

transition to competitive market conditions.”³⁶⁶ Conditions that the Commission imposed were to remain in effect for only *three years*.³⁶⁷ and they expired years ago.

In all events, the 1990s-vintage concerns that underlay the conditions no longer apply. The requirements of Sections 251 and 271 were fully implemented years ago, and intramodal and intermodal competition has flourished in the ensuing years. Moreover, AT&T, Verizon and Qwest are now major purchasers of ILEC services outside their regions and, thus, have powerful incentives to resist practices that would interfere with their own ability to purchase access.

A. Applicants’ Increased Local Footprint Does Not Threaten Discrimination

The market conditions underlying the Commission’s concern in the 1990s that RBOC mergers could increase the merged company’s incentive to discriminate vanished long ago.³⁶⁸ The concerns rested on findings that incumbent LECs have “monopoly control over key inputs that rivals need in order to offer retail services,”³⁶⁹ particularly “bottleneck” loop facilities.³⁷⁰ The Commission also found that existing regulatory obligations were insufficient to prevent such discrimination because regulatory authorities had not finished implementing the market opening obligations of the 1996 Act.³⁷¹ Neither concern exists today.

³⁶⁶ *SBC/Ameritech Merger Order* ¶ 63.

³⁶⁷ *Id.*, App. C ¶ 74; *Bell Atlantic/GTE Merger Order*, App. D ¶ 64.

³⁶⁸ As Applicants note elsewhere, even on the facts under which it was developed, this theory rested on untested and unexplored assumptions, and the Commission’s findings in the earlier orders were refuted in subsequent empirical studies. Public Interest Statement at 115-16.

³⁶⁹ *SBC/Ameritech Merger Order* ¶ 188; *see also id.* ¶ 190 (“Incumbent LECs’ ability to discriminate against retail rivals stems from their monopoly control over key inputs that rivals need in order to offer retail services.”); *id.* ¶ 202 (“competitors often are totally dependent on incumbent LECs for last mile wireline access to end users”).

³⁷⁰ *See id.* ¶ 197 (DSL providers are “dependent” upon ILEC loops and collocation to access those loops); *id.* ¶ 203 (ILECs have a “near monopoly in access to local customers”).

³⁷¹ *See id.* ¶¶ 197, 242.

RBOC's no longer have monopoly control over the critical inputs that competing carriers need. The 1996 Act has now been "fully implemented,"³⁷² and Applicants' local markets are "irreversibly open" to competition. Regulators and the industry have a decade of experience with the new regulatory scheme – including the near universal adoption by state commissions of detailed "performance metrics" to ensure nondiscriminatory provisioning. Applicants also now face competition not only from carriers leasing UNEs, but also from facilities-based carriers that own their own "last-mile" facilities and "over the top" VoIP providers that do not need to collocate in ILEC end offices or need access to ILEC operations support systems.³⁷³ This vibrant competition, the Commission has found, is "the one sure remedy for the ILEC's threat of discrimination."³⁷⁴

Merger opponents simply ignore these developments. For example, Cbeyond and Access Point assert at length that ILECs face no more UNE-based competition in 2006 than they did in 1999.³⁷⁵ This claim would be irrelevant even if it were true. The emergence of intermodal competition from cable, wireless, VoIP and other sources has put unprecedented pressure on prices, spawned a wide variety of new services, features and options, and achieved far greater scope and intensity than the "arbitrage" competition that existed in 1999.

TWTC acknowledges that mass market customers benefit from intermodal competition,³⁷⁶ but insists that ILECs still have monopoly power over special access and other

³⁷² *In re Petition of Qwest Corp. for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415 (Dec. 2, 2005) ¶¶ 52-53 ("*Qwest Omaha Forbearance Order*").

³⁷³ See *SBC/Ameritech Merger Order* ¶ 239.

³⁷⁴ *Id.* ¶ 230.

³⁷⁵ Cbeyond Comments at 16-23; Access Point Pet. at 24-28.

³⁷⁶ TWTC Pet. at 34-35.

local inputs required to provide service to business customers and that the merger will increase incentives to abuse that power to discriminate against rivals.³⁷⁷ This contention should be rejected.

First, in the prior ILEC mergers, the Commission was most “acute[ly]” concerned about their effect on “competitive providers of local exchange services to mass market customers,”³⁷⁸ but had no issue with special access services, presumably because there had long been both competition and Commission oversight of such services. TWTC now explicitly challenges the predicates of the Commission’s existing regulation of special access services³⁷⁹ and is rehashing the arguments it and other CLECs are currently advancing in the Commission’s ongoing review of special access pricing and provisioning.³⁸⁰ Under the Commission’s precedents, these claims must be raised in those ongoing proceedings, not in this merger.³⁸¹

Second, in any event, there is no basis for TWTC’s assertions that ILECs control bottleneck access facilities and have unconstrained market power – predicates for even theoretical concern about the size of any ILEC’s footprint. To the contrary, the provision of high-capacity local facilities is intensely competitive, and regulations already address any residual power that ILECs are alleged to have over certain DS-level facilities.

³⁷⁷ *Id.* at 34; *see also* Access Point Pet. at 41-47. Indeed, Access Point even goes so far as to claim that cable, VoIP, wireless providers, systems integrators and equipment vendors do not offer meaningful levels of service to enterprise customers.

³⁷⁸ *SBC/Ameritech Merger Order* ¶ 188.

³⁷⁹ TWTC Pet. at 34-35.

³⁸⁰ *See id.* at 33-42.

³⁸¹ *See, e.g., SBC/AT&T Merger Order* ¶ 55 (“[t]o the extent that certain incumbent LECs have the incentive and ability under our existing rules to discriminate against competitors . . . such a concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing”).

Both the Commission's precedents and market evidence confirm these points. In the *SBC/AT&T Merger Order*, the Commission held that incumbent LECs face "robust" competition for enterprise services,³⁸² that "foreign-based companies, competitive LECs, cable companies, systems integrators, equipment vendors and value-added resellers" were all competing for enterprise customers, and that cable and VoIP providers, in particular, were dramatically expanding.³⁸³ The Commission also has found that CLECs pervasively deploy competitive fiber loops at OCn-level capacity.³⁸⁴ These facilities can be used to offer not just OCn-level services to high-demand customer locations, but also, through channelization, DSn-level services.³⁸⁵ As described above, carriers are also increasingly using fixed wireless to provide dedicated transmission services to buildings that cannot be served economically by local fiber.³⁸⁶ And, as detailed above and in the declaration of Drs. Carlton and Sider,³⁸⁷ CLECs have blanketed BellSouth's major metro markets with thousands of miles of local fiber, connected thousands of individual buildings to these local fiber networks, and established fiber-based collocation in

³⁸² *SBC/AT&T Merger Order* ¶¶ 57, 73 n.223. See also *Verizon/MCI Merger Order* ¶ 74.

