Additionally, BellSouth's conduct in cooperating at least somewhat with TWTC's request for access to Ethernet local transmission facilities offers another example of BellSouth's role as a maverick. As with special access performance measurements advocacy, there is of course the risk that BellSouth's Ethernet practices and performance metrics tariff offerings will fall in line with AT&T's practices even without the merger. But if the merger is approved, that outcome is a virtual certainty and, in any event, BellSouth would be unlikely to show even an initial willingness to cooperate with competitive entry in other contexts after the merger.

E. The Applicants' Argument That RBOC-To-RBOC Benchmarking Is No Longer Necessary Is Without Merit.

The Applicants argue that benchmarking is no longer needed because "access to incumbent LEC local facilities is now more commonly accomplished through individually negotiated commercial arrangements." outside of regulatory oversight. *Public Interest Statement* at 122.[126] It is undoubtedly true that certain inputs, such as Ethernet transmission facilities, QoS and CoS for IP traffic remain largely free of regulation. However, it is absurd for the Applicants to argue that lack of regulation, *ipso facto* means that RBOCs do not have market power over these inputs or cannot exercise that market power in destructive ways. As shown above, the RBOCs, especially AT&T, have taken advantage of this regulatory vacuum to exercise market power over these inputs to discriminate against competitors on both price and non-price terms. The obvious remedy for this problem is more effective regulatory oversight, something that can only be accomplished with the assistance of benchmarking. Fewer RBOCs can only mean that

[126] The Applicants raised identical arguments with respect to why benchmarking is unnecessary as they did for why the Commission should not be concerned with a larger combined company footprint post-merger. *See Public Interest Statement* at 121-23. As explained above, these arguments have no merit.

the FCC's ability to correct behavior such as AT&T's described above will diminish substantially.

CONCLUSION

The preceding discussion demonstrates that the competitive consequences of the proposed merger are unambiguously negative. The harmful horizontal effects increase the merged firm's stranglehold over local transmission facilities and threaten to tip the Internet backbone market into one where firms with larger market share acquire inefficient incentives. The harmful vertical effects (i.e., changes in the provision of inputs to competitors) of a larger footprint increase the incentive and ability of the merged firm to exploit market power over inputs, such as interconnection, the exchange of IP traffic and local transmission facilities that are necessary for competitors to provide services in the downstream retail market. Finally, the likely elimination of benchmarking as a means of detecting and punishing unreasonable conduct makes this merger a "perfect storm" of anticompetitive consequences

These deleterious effects plainly warrant the conclusion that the merger is contrary to the public interest. The Commission has repeatedly scrutinized prior transactions for their adverse horizontal and vertical effects, including the likelihood that the merged firm will have increased incentives to raise rivals' costs through price and non-price discrimination.[127] In its prior reviews of BOC mergers, the Commission has explained not only that the individual BOCs retain market power in their respective regions but has voiced serious concerns that the merger

---

[127] *See, e.g., Bell Atlantic/GTE Order* ¶ 173; *Merger of MCI Communications Corp. and British Telecommunications plc*, Memorandum Opinion and Order, 12 FCC Rcd 15351, ¶ 155 (1997) ("[W]e are concerned whether the merger ... will increase the ability or the incentive of the vertically integrated firm to affect competition adversely in any downstream end-user market."); *Sprint Corporation Petition for Declaratory Ruling Concerning Section 310(b)(4) and (d) and the Public Interest Requirements of the Communications Act of 1934, as amended*, Declaratory Ruling & Order, 11 FCC Rcd 1850, ¶¶ 58-60 (1996).

will result in an "incremental increase in that power or misconduct that will result from the proposed transfer."[128] Here, the showing has been plainly made; both the incentive and the ability to engage in anticompetitive conduct worsen with the merger.

The Commission has plenary authority over questions of industry structure. The Commission's statutory mandate extends well beyond merely correcting bad conduct; it obligates the FCC to affirmatively act to assure efficient industry structures which themselves will aid to minimize such conduct. On numerous occasions, reviewing courts have upheld the FCC's use of its broad authority to prescribe a particular industry structure in order to achieve perceived benefits or to avoid potential problems.

