



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

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Pacific Bell Telephone Company d/b/a AT&T California  
(U 1001 C),

Complainant

v.

Cbeyond Communications, LLC (U 6446 C) and Covad  
Communications Company (U 5752 C), and Arrival  
Communications, Inc. (U 5248 C),

Defendants

Case No. 06-03-023

**(PUBLIC)**

**OPENING BRIEF OF  
CBEYOND COMMUNICATIONS, LLC (U 6446 C),  
COVAD COMMUNICATIONS COMPANY (U 5752 C),  
XO COMMUNICATIONS SERVICES, INC. (U 5553 C),  
MPOWER COMMUNICATIONS CORP. (U 5859 C), AND  
U.S. TELEPACIFIC CORP. (U 5721 C)**

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On Behalf of Joint CLECs

November 13, 2006

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## INTRODUCTION

The Commission must determine in this case whether certain wire centers in California are “impaired,” according to criteria established by the Federal Communications Commission (“FCC”). This determination will control whether competitive local exchange carriers (“CLECs”) continue to have access to certain unbundled network elements (“UNEs”), high capacity loops and dedicated transport, at those wire centers.<sup>1</sup>

The FCC chose to rely on the expertise of state commissions because the FCC lacked sufficient information itself to decide whether non-impairment exists in particular markets. Rather, the FCC established a framework for state commissions to apply and determine the existing or potential deployment of competitive alternatives for high-capacity loops and interoffice transport. At the core of the FCC’s framework are two criteria meant to serve as a proxy for measuring the actual level of competition (or availability of non-UNE alternatives) at a particular wire center: (1) fiber-based collocators (“FBCs”), and (2) business lines.<sup>2</sup> Therefore, an incumbent local exchange company’s (“ILEC”) obligation to provide an unbundled high capacity (DS1 or DS3) UNE loop or high capacity transport to a building or customer premises depends on whether the wire center serving that building meets a certain threshold in terms of fiber-based collocators and business lines.

The determination that a wire center meets the FCC criteria, and thus is “non-impaired,” will have substantial and dramatic consequences for the Joint CLECs’<sup>3</sup> ability to offer

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005) (“*TRRO*”).

<sup>2</sup> *TRRO*, at ¶ 93.

<sup>3</sup> The Joint CLECs are: Cbeyond Communications, LLC (U-6446-C), Covad Communications Company (U-5752-C), XO Communications Services, Inc. (U-5553-C), Mpower Communications Corp. (U-5859-C) and U.S. Telepacific Corp. (U-5721-C).

competitive services to customers in California.<sup>4</sup> Once the determination is made, it is irreversible, and Complainant Pacific Bell Telephone Company, d/b/a AT&T California (“AT&T”) can, and has indicated that it will, permanently withdraw availability of high capacity loop and transport UNEs thereafter.<sup>5</sup> In contrast, however, AT&T may repeatedly request a Commission examination until a wire center is determined to be non-impaired.<sup>6</sup> Because an erroneous finding of non-impairment cannot be reversed, while an erroneous finding of impairment can be corrected, the Commission should err on the side of caution and rule that a wire center remains impaired if there is any doubt regarding the validity of AT&T’s claims.

Once a high capacity UNE loop or transport is withdrawn, the Joint CLECs must then make alternate arrangements for the facilities necessary to serve their customers. In practical terms, this means that the Joint CLECs will be required to identify third party carriers, to the extent they actually exist, who are willing to provide wholesale high capacity loops or transport at reasonable rates; attempt to “negotiate” reasonable rates, terms, and conditions rates for these components; or convert the affected circuits to AT&T’s high priced non-cost-based Special Access services.<sup>7</sup>

When the Commission reaches a decision regarding a particular wire center, it is imperative that the Commission be certain that AT&T has provided clear, convincing, and accurate data to support its claims that the requisite number of fiber-based collocators and business lines exist at a given wire center before declaring it to be non-impaired. As the FCC

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<sup>4</sup> AT&T is challenging the impairment status of 106 wire centers in California. Not only is this a large number, but the wire centers at issue are located in the most important service markets in which the Joint CLECs provide competitive alternatives to residential and business customers.

<sup>5</sup> Exh. 51 (Starkey Direct), at 19; 47 C.F.R. §51.319 (a) (4) and (5), (e) (3) (i) and (ii).

<sup>6</sup> Exh. 51 (Starkey Direct), at 19.

<sup>7</sup> Exh. 51 (Starkey Direct), at 5.

itself admitted, analysis of competition based on proxies is, by definition, imprecise.<sup>8</sup> Thus, it is possible, if not likely, that AT&T will be allowed to withdraw high capacity UNE loops and transport at some wire centers where, though the wire center technically meets the FCC's criteria, in reality the market conditions will not support competitive deployment of high-capacity loop and transport facilities. Nonetheless, AT&T attempts to manipulate the analysis by relaxing the FCC's criteria and relying on out-of-date data so that an even greater number of wire centers would be declared non-impaired. AT&T suggests numerous theories, suppositions and re-definitions of the FCC's clear criteria that would create the appearance of a greater number of fiber-based collocators and business lines than should be counted if the FCC's criteria are properly applied. To compound the admittedly imprecise FCC proxies for competition with an improper enlargement of the FCC's criteria for impairment, or with inaccurate or incomplete data, would be intolerable.

## **I. FRAMEWORK FOR RESOLUTION OF DISPUTED ISSUES**

### **A. Burden of Proof**

It is well-established that the complainant bears the burden of proof. Administrative Law Judge ("ALJ") Ryerson has applied this standard in this proceeding and determined that AT&T has the burden of proof.<sup>9</sup> Given that AT&T bears the burden of proof, the Commission must presume that all wire centers in California remain impaired *unless and until* AT&T proves otherwise. In order to prevail, AT&T must prove that each wire center at issue in this proceeding meets the criteria set forth in the FCC's Triennial Review Remand Order

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<sup>8</sup> *TRRO*, at ¶ 169.

<sup>9</sup> *Tr.*, 10/4/06, at 5.

(“*TRRO*”)<sup>10</sup> for a finding of non-impairment. The standard of proof that AT&T must meet to prove its case is a preponderance of the evidence.<sup>11</sup>

Typically, the Commission’s burden of proof analysis would weigh one party’s evidence against the evidence of the other to determine which party will prevail. In this proceeding, however, the Commission must take an initial step in order to determine whether AT&T has met its burden. The Commission must first resolve policy and definitional disputes to determine the showing required from AT&T in order to discontinue selling certain UNEs in specific wire centers. The Commission must then determine whether AT&T has established, by a preponderance of the evidence, that it has met the FCC’s requirements to discontinue selling UNEs in each wire center that it claims is non-impaired. In evaluating AT&T’s evidence, the Commission must take into account the credibility of AT&T witnesses, and it must weigh the sufficiency, as well as the accuracy or inaccuracy, of evidence offered by AT&T, in light of the rebuttal and/or contrary evidence offered by the Joint CLECs. Further, the Commission should consider both the *methodology* and the *data* AT&T used to support its claims that a wire center is non-impaired. If the methodology used by AT&T to make its initial designations is flawed, then the data developed by AT&T through use of that methodology will lead to a misleading result. For example, if AT&T’s survey of wire centers misidentifies an alleged fiber-based collocator at a wire center, or incorrectly concludes that a collocation arrangement has the necessary fiber facilities, then AT&T’s designation of that wire center as “non-impaired” may be incorrect. Under the FCC’s rules, the data on which AT&T relies must be easily verifiable, but AT&T’s “evidence”, particularly with respect to the fiber-based collocators’ allegations, comprised of

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<sup>10</sup> *TRRO*, at ¶23.

<sup>11</sup> *See e.g.*, D.04-09-062 Investigation on the Commission’s Own Motion into the Operations, Practices and Conduct of Pacific Bell Wireless, LLC, I. 02-06-003, Sept. 29, 2004, at p. 13 (preponderance of the evidence is the standard applied in adjudicatory proceedings).

summary conclusions by witnesses who did not perform or even supervise the alleged work efforts are hardly “easily verifiable”.<sup>12</sup> Further, AT&T’s data are not verified, as AT&T admits it took no steps (such as contacting CLECs identified as fiber-based collocators) to confirm that its assertions were correct. The end result is that AT&T’s “evidence” contains numerous, serious errors, and does not meet the standard the FCC mandated.

As discussed below, AT&T has not carried its burden of proof. AT&T has not submitted any verifiable data, such as photographs or billing records into evidence. Indeed, AT&T admits that it “did not contact any entity collocated in any wire center to confirm whether it operates a fiber-based cable or comparable transmission facility that terminates at a collocation arrangement within that wire center and leaves AT&T California’s premises.”<sup>13</sup> Thus, AT&T has no readily verifiable data in the record to support its claim that a given wire center is “non-impaired,” and its case must fail.

Several aspects of this case require that the Commission exercise caution in evaluating whether AT&T has met its burden of proof. First, this is AT&T’s initial effort to challenge the impairment status of California wire centers so that it may discontinue selling high capacity loops and transport UNEs at those wire centers.<sup>14</sup> The determinations made by the Commission will become the baseline list of wire centers at which these specific UNEs continue to be available, thus having a significant effect on Joint CLECs’ access to the facilities they need to provide competitive services to California consumers. Second, since AT&T chose to file this case as a complaint proceeding, it alone has to meet the burden of proof to establish non-

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<sup>12</sup> *TRRO*, ¶¶ 100, 234.

<sup>13</sup> Exh. 69 (AT&T Response to XO Interrogatory Request 1-22).

<sup>14</sup> California is the last major state in the AT&T Region in which the initial AT&T designated list of non-impaired wire centers is being considered. Most of the other states, including Texas, Illinois, and Michigan have already considered or are currently considering these issues.

impairment for each of the 106 wire centers it seeks to withdraw availability of high capacity UNE loops and dedicated transport. Finally, as mentioned above, under the FCC's rules, a finding of non-impairment by the Commission is irreversible.<sup>15</sup>

Given the Joint CLECs' status as defendants in a complaint case, and the irreversible nature of a ruling that a wire center is non-impaired, the Commission should be certain that AT&T has met its burden of proof for each wire center that it claims is non-impaired.<sup>16</sup> Any doubt regarding the accuracy or sufficiency of the evidence should be resolved in favor of the defendants, the Joint CLECs. It is not defendants' task to disprove AT&T's assertions; rather, it falls to the Commission to determine whether AT&T has presented, by a preponderance of verifiable evidence, a convincing showing that a particular wire center meets the FCC's criteria for determining impairment or non-impairment.

#### **B. Vintage of Data for Determination of Wire Center Impairment**

The primary objective of the FCC impairment designation is to provide evidence of revenue opportunities and the state of competition in a particular wire center based on the number of fiber-based collocators and the number of business lines in a wire center.<sup>17</sup> Unbundling obligations would therefore be limited to those areas where carriers genuinely *are* impaired without access to a particular network element and where unbundling does not frustrate sustainable, facilities-based competition (emphasis added).<sup>18</sup> Thus, the FCC clearly meant for state Commissions to capture the actual state of competition (as measured by the number of fiber-based collocators and business lines) for each disputed wire center.

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<sup>15</sup> Exh. 51 (Starkey Direct), at 5; 47 C.F.R. § 51.319 (a) (4) and (5), (e) (3) (i) and (ii).

<sup>16</sup> The Commission should not accept the AT&T proposals as a package and allow generalities to control the decision on the status of each of the 106 wire centers at issue. Instead, the Commission must determine that AT&T has met, or in most cases not met, its burden of proof on each of the six criteria outlined by the FCC.

<sup>17</sup> Exh. 51-C (Starkey Direct), at 17.

<sup>18</sup> *TRRO*, at ¶ 2.

AT&T, however, urges the Commission to rely on historical data, some of which is three years old.<sup>19</sup> AT&T offers no sound reasoning for such unorthodox approach; AT&T's only justification for using historical data is that those were the data available at the time the FCC was deliberating the *TRRO* or at the time the *TRRO* took effect. Both of these dates are purely legal and procedural mileposts with no substantive meaning. If the FCC had intended that impairment analyses should be limited to historical it could have made impairment decisions itself rather than delegating impairment findings to state commissions. Rather, the FCC required ILECs to submit data as part of its fact-gathering exercise to formulate the proxies that would be applied later, and to give guidance to state commissions for application of the proxies in wire center impairment proceedings in each state.<sup>20</sup>

Historical data can be sufficient, but only to provide a general idea of market conditions in a relatively static market. The telecommunications market over the last three years has been just the opposite. It has been characterized by substantial numbers of carriers being merged, acquired, or exiting the market altogether. The Commission is well aware that many carriers have discontinued operations or gone bankrupt in the last three years.<sup>21</sup> AT&T is also clearly aware of this fact. In an arbitration at this Commission last year, AT&T characterized the telecommunications industry as unstable, and AT&T's witness noted that "180 CLECs have ceased operations in SBC's 13-state ILEC region between 2000 and 2005."<sup>22</sup>

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<sup>19</sup> Opening Brief of AT&T California (U 1001 C) on Disputed Wire Center Issues, at 9, 35-37 ["AT&T Opening Brief"].

<sup>20</sup> *TRRO*, at ¶ 23.

<sup>21</sup> To deal with this reality, just last month the Commission established mass migration rules for customers of CLECs leaving the market. See D.06-10-021, *Order Instituting Rulemaking to Establish Rules Governing the Transfer of Customers from Competitive Local Carriers Exiting the Local Telecommunications Market*, October 5, 2006.

<sup>22</sup> SBC California's Opening Brief, A.05-05-27, *Application by Pacific Bell Telephone Company d/b/a SBC California (U 1001 C) for Arbitration of an Interconnection Agreement with MCImetro Access Transmission Services LLC (U 5253 C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Nov. 4, 2005, at

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Use of stale data in such circumstances will undermine the FCC's effort by creating a false and misleading picture of the level of competition in the wire centers at issue in this proceeding and by leading to the erroneous conclusion that market conditions justify the withdrawal of high capacity UNE loops and transport at those wire centers.<sup>23</sup> The Joint CLECs submit this is precisely the reason AT&T urges the Commission to rely on out-of-date data. As AT&T makes clear in the first two sentences of its opening brief, it is openly hostile to the continued availability of high-capacity UNE transport and loops and wishes to take (or make) any opportunity to terminate its legal obligations to offer such UNEs.<sup>24</sup>

The Commission should use the most recent data available for both its fiber-based collocator and business line count analysis. With regard to fiber-based collocators, the Commission should rely upon data current through the date of the hearing in this proceeding for fiber-based collocators, particularly with respect to known and undisputed changes in a carrier's status. Because AT&T has not submitted current data,<sup>25</sup> and the Joint CLECs were unable to provide current data for all wire centers in dispute, the Commission should require AT&T to submit current data for the Commission to use in its impairment analysis for all disputed wire

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(Continued)

19-20 (citing Direct Testimony of Suzette Quate, at 18). The Joint CLECs request that the Commission take official notice of this statement in SBC's (now AT&T) sworn testimony pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>23</sup> For example, using business line count data from 2005 rather than 2003 alters the classification of five wire centers. Using current data for fiber-based collocators alters the classification of 12 wire centers. Exh. 51-C (Starkey Confidential Direct), at 110-111. When AT&T's data are corrected for other errors, an additional 10 wire centers (or a total of 25 wire centers) are mis-identified as non-impaired by AT&T. The numerous errors resulting from the use of historical data for fiber-based collocators and business line counts are discussed in detail below.

<sup>24</sup> AT&T Opening Brief, at 1 (describing Congress' and the FCC's unbundling approach as "nearly confiscatory" and "overly broad.")

<sup>25</sup> Exh. 71. AT&T states "AT&T has not conducted more recent physical inspections of the wire centers at issue in this proceeding to determine the number of fiber-based collocators than the inspections discussed in AT&T California's direct testimony."

centers. With regard to business line counts, the Commission should analyze the ARMIS<sup>26</sup> data from 2005 that was submitted by the Joint CLECs in this proceeding.<sup>27</sup>

### **C. Accuracy of Data for Determination of Wire Center Impairment**

It should go without saying that AT&T must base any challenge to the impairment status of a wire center on accurate data. Nonetheless, AT&T has not done so. As discussed in detail in Mr. Starkey's testimony, AT&T's identification of fiber-based collocators contains numerous errors.<sup>28</sup> Some of these inaccuracies could have been avoided or resolved by simple inquiries like reviewing the commission's website to see if a carrier had a certificate of public convenience and necessity ("CPCN") or was still operational. AT&T's sloppiness and apparent rush to inflate the fiber-based collocator count reveals that AT&T does not have a consistent or sustainable system for making such important findings.<sup>29</sup> If the Commission does not require AT&T to correct its haphazard approach to data collection, this failing will affect not only this proceeding, but also for future wire center impairment analyses as well.

It is critical that AT&T's data be current and accurate. As discussed above, the FCC could not determine directly the level of competition in wire centers throughout the country, so it chose to employ a proxy – the number of fiber-based collocators coupled with the number of business line counts in wire centers. The FCC acknowledged that using a proxy was imprecise, but expressed confidence that such approach would not result in an undue number of incorrect impairment determinations.<sup>30</sup> If, however, inaccurate data are fed into the proxy, the

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<sup>26</sup> ARMIS is the acronym for Automated Reporting Management Information System and it is the reporting system used by Tier 1 local exchange carriers to provide financial, operational, service quality and network infrastructure data as required by the FCC.

<sup>27</sup> The Joint CLECs obtained the 2005 data from AT&T through discovery. See discussion of the current line count data in Exh. 51-C (Starkey Confidential Direct), at 111.

<sup>28</sup> Exh. 52 (Starkey Supplemental Direct), at 1.

<sup>29</sup> Exh. 52 (Starkey Supplemental Direct), at 2.

<sup>30</sup> *TRRO*, at ¶ 169.

imprecision of the proxy approach is amplified, and the resulting impairment decisions will be grossly incorrect. This will lead to unjustified and irreversible findings of non-impairment when impairment actually exists.<sup>31</sup>

The determination of a wire center as non-impaired will have an immediate impact on competition.<sup>32</sup> First, CLECs would be precluded from purchasing UNEs where they otherwise would be entitled to obtain them based on a determination using proper data. Second, CLECs are required to true-up any amounts to AT&T where AT&T properly designated wire centers as declassified. CLECs would therefore be liable for true-up payments from the date of the Commission's final determination in this proceeding back to March 2006, when AT&T filed the amended complaint.

**D. The Commission May Not Rely On Data Withheld by AT&T During Discovery and Not Entered into Evidence**

As a matter of logic and due process and state law, the Commission may not base a decision on information that was not submitted into evidence in the proceeding. Section 1701.2(a) of the California Public Utilities Code requires that any decision issued by the Commission "shall be based on the record developed by the assigned commissioner or the administrative law judge." The reason for this requirement is obvious. Allowing a party to submit new information in its brief violates due process because it deprives the opposing parties, the Administrative Law Judge, and the Commission of any opportunity to evaluate or test the veracity of the information. For the same reason, California law precludes the use of information

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<sup>31</sup> Exh. 51 (Starkey Direct), at 18.

<sup>32</sup> Exh. 51 (Starkey Direct), at 73.

to support a party's affirmative case if that information was sought in discovery, but withheld.<sup>33</sup> Yet this is exactly what AT&T has done.

**1. AT&T improperly attempts to introduce new information regarding an alleged fiber-based collocater in its brief**

At page 37 of its Opening Brief, in a footnote, AT&T attempts to introduce information outside the record of this proceeding to rebut the Joint CLECs' evidence<sup>34</sup> that AT&T mistakenly identified Mpower as a fiber-based collocater. AT&T indicates in a footnote that it "recently shared additional evidence" with the Joint CLECs that the disputed collocation arrangement identified might belong to ICG Communications instead of Mpower. The information in the footnote was not produced as a discovery response; rather on October 12 (after the conclusion of the evidentiary hearing), two photos were emailed to Joint CLECs with no notice, discussion, or follow-up. These photos were highly ambiguous, and the Joint CLECs believe they do not show what AT&T claims.<sup>35</sup> The photos decidedly are not "evidence," in any sense of the word, since they were neither offered nor admitted into the record of this proceeding. Rather, the footnote discussing the photos is, in fact, an attempt by AT&T's counsel to insinuate their extra-record "testimony" into the record.

Even if AT&T had attempted to bring forward this new evidence at the hearing, it would still be improper as an abuse of the discovery process. The Joint CLECs asked a number of discovery questions attempting to verify whether AT&T had accurately designated certain

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<sup>33</sup> Cal. Code Civ. Pro. §2023(b)(3).

<sup>34</sup> The Joint CLECs' evidence on this issue (whether Mpower is inaccurately listed as a FBC) is undisputed. Had AT&T desired to rebut Mr. Starkey's sworn testimony, it could have included this issue in its rebuttal testimony or it could have cross-examined Mr. Starkey. AT&T failed to do either step. Thus, Mr. Starkey's testimony is undisputed and should be accepted.

<sup>35</sup> Here the Joint CLECs' argument may appear to be offering extra-record "testimony" of their own, Joint CLECs, however, are forced to respond to AT&T's unfair, post-hearing attempt to insinuate information into the record. Moreover, unlike AT&T, Joint CLECs explicitly acknowledge that their assertions are not in the record and they do not misleadingly and inaccurately claim that they are "hopeful" that the parties may reach a stipulation as a means of suggesting that the information should be in the record.

carriers as fiber-based collocators. For example, XO, one of the Joint CLECs, asked AT&T to provide “the identity and number of Fiber-based Collocators at each such [allegedly non-impaired] wire center,” and “the data used for determining that these collocators are, in fact, Fiber-based Collocators.”<sup>36</sup> The Joint CLECs further asked AT&T to “describe the process that led to and the rationale for each change that AT&T made to its wire center classifications for California” and whether AT&T had “identified any other modifications or changes that need to be made to the wire center classifications for California . . . .”<sup>37</sup> One or both of these data requests should have elicited the photos of the collocation arrangement attributed to Mpower.

Yet rather than producing the information regarding ICG to Joint CLECs in a discovery response, AT&T withheld the information until after the hearing had concluded and the record was closed, and then attempted to slip it into the record via argument in its brief. Such “offensive” use of discovery cannot be condoned by the Commission.

## **2. AT&T’s Opening Brief Contains “Testimony” of Counsel, Not the Testimony of its Witnesses**

In its Opening Brief, AT&T attempts three times to bolster, with information not contained in the record, its claim that certain CLECs meet the definition of a fiber-based collocator even though they merely use fiber facilities deployed by other collocators. As discussed in detail below, one important requirement in designating a CLEC as a fiber-based collocator is to demonstrate that the CLEC “operates” a fiber transport cable. In an effort to demonstrate that CLECs “operate” fiber cable deployed by other collocators, AT&T claims that such CLECs “light” fiber strands at two places in its brief. However, the information stated in the brief is either not in the record at all, or not supported by the sources AT&T cites.

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<sup>36</sup> XO First Set of Data Requests to AT&T, Interrogatory and Request for Production No. 1, March 3, 2006.

<sup>37</sup> Second Set of Data Requests from Joint CLECs to AT&T, No. 2-25, April 26, 2006.

First, at pages 14-15 of its Opening Brief, AT&T presents the following claim:

The typical fiber transport facility may contain several hundred fiber strands that can easily support numerous carriers, each of which can have multiple fiber strands dedicated for their use. Oftentimes, instead of incurring the expense of deploying their own fiber-optic cables, carriers will connect to an existing cable, typically using a fiber facility as the cross-connect and “lighting” the fiber from their own collocation arrangements. Because these arrangements are similar to the Verizon “Competitive Alternate Transport Terminal” (or “CATT”) arrangement that the FCC specifically cited as an example of a “fiber-based collocation”<sup>57</sup> – a matter discussed in more detail below – AT&T California counted such collocation arrangements where the cross-connected carrier’s transmission facility was of at least a DS3 capacity and the other criteria were met.

. . .

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<sup>57</sup> See *TRRO* ¶ 102; see also Exh. 1 (Nevels Direct), at 10-11.

Second, at page 17, AT&T again claims that the CATT arrangement involves “carriers [that] obtain access to (and light) fiber strands . . . .” Third, on page 18, AT&T describes another scenario in which a CLEC might deploy dark fiber into a wire center and “peel off” strands to its own collocation arrangement. AT&T provides no citation at all for this passage, and the Joint CLECs can find nothing in the record to support these claims. Thus, this portion of the brief constitutes improper extra-record information.

