BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

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

CLEC COALITION'S INITIAL POST-HEARING BRIEF

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COME NOW McLeodUSA Telecommunications Services, Inc. ("McLeodUSA"), NuVox Communications of Missouri, Inc. ("NuVox") and XO Communications Services, Inc. ("XO") (collectively referred to as the "CLEC Coalition") and file their Initial Post-Hearing Brief in accordance with the procedural order entered in this case.

I. INTRODUCTION

The parties filed extensive legal briefs prior to hearing regarding the issues before the Commission in this case. The CLEC Coalition's Pre-Hearing Brief sets forth the detailed legal basis for our positions, and those arguments will not be repeated here. Rather, this Brief focuses on the specific issues discussed at the May 16, 2007 hearing.

II. BUSINESS LINE COUNT ISSUES
(Issues List A(1) – A(3))

The testimony at hearing demonstrated that the methodology for implementing the FCC's "Business Line" definition, 47 U.S.C. § 51.5, proposed by CLEC Coalition witness Mr. Gillan, is most consistent with the language of the FCC's entire Rule. Implementation of this methodology results in wire center classifications that are more similar to the FCC's calculations in the *Triennial Review Remand Order* ("*TRRO*") as well as with the specific requirements of the FCC's Rule. The revised Business Line counts and the wire center classifications that would result from implementation of this methodology are depicted in Exhibit 4HC (Table identified as Exhibit JPG-9 to Mr. Gillan's Rebuttal Testimony).

The testimony at hearing made clear that the dispute between the parties that makes the most difference to the bottom line wire center classifications is **Issue A(2): "Should the Business Line count for digital UNE-L be based on the loop's capacity or the loop's usage?"** As Mr. Gillan testified at hearing, the most important source of the differences between

the Business Line counts proffered by AT&T and the CLEC Coalition is the manner in which they account for usage of digital loops. Tr. at 269. The Commission's decision on this issue will make the biggest practical difference in current wire center classifications and future Business Line counts.

The CLEC Coalition's methodology for counting Business Lines is faithful to all the requirements of the FCC's Rule and, unlike AT&T's methodology, does not overlook or ignore any of the requirements. The FCC's Rule is reprinted below, with the terms in dispute regarding digital UNE-L (Issue A(2)) in bold underlined text:

> 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."**

The first sentence of the Business Line definition states that a Business Line must be "used to serve a business customer." This statement makes it obvious that the usage rather than the maximum capacity of a digital service is what matters to the FCC. If a CLEC obtains a DS-1 UNE-Loop from AT&T, the DS-1 could be used to serve a maximum capacity of 24 lines. However, not all 24 lines may be actually "used to serve a business customer," *i.e.*, they represent unused capacity or capacity used for non-switched (*e.g.*, data-only) purposes.

One could argue that all 24 lines are "used to serve a business customer" even if some of them are being used to provide non-switched services like data – but the FCC specifically precluded counting such capacity. In the third sentence of the Rule, the FCC explicitly states

that the only lines to be counted are those "access lines connecting end-user customers with incumbent LEC end-offices for switched services." So, an access line "used to serve a business customer" cannot be counted unless that access line is also providing "switched services." That means that of the 24 potential lines on a DS-1, the "Business Lines" cannot include those that are providing non-switched services or those sitting unused as spare capacity. As the Oregon Public Utility Commission recently concluded: "With respect to whether lines 'used to serve' should include spare capacity, including DS1 equivalents for the purpose of calculating line counts and consequent wire center eligibility … a simple reading of the phrase 'used to serve' precludes counting spare – i.e., unused – capacity either in individual lines or equivalents."[1]

Contrary to AT&T's arguments, the last part of the third sentence does not cancel out the requirements that go before it. The third sentence begins with the words "among these requirements," meaning that when counting lines "used to serve a business customer," the ILEC must comply with each of the requirements stated elsewhere in the Rule (one of which is to count only lines used to provide switched services). The instruction to count a DS-1 line not as a single line but (according to 64 kbps equivalents) as 24 lines is drawn directly from the FCC's ARMIS instructions that pre-date the *TRRO*. The ARMIS instructions, which AT&T has followed for its own line counts for years, <u>do not</u> tell the ILECs to count every DS-1 provided to a customer as 24 lines. Rather, they restrict the count to lines "connecting end-user customers with their end offices for switched services." Exhibit 1 (Gillan Direct, Exhibit JPG-2, FCC ARMIS Report 43-08 Instructions, p. 20). When it reports its own line counts to the FCC,

[1] Public Utility Commission of Oregon, 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*, Order at 9 (March 20, 2007) ("*Oregon 2007 Order"*).

