

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket 06-0029
Investigation into Illinois Bell Telephone)	
Company's designation of certain of its)	
wire centers as non-impaired)	

**INITIAL BRIEF OF THE STAFF
OF THE ILLINOIS COMMERCE COMMISSION**

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June 8, 2006

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Table of Contents

I.	Procedural Background	4
II.	Issues Presented	6
A.	Business Line Counts	6
	<i>Issue 1: What year’s ARMIS 43-08 data did/should AT&T Illinois use in making its business line counts – 2003 or 2004?</i>	6
	<i>Issue 2: What adjustments, if any, has AT&T Illinois made/should AT&T Illinois make to ARMIS 43-08 data for purposes of its business line counts? ..</i> 10	
	<i>Issue 3: Did/should AT&T Illinois exclude unused capacity on high capacity UNE-L lines (including those used in combination with UNE transport) for purposes of its business line counts?</i>	11
	<i>Issue 4: Did/should AT&T Illinois exclude non-switched UNE-L capacity on high capacity UNE-L lines (including those used in combination with UNE transport)?</i> 13	
	<i>Issue 5: Has AT&T Illinois included lines that are served by VoIP in its business line counts?</i>	14
B.	Fiber Based Collocators (“FBCs”)	16
	<i>Issue 1: Must a carrier counted as an FBC have fiber facilities that enter and exit its collocations? Should carriers cross-connected with another carrier (that is already counted as an FBC) be counted? Has AT&T Illinois counted such cross-connected carriers in its FBC counts?</i>	16
	<i>Issue 2: How should the phrase “terminates at a collocation arrangement within a wire center” (47 CFR 51.5) be construed and implemented?</i>	18
	<i>Issue 3: What non-fiber-optic cable facilities qualify as “comparable transmission facilities” under the definition of “FBC” in 47 CFR §51.5?</i>	18
	<i>Issue 4: In determining whether dark fiber obtained from an ILEC qualifies as CLEC fiber for purposes of applying the FBC criterion, what constitutes an “indefeasible right of use” under 47 CFR § 51.5 and what evidence should be used to identify an IRU? What criteria has AT&T Illinois applied in identifying IRUs?</i>	20

<i>Issue 5:</i> When will AT&T Illinois post a revised list of WC designations based on implementation of its merger commitment to the FCC to treat AT&T as an “affiliate”?	21
C. Data Access	21
<i>Issue 1:</i> The ICC should establish rules and procedures whereby CLECs can obtain meaningful access to data AT&T Illinois relies on to make its WC designations, so that the CLEC can review this data (subject to confidentiality restrictions) before deciding to make a self-certification?.....	21
<i>Issue 2:</i> Should the data underlying AT&T Illinois’ WC determinations be filed with the ICC and/or provided to Staff?	23
<i>Issue 3:</i> Should the data made available to CLECs per III.1 include the identities of the carriers in the WC that AT&T Illinois has counted as FBCs?	23
<i>Issue 4:</i> Should AT&T Illinois be required to notify and obtain confirmation from each carrier that AT&T Illinois has counted as a FBC in a WC?.....	24
Conclusion	25

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The Staff of the Illinois Commerce Commission ("the Staff"), by and through its counsel, and pursuant to Section 200.800 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.800), respectfully submits its Initial Brief in the above-captioned matter.

I. Procedural Background

On January 11, 2006, the Illinois Commerce Commission ("Commission") entered an order initiating this docket to investigate whether the wire centers Illinois Bell Telephone Company ("AT&T Illinois") designated as non-impaired are appropriate in accordance with the Federal Communications Commission's ("FCC") Triennial Review Remand Order ("TRRO")¹, accompanying FCC rules, and the directives of Docket No. 05-0717^{2,3}. The Commission further limited the

¹ Order on Remand, In the Matter of Unbundled Access to Network Elements, Review of th Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338 (el. Feb. 4, 2005).