With regard to the first two passage quoted above, AT&T cites to pages of Mr. Nevels’ testimony as support.<sup>38</sup> Those passages in Mr. Nevels’ testimony, however, do not contain or support AT&T’s assertions regarding CLECs allegedly “lighting” fiber from their own collocation arrangements. Rather, Mr. Nevels provides a generic description of Verizon’s CATT

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<sup>38</sup> AT&T Opening Brief, n.57 and n.67. With regard to the passage on page 17, AT&T also cites to Exh. 2 (Nevels Rebuttal) at 10, but it states only that CLECs using CATT are “leasing capacity and . . . operating a facility.” He does not provide evidence that CLECs “operate” fiber cable in a CATT arrangement because they “light” it.

fiber termination arrangement, including the fact that AT&T does not offer such arrangement.<sup>39</sup> He also describes various forms of wave division multiplexing that allow “multiple optronic systems [to] share the same fiber strand(s).”<sup>40</sup> The cited portions of witness Nevels’ testimony say nothing about “typical” carriers “oftentimes” “. . . ‘lighting’ the fiber from their own collocation arrangements.” In fact, Mr. Nevels’ testimony does not use the words “typical” or “typically” or “lighting” at all. The brief contains the “testimony,” not of Mr. Nevels, but rather of AT&T’s counsel in a post-hearing effort to bolster its insufficient record.

Likewise, Paragraph 102 of the *TRRO* contains nothing that supports AT&T’s claim that “typical” carriers “oftentimes” “. . . ‘lighting’ the fiber from their own collocation arrangements.” That paragraph provides as follows:

We define fiber-based collocation simply. For purposes of our analysis, we define fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center. We find that the collocation arrangement may be obtained by the competing carrier either pursuant to contract, tariff or, where appropriate, section 251(c)(6) of the Act, including less traditional collocation arrangements such as Verizon’s CATT fiber termination arrangements.<sup>41</sup>

In short, just as AT&T witness Nevels’ testimony said nothing about “typical” carriers “oftentimes” “. . . ‘lighting’ the fiber from their own collocation arrangements,” neither does the cited portion of the *TRRO*. It is plain that AT&T’s counsel – not AT&T’s witness – are testifying and, in the hope their footnote will not be checked too closely, purporting to provide citations to support their assertion. The Commission should see through, and reject, AT&T’s highly misleading and inappropriate conduct.

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<sup>39</sup> Exh. 1 (Nevels Direct), at 10-12.

<sup>40</sup> *Id.*, at 12.

<sup>41</sup> *TRRO*, at ¶ 102, fns. omitted.

AT&T's effort to slip new information into the record through its brief, is improper and the Joint CLECs hereby move that those passages<sup>42</sup> be stricken from AT&T's brief. Should the Commission decline to strike the improper passages, the Joint CLECs have included a declaration rebutting AT&T's assertions regarding Mpower, and the Joint CLECs hereby request that the declaration be admitted into the record in this proceeding.<sup>43</sup>

**E. AT&T Has A Duty To Be Truthful to the Commission**

Pursuant to Rule 1 of the Commission's Rules of Practice and Procedure, all parties, including AT&T have a duty "never to mislead the Commission or its staff by an artifice or false statement of fact or law." Nevertheless, AT&T's Opening Brief contains statements of "law" and "fact" that are egregiously misleading and frankly, wrong. In the interest of ensuring the clearest record possible, and to ensure that the Commission will not be misled by AT&T's unfair tactics, the Joint CLECs are compelled to bring these misstatements of law and fact to the attention of the Commission.

**1. The First Sentence of AT&T's Brief Seriously Mischaracterizes the U.S Supreme Court's Ruling on the Legality of TELRIC**

In the very first sentence of its Opening Brief, AT&T cites a United States Supreme Court decision in a highly misleading manner. AT&T's sentence reads as follows:

This proceeding asks whether AT&T California should be required to make available high-capacity loops and dedicated transport in certain wire centers in California at the nearly "confiscatory" TELRIC-based rates that the Federal Communications Commission ("FCC") has said apply to network elements unbundled under section 251(c)(3) of the Telecommunications Act of 1996 ("1996 Act" or "Act").<sup>44</sup>

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<sup>42</sup> AT&T Opening Brief, at 36, (last paragraph in Section iii beginning with the "*Second*"); Id. at 14-15 (last paragraph beginning with "The typical fiber transport facility" to the end of that paragraph on p. 15); Id. at 17 (first full paragraph beginning with "*Third*").

<sup>43</sup> The declaration from Don Poe, director of network services at Mpower is provided as Attachment 2 to this brief.

<sup>44</sup> AT&T Opening Brief, at 1 (citing *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 524-25 (2002) ("*Verizon*").

....

The obvious intention of this sentence and the citation to *Verizon* is to suggest to the Assigned ALJ or others in the Commission reading AT&T's brief that the Supreme Court held in *Verizon* that total element long run incremental cost ("TELRIC")-based UNE prices are "nearly 'confiscatory.'" However, as is readily apparent when one reads the pages cited by AT&T, the *Verizon* decision says no such thing. In fact, the case stands for the opposite proposition, as the following excerpt from the page preceding the text quoted by AT&T shows:

The incumbents' claim of TELRIC's inherent inadequacy to deal with depreciation or capital costs has its counterpart in a further argument. They seek to apply the rule of constitutional avoidance in saying that "cost" ought to be construed by reference to historical investment in order to avoid a serious constitutional question, whether a methodology so divorced from investment actually made will lead to a taking of property in violation of the Fifth (or Fourteenth) Amendment. *The Eighth Circuit did not think any such serious question was in the offing, 219 F.3d at 753-754, and neither do we.*<sup>45</sup>

This passage is a direct and unambiguous rejection of the notion that TELRIC is somehow "nearly 'confiscatory,'" which it is not. Indeed, if one reads the cited pages, it is clear that the Supreme Court directly rejected the ILECs' arguments, calling their contrived financial comparison "... spurious because the numbers assumed by the incumbents are clearly wrong" and stating that, "[o]n the other side of the comparison, the 'balance sheet' number is patently misstated."<sup>46</sup> The discussion in question concludes with the Court observing that "... the incumbent carriers here are just like the electric utilities in *Duquesne [Light Co. v. Barasch, 488 U.S. 299 (1989)]* in failing to present any evidence that the decision to adopt TELRIC was arbitrary, opportunistic, or undertaken with a confiscatory purpose."<sup>47</sup>

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<sup>45</sup> 535 U.S. at 523 (emphasis added).

<sup>46</sup> *Id.* at 525, 526.

<sup>47</sup> *Id.* at 527-28.

In fact, as AT&T should well know, this Commission has on at least two occasions – in the AT&T (then SBC) UNE rate decision and in the Verizon UNE rate decision – clearly and unmistakably noted the Supreme Court’s rejection in *Verizon* of the ILECs’ oft-repeated, but completely fallacious, claim that TELRIC somehow offends the constitution as a “confiscation” or “taking” because it is not calculated on the basis of embedded, but rather on the basis of forward-looking costs.<sup>48</sup> In view of this Commission’s *twice* having prominently cited *Verizon* correctly, AT&T’s mis-citation of *Verizon* is all the more egregious.

It is clear beyond any conceivable measure of doubt that AT&T’s citation of the Supreme Court’s *Verizon* decision is completely inaccurate and highly misleading. In the hope that its footnote would not be checked too closely, AT&T was attempting to color the issues in its favor by insinuating that *Verizon* found that TELRIC is “nearly confiscatory.” It did not do so, and AT&T knows or should know that it did not do so. AT&T’s mischaracterization of the U.S. Supreme Court’s opinion upholding TELRIC should not be tolerated by the Commission. It is difficult to understand why AT&T would even attempt to mislead the Commission regarding the economic viability of TELRIC rates, as the Commission already clearly understands and twice, in the SBC and Verizon UNE rate decisions, has applied TELRIC principles upheld in *Verizon*. Perhaps AT&T believed that an ALJ who acknowledged to the parties that he had been away

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<sup>48</sup> See D.04-09-063, *Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc. for the Commission to Reexamine the Recurring Costs and Prices of Unbundled Switching in Its First Annual Review of Unbundled Network Element Costs Pursuant to Ordering Paragraph 11 of D.99-11-050*, A.01-02-24 and related proceedings, Opinion Establishing Revised Unbundled Network Element Rates for Pacific Bell Telephone Company dba SBC California at 15-16 (September 23, 2004) [2004 Cal. PUC LEXIS 476, \*20-21]; D.06-03-025, *Rulemaking on the Commission's Own Motion to Govern Open Access to Bottleneck Services and Establish A Framework for Network Architecture Development of Dominant Carrier Networks*, R.93-04-003; *Investigation on the Commission's Own Motion into Open Access and Network Architecture Development of Dominant Carrier Networks*, I.93-04-002 (*Verizon UNE Phase*); Opinion Establishing Unbundled Network Element Rates and Price Floors for Verizon California and Modifying Decision 99-11-050 Regarding Monopoly Building Blocks at 11-12 (March 15, 2006) [2006 Cal. PUC LEXIS 107, \*16-17].

from telecom issues for several years would not check the citation very closely. This conduct by AT&T closely borders on misconduct.

**F. The *TRRO* Sets Forth Specific, Mandatory Impairment Criteria That Must Be Applied in the Commission's Impairment Analysis**

In the *TRRO* the FCC established an unbundling framework for high capacity loops and transport based on two criteria meant to serve as a proxy for measuring the actual level of competition (or availability of non-UNE alternatives) in a particular wire center. The two criteria are the number of fiber-based collocators and the number of business lines. The primary disputes between the Joint CLECs and AT&T arise from the proper definition and application of these two FCC criteria.<sup>49</sup>

**1. Fiber-Based Collocators**

The FCC defines a fiber-based collocator as follows:

Fiber-based collocator. A fiber-based collocator is any carrier, unaffiliated with the incumbent LEC, that maintains a collocation arrangement in an incumbent LEC wire center, with active electrical 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 incumbent LEC wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC 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 affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.<sup>50</sup>

**2. Business Line Count**

The FCC defines business lines as follows:

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<sup>49</sup> *TRRO*, at ¶ 93.

<sup>50</sup> 47 CFR §51.5.

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.”<sup>51</sup>

### 3. Application of FCC Criteria

AT&T and Joint CLECs dispute the interpretation and application of the definitions cited above; the parties do not dispute the FCC threshold levels of fiber-based collocators or business lines required to support a finding of non-impairment. Once the triggering entities are properly defined, and the accuracy and sufficiency of AT&T’s data is determined, the Commission must step through a mathematical exercise to determine whether sufficient numbers of triggering entities (as set forth below) are present in a given wire center.

#### a. The FCC Criteria

The ILECs’ obligations regarding unbundling high capacity loops<sup>52</sup> are as follows:

- *DS1 Loops*: ILECs must unbundle DS1 loops to all buildings, except those buildings served by a wire center with at least 60,000 business lines and at least four fiber-based collocators.<sup>53</sup> Importantly, both 60,000 business lines and four fiber-based

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<sup>51</sup> 47 CFR §51.5

<sup>52</sup> The Commission should note that the threshold for finding a wire center is non-impaired for loops is higher than that found for a determination of non-impairment for transport. The reason should be obvious – the FCC recognized, as this Commission should, that the provision of the loop (the “last mile” to the customer premises) is primarily provisioned by the ILEC and it would be a very costly to invest infrastructure to construct loops to individual customers premises to provide alternative choices.

<sup>53</sup> 47 CFR §51.319(a)(4)(i).

collocators must be exceeded before a finding of non-impairment can be made for DS1 loops.<sup>54</sup>

- *DS3 Loops*: ILECs must unbundle DS3 loops to all buildings, except those buildings served by a wire center with at least 38,000 business lines and at least four fiber-based collocators.<sup>55</sup> Again, both the business line count and fiber-based collocator count must be exceeded before a finding of non-impairment can be made for DS3 loops.<sup>56</sup>

Once the business line count and fiber-based collocator count data is collected for the wire centers, determining impairment for high capacity unbundled *loops* is a matter of determining which wire centers have at least 60,000 business lines **and** at least four fiber-based collocators (for DS1 loops), and determining which wire centers have at least 38,000 business lines **and** at least four fiber-based collocators (for DS3 loops).<sup>57</sup>

The FCC's unbundling framework for dedicated transport relies on a wire center tier structure that groups wire centers into Tier 1, Tier 2, and Tier 3 wire centers, according to business line counts or fiber-based collocator counts. Once wire centers are given a tier designation, impairment for dedicated transport will depend on the tier designation of the wire centers on both endpoints of the requested circuit. Wire centers are assigned a tier designation based on the following characteristics:

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

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<sup>54</sup> 47 C.F.R. §51.319(a)(4)(ii) caps the number of unbundled DS1 loops to a single building at 10.

<sup>55</sup> 47 CFR §51.319(a)(5)(i).

<sup>56</sup> 47 C.F.R. §51.319(a)(5)(ii) caps the number of unbundled DS3 loops to a single building at 1.

<sup>57</sup> Exh. 51 (Starkey Direct), at 10-11.

both. Once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center.

(iii) Tier 3 wire centers are those incumbent LEC wire centers that do not meet the criteria for Tier 1 or Tier 2 wire centers.<sup>58</sup>

Therefore, **Tier 1** wire centers are those with at least 38,000 business lines *or* four fiber-based collocators (the “or” being in contrast to the “and” requirement in the high capacity loop unbundling framework), **Tier 2** wire centers are those with at least 24,000 business lines *or* three fiber-based collocators, and **Tier 3** wire centers are those that do not qualify as Tier 1 or Tier 2 wire centers.<sup>59</sup>

The tier classifications for the wire centers on the endpoints of the dedicated transport route<sup>60</sup> will determine whether the dedicated transport circuit must be unbundled by the ILEC.

The specific thresholds for DS1, DS3 and dark fiber transport are summarized as follows:

DS1 Transport:<sup>61</sup> ILECs must unbundle DS1 transport where the wire centers at either end of the route are non-Tier 1 wire centers.<sup>62</sup> Or, in other words, if either wire center at the end of a requested route is a Tier 2 or Tier 3 wire center, then the ILEC must unbundle DS1 transport.

DS3 Transport:<sup>63</sup> ILECs must unbundle DS3 transport where a wire center on either end of the requested route is a Tier 3 wire center.<sup>64</sup>

Dark Fiber Transport: As in the case of DS3 Transport, ILECs must unbundle dark fiber dedicated transport where a wire center on either end of the requested route is a Tier 3 wire center.<sup>65</sup>

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<sup>58</sup> 47 C.F.R. §51.319(e)(3).

<sup>59</sup> Exh. 51 (Starkey Direct), at 11-12.

<sup>60</sup> “Route” is defined in 47 CFR 51.319(e) as “a transmission path between one of an incumbent LEC’s wire centers or switches and another of the incumbent LEC’s wire centers or switches. A route between two points (e.g., wire center or switch “A” and wire center or switch “Z”) may pass through one or more intermediate wire centers or switches (e.g., wire center or switch “X”). Transmission paths between identical end points (e.g., wire center or switch “A” and wire center or switch “Z”) are the same “route,” irrespective of whether they pass through the same intermediate wire centers or switches, if any.”

<sup>61</sup> 47 C.F.R. §51.319(e)(2)(ii)(B) caps the number of unbundled DS1 dedicated transport circuits on each route at 10.

<sup>62</sup> 47 C.F.R. §51.319(e)(2)(ii)(A).

<sup>63</sup> 47 C.F.R. §51.319(e)(2)(iii)(B) caps the number of unbundled DS3 dedicated transport circuits on each route at 12.

<sup>64</sup> 47 C.F.R. §51.319(e)(2)(iii)(A).

## **b. The Dispute and Its Importance**

Although the unbundling framework is a relatively straightforward process, it is more than a mere counting exercise. Otherwise, the determination of non-impairment could have been accomplished with a calculator alone. There would have been no need for the FCC to give state commissions the task of determining the accuracy and sufficiency of data for each wire center and analyzing the level of competition based on facts specific to the wire center and telecommunications market in the state.

Indeed, the disagreement between the parties in this proceeding over the proper interpretation and application of the FCC's criteria demonstrates that the FCC's criteria require some level of analysis and interpretation. The key to determining which party's interpretation, and proposed counts of business lines and fiber based collocators is correct, is an understanding of what the FCC intended to accomplish when it established its criteria. The Joint CLECs will discuss in detail below how the FCC intended for its criteria to be applied. When the criteria are properly applied, the level of competition at most wire centers at issue in this case is too low to meet the FCC's criteria for non-impairment, and therefore, AT&T's effort to withdraw high capacity UNE loops and transport fails.

## **II. DISPUTED ISSUES**

### **A. *Fiber-Based Collocators: How should Fiber-based Collocators ("FBC") be counted under the FCC's definition of "Fiber-based collocator" in 47 C.F.R. § 51.5 and applicable orders?***

The primary purpose of the *TRRO* was to establish a framework that would "impose unbundling obligations in a more targeted manner where requesting carriers have undertaken

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(Continued)

<sup>65</sup> 47 C.F.R. § 51.319(e)(2)(iv)(A).

their own facilities-based investments and will be using UNEs in conjunction with self-provisioned facilities.”<sup>66</sup> Because the deployment of fiber transport facilities involves substantial fixed and sunk costs that must be recovered from “numerous customers’ traffic,”<sup>67</sup> the FCC reaffirmed its holding that CLECs are impaired “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry . . . that are likely to make entry into a market uneconomic.”<sup>68</sup> The FCC determined that the “best and most readily administrated indicator of the potential for competitive deployment is the presence of fiber-based collocators in a wire center.”<sup>69</sup> The FCC stated:

As described below, the record shows a correlation between the number of business lines and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served via that wire center. In light of these correlations, we draw inferences, based on competitive deployment in certain markets, regarding the likelihood of competitive entry in other markets exhibiting similar characteristics. We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of actual deployment found in the record.<sup>70</sup>

Thus, the FCC reasoned that if revenue opportunities are sufficiently high, as evidenced by a large number of CLECs deploying fiber facilities inside the wire center (coupled with large numbers of business lines), then CLECs would likely not be impaired without unbundled access to high capacity loops and transport because competitive facilities-based deployment is likely to be economically feasible.<sup>71</sup>

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<sup>66</sup> *TRRO* at ¶ 3.

<sup>67</sup> *TRRO* at ¶ 72.

<sup>68</sup> *TRRO* at ¶ 21, quoting *TRO*, at ¶ 84.

<sup>69</sup> *TRRO* at ¶¶ 43, 93, 167 (footnotes omitted).

<sup>70</sup> Exh. 51 (Starkey Direct), at 16-17 (citing *TRRO*, ¶43 (emphasis added)(footnotes omitted).

<sup>71</sup> Exh. 51 (Starkey Direct), at 17.

With regard to high-capacity loops, the FCC concluded that the presence of fiber-based collocators could be viewed as an indicator of the presence of fiber rings from which competitors could economically construct fiber loops to serve individual buildings in the vicinity of a particular wire center.<sup>72</sup> With regard to interoffice transport, the FCC relied on fiber-based collocators as an indicator that fiber rings have been, or could be, constructed between ILEC wire centers.<sup>73</sup> In sum, the FCC's fiber-based collocator criteria are not a direct indicator of competition, but rather are employed by the FCC as a barometer of conditions in the service area associated with a particular wire center. As a consequence, any error or lack of rigor in determining the presence of fiber-based collocators in a wire center is amplified.

Erroneous fiber-based collocator counts will lead to the erroneous conclusion that there is a higher level of competitive deployment of transmission facilities than actually exist and that the market in the service area associated with the given wire center is conducive to competitive facilities being economically deployed when that is not actually the case.<sup>74</sup> Such errors would render the resulting impairment analysis grossly incorrect, and would lead to an irreversible finding of non-impairment when impairment actually exists.<sup>75</sup>

The FCC set forth six specific criteria of fiber-based collocation, and mandated that an entity must clearly meet all six criteria in order to be considered as a fiber-based collocator. The six criteria are:

1. The collocator must maintain a collocation arrangement;
2. The collocator must have an active electrical power supply in the collocation arrangement.<sup>76</sup>

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<sup>72</sup> *TRRO*, at ¶176.

<sup>73</sup> *TRRO*, at ¶ 167.

<sup>74</sup> Exh. 51 (Starkey Direct), at 17.

<sup>75</sup> Exh. 51 (Starkey Direct), at 18.

<sup>76</sup> The Joint CLECs asked AT&T to provide data demonstrating that Time Warner and Southern California Edison had active power supplies to their collocation arrangements. AT&T provided billing records from March, 2005

(Continued)

3. The collocator must operate a fiber-optic cable or comparable transmission facility;
4. The fiber-optic cable or comparable facility must terminate at a collocation arrangement within the wire center;
5. The fiber-optic cable or comparable facility must leave the ILEC's wire center premises; and
6. The fiber-optic cable or comparable facility must be owned by a party other than the ILEC, unless the cable is obtained from the ILEC as dark fiber on an indefeasible right of use basis ("IRU").<sup>77</sup>

AT&T argues, however, that the Commission should relax the FCC's standards in its fiber-based collocator analysis. AT&T argues that it is enough for an entity to meet some of the criteria directly, while meeting other criteria vicariously. Specifically, AT&T argues that it is enough to constitute being a fiber-based collocator if a carrier without any fiber facilities leaving the wire center cross connects to a collocation arrangement of another carrier that does have fiber facilities leaving the wire center.<sup>78</sup> The Joint CLECs will demonstrate below that the evidence shows that these so-called "connecting carriers," do not meet the FCC's minimum criteria for being a fiber-based collocator and must not be counted as such. Further, the Joint CLECs will demonstrate that AT&T incorrectly identifies entities as fiber-based collocators for other reasons, including non-operational entities, entities lacking a certificate to operate in California, and empty or non-functional collocation arrangements.

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(Continued)

for these two carriers, but there were no records indicating an active power supply at the following wire centers. For Time Warner, there were no billing records for power supply at BEGIN CONFIDENTIAL\*\*\*  
 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx \*\*\*END CONFIDENTIAL. For Southern California Edison, there were no billing records for power supply at BEGIN CONFIDENTIAL\*\*\* xxxxxxxxxxxxxxxxxxxxxx  
 xxxxxx\*\*END CONFIDENTIAL. Thus, these carriers should not be counted as collocators at those wire centers. Should AT&T attempt to provide billing records for power supply at these locations now, such information cannot be relied upon by the Commission because it is not contained in the record of this case. See discussion in Section I.D. above. Further, AT&T should be required to provide current billing records rather than records from 2005 demonstrating that these two carriers currently have active power supplies.

<sup>77</sup> TRRO, ¶102; 47 CFR §51.5.

<sup>78</sup> See AT&T Opening Brief, at 16-26; Exh. 1 (Nevels Direct), at 13.

**1. Are there instances in which the Commission should count a connecting carrier that uses a collocation-to-collocation cross-connect to access fiber capacity from a second collocator as a separate FBC (i.e., in addition to the collocation of the second collocator)? If so, what are the circumstances in which such connecting carriers should be counted as an FBC?**

There are no instances in which the Commission should count as a fiber-based collocator an entity that fails to directly meet all six of the FCC's mandatory criteria. AT&T does not offer evidence that a cross connecting carrier meets the six FCC criteria. Rather, AT&T attempts to redefine the FCC's criteria so that a carrier purchasing a transport service on another carrier's facility would qualify as a fiber-based collocator.<sup>79</sup> The Joint CLECs will demonstrate below that cross-connected carriers fail to meet at least three of the FCC mandatory criteria for fiber-based collocators.<sup>80</sup>

It is noteworthy that a recent AT&T commitment to the FCC directly contradicts AT&T's position in this docket and supports the Joint CLECs' position. As part of the FCC's consideration of the AT&T and BellSouth merger, FCC staff and certain commissioners requested that AT&T agree to a set of commitments, which AT&T did publicly and in writing. One of those commitments was the exclusion of cross-connecting carriers from the count of fiber-based collocators in wire center impairment analyses in the entire AT&T/Bell South region.<sup>81</sup> The request is a strong indication that the FCC intended that fiber-based collocator counts exclude cross connecting carriers but AT&T is not honoring that commitment in this

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<sup>79</sup> See e.g., AT&T Opening Brief, at 19; Exh. 1 (Nevels Direct), at 9.

<sup>80</sup> Exh. 51 (Starkey Direct), at 22.

