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	)	

REPLY BRIEF OF THE STAFF OF THE ILLLINOIS COMMERCE COMMISSION

Michael J. Lannon
Brandy D.B. Brown
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

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Counsel for the Staff of the
Illinois Commerce Commission

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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 Reply Brief in the above-captioned matter.

I. Introduction

Much of what the parties argued in their Initial Briefs reflected their various respective positions as testified to in pre-filed testimony and at the evidentiary hearing. Staff, accordingly, in an effort to avoid rehashing what Staff has already argued in its Initial Brief, has not addressed in detail each and every assertion made by the parties in their respective Initial Briefs. Instead, Staff reasserts and reincorporates all of the arguments in its Initial Brief in this proceeding as though fully set forth herein. Accordingly, where Staff does not respond specifically to an assertion made by another party in this Reply Brief, this should not be deemed a waiver of any argument in support of Staff's position, but rather a decision to stand on arguments that Staff has raised in its Initial Brief.

II. Staff Reply To AT&T

A. Business Line Counts

Staff will address AT&T's arguments in support of its position on whether the business line count issue has already been decided, whether AT&T should exclude unused capacity, and whether lines provided under commercial agreements should be excluded from its business line counts. For the reasons articulated below, Staff disagrees with AT&T's arguments in support of its positions on these business line count issues.

1. Whether The Issue Has Been Decided in Docket No. 05-0442

AT&T argues that the Commission has already, within Docket No. 05-0442, ruled on the methodology for counting UNE-L lines and, therefore, that this issue cannot be re-litigated. AT&T IB at 23. In support of its contention, AT&T points to language from the Commission's Order in Docket No. 05-0442 permitting AT&T to include within its business line counts all UNE-L lines including residential and non-switched UNE-L lines. AT&T IB at 23-24. AT&T's argument fails and should be rejected.

To Staff's knowledge, no party in this proceeding disputes the notion that the Commission permitted, within its determination in Docket No. 05-0442, AT&T to include within its business line counts all UNE-L lines including residential and non-switched lines. Nor does the Commission's determination that all UNE-L lines should be counted as business lines have any bearing on resolution of this issue. The issue at hand concerns how UNE-L lines should be counted, not

whether they should be counted. A determination that each UNE-L line should be counted does not address whether each should be counted as one line or alternatively as multiple lines based upon capacity.

Staff does not, however, disagree that the Commission resolved this issue. In its Order in Docket No. 05-0442, 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, plus UNE-P loops. Altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings.

Commission Order in Docket No. 05-0442 at 30.

In December of 2004, AT&T submitted business line counts to the FCC that counted each UNE-L lines as one line regardless of capacity. AT&T IB at 28. It was this data that the FCC relied on to establish its impairment thresholds. TRRO at ¶ 105. Counting each UNE-L line as one line would, therefore, ensure that business line counts are computed in a manner consistent with those used by the FCC to establish thresholds. On the other hand, AT&T proposal to count UNE-L lines in capacity based equivalents would not. Therefore, the Commission has resolved this issue, but has done so in a manner that rejects AT&T's proposed methodology.

2. Whether The Issue is Resolved by the FCC's Rule

AT&T next argues that the Commission must allow it to count UNE-L lines, because to do otherwise would violate the FCC's rules. AT&T IB at 28. In support of this argument, AT&T first argues that the FCC is aware of the

difference between business line counts which count each UNE-L line as a single line and business line counts that count UNE-L lines in capacity based equivalents because AT&T recalculated and resubmitted business line counts to the FCC after the TRRO was issued. AT&T IB at 29.

AT&T's subsequent filing at the FCC is irrelevant. It cannot have influenced FCC rules, since by AT&T's own admission it was filed *after* the TRRO was issued. AT&T IB at 29. Further, the FCC neither endorsed nor rejected the approach in the subsequent AT&T filing. The fact remains that the FCC relied on AT&T business line data that counted each UNE-L line as one line when establishing its impairment thresholds and altering those business counts after the thresholds have been established renders the impairment determinations inconsistent with the FCC's findings.

Second, AT&T argues that the FCC' rules clearly state that business line counts must include "*all* UNE loops." AT&T IB at 34. This again has no relevance in determining this issue as the issue concerns not whether UNE-L lines should be counted, but rather whether it should be resolved by counting each UNE-L line as one business line or by counting each as multiple business lines based on capacity based equivalents. As argued above, AT&T's argument is simply irrelevant.