² XO Communications Services, Inc., CIMCO Communications, Inc., and Mpower Communications Corp. d/b/a Mpower Communications of Illinois, Petition to Investigate the Non-

issues relevant to this proceeding by deeming inappropriate any methodological and interpretation issues previously arbitrated and resolved in Docket 05-0442.⁴ In addition, the Commission directed AT&T Illinois to file direct testimony and supporting data explaining “how AT&T Illinois determined that such wire centers were designated wire centers in accordance with the TRRO and the FCC’s rules.”⁵

Pursuant to due notice, the Administrative Law Judges (“ALJs”) held pre-hearing conferences on January 27 and February 10, 2006. The ALJs set a schedule whereby AT&T IL would file its Initial Direct Testimony on February 1, 2006 with responsive testimony by Staff and any intervening parties on March 21, 2006. The schedule also provided for AT&T IL to file Rebuttal Testimony on April 18, 2006 and subsequent Staff/Intervenor Surrebuttal testimony on May 8, 2006 – said surrebuttal limited to only those issues raised in the March 21, 2006 testimony. Evidentiary hearings were set for May 16-18 in Chicago.

On February 1, 2006, AT&T Illinois filed the Direct Testimony of Carol A. Chapman (AT&T IL Ex. 1.0) and Marvin Nevels (AT&T IL Ex. 2.0).

On March 21, Staff filed the Direct Testimony of Dr. James Zolnierrek (Staff Ex. 1.0). In addition, the CLEC Coalition⁶ filed the Direct Testimony of Joseph Gillan (Joint CLEC Ex. JPG 1.0).

Impairment Claims of Illinois Bell Telephone Company Regarding Wire Centers, ICC Docket No. 05-0717 (Dec. 21, 2005).

³ Illinois Commerce Commission On its Own Motion vs. Illinois Bell Telephone Company, Investigation into Illinois Bell Telephone Company’s designation of certain of its wire centers as non-impaired, ICC Docket No. 06-0029 (Jan. 11, 2006) (“Initiating Order”).

⁴ Id. at 2.

⁵ Id.

⁶ The CLEC Coalition include XO Communications Services, Inc., NuVox Communications of Illinois, inc., McLeodUSA Telecommunications Services, Inc., Covad Communications Company,

Rebuttal Testimony was filed by Joseph Gillan on behalf of the CLEC Coalition (Joint CLEC Ex. JPG 2.0) on April 18, 2006. AT&T IL also filed the Rebuttal Testimony of Carol A. Chapman (AT&T IL Ex. 1.1) and Marvin Nevels (AT&T IL Ex. 2.1).

On May 8, CLEC Coalition filed the Surrebuttal Testimony of Joseph Gillan (Joint CLEC Ex. JPG 3.0).

The evidentiary hearing was held in Chicago on May 16, 2006. As a result of the ALJs' ruling on AT&T IL's Motion to Strike Joint CLEC Ex. JPG 3.0, AT&T IL was allowed to present oral surrebuttal testimony to address new issues raised in JPG 3.0. The record was marked heard and taken. TR 314.

II. Issues Presented

A. Business Line Counts

Issue 1: What year's ARMIS 43-08 data did/should AT&T Illinois use in making its business line counts – 2003 or 2004?

On February 22, 2005, AT&T IL issued a series of accessible letters notifying CLECs in Illinois that it had identified lists of wire centers that it asserted satisfied non-impairment thresholds for DS1 loops, DS3 loops, DS1 transport circuits, DS3 transport circuits, and dark fiber transport to the AT&T CLEC Online website.⁷ Further, in granting the merger of SBC Communications, Inc. and AT&T Corp., the FCC accepted, and adopted as express conditions of its merger

Cbeyond Communications, Globalcom, Inc., CIMCO Communications, Inc., and MPower Communications, Corp.

