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ATTACHMENT 4 – KANSAS CORPORATION COMMISSION ORDER

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3 of 6 DOCUMENTS

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 Declassifications

Docket No. 06-SWBT-743-COM

Kansas Corporation Commission

2006 Kan. PUC LEXIS 664

June 2, 2006, Dated

PANEL: [*1] Before Commissioners: Brian J. Moline, Chair; Robert E. Krehbiel; Michael C. Moffet

OPINION: ORDER DETERMINING PROPER METHOD FOR FIBER-BASED COLLOCATOR AND BUSINESS LINE COUNTS

NOW, the above-captioned matter comes on before the State Corporation Commission of the State of Kansas (Commission) for consideration and decision. After reviewing its files and records, and being duly advised in the premises, the Commission finds and concludes as follows.

Jurisdiction

1. On January 9, 2006, Southwestern Bell Telephone, L.P. (SWBT) filed its Complaint for Post-Interconnection Agreement Dispute against NuVox Communications of Kansas, Inc. (NuVox), regarding Wire Center Unbundled Network Element (UNE) Declassification (Complaint). SWBT explained that the Federal Communications Commission (FCC) had established certain thresholds in its *TRRO* n1 pertaining to the declassification of dedicated interoffice transport and high-capacity loops as UNEs. For example, on routes connecting a pair of incumbent local exchange carrier (incumbent LEC) wire centers, both of which have at least four fiber-based collocators or at least 38,000 business access lines (Tier 1 wire centers), the incumbent LEC is no [*2] longer obligated to provide unbundled DS1 transport on those routes. n2 SWBT identified two wire centers as Tier 1 wire centers and three wire centers as Tier 2 wire centers. n3

n1 Order on Remand, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-289, rel. Feb. 4, 2005 (*TRRO*).

n2 Complaint P 3; *TRRO* P 126. SWBT has not claimed that any wire center qualifies for the declassification of high-capacity loops as UNEs. SWBT Chapman Direct p. 13 lines 9 - 10.

n3 Tier 2 wire centers are those wire centers with three or more fiber-based collocators or with at least 24,000 business lines. CLECs are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both of the wire centers are either Tier 1 or Tier 2 wire centers. *TRRO* PP 118, 129 respectively.

2. SWBT reported that it has continued to provide unbundled transport [*3] between qualified wire centers to NuVox because NuVox had self-certified that it was eligible for access to UNEs at these wire centers as permitted by the *TRRO*. n4 SWBT further reported that it and NuVox had not been able to resolve the dispute. Therefore, in accordance with the parties' interconnection agreement, SWBT filed its complaint for dispute resolution. n5

n4 In P 234 of the *TRRO*, the FCC held that, in order for a requesting carrier to submit an order to obtain unbundled transport, the requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge and consistent with various parts of the *TRRO*, it is entitled to access to unbundled transport. Although the incumbent LEC may challenge the requesting carrier's self-certification through the dispute resolution contained in the parties' interconnection agreement, the incumbent LEC must continue to provide unbundled transport until resolution is reached.

n5 Complaint PP 11 - 12.

[*4]

3. The Commission examined SWBT's Complaint and determined that SWBT had presented a prima facie case that would require Commission action. In accordance with K.A.R. 2005 Supp. 82-1-220, the Commission served the Complaint upon NuVox.

4. In its Answer filed January 27, 2006, NuVox noted that it and SWBT could agree on at least one thing: "Commission dispute resolution will be necessary to verify and finalize the list of wire centers where SWBT claims competitive local exchange carriers ("CLECs") may no longer purchase unbundled network elements ("UNEs") pursuant to the terms of the FCC's Triennial Review Remand Order ("TRRO")." n6

n6 Answer P 1.

5. The Commission concludes that it has jurisdiction to resolve this dispute, in accordance with K.S.A. 66-1,189 and 66-1,194 and K.A.R. 2005 Supp. 82-1-220. The issues in this Docket presented to the Commission [*5] for determination are controversies of first impression.

Pertinent Procedural Background

6. SWBT filed its complaint on January 9, 2006, and NuVox filed its Answer to Complaint on January 27, 2006. Pursuant to Commission Order, SWBT and NuVox participated in a pre-hearing conference on February 7, 2006, in the third-floor hearing room of the Commission's offices at 1500 SW Arrowhead Rd., Topeka, Kansas. Upon request by SWBT and NuVox, the Commission issued a Protective Order on February 17, 2006. A Procedural Order was issued on February 23, 2006, establishing dates for initial and rebuttal testimony, hearing and briefs. The Procedural Order was revised several times in accordance with the parties' requests.

7. The hearing was held on April 6, 2006, in the first-floor hearing room at the Commission's offices, beginning at 9:00 a.m. Hearing no objection to notice, the Commission found that it was proper to proceed with the hearing. Mark Johnson of Sonnenschein, Nath & Rosenthal, L.L.P. and Bill Magness of Case, Gentz & Magness appeared for NuVox. Bruce Ney and Timothy Pickering appeared for SWBT. Robert Lehr made a limited appearance for Commission staff. The hearing concluded [*6] at approximately 2:00 p.m., April 6, 2006.

8. Briefs were filed by NuVox and SWBT on May 5, 2006.

9. The Commission recognizes that the FCC established disjunctive thresholds with respect to its impairment analysis of dedicated interoffice transport-fiber-based collocators and business line counts. The Commission will first discuss facts common to both fiber-based collocators and business line counts. The Commission will then consider the two alternative thresholds separately.