³⁸³ *SBC/AT&T Merger Order* ¶ 73. This competition is intensifying. Many CLECs have announced major expansions. See Public Interest Statement at 59. Although merger opponents continue to insist (without citation) that cable companies are not leveraging their state-of-the-art networks to provide dedicated broadband transmission services to businesses, *cf.* Access Point Pet. at 41-42, the facts are clearly to the contrary, *SBC/AT&T Merger Order* ¶ 64; see also, e.g., Carlton & Sider Decl. ¶ 27; Public Interest Statement at 81. Analysts estimate that cable companies have sold about \$2 billion in services to business customers. Public Interest Statement at 81 (citing authorities). See Section III.B.1, above.

³⁸⁴ *TR Remand Order* ¶ 183.

³⁸⁵ *Id.* ¶ 154.

³⁸⁶ Merger opponents predictably point to the Commission's characterization of fixed wireless several years ago as a "nascent technology." Access Point Pet. at 44. But, as the vibrant and expanding fixed wireless operations of XO and others establish, initial difficulties in deploying this technology have been overcome and fixed wireless is now quite commonly used by traditional fiber-based CLECs to reach low and medium demand buildings.

³⁸⁷ Carlton & Sider Decl. ¶¶ 103-12.

scores of BellSouth wire centers that can be used to reach other commercial buildings in BellSouth's region.

Even if ILECs retained some residual market power over certain DSn-level facilities, the "full implementation" of Sections 251 and 271 means that CLECs can obtain loop and transport UNEs at TELRIC-based rates in areas where the Commission has found that self-deployment of such facilities by the CLECs is uneconomic.³⁸⁸ Further, the Section 251 and 271 proceedings have subjected access to these UNEs to comprehensive "performance standards" and self-executing remedy plans.³⁸⁹ As explained in the accompanying Reply Declaration of William L. Dysart, Ronald A. Watkins and Brett Kissel and the Reply Declaration of Ronald Pate and Kevin Graulich, these plans establish standards for BellSouth's and AT&T's performance in the pre-ordering, ordering, provisioning, billing, and maintenance and repair of network elements and interconnection, measure their performance in meeting such standards, and contain automatic remedies for failures to meet these standards.³⁹⁰

³⁸⁸ Remarkably, TWTC contends that there has not been "full implementation" of the 1996 Act because the Commission "decided not to apply the requirements of Section 251 and the Section 271 checklist to [] packetized local transmission services." TWTC Pet. at 37-38. The Commission based these decisions on specific findings that there are no significant barriers to deploying such "layer 4" equipment and services – as the very decisions cited by TWTC make clear. *See id.* n.60 (citing decisions).

³⁸⁹ TWTC and Access Point generically contend that the state performance plans are "obsolete" and impose "[in]adequate" remedies. TWTC Pet. at 40; Access Point Pet. at 27-28. The accompanying declarations demonstrate that there is no support for these *ipse dixit* assertions and that, in fact, the state plans impose substantial remedies and can be – and have been – modified to account for relevant changes in the industry. *See* Dysart, Watkins & Kissel Decl. ¶¶ 16-17, 52-53; Pate & Graulich Decl. ¶¶ 8-22. Indeed, many CLECs supported BellSouth's recently revised regional "transaction-based" performance plans.

³⁹⁰ Dysart, Watkins & Kissel Decl. ¶¶ 13-17, 51; Pate & Graulich Decl. ¶ 8-22.

Further, Applicants have steadily improved the quality of their UNE provisioning.³⁹¹ Today, Applicants routinely satisfy or exceed between 85% and 90% (or more) of the demanding performance standards that have been adopted to monitor network element provisioning. These levels are above even the high levels of performance that supported BellSouth's and AT&T's Section 271 filings. Even if opponents were correct that the merger might marginally change Applicants' incentives, any attempt to reverse this trend would be easily detected and would subject Applicants to significant, self-executing remedies, including the payment of liquidated damages.

Of course, CLECs also have the choice of obtaining last-mile access to customers by purchasing special access services. The provisioning of these services is accomplished through processes that are now quite mature.³⁹² Applicants have designed high-quality automated special access provisioning systems that treat all requests - whether from an affiliate or a non-affiliate - the same. Applicants also have instituted rigorous training for their personnel to ensure strict adherence to existing safeguards and procedures. And Applicants' tariffs contain express performance guarantees (supported by substantial penalties for non-performance) for DSn-level services.³⁹³ These steps ensure that the merged company will continue to provide special access service in a non-discriminatory manner.

³⁹¹ Dysart, Watkins & Kissel Decl. ¶ 57-63 & Attachment 8; Pate & Graulich Decl. ¶¶ 4, 32-35.

³⁹² Dysart, Watkins & Kissel Decl. ¶ 74; Pate & Graulich Decl. ¶¶ 23-27.

³⁹³ For example, AT&T's "MVP" tariff provides service guarantees for DS1- and DS0-level services with substantial penalties for poor performance. Similarly, BellSouth's contract tariffs offer customers performance guarantees for the installation and reliability of BellSouth DS-1 and DS-3 services. In addition, AT&T and BellSouth each provide for credits in their special access tariffs for service interruptions.

Notably, the many Commission performance audits that have been conducted since the prior BOC mergers were approved show that Applicants' special access performance has been exemplary.³⁹⁴ The most recent audit reports for AT&T and BellSouth confirm that each carrier provisions special access on a nondiscriminatory basis.³⁹⁵ Not a single party filed comments on the 2003-2005 audits, and no regulatory commission, state or federal, has taken any adverse action or even made any follow-up inquiries or data requests) in response to the 2003-2005 audit reports.

Third, several merger opponents' claims rest on factual assertions that are incorrect. Foremost, the centerpiece of TWTC's claim that the merger would increase incentives for discrimination is its allegation that BellSouth is providing TWTC with wholesale access to the "Ethernet loops" that TWTC needs to provide retail Ethernet services, but that AT&T has refused to do so (purportedly because of the incentives that were created by the existing large footprint that AT&T has). Every aspect of this claim -- which is a transparent attempt to use this merger proceeding to gain leverage in the ongoing commercial negotiations between AT&T and TWTC to structure a complex contract tariff for the purchase by TWTC of a wide range of services from AT&T -- is wrong.

Contrary to its assertions, TWTC does not need to "obtain access to Ethernet transmission facilities from [AT&T or BellSouth]" to compete successfully in the marketplace.³⁹⁶ Ethernet services are provided over ordinary dedicated transmission facilities

³⁹⁴ Dysart, Watkins & Kissel Decl. ¶¶ 41, 67-73; Pate & Graulich Decl. ¶¶ 32-35.