⁷ Direct Testimony of Carol A. Chapman On Behalf of AT&T Illinois, AT&T Illinois Ex. 1.0 ("Chapman Direct"), Schedule CAC-3.

approval, certain voluntary commitments made by the merging parties. One such condition states:

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.⁸

AT&T IL witness Carol A. Chapman provided revised lists of wire centers that contain the wire center lists referenced in AT&T's February 22, 2005, accessible letters revised to reflect the exclusion of AT&T CLEC collocation arrangements.⁹

In Staff's opinion, the appropriate date that would apply for challenges to non-impaired designations of the post merger adjusted wire centers, is February 22, 2005. AT&T Illinois notified CLECs of these non-impaired designations on February 22, 2005. Further, the only adjustment to AT&T IL's February 22, 2005, designations is that AT&T IL updated its lists as a result of its merger condition by removing wire centers where AT&T (the pre-merger CLEC) fiber-based collocations were a determining factor in meeting non-impairment thresholds.¹⁰ In the TRRO Arbitration Order, the Commission determined that the self-certifications submitted for wire centers are to be based on the date that AT&T IL

⁸ Federal Communications Commission, Memorandum Opinion and Order, In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, WC Docket No. 05-65, FCC 05-183 (Rel. November 17, 2005) (hereafter "Merger Order"), Appendix F, at 4.

⁹ Chapman Direct at 15-22.

¹⁰ Chapman Direct at 13.

listed the wire center.¹¹ Thus, the appropriate date that would apply for challenges to non-impairment designations of the post merger adjusted wire centers referenced in Ms. Chapman's testimony is February 22, 2005, the date AT&T IL listed the wire centers as non-impaired. Staff Ex. 1.0 (Zolnierek), at 6.

The CLEC Coalition initially argued that AT&T IL should have used ARMIS data from 2004 to designate the wire centers that were no longer impaired. Subsequently, in its Rebuttal Testimony, CLEC Coalition witness, Joseph Gillan, agreed to support Staff's acceptance of "December 2003 'vintage' data, but *only* for this initial list, and *only* as part of a decision that also adopts the same business line count that the FCC relied upon in determining its impairment thresholds in the TRRO."¹²

Staff recommends that the Commission make determinations regarding the appropriateness of wire center classifications based on the ARMIS business line counts AT&T Illinois *actually* files with the FCC. AT&T Illinois is already required to produce and report ARMIS information to the FCC. Therefore, relying on this information that AT&T Illinois already files with the FCC obviates the need to develop business line definitions and for AT&T Illinois to produce new information.¹³ This is consistent with the FCC's stated intention that:

[B]y 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

¹¹ Arbitration Decision, Access One, Inc. et. al., Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and Triennial Review Remand Order, Docket No. 05-0442 (November 2, 2005) (hereafter "TRRO Arbitration Order") at 106.

¹² CLEC Coalition Ex. JPG 2.0 at 3.

¹³ AT&T Illinois will, however, need to disaggregate to the wire center level the state level ARMIS information it reports to the FCC.

thresholds, and a simplified ability to obtain the necessary information.¹⁴

In developing its non-impaired wire center lists, AT&T used ARMIS information reflecting business line counts for 2003.¹⁵ AT&T is required to file ARMIS data for December 31 of a given year on or before April 1 of the following year.¹⁶

AT&T intends to: “use the previous year’s ARMIS 43-08 data for any wire center designations made on May 1 or later.”¹⁷ The date AT&T proposes to use as the basis of wire center determinations is a date that is one month later than the date when AT&T must file its ARMIS 43-08 data with the FCC. With respect to this additional month, AT&T states “AT&T Illinois estimates that the disaggregation process can be completed within approximately 30 days.”¹⁸ Because February 22, 2005, is before May 1, 2005, the appropriate information to use in evaluating wire center designations is the 2003 ARMIS information. Staff Ex. 1.0 (Zolnierek), at 7.

Staff continues to recommend that the Commission, at a minimum, use the previous year’s ARMIS 43-08 data only for any wire center designations made on April 1 or later. The remaining issue is whether or not the Commission should extend the April 1 date to May 1 in order to give AT&T time to produce disaggregated data consistent with its state level ARMIS filings. With respect to this issue, Staff has no reason to dispute AT&T’s estimate that 30 days is an

¹⁴ TRRO at ¶ 105 (emphasis added).

¹⁵ Chapman Direct at 11.

¹⁶ Chapman Direct at 10, footnote 13 and AT&T Illinois response to McLeodUSA/NuVox Data Request 1.3. The FCC’s ARMIS website (<http://www.fcc.gov/wcb/armis/filereqt.html>) states “Currently, all of the reports are filed annually, and reports are due on April 1 of a given year, for prior year data. Subsequent submissions correcting previously filed data should be filed as soon as the correction is identified.”