The FCC's initial Computer Inquiry proceeding provides a clear example of such action. In *Computer I*, the FCC promulgated regulations which required common carriers to provide non-regulated data services through a structurally separate corporate entity. The Second Circuit upheld the FCC's authority to regulate common carrier entry into the unregulated field of data processing services.

> The burgeoning data processing activities of the common carriers pose, in the view of the Commission, a threat to efficient public communications services at reasonable prices and hence regulation is justified under its broad rule-making authority.[129]
>
> In so doing, the Court rejected petitioners' attempts to narrow the FCC's authority.
>
> It is irrelevant that the [separation] rule is aimed at potential rather than actual domination or restraints, or that the Commission is not certain that the developments forecast will occur if the rule is not enacted.[130]

---

[128] *See, e.g., Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 2624, ¶ 42 (1997); *see also SBC/Ameritech Order* ¶ 186.

[129] *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 730 (2d Cir. 1973).

The Commission's authority over the structure of the industries it regulates extends to outright proscription of certain entities participating in some markets. The FCC's cable-telephone cross-ownership rules promulgated in 1970 and eventually removed by Congress after the rules had served their purpose are a prime example of this.[131] In reviewing the agency's initial decision, the Fifth Circuit explained the Commission's broad authority under the Communications Act, specifically relying upon Sections 151, 152(a), and 214. Moreover, the Commission has exercised its power to review mergers by blocking those that threaten significant harm to consumer welfare, as was the case with the DirecTV-Echostar merger and more recently with XM Radio's now abandoned attempt to purchase WCS.[132]

These cases demonstrate the prophylactic nature of the FCC's powers over industries it regulates. Plainly the FCC has the authority – indeed the obligation – to consider transactions in light of whether they promote efficient market structures. It need not and must not acquiesce in proposals that force it to await the inevitable inefficient outcomes and search for second-best, after-the-fact remedies. It must take a stand now and refuse to permit the consummation of the proposed merger as clearly contrary to the public interest.

---

[130] *Id.* at 731 (citation omitted). In *Computer II*, the Commission required AT&T to provide data services through a separate subsidiary and once again the appellate court deferred to the Commission's determination of the appropriate industry structure. *See Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[131] These rules were ultimately codified by Congress, and subject to constitutional challenges. *See Chesapeake & Potomac Tel. Co. of Va. v. United States*, 42 F.3d 181 (4th Cir. 1994), *cert. granted*, 515 U.S. 1157 (1995), *j. vacated*, 516 U.S. 416 (1996). The litigation was mooted by the amendments made by the Telecommunications Act of 1996.

[132] *See* Tony Sanders, *XM, WCS Scrap a $196 Mil. Merger*, Mediaweek (May 22, 2006), *available at* http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1002540358.

Respectfully submitted,

Thomas Jones
Jonathan Lechter
Megan Stull
Dan Alvarez*
Grace Koh**

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM

June 5, 2006

*Admitted only in Virginia

**Admitted only in New York

APPENDIX A

DECLARATION OF GRAHAM TAYLOR

REDACTED - FOR PUBLIC INSPECTION

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of	)	
AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer Of Control	)	WC Docket No. 06-74

DECLARATION OF GRAHAM TAYLOR
ON BEHALF OF TIME WARNER TELECOM, INC.

I. INTRODUCTION

1. My name is Graham Taylor. My business address is 10475 Park Meadows Drive, Littleton, CO 80124.

2. I am Senior Vice President for Marketing at Time Warner Telecom ("TWTC"). I have over 25 years of telecommunications industry experience in marketing, sales, corporate development, management and operations. I spent 15 years specifically in the local network services competitive environment with TCG, AT&T Local, LOGIX Communications and TWTC. I was responsible for the planning, construction and implementation of many of TCG's networks and markets.