Third, AT&T argues that the FCC' rules state that a "DS1 line corresponds to 24 64 kbps-equivalents and therefore to 24 'Business Lines'" and that this requires UNE-L lines to be counted based on capacity equivalents. AT&T IB at

34. Staff disagrees. A close reading of the TRRO and associated rules favors Staff's recommendation over AT&T's.

In its rule, the FCC indicated that business lines,

> (1) shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64-kbps-equivalent as one line. For example, a DS1 line corresponds to 24 64-kbps-equivalents, and therefore to 24 "business lines."
>
> 47 C.F.R. § 51.5.

A UNE-L line is a line that is not connected to incumbent LEC end-offices for switched services. Therefore, if these requirements were applied uniformly to all measures of business lines then they would preclude inclusion of UNE-L counts in the counts of business lines used for impairment purposes. However, the FCC defined business lines in its rules such that

> A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent itself *or by a competitive LEC that leases the line from the incumbent LEC*."
>
> 47 C.F.R. § 51.5 (emphasis added).

Furthermore, in the TRRO the FCC indicated that:

> [B]usiness line counts are an objective set of data that the incumbent LECs already have created for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops. … Although it may provide a more complete picture to measure the number of business lines served by competing carriers entirely over competitive loop facilities in particular wire centers, such information is extremely difficult to obtain and verify. Conversely, by baasing our definition in an ARMIS filing required of incumbent LECs, and adding UNE figures, which must also be reported, we can be confident in the accuracy

> of the thresholds, and a simplified ability to obtain the necessary information.
>
> TRRO at ¶ 105.

And, as explained above, the FCC relied on UNE-L lines when establishing its thresholds. Thus, it is clear that the FCC intended for UNE-L lines to be included in business line counts. Therefore, interpreting the three requirements included in the FCC rules as applying to all business line counts would create an irresolvable inconsistency between the FCC rules and its order creating them. On the one hand, the text of the order requires inclusion of UNE-L lines, while on the other hand the requirements of the rules themselves would preclude any such inclusion.

A more logical interpretation, and one that does not imply inconsistency between the text and rules, would be to interpret the requirements identified in the FCC's business as prescribing the use of ARMIS data. Under this interpretation, requirement (1), that business lines "shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services", would ensure that ILECs would include information on business lines in a manner in which they supply such information in their ARMIS reports. Requirement (2), that business line counts "shall not include non-switched special access lines," would again prescribe that they report information in a manner in which they supply such information in their ARMIS reports (as ILECs file separate switched and special access lines for purposes of ARMIS reporting). Finally, requirement (3), that business line counts "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'", again would prescribe a counting methodology which matches that prescribed in the ARMIS filing requirements. That is, the three requirements identified in the FCC's rule do precisely what the FCC does in the text of the TRRO, require ILECs to use ARMIS data for purposes of calculating business lines. They do not, however, preclude the inclusion of UNE-L data.

More pointedly, these criteria do not, as AT&T argues, inform as to how UNE-L lines are to be reported. The FCC started with ARMIS figures and then "added UNE figures, which must also be reported". See TRRO at ¶ 105. Unlike ARMIS data (and UNE-P data for that matter), the ability of ILECs to determine how UNE-L lines are used is limited. In fact, 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." When collecting such UNE-L information from ILECs the FCC requires only that ILECs report total lines without identifying the capacity of the lines, the classification of the lines (residential or business), or whether or not the lines are being used to provide switched service. See FCC Form 477 – Local Telephone Competition and Broadband Reporting, Part II Wireline and Fixed Wireless Local Telephone, Section II.C., OMB No: 3060-0816. It is precisely this type of data that "must also be reported" that the FCC indicated should be used to calculate business line counts. Thus, a proper interpretation of the three specific requirements identified within the FCC's business line definition

is that they prescribe use of FCC ARMIS data and do not prohibit or otherwise inform as to how UNE-L lines should reported. UNE-L counts are, according to the rule, properly included, but it is the text of the TRRO order itself which provides more specific guidance on how UNE-L lines should be reported. This reading is not only the most logical but does not create the inconsistency between the FCC's rules and text that AT&T creates through its own interpretations.

