

Moreover, AT&T's history of broadband deployment shows that it has aggressively made DSL service available widely throughout its local service territory to the extent technically feasible, regardless of the income levels of the residents. AT&T has upgraded its networks and now offers DSL service to nearly 80% of households in its service areas.⁴⁷⁷ Given this record, there is no basis for the Commission even to assume that AT&T will unlawfully discriminate in its deployment of IPTV services. If and when evidence of discriminatory behavior in the roll out of video services develops, appropriate relief may be sought at that time under applicable law.⁴⁷⁸

C. The ACLU's Concerns About Alleged Call Record Disclosures to the Government in Connection with Anti-Terrorist Intelligence Activities Cannot Be Considered in This Proceeding

The ACLU asserts that the Commission cannot approve the merger unless it first investigates *USA Today's* allegations that AT&T, Verizon, and BellSouth violated provisions of the Communications Act in allegedly providing assistance to the National Security Agency ("NSA") in connection with anti-terrorist intelligence activities instituted following the terrorist attacks of September 11, 2001. The ACLU contends that this investigation is necessary to determine if AT&T's has the requisite "character" to control BellSouth's licenses. The argument

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cable operators offering a bundle of voice, video and Internet services. *In re Implementation of Section 621(a)(1) of the Cable Commc'ns Policy Act of 1984, as Amended*, MB Docket No. 05-311, Reply Comments of AT&T, Inc. at 39-40 and n. 62 (Mar. 28, 2006); *id.*, Comments of AT&T, Inc. at 54-55 (Feb. 13, 2006). Moreover, AT&T's comments explain that research indicates that subscription rates correlate little with income. As a new entrant facing entrenched cable incumbents and DBS providers with an established customer base, AT&T has strong incentives to market its IP video service as broadly as economically feasible to establish a foothold in the market.

⁴⁷⁷ See Paul Taylor, *AT&T Plans Expansion of Broadband Reach*, Fin. Times, May 9, 2006 (quoting AT&T Chairman and CEO Edward Whitacre in a May 8, 2006, speech to the Detroit Economic Club).

⁴⁷⁸ Similarly, opponents' claims about cross-subsidization are baseless and not merger specific. See, e.g., Baldwin & Bosley Decl. ¶ 50; Fones4All Comments at 13. Moreover, to the extent there are cross-subsidy concerns about rate regulated services, there are federal and state rules and procedures in place to address those issues.

is meritless. First, the Commission has already determined that it is “unable to investigate” these allegations in *any* proceeding because information about the NSA’s activities is classified and because the National Security Act deprives the Commission of authority to compel production of classified information.⁴⁷⁹ While the ACLU asks the Commission to “reconsider” this decision, the ACLU does not challenge the Commission’s interpretation of the National Security Act, which is plainly correct. Second, even if the Commission could investigate these issues, a merger review would not be the proper forum, for the alleged misconduct is wholly unrelated to the merger and was allegedly engaged in by multiple carriers in the industry.⁴⁸⁰ Indeed, the ACLU and others are challenging this same alleged conduct in over 20 separate putative class action lawsuits that are now pending in federal district courts, which will determine whether the “military and states secrets privilege” of the United States bars litigation of these claims and, if not, whether any violations have occurred. Indeed, even assuming that the Commission can lawfully pursue such an investigation under the national security laws applicable to the alleged activities of the NSA, the Commission’s own policy on character issues⁴⁸¹ dictates that it should stay its hand until these judicial proceedings are resolved.

⁴⁷⁹ See Letter from Kevin J. Martin, FCC, to the Edward J. Markey, U.S. House of Representatives, at 1 (May 22, 2006) (citing Pub. L. No. 86-36, § 6(a), 73 Stat. 63, 64, codified at 50 U.S.C. § 402 note).

⁴⁸⁰ *SBC/AT&T Merger Order* ¶ 175 & n.493; *accord 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; *In re Application of Worldcom, Inc. & MCI Commc’ns Corp. for Transfer of Control of MCI Commc’ns Corp. to Worldcom, Inc.*, Memorandum Opinion and Order, 13 FCC Red. 18025, ¶ 215 (Sept. 14, 1998); *McCaw/AT&T Merger Order* ¶ 123.