3. The purpose of this declaration is to (1) describe TWTC's business and network generally; (2) describe some of the products that TWTC offers to its customers, particularly TWTC's Ethernet Services, Ethernet Internet Access and Internet Protocol ("IP") Virtual Private Network ("VPN") Solutions, and how those products create value for TWTC's customers; (3) explain how easily ILECs could (if not constrained by regulation) engage in anticompetitive practices that would impede TWTC's ability to deliver these services to its customers; (4) describe some of the experiences that TWTC

has had with the ILECs to date; and (5) describe TWTC's experience in attempting to interconnect with AT&T's Internet backbone.

II. TWTC'S BUSINESS AND NETWORK

4. TWTC was established in 1993. It is a leading provider of managed voice and data networking solutions for business customers, carriers, and Internet service providers ("ISPs") in 22 states and 44 metropolitan areas around the country. TWTC is collocated in **[proprietary begin] [proprietary end]** around the country and has installed 72 switches. TWTC has invested over $2.5 billion in its network and has deployed nearly 21,000 route miles of fiber, of which over 13,000 route miles have been deployed in local metro networks.

5. It is in TWTC's interest to build its own facilities whenever possible. When TWTC provides service over its own facilities, it is able to control the service end-to-end and provide a more reliable customer experience. TWTC also possesses greater flexibility to design innovative new offerings when providing service over its own facilities, because, in such cases, it is not constrained by another carrier's choice of technology or network design.

6. Unfortunately, there are many locations where TWTC is unable to achieve the revenue and return on investment required to deploy its own loop facilities. For example, TWTC serves approximately **[proprietary begin] [proprietary end]** of its broadband lines (i.e., lines that carry more than 200 Kpbs in both directions) over its own loops. Where TWTC has not built its own loops, it must rely on incumbent LEC loops (generally special access services). This is because the incumbent LEC

usually owns the only loop facility serving locations to which TWTC cannot efficiently deploy its own loops. Competitive providers usually have not deployed loop facilities serving such locations.

III. TWTC'S ETHERNET SERVICES, ETHERNET INTERNET ACCESS AND IP VPN SOLUTIONS

7. TWTC offers one of the most comprehensive suites of data solutions to retail business customers and carriers on the market today. Our solutions allow retail customers to create their own internal voice and data networks with Internet access through TWTC to Internet users on other external networks. Two of TWTC's most promising IP-based solutions are Ethernet Services and IP VPN Solutions. The demand for these services has been growing. For example, TWTC's Ethernet business has been growing at a rate of over 30 percent per year.

8. TWTC's Ethernet Internet Services deliver connectivity between customer locations and Internet access over a fully duplex Ethernet connection. The generic term "Ethernet" refers to a set of networking technologies and protocols that allow multiple devices to be connected to a single network via multiple points of access and to communicate with each other effectively and reliably. These protocols have been standardized as the Institute of Electrical and Electronics Engineers' ("IEEE") standard 802.3. The IEEE 802.3 standard essentially defines the language that devices connected to the network speak. In addition, Ethernet uses a scheme called carrier sense multiple access with collision detection ("CSMA/CD"). This scheme defines the manner in which devices connected to the network will act when they detect that there is other traffic

traversing the network, or when they detect that data traversing the network has "collided" with other data.

9. Since its invention in the early 1970s, Ethernet has proven itself to be a flexible, scalable and reliable networking technology. As Ethernet became the Local Area Network ("LAN") protocol-of-choice in the 1990s, innovation in the area of Ethernet-related technologies led to better devices that could communicate faster, more reliably, and over longer distances. Today, TWTC offers its customers four types of Ethernet solutions: Ethernet over SONET transparent LAN, Switched Ethernet transparent LAN, Extended Native LAN Ethernet for wide-area solutions and Ethernet Internet Access which gives users fractional, full or burstable solutions from 2 Mbps to 1000 Mbps (1 Gbps). Wherever possible, TWTC customers connect directly using TWTC's own local fiber transmission facilities to TWTC's national IP backbone.

