteristics" of that transmission path;
- attempts to ensure that the transmission quality of the end-to-end transmission path meets (and continues to meet) its desired standards;

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[11] Indeed, NuVox's affidavit stated that "it is likely that **_____** does qualify as a [FBC] in each wire center." See also, Exh. 21 (Scheperle Direct), Sch. 2C, at 29 (HC). Regardless, AT&T Missouri's identification in March, 2005 of the arrangement as a fourth FBC in the wire center is supported by its on-site inspection, and this evidence remains unrebutted. Thus, on either ground, the Commission should conclude that the **_____ _____** wire center was appropriately shown as a Tier 1 wire center on the March, 2005 list, since it held 4 (not 3) FBCs. Any other result would be tantamount to altogether denying the fourth FBC's existence.

[12] Exh. 12 (Nevels Direct), at 14-15; Exh. 14 (Nevels Rebuttal), at 7-8; Exh. 18 (Chapman Rebuttal), at 53-54.

[13] Exh. 14 (Nevels Rebuttal), at 10.

- makes engineering and market entry determinations in deciding the transmission capacity required to meet the demands of its network; and
- monitors the use of the comparable transmission facility to determine if and when network modifications and augments are needed.[14]

In short, while a cross-connected carrier in a collo-to-collo arrangement obtains transmission capacity from another carrier, it has dedicated use of that capacity and controls everything else on its own. The nature of the transmission path and the control that the cross-connected carrier exercises meet any reasonable definitions of "operate," "terminate" and "leave." In the words of the FCC's rule, the cross-connected carrier "operates" a facility which "(1) [t]erminates at a collocation arrangement within the wire center; [and] (2) [l]eaves the ILEC wire center premises[.]"[15]

Nothing in the FCC's rule or the *TRRO* says that there can be only one FBC that "operates" any fiber transmission facility. Nor did the FCC say that a collocator must own the fiber or supply its own optronics equipment in order to be counted as an FBC. To the contrary, the *TRRO* assumed that not all FBCs would deploy their own facilities, and expressly acknowledged that some FBCs would use inputs from other competing carriers.[16] Given the language of the FCC's rule and the *TRRO's* expression of the rule's intent, it cannot be said that the cross-connected carrier's transmission facility is confined to merely the cross-connect between the two collocations. Rather, it includes the combined transmission path created by the cross-connect in conjunction with the leased fiber transport.

The R&O wrongly presumes that a transport facility can only support one FBC (*i.e.*, the facility's owner). But, as noted above, neither the FCC's rule nor the *TRRO* reflect that ownership is a *sine qua non* of an FBC arrangement. This circumstance is critical and should be given effect. As the United States District Court for the Southern District of Ohio noted just last month:

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[14] Exh. 14 (Nevels Rebuttal), at 7-8; Exh. 18 (Chapman Rebuttal), at 53-54.
[15] 47 CFR §51.5.
[16] *See*, *TRRO*, ¶ 28 ("our inferences regarding the potential for deployment are based on the characteristics of markets where actual deployment has occurred, which presumes that *competitive LECs will* use reasonably efficient technologies and *take advantage of existing alternative facilities deployment where possible*"). (emphasis added).

> [The Public Utilities Commission of Ohio] found as fact that the collocators involved - i.e., those that leased fiber from another collocator - offered the same amount of control over the facility as the arrangement credited in the TRRO, which recognized that the collocation arrangement may be obtained through less traditional collocation arrangements that nonetheless qualify as comparable collocator arrangements. *See* 20 F.C.C.R. at 2493 ¶ 102 (referencing Verizon's CATT fiber termination arrangements). To support its conclusion, PUCO relies on the rule-based definition of "fiber-based collocator," which precludes ownership by an incumbent ILEC, but accepts ownership "by a party other than the incumbent LEC or any affiliate of the incumbent LEC" (subject to an inapplicable exception for dark fiber obtained from an incumbent ILEC on an indefeasible right of use basis). *See* 47 C.F.R. § 51.5. Such reliance is correct, because *nothing in the definition addresses when a CLEC leases fiber from another CLEC; there is no prohibition in the specific provision of the rule that would throw such a situation out of the scope of the definition.* And by specifically precluding ILEC ownership or affiliation while concurrently remaining silent as to similar CLEC ownership, the rule leaves open an avenue that PUCO was left to find permissible.[17]

The Ohio District Court properly understood "[t]he post-*TRO* absence of an ownership or indefeasible right of use requirement."[18] However, the Commission's R&O would count only a carrier that has actually deployed its own fiber transport facilities and would permit each facility to count only once. There is no support for that conclusion in the *TRRO*. The *TRRO* does not state that ILECs such as AT&T Missouri may count as FBCs only those CLECs that deploy their own transport facilities. In fact, the only time the *TRRO* mentions ownership of transmission facilities in its discussion of FBCs is to state that the facility cannot be owned by the ILEC or an affiliate. *TRRO* ¶ 102; 47 C.F.R. § 51.5. Other than that, the facility can be owned by anyone. Indeed, the *TRRO's* new approach counts instances where the interoffice facilities are owned by another party, as in Verizon's CATT arrangement, or where facilities are obtained from the incumbent under an indefeasible right of use. *TRRO* ¶ 102; 47 C.F.R. § 51.5.

Furthermore, the R&O's approach reverts to the ownership-based approach that the FCC tried to follow in the vacated *TRO*, not the new rule established in the *TRRO*. The FCC's *TRO*

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[17] XO Communications Services, Inc. v. The Ohio Bell Telephone Co., Op. at pp. 10-12.
[18] XO Communications Services, Inc. v. The Ohio Bell Telephone Co., Op. at n. 17.

focused on ownership and the number of discrete competitive transport facilities, determining impairment by counting only instances where the competing carrier had deployed (installed) *its own* transport facilities and allowing each such facility to be counted just once. *TRO* ¶ 400. In the *TRRO*, however, the FCC adopted a new and different approach that examines the number of collocated *carriers*, not the number of distinct transport *facilities* or who owns them. Rather, the *TRRO* states that a fiber-based collocator must merely "*operate*[] a fiber-optic cable or comparable transmission facility," not own it. 47 C.F.R. § 51.5. As Mr. Nevels explained, a cross-connected carrier does just that.

Finally, it is important to remember that the FCC intended that its rule for counting FBCs be easy for state commissions to apply (just as in the business line count context) because the counts would be based exclusively on objective data possessed by and readily available to ILECs, and not on any CLEC-supplied data. *TRRO* ¶¶ 93, 99, 100, 105, 108, 161. The evidence is undisputed that when a collocator is cross-connected to another collocator's equipment, AT&T Missouri has no way of knowing (based on objective data possessed by and readily available to it) which collocator has provided the fiber cable or optronics. To make that determination, AT&T Missouri would have to request and obtain that information from the CLECs (who are not likely to be inclined to provide it), a process contrary to the FCC's intent of relying only on data that ILECs already possess.[19]

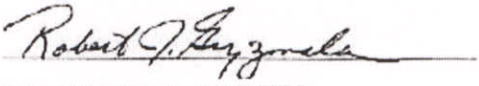
[19] Exh. 14 (Nevels Rebuttal), at 9-10.

IV. CONCLUSION

For all the reasons set forth above, AT&T Missouri respectfully requests that the Commission grant its Application for Rehearing and/or Reconsideration.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

BY 

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CERTIFICATE OF SERVICE

Copies of this document were served on the following parties by e-mail on April 9, 2008.

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