¹⁷ AT&T Illinois response to McLeodUSA/NuVox Data Request 1.3.

¹⁸ AT&T Illinois response to McLeodUSA/NuVox Data Request 1.3.

appropriate period of time for such an exercise. Therefore, Staff recommends that the Commission adopt AT&T's proposal and use the previous year's ARMIS 43-08 data only for any wire center designations made on May 1 or later. Staff Ex. 1.0 (Zolnierrek), at 11.

***Issue 2:* What adjustments, if any, has AT&T Illinois made/should AT&T Illinois make to ARMIS 43-08 data for purposes of its business line counts?**

Apart from disaggregating the information by wire center, it is Staff's understanding that AT&T did not make any adjustments to the ARMIS 43-08 data for purposes of its business line counts. See Staff Ex. 1.0 (Zolnierrek), at 12, *citing* AT&T's response to McLeodUSA/NuVox DR 1.36. Moreover, in its TRRO Arbitration Order the Commission stated:

The point made by both SBC and Staff is that the FCC relied upon certain business counts in SBC's wire centers to establish thresholds to determine whether CLECs were competitively impaired. The data the FCC relied upon is based on ARMIS 43-08 business lines, business UNE-P, and UNE-P loops. Altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings.¹⁹

The Commission, thus, has determined that AT&T Illinois should use unaltered ARMIS 43-08 information when making its wire center determinations. Staff, accordingly, recommends that the Commission find this issue to be resolved by its prior determinations in its TRRO Arbitration Order. Staff Ex. 1.0 (Zolnierrek), at 13.

¹⁹ TRRO Arbitration Order at 30.

Issue 3: Did/should AT&T Illinois exclude unused capacity on high capacity UNE-L lines (including those used in combination with UNE transport) for purposes of its business line counts?

AT&T did not exclude unused capacity on high capacity UNE-L lines (including those used in combination with UNE transport) for purposes of its business line counts. According to Ms. Chapman:

Each 2-wire digital line UNE-L was counted as 2 business lines, and each DS1 UNE-L Loop was counted as 24 business lines, and each DS3 UNE-L Loop was counted as 672 business lines.²⁰

As noted by the FCC, its business line definition is based on "...an ARMIS filing required of incumbent LECs, and *adding UNE figures, which must also be reported...[.]*"²¹ In particular, AT&T Illinois is required to file UNE line data in response to the FCC's semi-annual "FCC Form 477 – Local Telephone Competition and Broadband Reporting" data request. The FCC Form 477 directions for reporting UNE loop information state:

Report the number of circuits you provided to unaffiliated telecommunications carriers under an unbundled network element (UNE) loop arrangement, where you do not provide switching for that circuit. Do not convert any high capacity circuits provided under such UNE arrangements into voice-grade equivalent measures.²²

The FCC's directions, accordingly, specify that AT&T should not, for purposes of completing the FCC Form 477 – Local Telephone Competition and Broadband

²⁰ Chapman Direct at 37.

²¹ TRRO at ¶ 105 (emphasis added).

²² FCC Form 477, Instructions for March 1, 2006 Filing (of data as of 12/31/05) at 8.

Reporting data request, convert circuits into voice-grade equivalents as it has done for purposes of its wire center determinations.

The Commission, moreover, in its TRRO Arbitration Order found that converting circuits into voice-grade equivalents would be inconsistent with the FCC's findings. The Commission stated:

The point made by both SBC and Staff is that the FCC relied upon certain business counts in SBC's wire centers to establish thresholds to determine whether CLECs were competitively impaired. The data the FCC relied upon is based on ARMIS 43-08 business lines, business UNE-P, and UNE-P loops. Altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings.²³

The UNE-L loops that were included in the information the FCC relied upon to set its thresholds were not measured consistent with the manner in which AT&T Illinois has counted them here for purposes of wire center determinations. The information the FCC relied upon to set its thresholds was based upon reports counting UNE-L lines as single business lines regardless of loop type.²⁴

AT&T acknowledges that in December of 2004, it provided the FCC business line counts that did not count digital UNE-L lines based upon each line's 64 kbps equivalency. AT&T Ex. 1.1 (Chapman), at 40-41. AT&T also acknowledges that they are counting digital UNE-L lines differently in this proceeding than the way it reported business line counts to the FCC in December of 2004. AT&T is counting business lines in this proceeding based upon each line's 64 kbps equivalency. AT&T explains that "[i]t was not until the FCC issued its *TRRO* that AT&T Illinois realized that the FCC required that UNE-

²³ TRRO Arbitration Order at 30.