<sup>81</sup> FCC Public Notice, Docket DA 06-2035, Application for Consent to Transfer of Control Filed by AT&T Inc. and BellSouth Corporation, WC Docket No. 06-74, Oct. 13, 2006, Letter from Robert W. Quinn, Jr. to FCC Chairman Kevin Martin, UNE 2(ii) ["AT&T BellSouth Merger Commitment Letter"]. For the convenience of the Commission, a copy of the public notice and letter are provided with this brief as Attachment 3. The Joint CLECs hereby ask the Commission to take official notice of the FCC public notice and attached letter pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

proceeding.<sup>82</sup> Moreover, AT&T's agreement to exclude cross-connecting carriers demonstrates that AT&T's effort to include such carriers in its fiber-based collocator count in this proceeding is a "policy" decision rather than a operational, technical, or legal decision. Surely if AT&T believed that excluding cross-connecting carriers from the fiber-based collocator count were contrary to the FCC's rules and or law, then it would not have agreed. Joint CLECs also submit that since AT&T has lost this issue in every state, but one, AT&T's commitment to exclude cross-connecting carriers from its fiber-based collocator count should be applied in the context of this proceeding as well.

AT&T's proposal to count any cross-connected carrier that uses another collocator's fiber transport facility is simply not supported by the law. Excluding such carriers is reasonable and justified because the FCC's purpose in identifying fiber-based collocators was to determine service areas in which conditions would allow CLECs to economically deploy their own high capacity loop and transport facilities rather than purchasing UNEs from the ILEC. Cross-connecting carriers purchasing another collocator's transport service neither satisfies the FCC's criteria nor identifies the feasibility of deploying new competitive facilities.

The six FCC criteria set forth the minimum characteristics necessary to conclude that a CLEC has the ability to economically deploy facilities. Put simply, if a CLEC has not deployed its own fiber facilities in the wire center, there is no basis to speculate that the CLEC could economically deploy outside plant such as loops and transport. Therefore, the Commission must

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<sup>82</sup> In fact, AT&T's public acceptance of the FCC's condition should – and in an ideal world, would – make it unnecessary to go through all of the arguments that AT&T has advanced in this case, arguments that are starkly at odds with AT&T's simultaneous commitment to the FCC. However, because the Joint CLECs only get to submit one brief in this proceeding, Joint CLECs must continue beyond AT&T's public acceptance of the FCC's condition and instead address, and refute, all of AT&T fallacious arguments.

require AT&T to prove, through a preponderance of verifiable evidence, that each fiber-based collocator identified by AT&T in each wire center indeed meets all of the FCC's criteria.

Because AT&T cannot demonstrate that many CLECs meet the six FCC criteria, it embarks on an effort to substitute a lower standard. AT&T posits that if a CLEC purchases transport service from another carrier (and is thus cross-connected to that carrier to obtain that service) rather than deploying its own facilities, such arrangement should be deemed to be fiber-based collocation. But such an approach completely undermines the FCC's paradigm of using actual competitive deployment as an indicator that further competitive deployment of facilities is possible. A collocator that has no fiber of its own (and therefore does not operate it), but is simply buying a fiber-based transport service (*e.g.*, DS3 transport service) from another carrier does not and cannot provide any basis to infer that the carrier has, or would, deploy "fiber rings," nor does it indicate that the carrier has, or would, deploy a competitive transport route between the wire center where the collocator resides and any other wire center. Similarly, for loop impairment purposes, the collocator using another carrier's leased lit capacity does not allow for an inference that the collocator could deploy competitive loops by building laterals off an existing competitive fiber ring—because there is no evidence that the collocator has any fiber ring in the first place. Reliance on fiber-based collocators as a proxy for actual or potential competitive facilities deployment makes no logical sense if the fiber-based collocator does not actually operate fiber facilities that are capable of providing competitive interoffice transport or high-capacity loops to other carriers.

The Commission should reject AT&T's argument because the cross-connected carriers fail to meet at least three of the FCC's mandatory minimum criteria for fiber-based collocators.<sup>83</sup>

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<sup>83</sup> Exh. 51 (Starkey Direct), at 22.

Cross-connecting carriers do not “operate” a fiber optic cable; they do not have a fiber optic cable that leaves the wire center;, and they do not terminate a fiber optic cable at a collocation arrangement.<sup>84</sup>

**a. Cross-connected carriers purchase transport service rather than “operate” a fiber cable**

The FCC stated in the *TRRO*, “[w]e define fiber-based collocation simply,”<sup>85</sup> and further stated that fiber-based collocation “stands out as one of the most objective indicia of competitive deployment available.”<sup>86</sup> Nonetheless, AT&T has turned the FCC’s straightforward fiber-based collocater test into precisely the “complex and lengthy” exercise that the FCC wished to avoid. AT&T’s proposed application of the FCC’s rules reaches far beyond the bounds set by the FCC. AT&T has created a complex, but unpersuasive, argument attempting to convince the Commission that it should count a far greater scope of entities as fiber-based collocators than the FCC intended.<sup>87</sup>

**1) AT&T attempts to redefine the FCC’s criteria**

The most nonsensical example of AT&T’s position is its attempt to ignore the clear word “operate” in the FCC’s rules and *TRRO*. AT&T erroneously insists that the FCC’s use of the phrase “operate” can properly be redefined to mean something less, or, in fact, something very different. As discussed above, the FCC criteria require that a fiber-based collocator must “operate” a fiber optic cable. AT&T ignores this text and instead substitutes the term “obtain.” AT&T claims that a fiber-based collocator need only “obtain” a transmission *capability*, rather

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<sup>84</sup> Exh. 51 (Starkey Direct), at 21.

<sup>85</sup> *TRRO*, at ¶102.

<sup>86</sup> *TRRO*, at ¶99.

<sup>87</sup> *TRRO*, at ¶99.

than “operate” a fiber facility or comparable transmission facility, as required in the FCC’s rule.<sup>88</sup> AT&T’s argument must be rejected.

The definition of the word “operate” means to exercise control, manage, or direct. Even AT&T admits that the term “operate” means “[t]o control the functioning of; [to] run.”<sup>89</sup> Nonetheless, AT&T urges the Commission to substitute the word “obtain” when applying the FCC’s rules.

AT&T’s purposeful effort to ignore the plain meaning of the FCC’s rule must fail. The Commission recognizes the well-established rule of judicial interpretation that words shall be given their common meaning unless a more specific definition is provided.<sup>90</sup> Further, if the FCC had intended to create an unbundling framework whereby all collocators using non-ILEC fiber transport counted as fiber based collocators, it would have chosen the word “obtain” (or “use”) rather than a more narrowly defined word with a different meaning, *i.e.*, “operate.”<sup>91</sup> Indeed, as discussed below, this is precisely the word that AT&T asks the Commission to substitute.

The FCC appears to have chosen the word “operate” because it better reflects the FCC’s intention to identify carriers that have established competitive transport facilities between central offices and thereby, have shown that it is economically feasible to do so. Carriers who simply cross-connect to use that same fiber, do not provide another alternative fiber route, and have, by purchasing capacity from the other carrier, shown exactly the opposite of economic feasibility, *i.e.*, those carriers apparently concluded that it was not economically feasible to build their own

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<sup>88</sup> AT&T Opening Brief, at 20-21; Exh. 1 (Nevels Direct), at 9.

<sup>89</sup> AT&T Opening Brief, at 20; Exh. 4 (Chapman Rebuttal), at 49.

<sup>90</sup> *See e.g.*, D.04-06-014, *Order Instituting Rulemaking to Implement the California Renewables Portfolio Standard Program*, June 9, 2004, at 7.

<sup>91</sup> However, the FCC specifically rejected using raw collocator counts for its impairment analysis, choosing instead to use fiber-based collocators, which suggests that the FCC chose its words wisely when it used the word “operate” instead of “obtain” or use.”

facility (so they lease capacity instead).<sup>92</sup> Indeed, AT&T's witness Mr. Nevels admits this. In his testimony, Mr. Nevels testified "[r]ather than incur the expense of installing its own fiber, carrier A [the cross connecting carrier] leases capacity from carrier B."<sup>93</sup> The clear reality, which AT&T chooses to disregard, is that connecting carriers fail to demonstrate either of the indicia of competition envisioned by the FCC. They neither demonstrate where alternative transport facilities have been deployed, nor are they indicators of the economic feasibility of competitive deployment of transmission facilities outside of the wire center.<sup>94</sup>

Notwithstanding the clear and unambiguous wording of the rule and practical application of the word "operate" on the manner that transport services are provided, AT&T tries to circumvent this requirement in two ways.<sup>95</sup>

First, AT&T attempts to substitute a different, more lenient term – "obtain." The dictionary definition of the term "obtain" means the ability to use something. Clearly, the ability to use something is less rigorous than the ability to control something.<sup>96</sup>

The FCC did not provide an exact definition of the word "operate," but the Joint CLECs submit that it did not have to provide a definition, given the common understanding of the word. Importantly, AT&T obviously has recognized the unambiguous meaning of the word "operate"

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<sup>92</sup> Exh. 51 (Starkey Direct), at 26, 33.

<sup>93</sup> Exh. 1 (Nevels Direct), at 10.

<sup>94</sup> Exh. 51 (Starkey Direct), at 34.

<sup>95</sup> In its Opening Brief, at 20, AT&T also makes a claim, unsupported by any citation to the record, that a cross connected carrier "splices into dark fiber and then lights that fiber from its own collocation arrangement . . . [and thereby can] be said to 'operate' the fiber . . ." CLECs believe this statement is not based on record evidence, and should be given no weight on that basis. In addition, however, it appears that AT&T means to say that the cross connecting carrier splices into, and lights, fiber for the cross connect. In such arrangement, the CLEC cannot be said to operate a fiber transport facility as required by the FCC.

<sup>96</sup> Exh. 51 (Starkey Direct), at 25. Other state commissions have agreed that AT&T's substituted language imparts a lower standard. *Id.* (citing New Hampshire PUC Case DT 05-083 and DT 06-112, Order No. 24,598 (March 10, 2006) at 36: "We consulted *Webster's II New College Dictionary* 786 (3<sup>rd</sup> ed. 2005) for a definition of "operate." Rule 51.5 uses "operate" in a transitive sense when it requires that a fiber-based collocater "operate a cable." The first definition for "operate" as a transitive verb seems to be most appropriate: "to control or direct the functioning of." This definition indicates some active control of the cable; not merely its existence or some use of its functions." (footnote omitted).

in the FCC's requirements for fiber-based collocators recently in a different context. In its merger commitments to acquire BellSouth, AT&T agreed that the term "operate" requires a CLEC to "own or manage the optronics on the fiber."<sup>97</sup> It is noteworthy that this condition was included at the specific request of FCC staff and certain commissioners. This request is strong evidence that the FCC intended the term "operate" to mean ownership or active operation of a fiber facility, rather than the purchase of fiber transport service from another carrier.

Also instructive of the FCC's intent is its discussion regarding dark fiber. The FCC distinguished the situation in which a CLEC would "operate" dark fiber from the situation of using lit transport on the basis that the CLEC "engineers and controls the network capabilities of transmission and can maximize the use of previously dormant fiber."<sup>98</sup> Thus, the key requirement for "operating" a facility is the CLEC's role in activating, determining the technical characteristics and managing the operation of the fiber facility.

Second, AT&T attempts to circumvent the FCC's requirement by redefining the object of control for a fiber-based collocator. In its Opening Brief, AT&T asserts that a CLEC need only "run" the comparable transmission facility (defined by AT&T either as the intraoffice cable, alone, or in combination with fiber transport service, according to AT&T) that it uses to connect to the collocation arrangement of a fiber-based collocator in order to purchase fiber transport service.<sup>99</sup> AT&T cites testimony from Ms. Chapman claiming that the cross-connecting carrier "must" perform functions as such choosing the type and quantity of equipment to place in its own collocation arrangement, deciding what traffic it will route on the comparable transmission facility, placing traffic onto the cross connect, comparable transmission facility, negotiating with

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<sup>97</sup> See, Attachment 3 (AT&T BellSouth Merger Commitment Letter).

<sup>98</sup> *TRRO*, at ¶ 135.

<sup>99</sup> AT&T Opening Brief, at 21; Exh. 4 (Chapman Rebuttal), at 49.

another carrier to lease transport capacity or services, and monitoring the cross connect to determine whether modifications or augments are needed.<sup>100</sup>

Ms. Chapman's observations are irrelevant and unsupported. They are irrelevant because the type of activities enumerated by Ms. Chapman are not examples of engineering and controlling the network capabilities of transmission – such as choosing the type and amount of fiber to deploy, attaching optronics and activating the transport fiber facility, engineering the capacity of circuits that facility, obtaining use of rights-of-way and or permits to construct in city streets, pulling fiber into the wire center, *etc.*<sup>101</sup> AT&T did not, and could not, offer any evidence that CLECs exercise these types of control or management over the fiber transport facility because, in fact, that fiber is owned and/or operated by another carrier. The cross-connecting carrier merely purchases transport service on the fiber.

Ms. Chapman's observations are also unsupported. AT&T admitted during discovery response that Ms. Chapman's testimony did not intend to assert that each cross-connecting carrier actually performed the activities she described.<sup>102</sup> Rather, AT&T stated that Ms. Chapman's assertion was "derived from Ms. Chapman's general knowledge" of the activities she believes cross-connecting carriers perform with regard to an intraoffice cross connect they use to connect to a fiber-based collocator.<sup>103</sup>

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<sup>100</sup> AT&T Opening Brief, at 21; Exh. 4 (Chapman Rebuttal), at 49-50.

<sup>101</sup> Exh. 51 (Starkey Direct), at 30; *see e.g.*, TRRO, at ¶¶315 n.931; 316, 408, 410; Exh. 15, at ¶¶6, 9, 12.

<sup>102</sup> Exh. 62 (AT&T Response to Joint CLEC Data Request 4-1).

<sup>103</sup> Exh. 63 (AT&T Response to Joint CLEC Data Request 4-3).

## 2) AT&T's redefinition of "operate" is at odds with engineering realities

AT&T's claim that cross-connecting carriers "operate" fiber optic cable runs counter to engineering realities. AT&T claims that that a connecting carrier satisfies the requirement that it operate a cable simply if it may "utilize" or "share" the capacity of a strand of fiber within a fiber cable, or the capacity of a single strand of fiber from another carrier through the use of Wave Division Multiplexing (WDM) or dense wave division multiplexing (DWDM).<sup>104</sup> This is yet another attempt by AT&T to define away the FCC's criteria. The common meaning of these words makes it clear that "utilizing" or "sharing" capacity are not the same as operating or controlling a fiber optic cable.<sup>105</sup> Even if a connecting carrier shares the same fiber strand, the physical fiber cable terminates only one place -- the optronic equipment of the collocator. The cross-connecting carrier merely leases a transport service, or capacity over that same facility.<sup>106</sup> Thus the CLEC that owns the optronics to which the fiber terminates and that lights the fiber is the only entity that controls (*i.e.*, operates) the fiber cable.<sup>107</sup> The plain English meaning of the FCC's mandatory criteria clearly demonstrates that purchasing a transport service does not qualify a carrier as being a "fiber-based collocator."

Further, AT&T's re-formulation of the FCC's criteria improperly equates "capacity" and "facility." The FCC's objective is to capture alternative transport options. In the FCC's context, "facility" implies separate ownership or control.<sup>108</sup> AT&T witness Mr. Nevels claims that because *capacity* of a single facility can be shared between several carriers from an engineering standpoint, this facility should be considered as more than one facility from the standpoint of

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<sup>104</sup> Exh. 1 (Nevels Direct), at 11-12. *See also*, Exh. 51 (Starkey Direct), at 27-28.

<sup>105</sup> Exh. 51 (Starkey Direct), at 45, 47.

<sup>106</sup> Exh. 51 (Starkey Direct), at 27-28.

<sup>107</sup> Exh. 51 (Starkey Direct), at 27-28.

<sup>108</sup> Exh. 51 (Starkey Direct), at 47-48.

control and ownership (and counted as multiple facilities in the fiber based collocator counts). This claim has no basis in the FCC’s rules or orders. That is, the FCC never suggests that the term “facility” should be interpreted to mean transmission capacity – not a physical facility.<sup>109</sup> And doing so is actually contrary to the plain reading of the *TRRO* as well as the objective of the FCC’s unbundling framework, which is to determine where competitive deployment of transmission *facilities* is economically feasible – not to determine where *capacity* is available on those facilities.

The FCC’s reasoning elsewhere in the *TRRO* also demonstrates that purchasing a service on an already lit fiber cable does not constitute operation of fiber facilities. When defining the types of facilities that are sufficient to constitute fiber-based collocation, the FCC stated that dark fiber obtained through an indefeasible right of use (“IRU”) could constitute fiber-based collocation.<sup>110</sup> In other words, the FCC looked for indicia of control – the CLEC has an indefeasible (*i.e.* long-term) right of use and the CLEC must take physical, operational steps such as placing optronics and activating the fiber cable.<sup>111</sup> In the case of a cross-connecting CLEC, there is no indicia of control because none exists. AT&T’s claims are nothing more than assertions that ignore the practical reality of what the cross-connected carrier purchases from the carrier that has invested in, owns, and operates fiber in that wire center.

AT&T’s purpose in redefining the FCC’s criteria to include any access to fiber cable, rather than operation of a fiber cable, is clear. Rather than having to demonstrate the existence of true, alternative fiber facilities, AT&T can create multiple fiber-based collocators based on the presence of only one physical fiber facility exiting the wire center. The practical effect of using

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<sup>109</sup> Exh. 51 (Starkey Direct), at 47-48.

<sup>110</sup> Exh. 51 (Starkey Direct), at 28-30 (citing ¶¶ 102, 408).

<sup>111</sup> Exh. 51 (Starkey Direct), at 28.

AT&T's approach would be that if two or three connecting carriers all share one fiber-based collocator's fiber cable exiting a wire center, then AT&T would claim that it had fully satisfied the FCC's fiber-based collocation criteria for having three or four fiber-based collocators in that wire center.<sup>112</sup> Such a result completely ignores and undermines the FCC's intent that "true alternatives to the ILEC network" exist in high numbers in a wire center before ILECs may withdraw high capacity UNEs.

Even AT&T appears to recognize the weakness of its argument that a carrier purchasing transport service on another CLEC's fiber constitutes a fiber-based collocation arrangement. As discussed below in Section II.A.2, AT&T has raised an alternate argument that even if a cross connecting carrier is not operating a fiber cable, it operates a so-called "comparable transmission facility," and thus qualifies as a fiber-based collocator.

### **3) AT&T's redefinition of "operate" is at odds with other portions of the FCC's unbundling framework**

AT&T's approach also leads to inconsistent results within the FCC's unbundling framework. The FCC rule calls for affiliated fiber-based collocators in a central office to be counted as one fiber-based collocator. Specifically, ¶ 102 of the *TRRO* states that, "[i]n tallying the number of fiber-based collocators for purposes of our transport impairment analysis, parties shall only count multiple collocations at a single wire center by the same or affiliated carriers as one fiber based collocation." The FCC apparently reasoned that if two carriers are affiliated, then their separate fiber facilities are under a single source of control, and thus should be counted as a single fiber-based collocation arrangement. It would be directly inconsistent for the FCC to have intended that both the cross connected carrier purchasing transport service, and the underlying fiber-based carrier should be counted as two separate fiber-based collocators when

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<sup>112</sup> Exh. 51 (Starkey Direct), at 31.

they use a single facility.<sup>113</sup> Just as with affiliated carriers, cross connect arrangements involve a single source of control – one carrier owns or operates the physical fiber facility on which the second carrier purchases transport service.<sup>114</sup>

AT&T's approach further contradicts the FCC's admonition that simply counting the number of collocation arrangements in a wire center is insufficient to approximate the existence of competitive facilities.<sup>115</sup> Rather, the FCC required that only fiber-based collocators (*i.e.*, carriers operating a fiber facility that terminates at their collocation arrangement and exits the wire center) should be counted.<sup>116</sup>

**b. Cross-connected carriers do not terminate fiber cable at their collocation arrangement**

The FCC's criteria require that a fiber-based collocator operate a fiber optic cable that “terminate[s] at a collocation arrangement within the wire center.” The FCC imposed this termination requirement to ensure that true alternative facilities exist at the wire center. The FCC stated, “. . . each competitive transport facility on a route counted to satisfy the trigger must terminate in a collocation arrangement in the incumbent LEC central office. This demonstrates that true alternatives to the incumbent LEC's network have been deployed and is consistent with the Supreme Court's interpretation of impairment.”<sup>117</sup>

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<sup>113</sup> Exh. 51 (Starkey Direct), at 31-32.

<sup>114</sup> Exh. 51 (Starkey Direct), at 31-32.

<sup>115</sup> Exh. 51 (Starkey Direct), at 32.

<sup>116</sup> Exh. 51 (Starkey Direct), at 32 (*citing TRRO*, at ¶102, n.296).

<sup>117</sup> Exh. 51 (Starkey Direct), at 29; Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996 (CC Docket No. 96-989); Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147), FCC No. 03-36, (rel. Aug. 21, 2003) (hereinafter, “*TRO*”), ¶408. Should AT&T argue on reply that this passage was superseded or invalidated by the *TRRO*, it should be noted that the FCC cites to ¶408 of the *TRO* in the *TRRO* at ¶102.

Fiber optic cables “terminate” where the fiber strands terminate into optronics equipment,<sup>118</sup> which “lights” the fiber and determines system capacity.<sup>119</sup> Fiber strands terminate only once in a wire center because the strand can, by definition, terminate to only one set of optronics.<sup>120</sup> Hence, the carrier that installs the optronics equipment and terminates the fiber transmission facility to its collocation cage “operates” the fiber cable. The connecting carrier merely purchases a transport service on another carrier’s cable.

AT&T tries to overcome this fatal flaw by casting the definitional net ever further. As discussed below in Section II.A.2., AT&T argues that if purchasing transport service on a fiber-based collocater’s fiber is not enough to meet the FCC’s rules, then adding the intra-office cable, used by the cross-connecting carrier to reach the collocation arrangement of the fiber-based collocater, should be enough to constitute a separate fiber-based collocation arrangement.

**c. Cross-connected carriers lack a fiber cable that leaves the wire center**

AT&T’s witness Mr. Nevels admits that cross-connecting carriers do not own fiber that leaves the wire center. In describing connecting carriers, Mr. Nevels testified:

A carrier that does not own the fiber it uses to leave the wire center, but instead obtains that *transmission capability* from another carrier, still “maintains a collocation arrangement...and operates a fiber-optic cable or comparable transmission facility” that satisfies Rule 51.5.

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The carriers [CLECs] apparently believe that because the cross-connected carrier does not own the fiber cable leaving the wire

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<sup>118</sup> Optronics is defined in fn. 628 of the *TRO* as follows: “Dark fiber is optical fiber through which no light is transmitted and no signal is carried. It is un-activated deployed fiber that is left dark, *i.e.*, with no necessary equipment, *i.e.*, “opto-electronics” or “optronics” attached to light the fiber to carry a signal to serve customers...Once the optronics are attached to the fiber to make signal transmission possible the dark fiber becomes “lit.”

<sup>119</sup> Exh. 51 (Starkey Direct), at 26.

<sup>120</sup> Exh. 51 (Starkey Direct), at 26.

center, this carrier's arrangement does not meet the definition of a "Fiber-Based Collocator" under Rule 51.5.<sup>121</sup>

Because cross-connected carriers do not have a fiber cable that exits the wire center, one of the FCC's mandatory criteria, such arrangements may not be considered as a separate fiber-based collocation.

**d. Other state commissions and another ILEC have rejected AT&T's argument that connecting carriers constitute fiber-based collocators**

**1) Cross connected CLECs do not count as fiber-based collocators**

To the best of the Joint CLECs' knowledge, all but one state commission that have evaluated the issue have rejected AT&T's theory that cross-connected CLECs should be counted as fiber-based collocators.<sup>122</sup> Thus the Commission would be squarely within the majority opinion across the country if it excludes cross-connected carriers from the fiber-based collocator count. The orders issued in other states may provide useful context for this Commission's analysis, thus the reasoning of some of those other commissions is provided below. The Kansas, Michigan, Texas, South Carolina commissions have rendered orders rejecting the position that cross-connected carriers are fiber-based collocators simply by virtue of the cross-connect.<sup>123</sup>

The Kansas Commerce Commission ("KCC") concluded that AT&T "has incorrectly interpreted the FCC's fiber-based collocator rule and the FCC's fiber-based collocator intentions

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<sup>121</sup> Exh. 51 (Starkey Direct), at 25 (*citing* Exh. 1 (Nevels Direct), at 9) (emphasis added).