³⁹⁵ See Section 272 Biennial Report for AT&T Inc. EB Docket No. 03-199, at 42-43 (Dec. 15, 2005), available at: http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518190405; Section 272 Biennial Report for BellSouth Telecomm., Inc., EB Docket No. 03-197, at 81 (Oct. 31, 2005), available at: http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518175905.

³⁹⁶ Taylor Decl. ¶ 26.

(which are connected to Ethernet electronics), and TWTC today offers a suite of retail and wholesale Ethernet services without the finished AT&T wholesale Ethernet service TWTC claims is an essential input.³⁹⁷

Contrary to TWTC's claims, it competes quite successfully by providing its own Ethernet electronics (rather than by outsourcing that function to AT&T or one of the many other suppliers of "finished" wholesale Ethernet services). In a recent press release, TWTC touted its 31% increase in data and Internet services revenues, "due to success with Ethernet and IP-based product sales."³⁹⁸ The day after TWTC filed comments in this proceeding claiming that it "cannot possibly compete by relying on Ethernet under the prices terms and conditions offered by AT&T,"³⁹⁹ TWTC issued a press release announcing its arrangement to deploy next-generation Ethernet customer premises equipment, which "enables [TWTC] to cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere" using ordinary TDM loops.⁴⁰⁰ Indeed, TWTC describes itself as the "*industry lead[er]*" with "a comprehensive portfolio of Ethernet services."⁴⁰¹

³⁹⁷ See Declaration of Parley C. Casto ("Casto Decl.") ¶ 19. See Taylor Decl. ¶ 43 (in addition to using its own loop facilities, "TWTC has relied [] on . . . 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")

³⁹⁸ Press Release, Time Warner Telecom, Time Warner Telecom Reports Solid First Quarter 2006 Results, at 1 (May 6, 2006), available at http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q1_2006_Earnings_Release.pdf.

³⁹⁹ TWTC Pet. at 47.

⁴⁰⁰ Press Release, Time Warner Telecom, Time Warner Telecom and Overture Networks Provide Ethernet Anywhere (June 6, 2006) available at <http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

⁴⁰¹ *Id.* at 2. TWTC recently signed a contract tariff with AT&T that provides TWTC with steep discounts for TDM special access facilities when TWTC chooses to purchase those services from AT&T. In TWTC's words, this arrangement with AT&T further "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market." Press Release, Time Warner Telecom, AT&T, SBC, Time Warner Telecom, AT&T, SBC Extend Long-Term

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TWTC nonetheless complains that the self-provisioning approach that made it the “industry leader” is “not a viable long term strategy,” because it causes TWTC to “incur extra costs,” and that TWTC can succeed in the future only by reselling AT&T’s Ethernet services.⁴⁰² In fact, these “extra costs” exist whether TWTC self-provides Ethernet connectivity or obtains it from a wholesale supplier: they are the costs of the “layer 2” Ethernet electronics – TWTC must either provide that equipment itself or its wholesale Ethernet provider must do so, in which case the costs of the equipment will be reflected in the wholesale Ethernet service price.⁴⁰³

This evidence that Ethernet providers can efficiently offer service via self-provisioning is a sufficient basis for rejecting TWTC’s claims. But TWTC does not mention, let alone dispute, the existence of alternative Ethernet access service providers, including the many carriers offering this access on a wholesale basis, such as Level 3, XO, Global Capacity Group and USCarrier Telecom.⁴⁰⁴

TWTC’s suggestion that AT&T has refused to provide reasonable wholesale access to “Ethernet loops”⁴⁰⁵ is not correct. Like BellSouth, AT&T has a generally available wholesale Ethernet access tariff, called OPT-E-MAN.⁴⁰⁶ In markets where AT&T has deployed the necessary Ethernet electronics, OPT-E-MAN provides Ethernet connectivity to any location served by AT&T fiber with a single point of interconnection that aggregates the traffic of all of a

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Service Agreement, (June 1, 2005) *available at* <http://www.sbc.com/genpress.room?pid=4800&cdun=news&newsarticleid=21695&phase=check>.

⁴⁰² Taylor Decl. ¶¶ 26, 43.

⁴⁰³ Casto Decl. ¶ 21.

⁴⁰⁴ *See, e.g.*, Casto Decl. ¶ 14.

⁴⁰⁵ TWTC Pet. at 46-47.

⁴⁰⁶ Casto Decl. ¶ 16.

wholesale carrier's Ethernet customers.⁴⁰⁷ Although AT&T hopes to expand this service and attract customers like TWTC, AT&T currently sells very little of this relatively new OPT-E-MAN services on a wholesale basis to retail Ethernet providers. Yet, retail competition is thriving, belying TWTC's claims that OPT-E-MAN is an essential input to retailers. In fact, AT&T is attempting to place this new product into the market, and competitive forces will compel AT&T to offer competitive and reasonable terms.

In this regard, as explained in greater detail in the accompanying Reply Declaration of Parley Casto, AT&T is deep into negotiations with TWTC to develop a contract tariff for Ethernet access services designed specifically for TWTC's needs.⁴⁰⁸ To be sure, TWTC is seeking even lower prices than AT&T has proposed and features that AT&T's service does not currently support. But these are exactly the type of issues that should be -- and, based on the recent successful negotiations between AT&T and TWTC, can be -- resolved at the bargaining table, not in a merger proceeding. In light of the vibrant competition that exists for Ethernet services, the number and quality of suppliers, and TWTC's unquestioned ability touted in TWTC's own press release to bypass AT&T's Ethernet network entirely and "cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere," the Commission can be quite confident that the merger will not result in discrimination against TWTC.

TWTC's arguments are also contradicted by the claims of other merger opponents. TWTC's central theory -- that the incentives for ILECs to discriminate in providing dedicated local facilities increase directly with the size of their footprints -- is flatly inconsistent with the claims of Cbeyond that AT&T (with its larger current footprint) has provisioning practices that

⁴⁰⁷ Compare *id.* with Taylor Decl. ¶ 27.

⁴⁰⁸ Casto Decl. ¶¶ 23-40.

are more favorable to CLECs than does BellSouth (with its smaller current footprint) and that BellSouth has service terms that are more favorable to CLECs than AT&T's.⁴⁰⁹ Cbeyond's arguments demonstrate that there is no correlation between the size of the footprint and the willingness of carriers to adopt practices that CLECs prefer.

Cbeyond nevertheless contends that the merger is contrary to the public interest because the merged firm will adopt the "less competitive and less favorable practices" of each of the merger partners.⁴¹⁰ Cbeyond's logic is flawed. If market and regulatory conditions permitted, AT&T could adopt the purportedly "less competitive and less favorable practices" of BellSouth and vice versa in the absence of a merger. To the extent the practices of AT&T and BellSouth *in fact* differ,⁴¹¹ they reflect different responses to marketplace conditions, and are not a basis for disapproving the merger.