Pertinent Findings of Fact Common to Both Thresholds

10. In its analysis of dedicated interoffice transport unbundling requirements, the FCC observed:

Competing carriers generally use unbundled interoffice transport as a means to aggregate end-user traffic. They do so by using dedicated transport to carry traffic from their end users' loops, which generally terminate at incumbent LEC wire centers, to a point of aggregation, permitting service to customers served via multiple incumbent LEC offices without requiring the competitor to deploy or otherwise obtain its own transport facilities to those offices. n7

To determine whether CLECs would be impaired without the ability to access unbundled dedicated [*7] interoffice transport, the FCC decided to measure impairment on a route-by-route basis. n8 The FCC defined a route as a "connection between incumbent LEC wire center or switch A and incumbent LEC wire center or switch Z." n9

n7 *TRRO* P 69 (footnotes omitted).

n8 *Id.*, P 79.

n9 *Id.*, P 80.

11. The FCC determined that, for its impairment analysis, the best and most readily administered indicator of the potential for competitive deployment of transport facilities was the presence of fiber-based collocators in a wire center. The FCC also determined that business line density in a wire center was a useful tool to "infer where carriers are likely to have collocated with fiber, and thus, a measure of where competitors are capable of duplicating the incumbent LEC's network." n10 The FCC then concluded that its test for impairment would be whether the wire centers defining a route's end-points had a particular number of fiber-based collocators or a particular number of business lines. n11

n10 *Id.*, P 93

[*8]

n11 *Id.*, P 94.

Findings of Fact Fiber-Based Collocators

TRRO

12. The FCC considered fiber-based collocation a key factor in its transport impairment analysis. The FCC believed a sufficient number of fiber-based collocations indicated the duplicability of incumbent LEC transport facilities and, thus, a lack of impairment if the incumbent LECs were no longer obligated to provide unbundled transport. The FCC further believed that fiber-based collocation was one of the most objective indicia of competitive deployment available. The FCC stated that use of the most objective criteria available in its impairment analysis was critical to avoid complex and lengthy proceedings. n12

n12 *Id.*, PP 96, 99 respectively.

13. For purposes of its transport impairment analysis, the FCC defined fiber-based collocation as a CLEC collocation arrangement in an incumbent LEC wire center, with active power supply, that has a non-incumbent [*9] LEC fiber-optic cable that both terminates at the collocation facility and leaves that wire center. n13

n13 *Id.*, P 102.

14. The rule established by the FCC to embody this definition of fiber-based collocator contains greater detail than the *TRRO* text does n14:

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 [*10] collectively be counted as a single fiber-based collocator. n15

n14 An FCC regulation must be read in conjunction with the text of the Order. *See, e.g., SBC Inc. v. FCC, 414 F.3d 486, 499 (3rd Cir. 2005).*

n15 47 C.F.R. § 51.5 Terms and Definitions, Fiber-based collocator.

SWBT/NuVox

15. SWBT believed that NuVox would agree that a "typical" fiber-based collocator should be counted -- "typical" being a carrier collocated in a SWBT wire center with active power and a single non-incumbent owned fiber cable from outside the wire center that terminates in the collocation space of a carrier and leaves that SWBT wire center. The critical issue, according to SWBT, is the counting of "less traditional collocation arrangements such as Verizon's CATT fiber termination arrangements" and transmission facilities comparable to fiber. n16

n16 SWBT Chapman Direct p. 29 line 20 - p. 30 line 14, paraphrasing parts of *TRRO* P 102. Ms. Chapman failed to mention that the fiber, or comparable facilities, must also leave that SWBT wire center.

[*11]

16. According to SWBT, the CATT fiber termination arrangement is a Verizon service that permits a non-collocating wholesale transport facilities provider to terminate fiber cable at a shared alternate splice point in a Verizon wire center for distribution to collocators in that office. SWBT does not provide such a service but does offer a Collocation-to-Collocation product that allows a collocator in a particular SWBT wire center to connect to a fiber-based collocator in that wire center to obtain facilities. In such an arrangement, SWBT would count both collocators, whether or not they used SWBT's Collocation-to-Collocation service, as fiber-based arguing that they would meet the FCC "less traditional collocation arrangements" in which the collocator-to-collocator connection is by fiber or DS3 coaxial cable. n17

n17 SWBT Pool Direct p. 6 line 4 - p. 7 line 12.

17. NuVox did not agree with SWBT's position as it related to the cross-connection of a collocator to fiber-based collocator. NuVox insisted that the connecting [*12] collocator is merely obtaining service from the fiber-based collocator and does not "operate" the fiber system which, NuVox argued, the FCC rules require before a collocator may be counted as a fiber-based collocator. NuVox also believed the arrangement does not convert the connecting collocator into a fiber-based collocator because the connection neither terminates a fiber network nor leaves the wire center. n18

n18 NuVox Gillan Rebuttal p. 18 lines 9-12, notes 28 - 29.

18. NuVox argued that fiber will terminate only once in a wire center because only one set of optronics (fiber optic terminating equipment) can be installed on a fiber. NuVox further argued that only the carrier that installs the Optronics "operates the fiber-optic cable because it is the one that determines the capacity of the system and its operating characteristics." n19

n19 NuVox Gillan Direct p. 19 line 1 - p. 20 line 4.

[*13]

19. NuVox claimed that SWBT had ascribed far more importance to *TRRO* P 102 than it deserved. That paragraph reads, in part:

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 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.