<sup>122</sup> Joint CLECs acknowledge the Public Utilities Commission of Ohio's decision ruling in favor of AT&T on this issue. The PUCO's decision, however, is not dispositive or probative in this proceeding. The Ohio decision is the exception, rather than the general rule. Because the Ohio decision is out of step with the decisions of other state commissions across the country, the Commission should give it little weight.

<sup>123</sup> With respect to the commission orders already issued, Joint CLECs do not believe that AT&T appealed any of these decisions.

and determinations as contained in the *TRRO*.<sup>124</sup> The KCC held that AT&T's proposal to include cross-connecting carriers with no fiber transport facility was fatally flawed because the *TRRO* made clear that a DS3 cross-connection facility to another CLEC would not qualify either as a "fiber-based collocator" or a carrier with "comparable transmission facility." The KCC correctly stated that the

FCC could not have been more plain about its intentions with its unqualified citation to ¶ 408 and notes 1263 and 1265: Collocators that are cross-connected to a 'lit' fiber-based collocator should not be counted as fiber-based collocators . . . But the fact of the matter is that the DS3 or multiple DS3s, do no more than connect a collocator to a fiber-based collocator to obtain transport services on a particular route. Those DS3s do not leave the central office as required by the FCC's definition of fiber-based collocators. As such, the DS3s are not 'comparable transmission facilities.'<sup>125</sup>

The KCC further found that SWBT's proposal to count cross-connecting carriers as fiber-based collocators was an improper effort to inflate the count. Crystallizing the issue and result, the KCC held that "counting cross-connect collocators, who have no ownership rights such as an IRU to the cable, as fiber-based collocators because they 'operated' the other carrier's fiber was improper and inflated the count of fiber-based collocators."<sup>126</sup>

Similarly, the Michigan Public Service Commission ("MPSC") rejected the attempt by SBC Michigan (aka AT&T Michigan) to count cross-connected carriers as fiber-based collocators. In a September 2005 decision, the Michigan PSC ruled that:

The arrangement in which one CLEC cross-connects to the facilities of another CLEC that is a fiber-based collocator does not increase the

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<sup>124</sup> *In the Matter of the Complaint of Post-Interconnection Dispute Resolution of Southwestern Bell Telephone, L.P. Against Nuvox Communications of Kansas, Inc. Regarding Wire Center UNE Declassification*, Docket No. 06-SWBT-743-COM, Order Determining Proper Method for Fiber-Based Collocator and Business Line Counts, ¶ 24 (June 2, 2006) ["Kansas order"]. For the convenience of the Commission, a copy of the Kansas order is provided as Attachment 4 to this brief. The Joint CLECs request the Commission to take official notice of the Kansas order pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>125</sup> *Id.* at ¶ 31.

<sup>126</sup> Exh. 51 (Starkey Direct), at 65-55 (*citing* Kansas Order at 19).

number of fiber-based collocators for purposes of this analysis. See 47 C.F.R. 51.5. Contrary to SBC’s arguments, the issue is not ownership, but rather control and operation of fiber facilities. There is no support for finding that this arrangement includes fiber to the collocation cage of the CLEC that cross-connects to the CLEC that does control and operate fiber facilities. Because there are only three fiber-based collocators at the Dearborn Fairborn wire center, the wire center is impaired . . . .<sup>127</sup>

The Texas Public Utility Commission (“TPUC”) also recently rejected AT&T Texas’ attempt to count cross-connected carriers as “fiber-based collocators.” It found that:

... in order for a collocated carrier’s equipment to operate a fiber-optic cable or comparable transmission facility that leaves the wire center, the collocator’s fiber-transmission equipment must be directly connected to that transmission facility and cannot be routed through (e.g. cross-connected to) an unaffiliated carrier’s collocated equipment located in the same central office.

\* \* \* \*

One of the FCC’s requirements for being an FBC [fiber-based collocator] is that the FBC operate a fiber-optic cable or comparable transmission facility. The Commission finds that in order for a carrier to qualify as an FBC that operates a fiber-optic cable or comparable facility, a collocator must have its collocated fiber-optic transmission equipment connected directly to the fiber-optic cable or comparable transmission facility that leaves the central office. The phrase *directly connected to* excludes from the count an FBC that is routed through (e.g., cross-connected to) another unaffiliated CLEC’s fiber-optic transmission equipment which connects to the fiber-optic cable or comparable transmission facility that leaves the wire center. For example, CLEC A, which cross-connects its collocation equipment to CLEC B’s transmission equipment in order to gain access to the fiber-optic cable or comparable transmission facility that leaves the central office is not considered a fiber-based collocator. The Commission finds CLEC A in this example is not operating the fiber-optic cable or comparable transmission that leaves the wire center. CLEC B is the collocated carrier that is directly connected to a fiber-optic cable or comparable transmission facility and it is CLEC B’s transmission equipment that operates that transmission facility.<sup>128</sup>

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<sup>127</sup> Exh. 51 (Starkey Direct), at 64 (*citing In the Matter, on the Commission’s Own Motion, to Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC Michigan and Verizon*, Michigan Public Service Commission Docket U-14447, Order at 11 (September 20, 2005). For the convenience of the Commission, a copy of the Michigan order is provided as Attachment 5 to this brief. The Joint CLECs request the Commission to take official notice of the Michigan order pursuant to Rule 13.9 of the Commission’s Rules of Practice and Procedure.

<sup>128</sup> *Post Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, Docket No. 31303, Order Approving Methodology to Determine AT&T Texas Wire Centers Which are Non-Impaired (April 7, 2006) (“*Texas Wire Center Order*”) at 13-14. For the convenience of the Commission, a copy of the

(Continued)

The South Carolina Public Service Commission also disallowed cross-connecting carriers from the fiber-based collocator count. The Commission held:

[T]he network of a Fiber-Based Collocator may only be counted once in making the determination of the number of Fiber-Based Collocators, notwithstanding that such single Fiber-Based Collocator leases its facilities to other collocators in a single wire center; provided, however, that a collocating carrier's dark fiber leased from an unaffiliated carrier may only be counted as a separate fiber-optic cable from the unaffiliated carrier's fiber if the collocating carrier obtains this dark fiber on an IRU basis.<sup>129</sup>

Likewise in two pending wire center designation cases, initial Administrative Law Judge's recommendations or proposed orders have rejected AT&T's position. First, in a pending wire center designation case before the Oklahoma Corporation Commission, the Administrative Law Judge issued her Arbitrator's Report rejected AT&T's cross-connect carrier position stating that "the FCC did not anticipate counting collocators who do not possess lit fiber that leaves the ILEC wire center."<sup>130</sup> The Report also concluded that "[t]he presence of a collocated carrier that is using leased lit capacity via a cross-connect does not establish an inference that the carrier has, or would, deploy 'fiber rings,' nor does it indicate that the carrier has, or would deploy a competitive transport route between the wire center where the collocator resides and any other

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(Continued)

Texas order is provided as Attachment 6 to this brief. The Joint CLECs request the Commission to take official notice of the Texas order pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>129</sup> Exh. 51 (Starkey Direct), at 66 (*citing* South Carolina Public Service Commission Docket No. 2004-316-C, Order No. 2006-136 at 38 (March 10, 2006)(footnote omitted). For the convenience of the Commission, a copy of the South Carolina order is provided as Attachment 7 to this brief. The Joint CLECs request the Commission to take official notice of the South Carolina order pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>130</sup> *In the Matter of the Complaint of Southwestern Bell Telephone L.P. d/b/a/ AT&T Oklahoma Against Nuvox Communications of Oklahoma, Inc. Regarding Wire Center UNE Declassification*, Report of the Arbitrator, at 35 (May 15, 2006) (*Oklahoma Arbitrator's Report*). The OCC has not ruled on the Arbitrator's Report. For the convenience of the Commission, a copy of the Oklahoma order is provided as Attachment 8 to this brief. The Joint CLECs request the Commission to take official notice of the Oklahoma order pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

wire center.”<sup>131</sup> The Report noted that by including cross-connected carriers in the definition of fiber-based collocators, “AT&T Oklahoma applies the Fiber-Based Collocator test so broadly that it would sweep in nearly every collocated CLEC, merely because the CLECs purchase services from Fiber-Based Collocators.”<sup>132</sup>

Second, in the wire center designation proceeding pending before the Illinois Commerce Commission, the Administrative Law Judge’s Proposed Order, rejects AT&T’s position.<sup>133</sup> In its analysis, the Proposed Order states:

The FCC, in the TRRO, was attempting to deduce where competitive LECs have the ability to duplicate the incumbent LEC's networks. TRRO, ¶59. In essence, IBT's position would have us double count the one CLEC that has made the investment to install all the facilities and duplicate the ILEC's network. The first CLEC that has installed the fiber transport facilities has duplicated the ILEC's network. The second CLEC has not.

In rejecting the Illinois Commission Staff’s position that it is irrelevant whether the fiber terminates in the wire center (a mandatory criteria that even AT&T tries to ignore in this proceeding, the Proposed Order reasons:

Staff does not dispute that fiber cable terminates only once in a wire center, but argues that it is irrelevant. We disagree. The FCC's definition of a FBC contains several situations that qualify a collocator for wire center designations: 1) a collocator that has installed its own fiber, 2) a collocator that obtains fiber from a carrier other than the ILEC, and 3) a collocator that obtains fiber from the ILEC on an IRU basis. When reading this definition, it must be read in conjunction with the FCC's other statements in the TRRO, specifically in ¶ 96 that the presence of FBCs signals that significant revenue is available and the duplicability of the ILECs network elements. Also in ¶98, the FCC recognizes the high costs of fiber deployment and finally in ¶161, FBCs indicate the presence of extensive competitive fiber rings. When considered all together, we do not agree

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Investigation on Its Own Motion Into Illinois Bell Telephone Company’s Designation of Certain of Its Wire Centers as Non-impaired*, Illinois Commerce Commission, Docket No. 06-0029, Proposed Order (Sept. 8, 2006) [“ICC Proposed Order”]. For the convenience of the Commission, a copy of the Illinois order is provided as Attachment 9 to this brief. The Joint CLECs request the Commission to take official notice of the Illinois order pursuant to Rule 13.9 of the Commission’s Rules of Practice and Procedure. The ICC has not ruled on the Proposed Order.

that IBT is correctly implementing the TRRO when it counts FBCs that are cross-connected. A CLEC that has merely cross-connected has not duplicated the ILEC's network, nor has it invested significant revenue in order to obtain its transmission path that leaves the wire center, nor does it indicate that the carrier has deployed fiber rings.

**2) Other state commissions have held that fiber-based collocators must operate a fiber cable**

A number of other state commissions have held that the FCC's requirement to "operate" a fiber transport facility means that the carrier must have active control of the cable, not merely use some of its functions, and thus have rejected the position that a cross-connected carrier is a fiber-based collocator. The New Hampshire Commission stated:

We consulted *Webster's II New College Dictionary* 786 (3rd ed. 2005) for a definition of "operate." Rule 51.5 uses "operate" in a transitive sense when it requires that a fiber-based collocator "operate a cable." The first definition for "operate" as a transitive verb seems to be most appropriate: "to control or direct the functioning of." This definition indicates some active control of the cable; not merely its existence or some use of its functions... Verizon also suggests "to put or keep in operation", a definition which, while transitive, suggests a more passive relationship to the cable than we find the rule requires... In our view, the plain meaning of "operate" in the context of Rule 51.5 requires the transitive sense of the verb, as well as a definition that indicates some level of control over the functioning of the property in question. We find that to operate a cable, a CLEC must be able to control not only the lighting of the fiber within it, but a broader range of functions, such as the placement, capacity and configuration of the cable itself.<sup>134</sup>

The Public Utilities Commission of New Hampshire also concluded that "to operate a [fiber] cable, a CLEC must be able to control not only the lighting of the fiber within it,

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<sup>134</sup> Exh. 51 (Starkey Direct), at 66 (citing *Verizon New Hampshire Wire Center Investigation, Verizon New Hampshire Revisions to Tariff 84*, New Hampshire Docket DT-05-083/DT 06-012, Order No. 24,598 - Classifying Wire Centers and Addressing Related Matters at 36-37 (March 10, 2006) ["New Hampshire Order"]. For the convenience of the Commission, a copy of the New Hampshire order is provided as Attachment 10 to this brief. The Joint CLECs request the Commission to take official notice of the New Hampshire order pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure.

but a broader range of functions, such as the placement, capacity and configuration of the cable itself.<sup>135</sup>

The Oklahoma Arbitrator's Report reached the same conclusion. The Report found that there is a "one-on-one relationship between the number of collocators and distinct transport facilities. . . [o]nly one carrier can 'operate' and 'terminate' a fiber-optic cable."<sup>136</sup> In defining a fiber-based collocator, "the FCC was identifying a particular sort of carrier, namely a carrier that has control of its own network transmission facilities that run through a particular wire center."<sup>137</sup> Such control includes the right to perform maintenance, the right to reconfigure the facility, the right to expand capacity on the facility, and the right to replace the transport facility in whole or in part.<sup>138</sup> A cross connecting carrier that merely purchases transport service can do none of these things; therefore, "that carrier cannot be said to be operating or terminating the cable."<sup>139</sup>

**e. AT&T's argument that connecting carriers constitute fiber-based collocators contradicts other ILECs and AT&T's BellSouth merger commitments**

In the BellSouth wire center impairment proceedings, BellSouth did not raise the argument made by AT&T that connecting carriers may be counted as fiber-based collocators.<sup>140</sup> Similarly, Qwest filed testimony in a wire center impairment case in Oregon in June indicating that Qwest does not consider connecting carriers as separate fiber-based collocators.<sup>141</sup> In fact,

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<sup>135</sup> New Hampshire Order, at 37.

<sup>136</sup> Oklahoma Arbitrator's Report, at 36.

<sup>137</sup> Oklahoma Arbitrator's Report, at 36.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> Exh. 51 (Starkey Direct), at 34.

<sup>141</sup> Exh. 51 (Starkey Direct), at 34-35.

Qwest witness Rachel Torrence testified that if a CLEC established cross-connect arrangements, that CLEC would be disqualified from being counted as a fiber-based collocator.<sup>142</sup>

Most astonishing, however, AT&T's argument that cross-connecting carriers should be counted as fiber-based collocators directly contradicts the commitments AT&T made at the FCC as part of its plan to acquire BellSouth. In that proceeding, AT&T has agreed to exclude "entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements" for purposes of impairment analyses in the AT&T/Bell South region.<sup>143</sup>

**f. AT&T's incorrect application of the FCC's criteria results in false identifications of carriers as fiber-based collocators**

AT&T's effort to include cross-connecting carriers in its fiber-based collocator analysis has resulted in an inflated count in almost half of the wire centers in dispute in this proceeding. The Joint CLEC witness Mr. Starkey determined that AT&T counted a total of \*\*\***BEGIN CONFIDENTIAL xxxxx END CONFIDENTIAL**\*\*\* fiber-based collocators in \*\*\***BEGIN CONFIDENTIAL xxxx END CONFIDENTIAL**\*\*\* wire centers that AT&T asserts meet the collocation thresholds.<sup>144</sup> Of this total, collocations located in \*\*\***BEGIN CONFIDENTIAL xx END CONFIDENTIAL**\*\*\* wire centers are double-counted because they represent collocation-to-collocation cross connect arrangements that utilize fiber transport of other carriers.<sup>145</sup>

Two of the Joint CLECs attempted to get AT&T to correct this double-counting error with regard to their collocation arrangements in California prior to this proceeding, but AT&T

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<sup>142</sup> Exh. 51 (Starkey Direct), at 35 (*citing* Qwest testimony filed June 16, 2006 in Oregon Case UM1251).

<sup>143</sup> *See*, AT&T BellSouth Merger Commitment Letter.

<sup>144</sup> Exh. 51-C (Starkey Confidential Direct), at 109.

<sup>145</sup> *Id.* Mr. Starkey's complete analysis correcting AT&T's erroneous designations of fiber-based collocators in contained in MS-2 and MS-3.

refused.<sup>146</sup> Accordingly, Joint CLECs request that AT&T be ordered to omit any and all cross-connected carriers in its count for FBCs in wire centers in California.

**2. What constitutes a “comparable transmission facility” under the FCC’s definition of a “Fiber-based collocator”?**

Apparently recognizing the weakness of its argument that a cross-connected carrier’s purchase of transmission capacity on another carrier’s fiber cable is not enough to qualify as an actual fiber facility of the type required by the FCC, AT&T attempts to cobble together a supposed fiber-based collocator by adding intraoffice cross connects to the mix. AT&T’s effort ignores the plain text of the FCC’s criteria, and is incorrect as a technical matter.

The FCC criteria state that a fiber-based collocator must operate a fiber cable or a “comparable transmission facility.” In its Opening Brief, AT&T raises the same claim that it has made and lost in other states that even if purchasing transport service alone is not sufficient to constitute being a fiber-based collocator, then adding the intraoffice cable used by the cross-connecting carrier to reach the collocation arrangement of the fiber-based collocator, should be enough.<sup>147</sup> AT&T’s argument is a red herring that adds nothing of substance to its previous argument.

The FCC’s makes clear that its reference to “comparable transmission facility” was meant to allow for the use of technologies other than fiber for competitively deployed facilities, but it was not meant as a way to circumvent the FCC’s six criteria.<sup>148</sup> Regardless of the media used, a facility must meet all six of the FCC’s criteria in order to constitute being a fiber-based collocation arrangement. The FCC made this clear in the *TRRO*:

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<sup>146</sup> See Exh. 51-C (Starkey Confidential Direct), at 58-59.

<sup>147</sup> AT&T Opening Brief, at 26-30.

<sup>148</sup> Exh. 51 (Starkey Direct), at 37.

For this reason, although we refer to our indicia as “fiber-based collocation,” our test is actually agnostic as to the medium used to deploy an alternative transmission facility, because we find that a technologically neutral test better helps us to capture the actual and potential deployment in the marketplace than would a wireline-specific test.<sup>149</sup>

To give context to its statement, the FCC offered guidance on certain limited forms of facilities – none of which are applicable or even at issue in this proceeding. For example, the FCC indicated that a fixed-wireless carrier could qualify as an fiber-based collocater if, **but only if**, “the carrier’s alternative transmission facilities both terminate in and leave the wire center.”<sup>150</sup> The FCC reasoned that while fixed-wireless carriers do not use fiber-optic cable as a transmission medium, the operation and termination of their facilities in a wire center “signal the ability to deploy transport facilities.”<sup>151</sup> Thus, the indicia upon which the FCC is relying do not change (i.e., the characteristics of deployment must signal conditions conducive to competitive deployment). No party in this case has suggested that there is any fixed wireless carrier at issue or in dispute in this proceeding.

Importantly, AT&T admits that a comparable transport facility must be “comparable” to the capabilities of a fiber transport facility in order to qualify as a component in a fiber-based collocation arrangement.<sup>152</sup> This admission is important and dispositive against AT&T because a coaxial cable (which is the cross-connect facility for the cross-connected carriers in dispute) is not comparable to fiber. Despite arguments to the contrary, an arrangement in which a carrier uses intraoffice cabling to reach a fiber-based collocater from which that carrier purchases fiber transport is not comparable. It is not comparable both because it fails to meet the FCC’s six criteria (e.g., the fiber facility must terminate at the collocation arrangement and exit the wire

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<sup>149</sup> *TRRO*, at ¶102 n.295.

<sup>150</sup> *TRRO*, at ¶ 102. The FCC’s example of fixed wireless being a potential “comparable transmission facility” is an example of a technology that, by definition, would be interoffice in nature, *i.e.* leaving the wire center.

<sup>151</sup> *TRRO*, at ¶ 102.

<sup>152</sup> AT&T Opening Brief, at 27.

center in order to count), and because such arrangement is not a proxy for actual competitive deployment. Recall that the purpose of the fiber-based collocator analysis is to determine service areas in which a CLEC likely could economically deploy competitive high capacity loops and transport. The Joint CLECs will demonstrate below that the addition of intraoffice cabling in AT&T's analysis creates neither the existence of a comparable transmission facility nor a fiber-based collocator.

**a. Examples of comparable transmission facilities cited by the FCC meet the fiber-based collocator criteria**

The *TRRO* identifies two alternative arrangements that may constitute comparable transmission facilities for purposes of identifying fiber-based collocators.<sup>153</sup> The first is fixed wireless collocation arrangements whose alternative transmission facilities both terminate in and leave the wire center. The second is a less traditional collocation arrangement that Verizon calls a Competitive Alternative Transport Terminal (“CATT”) arrangement for terminating fiber transport. Both of these arrangements differ in limited respects – either in the medium used, or the location of the connection point in the wire center -- from the traditional fiber-based collocation arrangement identified by the FCC. Importantly, both types of arrangements meet the pivotal criteria set forth by the FCC, namely that the arrangement includes a high-capacity transport facility that terminates in the wire center and exits the wire center. As a result, both of these arrangements are diametrically opposite of the situation where a cross-connecting carrier merely obtains transport service on another collocator's fiber facility.

The first example, fixed wireless, differs from the FCC's description of a fiber-based collocation arrangement simply because it uses wireless technology rather than fiber-optic

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<sup>153</sup> *TRRO*, at ¶ 102.

cable.<sup>154</sup> The FCC indicated, however, that the arrangement has the same characteristics as a fiber transport facility, and therefore could reasonably be viewed as being a component in a fiber-based collocation arrangement, so long as the FCC's other criteria are satisfied.<sup>155</sup> The Joint CLECs do not dispute that this type of arrangement would qualify as a comparable transmission facility; but this arrangement is not equivalent to a cross-connecting carrier purchasing transport service from another collocator.

The second example, Verizon's CATT arrangement, is a method under which third-party fiber transport providers terminate their facilities at Verizon wire centers other than in individual collocation arrangements. The CATT arrangement allows a CLEC to splice to a fiber facility of another collocator that has deployed a fiber transport facility at or near the cable vault within a wire center rather than at the fiber provider's collocation arrangement in that wire center.<sup>156</sup> Therefore, Verizon's CATT service would not meet the first *TRRO* criteria of a fiber-based collocator (to maintain a collocation arrangement).<sup>157</sup> Yet, the Joint CLECs agree that the absence of an individual collocation arrangement does not disqualify the CATT arrangement from being viewed as a component in a fiber-based collocation arrangement, *so long as* the third-party fiber provider using the CATT actually *operates* an alternative fiber-optic transmission facility that terminates in and leaves the wire center.<sup>158</sup> Such CATT arrangement may signal that deployment of competitive transmission facilities is economically feasible, thereby fulfilling the FCC's approach of using the presence of fiber-based collocators as a proxy for possible competitive deployment of facilities outside the wire center.

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<sup>154</sup> Exh. 51 (Starkey Direct), at 39.

<sup>155</sup> Exh. 51 (Starkey Direct), at 39.

<sup>156</sup> Exh. 51 (Starkey Direct), at 39-40 (*citing* Verizon's FCC Tariff No. 1, section 19.10.3).

<sup>157</sup> AT&T concedes this point. *See* Exh. 1 (Nevels Direct), at 11.

<sup>158</sup> Exh. 51 (Starkey Direct), at 40, 50.

The Joint CLECs disagree, however, that the fiber provider in a CATT arrangement is properly designated as a fiber-based collocator; and Joint CLECs disagree that other CLECs using that same fiber are fiber-based collocators. Although the CATT arrangement allows a CLEC to access a fiber provided by another carrier, there is no evidence in the record that the CLEC, rather than the fiber provider lights the fiber. Indeed, the Joint CLECs believe that AT&T has no such evidence because AT&T would have to have done an inspection of CLEC collocation cages, or have requested information from CLECs, in order to know whether a CLEC had equipment necessary to light a fiber. AT&T admitted that it did not enter CLEC collocation arrangements to verify what facilities were being used. Mr. Nevels testified,

When AT&T California conducts a physical inspection of a central office for fiber-based collocators, it cannot tell -- standing outside the collocation cage -- whether a carrier has optronics in that cage or is connecting to optronics in another CLEC's cage. In fact, we cannot tell what goes on inside the cages at all . . . .<sup>159</sup>

AT&T further admitted that it never contacted CLECs to determine whether they qualified as a fiber-based collocator.<sup>160</sup> Even if a CLEC did light a dark fiber strand contained in another collocator's transport facility, such arrangement would still not meet the FCC's requirements for at least two reasons. First, the dark fiber must be obtained via an IRU,<sup>161</sup> and AT&T witness Mr. Nevel testified that AT&T has not included any fiber facilities obtained on an IRU basis in its

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<sup>159</sup> Exh. 2 (Nevels Rebuttal), at 12.