B. The Proposed Merger Raises No "Benchmarking" Concerns

Some opponents claim that the merger would reduce the ability of the Commission to detect discrimination by comparing the practices of multiple independent LECs.⁴¹² These parties rely upon the Commission's findings in 1999 and 2000 that there was then an "acute present need for benchmarking" because (1) the merging ILECs then possessed local bottlenecks that could be used to discriminate against rivals⁴¹³ and (2) the existence of multiple ILEC

⁴⁰⁹ Cbeyond Comments at 84-85; Falvey Decl. ¶¶ 6-15; Younger Decl. ¶¶ 5-8.

⁴¹⁰ Cbeyond Comments at 85.

⁴¹¹ As explained below, Cbeyond's assertions that AT&T has adopted certain anticompetitive practices are false.

⁴¹² Access Point Pet. at 13-20; Cbeyond Comments at 78-88; EarthLink Pet. at 32-36; Sprint Nextel Comments at 8; TWTC Pet. at 49-72.

⁴¹³ *SBC/Ameritech Merger Order* ¶ 161.

benchmarks would “facilitate implementation of the market-opening measures of the 1996 Act.”⁴¹⁴

These claims ignore both the Commission’s corollary finding that its concern would be short-lived and the fact that the purported control of bottleneck facilities has long since disappeared. The Commission “agree[d]” that the marketplace is highly dynamic and could reasonably be expected to “evolve” in ways that would eliminate the need for multiple “benchmarks.”⁴¹⁵ The Commission observed that after “the course of the transition to full competition in local markets,”⁴¹⁶ existing local bottleneck monopolies would be broken. At that point, market forces – not regulation – would provide the “sure remedy for the ILEC’s threat of discrimination.”⁴¹⁷

Merger opponents also ignore Applicants’ detailed showing that the transition to full competition predicted by the Commission has in fact occurred. First, as noted above, facilities-based CLECs, cable and wireless companies, and others have deployed alternative wireline and wireless connections to customer premises throughout Applicants’ incumbent territories. This competition not only eliminates any substantial risk of discrimination, but also provides affirmative market incentives for Applicants to reach reasonable wholesale arrangements (to

⁴¹⁴ *Id.*

⁴¹⁵ *Id.* ¶ 154.

⁴¹⁶ *Id.* ¶ 161.

⁴¹⁷ *Id.* ¶ 230. TWTC claims that the Commission held in the *Bell Atlantic/GTE Merger Order* that any reduction in the number of ILEC benchmarks from 4 to 3 would be conclusively deemed to disserve the public interest. TWTC Pet. at 50. The Commission made no such finding. Although the Commission observed that any further reduction in the number of ILEC benchmarks at that time would raise significant concerns, *see Bell Atlantic/GTE Merger Order* ¶ 170, the Commission also stated that such diversity needed to be preserved only “during the transition to competition,” *id.* ¶ 172. Even merger opponents do not deny that where there is vigorous competition, the need for ILEC benchmarks is substantially reduced, if not eliminated.

avoid losing the business altogether to intermodal competitors).⁴¹⁸ As noted,⁴¹⁹ Applicants now provide commercially negotiated wholesale “UNE-P replacement” to scores of carriers that use these arrangements to serve millions of lines. Likewise, both AT&T and BellSouth offer heavily discounted special access tariffs with performance guarantees.⁴²⁰

In addition, the market opening requirements of the 1996 Act that the Commission previously regarded as too immature in 1999 and 2000 to supplant the need for benchmarking against multiple independent RBOCs have now been “fully implemented.”⁴²¹ Thus, the provisioning disputes over the services that the Commission regarded in 1999-2000 as candidates for RBOC-to-RBOC benchmarking comparisons (*e.g.*, loop testing and provisioning, number portability, cageless collocation, technically feasible points of interconnection)⁴²² have all but disappeared. Both ILEC unbundling and obligations concerning the OSS and other systems that must be used to provision UNEs are well-defined from both a technical and regulatory perspective.

Further, as noted above, AT&T and BellSouth are now uniformly subject to comprehensive performance plans, with literally thousands of metrics to identify whether UNEs are being provisioned in a non-discriminatory manner,⁴²³ and the plans provide for self-executing

⁴¹⁸ *Wireline Broadband Report* ¶ 75.

⁴¹⁹ See Public Interest Statement at 124.

⁴²⁰ Dysart, Watkins & Kissel Decl. ¶¶ 21-30; Pate & Graulich Decl. ¶¶ 23-27. For these reasons, the merger will not require the Commission to engage in “highly intrusive regulatory practices” as a substitute for “the ability to benchmark among major independent incumbent LECs.” *SBC/Ameritech Merger Order* ¶ 113. Given the presence of robust intermodal competition, the Commission can rely on market forces to prevent discrimination. This approach, not “comparative practices analysis,” is clearly much more consistent with the “deregulatory goals of the 1996 Act.” *Id.*

⁴²¹ *Qwest Omaha Forbearance Order* ¶¶ 52-53.

⁴²² *SBC/Ameritech Merger Order* ¶¶ 131-33, 141-43.

⁴²³ Dysart, Watkins & Kissel Decl. ¶¶ 13-16; Pate & Graulich Decl. ¶¶ 7-22.

remedies should AT&T and BellSouth fall short.⁴²⁴ Litigation over the terms, conditions and pricing of UNEs has become much less common, and the terms of interconnection arrangements today are largely provided through voluntary negotiations.⁴²⁵

Merger opponents do not seriously contest these points. Instead, they point to a handful of post-1999 instances in which benchmarking allegedly has “detected” purportedly anticompetitive conduct by ILECs.⁴²⁶ These disputes, however, have long been settled. For example, three of the cases TWTC cites are clearly irrelevant because they pertain to an RBOC’s satisfaction of the Section 271 checklist, which the Commission found satisfied in all states years ago.⁴²⁷ Similarly, several pertain to “line splitting” and NGDLC unbundling⁴²⁸ – issues that were settled by the Commission’s unbundling orders⁴²⁹ – and the ISP-bound traffic pricing issues that were hotly contested half a decade ago but were later resolved by the Commission.⁴³⁰

Nor do the decisions touted by merger opponents show that regulators have relied on RBOC-to-RBOC benchmarking to resolve what few disputes still surface.⁴³¹ Notably, merger opponents cite only one case where BellSouth was even *proposed* as a benchmark for SBC (an

⁴²⁴ Dysart, Watkins & Kissel Decl. ¶¶ 16-18; Pate & Graulich Decl. ¶¶ 15-17.

⁴²⁵ Public Interest Statement at 122.

⁴²⁶ TWTC Pet. at 53-58.

⁴²⁷ *Id.* at 55-56 & nn.89-91.

⁴²⁸ *Id.* at 54-55 & nn.84-86.

⁴²⁹ *In re 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*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Red. 16978, 17168, ¶¶ 251-52, 285-97 (Aug. 21, 2003) (“*Triennial Review Order*”).