⁴⁸¹ *In re Policy Regarding Character Qualifications in Broad. Licensing*, Report, Order and Policy Statement, 102 F.C.C. 2d 1179, 1204-06 ¶ 48 (Jan. 14, 1986) (stating that the Commission only considers finally adjudicated misconduct), *modified*, Policy Statement and Order, 5 FCC Red. 3252, 3252-53, ¶ 7 (May 11, 1990), *recons. granted in part*, Memorandum Opinion and Order, 6 FCC Red. 3448 (May 24, 1991), *modified in part*, Memorandum Opinion and Order, 7 FCC Red. 6564 (Oct. 9, 1992).

VI. CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny the filings made in opposition to the merger of AT&T and BellSouth. Applicants have demonstrated that the proposed merger serves the public interest, convenience, and necessity. Accordingly, the Commission should expeditiously grant, without conditions, the applications to transfer control of BellSouth's FCC authorizations to AT&T.

Respectfully submitted,

AT&T Inc.

By: /s/ James D. Ellis

James D. Ellis
Wayne Watts
Gary L. Phillips
AT&T Inc.
175 E. Houston
San Antonio, Texas 78205
Telephone: (210) 351-3476
Fax: (210) 351-3257

Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, D.C. 20004
Telephone: (202) 942-6060
Fax: (202) 942-5999

Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 624-2500
Fax: (202) 628-5116

Sidley Austin LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8088
Fax: (202) 736-8711

BellSouth Corporation

By: /s/ Marc Gary

Marc Gary
James G. Harralson
Bennett L. Ross
BellSouth Corporation
1155 Peachtree Street, NE
Atlanta, Georgia 30309
Telephone: (404) 249-2641
Fax: (404) 249-2385

Wiley Rein & Fielding LLP
1776 K Street, N.W.
Washington, D.C. 20006
Telephone: (202) 719-7000
Fax: (202) 719-7049

Axinn, Veltrop & Harkrider LLP
1370 Avenue of the Americas
New York, NY 10019-4602
Telephone: (212) 728-2200
Fax: (212) 728-2201

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

_____)	
In the Matter of Applications)	
for Consent to the Transfer)	
of Control of Licenses and)	
Section 214 Authorizations from)	
)	
BELLSOUTH CORPORATION)	WC Docket No. 06-74
Transferor)	
)	
to)	
)	
AT&T INC.)	
Transferee)	
_____)	

REPLY DECLARATION OF PARLEY C. CASTO

Sales Vice President – AT&T Wholesale

I, Parley C. Casto, hereby declare the following:

1. My name is Parley C. Casto. My title is Vice President – Sales – AT&T Wholesale, for AT&T. I am responsible for the management of a nationwide sales force that represents AT&T Wholesale products and services to interexchange carriers, CLECs and ISPs.

2. My declaration responds to claims made by Time Warner Telecom (“TWTC”) and its declarant Graham Taylor that AT&T has impeded TWTC’s ability to compete in the retail market for “Ethernet” services. TWTC Comments at 46-47. According to TWTC, AT&T has “been especially resistant to TWTC requests for Ethernet loops” that TWTC claims are an essential input into TWTC’s retail Ethernet services. *Id.*

3. As I explain below, these claims, which have nothing to do with the pending merger between AT&T and BellSouth and appear to be an attempt to gain negotiating leverage

in the parties' ongoing negotiations, do not withstand scrutiny. TWTC is a valued customer of AT&T, and AT&T and TWTC are in the middle of negotiations to structure the terms and conditions of a complex contract tariff under which AT&T would supply TWTC with, among other services, AT&T's new OPT-E-MAN Ethernet service. In AT&T's view, these ongoing negotiations have been productive, and AT&T hopes the parties can agree on terms that meet both parties' business needs. As I explain below, however, TWTC is wrong in suggesting that AT&T has taken unreasonable positions and in claiming that AT&T's OPT-E-MAN service is an essential input to TWTC's retail Ethernet services.

4. AT&T's OPT-E-MAN proposals to TWTC have done nothing to limit TWTC's ability to compete in the market for retail Ethernet services. The market for retail Ethernet services is, without a doubt, highly competitive. Yet, AT&T currently sells very little of its OPT-E-MAN to unaffiliated carrier customers, and the competition for Ethernet has developed almost completely without OPT-E-MAN. Consequently, AT&T's OPT-E-MAN can in no way be considered some kind of necessary input to retail Ethernet services. To the contrary, AT&T is trying to get this new product into the market. To attract carrier customers to AT&T's OPT-E-MAN product, AT&T is compelled by market forces to offer reasonable terms.