AT&T does not count every DS-1 as including 24 lines – rather it reports only the circuits on the DS-1 that are used to provide switched services. Tr. 280.

The statement that a DS-1 equals 24 lines is an instruction about how to deal with multi-channel access lines, not an instruction to inflate "Business Line" counts to include unused capacity and capacity providing non-switched services. When a "Business Line" counter encounters a DS-1, the FCC's Rule instructs that the counter examine the 24 lines on the DS-1 to determine which ones constitute "Business Lines," *i.e.*, which of the 24 meet the other requirements of the Rule. It is therefore incumbent on the counter to determine how to properly account for only the lines on the DS-1 used to provide switched services. Otherwise, the substance of the FCC's Rule (which mirrors the substance of the FCC's ARMIS instructions) would be cast aside and many lines that are not "used to serve a business customer" or used to provide "switched services" would improperly be included in the Business Line count.

Setting aside the substance of the FCC Rule is, however, exactly what AT&T asks the Commission to do. AT&T correctly does not count the "DS-1 lines" it uses to serve its own end-user customers inconsistently with the instructions; it counts only the circuits on a DS-1 line used to provide switched services (excluding spare capacity or data lines). But when it comes to "DS-1 lines" used by CLECs, AT&T incorrectly grosses up every DS-1 to the maximum count of 24 lines. Tr. at 281. The Rule does not permit such inconsistency. It provides instructions for counting "DS-1 lines," and does not differentiate between DS-1 lines used to provide services to ILEC customers and DS-1 lines sold to CLECs and used as UNE-Loops.

AT&T's defense for its inconsistent application of the FCC's requirements is that the FCC wanted its impairment tests to be "administratively simple" and based on "objective and readily identifiable facts." *See, e.g.*, Exhibit 16, at 3 (AT&T Direct Testimony of

Ms. Chapman). AT&T argues that since it does not know how a CLEC uses the "DS-1 lines" that constitute UNE-Loops, then AT&T should be allowed to count every DS-1 UNE-Loop up to its maximum capacity based on the "capacity" rather than the "usage" of the DS-1 line. Notably, what AT&T conveniently finds "administratively simple" increases the Business Line count in a way that is always going to be favorable to AT&T. As discussed above, however, AT&T's proposal fails to comply with the specific terms of the FCC's Rule.

The CLEC Coalition proposes a methodology that is "administratively simple," but also complies with the FCC Rule's insistence that it is "usage" rather than "capacity" that counts when determining "Business Line" numbers (just as it does when ILECs report their data in ARMIS reports). The CLEC Coalition proposal looks at DS-1 lines used by CLECs as UNE-Loops as being capable of providing 24 lines of switched services. To determine how many of those 24 potential lines qualify as "Business Lines," the proposal applies this Commission's previous determination that a DS-1 is typically used to provide 11 switched lines (with the remaining 13 as spare capacity or used to provide non-switched data service.) Tr. at 284; Exhibit 1 (Gillan Direct at 19-21). As Mr. Gillan described the methodology in his direct testimony:

> As the Commission is well aware, high-speed digital loop capacity is typically used to provide a mix of voice and data services and is almost never entirely used to provide switched voice service. This fact has previously been testified to by AT&T (then called SBC), which argued that CLECs would routinely use such high capacity facilities to serve as few as 4 business lines, with the remaining 20 lines devoted to non-switched data services. … The Commission reviewed similar claims and determined that the economic cross-over to serve a multi-line customer was eleven lines. I recommend that the Commission use this finding as a proxy for the average utilization of a DS-1 for voice services, which supports a finding that an 11:1 conversion ratio for high-speed capacity should be used to avoid counting capacity used for data and non-switched services.