The FCC referenced, by footnote in this paragraph, its *Triennial Review Order* n20 P 406 and footnote 1257, which reads:

Each counted self-provisioned facility along a route must be operationally ready to provide transport into or out of an incumbent LEC central office. We find that the competitive transport facilities counted to satisfy this trigger must terminate in a collocation arrangement which may be arranged either pursuant to contract, tariff or, where appropriate, [*14] section 251(c)(6) of the Act. We find it beneficial to count for purposes of this test all types of collocation arrangements, including those that may not qualify for collocation under section 251(c)(6). This provides an incentive to incumbent LECs to enable competitive LEC (sic), including the "carrier agnostic" wholesale transport providers, identified by incumbent LECs, to develop their transport networks by developing viable alternatives to unbundled transport.

n. 1257: Collocation may be in a more traditional collocation space or fiber can be terminated on a fiber distribution frame, or the like, to which any other competing carrier collocated in that central office can obtain a cross-connect under non-discriminatory terms . . . Our impairment analysis recognizes, alternatives outside the incumbent LEC's network regardless of the authority under which they came to exist. n21

NuVox insisted that SWBT cannot build its "cross-connect theory" upon the foregoing FCC determinations for two reasons: (1) the FCC never suggested that every carrier cross-connected to the CATT arrangement should be counted as a fiber-based collocator and (2) the FCC had determined that the only shared [*15] network arrangements that may produce multiple fiber-based collocators are those where dark fiber is leased under an indefeasible right to use (IRU) to a carrier that lights that fiber with its own optronics. n22

n20 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, FCC 03-36, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978* (rel. Aug. 21, 2003) (*Triennial Review Order or TRO*).

n21 Other footnotes within P 406 omitted.

n22 NuVox Gillan Rebuttal p. 19 line 1 - p. 21 line 7.

20. NuVox distinguished a carrier leasing dark fiber from a carrier that cross-connects to a fiber-based collocator to obtain transport over a designated route. According to NuVox, a cross-connected carrier [*16] does not operate the fiber facility as a CLEC with IRU fiber does. NuVox further maintained that the cross-connect facility, by definition, terminates at the collocation space of the fiber-based collocator and never leaves the building. n23

n23 NuVox Gillan Direct p. 21 lines 14 - 24.

21. In support of its proposition, NuVox cited footnote 292 to the *TRRO*'s paragraph 102:

We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities. *Triennial Review Order, 18 FCC Rcd at 17231-32, para. 408 and nn. 1263, 1265.*

Paragraph 408 of the *Triennial Review Order (TRO)* reads, in pertinent part:

The competitive transport providers identified to satisfy this trigger on a route must be unaffiliated with the incumbent [*17] LEC and each other. This requires that separate facilities are counted and avoids counting as a true alternative a provider that uses the transport facilities of the incumbent LEC or another alternative provider to provide service on that route. 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.

22. SWBT argued that the footnote has no bearing on the fiber-based collocator count. According to SWBT, any non-SWBT fiber is counted, whether the carrier using the fiber owns the fiber, leases it or has obtained the fiber on an IRU basis. n24 SWBT further disagreed with NuVox's belief that paragraph 102 of the *TRRO* requires each fiber-based collocator to have a distinct transport facility. According to SWBT, the focus of paragraph 102 is on (1) the ability to deploy facilities and (2) indications of the presence of alternative transport providers. In fact, "All of the arrangements that SWBT proposes be included provide an indication of a provider that has the ability to act as an alternative transport provider." [*18] n25

n24 SWBT Chapman Rebuttal p. 27 lines 5 - 13.

n25 *Id.*, p. 29 lines 9 - 11.

23. SWBT observed that NuVox witness Cadieux testified during cross-examination that NuVox had an incentive to interpret the tests at issue in this proceeding in a manner that would favor NuVox. n26 However, Mr. Cadieux also stated that "presumably in virtually every case that comes in front of the Commission, each side has an incentive to interpret the relevant rule most favorable to itself." n27

n26 SWBT Post-Hearing Brief (SWBT Brief) P 12.

n27 Tr. p. 117 lines 8 - 12.

Conclusions of Law Fiber-Based Collocators

24. The Commission concludes that SWBT has incorrectly interpreted the FCC's fiber-based collocator rule and the FCC's fiber-based collocator intentions and determinations as contained in the *TRRO*.

25. SWBT's fiber-based collocator count [*19] is fatally flawed because SWBT included in its count all collocators that have the "ability to provide at least DS3 transport out of the wire center." n28 The FCC never prescribed that an incumbent LEC should include in its fiber-based collocator count those collocated competitors that had the "ability" to operate a fiber-optic cable, or comparable facilities, that both terminated at a collocation facility in a wire center and left that wire center. Nonetheless, SWBT attempts to substantiate its "ability" qualifier by citing an FCC finding in paragraph 94 of the *TRRO*. n29 There, the FCC found that its disjunctive fiber-based collocator/business line counts provide the best means to deduce where CLECs have the "ability" to duplicate the incumbent LECs' networks. However, the Commission concludes that SWBT badly misinterprets the context in which the term "ability" was used by the FCC. Here, "ability" refers to the enabling power of a wire center's revenue opportunities, just as the FCC's use of *capable* did in paragraph 87 of the *TRRO* in discussing wire center end-points. The FCC was very straightforward with its view on this matter:

Specifically, our approach focuses [*20] on actual competitive deployment, which signifies that actual and potential revenues justified the underlying costs [of deployment]. n30

Specifically, we utilize evidence of actual deployment to define the general characteristics of incumbent LEC wire centers where we believe there is a lack of impairment -- that is, where reasonably efficient competitive LECs are capable of duplicating the incumbent LEC's network. n31

Our test for impairment, therefore, relies on whether the wire centers defining a route's end-points have a particular number of incumbent LEC business lines or a particular number of fiber-based collocators. n32

n28 SWBT Chapman Direct p. 32 lines 14 - 17. SWBT's count is also infirm because of the DS3 test, as discussed below.

n29 SWBT Brief P 3.

n30 *TRRO* P 74.

n31 *Id.*, P 87.

n32 *Id.*, P 94.