<sup>160</sup> Exh. 69

<sup>161</sup> Exh. 51 (Starkey Direct), at 28-29 (citing TRRO, at ¶102 and TRO, at ¶408 (“We find, however, that when a company has obtained dark fiber from another carrier on a long-term IRU basis and activated that fiber with its own optronics, that facility should be counted as a separate, unaffiliated facility. . . . “when a company acquires dark fiber, but not lit fiber, from another carrier on a long-term IRU or comparable basis, that facility should be counted as a separate, unaffiliated facility.”

fiber-based collocator count.<sup>162</sup> Second, the CLEC does not “operate,” or control a separate fiber transport facility for the reasons discussed above.<sup>163</sup>

The Joint CLECs further note that AT&T’s discussion of CATT is irrelevant, because AT&T witness Mr. Nevels admits that “AT&T California does not offer a CATT service.”<sup>164</sup> Indeed, an affidavit submitted to the FCC during deliberations on the *TRRO* by a CLEC employee stated that “SBC [now AT&T] has repeatedly refused to offer MFN collocation for the purpose of accessing dark fiber UNEs. . . In refusing MFN collocation to access dark fiber UNEs, SBC has without justification insisted that MFN collocate equipment necessary to ‘light’ the fiber in the end office.” Nonetheless, because AT&T raises this argument, the Joint CLECs will demonstrate why the CATT arrangement creates only one fiber-based collocator.

Neither a fixed-wireless transport arrangement, or the CATT arrangement, however, converts connecting carriers into independent fiber-based collocators, as AT&T argues.<sup>165</sup> Yet, that is precisely what AT&T suggests. AT&T proposes to include each of the “connecting carriers” that connect to that third party fiber transport via the CATT as independent fiber-based collocators. Such an approach must be rejected because the carriers connecting to the CATT do not “operate” a fiber-optic cable or comparable facility that leaves the wire center and terminates at collocation arrangements, as required by FCC criteria numbers 3, 4 and 5.<sup>166</sup> The following diagrams, provided in Mr. Starkey’s Direct Testimony demonstrate that in either a

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<sup>162</sup> Exh. 1 (Nevels Direct), at 14.

<sup>163</sup> See page 33-34 above.

<sup>164</sup> Exh. 1 (Nevels Direct) at 10-12 (footnotes omitted). Joint CLECs quote from pages 10 through 12 rather than 10 through 11 to ensure that AT&T cannot come back later and assert that we should have considered text on page 12. In setting forth AT&T witness Nevels’ testimony, the Joint CLECs do not, by any means, vouch for its accuracy or veracity, but present it merely to show that it does not contain anything close to providing a factual basis for AT&T’s claims, in its Opening Brief, about “typical” carriers “lighting’ the fiber from their own collocation arrangements.” Mr. Nevels’ testimony does not even address cross-connecting carriers “lighting’ the fiber from their own collocation arrangements.”

<sup>165</sup> Exh. 51 (Starkey Direct), at 50; see AT&T Opening Brief, at 27-28.

<sup>166</sup> Exh. 51 (Starkey Direct), at 51.

cross-connecting carrier arrangement, or a CATT arrangement there is only one fiber transport cable (denoted with a red line) leaving the wire centers.

Figure 1 (Connecting carrier arrangement in AT&T wire center)

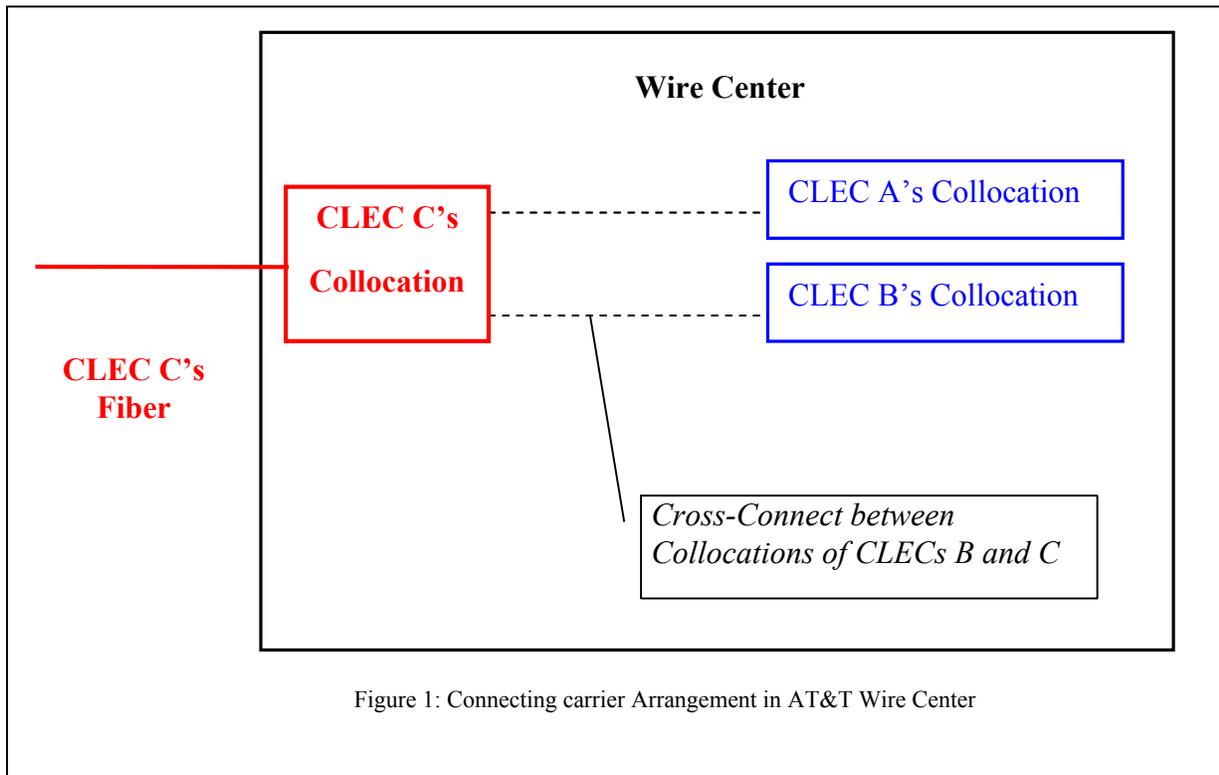


Figure 1: Connecting carrier Arrangement in AT&T Wire Center

Figure 2 (Verizon CATT)

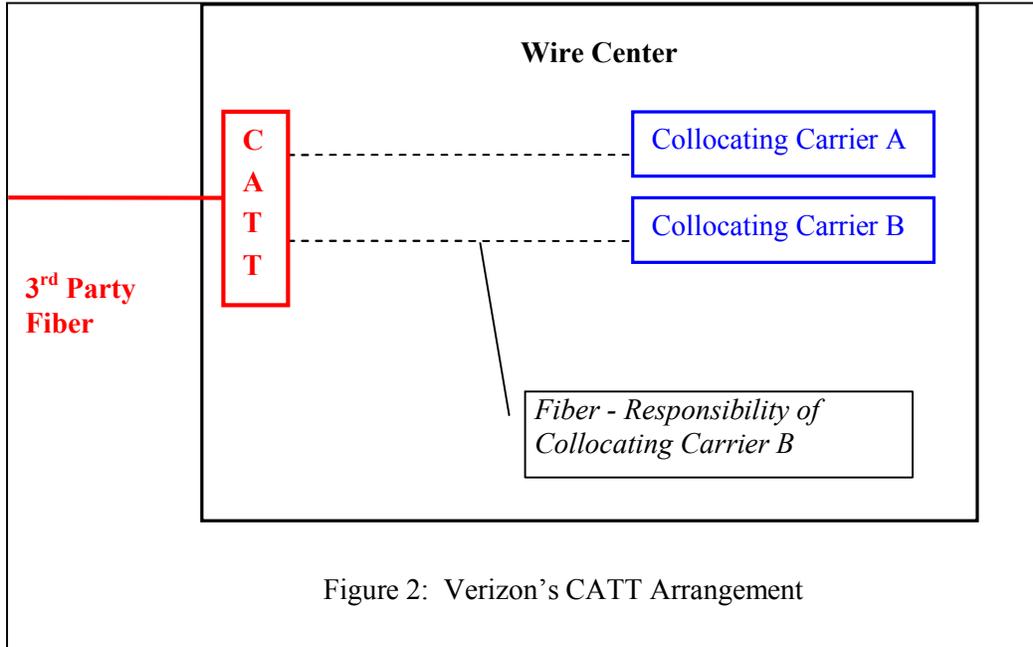


Figure 2 shows a third-party provider of fiber transmission facility (red line) that is terminated at a CATT in Verizon's wire center. The third-party transport provider can sell capacity on its facility to Collocator A and Collocator B by means of the installation of connecting cabling to the CATT, so that A and B can meet or connect to the third-party's fiber. By using the CATT product, the third-party provider, who actually operates the fiber transport facility, can avoid the need for an individual collocation arrangement. Hence, unless specifically allowed by the FCC, the fiber provider using CATT could not be counted as a fiber-based collocator. The FCC recognized that even though not collocated, the CATT provider was operating a fiber optic transport facility and clearly represented an investor who found the construction of the alternative facility to be economically feasible. As such, those facilities fit well within the framework guiding the FCC's analysis (*i.e.*, identifying markets with the economic characteristics likely to support alternative transport facilities).

A simple cross-connect between collocators, on the other hand, does not add to the number of alternative transport facilities available between wire centers, and does not identify situations wherein a carrier has determined that a transport facility is economically feasible to construct. As such, it is not comparable to Verizon's CATT service for purposes of this analysis.

It is important to note that both the fixed wireless and CATT arrangements are considered to be acceptable substitutes for a traditional fiber-based collocation arrangement because they represent a competitively-deployed transmission facility, demonstrate the economic feasibility of deploying a competitive transmission facility, and serve the same function as a fiber-optic cable leaving the wire center.<sup>167</sup> The result in both cases is another alternative transport facility (or medium) entering and leaving the wire center. As discussed above, this is a requirement that neither a CLEC intraoffice cross-connect nor the cross-connect coupled with fiber transport from another carrier can meet, and the combination of an intraoffice cross connect with fiber transport, whether terminated at an individual collocation arrangement or a CATT, does not change this fact.<sup>168</sup>

AT&T has argued in other states that CATT arrangements may be counted as a comparable transmission facility, but only one state commission has addressed AT&T's position directly. In the pending Proposed Order before the ICC, the ALJ recommends rejection of rejection of AT&T's attempt to characterize a cross-connect arrangement consistent with the CATT arrangement. The Proposed Order (not yet adopted) specifically rejects AT&T's reliance on the CATT arrangement to bolster its erroneous argument that a cross-connected carrier is using a comparable transmission facility. The Proposed Order states:

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<sup>167</sup> Exh. 51 (Starkey Direct), at 40.

<sup>168</sup> Exh. 51 (Starkey Direct), at 40, 53.

IBT argues that the cross-connected collocator is similar to the Verizon CATT arrangement. We disagree. The CATT arrangement is distinguishable because it does not use one FBC's facilities to qualify another collocator to be counted.<sup>169</sup>

**b. Intraoffice cross-connects do not meet the FCC's fiber-based collocator criteria**

As with other fiber-based collocator criteria, AT&T urges the Commission to stray from the FCC's text and intent regarding comparable transmission facilities. AT&T proposes two alternate theories as to why an intraoffice cross connect cable should qualify as a comparable transmission facility. The Joint CLECs will demonstrate below that both are disingenuous "interpretations" calculated to inflate the number of fiber-based collocators at California wire centers.<sup>170</sup> AT&T has used this same tactic elsewhere, and it has been rejected by other state commissions.<sup>171</sup>

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<sup>169</sup> ICC Proposed Order, at 17.

<sup>170</sup> Exh. 51 (Starkey Direct), at 41, 48.

<sup>171</sup> See discussion below. For example, the Texas PUC rejected AT&T's claim that a coaxial cable was a comparable transmission facility (which is identical to the argument AT&T makes here). See Texas PUC Order at 19-20 (Attachment 6). In the Illinois Proposed Order (pending), the proposed order rejects AT&T's position on the same issue. The Proposed Order finds:

The Commission agrees with CLECs that coaxial cable is not comparable to fiber-optic transmission facilities because coaxial cable is limited to a transmission capacity of one DS 3 (fiber is capable of speeds up to 192 DS3 circuits) and even then cannot transmit signals reaching the same distances that fiber-optic cable can reach.

The FCC intended its FBC count to be technologically agnostic and directed that other networks that are comparable to fiber be considered. The Commission concludes, however, that determining exactly which transmission media are comparable to fiber-optic cable is not possible and will be ever-changing with technology.

See Illinois Proposed Order at 18 (Attachment 9).

**1) AT&T incorrectly equates any facility with DS3 capacity with a fiber transmission facility**

AT&T posited in its initial testimony that “[a]t a minimum, a facility capable of DS-3 (e.g., coaxial cable) or higher capacity meets the comparable transmission facility standard,” and that the carrier using that facility should be counted as a separate fiber-based collocator.<sup>172</sup> AT&T appears to have abandoned that argument since it admits in its Opening Brief that “a cross-connect is not a separate ‘comparable transmission facility’ unto itself.”<sup>173</sup> Nevertheless, because AT&T could revert to this argument in its reply brief, the Joint CLECs will briefly demonstrate why AT&T’s theory is incorrect (as evidenced by the rejection of AT&T’s argument by other state commissions).

First, as mentioned above, the facility in question must *leave* the central office (*i.e.*, the facility must be an *interoffice* facility), but the facility that AT&T alleges is “comparable” does not. The facility that AT&T is attempting to call “comparable” to fiber-optic transport is actually an *intra*-office cable used to connect one collocator with another collocator in order to gain access to capacity on a fiber-optic cable (again, within the same central office).<sup>174</sup> Indeed, AT&T appears to admit this point when it states in its Opening Brief that “a cross connect merely provides the initial connectivity” to a fiber-based collocator’s fiber transport facility.<sup>175</sup> In addition, the connecting carriers do not “operate” any transmission facility in that wire center, let alone operate a comparable transmission facility. The capacity of the cross-connect cannot convert an intra-office cable into an interoffice fiber cable that exits the wire center.<sup>176</sup>

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<sup>172</sup> Exh. 1 (Nevels Direct), at 13.

<sup>173</sup> AT&T Opening Brief, at 27-28.

<sup>174</sup> Exh. 51 (Starkey Direct), at 41-42.

<sup>175</sup> AT&T Opening Brief, at 28.

<sup>176</sup> Exh. 51 (Starkey Direct), at 41-42.

Second, the type of cable typically used for intraoffice cross connects is coaxial cable, and AT&T admits that the characteristics of such cables make them unusable as high capacity interoffice transport facilities. In response to a data request from one of the Joint CLECs, AT&T stated that:

AT&T California routinely uses coaxial cable for DS-3 inter/intra-equipment, *intra-building* connections. Distance limitations are set by industry standards and are limited to approximately 415 feet from powered equipment to a digital cross-connect panel, and approximately 70 feet between digital cross-connect panels, depending on the coaxial cabling used. This means that there can potentially be approximately 900 feet between equipment locations. This is an industry standard distance, regardless of whether it is for an AT&T California customer or for internal use. AT&T California uses fiber optic connections for higher capacity connections.<sup>177</sup>

The AT&T response demonstrates that coaxial is used for intra-building – not building-to-building – applications and therefore would not meet the criterion of leaving the central office.<sup>178</sup> This response also shows that coaxial is limited to about 900 feet between locations, which is simply not comparable to fiber optic cables that can (and must) carry signals for miles between wire centers.<sup>179</sup> Further, AT&T indicates that, “[d]ue to distance limitations, AT&T California would not use coaxial cable for interoffice traffic. In regards to fiber for inter-office transport for purposes of providing its own retail services, AT&T California uses fiber optic connections for higher capacity connections. Fiber is not affected by distance limitations that are associated with coaxial cable.”<sup>180</sup> Hence, at the same time that AT&T holds up coaxial as a comparable transmission facility, it concedes that it could not use coaxial cable for applications

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<sup>177</sup> Exh. 51 (Starkey Direct), at 42-43 (*citing* AT&T Response to XO Interrogatory No. 4(b)) (emphasis added).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*, at 43 (*citing* AT&T response to XO Interrogatory No. 14 (c)) (emphasis added).

that leave the central office due to engineering limitations associated with it, and would instead use fiber for these interoffice applications.

In its Opening Brief, AT&T changes its argument to state that a cross-connect could be fiber, and therefore be able “to handle far more than a single DS3 worth of traffic.”<sup>181</sup> AT&T misses the point. The Joint CLECs do not argue that a coaxial cross-connect cable is ineligible to be a comparable transmission facility solely due to its limited capacity; although that position is certainly supported by the credible evidence and even AT&T’s admissions. Rather, a coaxial cable is also ineligible because it cannot meet all of the FCC’s criteria. Because it is usable only for intraoffice wiring, it cannot, taken alone, constitute a transport facility that exits the wire center, as required by the FCC’s rules.<sup>182</sup>

Third, the economics of a DS3 cross-connect are not comparable to a fiber-optic transmission facility. The FCC explained in the *TRRO* that the economics of competitive transport deployment are determined by traffic volume, distance, and location.<sup>183</sup> The cost of deployment increases with the length of a transport segment, and the revenues increase with the amount of traffic that is carried on a particular transport route. Further, the FCC explains that the competitive deployment of transport facilities is marked by significant sunk and fixed costs<sup>184</sup> and can vary widely among geographic areas, with costs being higher in more widely dispersed areas. Specifically, the FCC found that deploying an alternative transport facility would involve the cost of collocation, the cost of optronics and other equipment, and costs of obtaining rights of way, totaling as much as \$350,000 to \$450,000,<sup>185</sup> as well as the cost of constructing or placing

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<sup>181</sup> AT&T Opening Brief, at 29.

<sup>182</sup> Exh. 51 (Starkey Direct), at 43.

<sup>183</sup> *TRRO*, at ¶71.

<sup>184</sup> *See, TRRO*, at ¶ 72.

<sup>185</sup> *TRRO*, at ¶ 75.

the fiber in the outside plant (which according to the FCC, represents the most significant cost involved in the deployment of dedicated transport) which can range from \$110,000 to \$700,000 *per mile*.<sup>186</sup>

The high cost of deploying alternative transport facilities, combined with the revenue-sensitivity to traffic load and the fixed/sunk nature of transport costs, are the primary reasons why competitive deployment of fiber transport is only present in dense traffic routes.<sup>187</sup> It would be highly unlikely for a carrier to incur such substantial fixed and sunk costs in order to install a facility capable of carrying only a single DS3's worth of capacity leaving the wire center because the potential revenue from the traffic carried by this DS3 simply cannot justify the costs of constructing the transport facility (*i.e.*, deploying competitive fiber at the DS3 capacity level would be uneconomic).<sup>188</sup> Costs (or economic signals) of the magnitude involved in deploying a true alternative transmission facility are significantly higher (and provide much different economic messages) than the costs involved in establishing a collocator-to-collocator central office cross-connect in order to *use capacity* on a competitively deployed fiber.<sup>189</sup> And because AT&T's proposed comparable transmission facility is an *intra*-office facility and not an *inter*-office facility, AT&T ignores one key piece of evidence: the cost of deploying the fiber facility in the outside plant – or what the FCC referred to as the most significant cost of deploying competitive fiber. Since AT&T's proposed DS3 capacity threshold ignores this cost of deployment, it is not representative of the costs that would be incurred by a carrier deploying

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<sup>186</sup> *TRRO*, at ¶ 76.

<sup>187</sup> *TRRO*, at ¶ 70.

<sup>188</sup> Exh. 51 (Starkey Direct), at 46-47.

<sup>189</sup> *Id.*

alternative transport facilities, and is therefore, not indicative of the economic feasibility of deploying alternative competitive transport facilities.<sup>190</sup>

In its Opening Brief, AT&T attempts to neutralize, but does not deny, the substantial cost difference between a DS3 cross-connect and a true fiber transport facility. AT&T claims that Mr. Starkey's figures are "vastly overstated" because he allows for the cost of fiber conduit construction, and because DS3 facilities can now support greater numbers of voice-grade equivalent lines.<sup>191</sup> Neither of these arguments proves that the economics of a DS3 circuit have somehow become comparable to the economics of an interoffice transport facility. At best, AT&T's arguments suggest that the magnitude of difference in economic feasibility could be less in certain configurations. Further, AT&T tries to discredit Mr. Starkey's economic analysis by noting that recognized comparable transmission facilities such as fixed wireless and CATT may not include the same deployment costs as an interoffice transport facility.<sup>192</sup> AT&T offers no citation to the record for this proposition, but even if it were true, it proves nothing. The fact that recognized comparable transmission facilities may not incur some of the same costs as a carrier deploying fiber is irrelevant to whether it would be economic for a carrier to incur the substantial fixed and sunk costs of deploying fiber facilities limited to DS3 capacity.

**2) AT&T incorrectly equates a transmission path with a comparable transmission facility**

Having abandoned the stand-alone cross connect theory, AT&T focuses instead in its Opening Brief on a modified version of the theory to justify its proposal that an intra-office cross-connect should be considered to be a comparable transmission facility.<sup>193</sup> Nonetheless,

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<sup>190</sup> Exh. 51 (Starkey Direct), at 46-47.

<sup>191</sup> AT&T Opening Brief, at 30.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*, at 27-28; see also Exh. 1 (Nevels Direct), at 12.

AT&T asserts that a “facility” sufficient to meet the FCC’s requirements can be *implied* if one views the intra-office cross-connect and transport service purchased from another carrier as an “uninterrupted transmission route.”<sup>194</sup> AT&T’s argument is wrong technically, and fails, for several reasons, to demonstrate that a “transmission path” should be deemed to be a fiber transport facility. Among the reasons AT&T’s argument fails are the following: it violates the FCC’s requirements for a fiber-based collocator, and it is contrary to engineering reality.

First, a cross-connect that terminates at a second carrier’s collocation arrangement does not establish an “uninterrupted” facility that exits the wire center. AT&T claims in its Opening Brief that the FCC views “transmission paths,” including all equipment and electronics, as a single facility.<sup>195</sup> Ironically, the examples cited prove just the opposite. AT&T points to the FCC’s definition of “local loop” as an example where the FCC considers the end-to-end transmission path to be a single facility.<sup>196</sup> The definition to which AT&T refers is as follows: “[t]he local loop network element is defined as a transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises.”<sup>197</sup> Thus, this definition actually demonstrates that regardless of what components are required to create a transmission path, that path ends when a facility terminates (at the distribution frame in the wire center for a local loop). Applying this definition,

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<sup>194</sup> AT&T Opening Brief, at 28. *See also*, Exh. 3 (Chapman Direct), at 28-31; Exh. 4 (Chapman Rebuttal), at 58, 60; Exh. 1 (Nevels Direct), at 6-13; Exh. 51 (Starkey Direct), at 44 (citing AT&T response to XO Interrogatory No. 4(a) “AT&T California does not consider coaxial cable, in and of itself, to be comparable transmission facility to fiber under the definition of “Fiber-based collocator” in 47 C.F.R. § 51.5 (Definition of “Fiber-based collocator”). Instead, AT&T California contends that coaxial cable may be used as a component of a comparable transmission facility that is comparable to fiber.

<sup>195</sup> AT&T Opening Brief, at 28-29.

<sup>196</sup> *Id.*

<sup>197</sup> 47 C.F.R. §51.319(a). The definition of “hybrid loop” on which AT&T relies merely notes that “[a] hybrid loop is a local loop composed of both fiber optic cable, usually in the feeder plant, and copper wire or cable, usually in the distribution plant.

then, when a CLEC's intra-office cross-connect cable terminates at the fiber-based collocator's arrangement in the wire center, the "transmission path" ends.