⁴³⁰ In several instances, the decisions that TWTC claims were adopted “since” the *SBC/Ameritech Merger Order* actually *preceded* that order and are clearly irrelevant. See TWTC Pet. at 58 & nn.99-101 (purporting to cite decisions that show that regulators use benchmarking to identify “worst-practices”).

⁴³¹ TWTC Pet. at 52.

Indiana PUC arbitration), and there the state commission based its decision on other grounds, not benchmarking.⁴³² Similarly, the Arizona commission decision cited by TWTC concerning Qwest's delivery of interconnection trunking did *not* adopt Level 3's proposed benchmarking standard,⁴³³ but merely required Qwest to provide a date certain for each order in accordance with the guidelines in Qwest's own Interconnect and Resale Source Guide.⁴³⁴ Nor is TWTC correct in its claim that the Colorado commission determined that Qwest should be "required to submit to certain billing practices" because AT&T had received better terms with SBC.⁴³⁵ And, although the Commission in the *Virginia TELRIC Arbitration Order* examined BellSouth's approach to "structure sharing," the Commission's rejection of Verizon's position ultimately rested on Verizon's *own* cost evidence.⁴³⁶

Moreover, the examples of "average" practice benchmarking offered by TWTC refute any notion that the only relevant benchmarks are RBOCs. TWTC cites several instances in which state commissions or the Commission used a "proxy group" to determine the cost of

⁴³² *Id.* at 53 & n.81. The language cited by TWTC quotes Level 3's argument – summarized in the "position of the parties" section of the decision, not the Indiana commission's actual holding and analysis. TWTC Pet. at 53 n.81 (quoting *In re Level 3 Commc'ns, LLC's Pet. for Arbitration*, 2004 Ind. PUC LEXIS, 465, at *67 (Ind. Utility Reg. Comm'n Dec. 22, 2004). Although the Indiana commission ruled in Level 3's favor, it did not rely on "benchmarking" – indeed, the Indiana commission never mentions Level 3's benchmarking argument in its analysis. *Id.* at *98.

⁴³³ TWTC Pet. at 54 & n.82.

⁴³⁴ *In re Pet. of Level 3 Commc'ns LLC for Arbitration*, 2000 Ariz. PUC LEXIS 4, at *23-24 (Az. Corp. Comm'n Apr. 10, 2000).

⁴³⁵ TWTC Pet. at 54 & n.83. In fact, the Colorado commission did not "require" Qwest to submit to any billing practices at all. To the contrary, it merely held that the parties should *negotiate* a separate billing arrangement. *In re Pet. of Qwest for Arbitration* 2003 Colo. PUC LEXIS 1149, at *149 (Colo. Public Utilities Comm'n Oct. 14, 2003). ("We are persuaded by AT&T that billing for alternatively billed calls is better dealt with through a separate agreement").

⁴³⁶ *In re Pet. of WorldCom, Inc. Pursuant to Section 252(E)(5) of the Communications Act*, Memorandum Opinion and Order, 18 FCC Red. 17722, ¶ 291 (Aug. 29, 2003) ("*Virginia Arbitration Order*").

capital in TELRIC proceedings.⁴³⁷ But the proxy groups offered by CLECs in these proceedings included not just the RBOCs, but also ILEC's such as ALLTEL and CenturyTel.⁴³⁸ Indeed, in the *Virginia Arbitration TELRIC Order*, the Commission adopted a cost of capital based in large part on a proxy group of the S&P 500.⁴³⁹ And the Commission abandoned several years ago the "industry average" formerly used to determine the productivity adjustment for price cap regulation.⁴⁴⁰

TWTC recognizes that the relevant issue is whether there is a need for benchmarking "going forward," not the past role of benchmarking during the early implementation of the 1996 Act.⁴⁴¹ TWTC nevertheless offers three reasons for reviving this historical artifact. First, TWTC says that benchmarking is necessary to prevent "possible backsliding by the RBOCs."⁴⁴² But the best evidence of any "backsliding" by an RBOC is a comparison between its current conduct and

⁴³⁷ TWTC Pet. at 57-58.

⁴³⁸ See, e.g., *Virginia Arbitration Order* ¶ 69; *In re Application of Cincinnati Bell Telephone*, 1999 Ohio PUC LEXIS 620, at *26 (Oh. Public Utilities Comm'n Nov. 4, 1999). TWTC contends that even Qwest cannot be considered a benchmark because of its relatively smaller size. Compare TWTC Pet. at 62 (arguing Qwest cannot be used as a benchmark) with TWTC Pet. at 57-58 (claiming that state commissions and this Commission properly used Qwest as a "benchmark" in setting special access price caps and UNE rates). But the only analysis offered by TWTC in support of this claim is that Qwest has not announced plans to offer wireline video services or its own wireless services. TWTC Pet. at 62. The extent to which Qwest provides such services is irrelevant to the appropriateness of Qwest as a "benchmark" for regulated local facilities. There is no need to "benchmark" AT&T's wireless or wireline video service offerings against Qwest's because there could be no conceivable claim that regulation is necessary to compel access to those facilities. And while Qwest's financial difficulties and securities issues may have made it an inappropriate "benchmark" for determining cost of capital in TELRIC proceedings initiated several years ago, cf. TWTC Pet. at 62-63, those conditions no longer persist today.

⁴³⁹ *Virginia Arbitration Order* ¶¶ 88, 90.

⁴⁴⁰ Compare TWTC Pet. at 57 with 47 C.F.R. § 61.45(b)(1)(iii)-(iv).

⁴⁴¹ TWTC Pet. at 59.

⁴⁴² *Id.* at 59; see also *Access Point Pet.* at 27.

its prior actual conduct, not a horizontal comparison between the BOC's conduct and that of other carriers.

Second, TWTC contends that benchmarking is still vital to appropriate regulation of ILEC special access.⁴⁴³ TWTC does not cite a single recent instance in which the conduct of a second ILEC has been relied upon as a benchmark in a proceeding concerning either the lawfulness or the adequacy of an ILEC's provisioning of special access, and Applicants are aware of none.

Rather, as the comments in the current special access performance standards proceeding confirm,⁴⁴⁴ the relevant comparisons are between the ILEC's performance in providing service to itself and its performance in providing service to others -- *i.e.*, parity standards. As CLEC commenters have explained, "[o]nce provisioning parity is established, ILECs and CLECs can compete on grounds that they *both* can control, including price, quality of service, customer support, and additional features."⁴⁴⁵ Indeed, there is broad consensus that the central safeguard should be a parity standard,⁴⁴⁶ with both CLECs and ILECs proposing detailed plans that incorporate a parity standard.⁴⁴⁷

⁴⁴³ TWTC Pet. at 59-60.

⁴⁴⁴ *In re Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321.