10. These services provide TWTC's customers with the ability to cost-effectively connect between their network locations and to the Internet using a familiar technology. Using the protocol that is native to most LANs around the country allows the customers to save on equipment costs and ensures a smoother "handing-off" of the data from their LAN to the service provider. Further, this solution is scalable and can easily expand to meet growing bandwidth requirements without the need to purchase new equipment. For example, TWTC's Ethernet product allows customers to achieve speeds anywhere from 2 Mbps to 100 Mbps with the same piece of equipment. Using traditional TDM-based special access services such as DS1s, DS3s, etc., a customer who wants to achieve higher levels of speed would need to change equipment to achieve that higher speed.

11. Another example of the value delivered by the TWTC switched Ethernet offering to customers involves the concept of oversubscription. As with the Public Switched Telephone Network ("PSTN"), a switched Ethernet connection is capable of serving more subscribers than can use it at any one time. Compared to point-to-point private line networks, which require a directly proportional relationship between the number of connections and network capacity, an Ethernet network is designed with the assumption that not everybody who is connected to the network will be using the network, allowing the customer to purchase connectivity at a better value.

12. Ethernet also benefits our customers from a technological perspective. For example, the wide-area multipoint configuration that TWTC uses for our Ethernet is more efficient than using multiple point-to-point connections, because the Ethernet protocol used by TWTC dynamically routes data on the network based on capacity, allocation and usage. Essentially, the network can sense when there is congestion and route the data appropriately so that it reaches its destination more quickly. This dynamic routing and bandwidth allocation is not possible using multiple point-to-point connections.

13. TWTC has been offering the IP VPN Solution for about six months. Generally speaking, a VPN allows remote locations or users to connect via different access methods. The VPN network uses protocols that encrypt and encapsulate the data to ensure privacy and integrity. These "tunneling" protocols effectively simulate a point-to-point connection. There are various protocols that are used to accomplish this "tunneling," including the Point-to-Point Tunneling Protocol championed by Microsoft and the Layer 2 Tunneling Protocol adopted as a standard by the Internet Engineering

Task Force. TWTC uses Multiprotocol Label Switching ("MPLS"), because it allows our customers to maintain their existing network protocols while ensuring the privacy and reliability of the data they send over TWTC's network.

14. The benefits of VPN solutions for customers are fairly straightforward. Many of the same scalability and flexibility benefits offered by Ethernet are also offered by VPN, because both solutions use many of the same underlying technologies, such as MPLS. Furthermore, IP VPN Solutions allow our customers "any-to-any" connectivity to locations across the U.S. with the same level of privacy and efficiency that a point-to-point network connection would deliver. Without VPN, customers who want secure, private connections would be required to purchase point-to-point connections to link up their various sites. This is costly, time-consuming and inefficient, especially if a customer has more than two locations to connect to the network. A VPN allows the customer to use existing access methods and infrastructure that is already built-out and still achieve the same levels of security and privacy. This is a much more efficient scheme, and much more scalable and cost-effective than services such as ATM and Frame Relay that IP VPN is rapidly replacing.

15. TWTC's Ethernet Services and IP VPN Solutions also allow TWTC to provide our customers with a variety of class of service commitments and applications that allow for even more efficient use of network capacity. For example, customers who choose the IP VPN Solution can prioritize the different types of data that will traverse the network. This is important for applications that are sensitive to latency (i.e., the time it takes from the data to travel from its origin to its destination) in the network.

16. For example, customers increasingly use Ethernet and VPN solutions to transmit intra-company IP voice among a company's different locations. IP voice applications offer customers lower costs, greater flexibility and increased customer control of service features. However, voice applications are very latency-sensitive, and, as such, voice IP traffic must be prioritized accordingly.

17. TWTC has incurred substantial fixed costs (i.e., costs that are constant regardless of the actual number of customers served) in the process of developing the capability to deliver these products to our customers. These are incremental costs associated exclusively with providing IP services, and they pre-suppose an enormous infrastructure investment in network facilities, back office systems development and capability and personnel before TWTC can take advantage of the incremental opportunity to offer IP-based services. The incremental fixed costs of IP include, for example, substantial sums to purchase new equipment and software to support back office functionalities such as billing and collection related to both our Ethernet and VPN solutions. TWTC also incurred substantial costs to install the equipment and software and to train personnel to use them. As with all fixed costs, having more customers allows TWTC to spread these costs out and lower average per-customer costs.