Exhibit 1 (Gillan Direct at 19-20). As Mr. Gillan's testimony at hearing demonstrated, there is nothing complicated or administratively complex about using the factually-based 11:1 conversion ratio to meet the FCC's requirements for counting only DS-1 capacity used for switched services. Mr. Gillan was able to apply it in this case, using data provided by AT&T, to generate the corrected Business Line counts presented in Exhibit 4HC (Table identified as Exhibit JPG-9).

Moreover, use of the CLEC Coalition methodology prevents the Commission from creating several problems that arise only if one uses AT&T's methodology. First, the Coalition methodology does not ask the Commission to ignore the FCC's determination that only lines used to provide "switched services" count as "Business Lines."

Second, the Coalition methodology is consistent with the ARMIS reporting instructions that the FCC referenced repeatedly in setting forth the data requirements in the *TRRO*. The Coalition recognizes that all DS-1 lines consist of 24 potential business lines (consistent with ARMIS and the *TRRO*), but counts only the capacity that is being used to provide switched services (also consistent with how that data is reported in ARMIS and with the text of the *TRRO* Rule).

Third, use of AT&T's methodology generates results that are significantly different than what the FCC had before it when it set the impairment thresholds in the *TRRO*. The Business Line numbers for Missouri that result from application of the CLEC Coalition's methodology are much closer to the Business Line numbers the FCC had before it when it approved the Business Line Rule. Exhibit 4HC (in the table identified as Exhibit JPG-8) compares the data provided by AT&T to the FCC to: (a) the business line count calculated using the methodology AT&T is recommending, and (b) to the business line count calculated using the methodology

recommended by the Coalition. This evidence demonstrates that the Coalition methodology produces results significantly closer to the data reviewed by the FCC (and which the FCC relied upon to establish its non-impairment thresholds) than the methodology AT&T recommends. This variance indicates that the Coalition methodology is more consistent with what the FCC intended when it adopted the Business Line Rule in the *TRRO*.

Fourth, the Coalition methodology reflects an interpretation of the FCC Rule that is consistent with marketplace reality. As Mr. Gillan testified, this Commission's 2004 Order regarding usage of DS-1 UNE-Loops, SBC's testimony underlying the Commission's 2004 decision, and similar data gathered in other states, all demonstrate a marketplace reality: of the 24 available lines on a DS1 facility, only 11 are typically used to provide the switched voice services the FCC intends be counted in the Business Line rule. Exhibit 1 (Gillan Direct at 19-21). Counting every DS1 as 24 "Business Lines" has no nexus to reality, and the FCC's rule should not be interpreted to embrace such a result.

Other state commissions have recognized that the FCC's Rule should not be read to depart from marketplace reality in this way. For example, in the most recent decision on the issue, the Public Utility Commission of Oregon ruled that interpreting the FCC's Rule to be based on usage of a DS-1 line rather than capacity "is not only reasonable; it most closely reflects current, real world circumstances."[2] Similarly, the North Carolina Public Utilities Commission held, regarding BellSouth's wire center designations, that "it is inappropriate for BellSouth to expand its count of its switched access business lines to count full system

[2] *Oregon 2007 Order*, at 9.

capacity."[3] Other state commissions have erroneously ruled differently, but that should not constrain this Commission from applying the FCC's Rule as written – which also applies it in a way that comports with common sense and real world circumstances. As the Regulatory Law Judge correctly noted when questioning a witness at hearing, in the *TRRO* the "FCC is trying to determine how much activity is going on in a wire center in order to determine whether or not it should be non-impaired." Tr. at 195. An interpretation of the Business Line definition based on "usage" of DS-1 lines is much more consistent with that overall objective than one based on looking at potentially unused "capacity."

The other "Business Line" issues were not discussed at length by the witnesses at hearing, so the CLEC Coalition will not re-state the arguments detailed in is Pre-Hearing Brief on Issues A(1) and A(3). The Coalition reserves the right to respond in its Reply Post-Hearing Brief to issues discussed by the other parties.