5. Further, with respect to the TWTC negotiations for OPT-E-MAN, in contrast to its claim here that AT&T is insisting on unreasonable prices, for example, **[BEGIN TWTC PROPRIETARY]**

¹ **[END TWTC PROPRIETARY]**. And in contrast to its claims here that it cannot compete in the retail Ethernet business without a better OPT-E-MAN deal from AT&T,

¹ TWTC Counter Proposal to AT&T, May 8, 2006, p. 2.

TWTC issued a press release -- the day after it filed its comments in this proceeding -- in which it touted its new arrangement with Overture Networks as enabling TWTC “to *cost-effectively* deliver [its] industry-leading Ethernet portfolio to businesses *anywhere*.”² TWTC’s filings with the Commission raise no valid concerns about Ethernet services, and the specific price terms for TWTC’s custom tariff arrangements, as well as the terms for the other “minor” technical concerns raised by TWTC, can and should be resolved at the bargaining table.

6. In this declaration, I also respond to the charge of EarthLink, Inc. (“EarthLink”) that “AT&T has stalled negotiations and/or refused to negotiate any broadband transmission arrangements.”³ This allegation, too, is an attempt by EarthLink improperly to take advantage of this merger proceeding to gain leverage in its commercial relationship with AT&T.

I. RETAIL ETHERNET PROVIDERS CAN OFFER SERVICES EITHER THROUGH SELF-PROVISIONING OR BY PURCHASING “FINISHED” ETHERNET ACCESS SERVICES OFFERED BY NUMEROUS WHOLESALE PROVIDERS.

7. Before addressing the substance of TWTC’s claims, TWTC’s terminology is somewhat misleading, to the extent it implies that a special type of loop exists that is needed to provide Ethernet services to end users. That is simply not true. To put TWTC’s arguments in a proper context, I explain briefly what Ethernet services are and what equipment and facilities are needed to provide Ethernet services to end users.

8. Retail Ethernet services are a type of advanced service that allows business customers to connect local area networks, or LANs, across multiple locations in a metropolitan area. Ethernet services can provide customers with multiple uplink speeds and a variety of network configurations, depending on the customers’ needs. Ethernet is simply a protocol.

² Time Warner Telecom, Press Release, at 1, June 6, 2006.

³ EarthLink Pet. at 30.

Ethernet services can be provided over several types of network architecture, which are available from several competing providers.

9. To offer Ethernet Services, a provider deploys Ethernet switches and Ethernet equipment at the customers' premises that connects to the customers' LANs. Ethernet providers then use dedicated transmission facilities to connect customers' LANs to Ethernet routers and switches. However, they do not need special facilities, such as "Ethernet loops." In fact, there is no such thing as an "Ethernet loop." Rather, Ethernet providers can use ordinary dedicated transmission facilities that are also used for other types of services. Typically, fiber facilities are used, but copper loops can also support Ethernet services at some speeds.

10. Accordingly, a retail Ethernet provider like TWTC can readily self-provision Ethernet services. All that is necessary is for the retail Ethernet provider to deploy its own loop facilities (or obtain them from another provider as special access or private line services or through IRU or other arrangements), attach the necessary Ethernet electronics, and then sell the retail Ethernet services to end users. For customer locations with large demand, the retail provider will typically use OCn-level fiber facilities. For smaller locations that do not require the highest Ethernet speeds, the retail provider can use basic DS1 or DS3 special access circuits. Numerous retail Ethernet providers, including TWTC, AT&T and others, offer retail Ethernet services through this method today.⁴

11. Retail Ethernet providers increasingly have an additional option for providing services. In response to market demand, a number of companies offer "finished" wholesale Ethernet access services, in which the wholesale provider combines fiber loops with Ethernet

⁴ 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.").

electronics and management. Some providers also have developed (or are developing) Ethernet access services that use copper loops. These services essentially provide a retail Ethernet provider with optical connectivity to its customers using a single point hand-off.

12. If a carrier purchases one of these finished services, it does not need to deploy its own personnel to the customer's premises to install or to maintain Ethernet equipment. Rather, it outsources these functions to the wholesale Ethernet provider. The end user's traffic is routed over the facilities and electronics provided by the wholesale Ethernet provider, which then routes all of the traffic to the retail Ethernet provider at a collocation facility or a POP.