⁴⁴⁵ Comments of Focal Commc'ns Corp., *et al.*, *In re Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321 (Jan. 22, 2001) ("Focal Commc'ns Comments") at 14 (emphasis in original).

⁴⁴⁶ *See, e.g.*, Focal Commc'ns Comments at 13-14 ("[F]ederal rules can, and must, assure that ILEC provisioning of special access . . . to CLECs is on parity with its provisioning of special access . . . to itself, its affiliates, or its retail customers. . . . The objective level of quality or cost of service from the ILECs is less important to the Joint Commenters than the fact that CLECs obtain bottleneck facilities from the ILEC on a performance level *equivalent* to the service it provides to itself.") (emphasis in original); Comments of TWTC and XO Communications, Inc., at 24 (Jan. 22, 2002) ("The point of performance rules is to facilitate the detection of discrimination in favor of the ILEC's end users and affiliates as well as discrimination among competitors. Accordingly, any meaningful performance requirements must include a basis for

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Merger opponents' only rejoinder is that parity rules may be insufficient because an ILEC might provide itself poor service or not provide a comparable "retail" service.⁴⁴⁸ This claim makes no sense in today's radically changed markets. Unlike SBC and Ameritech in 1999, AT&T today provides retail services to enterprise customers. Further, AT&T has an established reputation for providing the highest quality enterprise services, and relies on that reputation in marketing its services. It is simply not credible to suggest that AT&T would find it "profitable" to provide its own retail enterprise affiliates with poor quality special access service.

Nor is "benchmarking" required for effective special access rate regulation. ILEC-to-ILEC "benchmarking" today has no role in the current price cap regime for regulating special access rates. Likewise, for special access services that have pricing flexibility, "benchmarking" is not a focus in the Commission's ongoing proceeding to address regulation of special access pricing.⁴⁴⁹ No party in that proceeding is proposing that comparisons between or among ILEC

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comparing the level of service quality provided to specific competitors with the service quality provided to (1) the ILEC's end users and affiliates, and (2) all competitors."); Comments of Sprint Corporation *In re Performance Measurements and Standards for Interstate Special Access*, (Jan. 22, 2002) at 3 ("the Commission should interpret the Section 202 prohibition on discrimination as requiring parity -- equality in the provision of special access service to an affiliate or subsidiary, a non-affiliated carrier, or to an end user").

⁴⁴⁷ See Letter from The Joint Competitive Industry Group to Chairman Michael K. Powell (Jan. 22, 2002), Attachment A, *Joint Competitive Industry Group Proposal-ILEC Performance Measurements & Standards in the Ordering, Provisioning, and Maintenance & Repair of Special Access Service*, at 3 (Jan. 18, 2002) (establishing objective performance standards and also requiring comparison reports for CLEC/IXC Carrier Aggregate and ILEC Affiliates Aggregate); Letter from BellSouth, Qwest, SBC and Verizon to Mr. Jeff Carlisle, Chief, Wireline Competition Bureau (Dec. 20, 2004), attaching *Service Quality Measurement Plan (SQM) - Joint BOC Section 272(e)(1) Performance Metrics Proposal*, at 7 ("For purposes of this plan, the RBOC's performance in providing service to its non-affiliate carrier customers shall be substantially similar to that which it provides to its affiliates. Performance shall be measured by comparing, for each of these measures, the service received by the Non-Affiliate Aggregate (IXC/CLEC) with the service received by the RBOC Affiliates Aggregate").

⁴⁴⁸ TWTC Pet. at 67.

⁴⁴⁹ *In re Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25.

special access rates should be used either to determine whether current special access rates are excessive or to set rates prospectively. Nor would such comparisons be meaningful because special access rates depend on a host of company-specific factors, such as geographic density, network architecture, cost of capital, mileage of the average circuit, term/volume commitment, and performance guarantees. Therefore, substantial variation among ILEC special access rates is to be expected.

Third, TWTC claims that benchmarking is necessary to protect competition for emerging advanced services.⁴⁵⁰ But as the Commission concluded in the *SBC/AT&T Merger Order* and *Verizon-MCI Merger Order*, following a long line of prior decisions, a wide and heterogeneous array of competitors “ensure that there is sufficient competition” for Frame Relay, ATM, and Gigabit Ethernet and similar based transmission services.⁴⁵¹ The Commission also observed that “a growing number of enterprise customers” have begun switching to new entrant providers. “These new competitors are putting significant competitive pressure on traditional service providers.”⁴⁵²

Finally, merger opponents note that in the prior ILEC merger orders, the Commission expressed concern that a merger of ILECs would “increase the likelihood of coordination . . . to

⁴⁵⁰ TWTC Pet. at 60.

⁴⁵¹ *SBC/AT&T Merger Order* ¶ 73; see also *id.* (“we find that myriad providers are prepared to make competitive offers” to enterprise customers); *Verizon/MCI Merger Order* ¶ 74 (same); *Bell Atlantic/GTE Merger Order* ¶ 121 (“a large number of other firms” with “similar capabilities” provide both local and long distance services to business customers, and “more firms are entering the larger business market”); *id.* ¶¶ 120, 126 (“incumbent LECs face increasing competition from numerous new facilities-based carriers in serving the larger business market”; “there are a number of significant competitors equally competitive with Bell Atlantic and GTE in these larger business markets”); *SBC/Ameritech Merger Order* ¶¶ 89-90 (noting actual and potential competition for larger businesses); *In re Teleport Commc’ns Group Inc., Transferor, and AT&T Corp., Transferee*, Memorandum Opinion and Order, 13 FCC Rcd. 15236, ¶¶ 28, 37, 40 (July 23, 1998) (same).

⁴⁵² *Verizon/MCI Merger Order* ¶ 75 n.229; see also Public Interest Statement at 71-82 (discussing many competitors that offer these advanced services).

settle on a lower benchmark or . . . conceal[] information concerning operating practices and dealing with competitors.”⁴⁵³ But the Commission’s more recent deregulatory decisions and the intense intermodal competition fostered by those policies have spurred enormous investment in innovation. ILECs have overwhelming incentives today to meet their customers’ needs as effectively as possible and to innovate whenever possible – or risk losing those customers to other providers.

Likewise inapplicable today is any concern about “increasing the incentive and opportunity for collusion and concealment of information among the few remaining major incumbent LECs.”⁴⁵⁴ AT&T and Verizon are fierce competitors, particularly in the markets for enterprise level customers, with each other and with “myriad” other suppliers. AT&T has deployed local network facilities in Verizon’s and Qwest’s territories and purchases several *billion* dollars in access services from these carriers; Verizon and Qwest have a similar presence in Applicants’ territories. Indeed, Qwest is expanding its CLEC presence with the recent acquisition of OnFiber.⁴⁵⁵ The merger will diminish neither this competition nor Applicants’ incentive to ensure that they will be able to access customer locations in Verizon’s and Qwest’s territories on reasonable terms and conditions.⁴⁵⁶

Despite these facts, and the near-complete absence of out-of-region operations by BellSouth, TWTC claims that the merger will substantially increase the likelihood of regulatory

⁴⁵³ TWTC Pet. at 66 (quoting *SBC/Ameritech Merger Order* ¶ 121); see also *Access Point Pet.* at 17-18; *EarthLink Pet.* at 21-27.