²⁴ AT&T Illinois response to Staff Data Request JZ 2.01.

L lines be counted based on digital equivalency. AT&T Ex. 1.1 (Chapman), at 48.

In sum, AT&T did not exclude unused capacity on high capacity UNE-L lines (including those used in combination with UNE transport) for purposes of its business line counts. Had AT&T reported UNE-L lines in a manner consistent with the manner in which it reported UNE-L lines in response to the FCC Form 477 – Local Telephone Competition and Broadband Reporting data request and the manner in which it reported line counts used by the FCC to establish its wire center impairment thresholds then such capacity would have been, for the most part, excluded.²⁵ Staff recommends that AT&T count UNE-L lines, for purposes of making wire center impairment determinations, as single business lines regardless of loop type. Staff further recommends that AT&T revise its February 22, 2005, lists to reflect the exclusion of any wire centers that were included in these lists, but that would not have been included had AT&T counted UNE-L lines as single business lines.

***Issue 4:* Did/should AT&T Illinois exclude non-switched UNE-L capacity on high capacity UNE-L lines (including those used in combination with UNE transport)?**

AT&T has not excluded non-switched UNE-L capacity on high capacity UNE-L lines (including those used in combination with UNE transport).

²⁵ Staff notes that unused capacity would not be excluded when CLECs don't use the high-capacity line at all. However, AT&T Illinois states in response to McLeodUSA/NuVox Data Request 1.32 "AT&T Illinois does not know (and cannot know) the service(s) that the CLEC actually provides to the end user over a stand-alone UNE loop."

According to AT&T's response to McLeodUSA/NuVox Data Request 1.32 AT&T took no steps to exclude non-switched UNE-L capacity from its UNE-L line counts.

In its TRRO Arbitration Order the Commission stated:

The FCC's definition of business lines specifically includes "...the sum of all incumbent LEC business switched lines, plus *the sum of all UNE loops* connected to that wire center, including UNE loops provisioned in combination with other unbundled elements." (47 C.F.R. §51.5) (emphasis added). The phrase "all UNE loops" encompasses residential customers and non-switched services.²⁶

Thus, the Commission has determined that AT&T Illinois need not exclude non-switched UNE-L lines from its business line counts. Staff, accordingly, recommends that the Commission find this issue to be resolved by its prior determinations in its TRRO Arbitration Order.

***Issue 5:* Has AT&T Illinois included lines that are served by VoIP in its business line counts?**

It is not clear whether AT&T included lines that are served by VoIP in its business line counts. Ms. Chapman states: "I note that there are no VoIP UNE-P lines at the current time."²⁷ However, as noted by AT&T in response to McLeodUSA/NuVox Data Request 1.32 "AT&T Illinois does not know (and cannot know) the service(s) that the CLEC actually provides to the end user over a stand-alone UNE loop." Therefore, it is possible that VoIP services are being provided over stand-alone UNE loops that AT&T Illinois has included in its business line counts.

²⁶ TRRO Arbitration Order at 30.

²⁷ Chapman Direct at 35.

The Commission has determined that AT&T Illinois can include all UNE-L lines in its business line counts.²⁸ Thus, AT&T Illinois need not exclude UNE-L lines used to provide VoIP.

Furthermore, as explained above, the Commission has determined that, apart from disaggregation, AT&T Illinois should compute business line counts based on unaltered ARMIS 43-08 information. Thus, on a going forward basis, AT&T Illinois need not exclude business retail lines used to provide VoIP that it reports to the FCC pursuant ARMIS 43-08 reporting requirements.