Second, the "transmission path" theory does not meet the FCC's requirement that a fiber transport facility must terminate at the collocation arrangement of a carrier considered to be a fiber-based collocator. In the arrangement identified by AT&T, the CLEC terminates only an intra-office cross-connect cable to its collocation arrangement, and does not terminate a fiber transport facility to optonics equipment in its collocation cage, as required under the FCC rules.<sup>198</sup> Simply put, the connecting carrier does not operate a transport facility exiting the wire center -- regardless of whether AT&T views the cross-connect itself as the comparable transmission facility, or considers the cross-connect as a component of the larger collocator-to-collocator arrangement.<sup>199</sup>

Third, AT&T's "transmission path" theory incorrectly asserts that capacity available to one CLEC on another carrier's fiber cable is the same as the CLEC operating its own separate fiber transport facility.<sup>200</sup> Capacity is simply not the same thing as a separate facility, and AT&T's attempt to substitute a new word with a meaning different from the FCC's criteria must fail.<sup>201</sup> As discussed above, the FCC's objective is to capture alternative transport options. In the FCC's context, "facility" implies separate ownership or control. AT&T witness Mr. Nevels claims that because *capacity* of a single facility can be shared between several carriers from an engineering standpoint, this facility should be considered as more than one facility from the

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<sup>198</sup> Exh. 51 (Starkey Direct), at 45.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> See AT&T Opening Brief, at 28-29. Mr. Nevels uses the word "capability" in the same way he uses "capacity." See Exh. 1 (Nevels Direct), at 8.

standpoint of control and ownership (and counted as multiple facilities in the fiber-based collocator counts).

AT&T's theory has no basis in the FCC's rules or orders. There is simply nothing in the *TRRO* that suggests the FCC intended the term "fiber-optic cable or comparable facility" to mean fiber-optic cable, or comparable transmission paths created via intra-office cross-connect cables and leased capacity on another carrier's fiber cable. Indeed, the *TRRO* states the opposite. Without exception, the FCC repeatedly describes the requirement for fiber-based collocation as a "facility," not just a call path.<sup>202</sup> For example, the FCC states, "[f]iber-based collocation in a wire center very clearly indicates the presence of competitive transport *facilities* in that wire center and signals that significant revenues are available from customers served by that wire center sufficient to justify the deployment of transport facilities."<sup>203</sup> It is clear that the FCC uses the term "facility" to refer to a physical transmission medium (like a cable or wireless system), and not just the transmission paths that could be created over such facilities. Indeed, the FCC was explicit that it was using the term to refer to a specific medium, explaining in the *TRRO*:

For this reason, although we refer to our indicia as "fiber-based collocation," our test is actually agnostic as to the medium used to deploy an alternative transmission facility, because we find that a technologically neutral test better helps us to capture the actual and potential deployment in the marketplace than would a wireline-specific test.<sup>204</sup>

The language of the *TRRO* makes clear that the term "facility" must: (1) be a tangible transmission media (such as fiber cable or a wireless system), and (2) exit the wire center. The "transmission path" created using an intra-office cross-connect and capacity on another carrier's

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<sup>202</sup> See, e.g., *TRRO*, at ¶¶ 95-98, 102; see also, 47 C.F.R. § 51.5.

<sup>203</sup> See, e.g., *TRRO*, at ¶ 96 (emphasis added).

<sup>204</sup> *TRRO*, at n.295.

fiber does neither. Thus, AT&T’s “transmission path” is actually contrary to the plain reading of the *TRRO* as well as the objective of the FCC’s unbundling framework, which is to determine where competitive deployment of transmission *facilities* is economically feasible – not to determine where *capacity* is available on those facilities. AT&T’s theory would require the Commission to count a cross-connecting carrier as a fiber-based collocater even though the cross-connect is not actually comparable in terms of control, capacity, functionality, and engineering capabilities.<sup>205</sup>

As with other AT&T misinterpretations, this approach will substantially inflate the appearance of fiber-based collocators, by double or triple counting the same alternative transport facility by counting the third party fiber and the connecting carriers.<sup>206</sup>

3. **What data should be used to identify FBCs in the disputed wire centers?**
  - a. **Should affiliate relationships (other than the affiliation between AT&T Corp. and SBC Communications Inc.) be examined based on the carrier’s affiliate status at the time that the wire center is designated as non-impaired or should more recent data be considered? Should the affiliate relationship between Verizon and MCI affect the FBC count (regardless of the date of affiliation)?**

The FCC rule calls for affiliated fiber-based collocators in a central office to be counted as *one* fiber-based collocator. It does not, as AT&T would have the Commission believe, exclude entities that have become affiliated since March 11, 2005.<sup>207</sup> Specifically, ¶102 of the *TRRO* states that, “[i]n tallying the number of fiber-based collocators for purposes of our transport impairment analysis, parties shall only count multiple collocations at a single wire

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<sup>205</sup> Exh. 51 (Starkey Direct), at 43-45.

<sup>206</sup> *Id.*, at 45.

<sup>207</sup> AT&T Opening Brief, at 31.

center by the same or affiliated carriers as one fiber based collocation.” The FCC’s logic apparently was that if two carriers are affiliated, then their separate fiber facilities are under a single source of control, and thus should be counted as a single fiber-based collocation arrangement.

Subsequent to the *TRRO*, the Commission issued an order adopting amendments to all CLEC interconnection agreements with AT&T.<sup>208</sup> The AT&T order also included language that the term “fiber-based collocator” should exclude SBC (AT&T was operating at that time as SBC), any affiliate of SBC, or any entity that (at that time) was currently subject to a binding agreement that, if consummated, would result in its becoming an affiliate of SBC.<sup>209</sup> Similarly, this Commission issued an order adopting amendments to all CLEC interconnection agreements with Verizon<sup>210</sup> to implement the *TRRO*. That order included language that “fiber-based collocator” shall not apply to any affiliate of Verizon, or an entity that is subject to a binding agreement that, if consummated, would result in its becoming an affiliate of that ILEC.<sup>211</sup>

Nevertheless, AT&T now argues that both Verizon and MCI should be counted as separate fiber-based collocators.<sup>212</sup> Joint CLEC witness Mr. Starkey identified **\*\*\*BEGIN CONFIDENTIAL xxxxxxxx END CONFIDENTIAL\*\*\*** wire centers with this counting error.<sup>213</sup> AT&T should be required to eliminate the double counting of the merged Verizon/MCI entity. AT&T suggests that it does not have to recognize the single merged entity because the Verizon/MCI merger happened after March 11, 2005 (effective date of *TRRO*). As discussed

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<sup>208</sup> Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996, Decision Adopting Amendment to Existing Interconnection Agreements, D.06-01-043, Jan. 27, 2006, at p. 12-13 (Issue 4, §0.1.13).

<sup>209</sup> *Id.*, at p. 12-13 (Issue 4, §0.1.13).

<sup>210</sup> Exh. 51 (Starkey Direct), at 55 (*citing* Application 04-03-014; *Decision 06-02-035*, February 16, 2006).

<sup>211</sup> *Id.* (*citing* D.06-02-035) at 129.

<sup>212</sup> AT&T Opening Brief, at 31.

<sup>213</sup> Exh. 51-C (Starkey Confidential Direct), at 54-55, MS-2, MS-3.

above, the argument is disingenuous on its face since AT&T chose to file its complaint after the Verizon/MCI merger was closed and became a known and material fact. The purpose of the criteria is to ensure that there is a proper recognition of entities that are merged because with the merger comes a merger of the economic opportunities for facilities deployment. AT&T should be required to recognize it in its FBC count in California.

**b. How should fiber that AT&T Corp. deployed prior to the merger with SBC Communications Inc., and that is operated and/or utilized by other carriers, be treated?**

Any fiber obtained by a CLEC from AT&T Communications of California, Inc. (“old AT&T”), whether pre-merger or post merger, should be excluded from the fiber-based collocator count. The FCC rules exclude from the fiber-based collocator count any CLEC operating fiber obtained from the ILEC.<sup>214</sup> The only exception is fiber obtained pursuant to an indefeasible right of use (“IRU”).<sup>215</sup> AT&T’s testimony indicated that it is not relying on any fiber obtained through an IRU as part of its fiber-based collocator count in this proceeding.<sup>216</sup> Thus, any fiber obtained by a CLEC from “old AT&T” that is included in AT&T’s fiber-based collocator count must necessarily be obtained on a non-IRU basis, and is properly excluded from the fiber-based collocator count.

The problem in this case is that AT&T removed from its fiber-based collocator count “old AT&T’s” collocation arrangements,<sup>217</sup> but it did not remove carriers that are connected to pre-merger AT&T via central office cross-connects.<sup>218</sup> AT&T counted as a fiber-based collocator a carrier that is simply utilizing AT&T’s own fiber (*i.e.*, “old AT&T’s fiber) through a

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<sup>214</sup> TRRO, at ¶102.

<sup>215</sup> *Id.*

<sup>216</sup> Exh. 1 (Nevels Direct), at 14.

<sup>217</sup> Removal of pre-merger AT&T’s fiber-based collocators is discussed in Exh. 3 (Chapman Direct), at 12-14.

<sup>218</sup> Exh. 51 (Starkey Direct), at 59.

cross-connect to AT&T's own (*i.e.*, old AT&T's) collocation cage.<sup>219</sup> This arrangement should be excluded on the grounds that the CLEC is utilizing AT&T's fiber optic cable.<sup>220</sup>

**c. Are network changes that occurred after March 11, 2005 relevant to the disputed wire center determinations?**

In its testimony and Opening Brief, AT&T argues that the Commission should refuse to take account of the actual state of competition in California in determining whether a wire center is impaired.<sup>221</sup> Rather, AT&T claims the Commission should impose an arbitrary cutoff as of March 11, 2005 and use no more recent data. AT&T did not, and cannot, cite to an FCC rule or order that requires such a bizarre approach. AT&T bases its position solely on the fact that the *TRRO* took effect on March 11, 2005.<sup>222</sup> Had the FCC intended that wire center impairment analyses be restricted to data as of that date, it would certainly have stated so expressly. It did not. Indeed, the text of the *TRRO* and subsequent FCC orders make clear that the FCC expected wire center impairment analysis would be based on the presence of actual competitors, not phantoms.

The Joint CLECs believe that AT&T is attempting to impose the March 11, 2005 cutoff in order to maximize, arbitrarily, the number of fiber-based collocators in California wire centers. As the Commission is well aware, numerous CLECs, some of whom might have qualified as fiber-based collocators in 2005, have gone bankrupt or discontinued operations in California. As discussed below, the Joint CLECs have demonstrated that if current data are used, a number of entities must be removed from AT&T's list of fiber-based collocators.

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<sup>219</sup> This can be seen in the version of *Confidential Attachment CA\_FIBERBased.xls* that AT&T provided in its response to Joint CLECs 2<sup>nd</sup> Set of Data Requests, Requests No. 10. The last column of this attachment contains plain-English names of cross-connected carriers.

<sup>220</sup> This carrier should also be excluded from the fiber-based collocator count on the basis that it is a "connecting carrier" that does not operate a fiber-optic cable. Exh. 51 (Starkey Direct), at 59.

<sup>221</sup> AT&T Opening Brief, at 35-37.

<sup>222</sup> *Id.* at 36.

### 1) The use of stale data is contrary to the FCC's directive

Not only is AT&T's argument illogical, it also runs counter to the FCC's intent. As discussed above, the FCC determined that the presence of fiber-based collocators was a reasonable proxy for the potential for competitive deployment.<sup>223</sup> The FCC stated:

We believe it is reasonable to expect that competitive LECs can most economically deploy dedicated transport facilities and high-capacity loops in those geographic markets where revenue opportunities are highest, which is confirmed by the evidence of *actual deployment* found in the record.<sup>224</sup>

There is no doubt that the term "actual deployment" means just that – there must be operational fiber-based collocators in a wire center. Data showing fiber-based collocators that existed two years ago indicates nothing about the current level of competitive facility deployment in a wire center, and thus is useless as a proxy to determine the likelihood that competitors currently can deploy high capacity fiber loops or transport in the wire center service area.<sup>225</sup> The Joint CLECs do not object to the use of historical data if it is used in conjunction with current data as an indicator of market trends. The progressive demise of fiber-based collocators should signal to the Commission that the conditions are not conducive to competitive deployment, and are becoming less so. Reliance on historical data in a vacuum, provides no useful guidance.

In the *TRRO* and *TRO*, the FCC also described a facilities-based collocator in terms of existing market conditions. For example, in the *TRO*, the FCC stated that "[e]ach counted self-provisioned facility along a route must be *operationally ready* to provide transport into or out of an incumbent LEC central office." Clearly, such requirement anticipates that a designated fiber-based collocator must actually be able to operate the transport facility in order to be counted.

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<sup>223</sup> *TRRO* at ¶¶ 43, 93, 167 (footnotes omitted).

<sup>224</sup> Exh. 51 (Starkey Direct), at 16-17 (*citing TRRO*, ¶43 (emphasis added))(footnotes omitted).

<sup>225</sup> *Id.*, at 17.

Data from two years ago cannot verify what fiber-based collocators are operationally ready to provide transport at the present time.

Further, the FCC expressly required AT&T to revise its AT&T's fiber-based collocator list as of December 16, 2005 to reflect the merger of SBC and AT&T. The FCC required AT&T to exclude any pre-merger AT&T Corp. fiber-based collocation arrangement from its fiber-based collocator count due to the new affiliation between SBC and AT&T.<sup>226</sup> The FCC ordered that:

Within thirty days after the Merger Closing Date, SBC/AT&T shall exclude fiber-based collocation arrangements established by AT&T or its affiliates in identifying wire centers in which SBC claims there is no impairment pursuant to section 51.319(a) and (e) of the Commission's rules. SBC/AT&T shall file with the Commission, within thirty days of the Merger Closing Date, revised data or lists that reflect the exclusion of AT&T collocation arrangements, as required by this condition.<sup>227</sup>

In November, 2005, the FCC similarly imposed the requirement that MCI be removed from Verizon's fiber-based collocator list after the merger of those two carriers.<sup>228</sup> Therefore the FCC, through express directives, has made clear that it is not only acceptable, but necessary, for wire center impairment analyses to be based on current, accurate data.

Finally, the *TRRO* requires that the data used in wire center impairment analyses should be "readily available" and "verifiable."<sup>229</sup> Historical data that is more than two years old meets neither of these requirements. Because AT&T did not create a permanent record (such as

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<sup>226</sup> Exh. 3 (Chapman Direct), at 9; Exh. 4 (Chapman Rebuttal), at 67.

<sup>227</sup> Exh. 51 (Starkey Direct), at 55 (reference to In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65, Nov. 17, 2005 (released), at Appendix F, UNE.2). The Joint CLECs hereby request that the Commission take official notice of the FCC order, pursuant to rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>228</sup> Exh. 51 (Starkey Direct), at 55; see *In the Matter of Verizon Communications, Inc. and MCI, Inc. for Approval of Transfer of Control, Memorandum Opinion and Order*, WC Docket No. 05-75, Nov. 17, 2005 (released), at Appendix G, UNE.2. The Joint CLECs hereby request that the Commission take official notice of the FCC order, pursuant to rule 13.9 of the Commission's Rules of Practice and Procedure.

<sup>229</sup> *TRRO*, at ¶100.

photographs)<sup>230</sup> of the supposed fiber-based collocators in the wire centers at issue in this proceeding, it is quite literally impossible for the Commission or the Joint CLEC defendants to verify AT&T's data. If, however, current data are used, AT&T's fiber-based collocator designations can be verified through readily available means by conducting a physical inspection of a disputed wire center to verify the actual conditions that exist there.

## **2) The use of two-year old data leads to absurd results**

Despite the obvious flaws in this approach, AT&T persists in attempting to persuade the Commission to rely solely on data from 2005 in deciding this case. A number of the so-called fiber-based collocators identified by AT&T are no longer operational. It goes without saying that it is impossible for a fiber-based collocator to be "operationally ready to provide transport" if it has gone bankrupt, liquidated its assets, has no equipment in its collocation arrangement, or has no certificate to operate in California. Yet, AT&T's list of alleged fiber-based collocators includes just such entities. The numerous errors created by AT&T's faulty collection methods and outdated data are set forth in their entirety in Mr. Starkey's testimony.<sup>231</sup> For the sake of brevity, the Joint CLECs incorporate Mr. Starkey's discussion in its entirety by reference, and will discuss a few illustrative examples of these problems below.

The Joint CLECs submit that their investigation and analysis is exactly the type of effort AT&T should have undertaken before claiming that California wire centers are non-impaired. AT&T claims that generally the Joint CLECs' analysis identifies single concerns that do not result in changes to the count. The Joint CLECs strongly disagree.

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<sup>230</sup> The Joint CLECs believe AT&T personnel did not take photographs of alleged fiber-based collocators' arrangements at wire centers because AT&T did not produce any photographs in response to discovery questions seeking documentation of AT&T's fiber-based collocator count.

<sup>231</sup> Exh. 51 (Starkey Direct), at 59-63; Exh. 52 (Starkey Supplemental Direct), at 5-26.

First, the requirement of conducting a timely and thorough investigation is not limited only to fiber-based collocator designations that “make a difference” in the final counts. AT&T is under a duty and obligation to perform a good faith and diligent investigation before it invokes the “non-impairment” designation (particularly given the significant amount of time and resources it has required for CLECs to respond to AT&T’s complaint in this proceeding). AT&T did not undertake such an investigation and the flaws are evident throughout the wire center numbers. The Commission should not tolerate AT&T’s cavalier attitude that errors should be ignored if they would not “make a difference.”

Second, AT&T is incorrect that the errors identified by the Joint CLECs will not make a difference. Based on the Joint CLECs’ analysis, presented in Mr. Starkey’s testimony, each of these errors, when taken into consideration with other errors or improper definitions or analysis, will cumulatively have an affect on the list of wire centers that AT&T designates or can designate as non-impaired in this proceeding.

Third, the Commission must remember that the carriers that are identified as fiber-based collocators will not only affect this proceeding, but it will also affect future wire center designations. Therefore, it is imperative to get it right now, rather than have to expend time and resources in yet another contested case proceeding.

For all of these reasons, Joint CLECs submit that AT&T did not meet its burden of proof with respect to these carriers and the following list of CLECs identified by AT&T should be deleted from the list of fiber-based collocators in AT&T’s wire centers.

**FirstWorld Communications, Inc.**

FirstWorld is identified by AT&T as a fiber-based collocator despite the fact that FirstWorld does not hold a certificate of public convenience and necessity (“CPCN”) from the

CPUC.<sup>232</sup> Any entity that does not hold a CPCN from the Commission clearly should not be counted as a fiber-based collocator, since a CPCN is a prerequisite to ordering interconnection services, including collocation, from AT&T.<sup>233</sup> Further, it is unclear how an entity without a CPCN to provide telecommunications services in California could provide the type of competitive transport services the FCC had in mind when establishing a simple count of FBCs as a proxy for impairment (or the lack thereof). Hence, if an entity is not certified, it should not be collocated in AT&T's central office, and would not be "operating" a fiber optic cable from that collocation.

Further, FirstWorld stopped providing service to its entire customer base in 2001.<sup>234</sup> On February 15, 2002, FirstWorld filed for bankruptcy in the U.S. Bankruptcy Court for the District of Delaware and its assets were liquidated. On May 16, 2002, the CPUC approved FirstWorld's request to withdraw from service in California, directed FirstWorld not to accept any new customers, and stated that FirstWorld's certificate to operate would be revoked.<sup>235</sup> Despite these clear and convincing facts, showing that it is impossible for FirstWorld to have been a collocator, much less a fiber-based collocator, in 2005, AT&T included FirstWorld in its list.

Even the most ardent supporter of AT&T's theories in this proceeding would have to concede that it is a gross error to identify as a fiber-based collocator (a relatively detailed designation meant to identify carriers actively providing competitive transport to the

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<sup>232</sup> According to the Carrier Search page on the CPUC website, there is no entity by the name of FirstWorld Communications that holds an active certificate in California. AT&T's Attachment to Joint CLECs' DR 3-7 shows that FirstWorld Communications is the parent company for the company identified as Carrier 9 (*see*, Exh. 53-C), which is also not in the CPUC's database.

<sup>233</sup> Exh. 52 (Starkey Supplemental Direct), at 7.

<sup>234</sup> Exh. 52 (Starkey Supplemental Direct), at 5 (*citing In the Matter of Application of FirstWorld Communications (U-5733-C) to Withdraw From Local Exchange Service in Selected Rate Centers*, Opinion, D.02-05-045, Application 01-05-023, May 16, 2002, pp. 2-3. FirstWorld changed its name and its assets were transferred to another entity in 2001. [www.bankrupt.com](http://www.bankrupt.com), January 2005.

<sup>235</sup> *Id.* (*citing* D.02-05-045, at 1).

telecommunications marketplace) a carrier that has not operated in California for more than four years. Nonetheless, even after Mr. Starkey's testimony identified this error, AT&T continued to assert that as of March 11, 2005, the FirstWorld collocation arrangement met all of the physical requirements outlined in the FCC's definition of a Fiber-based Collocator.<sup>236</sup> AT&T eventually "determined that this carrier is no longer in business and was not in business as of March 11, 2005."<sup>237</sup> Even then, AT&T agreed to remove FirstWorld from its fiber-based collocator list only "out of an abundance of caution."<sup>238</sup>

AT&T's error regarding FirstWorld is disturbing for several reasons. First, it calls into question the accuracy of AT&T's supposed inspections of fiber-based collocation arrangements in California wire centers. Even if a FirstWorld collocation cage remained in a California wire center as of 2005, it most certainly would have been empty, lacked power supply and lacked any cabling (whether cross-connect or fiber transport).<sup>239</sup> Thus, it is unclear what AT&T employees "inspected" with regard to FirstWorld. Second, this error was corrected only when AT&T conducted a current inspection in response to Mr. Starkey's testimony. Thus, the use of historical data, clearly, may be grossly inaccurate. Third, the error suggests that AT&T is willing to apply its theories to extremely dubious situations, in order to create the appearance of sufficient numbers of fiber-based collocators in a wire center to claim the wire center is non-impaired. These concerns are especially relevant, given that Joint CLECs were unable to verify with several fiber-based collocators whether AT&T's list, identifying them as a fiber-based collocator, was accurate.<sup>240</sup>

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<sup>236</sup> Exh. 52 (Starkey Supplemental Direct), at 7 (*citing* Exh. 4 (Chapman Rebuttal), at 74.

<sup>237</sup> Exh. 52 (Starkey Supplemental Direct), at 8 (*citing* Exh. 4 (Chapman Rebuttal), at 74.

<sup>238</sup> *Id.*

<sup>239</sup> Exh. 52 (Starkey Supplemental Direct), at 8.

<sup>240</sup> *Id.*, at 24.

As discussed above, AT&T bears the burden of proof in this proceeding. In the absence of verified data<sup>241</sup> demonstrating that each carrier identified as a fiber-based collocator by AT&T actually meets the necessary FCC criteria at the time that the dispute is being resolved, and given AT&T's apparent willingness to stretch the boundaries of the FCC's mandate, the Commission should give no weight to AT&T's unsupported claims.

### **Fiber Communications**

AT&T identifies Fiber Communications as a fiber-based collocator, but AT&T's basis for this designation is unverifiable. In response to Joint CLEC inquiries, AT&T indicated that the U Number for Fiber Communications is (U-6063-C).<sup>242</sup> A search of the Commission website, however, indicates that this U number belongs to a different carrier, Netstream, Inc. A search of the CPUC's entire website returns no "hits" for an entity by the name of Fiber Communications.<sup>243</sup> AT&T claimed in response to a discovery request that Netstream is doing business under the name of Fiber Communications, "as shown on AT&T's internal company records[,]” but again, AT&T's claims are not consistent with the CPUC's website, which indicates that Netstream, Inc.'s dba is Netstream Communications.<sup>244</sup> Even if AT&T were correct that Fiber Communications was the dba for Netstream and its U Number was actually what AT&T claims it is, the CPUC website shows that Netstream's certificate was revoked years ago.<sup>245</sup> Numerous efforts to contact the regulatory contact listed for Netstream on the CPUC's

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<sup>241</sup> Such verification could take the form of photographs, authentic billing records or declarations from the alleged fiber-based collocators. The last of these is perhaps the easiest, yet AT&T admits that it took no steps at all to contact carriers to confirm the details of their collocation arrangements in California. See Exh. 69 ("AT&T California did not contact any entity collocated in any wire center to confirm whether it operates a fiber-based cable or comparable transmission facility that terminates at a collocation arrangement within that wire center and leaves AT&T California's premises.")