26. In reality, any collocator has the "ability", or capability, to be a fiber-based collocator, with the will and financial wherewithal to do so. However, the FCC did [*21] not provide for the evaluation of the "ability" of collocators to become fiber-based collocators. Rather, the FCC chose objective measurements by which collocators are identified as fiber-based collocators.

27. The Commission further disagrees with SWBT's proposition that a CLEC collocator which cross-connects to a fiber-based collocator's facilities constitutes an indicator of "where sufficient revenues exist such that competing carriers potentially *can* deploy facilities consistent with the FCC's considerations." n33 The Commission is of the opinion that a wire center with collocators connected to fiber-based collocator's facilities to obtain transport service may very well indicate that there are not sufficient revenues to support multiple fiber-based collocations. After all, "Facilities-based competitive LECs have every incentive to deploy efficient technologies so as to maximize quality of service and minimize their costs." n34

n33 SWBT Brief P 16, p. 11 (emphasis in original).

n34 *TRRO* P 28.

28. [*22] It comes to this -- for Tier 1 wire centers, there are either 38,000 or more business lines served by a SWBT wire center or there are not; or, there are either four fiber-based collocators or more in the wire center or there are not. n35 The FCC provided no occasion to SWBT to identify "want-to-be" or "could-be" fiber-based collocators.

n35 The same is true, of course, for Tier 2 wire centers with their lesser number of business lines and fiber-based collocators.

29. The Commission concludes that SWBT's fiber-based collocator count is also fatally flawed because SWBT considered any carrier with a DS3 level transmission facility to be operating a transmission facility comparable to fiber. SWBT allegedly based its selection of such a low-level transmission capacity upon the FCC's inclusion of fixed-wireless carriers in the count if the fixed-wireless carriers' transmission facilities both terminate in and leave the wire center. n36 A plain reading of the *TRRO*'s paragraph 102 is that the FCC, after defining a fiber-based [*23] collocation, concerned itself with unique situations -- (1) Verizon's CATT fiber termination arrangements, (2) fixed-wireless, (3) multiple collocations of the same or affiliated carriers and (4) service-neutral counts.

n36 SWBT Pool Direct p. 8 lines 3 - 15.

30. Although the FCC referenced fixed-wireless for its unique characteristics, n37 SWBT elevated fixed-wireless to the standard by which "comparable facilities" are measured. SWBT considered any carrier with a DS3 level transmission facility as meeting the FCC's "comparable transmission facility" test. n38 SWBT compared DS3 capacity with OC-1 capacity, both of which provide 672 voice-grade equivalent lines. However, SWBT cautioned that OC-1 is not "part of North American Digital Hierarchy" but was shown for illustrative purposes only. n39 Thus, there is no real comparison between a DS3 and an OC-1. In fact, SWBT testified that the minimum-capacity fiber that would enter a SWBT wire center would be an OC-12. n40 If "comparable" is to have any meaning at all, "comparable [*24] facilities" must

have the qualities, characteristics and capacities of fiber. This is precisely the point made by the FCC when it rejected the BOCs' argument that no impairment should be found at any fiber capacity:

While the BOCs suggest, and rightly so, that a fiber transmission facility can be channelized down to serve any level of capacity, we reject their argument that such ability requires a finding of no impairment for any capacity. Their argument simply ignores the high fixed and sunk costs associated with deploying local fiber transmission facilities that we find are overcome only at higher transmission capacities. n41

SWBT's fiber collocator count is invalid because it wrongly included in its count all DS3 level transmission facilities as "comparable transmission facilities".

n37 The FCC chose fixed-wireless to explain that its test for fiber-based collocation 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 wire-line specific test. *TRRO* P 102, footnote 295.

[*25]

n38 SWBT Pool Direct p. 8 lines 10 - 12.

n39 *Id.* p. 9, footnote 9.

n40 SWBT Pool Tr. p. 36 line 25 - p. 36 line 1 - 7.

n41 *TRRO* P 86.

31. The Commission concludes that SWBT's fiber-based collocator count is also fatally flawed because it included in its count those collocators that had cross-connected their facilities to a fiber-based collocator. SWBT included the cross-connected collocators in its count because "the coaxial cable and the fiber optic cable, they are all linked together to make up a -- again, what the *TRRO* defined as a -- or stated as a comparable transmission facility which begins at [the cross-connecting] Collocator No. 2. It's routed through Collocation No. 1's [the fiber-based collocator's] arrangement and leaves the wire center on the optic cable". n42 In footnote 292 of the *TRRO*, the FCC addressed fiber facilities obtained by one collocator from another collocator obtained on an IRU basis:

We find that when a company has collocation facilities connected to fiber transmission facilities obtained on an indefeasible right of use (IRU) basis [*26] from another carrier, including the incumbent LEC, these facilities shall be counted for purposes of this analysis and shall be treated as non-incumbent LEC fiber facilities. *Triennial Review Order, 18 FCC Rcd at 17231-32, para. 408 & nn. 1263, 1265.*

The implication of the FCC's finding is that the other class of collocators -- those collocators connected to another carrier's fiber transmission facilities but not on an IRU basis -- should not be counted. n43 This implication is confirmed by the FCC's unqualified cite to paragraph 408 of the *TRO*, which reads, in pertinent part:

The competitive transport providers identified to satisfy this trigger on a route must be unaffiliated with the incumbent LEC and each other, (footnote 1263) This requires that separate facilities are counted and avoids counting as a true alternative provider a provider that uses the transport facilities of the incumbent or another alternative provider to provide service on that route. 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 [*27] facility, (footnote 1265). n44

Note 1263 reads, in pertinent part:

As discussed above, we find, for the limited purposes described herein, that 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, (emphasis added).