Staff's recommended approach of counting each UNE-L line as one line is both consistent with the FCC rules and regulations and the Commission's prior determination in Docket No. 05-0442 regarding computation of business line counts in accordance with the methodology upon which the FCC thresholds were established. Alternatively, AT&T's approach of allowing AT&T to count UNE-L lines in capacity based equivalents would require the Commission to depart from its prior determination and further would require the Commission to conclude that the FCC's rules and supporting text are inconsistent. For these reasons, the Commission should accept Staff's recommendation and reject that of AT&T on this issue.

3. Whether Lines AT&T Provides Under Commercial Agreements Should Be Excluded From Its Business Line Counts

AT&T Illinois argues that "AT&T Illinois' commercial UNE-P replacement offerings, which are access lines with AT&T Illinois-provided switching, must be counted under the FCC's rule." AT&T Illinois IB at 39. Staff disagrees.

The FCC's rules state:

> 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.
>
> 47 C.F.R. § 51.

Similarly, within the TRRO, the FCC stated

> [B]usiness line counts are an objective set of data that the incumbent LECs already have created for other regulatory purposes. The BOC wire center data that we analyze in this Order is based on ARMIS 43-08 business lines, plus business UNE-P, plus UNE-loops.
>
> TRRO at ¶ 105.

Thus, the FCC specifically identified the composition of its business line counts as including ARMIS and UNE lines, but made no mention of lines provided pursuant to commercial agreement. Clearly, the FCC was fully aware of such lines when crafting its order as it referred to them elsewhere. "Moreover, several carriers have entered into commercial agreements with incumbent LECs establishing arrangements similar to UNE-P…" TRRO at ¶ 215. Thus, had the FCC intended that lines provided under commercial agreements be included in business line counts it could have specifically stated that. The fact that it did not favors the CLEC position relative to that of AT&T Illinois on this issue.

AT&T Illinois' argument that it is illogical to assume that the FCC intended to exclude business lines provisioned under commercial agreements but include physically identical configurations is similarly unavailing. As the CLEC Coalition notes, the FCC took precisely the path of including and excluding identically configured arrangements provided under differing rates, terms, and conditions

when it permitted ILECs to include UNE-L lines but not special access lines in business line counts. See CLEC Coalition IB at 54.

For the reasons above, AT&T Illinois' position should be rejected and the Commission should find that lines provided under commercial agreements should be excluded from business line counts.

III. Staff Reply To CLECs

Staff will reply to the CLEC arguments contained in their Initial Brief that support their position on whether cross-connected fiber-based collocators should be included in AT&T's business line counts. CLEC IB at 63-84. For the reasons articulated below, Staff disagrees with the CLECs on this business line count issue.

A. Counting Cross-Connected Fiber Based Collocators

The FCC explicitly indicated that its intent was to define fiber-based collocation simply. TRRO at ¶ 102. Consistent with that declaration the FCC defined a fiber-based collocator ("FBC") as follows:

> 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 wire center premises; and (3) is owned by a party other than the incumbent LEC or any affiliate of the incumbent LEC, except as set forth in this paragraph. Dark fiber obtained from an incumbent LEC on an indefeasible right of use basis shall be treated as non-incumbent LEC fiber-optic cable. Two or more affiliated fiber-based collocators in a single wire center shall collectively be counted as a single fiber-based collocator. For purposes of this paragraph, the term affiliate is defined by 47 U.S.C. § 153(1) and any relevant interpretation in this Title.

47 C.F.R. § 51.5.

With few exceptions, there has been little dispute regarding how AT&T Illinois has applied this definition in order to classify wire centers for impairment designation purposes. The CLEC Coalition does, however, argue that carriers that are cross-connected to another FBC are not FBCs within the FCC's definition. CLEC Coalition IB at 58. Staff disagrees.