⁴⁵⁴ *SBC/Ameritech Merger Order* ¶ 184.

⁴⁵⁵ See Press Release, Qwest, Qwest To Acquire OnFiber Communications, Inc. (May 15, 2006), available at http://www.qwest.com/about/media/pressroom/1,1281,1869_current,00.html.

⁴⁵⁶ Carlton & Sider Reply Decl. ¶ 108-09.

collusion because BellSouth is a “maverick” among special access service providers.⁴⁵⁷ TWTC offers two pieces of evidence to support this counter-intuitive proposition. First, TWTC says BellSouth alone among the RBOCs urged the adoption of “performance metrics” in 2002.⁴⁵⁸ But, as TWTC subsequently admits, all of the RBOCs, including BellSouth, subsequently sponsored a joint proposal that supplanted the initial BellSouth filing.⁴⁵⁹

TWTC also claims that BellSouth provides TWTC with better special access performance metrics than AT&T.⁴⁶⁰ Yet, the very AT&T tariff that TWTC now attacks is a contract tariff negotiated barely a year ago to respond to demands from TWTC for special access terms and conditions different than those available in SBC’s other offerings.⁴⁶¹ TWTC, when executing the contract tariff, informed the public that the deal “strengthens Time Warner Telecom’s ability to compete effectively for the nationwide business market.”⁴⁶²

⁴⁵⁷ TWTC Pet. at 68. *Compare* Cbeyond at 84-85 (contending that BellSouth’s special access practices are inferior to AT&T practices).

⁴⁵⁸ TWTC Pet. at 68.

⁴⁵⁹ TWTC Pet. at 68-70. Contrary to TWTC’s claim, the joint RBOC filing did not “water down” the BellSouth proposal but strengthened it in several respects.

⁴⁶⁰ TWTC Pet. at 70-71.

⁴⁶¹ Casto Decl. ¶ 41.

⁴⁶² Press Release, Time Warner Telecom Inc., AT&T, SBC Commc’ns, Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement (June 1, 2005) *available at* <http://www.sbc.com/gen/press.room?pid=4800&cdun=news&newsarticleid=21695&phase=check>. TWTC’s comparisons of the AT&T and BellSouth tariffs are misleading and inappropriate in other respects. For example, although the AT&T tariff has fewer performance metrics than the BellSouth tariff (albeit more than TWTC states), AT&T’s metrics contain “ratchet” terms that require enhanced performance over the life of the contract. Casto Decl. ¶ 44. Likewise, one of the key provisions of the AT&T tariff that TWTC attacks – the use of penalties to improve performance – was included specifically to satisfy TWTC’s demands during the contract negotiations. Casto Decl. ¶ 43. And AT&T’s tariff provides other discounts to TWTC beyond what BellSouth offers. Casto Decl. ¶ 44. Cbeyond broadly claims that AT&T has a practice of discriminating against CLECs and would extend those practices to BellSouth post-merger. These allegations – which have nothing to do with this merger – are refuted in detail in Appendix A.

V. AT&T IS FULLY QUALIFIED TO CONTROL BELLSOUTH'S AUTHORIZATIONS, BELLSOUTH IS FULLY QUALIFIED TO HOLD THEM, AND OTHER OBJECTIONS TO APPLICANTS' PRACTICES ARE UNFOUNDED

The Commission has concluded repeatedly that AT&T is fully qualified to control Commission authorizations. Nothing has changed to disturb this conclusion.⁴⁶³ Similarly, there is no question as to BellSouth's character or qualifications to hold Commission authorizations.⁴⁶⁴ Although certain merger opponents have cited various incidents involving AT&T and BellSouth, their claims do not withstand scrutiny. Indeed, with respect to BellSouth, the FCC's policy "when evaluating transfer of control applications under section 310(d) . . . [is] not [to] re-evaluate the qualifications of the transferor" particularly in instances in which "no issues have been raised that would require us to re-evaluate the basic qualifications of the transferor."⁴⁶⁵ Opponents' other objections to various practices of Applicants that allegedly are abusive or improper are without merit.⁴⁶⁶ Applicants' responses to these claims are summarized below, with additional detail provided in Appendix A hereto.

⁴⁶³ Public Interest Statement at 2.

⁴⁶⁴ *Id.*

⁴⁶⁵ *In re Applications of XO Communications, Inc.*, Memorandum Opinion, Order, and Authorization, 17 FCC Red. 19212, ¶ 13 (IB/WTB/WCB Oct. 3, 2002).

⁴⁶⁶ Jonathan Rubin's opposition to Applicants' request for a waiver of Section 1.913(b) of the Commission's rules, 47 C.F.R. §1.913(b) - to sanction their manual filing of a single Wireless Radio Services Application (File No. 0002560497) - Rubin Comments at 7-8, reveals his misunderstanding of the facts. Contrary to his claim, only one out of the 101 Wireless Radio Services applications filed in connection with this merger was filed manually and is the subject of the waiver request. And, contrary to his assertion, the public was not deprived of *any* access to *any* information about the sole manually filed application.

Moreover, Mr. Rubin's suggestion that Applicants failed to justify their manual filing of this one application shows no appreciation for the limitations inherent in the Commission's Universal Licensing System ("ULS"). It is not uncommon for ULS to be unable - as it was here - to accept electronic filings when a license is subject to multiple transactions simultaneously or in close proximity. In such circumstances, the communications bar and the Commission staff have developed a standard practice of filing and processing manual applications when ULS is unable to accept an electronic filing. *See, e.g.*, File Nos. 50002CWTC05 (transfer of control accompanied by waiver request; attached to File No. 0001969071), 50004CWTC05 (transfer of

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A. AT&T Is Fully Qualified to Control BellSouth's Authorizations, and BellSouth Is Fully Qualified to Hold Them

Virtually all of the challenges to Applicants' character rest on charges that have been addressed by the Commission in other proceedings and rejected. EarthLink, in particular, trots out a series of old allegations of supposed misconduct by AT&T (and its predecessor, SBC). The remaining allegations raised by EarthLink and other opponents are no more availing. Some involve consent decrees, which the Commission "does not consider . . . for purposes of assessing an applicant's character qualifications."⁴⁶⁷ Others stem from business disputes and similar matters, which, under well-established precedent, the Commission should ignore because the allegations are not merger-specific⁴⁶⁸ or "are better addressed in other Commission proceedings, or other legal fora."⁴⁶⁹ if at all. Applicants respond in detail in Appendix A to each of these challenges—as well as to the New Jersey Ratepayer Advocate's misleading and irrelevant attacks on service quality and Beyond's unfounded allegations that the merger will result in the "standardization" of "unfair" or "anticompetitive" practices.