Note 1265 reads, in pertinent part:

For purposes of this [route-specific] test, a competing carrier that has obtained dark fiber transport facilities from the incumbent LEC on an IRU basis should be considered to operate its own unaffiliated facilities . . . Because we want to be certain of the independent ownership of the transport facilities, *we find that consideration of transport facilities transferred on an IRU basis is limited to dark fiber and does not include "lit" fiber IRUs.* (emphasis added).

The FCC could not have been more plain about its intentions than with its unqualified citation to P 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. To do so, as SWBT did, makes the fiber-based collocator count infirm. [*28]

n42 SWBT Pool, Tr. p. 42 lines 8 - 15.

n43 *See, e.g., In re Lietz Const. Co., 273 Kan. 890, 911, 47 P.3d 1275 (2002).*

n44 *TRO* P 408.

32. SWBT claimed that such a reading would, in effect, reinstate the *TRO* transport rules vacated by the D.C. Circuit Court. n45 SWBT is wrong in this regard. The D.C. Court vacated the national impairment findings with respect to DS1, DS3 and dark fiber because of the FCC's subdelegation to the states. The D.C. Court remanded the impairment findings to the FCC "to implement a lawful scheme." n46 Part of that lawful scheme devised by the FCC is that collocators in a SWBT wire center that are connected to fiber-based collocators to obtain transport services over a particular route shall not be counted as fiber-based collocators.

n45 SWBT Chapman Rebuttal p. 28 lines 18 - 20.

n46 *United States Telecomm Ass'n v. FCC, 359 F.3d 554, 574 (D.C. Cir. 2004).*

[*29]

33. SWBT also claimed that such a determination would create a "perverse incentive for CLECs to deploy collocation arrangements in which cross-connected collocators lease capacity over the network of another CLEC carrier instead of investing in their own fiber." n47 The Commission doubts that a "reasonably efficient competitor" would act in such a manner unless, of course, it is more efficient for the "reasonably efficient competitor" to obtain transport services from

another carrier than construct its own facilities. Regardless of a CLEC's choice, SWBT's issue is with the FCC, not with this Commission which must base its decision upon FCC determinations. n48

n47 SWBT Brief P 40.

n48 Both SWBT (Tr. p. 10 lines 21 - 24) and NuVox (Tr. p. 13 lines 16 - 17) advised the Commission that the FCC's *TRRO* determinations were mandatory upon the states.

34. The Commission concludes that SWBT's fiber-based collocator count is also fatally flawed because SWBT considers cross-connecting collocators as operating comparable [*30] facilities. n49 SWBT attempts to support its proposition by describing how a cross-connected collocator could build its facilities to an OC-12 level by adding more DS3s. n50 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".

n49 SWBT Chapman Rebuttal p. 32 lines 4 - 14.

n50 SWBT Pool Tr. p. 60 lines 1 - 16.

35. Even if SWBT could convince the Commission that DS3s constitute "comparable transmission facilities", the Commission would conclude SWBT's fiber-based collocators count was fatally flawed because SWBT considered the cross-connecting collocators as "operating" the fiber-based collocator's fiber-optic cable in some fashion. It is the Commission's experience that an operator of a fiber-optic cable provides surveillance [*31] of the integrity of the system, responds to trouble reports and undertakes routine maintenance. Cross-connecting collocators do not perform any of these functions and, thereby, do not qualify as "operators" of a fiber-optic cable.

36. Furthermore, the Commission concludes that the FCC intended the term "operator" to be at a higher operative level than that proposed by SWBT. The FCC defined fiber-based collocation, for its impairment analysis, as a "competitive 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." n51 Reading the text of the order with the rule, n52 it is clear that the FCC intended that, to be counted as a fiber-based collocator, the CLEC must have some ownership of the cable, such as an IRU. Furthermore, the FCC has agreed with NuVox n53 that the carrier with the Optronics controls the cable:

We find [] 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. n54

We find [] that when [*32] a wholesale transport provider has obtained dark fiber from another carrier, including unbundled dark fiber from the incumbent LEC, and activates that fiber with its own optronic equipment, that facility should be counted as a separate unaffiliated facility. n55

Further, the FCC has elsewhere described the reality that a cross-connecting carrier does not operate the fiber-optic cable:

When transport is leased as an unbundled element to competing carriers, for example, a DS3 capacity circuit, the leased dedicated circuit is channelized within the larger OCn circuit *operated* by the incumbent LEC. n56

In this context -- i.e., looking at the meaning of "operate" -- leasing transport from another collocator is comparable to leasing transport from SWBT. Therefore, the Commission concludes that SWBT's counting cross-connected 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.

n51 *TRRO* P 102 (emphasis added).

n52 *SBC Inc. infra* p. 6.

[*33]

n53 NuVox Gillan Rebuttal p. 18 lines 1-12.

n54 *TRO* P 408.

n55 *Id.*, P 414.

n56 *Id.*, P 372 (emphasis added), referenced by *TRRO* footnote 248.

37. It is worthy to mention that other state commissions, considering the "operator" issue, have issued similar determinations, that a collocated carrier that cross-connects to a fiber-based collocator for transport services over a particular route does not qualify the cross-connecting carrier as a fiber-based collocator:

Michigan PSC -- The arrangement in which one CLEC cross connects to the facilities of another CLEC that is a fiber-collocator does not increase the number of fiber-based collocators for purposes of this analysis. n57

New Hampshire PUC -- to operate a [fiber] 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. n58

Texas PUC -- CLEC A, which cross-connects its collocation equipment to CLEC B's transmission equipment in order to gain access to the fiber-optic [*34] cable or comparable transmission facility that leaves the central office is not considered a fiber-based collocator. n59

n57 NuVox Gillan Rebuttal p. 22 lines 5 - 8; NuVox Post-Hearing Brief (NuVox Brief) P 60.

n58 NuVox Brief P 60.

n59 *Id.* P 61.