<sup>242</sup> Exh. 52 (Starkey Supplemental Direct), at 11.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* (citing AT&T Response to Joint CLECs Data Request 3-2, July 17, 2006).

<sup>245</sup> Exh. 52 (Starkey Supplemental Direct), at 11.

website<sup>246</sup> were unsuccessful.<sup>247</sup> Nonetheless, AT&T refuses to remove this carrier from its list of fiber-based collocators, presumably because AT&T claims its “internal company records” show that Fiber Communications is Netstream’s dba. Neither of these entities is currently certified in the State of California, however.

### **Integrated Communications Consultants (“ICC”)**

AT&T identified ICC as a fiber-based collocator despite the fact that it is defunct.<sup>248</sup> The facts are: (1) AT&T identified ICC as a fiber-based collocator; (2) ICC had unidentified assets acquired by I-Element in March 2003; (3) ICC filed for bankruptcy in 2004; and (4) the carrier that acquired ICC’s assets did not hold a CPCN in California until September of this year.<sup>249</sup> Joint CLECs have not discovered any data indicating that I-Element acquired a collocation arrangement from ICC, but even if such a transfer occurred, I-Element could not have lawfully provided services from that collocation since it lacked a certificate to operate. Again, these facts, which can be discerned from public sources (most on the CPUC’s own website), should have raised some serious red flags for AT&T when it compiled its list of fiber-based collocators, but apparently did not, suggesting that AT&T did not perform even the most basic quality control on its data.

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<sup>246</sup> Mr. Phipps, one of Mr. Starkey’s associates at QSI, called the phone number on the CPUC for the regulatory contact, Mr. Milt Morris, and was provided another number for him 1-916-677-4020 by an automated message. He called this number numerous times without reaching Mr. Morris or an answering service.

<sup>247</sup> Exh. 52 (Starkey Supplemental Direct), at 11.

<sup>248</sup> Exh. 52 (Starkey Supplemental Direct), at 12.

<sup>249</sup> *Id.*, (citing Exhibit 99, Index to the Financial Statements of Form 8-K for I-Element, Inc. for years ended December 31, 2004 and 2003 (filed 4/5/05), note 1, paragraph 2, and Draft Decision of ALJ Prestidge. *In the Matter of the Application of I-Element Telephone of California, Inc. for a Certificate of Public Convenience and Necessity to Provide Limited Facilities-Based and Resold Local Exchange, IntraLATA and InterLATA Interexchange Telephone Service in all SBC California, Verizon California, Citizens Telephone and SureWest Telephone Local exchange areas.* Application 05-12-016, August 16, 2006, p. 3. “Integrated Communications Consultants... filed for a Chapter 11 bankruptcy in the U.S. Bankruptcy Court of the Northern District of Texas, in 2004.” See also Exhibit 99, Index to the Financial Statements of Form 8-K for I-Element, Inc. for years ended December 31, 2004 and 2003 (filed 4/5/05), note 9, paragraph 3).

## **Radio Communications Services**

AT&T identified Radio Communications Services as a fiber-based collocator, however, this carrier is not listed as a carrier of any sort on the CPUC website and there were no “hits” on the CPUC website for an entity with that name.<sup>250</sup>

## **Air Communications Co.**

AT&T identified Air Communications in two wire centers. The Joint CLECs could not locate any entity operating under the name Air Communications in California. On the CPUC’s website, several entities with similar names, containing the word “Air,” are all non-operational, as their CPCNs were revoked by Resolution T-16875 in September 2004.<sup>251</sup> AT&T indicated that the collocation arrangements attributed to Air Communications might actually be collocation arrangements of Arrival Communications.<sup>252</sup> However, Arrival Communications never operated as Air Communications, and never used the ACNA “ANC.”<sup>253</sup> Arrival’s ACNA is “AZC.”<sup>254</sup> Further, the signage on the two collocation arrangements that AT&T attributes to Arrival is not consistent with AT&T’s description of the signage its employee supposedly saw on the disputed collocation arrangement during AT&T’s inspection in 2005.<sup>255</sup>

AT&T’s error regarding “Air Communications” highlights a few important points. First, it shows that AT&T’s reliance on signage in identifying FBCs, rather than on its own billing records, can lead to incorrect results. That is, AT&T misidentified a fiber-based collocator because it apparently read a sign on a collocation cage that may or may not have accurately

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<sup>250</sup> Exh. 52 (Starkey Supplemental Direct), at 14. AT&T’s Attachment to its response to Joint CLECs’ Data Request 3-7 indicates that Radio Communications Services is the parent company of the carrier identified as Carrier 1 on Exh. 53-C, but AT&T did not name Carrier 1 – which changed its name to SureWest several years ago – as an FBC.

<sup>251</sup> Exh. 52 (Starkey Supplemental Direct), at 14-15.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*, at 15

identified the company collocated therein, and simply jotted that name down, without attempting to verify that the sign was accurate.<sup>256</sup>

Further, this example demonstrates a clear lack of quality control in AT&T's data collection process for fiber-based collocators. AT&T acknowledges that the ACNA code "ACN" is no longer valid in California, which means that this should have raised red flags for AT&T when it first began conducting its inspections and gathering data.<sup>257</sup> If, in fact, AT&T was actually attempting to verify and substantiate the data it was collecting on FBCs, these are the types of questions that should have been investigated. Furthermore, this error shows that relying on AT&T's internal records, without verification, can lead to inaccuracies. In this instance, AT&T's reliance on its internal records resulted in AT&T's identifying as an FBC, apparently based on incorrect signage, a carrier that was no longer operating in California.<sup>258</sup>

### **Mpower Communications**

AT&T misidentified Mpower Communications as a fiber-based collocator in one wire center, but did not provide further details.<sup>259</sup> The Joint CLECs have submitted record evidence demonstrating that AT&T counted an empty collocation cage for Mpower Communications.<sup>260</sup> This empty collocation cage is the subject of the photographs that AT&T provided to Joint CLECs after the close of discovery, the hearing and submission of the record and which it discusses only in its Opening Brief. AT&T claims the photographs show that the collocation cage in question, which purportedly might belong to ICG, a bankrupt CLEC, is not empty. This attempt to introduce extra-record information that was withheld during discovery is improper and

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<sup>256</sup> *Id.*, at 14-15.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *See*, Exh. 51-C (Starkey Confidential Direct), at 57.

<sup>260</sup> Exh. 52 (Starkey Supplemental Direct), at 17.





Verizon and MCI as separate collocators in four wire centers.<sup>268</sup> In all of these instances, AT&T should, at most, be counting only one fiber-based collocator.<sup>269</sup>

The status of fiber-based collocators in March of 2005 is not representative of their status when AT&T filed its Complaint in this case or today when the Commission must review the facts and make a determination regarding the available alternatives for transport services in the California marketplace.<sup>270</sup> AT&T should not be allowed to select an arbitrary cut-off date of more than a year ago when presenting data upon which the Commission must rely in this case, simply because it advantages AT&T.<sup>271</sup> The data available at the time a decision regarding impairment must be made is the most relevant data.<sup>272</sup>

**4) AT&T relies on data later than March 11, 2005 in support of its list of fiber-based collocators**

Despite arguments to the contrary, AT&T itself did not restrict its analysis of fiber-based collocators to data as of March 11, 2005.<sup>273</sup> Mr. Nevels unequivocally testified that “between July and August 2005 additional physical site inspections were completed by AT&T personnel.”<sup>274</sup> Ms. Chapman subsequently stated that AT&T did not rely on any “network modifications” after March 11, 2005.<sup>275</sup> It is not clear what the term “network modifications” means, but discovery responses provided by AT&T make clear that AT&T personnel revised data regarding fiber-based collocator designations based on inspections in July and August.

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<sup>268</sup> Exh. 51-C (Starkey Confidential Direct), at 54-55. Due to the total number of collocators in these wire centers, the inclusion of the above listed affiliates affects the non-impairment status of **\*\*\*BEGIN CONFIDENTIAL xxxxx END CONFIDENTIAL\*\*\*** wire centers.

<sup>269</sup> Exh. 52 ( Starkey Supplemental Direct), at 23-24.

<sup>270</sup> Exh. 52 ( Starkey Supplemental Direct), at 23-24.

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> AT&T Opening Brief, at 36; *see also* Exh. 4 (Chapman Rebuttal), at 69-70.

<sup>274</sup> Exh. 1 (Nevels Direct), at 15.

<sup>275</sup> Exh. 4 (Chapman Rebuttal), at 69-70. Ms. Chapman states that the inspections done in July and August were related to the merger between SBC and AT&T. *Id.* The merger, however, is directly related to the fiber-based collocator designations in this proceeding, because the FCC required, as part of that merger, that the merged entity remove AT&T as a fiber-based collocator since AT&T was to become an affiliate of SBC.



this proceeding. The photographs, however, prove that AT&T is willing to rely on data later than March 11, 2005. Thus, because even AT&T has not limited its analysis to data as of March 11, 2005, the Commission should reject AT&T's proposed arbitrary cutoff, and instead base its impairment determination on data that were current as of October 5, 2006, the date the record closed in this proceeding.

**5) Other state commissions have rejected AT&T's attempt to limit analysis to 2005 data**

At least one other state commission has recognized the folly of ignoring the last two years of data, and have ruled that the most recent data available should be used. Similarly, the Oklahoma Arbitrator's Report concluded that wire center impairment decisions should be based on the most recent data available. The Report states, "[t]here is nothing in the *TRRO* that indicates the FCC wanted state commissions to apply its 'going forward' Business Line and Fiber-Based Collocator definitions based on stale data."<sup>276</sup>

**d. Is a carrier that sub-leases collocation space from another carrier eligible to be considered as an FBC?**

In one instance, AT&T counted as a fiber-based collocator a company that sub-leases a collocation cage from another (apparently legitimate) fiber-based collocator.<sup>277</sup> The inclusion of this arrangement is improper because nowhere in the *TRRO*, *TRO*, or the implementing rules does the FCC permit counting such arrangements as fiber-based collocators – and for good reason: a sub-lease arrangement does not indicate evidence of competitive deployment of transmission facilities.<sup>278</sup> This flaw is particularly telling because it shows that even if AT&T's effort to count every collocation cage had merit (which it does not), it would have exaggerated

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<sup>276</sup> Oklahoma Arbitrator's Report, at 27.

<sup>277</sup> Exh. 51 (Starkey Direct), at 60 (*citing* Confidential Attachment CA\_FIBERBased.xls provided in AT&T's response to XO Communications Services, Inc. 1<sup>st</sup> Set of Data Requests, Request No. 1, column F.

<sup>278</sup> Mr. Starkey also excluded this arrangement on the grounds that this is a collocation-to-collocation cross connect arrangement where a connecting carrier does not operate a fiber-optic cable.





- B. *Business Line Counts: How should Business Lines be counted in order to comply with the FCC’s definition of “Business Lines” in 47 C.F.R. § 51.5 and applicable orders?***
- 1. What is the appropriate vintage for the supporting data used in evaluating the Business Line counts governing proper classification in the disputed wire centers?**

For purposes of its 2006 wire center designation and for purposes of this case, the Commission should use the most recent data available because this is the information that will—in accordance with FCC intent—yield the most accurate view of the economic feasibility of competitive construction of new facilities. The alternative suggested by AT&T—to use data from 2003<sup>283</sup>—will yield inflated line counts and a skewed view of the current state of competition in California. The Commission should reject AT&T’s 2003 business line data-set and utilize business line counts that are more recent and relevant.

As Mr. Starkey explains in his direct testimony, ARMIS (which stands for Automated Reporting Management Information System) is an FCC process that requires large incumbent telecommunications carriers such as AT&T to provide—via an electronic database—financial, operational, service quality and network infrastructure data.<sup>284</sup> After the data is uploaded, the ARMIS database produces ten public reports<sup>285</sup> that show various year-end results.<sup>285</sup> 2003 ARMIS data is for year-end 2003, 2004 ARMIS data is for year-end 2004, and so on.

Carriers file the necessary ARMIS information with the FCC during the first quarter of the following year,<sup>286</sup> and the FCC then releases the data so that it can be used for various regulatory purposes. Because the information the FCC requires is tracked continuously by the

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<sup>283</sup> Exh. 3 (Chapman Direct), at 10, 18.

<sup>284</sup> More information on the ARMIS system is available at: <http://www.fcc.gov/wcb/armis/descriptions.html>.

<sup>285</sup> These reports are available online at: <http://svartifoss2.fcc.gov/eafs/MainMenu.cfm>.

<sup>286</sup> The FCC’s current ARMIS instructions require carriers to file 2005 ARMIS data no later than April 1, 2006. (<http://www.fcc.gov/wcb/armis/instructions/>).

ILECs, they have the previous year's information at their disposal by early January.<sup>287</sup> For instance, AT&T has the line count information for ARMIS available to it in time to utilize these line counts for its fourth quarter and year-end earnings statements which are generally released in January of the following year.<sup>288</sup>

Given, then, that this data is available on an almost real-time basis, there are several pernicious results that will flow from a decision to use the stale data pushed on the Commission by AT&T. First, the 2003 ARMIS data is now about 30 months old and cannot help the Commission in its task of implementing the FCC's intent: old data tells us very little about the economic feasibility of facilities-based entry in today's market which—as noted above—is the overarching objective of the FCC's impairment analysis. Using outdated information might be justified if it were all that was available, but that is certainly not the case. Data from 2005 is available right now, and, as Mr. Starkey notes, neither the FCC rules nor orders tie the business line count to ARMIS 2003 data.<sup>289</sup>

Second, more recent business line data is a better match for the fiber-based collocator counts submitted by AT&T. As a general rule, because both data-sets (i.e., business lines and fiber-based collocators) are being used within a common analysis to evaluate impairment, the vintage of the business line data should correspond to the greatest extent possible to the vintage of data used to identify fiber-based collocators. AT&T's 2003 ARMIS data was about 14 months old when AT&T began counting fiber-based collocators and about 20 months old when

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<sup>287</sup> Exh. 51-C (Starkey Direct), at 69.

<sup>288</sup> AT&T's report for year ending is issued in January of the following year. <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22058>

<sup>289</sup> Exh. 51-C (Starkey Direct), at 70.

AT&T completed these counts.<sup>290</sup> Likewise, it will be more than 30 months old when the Commission's reaches its decisions in this case.<sup>291</sup>

As Mr. Starkey notes, if AT&T's ARMIS data and fiber-based collocator data are for different time periods, mismatches between the two can result in a wire center declassification based on misinformation.<sup>292</sup> For example, AT&T's data may show that it meets a non-impairment threshold in a particular wire center in terms of business lines in year 2003 and in terms of fiber-based collocators in year 2005, but for the purposes of evaluating high capacity loop impairment, AT&T's data cannot show—as is required by the FCC—that this wire center met *both* the business line and the fiber based collocators *at the same time* in 2003 or 2005.

Further, using 2003 ARMIS data will provide a distorted impairment analysis by suggesting a slightly higher potential for the economic deployment of alternative transmission facilities than actually exists today. This would undermine the FCC's non-impairment rule because CLECs would be forced to purchase high capacity loops and transport at non-TELRIC based rates where effective transmission alternatives have *not* developed in that particular wire center. The FCC's intent in the *TRRO* was to use business line counts together with fiber-based collocator counts as a proxy for the potential for deployment of competitive loop and transport facilities. That is, the more business lines, the more revenue opportunities, and the more potential for competitive deployment of facilities.

The trend in the years since AT&T's 2003 ARMIS data was produced, however, has been a slight year-to-year drop in business line counts, a drop that is more pronounced in some wire

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<sup>290</sup> *Id.* at 71.

<sup>291</sup> Exh. 51-C (Starkey Direct), at 71.

<sup>292</sup> *Id.*

centers than others.<sup>293</sup> For instance, based on the business line data that AT&T provided in this proceeding, between 2003 and 2004 total business lines (Business Switched Access Lines + Business UNE-P+ UNE-L) decreased by **\*\*\*BEGIN CONFIDENTIALxxxxxxxEND CONFIDENTIAL\*\*\***. This resulted in one wire center **\*\*\*BEGIN CONFIDENTIAL xxxxxxxxxxxxEND CONFIDENTIAL\*\*\*** to fall below the 60,000 business line threshold, and one wire center **\*\*\*BEGIN CONFIDENTIAL xxxxxxxxxxxx END CONFIDENTIAL\*\*\***, which AT&T claims is above the 38,000 business line threshold, to fall below that level.<sup>294</sup>

In short, if the Commission accepts AT&T's invitation to use data sets scattered over a broad time range,<sup>295</sup> the Commission cannot be assured that its impairment analysis reasonably measures what the FCC wants measured: the likelihood that carriers can actually gain access to economically viable, non-UNE sources of loops and transport.

There is, of course, no need to use old line count data because more recent data is readily available. AT&T provided both 2004 and 2005 data in its supplemental responses to Joint CLEC DR No. 2-27.<sup>296</sup> As Mr. Starkey's analysis shows, the 2005 data shows that business line counts fell by **\*\*\*BEGIN CONFIDENTIALxxxxxxxEND CONFIDENTIAL\*\*\*** between 2003 and 2005, for an incremental decrease of **\*\*BEGIN CONFIDENTIALxxxxxxxEND CONFIDENTIAL\*\*\*** between 2004 and 2005.<sup>297</sup> While these changes appear small, they have a dramatic impact on the number of wire centers that exceed various FCC thresholds. In addition to wire center reclassifications, described above, using 2005 data instead of 2003 data results in the following additional changes to AT&T's proposed wire center classifications: one

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<sup>293</sup> Exh. 51-C (Starkey Direct), at 72.

<sup>294</sup> *Id.*

<sup>295</sup> AT&T conducted the site inspections that served as the basis for its fiber-based collocator counts in February 2005 and again between July and August 2005 (Exh. 1 (Nevels Direct) at 14-15). As noted above, AT&T used 2003 ARMIS data for its business line count.

<sup>296</sup> Exh. 65-C.

<sup>297</sup> Exh. 51-C (Starkey Confidential Direct), at 72.



would have been no reason for this reference if the FCC felt that the 2003 ARMIS data carried some sort of talismanic significance, as AT&T suggests.

Before addressing AT&T's arguments in support of its desire to use stale data, it is important to note that AT&T does not argue that use of 2003 data is *required* by the *TRRO*. Instead, it simply urges that it is *permissible* for it to refer that far back in time.<sup>300</sup> The Commission should reject AT&T's position in favor of data that most accurately represents the state of competition in California *today*.

AT&T mounts two arguments in support of its request that the Commission use stale data in this proceeding: (1) it is the data that the FCC used, and (2) the effective date of the *TRRO* should govern. Both of these arguments are nonsensical. First, the FCC made no finding whatsoever regarding what vintage of data would be proper for state commissions to use when implementing the *TRRO*.<sup>301</sup> Instead, the FCC simply used the most recent data available to it prior to issuing the *TRRO* to set thresholds. The Commission should likewise use the most recent data available to it to carry out its task in this proceeding, the data that would allow a snap-shot of the real state of competition in each wire center *today*, not the status of competition three years ago.

AT&T claims that since the FCC established the impairment thresholds based on 2003 data, this 2003 data should be used for state impairment analyses. This argument makes no sense because the FCC used the 2003 data for a different purpose than the question that is before the Commission here. The FCC used 2003 data (the most recent data available to it when it was deliberating the *TRRO*) to set general thresholds that are indicative of competitive facilities deployment. As Mr. Starkey makes abundantly clear, these thresholds are not tied to any

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<sup>300</sup> AT&T Opening Brief at 45-46.

<sup>301</sup> *Id.* at 71.

specific timeframe: there is no reason whatsoever to suggest that 2004 or 2005 line counts cannot be properly analyzed for impairment based on thresholds that were established using 2003 ARMIS data.<sup>302</sup>

In other words, the impairment thresholds established by the FCC in the *TRRO* are indicative of competitive facilities deployment regardless of the vintage of business line data to which they are applied. It follows logically that the FCC intended that state commissions would analyze timely data when making wire center designations because competition is not static, rather it is an evolving process whereby CLECs and ILECs continue to deploy facilities based on dynamic market conditions. The CLECs' ability to respond to, and compete in, varying markets is the genesis for the FCC's impairment analysis. Rather than use stale, inaccurate data, as urged by AT&T, the Commission should—as other ILECs and state commissions have done<sup>303</sup>—use the most recent data available, in this case, 2005 business line count data.<sup>304</sup> This would involve replacing the 2003 business line counts (*i.e.*, 2003 ARMIS Business Lines + 2003 Business UNE-P + 2003 UNE-L) with 2005 business line counts (*i.e.*, 2005 ARMIS Business Lines + 2005 Business UNE-P + 2005 UNE-L).<sup>305</sup>

## **2. How should UNE Loops be counted?**

As discussed fully above, the *TRRO* requires a wire-center by wire-center analysis of the number of fiber-based collocators in a given wire center to determine the availability of high

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<sup>302</sup> *Id.* at 72.

<sup>303</sup> *See Id.*, at 75-76 describing BellSouth's use of the freshest line count data in similar proceedings and the Michigan Commission's order forcing SBC to use the most recent data available. As AT&T points out in its Opening Brief, other state commissions have found the use of 2003 data to be appropriate.

<sup>304</sup> *See id.* at 73-74. AT&T conducted its site inspections associated with identifying fiber-based collocators in February 2005, July 2005 and August 2005. 2005 business line count data would thus match the collocator data AT&T is relying on. Further, 2005 data was the most recent available when AT&T filed its complaint in this matter.

<sup>305</sup> *Id.* at 73. Should the Commission disagree with the primary recommendation to use 2005 data, at a minimum, 2004 data should be used. AT&T has urged that the issuance date of the *TRRO* holds some significance in terms of what vintage of business line data to use, and the 2004 data was available at the time of the issuance of the *TRRO*.

capacity loop and transport UNEs served by that wire center. It is now time to turn to the second key variable that the FCC identified to make this UNE-availability determination: the number of “business lines” served by a given wire center. Significantly, there is no dispute concerning the appropriate definition of the term “business line,” but there is significant disagreement between the parties over (1) the appropriate interpretation of the FCC’s definition of a “business line”,<sup>306</sup> and (2) whether the most recent data available should be used to count business lines once the Commission has determined how that count should be conducted. These issues will be addressed in turn.

To fully understand the dispute regarding the appropriate interpretation of the FCC’s definition of a business line, it is first necessary to understand the nature of the various kinds of “lines” within the network that AT&T controls. The most basic line in the AT&T network is a Plain Old Telephone—or POTS—line. A POTS line is a two-wire analog line such as that used to serve most residential customers (and many small businesses) with local and long distance phone service or to provide a basic fax line. The UNE equivalent of a POTS line is known as a UNE-P line. A POTS line has a very limited capacity to carry information, and it can only accommodate a single information stream at a time (*i.e.*, one phone call or one fax transmission).

Newer telecommunications services tend to be carried over digital telephone lines. Whereas analog telecommunications services operate by creating an electronic signal that correlates directly with the sound they carry, digital lines convey information by converting it into a series of 1s and 0s that can be decoded on the other end of the line and then reassembled into an accurate rendering of the information as it appeared or sounded as it entered the system. One of the primary advantages of a digital line is the fact that it can carry multiple signals

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<sup>306</sup> The FCC “business line” definition is set out at 47 CFR § 51.5 (previously quoted in full).

simultaneously within the stream of 1s and 0s; the equipment at the other end of the line is “smart” enough to know which 1s and 0s to pull out of the stream and reassemble, leaving the rest to perform other potential functions.