Further, AT&T Illinois did not knowingly include VoIP lines in its business line counts, but might have unknowingly included VoIP services provided over stand-alone UNE loops. With respect to UNE-L counts, the Commission has determined that AT&T Illinois can include all UNE-L lines in its business line counts. Thus, with respect to these lines, Staff recommends that the Commission find this issue to be resolved by its prior determinations in its TRRO Arbitration Order. Similarly, with respect to AT&T Illinois retail business line counts, the Commission has determined that AT&T Illinois should compute business line counts based on unaltered ARMIS 43-08 information. Thus, with respect to these lines, Staff again recommends the Commission find this issue to be resolved by its prior determinations in its TRRO Arbitration Order.

With respect to UNE-P counts, as Ms. Chapman notes, there are no VoIP UNE-P lines at the current time. Nor is it clear that there will ever be a VoIP UNE-P offering. The question of whether a VoIP UNE-P offering will be offered in Illinois at some future date is uncertain – as are the consequent ramifications that

²⁸ TRRO Arbitration Order at 30.

such an offering would have on the impairment questions at issue in this proceeding. In fact, these issues are sufficiently speculative in nature that Staff recommends the Commission decline to make a determination on them at this time.

Staff notes that the Commission has determined that “if an issue can be raised in this investigation, parties are precluded from raising it in a subsequent proceeding.”²⁹ While this statement may imply that the Commission must determine the appropriate methodology for counting UNE-P VoIP lines, Staff recommends that the Commission explicitly find that it does not. Rather, Staff recommends that the Commission determine that the question of how to count UNE-P VoIP lines is sufficiently speculative in nature (given that it is not clear that there will ever be a UNE-P VoIP product) that it cannot reasonably be raised at this time, and, therefore, that the Commission need not resolve it at this time.

B. Fiber Based Collocators (“FBCs”)

***Issue 1:* Must a carrier counted as an FBC have fiber facilities that enter and exit its collocations? Should carriers cross-connected with another carrier (that is already counted as an FBC) be counted? Has AT&T Illinois counted such cross-connected carriers in its FBC counts?**

With respect to defining fiber-based collocation, the FCC stated

[W]e define fiber-based collocation as a competitive carrier collocation arrangement, with active power supply, that has

²⁹ Initiating Order at 3.

a non-incumbent LEC fiber-optic cable that both terminates at the collocation facility and leaves the wire center.³⁰

Similarly, within its rules, the FCC stated the FBC's fiber-optic cable must be "owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC."³¹ Thus, the FCC defined a competitive carrier as an FBC provided it uses a non-incumbent LEC fiber-optic cable rather than restricting FBCs to those carriers using their own fiber-optic cable.

More pointedly, as Mr. Nevels notes, the FCC specifically referenced arrangements, that it includes for purposes of counting FBCs, under which carriers rely on non-incumbent, third-party fiber optic cable.³²

AT&T Illinois included one carrier that is cross-connected with another carrier (that is already counted as an FBC) in its FBC count for one wire center.³³ However, the inclusion or exclusion of this carrier was not a determining factor in the impairment designation of the wire center.³⁴

While AT&T Illinois has counted as an FBC a carrier cross-connected with another carrier (that is already counted as a FBC), the inclusion or exclusion of this carrier was not a determining factor in the impairment designation of the wire center. Thus, the Commission need not make a determination regarding this issue with respect to AT&T Illinois' prior wire center impairment designations. As it concerns future designations, however, counting as FBCs carriers cross-

³⁰ TRRO at ¶ 102 (footnotes omitted).

³¹ 47 C.F.R. §51.5.

³² Direct Testimony of Marvin Nevels On Behalf of AT&T Illinois, AT&T Illinois Ex 2.0 ("Nevels Direct") at 7-8 and TRRO at ¶ 102.

³³ AT&T Illinois response to Staff Data Request JZ 1.03.

³⁴ Chapman Direct, Schedule CAC-6.

connected with another carrier (that is already counted as a FBC) is, in Staff's opinion, reasonable and consistent with the direction in the TRRO.

Issue 2: How should the phrase “terminates at a collocation arrangement within a wire center” (47 CFR 51.5) be construed and implemented?

See Staff's position in FBC issue 1, immediately above.