38. The Commission does not depend upon the cumulative effect of the foregoing SWBT errors in order to conclude that SWBT's fiber-based collocator count is infirm. Rather, each of those errors is sufficient for the Commission to conclude that SWBT's count is wrong.

Findings of Fact Business Line Count

TRRO

39. As noted above, the FCC determined that "business line density in a wire center is a useful tool to infer where carriers are likely to have collocated with fiber and, thus, a measure of where competitors are capable of duplicating the incumbent LEC's network. n60

n60 *TRRO* P 93.

[*35]

40. The FCC found additional value in business line counts because they were an objective set of data that the Bell Operating Companies (BOCs) had created for other regulatory purposes. This set of wire center data consisted of ARMIS 43-08 business lines, business UNE-P loops and UNE-loops. n61 The FCC adopted these line and loop data as the definition of business lines because "it fairly represent[ed] the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs." The FCC conceded that a more complete picture could be provided if it measured the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, but the FCC acknowledged that such information was extremely difficult to obtain and to verify. n62

n61 Pursuant to FCC request, the BOCs, including SWBT, provided business line data to the FCC in early December of 2004. Tr. p. 69 lines 5 - 8.

n62 *TRRO*, P 105.

[*36]

41. The FCC determined that those wire centers with 38,000 or more business lines would be designated Tier 1 wire centers and those wire centers with 24,000 or more business lines would be designated Tier 2 wire centers. Tier 3 wire centers were wire centers that were not Tier 1 or Tier 2 wire centers. n63

n63 *Id.*, PP 112, 118 and 123, respectively.

42. The FCC determined that requesting carriers were impaired without access to DS1-capacity transport n64 on all routes except for those routes connecting two Tier 1 wire centers. Thus, an incumbent LEC, like SWBT, must provide unbundled DS1 transport that originates or terminates in any Tier 2 or Tier 3 wire center, but is not obligated to provide unbundled DS1 transport on routes connecting two incumbent LEC Tier 1 wire centers. n65 The FCC defined Tier 2 wire centers as those wire centers serving 24,000 business lines n66 and concluded that CLECs are not impaired without access to unbundled DS3 transport on routes connecting wire centers where both of the wire [*37] centers are either Tier 1 or Tier 2 wire centers n67.

n64 DS1 capacity is equivalent to 24 voice-grade lines.

n65 *TRRO* P 126.

n66 *Id.*, P 118.

n67 *Id.*, P 129.

43. As it did for "fiber-based collocator", the FCC amended 47 *C.F.R.* § 51.5 to include the definition of "business line":

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 [*38] 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."

SWBT

44. To calculate the business lines in its wire centers, SWBT summed the number of ARMIS 43-08 business lines, the number of UNE-P business lines and the total number of UNE loops. SWBT explained that UNE-P business line counts were categorized by loop type, including 2-wire analog, 2-wire digital and DS1. The UNE-L counts were determined in the same manner with DS3 loops included. SWBT counted digital loops by counting each 64 kbps-equivalent as one line. For instance, a DS 1 loop was counted as 24 business lines and a DS3 UNE-L loop was counted as 672 business lines. n68

n68 SWBT Chapman Direct p. 11 line 9 - p. 12 line 6; p. 24 line 9 - 16.

45. SWBT conceded that the initial data filed with the FCC in December, 2004, did not include any digital equivalency conversions; that [*39] is, a DS1 line, for example, was counted as one line rather than 24 business lines. SWBT explained equivalency conversions were not undertaken because the data submitted to the FCC pre-dated issuance of the *TRRO*. Upon understanding that the FCC required equivalency conversions, SWBT updated the business line counts accordingly. n69

n69 SWBT Chapman Rebuttal p. 4 line 1 - p. 5 line 5.

46. SWBT claimed that the *TRRO* did not require an ILEC -- and SWBT, thus, did not attempt -- to determine (1) which UNE loops served residential customers, if any, (2) which UNE loops provided a CLEC's customer with switched access or data services; or (3) the fill factor of the facility containing the UNE loops, such as a DS1. Further, SWBT claimed it could not have provided such data because it does not know the use to which a CLEC places a UNE loop. n70

n70 SWBT Chapman Direct p. 20 line 9 - p. 21 line 11.

[*40]
NuVox

47. NuVox indicated that its principal concern was whether SWBT had counted the fiber-based collocators and business lines in accordance with the FCC rules governing the method by which those counts are to be made. n71 For instance, NuVox obtains DS1 UNE facilities to provide voice and high-speed internet to its customers. But, for the vast majority of those customers, a significant portion of the DS1 capacity is not utilized. Nonetheless, SWBT counts each DS1 loop as if all 24 channels were being used to provide switched services, resulting in business-line over-counts. NuVox cautioned care in counting business lines because a finding of non-impairment in a particular wire center is permanent and irreversible. n72

n71 NuVox Cadieux Revised Direct p. 8 lines 18 - 20.

n72 *Id.*, p. 13 lines 4 - 18; p. 10 lines 16 - 21, respectively. The Commission understands NuVox's concern; but, it must also be mindful that "the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to network elements at the lowest price that government may lawfully mandate. Rather, its purpose is to stimulate competition-preferably genuine, facilities-based competition." *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 576 (D.C. Cir. 2004).