III. FIBER-BASED COLLOCATOR ISSUES
(Issues List B(1) – B(3))

While the outcome of the disputed issues regarding the FCC's "Fiber-Based Collocator" Rule does not have a major impact on the wire center classifications currently at issue, the outcome will have a significant impact on future wire center classifications. At hearing, both the CLEC Coalition and AT&T witnesses explained their reasons for urging the Commission to decide the disputed issues in this case rather than deferring them. Tr. at 223 (Mr. Gillan); Tr. at 170 (Mr. Nevels). When the Commission decides the issue, the Coalition strongly urges the Commission to reject AT&T's position, because it is inconsistent with the FCC Rule,

[3] 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*, Order Concerning Changes of Law, p. 8, ¶ 5 (March 1, 2006).

inconsistent with business sense, and has been rejected by all but one of the numerous state commissions where AT&T has advocated it.

The disputes all arise from AT&T's insistence that it can count as "Fiber-Based Collocators" ("FBC") any CLEC collocator that leases fiber capacity from a collocated carrier other than AT&T. At hearing, it was clear that AT&T is relying on arguments that have no basis in the text of the FCC's Rule, or in the text of the TRRO. Rather, AT&T refers repeatedly to the inapposite "Verizon CATT arrangement," to a "transmission path" concept that finds no support in the FCC's orders, and to an artificial way of defining the word "operate." None of these arguments has any basis in the FCC's Rule or Order; rather they are all ways of summoning up FBC where they simply do not exist.

The hearing transcript includes the term "Verizon CATT" thirty-four (34) times. That is not because AT&T has any arrangements in Missouri that resemble the "Verizon CATT" arrangement, or that any of the collocators named as FBC by AT&T use a collocation arrangement similar to the Verizon CATT. In fact, AT&T witness Mr. Nevels admitted that "we don't have the CATT arrangement in Missouri." Tr. at 150. Rather, Mr. Nevels' constant Verizon CATT refrain was little more than a way to evade answering questions about the FBC situation as it really exists in Missouri – and about the obvious flaws in AT&T's "collocation-to-collocation cross-connect" theory.

The Verizon CATT arrangement appears to be a way for a carrier that owns its own fiber to make dark fiber (*i.e.*, fiber that has not been attached to optronics equipment and thus become "lit fiber") available to other carriers within a central office. The Verizon CATT arrangement is not the only way to make that happen; carriers sometimes enter into dark fiber "indefeasible right to use" ("IRU") agreements as a way for the carrier owning fiber facilities to lease dark fiber to

another carrier. Mr. Gillan describes such dark fiber IRU agreements – and how they were treated by the FCC in the *TRRO* in his direct testimony:

> There are times when one carrier leases dark fiber from another and activates the fiber by adding its own optronics. The FCC addressed this unique circumstance by indicating that when a carrier leases dark fiber (typically under an indefeasible right to use ("IRU") arrangement) – and then activates that fiber through its own optronics investment – then the carrier effectively operates a fiber facility that should be counted.

Exhibit 1 (Gillan Direct at 25). The key to counting a collocated carrier that leases fiber in this scenario is that the carrier is leasing dark fiber that it lights on its own. The FCC made this point both in the *TRRO*, as well as in portions of its predecessor order, the *Triennial Review Order*. *See* Exhibit 1 (Gillan Direct at 24-26). In an IRU, the collocated CLEC leasing dark fiber attaches the electronics that light the dark fiber. At that point, the CLEC is not simply leasing capacity from someone else's network; the CLEC is able to completely control how the fiber is used and how much capacity is available to it.

The IRU arrangement akin to Verizon CATT is depicted in Mr. Gillan's direct testimony, Exhibit 1 (diagram identified as Exhibit JPG-6). A copy of the diagram labeled Exhibit JPG-6 is attached hereto. In JPG-6, CLEC B is a collocated carrier that all parties agree qualifies as a FBC. The CLEC Fiber in the diagram enters the CLEC B collocation space, terminates there, and leaves the wire center. CLEC A does not have its own fiber entering the wire center, but it leases dark fiber strands from CLEC B and lights the fiber with its own optronics equipment. The fiber strands used by CLEC A in this situation actually terminate in the CLEC A collocation space because that is where the optronics reside. This is the type of arrangement that the FCC found might qualify as a FBC even though it represented "less traditional collocation arrangements such as Verizon's CATT fiber termination arrangements." Note that the Verizon

CATT is a "fiber termination arrangement," *i.e.*, a means for fiber to terminate in the collocation of a carrier like CLEC A.