Issue 3: What non-fiber-optic cable facilities qualify as “comparable transmission facilities” under the definition of “FBC” in 47 CFR §51.5?

AT&T defines comparable fiber facility, for purposes of counting FBCs as:

...AT&T Illinois only included collocation arrangements where, based on the network configuration identified, it appeared that the collocater had the ability to provide at least DS3 level transport out of the wire center.³⁵

Accordingly, AT&T Illinois counted only one carrier that might be designated as using comparable transmission facilities.³⁶ The inclusion or exclusion of this carrier did not appear to be a determining factor in the impairment designation of the wire center.

The FCC did not define comparable transmission facility. The FCC did, however, state:

Because fixed-wireless carriers' collocation arrangements may not literally be fiber-based, but nevertheless signal the ability to deploy transport facilities, we include fixed-wireless collocation arrangements at a wire center if the carrier's alternative transmission facilities both terminate in and leave the wire center.

³⁵ Chapman Direct at 42.

³⁶ AT&T Illinois responses to Staff Data Request JZ 1.03 and McLeodUSA/NuVox Data Request 1.16.

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.³⁷

Thus, the TRRO does provide that a carrier counted as an FBC might use non-fiber optic cable.

Staff’s understanding is that a DS3 transmission path provides transmission speeds that are equivalent to an Optical Carrier Level 1 (“OC-1”) transmission path – or transmission speeds of approximately 51.84 Mbps. Thus, a DS3 transmission path would, at least in this respect, be comparable to a basic fiber-optic transmission path.

In counting FBCs, AT&T Illinois has included collocation arrangements where, based on the network configuration identified, it appeared that the collocator had the ability to provide at least DS3 level (non-fiber optic cable) transport out of the wire center. While AT&T Illinois has included one such carrier in one wire center in its FBC counts, the inclusion or exclusion of this carrier had no determining influence on any wire center impairment designation. Thus, the Commission need not make a determination regarding this issue with respect to AT&T Illinois prior wire center impairment designations. As it concerns future designations, however, including collocation arrangements where, based on the network configuration identified, collocators have the ability to provide at least DS3 level transport out of the wire center is, based on signal levels and the FCC’s statements in the TRRO, reasonable.

³⁷ TRRO at ¶ 102.

Issue 4: In determining whether dark fiber obtained from an ILEC qualifies as CLEC fiber for purposes of applying the FBC criterion, what constitutes an “indefeasible right of use” under 47 CFR § 51.5 and what evidence should be used to identify an IRU? What criteria has AT&T Illinois applied in identifying IRUs?

AT&T Illinois has not counted as an FBC any carrier that is relying on fiber provided by AT&T Illinois based upon the premise that the fiber was provided pursuant to an IRU.³⁸ Thus, this issue is not applicable with respect to AT&T Illinois’ prior wire center determinations, as AT&T Illinois did not count any carriers as FBCs that relied on AT&T Illinois fiber. With respect to future determinations, neither party has offered terms that would define an IRU. In fact, AT&T Illinois does not currently have an IRU offering for dark fiber and does not have defined terms that would accompany such an offer. Tr. 221-22. Based on these particular facts, Staff recommends that the Commission conclude that the issue of what constitutes an “indefeasible right of use” under 47 CFR § 51.5 and what evidence should be used to identify an IRU is sufficiently speculative in nature that it cannot reasonably be raised within this proceeding and, therefore, that the Commission need not resolve it at this time.

Staff, nonetheless, reserves its right to respond to any arguments the parties may make in their respective briefs on this issue.

³⁸ AT&T Illinois response to McLeodUSA/NuVox Data Request 1.18.

***Issue 5:* When will AT&T Illinois post a revised list of WC designations based on implementation of its merger commitment to the FCC to treat AT&T as an “affiliate”?**

AT&T Illinois witness, Ms. Chapman provided the revised lists in her direct testimony in this proceeding that accommodated the requirements of the FCC merger commitment.³⁹

This issue has been resolved. As noted above, Ms. Chapman provided the revised lists of wire center designations, based on implementation of its merger commitment to the FCC, in her direct testimony in this proceeding. Staff, nonetheless, reserves its right to address any arguments made in the other parties' respective Briefs on this issue.