[*41]

48. NuVox suggested that, rather than debate the correct way to count business lines in a particular wire center, the Commission should use the business line count that SWBT provided the FCC in December, 2004. n73 In the alternative, NuVox urged the Commission to interpret the FCC business line definition in a manner that, it argued, would give better effect to all of the rule's provisions. Using this approach, according to NuVox, a UNE loop may not be counted as a business line unless (1) it is used to serve a business customer; (2) used to provide switched services; and (3) each 64 kbps channel should be evaluated as one line, that is, it must be determined if the one line serves a business customer or not. Further, NuVox disagreed that the FCC instructed each DS1 to be counted as 24 business lines regardless of the fill factor. Rather, NuVox insisted, the FCC did nothing more than give an example. n74

n73 NuVox Gillian Direct p. 6 lines 1 - 14.

n74 *Id.*, p. 9 lines 8 - 19; p. 11 lines 1 - 15; p. 12 lines 6 - 22.

[*42]

49. NuVox also contended that SWBT wrongly counts its retail business lines differently than it does CLEC business lines. NuVox alleged that ARMIS reporting instructions do not permit an ILEC to count empty circuits. Thus, according to NuVox, SWBT may not change the count methodology because the customer has shifted to a CLEC. n75

n75 *Id.*, p. 13 line 1-p. 14 line 3.

50. Finally, NuVox suggested that if the Commission determines that it should accept SWBT's business line count, revised from the data SWBT filed in December of 2004, then 2005 ARMIS data should be used and that SWBT should

make a "good faith" estimate to provide, and subsequently delete, residential services, empty capacity and capacity used for data services. n76

n76 *Id.*, p. 14 line 5-p. 16 line 13.

Conclusions of Law Business Line Count

51. As NuVox stated, the issue is [*43] not SWBT's data -- indeed, NuVox agreed to use SWBT business line data. Rather, the issue is whether SWBT calculated the business line count correctly from that data. n77 The Commission concludes SWBT used the correct methodology in counting the number of business lines in the wire centers identified.

n77 NuVox Cadieux Revised Direct p. 8 lines 16 - 20.

52. At first read, the definition of "business line" in 47 C.F.R. 51.5 appears to have internal inconsistencies. The rule first reads that a business line is an incumbent LEC's switched access service line used to serve a business customer, whether by the incumbent LEC or leased to a CLEC. But, then, the rule seems to change the character of a business line by quantifying the number of business lines in a wire center as equaling 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 unbundled elements. UNE loops [*44] may include residential customers. The definition of business line is further complicated by the rule's requirement for digital line equivalency noting, as an example, that a DS1 line corresponds to 24 business lines. The Commission concludes that the rule must be analyzed to reach the FCC's intention in crafting the rule.

53. The fundamental rule in statutory construction is that, upon encountering ambiguous provisions, the purpose and intent of the rulemaker governs, when that intent can be ascertained from the rule. n78 Further, the agency construing the rule may also consider the causes that impel the rule's adoption, the rule's objective, the historical background and the effect of the rule under various constructions and reconcile provisions to make them consistent and harmonious. n79

n78 *See, e.g., State v. Gonzales, 255 Kan. 243, 248, 874 P.2d 612 (1994).*

n79 *See, e.g., State v. Manbeck, 277 Kan. 224, 227, 83 P.3d 190 (2004).*

[*45]

54. The principal reason for the use of the ARMIS 43-08 business lines, business UNE-P and UNE-L loops is that the resulting line counts are an "objective set of data that incumbent LECs already have created for other regulatory purposes" and "fairly represent the business opportunities in a wire center, including business opportunities already being captured by competing carriers through the use of UNEs." n80 Further, the FCC used the fiber-based collocater and business line proxies because they (1) rely on objective criteria to which incumbent LECs have full access; (2) are readily confirmable by competitors; and (3) make appropriate inferences regarding potential deployment. n81

n80 *TRRO P 105.*

n81 *Id.*, P 108.

55. The Commission concludes that there is no conflict between the first and second sentences of the "business line" definition. The FCC defined the term in the first sentence and then, in the second sentence, provided the means by which business lines would be counted in an incumbent LEC's [*46] wire center. The FCC determined that the sum of incumbent LEC's business switched access lines and UNE loops was appropriate because this set of data was objective and already in existence for other regulatory requirements. n82 The FCC adopted the most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful and add only marginal value to the unbundling analysis. n83

n82 *Id.*, P 105.

n83 *Id.*, P 99.

56. Following the rule's instructions of how to calculate the number of business lines in a wire center, the phrase "among these requirements" is used. SWBT and NuVox interpreted this phrase differently. To understand what "among these requirements" means, the "last antecedent" rule must be utilized. The "last antecedent" rule of statutory construction means that qualifying words -- in this case, "among these requirements" -- are ordinarily confined to the last antecedent or to the words and phrases immediately preceding the qualifying words. n84 Thus, [*47] the phrase "among these requirements" applies to the method of tallying business line counts, not to the first sentence of the rule which references "an incumbent LEC-owned switched access line". A fair reading of "among these requirements", using different parlance, would be:

Among these requirements of the summing 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 . . .