The CLEC Coalition first argues that "[f]iber cable, by definition, *terminates* in one place and *is terminated* by one carrier." CLEC Coalition IB at 66. This argument is irrelevant. Staff does not dispute that a fiber cable might enter a wire center and terminate at a piece of fiber optic equipment outside the collocation arrangement of a potential FBC. However, that does not mean that the potential FBC cannot connect to this fiber facility with another piece of fiber that does terminate in its collocation arrangement. For example, carrier A might have an OC3 fiber cable between its collocation cage and that of carrier B. That OC3 cable might in turn be connected to a second OC3 fiber cable that enters the wire center and terminates in fiber optic equipment in carrier B's collocation cage. Under this arrangement, carrier A would have fiber facilities that enable OC3 level transport between its collocation arrangement and points outside the wire center. Carrier A's transport capability would therefore be no different than if it had an OC3 level fiber transport facility that left the wire center directly from its collocation arrangement without first detouring through another carriers collocation arrangement.

The CLEC Coalition also argues that when a CLEC relies on another carrier's fiber optic equipment that it does not "operate" the fiber. In particular, the CLEC Coalition argues that "[w]hen a carrier purchases services from an alternative transport provider and cross-connects to the provider's collocation arrangement, it does not "operate" the facility that leaves the wire center any more than it would "operate" interoffice transport services obtained from AT&T Illinois (whether special access or UNE dedicated transport). CLEC Coalition IB at 67. This argument serves to highlight the flaw in the CLECs reading of the FCC's use of "operate." In particular, it serves to highlight that the CLECs reading would require imposition of an "operate" standard that is not observable through visible inspection or feasibly implemented through any reasonable mechanism and therefore inconsistent with the FCC's prescriptions in the TRRO.

For example, consider a potential fiber based collocation arrangement not involving interoffice cross connects between collocation arrangements. In order to establish who is "operating" the fiber under the CLEC approach, AT&T Illinois would need to identify the provider of the fiber facilities. If such provider is a third party then AT&T Illinois would, under the CLEC Coalition approach, need to determine the arrangement between the third party provider and the collocated CLEC to determine whether the third party provider was supplying the fiber optic equipment (presumably at the collocation space and at some unknown point outside the wire center) to determine whether the third party was providing transport comparable to UNE dedicated transport, providing dark-fiber on an IRU basis, or according to some other arrangement. This approach could not be

performed through visual inspection or by examination of ILEC billing records, but rather would require a detailed investigation of the business relationship between the collocated CLEC and the third party fiber provider. This is not the approach used by AT&T Illinois to derive its wire center list -- correctly so in Staff's opinion as it is clearly not the approach contemplated in the TRRO.

With respect to the example above, the CLEC Coalition, in fact, voices no objection to counting all third party provided fiber facilities without imposing its "operating" standard. Mr. Gillan testified that "[a]fter all, AT&T can visually observe a single-fiber optic cable entering its wire center (which means that the fiber leaves it) and can trace it to a collocation. These 'readily verifiable' facts enable (subject to unusual circumstances) AT&T Illinois to count <u>one</u> fiber based collocator." CLEC Coalition Exhibit JPG 3.0 (Gillan) at 24. Rather the CLEC Coalition proposes to impose its "operate" standard only in circumstances involving cross-connected FBCs. In Staff's opinion, there is no reason to differentiate between the two circumstances. It is no more appropriate to apply the CLEC Coalition's "operate" standard to situations involving cross-connects then it is to apply it to situations that do not involve such cross-connects.

The CLEC Coalition supports its erroneous reading of the FCC's definition of FBC by arguing that its proposed reading "…will ensure that only carriers that properly meet the definition of 'fiber-based collocator' are counted as FBCs, and will therefore prevent erroneous designations of wire centers as non-impaired." CLEC Coalition IB at 58. The CLEC Coalition fails, however, to acknowledge that the FCC's definitions were not intended to be perfect. The FCC specifically

acknowledged that "[a]lthough these measures may prove occasionally to over- or under-predict the presence of actual competitive facilities, as explained below, we find that this test provides the best means to deduce where competitive LECs have the ability to duplicate the incumbent LEC's networks." TRRO at ¶ 59. The FCC further indicated that the tests it adopted were the "most objective criteria possible in order to avoid complex and lengthy proceedings that are administratively wasteful but add only marginal value to our unbundling analysis." TRRO at ¶ 99. If adopted, the CLEC Coalition proposals to define FBCs would be complicated, subjective, and difficult to administer and thus inconsistent with the FCC's prescribed approach.

IV. 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,

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Michael J. Lannon
Brandy D.B. Brown
Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
312 / 793-2877

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Counsel for the Staff of the
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