C. Data Access

***Issue 1:* The ICC should establish rules and procedures whereby CLECs can obtain meaningful access to data AT&T Illinois relies on to make its WC designations, so that the CLEC can review this data (subject to confidentiality restrictions) before deciding to make a self-certification?**

The TRRO does not provide any specific guidance on data access. It states:

We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above that it is

³⁹ Chapman Direct at 15-22.

therefore entitled to unbundled access to the particular network elements sought pursuant to Section 251(c)(3). [n. 658: ...Although we decline to adopt specific record-keeping requirements, we expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. ...]

⁴⁰

Thus, the TRRO placed the burden for making impairment determinations, at least initially, on requesting carriers and not on AT&T Illinois. The TRRO provided no guidance on whether AT&T Illinois must provide requesting carriers wire center impairment related information prior to their self-certification.

The parties to the TRRO Arbitration Proceeding, as noted by Ms. Chapman,⁴¹ agreed to the following language:

In the event of a dispute following CLEC's self-certification, upon request by the Commission or CLEC, SBC will make available, subject to the appropriate state or federal protective order, and other reasonable safeguards, all documentation and all data upon which SBC intends to rely.⁴²

Thus, the parties to that proceeding agreed to information sharing provisions, including provisions related to the timing of information exchanges.

The TRRO amendment resulting from the TRRO Arbitration proceedings resulted in processes and procedures for wire center impairment designations that resolved issues related to the timing of information exchanges. Staff recommends that the Commission find this issue to be resolved by the TRRO

⁴⁰ TRRO at ¶234.

⁴¹ Chapman Direct at 48.

⁴² Petition for Arbitration, Access One, Inc. et. al., Petition for Arbitration pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and Triennial Review Remand Order, Docket No. 05-0442 (July 14, 2005) (hereafter "TRRO Arbitration Petition"), Attachment A to Arbitration Petition at 17.

amendment produced through negotiation and arbitration in the TRRO Arbitration Proceeding.

***Issue 2:* Should the data underlying AT&T Illinois' WC determinations be filed with the ICC and/or provided to Staff?**

The outcome of this issue is contingent on the Commission's decision with respect to Data Access Issue 1. This issue concerns what rules and procedures would apply if the Commission were to establish rules and procedures whereby CLECs can obtain meaningful access to data SBC relies on to make its WC designations, so that the CLEC can review this data (subject to confidentiality restrictions) before deciding to make a self-certification. However, because Staff recommends the Commission find that it need not establish such rules, it necessarily follows that Staff recommends that the Commission find that it need not determine whether AT&T Illinois' WC determinations should be filed with the ICC and/or provided to Staff.

***Issue 3:* Should the data made available to CLECs per III.1 include the identities of the carriers in the WC that AT&T Illinois has counted as FBCs?**

The outcome of this issue is contingent on the Commission's decision with respect to Data Access Issue 1. This issue concerns what rules and procedures would apply if the Commission were to establish rules and procedures whereby

CLECs can obtain meaningful access to data AT&T Illinois relies on to make its WC designations, so that the CLEC can review this data (subject to confidentiality restrictions) before deciding to make a self-certification. However, because Staff recommends the Commission find that it need not establish such rules, it necessarily follows that Staff recommends that the Commission find that it need not determine whether AT&T Illinois should make available to CLECs prior to self-certification disputes the identities of the carriers in the WC that AT&T Illinois has counted as FBCs.

***Issue 4:* Should AT&T Illinois be required to notify and obtain confirmation from each carrier that AT&T Illinois has counted as a FBC in a WC?**

Staff continues to question the feasibility of this proposal and agrees with Ms. Chapman's assessment that, it is not only conceivable, but in fact likely, that the responses AT&T Illinois would receive, if any, would fail to resolve any issues regarding the number of FBCs in a wire center.⁴³ Staff Ex. 1.0 (Zolnierrek), at 34. Staff, consequently, reserves the right to respond to the parties' respective briefs if this issue is further addressed.

⁴³ Chapman Direct at 52.

Conclusion

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety consistent with the arguments set forth herein.

Respectfully submitted,

/s/_____

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June 8, 2006

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