The IRU arrangement assumes the carrier obtaining the fiber strands from a FBC will control them on a long-term basis. The "indefeasible right to use" is not the same legal creature as a simple agreement to lease a set amount of capacity from another carrier's fiber network. Moreover, the control a carrier gains when it "lights" dark fiber is completely different than that available when it leases capacity. For example, if a carrier with an IRU needs to quickly increase the capacity available to a particular customer, it can make that adjustment on its own through making changes to the optronics that light the fiber. A carrier leasing capacity, on the other hand, must go to the carrier from whom it purchases capacity and attempt to obtain an increase in what it can use. If the underlying carrier chooses not to offer any more capacity, the requesting carrier is out of luck. The IRU arrangement dramatically changes a carrier's ability to control its own use of fiber resources.

Based on the FCC's determinations in the *TRRO*, the CLEC Coalition does not quarrel with the fact that both CLEC A and CLEC B in JPG-6 qualify as FBC. However, when AT&T argues that "collocation-to-collocation cross-connected" CLECs should count as FBC, it is not talking about the arrangements represented by CLEC A or B in JPG-6. No matter how many times AT&T's witnesses recite "Verizon CATT," the cross-connected CLEC arrangement does not resemble Verizon CATT. Rather, it resembles what is depicted as CLEC C in JPG-6.

CLEC C does not have its own optronics equipment (labeled as "FOT" for Fiber Optic Terminating Equipment), and does not light any fiber. No fiber terminates in CLEC C's collocation space. Rather, CLEC C uses intra-office cabling (often coaxial copper cable, but sometimes fiber cable) to run a "jumper" that connects its multiplexing equipment (labeled as

"MUX") to CLEC B's multiplexing equipment. This permits CLEC C to make use of CLEC B's fiber capacity. Just as CLEC C might lease a DS-1 or DS-3 capacity facility from AT&T, it can lease similar capacity from CLEC B – but only because CLEC B actually has fiber terminating in its collocation space that leaves the wire center building.

The CLEC C arrangement thus represents a completely different situation than the CLEC A arrangement (which resembles the Verizon CATT fiber termination arrangement) or the true FBC depicted as CLEC B. AT&T's witnesses attempt to latch their argument to Verizon CATT because the FCC said that "Verizon CATT fiber termination arrangements" might qualify as FBC, but the FCC never said that the "collo-to-collo cross-connect," standing alone without any actual fiber termination, could ever qualify as a FBC.

The AT&T arguments supporting its "collo-to-collo cross-connect" creation do not withstand analysis. To begin with, a fiber cable can only terminate once. This is an engineering fact acknowledged, albeit reluctantly, by AT&T witness Mr. Nevels. Tr. at 142. Under the FCC's Rule, a FBC must operate a fiber cable or comparable transmission facility that "terminates at a collocation within the wire center." In the JPG-6 diagram discussed above, CLEC B and CLEC A both terminate fiber cables within their collocations in the wire center. The terminations occur at the optronics equipment (the "FOT") within the CLEC B and CLEC A collocations. Mr. Nevels acknowledges that in order to light the fiber and make it work "you would have optronics connected to push the traffic along that path." Tr. at 140. The "cross-connected" CLEC C, however, does not have a fiber terminating in its collocation space. Rather, the fiber terminates in the collocation space of the true FBC from whom it is leasing capacity.

AT&T attempts to wriggle out of this problem by claiming that while CLEC C may not terminate the fiber that actually leaves the wire center building (what the FCC contemplated), it

does "terminate" a "comparable transmission facility." That facility, however, is nothing more than the jumper cable that connects the CLEC C and CLEC B equipment in JPG-6. This cable, most likely coaxial cable rather than fiber, permits CLEC C to ride on the fiber network run by CLEC B. Coaxial cable is not the type of cable that any carrier would use to carry traffic out of the wire center building and into the network. AT&T witness Mr. Nevels admitted that AT&T would never use coaxial cable in its network between wire center offices because of its limited capabilities when compared with fiber. Tr. at 144-45. Nevertheless, AT&T urges the Commission to find that coaxial cable constitutes a "comparable transmission facility" when used as part of a cross-connected scenario like that of CLEC C in JPG-6.