Thus the Commission concludes that NuVox's attempt to link the phrase "among these requirements" to the first sentence of the rule n85 is wrong. NuVox's interpretation would limit the business line count to only SWBT-owned switched access lines used to serve business customers, whether by SWBT itself or by a CLEC that leases lines from SWBT. This limitation is clearly not the intention of the FCC because an inquiry would be required as to which CLEC-leased lines were used for business customers and which lines were leased for switched access or data purposes. This information is held only by the CLECs in Kansas n86 and clearly is not the "objective set of data that incumbent [*48] LECs already have created for other regulatory purposes" envisioned by the FCC. n87 As the FCC observed, relative to fiber-based collocation data: "Moreover, unlike information regarding fiber-based collocation, the information necessary to implement the previous self-employment triggers was possessed entirely by a span of competitive LECs and was not easily verifiable." n88 That observation is equally germane to the business line count in a SWBT wire center. Depending upon data that is not objective criteria to which SWBT does not have full access, that is not readily confirmable by competitors and that does not make appropriate inferences regarding potential deployment does not comply with FCC intentions in the analysis of unbundled transport impairment.

n84 *See, e.g., Link, Inc. v. City of Hays*, 266 Kan. 648, 654, 972 P.2d 753, appeal after remand 268 Kan. 372, 997 P.2d 697 (1999).

n85 NuVox Gillan Direct p. 9 lines 8 - 19.

n86 SWBT Chapman Direct p. 21 lines 1 - 7.

n87 *TRRO* P 105.

n88 *Id.*, P 99.

[*49]

57. The Commission also concludes that NuVox's primary recommendation -- that the Commission use the business line count filed by SWBT on December 7, 2004 n89 -- would not comport with either the FCC's order or 47 C.F.R. § 51.5's line count requirements. SWBT explained that it did not originally calculate digital-line equivalence because it filed the count prior to issuance of the *TRRO* and was unaware that the FCC wanted that exercise to be undertaken. SWBT advised that it subsequently had updated the line counts, based on digital equivalency. n90 The Commission finds no fault with SWBT's update. In fact, for SWBT to be in compliance with the rule, it would need to include digital equivalence in its business line count. The Commission, therefore, rejects NuVox's "primary recommendation" of using the unamended line counts submitted by SWBT prior to the issuance of the *TRRO*.

n89 NuVox Gillan Rebuttal p. 3 lines 8 - 17.

n90 SWBT Chapman Tr. p. 70 line 23 - p. 71 line 17.

[*50]

58. NuVox also claimed that the rule does not direct an incumbent LEC to count each channel in a high capacity facility as a "business line". The Commission finds this claim to be without any merit whatsoever. The rule plainly states, in pertinent part:

Among these requirements [in quantifying business lines], business line tallies (1) shall include only those access lines n91 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." (emphasis added).

If the FCC had intended to limit each 64 kbps-equivalent as NuVox suggested, it would not have stated that a DS1 line corresponds to 24 "business" lines. The Commission concludes that the FCC plainly and unambiguously stated its intentions: each 64 kbps-equivalent shall be counted as a CLEC-served business line for purposes of its impairment analysis.

n91 "Access lines" here refers to SWBT access lines as specified in the immediately preceding sentence of the rule's definition.

[*51]

59. NuVox further claimed that the "single largest business line issue in this proceeding is whether UNE loops should be converted to their maximum potential capacity" when SWBT counts only capacity used for ARMIS 43-08 purposes. n92 NuVox suggested that a "good faith" estimate be made to remove residential lines, empty capacity and data-providing lines from the maximum potential capacity loops. SWBT, on the other hand, asserted that, when it provides a full DS1 to a retail end user or to a CLEC, ARMIS 43-08 requires counting the DS1 as 24 equivalent lines. n93 The Commission concludes that this sort of dispute is precisely what the FCC intended to avoid. The FCC purposely chose "objective criteria to which the incumbent LECs have full access, [that] is readily confirmable by competitors, and [that] makes appropriate inferences regarding potential deployment" n94 to "avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis." n95 The FCC's requirement of counting all UNE loops in a wire center is unqualified. The Commission, therefore, concludes that Nu-

Vox's "good faith" proposal is not in compliance with the rule [*52] or the FCC's intent expressed in that rule and in the *TRRO*.

n92 NuVox Gillan Rebuttal p. 10 lines 9 - 18.

n93 SWBT Chapman Rebuttal p. 12 lines 17 -22.

n94 *TRRO* P 108.

n95 *Id.*, P 99.

60. In its order n96, the Texas Public Utility Commission reached the same determination as the Commission does with respect to the counting of UNE loops:

The Commission is not persuaded by the Joint CLEC's (sic) assertion that further examination regarding the type of customer being served by UNE loops is required, since that requirement would go beyond the FCC's directive in P 105 of the *TRRO* . . . The Commission is persuaded that if the FCC intended that only UNE loops serving business customers should be counted, it would have state this in P 105 of the *TRRO*.

n96 Order Approving Methodology to Determine AT&T Texas Wire Centers Which Are Non-Impaired, *Post-Interconnection Dispute Resolution Proceeding Regarding Wire Center UNE Declassification*, PUC Docket No. 31303, Public Utility Commission of Texas, dated April 7, 2006, at p. 30.

[*53]

IT IS, THEREFORE, ORDERED BY THE COMMISSION THAT:

A. SWBT may not count, as a fiber-based collocator, a collocator that is cross-connected to a fiber-based collocator to obtain transport services over a particular route.

B. "Comparable facilities" are limited to those instances in which collocators operate a facility that has capacity equivalent to fiber that terminates at the collocators' collocation facilities in a SWBT wire center and leaves that SWBT wire center, except as otherwise specifically provided by the FCC in its *TRRO*.

C. Business line counts at SWBT wire centers shall be the sum of all SWBT business switched access lines plus UNE-P business lines plus all UNE loops, all of which are to include digital-line equivalency.

D. The parties have fifteen days upon service of this Order within which to petition the Commission for reconsideration of any final matter decided herein. If service is by mail, service is complete upon mailing and the parties may add three days to the above time frame. All petitions for reconsideration must be served upon the Commission's Executive Director.

E. The Commission retains jurisdiction over the subject matter and over the parties [*54] for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED.

Moline, Chr.; Krehbiel, Com.; Moffet, Com.

Dated: June 2, 2006