The capacity of a given digital line is described in kilobits-per-second (“kbps”) or megabits-per-second (“mbps”), and the FCC often speaks of “digital equivalencies” in which it describes the maximum capacity of a digital line in reference to its 64 kbps analog equivalents.<sup>307</sup> Under this method of counting, a digital UNE-P or a 2-wire UNE-L line has a maximum capacity of 128 kbps or 2 digital equivalencies. A DS-1 UNE-L or a DS-1 Business line, on the other hand, has a maximum capacity of 1.5 mbps (1500 kbps) or 24 digital equivalencies. A single digital equivalency can (1) act as a single phone line, (2) carry 64 kbps of data other than voice or (3) simply be unused. The different kinds of lines at issue in this proceeding are summarized in the table below:

Line Name	Service Provider	Capacity	Digital Equivalents (used or unused)	Disputed?	Notes
<b>POTS</b>	AT&T	64 kbps	1	No	
<b>UNE-P</b>	CLEC	64 kbps	1	No	
<b>Analog UNE-L</b>	CLEC	64 kbps	1	No	
<b>2-wire digital</b>	AT&T	128 kbps	2	No	
<b>Digital UNE-P</b>	<b>CLEC</b>	<b>128 kbps</b>	<b>2</b>	<b>Yes</b>	<b>Digital UNE-L / UNE-P lines will be referred to collectively as UNE-L lines throughout the brief.</b>
<b>Digital UNE-L</b>	<b>CLEC</b>	<b>128 kbps</b>	<b>2</b>	<b>Yes</b>	
<b>DS1</b>	AT&T	1.5 mbps	24	No	
<b>DS1 Business</b>	<b>CLEC</b>	<b>1.5 mbps</b>	<b>24</b>	<b>Yes</b>	<b>Business and UNE DS1 lines will be referred to collectively as DS1 lines throughout the brief.</b>
<b>DS1 UNE-L</b>	<b>CLEC</b>	<b>1.5 mbps</b>	<b>24</b>	<b>Yes</b>	
<b>DS3 UNE-L</b>	<b>CLEC</b>	<b>n/a</b>	<b>672</b>	<b>Yes</b>	

<sup>307</sup> *See, e.g., id.*

In looking at these different kinds of lines, there is no dispute between the parties as to how to count analog lines: if they go to a business, each POTS or UNE-P line should be counted as a single business line.<sup>308</sup> For digital lines where AT&T is the service provider, no dispute: AT&T will count each digital equivalent actually used to provide switched access voice (or fax) services as one line, and the CLECs agree that this is appropriate. For digital lines where a CLEC is the service provider, on the other hand, there is a significant dispute: AT&T believes that the FCC has directed them to count the maximum theoretical digital equivalency regardless of whether any service—voice or data or nothing at all—is being provided over that capacity. AT&T's reading of the *TRRO* leads to perverse and nonsensical results that—as will be shown fully below—the FCC could not have intended.

There is no dispute as to the content of the FCC's Business Line definition. "Business Line," is defined in 47 C.F.R. Section 51.5:

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."<sup>309</sup>

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<sup>308</sup> Joint CLECs recognize that in the California *TRO/TRRO* proceeding, the Commission has already ruled on the issue of counting residential and business UNE-L lines and we are not asking the Commission to revisit that ruling in this case. See D.06-01-043 and D.06-02-035.

<sup>309</sup> 47 CFR § 51.5.

Of course, the bare definition is not the only information the Commission has to work with to resolve the line count issues in this case. The Commission should also be guided by (1) the FCC's intent in setting the business line count thresholds of the *TRRO*, (2) the information that the FCC was working with when it set those thresholds, and (3) the results obtained when the competing interpretations of the definition are used in the real world.

First, the Commission should consider the FCC's intent in setting the *TRRO*'s business line count thresholds, an intent which it made explicitly clear within the *TRRO*. The FCC speaks for itself here:

. . . high business line counts and the presence of fiber-based collocators , when evaluated in conjunction with one another, are likely to correspond with actual self-deployment of competitive LEC loops or to indicate where deployment would be economic and potential deployment likely.<sup>310</sup>

In other words, the FCC was using line counts and fiber-based collocators as a proxy to identify locations where it believed ILEC competitors could economically deploy their own DS1 facilities or gain access to DS1 facilities provided by other competitors.<sup>311</sup> More specifically, the FCC found that CLECs could economically build their own DS1 facilities to reach customers only in those wire centers with at least 60,000 business lines and four fiber-based collocators.<sup>312</sup> With this background, it is now possible to address the appropriate way to count business lines in California.

- a. **How should digital UNE-L lines be counted under the FCC's definition of business line?**
- b. **How should digital UNE-P lines be counted under the FCC's definition of business line?**
- c. **Should UNE lines be counted in the same manner as AT&T's retail active voice grade circuits?**

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<sup>310</sup> *TRRO*, at ¶167

<sup>311</sup> *TRRO*, at ¶¶166, 178.

<sup>312</sup> *TRRO*, at ¶179.

The answers to these three issues are intertwined, and so they will be addressed together. The question confronting the Commission regarding the counting of a UNE-L and the counting of a digital UNE-P line is the same: is it appropriate for AT&T to count capacity on those lines that is not used for switched access services? A starting point for answering this question is, of course, the text of the business line definition itself which is repeated here with emphasis added:

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.”<sup>313</sup>

A brief summary of the parties’ basic positions on what this definition means will help frame the rest of the discussion. AT&T asserts that only two short phrases of the definition matter *at all* in considering how to count CLEC-leased business lines: (1) the phrase “sum of all UNE loops connected to that wire center,” and (2) the words between the numeral “(3)” and the end of the definition;<sup>314</sup> taking these isolated words, AT&T asserts that the FCC has directed it to count 100% of the capacity on high-capacity UNE-L lines as “business lines,” even capacity that is not used to provided the switched access services described in the first sentence or—for that matter—any service at all.

The Joint CLECs, on the other hand, submit that all of the words in the definition have meaning and that the definition must, therefore, be read in its entirety. When the definition is

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<sup>313</sup> 47 CFR § 51.5.

<sup>314</sup> AT&T Opening Brief, at 53.

read in its entirety, a “business line” is one that is (a) used to serve a business customer, (b) used to provide switched services, and (c) potentially a single, 64 kbps digital equivalent on a higher capacity digital line to the extent that the digital equivalent in question meets the requirements of (a) and (b). As shown below, the CLEC reading of the definition is in accord with the intent of the FCC. The Commission should reject AT&T’s cramped reading of the definition in favor of a reading that meshes with FCC intent and takes the *all* the words of definition into account.

**1) AT&T’s Errors**

By ignoring most of the words in the FCC’s definition, AT&T creates a reading of the regulation that dramatically over-counts business lines by including unused capacity on the high-speed digital lines leased to CLECs.

The basis for AT&T’s assertion that it should count even empty channels on a high-capacity circuit as business lines is (once again) the result of an isolated reading of the definition, in this instance, the last clause of the last sentence. There is no indication in the text of the *TRRO*, or in its definition, that the FCC intended for its third criteria to reverse the prior two. Indeed, upon closer examination, it is clear that (3) above does not direct AT&T to count each channel in a high capacity circuit as a “business line” at all. The critical sentence in (3) is that AT&T “shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one line.” This requirement, however, does nothing more than it plainly states: It merely directs that each 64 kbps-equivalent should be considered “one line;” it does not direct that each line then be declared a “business line” without regard to the remaining criteria.

The fact that the definition provides an example of how the analysis might count a DS1 is not the same as defining all DS1s as 24 business lines. Indeed, had the FCC wanted to declare all high capacity services business lines, it could have easily simplified the definition to say so. But the FCC did not. It directed that each 64-kbps equivalent be considered one line, and then

directed that other criteria—most specifically, that the line be used to provide switched access line service to a business customer—determine whether each “line” should be considered a business line.

But standard statutory interpretation is not the only way to reveal AT&T’s errors. The problems with its business line definition interpretation can also be seen in the huge discrepancy between the line counts AT&T reported to the FCC in 2003 and the line counts it has produced for the Commission in this proceeding. These discrepancies matter because the FCC states explicitly in the *TRRO* that it made its threshold determinations “based on the data in the record,” finding that “this rule will eliminate unbundled DS1 loops in wire centers accounting for approximately 8 percent of all BOC business lines.”<sup>315</sup> The data in the record regarding AT&T’s (formerly SBC) wire center line counts was contained in SBC’s December 7, 2004 Wire Center Data *Ex Parte* Letter,<sup>316</sup> and the FCC clearly and unequivocally relied on it in making their threshold determination.<sup>317</sup> The question then arises, if AT&T is now reporting dramatically higher line counts than it did in 2003 (at a time when line counts are generally declining), how can it claim that it is doing as the FCC intended? The answer to this question is instructive.

## 2) AT&T’s Bait-and-Switch

The number of business lines AT&T claims exist in the affected California wire centers is higher than the number it provided to the FCC in December 2004 when the FCC was setting

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<sup>315</sup> *Id.*

<sup>316</sup> *Id.*, at fn. 486. *See also*, Exh.3 (Chapman Direct), at p. 16 referencing the letter AT&T (then SBC) submitted to Mr. Jeffrey J. Carlisle, Chief, FCC Wireline Competition Bureau, at page 1, fn.2. Footnote 2 reads, in part, as follows: “The wire center business line data includes retail business lines, resale, and coin lines from the 2003 ARMIS 43.08 report and UNE-P business lines, stand alone UNE loops, and EELs adjusted for 64 kbps-equivalents. SBC’s December 7 and December 10, 2004 filings used different criteria that did not account for voice grade equivalents for the UNE lines (CFR § 51.5). . . .” (emphasis added).

<sup>317</sup> *Id.* at ¶ 105 (“Moreover, as we define them, business line counts are an objective set of data that incumbent LECs already have created for other regulatory purposes.”), *referencing* SBC’s Dec. 7, 2004 Wire Center Data *Ex Parte* Letter.

benchmarks for the *TRRO* proceeding as AT&T did not count each UNE-L as 24 business lines, but rather, counted each UNE-L as one line.<sup>318</sup> However, *after* the FCC released the *TRRO*, AT&T adjusted its business line count “to account for voice grade equivalents for the UNE lines.”<sup>319</sup> AT&T’s tactic is obvious: artificially inflate the *CLEC* UNE-L count in order to declassify wire centers. AT&T cannot claim that the business line count in the *TRRO* requires such an absurd analysis, especially since AT&T does not apply the digital equivalency factor when counting its own DS-1 and DS-3 lines. Instead, AT&T counts only its “business switched access lines” (those lines used for voice or fax) in its business line counts, not the total voice grade equivalent of each line. The term “business switched access lines” is a defined term in ARMIS 43-08,<sup>320</sup> which is the report that the FCC directed be used to measure AT&T’s retail lines.<sup>321</sup> Significantly, the ARMIS reporting instructions *already* require that AT&T report its lines in voice-equivalents,<sup>322</sup> but limit the voice-equivalent line count only to those circuits actually activated to provide business switched access line service. While AT&T complied with this requirement in counting its own business lines, it did not even make the effort to count *CLEC* business lines. Instead it chose to use the digital equivalency factor to dramatically inflate each of its wire center line counts, by including capacity that is empty or not used for switched access services.

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<sup>318</sup> Exh.3 (Chapman Direct), at 16 *referencing* the letter AT&T (then SBC) submitted to Mr. Jeffrey J. Carlisle, Chief, FCC Wireline Competition Bureau, at page 1, fn.2. *See also*, Exh. 51-C (Starkey Direct), at 81.

<sup>319</sup> *Id.*

<sup>320</sup> *See TRRO*, ¶ 105, n.303, specifically referencing a document from the FCC website: <http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf> (*see* p. 21 for definition of Business Switched Access Lines).

<sup>321</sup> As the FCC explained: “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... by basing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy of the thresholds, and a simplified ability to obtain the necessary information.” *TRRO*, at ¶105 (footnotes omitted).

<sup>322</sup> *See* <http://www.fcc.gov/wcb/armis/documents/2004PDFs/4308c04.pdf> (page 21) defining ARMIS 43-08 Business Switched Access Lines as “total voice-grade equivalent analog or digital switched access lines to business customers.” (emphasis added).

The FCC could not have been more clear. The *TRRO* points to a previously defined standard measure of AT&T's business switched access lines. That standard meets each of the FCC's criteria as filed, yet AT&T nevertheless insists that the FCC's definition requires that it inflate this measure to count CLEC capacity that does not comply with the definition. This, certainly, was not the FCC's intent.

It is instructive to consider the impact of AT&T's spurious reading of the Business Line definition on a real-world example because it is there that its true absurdity becomes apparent. Assume that AT&T has a business customer getting various services from AT&T over a DS1 line. In this instance, the customer is using half of the circuit's 24 digital equivalents for telephone service (12 of them) and the other half for data services, which are used to access the internet, email, etc. Under these circumstances, AT&T would report a business line count of 12 under ARMIS rules.<sup>323</sup>

Now assume that a CLEC wins that customer from AT&T and provisions precisely the same services over exactly the same DS1 facility. Under AT&T's reading of the *TRRO*, it will now report this DS1 as carrying 24 business lines even though nothing has changed, aside from the underlying provider. There is absolutely nothing in the *TRRO* that would indicate the FCC intended such a result and AT&T has made no effort to point to anything in the *TRRO* that would indicate the FCC intended such an absurd result. It is only through a cramped, strained, illogical and partial reading of the Business Line rule that such a result can be obtained, and the Commission should not allow it.

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<sup>323</sup> See Exh. 51 (Starkey Direct) at 86.

AT&T attempts to deny that this example holds true in a couple of misleading paragraphs in its Opening Brief, in which it artfully uses telecommunications jargon to conceal the truth.<sup>324</sup> By using the words “line” and “service” and “product” as if they are interchangeable, AT&T changes the example above into something entirely different, asserting correctly that line counts might change as services and products change. The Commission should not be fooled by this sleight-of-hand. The truth is this: under AT&T’s reasoning a DS1 providing half of the voice and fax telephone service when provisioned by AT&T magically becomes a full DS1 when a CLEC provisions it, even though only half of those circuits are providing voice and fax service. This result is, indeed, absurd, and the Commission should reject it: AT&T must count CLEC business lines in accordance with a complete reading of the business line definition, and this means counting them in the same way it counts its own business lines.

In support of its claims, AT&T also asserts that its use of the maximum possible digital equivalency factor is justified by the fact that it cannot know how many switched access lines a CLEC provisions over a given DS1. This is a spurious argument that the Commission should reject out-of-hand. AT&T seems to be under the impression that complying with the FCC’s full and complete definition of “business line” is optional. It is not optional.

### **3) An Alternative to AT&T’s Digital Equivalency Factor**

The FCC’s Business Line definition makes clear that *only* switched business lines are to be counted—not the maximum potential capacity, which would include empty circuits and data circuits. Hence, even if AT&T does not know the utilization rate of a CLEC UNE-L for switched business lines, AT&T cannot simply toss out part of the FCC’s definition and count all UNE-Ls at their maximum potential capacity regardless of whether they meet the other

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<sup>324</sup> AT&T Opening Brief at 62-63.

applicable criteria. The counting method that AT&T has chosen is so wildly unreliable that it would actually be more accurate to count each UNE-L as one line rather than applying the maxed-out digital equivalency factor AT&T favors: applying AT&T's factor *over*-counts business lines by a larger margin than any *under*counting of business lines that would result if each UNE-L is counted as one line (as AT&T does when submitting ARMIS data to the FCC).<sup>325</sup>

Whether over-counting or undercounting is the better choice to make, it is clear that the FCC wanted an accurate count of business lines in accordance with its definition. Recognizing that (1) AT&T's maxed-out digital equivalency factor will over-count lines nearly 100% of the time and is not allowable under the FCC's business line definition, (2) assigning a count of "1" to every UNE-L line will undercount lines nearly 100% of the time and is also not allowable under the FCC's business line definition, and (3) AT&T's contention that it has no way of knowing how many business lines a CLEC will provision over any given UNE-L line is correct, we recommend using a good faith proxy that comes much closer than the other alternatives to replicating the real world.

The Commission should find that in order to remove unused UNE loop capacity and capacity used for data services from the business line counts, it is appropriate to use the midpoint between the counting method AT&T originally used to count UNE-L (*i.e.*, each UNE-L is one business line) and AT&T's revised counting method (*i.e.*, each UNE-L is counted at their maximum potential capacity). In other words, for each DS1 UNE-L loop, AT&T should be required to count no more than 12 business access lines (50% of its total 64 kbps equivalency). This proposal strikes a fair balance between the FCC's goal to accurately count multiple business

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<sup>325</sup> *See generally*, Exh. 51-C (Starkey Confidential Direct), at 93-96 detailing how line counts and wire center designations would change if AT&T's digital equivalency factor were removed.

lines provided over digital/high capacity loops and AT&T's attempt to inappropriately count each UNE-L to its maximum potential capacity – regardless of the reality of the situation.

Using this business line counting methodology would be conservative. In preparing his testimony, Mr. Starkey received data from a number of CLECs regarding the average number of business lines provided over their high-capacity UNE-L line. This data shows that as a general matter, CLECs utilize **\*\*\*BEGIN CONFIDENTIALXXXXXXXXXXEND CONFIDENTIAL\*\*\*** voice lines over a high capacity DS1 UNE-L.<sup>326</sup> In other words, **\*\*\*BEGIN CONFIDENTIALXXXXXXXXXXEND CONFIDENTIAL\*\*\*** of the maximum potential capacity of CLEC high-capacity loops is used for switched business voice services.<sup>327</sup> The remaining channels are used for data services or are empty. Further, the market data provided by AT&T witness Hopfinger in the California *TRO* case shows that CLEC high capacity UNE-L based services use less than this percentage of their total capacity to provide business voice services. In fact this data shows that the utilization is considerably lower than the maximum potential capacity and is also lower than the 50% factor we suggest.<sup>328</sup>

Finally, AT&T itself believes that from an economic standpoint, CLECs can begin serving a customer with DS1 service via UNE-L when that customer purchases only 4 business lines (or 17% of the maximum potential capacity).<sup>329</sup> This makes AT&T's insistence on a maxed-out digital equivalency factor even more suspect, but it also illustrates how conservative a 50% factor actually is. The Commission should reject AT&T's attempt to force a dramatic over-count of business lines and instead adopt a rational and fair digital equivalency factor of 50%.

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<sup>326</sup> Exh. 51-C (Starkey Direct), at 102.

<sup>327</sup> *Id.* See also *Id.*, at 94, 95, 97, 98, 99, 100,

<sup>328</sup> Exh. 51-C, (Starkey Direct), at 90-93..

<sup>329</sup> *Id.*, at 89.

**3. Should business switched access lines provided under a commercial agreement be counted as business lines under the FCC's definition of business line?**

It is important to note at the outset that switched access lines provided under a commercial agreement are not included in AT&T's current line counts.<sup>330</sup> This is because the data that AT&T used to calculate its business line counts is so old that no commercial agreements existed at the time:<sup>331</sup> various CLECs executed commercial agreements to take the place of UNE-P, beginning in April and May of 2004,<sup>332</sup> and AT&T's use of 2003 ARMIS data predates these agreements. This—of course—raises yet another significant concern with the use of 30-month old data in this proceeding: as will be shown below in more detail, the inclusion of commercial lines is inappropriate under the Business Line definition, yet AT&T's 2003 business line count data includes lines that were migrated to commercial offerings in 2004, meaning that this practice further inflates their already-bloated line counts. Once again, the use of stale business line data provides the Commission with information that is not relevant to current regulatory and market conditions.

Inclusion of commercial line counts today or in any future proceeding is inappropriate because—quite simply—the FCC did not mention commercial lines much less permit the inclusion of commercial lines in the definition of business line. As Mr. Starkey points out in his direct testimony, the FCC's rule requires the following simplified equation to be used to calculate business lines:<sup>333</sup>

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<sup>330</sup> *Id.*, at 103.

<sup>331</sup> *Id.*, *See also, Id.*, AT&T response to XO Interrogatory No. 26

<sup>332</sup> For example, SBC Communications announced a commercial wholesale agreement with Sage Telecom on May 4, 2004. *See also, TRRO*, fn. 587 describing additional commercial agreements around the same time.

<sup>333</sup> Exh. 51-C, (Starkey Direct), at 105.

**Simplified Equation for Counting Business Lines (FCC Rule)**

(1) ILEC business switched access lines + (2) UNE-L + (3) Business UNE-P

AT&T's proposal to include commercial lines in future business line counts would change the FCC's definition as follows:<sup>334</sup>

**Simplified Equation for Counting Business Lines (AT&T Position)**

(1) ILEC business switched access lines + (2) UNE-L + (3) Business UNE-P + **(4) Commercial Lines**

AT&T should not be allowed to change the FCC's rule, and the Commission should make clear that AT&T is prohibited from including commercial lines in any future wire center designations.

AT&T argues that commercial agreement lines are encompassed by the phrase "all incumbent LEC business switched access lines" within the Business Line definition.<sup>335</sup> While this argument seems reasonable, it is not when viewed through the lens of what the FCC actually chose to include and exclude from its Business Line definition. It is certainly true that a UNE-P line appears very similar to a related line sold by AT&T under a commercial agreement, but it is also true that UNE DS1s and UNE DS3s are very similar to tariffed "special access" DS1s and DS3s.<sup>336</sup> Yet the FCC specifically rejected the inclusion of tariffed special access services in its line count definitions. In fact, the FCC references lines provided via commercial agreements numerous times in the *TRRO*,<sup>337</sup> yet does not include the lines associated with these commercial agreements in its definition of business lines.

<sup>334</sup> *Id.*

<sup>335</sup> 47 C.F.R. § 51.5.

<sup>336</sup> Exh. 51 (Starkey Direct) at 105-106.

<sup>337</sup> *See, e.g., TRRO*, ¶ 198 ("The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of high-capacity loop facilities or services.")

More support is provided for the assertion that the FCC did not intend commercial agreement line counts to be included in the Business Line definition by a return to a brief discussion of the FCC's intent in designing the line count thresholds. As discussed fully above, the FCC used line counts and fiber-based collocators as a proxy to identify locations where it believed ILEC competitors could economically deploy their own DS1 facilities or gain access to DS1 facilities provided by other competitors.<sup>338</sup> Yet commercial agreement line counts provide evidence of exactly the opposite assertion because a carrier would only enter into a commercial business line agreement with the ILEC in places where it was economically impossible to build its own facilities or to find a cheaper competitive offering. The FCC left these lines out of the Business Line definition for a reason, and the Commission should not allow AT&T to sneak them in the back door and thereby further damage the competitive marketplace in California.

**4. Taking all relevant factors into consideration, are the Business Line Counts identified by AT&T California appropriate? If not, what adjustments to the Business Line counts should be made?**

The short answer to this question is, of course, “no.” In accordance with Mr. Starkey's testimony and the arguments set forth above, the table below records the impact of the following changes to the business line counting methodology used by AT&T:<sup>339</sup>

- ARMIS 2005 data is used in place of the 2003 ARMIS data used by AT&T;
- 2005 UNE-L and UNE-P data is used;
- AT&T's digital equivalency factor is replaced with a factor of 50%.

The cumulative impact of these modifications, together with the changes necessary to AT&T's fiber-based collocator counts, is summarized in the table below:

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<sup>338</sup> *TRRO*, at ¶167.

<sup>339</sup> *See* Exh. 51-C (Starkey Direct), at 112-114.




**END CONFIDENTIAL\*\*\***

**C. Based on the Commission’s determinations for the issues presented in Parts 1 and 2 above, what are the appropriate classifications for the wire centers at issue in this proceeding?**

The weight of evidence in this proceeding demonstrates that AT&T has mis-designated at least 27 wire centers as non-impaired based on errors in counting fiber-based collocators and/or business lines. The Joint CLECs have submitted evidence showing that AT&T erred in at least three ways: 1) by mis-applying the FCC’s mandatory requirements, and thus incorrectly including non-qualifying carriers as fiber-based collocators 2) by employing insufficient survey techniques that lead to erroneous data regarding fiber-based collocators and 3) by using out-of-date data that fails to reflect the actual competitive environment in the California wire centers in dispute in this proceeding. For all of these reasons, AT&T has failed to carry its burden of proof in this proceeding, and its complaint must fail.

The Commission may correct AT&T’s faulty complaint by requiring AT&T to withdraw and re-submit its allegations with complete and accurate documentation demonstrating through a preponderance of the evidence that certain wire centers qualify as non-impaired. Failing that, at a minimum, the Commission should hold that the corrected wire center list provided as

Attachment 1 to this brief (with the addition of **BEGIN CONFIDENTIAL** \*\*\*XXXXXXXX and \*\*\***END CONFIDENTIAL**, which the Joint CLECs subsequently determined to be non-impaired due to erroneous fiber-based collocator counts) reflects that correct status of wire centers at dispute in this proceeding. Finally, the Commission should adopt the recommendations of Mr. Starkey<sup>340</sup> on how to improve the process any future wire center impairment challenges that AT&T may raise that specifies the type of data AT&T must collect and submit to support its claims.

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Respectfully submitted,

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Communications Corp. (U-5859-C)  
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<sup>340</sup> Exh. 52, at 26.