It is clear that such a finding is not supported by the language of the FCC's Rule or the *TRRO,* which makes clear that "comparable transmission facilities" must be "comparable" to fiber in the sense that they indicate the CLEC's deployment of alternative transport facilities (facilities that, by definition, leave wire center buildings and connect to other wire center buildings). For example, the FCC found that fixed wireless systems could qualify because while "fixed-wireless carriers' collocation arrangements may not literally be fiber-based, [they] nevertheless signal the ability to deploy alternative transport facilities." *TRRO* ¶ 102 (emphasis supplied). The cross-connected CLEC's coaxial jumper cable signals just the opposite: it signals that the cross-connected CLEC is leasing capacity from another carrier rather than deploying its own "alternative transport facilities." If a CLEC's use of another carrier's transport facilities meant it counted as a FBC, then every CLEC who leases capacity from any carrier other than AT&T would qualify – even if the CLEC had not invested one penny in deploying alternative transport facilities.

At hearing, AT&T claimed that a cross-connected carrier like CLEC C meets the FCC's requirements because by cross-connecting to a legitimate FBC and leasing its capacity, the cross-connected CLEC still "operates" a fiber cable or comparable transmission facility. AT&T witness Mr. Nevels argued that the cross-connected CLEC obtained a "transmission path" that reached all the way to its end-user customer. By creating this path, the cross-connected carrier was able to execute a "business plan" for serving its customers. Tr. at 148. This, according to Mr. Nevels, means that the cross-connected CLEC "operates" the fiber cable in question. Tr. at 160.

These arguments suffer from two fundamental flaws. First, there is absolutely nothing in the text of the FCC's Rule, nor in the relevant text of the *TRRO*, that supports the notion that if a collocated CLEC can create a "complete transmission path" to its customer by leasing fiber capacity from another carrier, that this arrangement qualifies it as a FBC. When asked whether the words "complete transmission path" even appear in the FCC's rule, Mr. Nevels had to admit that "those words in that exact line up are not listed in the order." Tr. at 155.

Second, the argument makes no practical sense. Mr. Nevels argues that a CLEC "operates" another carrier's fiber network when it leases capacity and reaches its customers using that leased capacity. He would not agree, however, that a carrier leasing capacity from AT&T to create a "transmission path" to its customer "operates" the AT&T network. He would also not recognize the logical extension of his argument: that any user of the network who controls a "complete transmission path" (like a caller who controls a transmission path between himself and the party he calls) thus "operates" a telecommunications network. Tr. at 162. In addition, Mr. Nevels had to concede that a cross-connected CLEC does not "fix the cable when it

breaks," because that is not the job of the company leasing capacity, it is the job of the company that actually operates the cable. Tr. at 163-64.

In sum, even if AT&T's arguments had any basis in the FCC's Rule (which they do not), the arguments break down as a matter of common and business sense. This is why every state commission but one that has heard AT&T's arguments for counting "cross-connected" CLECs as Fiber-Based Collocators has rejected the argument in its entirety. The CLEC Coalition urges this Commission to do the same.[4]

IV. SPECIFIC WIRE CENTER CLASSIFICATIONS
(Issues List C – F)

Important facts emerged at hearing regarding the multiple wire center classification lists that AT&T asks the Commission to approve. In 2005, AT&T identified fourteen (14) wire centers in Missouri where it claimed "Tier 1" non-impairment pursuant to the *TRRO*. AT&T later revised its list to comport with its merger commitments (made as part of the SBC merger with AT&T). That list includes nine (9) "Tier 1" wire centers.

When Commission Staff conducted its investigation of AT&T's wire center designations, Staff only reached conclusions regarding Tier 1 status based on the circumstances in the 9 wire centers AT&T listed in its subsequent filing. The CLEC Coalition, for reasons detailed in its Pre-Hearing Brief (at pages 50-55), agrees that this was the proper approach because the list identifying 9 Tier 1 wire centers is the one the Commission should approve or revise.

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[4] BellSouth (now part of AT&T) went through proceedings like this one in each state in its territory, and issues regarding the "Fiber-Based Collocator" definition were litigated by the parties. Tr. at 289. BellSouth never argued, as AT&T does here, that a "cross-connected" CLEC qualifies as a Fiber-Based Collocator. Therefore, in the nine states in the former BellSouth territory, there are no decisions that even address the strained interpretation of the FCC's Rule that AT&T urges here.