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control accompanied by waiver request; attached to File No. 0001966108), 50004CWAA04 (assignment accompanied by a waiver request; attached to File No. 0001487713). Applicants followed standard Commission practices, their waiver request is fully justified, and it should be granted.

⁴⁶⁷ *Cingular/AT&T Wireless Merger Order* ¶ 53.

⁴⁶⁸ See *AT&T/Comcast Merger Order* ¶ 165 (rejecting alleged harm as not merger-specific); *In re Joint Applications of Global Crossing Ltd. & Citizens Commc 'ns Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 8507, 8511, ¶ 10 (CCB/IB/CSB/WTB Apr. 16, 2001) (rejecting alleged harms as insufficiently merger-specific).

⁴⁶⁹ *In re Applications of Craig O. McCaw & AT&T Co.*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5904, ¶ 123 (Sept. 19, 1994) ("*McCaw/AT&T Merger Order*"); see also *SBC/AT&T Merger Order* ¶ 175 & n.493; *Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222; *GM/Hughes Order* ¶¶ 304-09, 313-14 (2004); *SBC/Ameritech Merger Order* ¶¶ 518, ¶¶ 557-59.

B. The Commission Should Disregard Opponents' Irrelevant and Unsubstantiated Claims Involving Redlining and Franchising

The Commission also should summarily reject the attempt of the Concerned Mayors Alliance ("CMA") to insert franchising and redlining issues, which are totally unrelated to this merger, into this proceeding.⁴⁷⁰ These issues are generic industry-wide issues, and the merger does not affect their resolution one way or the other; thus, they are wholly irrelevant to whether the Applications should be approved.⁴⁷¹ Moreover, many of those issues are addressed in existing federal and state laws and are the subject of pending legislation, administrative proceedings, including proceedings pending at the FCC, and court cases.⁴⁷² This merger proceeding is not the appropriate forum in which to address them.

⁴⁷⁰ See CMA Pet. at 13-20, 26-27.

⁴⁷¹ In previous merger proceedings, the Commission has wisely declined to address such unrelated issues. See *SBC/AT&T Merger Order* ¶ 55; see *Comcast/AT&T Merger Order* ¶ 31 (2002); *In re Applications of S. New England Telecomms. Corp. and SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Red. 21292, 21297, ¶ 29 (Oct. 23, 1998).

⁴⁷² Franchising, redlining and related buildout issues are being debated in a number of proceedings and fora. The Commission is considering these issues in two proceedings. See *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984, as Amended*, Notice of Proposed Rulemaking, 20 FCC Red. 18581, ¶ 23 (Nov. 23, 2005) ("621 NPRM") (rulemaking addresses the local imposition of buildout requirements on new entrants); *In re IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Red. 4863 (2004) (Commission considering the regulatory structure applicable to IP-enabled services). Congress is also debating MVPD legislation that contains antidiscrimination language. See *Communications Opportunity, Promotion and Enhancement (COPE) Act of 2006*, H.R. 5252, 109th Cong. (2006) (passed by the House on June 8, 2006); *American Broadband for Communities Act*, S. 2332, 109th Cong. (2006); *Franchise Reform Act of 2006*, S. 2989, 109th Cong. (2006); *Communications, Consumer Choice, and Broadband Deployment Act of 2006*, S. 2686, 109th Cong. (2006). A number of states have recently passed statewide video franchising legislation (e.g., Texas, Virginia, Indiana, Kansas, New Jersey and South Carolina), and similar legislation is pending in others (e.g., California, Michigan and North Carolina). At the state administrative level, the Connecticut Department of Public Utility Control recently decided that AT&T's IP video service is not subject to state cable franchising requirements. See *Investigation of the Terms and Conditions Under Which Video Products May Be Offered by Connecticut's Incumbent Local Exchange Cos.*, Decision, Docket No. 05-06-12, (Conn. Dep't of Pub. Util. Control June 7, 2006).

So too, the Commission should reject CMA's argument that "redlining" conditions are required because "redlining" contravenes the public interest and applicable law.⁴⁷³ The claims that AT&T will engage in redlining are pure speculation. There is no evidence to suggest that AT&T has previously engaged in, or ever will engage in, discriminatory conduct based on income or other impermissible factors.⁴⁷⁴ To the contrary, more than 5.5 million lower-income households in 41 Project Lightspeed markets will be capable of receiving U-verseSM within the first three years of deployment.⁴⁷⁵ Indeed, as AT&T has pointed out in pleadings filed in the 621 NPRM proceeding, it would be economically irrational for AT&T to follow a discriminatory course in the video market, given current market conditions.⁴⁷⁶

⁴⁷³ CMA posits that the Commission has some sort of obligation in this proceeding to prevent redlining because such a practice is unlawful under the Communications Act. We assume CMA's primary concern is directed at cable and broadband services since all the so-called "evidence" it cites, involves such services. *See* CMA Pet. at 15-18. However, CMA relies on provisions relating to common carriers and telecommunications services, which do not apply to either Title VI cable services, cable modem service or wireline broadband Internet access services. CMA Pet. at 17. Moreover, the one antidiscrimination provision that applies to cable service has no applicability here because, among other things, AT&T's IPTV service is not a Title VI cable service; the cited provision imposes no statutory obligation on the Commission to prevent redlining; and there is no evidence of a redlining problem.

⁴⁷⁴ CMA's bald assertions about AT&T are particularly egregious. CMA complains of misdeeds that involve AT&T Broadband. However, the party in this proceeding is the former SBC Communications Inc., which acquired AT&T Corp. in 2005. AT&T Broadband was a separate entity that legacy AT&T sold to Comcast long before legacy AT&T was acquired by SBC to create the AT&T applicant here. New AT&T has never owned or had any interest in AT&T Broadband. CMA also cites to seven-year-old press accounts involving MediaOne, which AT&T Broadband acquired before it was sold to Comcast.

⁴⁷⁵ *See* Press Release, AT&T Inc., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 8, 2006), *available at* <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272>. AT&T has further demonstrated its commitment to expanding the availability of advanced services to people of all backgrounds through "AT&T AccessAll," a \$100 million program recently announced by AT&T and the AT&T Foundation that is designed to provide in-home Internet and technology access to low income families and underserved communities across the country. *See* Press Release, AT&T Inc., AT&T Announces \$100 Million 'AT&T Accessall' Signature Program - Nation's Largest to Provide In-Home-Technology Access to Underserved Populations (June 14, 2006), *available at* <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22339>.

⁴⁷⁶ AT&T is under competitive pressure to offer video programming services as quickly and broadly as economically feasible, in order to retain customers being aggressively courted by

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