18. In addition, in deploying Ethernet, VPN and VoIP, TWTC has incurred fixed costs in a geographic area that increase when TWTC expands its service territory to a new geographic area. These costs are substantial even where TWTC does not extend its fiber network to serve the area in question. Costs associated with extending network coverage even without fiber deployment include the costs TWTC incurs to purchase

Ethernet multiplexers and switches and soft switches, to acquire and to prepare central office spaces for those facilities, and to install the equipment.

IV. WITHOUT COOPERATION FROM ILECS TWTC WILL BE UNABLE TO DELIVER THESE SOLUTIONS TO ITS CUSTOMERS.

19. The ILECs can impede TWTC's ability to deliver its products to customers in one of two ways: (1) by refusing TWTC access to the ILEC local transmission facilities on just, reasonable and non-discriminatory terms and conditions; and (2) by refusing to treat the traffic that TWTC hands off to the ILEC network with the same prioritization and level of service quality that TWTC gives to the traffic.

20. If an ILEC were to discriminate against TWTC in this manner and prevent TWTC from expanding its customer base or geographic coverage, competition in the business market would be significantly harmed. This is especially significant given customers' increasingly common demand that, as discussed below, their service provider serve more (or all) of their locations. To illustrate the extent of such consequences, TWTC has determined the total number of locations that its customers have throughout the country (hereinafter referred to as "Customer Locations"). Most of TWTC's customers have multiple locations. In fact, TWTC customers have on average **[proprietary begin]** **[proprietary end]** locations within the U.S. Customer Locations, as used herein, refers to the total number of locations of TWTC's customers, both those that TWTC serves and those that TWTC does not serve.

21. Of the total TWTC Customer Locations in the U.S., **[proprietary begin]** **[proprietary end]** percent are located in the AT&T ILEC territory and **[proprietary begin]** **[proprietary end]** percent are located in the BellSouth territory. In markets in

which TWTC has deployed fiber transport facilities (hereinafter referred to as "TWTC Markets") in the AT&T ILEC territory and BellSouth territory, there are **[proprietary begin]** **[proprietary end]** Customer Locations respectively. Within the non-TWTC Markets in the AT&T ILEC territory and BellSouth territory, there are **[proprietary begin]**

[proprietary end] respectively. These Customer Locations totals are slightly overstated, because they include portions of markets in the AT&T and BellSouth regions that are served by other ILECs. Finally, TWTC currently serves Customer Locations of the same customer in both the BellSouth territory and the AT&T ILEC territory for approximately **[proprietary begin]** **[proprietary end]** customers. These **[proprietary begin]** **[proprietary end]** customers account for approximately **[proprietary begin]** **[proprietary end]** percent of TWTC's billed charges in the BellSouth and AT&T ILEC regions.

22. Currently, **[proprietary begin]**

[proprietary end]

23. **[proprietary begin]**

[proprietary end]

24. Given that, as explained, TWTC cannot construct its own loops to serve many Customer Locations, TWTC needs to rely on ILEC inputs to serve a very large number of Customer Locations that it currently does not serve with its own facilities. Indeed, TWTC would need to rely exclusively on ILEC local transmission facilities to serve customers in non-TWTC Markets.

25. Moreover, it is becoming increasingly important that TWTC serve a higher percentage of its Customer Locations than it has in the past. In the past, it was possible for TWTC to provide a service to a subset of a customer's locations and the customer would then integrate the TWTC service with services offered by other carriers. However, customers increasingly demand that carriers perform this network integration function and that carriers provide all of the services that a business customer needs to all of the customer's locations. For example, whereas in the past a business customer might have purchased Ethernet from TWTC at three locations and voice service from another

carrier at those three locations as well three other locations to which Ethernet was not essential, that same business customer is likely today to insist that its carrier provide an integrated IP voice and data solution to all six of its locations. As discussed, to reach all of a customer's locations to provide services in this manner, TWTC is increasingly dependent on purchasing local transmission facilities to locations to which TWTC could not deploy its own loops.