At hearing, Staff witness Mr. Scheperle confirmed that the CLEC wire center "verification affidavits" for the five (5) wire centers that were on AT&T's original list of 14 wire centers do not provide factual support for Tier 1 findings in those 5 wire centers. Tr. 206-08. Staff's verification affidavits asked the CLECs identified as FBC by AT&T to agree or contest the FBC designation. The CLEC affidavits are the only factual evidence in the record that backs up AT&T's FBC claims. Notably, neither of AT&T's witnesses (Mr. Nevels nor Ms. Chapman) personally conducted the wire center inspections in Missouri that resulted in AT&T's wire center classifications. Their reliance on hearsay reports from other AT&T personnel was the primary reason that the affidavits obtained by Staff and put in the record by Mr. Scheperle are so important to the factual record in this case.

The record thus does not contain factual verification of AT&T's original Tier 1 classifications regarding the 5 additional offices that it now asserts should be declared Tier 1 non-impaired for the months in 2005 between the *TRRO* effective date and the AT&T/SBC merger closing date. That means that there is no factual evidence (aside from AT&T's unreliable hearsay testimony) supporting AT&T's assertion that the following wire centers should be classified as Tier 1 non-impaired: Bridgeton, Kirkwood, Parkview, Prospect (all located in the St. Louis area), and Tuxedo (located in Springfield). For the reasons stated in its Pre-Hearing Brief, the CLEC Coalition strongly urges that the Commission not approve the separate wire center classification list requested by AT&T that classifies these wire centers as Tier 1.

Even if it was appropriate to approve a separate classification list, which the Coalition disputes, there is insufficient record evidence to support the assertions made by AT&T about the 5 wire centers listed above. Without factual evidence obtained from the CLECs that AT&T names as FBC (as Staff obtained for all the other wire centers named by AT&T), the

Commission should not make additional non-impairment findings regarding the 5 wire centers. In particular, there is no factual evidence in the record supporting AT&T's claims that pre-merger AT&T qualified in each of those wire centers as a legitimate FBC. Without such evidence, there is no basis for including those wire centers in the Tier 1 category – which limits UNEs in a much more significant way than the Tier 2 category. Indeed, Staff's pre-filed testimony concluded that the 5 wire centers belonged in Tier 2 rather than Tier 1. Exhibit 22HC (Scheperle Direct Testimony, Schedule Nos. 1 & 2A).

This issue affects more than the "temporary" period in 2005 pre-dating the AT&T/SBC merger. When AT&T's merger conditions expire, if the Commission had found these 5 offices to be non-impaired in this proceeding, AT&T believes it is entitled to revert these locations to Tier 1 status permanently. *See* Tr. at 188 (testimony of Ms. Chapman). A non-impairment finding is permanent under the terms of the *TRRO*, so the Commission's ruling in this case will reverberate well into the future (including a future in which AT&T is no longer bound by its various merger commitments). Given the permanent impact of AT&T's wire center classifications, the Commission should make non-impairment findings only after fully developing the factual record – as Staff did with the other 9 wire centers on AT&T's list.

To do otherwise would limit competitive alternatives in the important St. Louis and Springfield markets where the five wire centers are located. The difference between Tier 1 and Tier 2 is critical to the members of the CLEC Coalition because it affects the availability of DS-1 unbundled transport, which is widely used by CLECs to provide enhanced extended links ("EELs") serving small business customers. In addition, including the 5 disputed wire centers in the Tier 1 category permits AT&T to attain Tier 1 status for wire centers based solely on the presence of facilities in a wire center in 2005 that were owned by pre-merger AT&T – facilities

that are now owned by AT&T as the ILEC. For the evidentiary reasons discussed herein and the legal and policy reasons discussed in the CLEC Coalition's Pre-Hearing Brief, this outcome is unsupportable and should be rejected by the Commission.

V. CONCLUSION

For all the reasons stated, the CLEC Coalition respectfully requests that the Commission rule consistently with the recommendations presented by the CLEC Coalition on the issues on the Issues List filed in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this document was served upon the attorneys for all parties on the following list by U.S. Mail, fax, or email on this 23rd day of July, 2007.

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