26. TWTC can only efficiently integrate its network with the ILEC's network if it can obtain access to the appropriate loop and transport facilities. For Ethernet, this means that TWTC must obtain access to Ethernet transmission facilities from the ILEC. If TWTC must rely on DS1 or DS3 local transmission facilities, it would incur extra costs of equipment and encounter service degradation, as discussed above.

27. Often, with Ethernet and VPN services, connecting the ILEC's local data facilities with TWTC's local data facilities should involve a straightforward connection between a TWTC Ethernet switch or IP router (in the case of VPN) and the connection to the ILEC's switch or IP router. Network connectivity can be established in this simple fashion, because many of the protocols and technologies supporting these services have become so widely adopted and standardized that even pieces of equipment from different vendors usually have little trouble interfacing and communicating with each other.

28. TWTC's customers often require that their telecommunications carrier handle and prioritize different types of traffic. Most carriers manage their networks by prioritizing the traffic that traverses their networks. Typically, voice and video traffic are considered highest priority and are guaranteed to be delivered in a certain amount of time (usually milliseconds). Internet traffic, which does not necessarily travel exclusively on a

single carrier's network, is usually given "best efforts" level of service. However, because of the increasing importance of Internet traffic in terms of the applications, such as voice, that are now carried via the Internet, "best efforts" are inadequate in many cases.

29. As detailed above, TWTC's Ethernet and VPN services are designed so that TWTC can offer its customers quality of service and class of service commitments that ensure a customer's latency-sensitive data will be prioritized and delivered in a timely manner. However, since TWTC traffic must traverse ILEC network facilities, TWTC needs to negotiate agreements whereby the traffic that TWTC hands off to the ILEC networks will be treated with the same prioritization and class of service with which the data was treated while on TWTC's network.

30. For example, when TWTC must rely on ILEC local transmission facilities to reach customer locations to which TWTC cannot efficiently deploy its own facilities, TWTC must work with the ILEC to gain class of service and appropriate prioritization of packets as they traverse the ILEC's facilities. An ILEC that refuses to ensure that traffic handed off from TWTC's network to the ILEC's network is treated in accordance with these requirements would preclude TWTC from delivering the quality of Ethernet and VPN services to end users that they increasingly demand. If the ILEC were at the same time to treat traffic that stays entirely on its own network in accordance with appropriate class of service and prioritization, the ILEC, given its ubiquitous network reach, would have a significant competitive advantage over TWTC.

V. TWTC HAS EXPERIENCED SUBSTANTIAL DIFFERENCES AMONG ILECS IN SEEKING TO OBTAIN NETWORK ACCESS AND APPROPRIATE TREATMENT OF TRAFFIC ORIGINATING ON TWTC'S NETWORK.

31. **[proprietary begin]**

32.

33.

34.

35.

36.

37.

38.

39.

40.

41.

[proprietary end]

42. Finally, **[proprietary begin]**

proprietary end]

43. In light of AT&T's anticompetitive pricing and practices, TWTC has relied exclusively on its own facilities and, where necessary, DS1 and DS3 AT&T ILEC loops with TWTC-provided Ethernet equipment to compete in the provision of Ethernet in the AT&T ILEC territory. As explained, however, reliance on AT&T DS1 and DS3 loops is not a viable long term strategy because those facilities impose costs and inefficiencies on TWTC. The combination of AT&T's anticompetitive Ethernet pricing and practices and the increasing obsolescence of TDM facilities threatens to drive competitive providers of Ethernet like TWTC out of the market.

VI. TWTC'S EXPERIENCE IN ATTEMPTING TO EXCHANGE TRAFFIC WITH AT&T'S INTERNET BACKBONE RAISES CONCERNS WITH REGARD TO THE PROPOSED MERGER WITH BELLSOUTH

44. In order to provide Internet access service to its end user business customers and to its wholesale ISP customers, TWTC must connect its Internet backbone with other Internet backbones. **[proprietary begin]**