13. Wholesale "finished" Ethernet services are relatively new. AT&T, for example, first offered its wholesale switched Ethernet service – which it calls OPT-E-MAN – beginning in about March 2005.⁵

II. THERE ARE MANY PROVIDERS OF WHOLESALE ETHERNET SERVICES.

14. Like other high-capacity services provided to enterprise and carrier customers, the provision of Ethernet Services is highly competitive, with a variety of providers offering services, both wholesale and retail. All of the major cable companies are taking advantage of their ubiquitous fiber networks to offer Ethernet access services.⁶ There are also numerous

⁵ AT&T also offers a high-capacity, dedicated Ethernet service called Gigaman. This declaration relates to the switched OPT-E-MAN service.

⁶ See, e.g., Press Release, Cablevision Systems Corporation, Optimum Lightpath - First Cable MSO to Earn Metro-E Forum's Carrier Ethernet Certification (April 26, 2006) <http://www.optimumlightpath.com/Interior187-3.html> (describing Cablevision's E-line and E-LAN services offerings for enterprise customers through its Optimum Lightpath business telecommunications services division); Cox Optical Internet, http://www.coxbusiness.com/pdfs/cox_optical.pdf (last visited June 7, 2006), at 2 (offering Gigabit Ethernet service to business customers); Press Release, Artica, New Atrica A-2160 Outdoor Carrier Ethernet Edge Switch Extends Network Operator Points of Presence Virtually to Anywhere (April 5, 2006), <http://www.atrica.com/landing.php?page=31s77> ("Cox Business Services continues to experience significant growth in our Carrier Ethernet service offerings," said Andrew Redman, a Senior Network Engineer at Cox.); Time Warner Cable, "Metro

companies that actively provide *wholesale* Ethernet access to retail Ethernet providers like TWTC. These include CLECs like Level 3, XO, Global Capacity Group, and USCarrier Telecom.⁷ TWTC itself provides wholesale Ethernet access services.

15. Thus, a retail Ethernet provider typically has a variety of options in deciding how to provide its services. As described above, it can self-provision a retail Ethernet service by deploying or leasing its own loops and combining them with its own Ethernet electronics. Alternatively, it can purchase a wholesale service from an alternative provider like one of the companies discussed above. Or, it can purchase similar services from an incumbent LEC.

16. AT&T's Ethernet service, available to both retail and wholesale customers, is called "OPT-E-MAN." A copy of the FCC tariff for this service is available online.⁸ As the

Ethernet Services," http://www.twc-sa.com/business/bs_eos_m.asp (stating that its "substantial Metro Ethernet network is solely owned and operated locally by Time Warner Cable"); Cisco Systems, "With Cisco, Comcast Scales Its Commercial Metro Services and Company Reach," http://www.cisco.com/en/US/products/hw/switches/ps5023/products_customer_success_story0900aecd8013dfeb.html (describing Comcast's Ethernet offerings); Cisco Systems, "Charter Business Delivers Flexible Metro Ethernet-Based Services," http://www.cisco.com/en/US/netsol/ns465/networking_solutions_customer_profile0900aecd80361014.html (same).

⁷ See, e.g., Level 3 Metro Ethernet Private Line Service, <http://www.level3.com/3257.html> (last visited June 7, 2006) (describing Ethernet service offered to carriers); Level 3 Ethernet VPN Service, <http://www.level3.com/1505.html> (last visited June 7, 2006) (same); XO Carrier Ethernet Services, <http://www.xo.com/products/carrier/transport/Ethernet/index.html> (last visited June 6, 2006); see also Press Release, Global Capacity Group, Inc., Global Capacity Group Offers Carriers Cost-Effective Customer Access Strategy with Flat-Rate Ethernet Service (Feb. 27, 2006), <http://host.issupport.com/GCG/News/feb27release.htm> (announcing offering of a "flat-rate Ethernet product to provide carriers a cost-effective network access strategy for customers in remote, off-net locations[]" that is available in 41 states and "delivers a completely transparent, totally secure Layer 2 extension of the carrier's MPLS backbone directly to the customer premise"); USCarrier Telecom Carrier Solutions, <http://www.uscarrier.com/carriersolutions.htm> (last visited June 7, 2006) ("Other services provided include wholesale Internet access ports with speeds to gigabit levels"); Press Release, USCarrier Telecom LLC, Southeast wholesaler offers long-haul Ethernet (June 29, 2004), <http://www.uscarrier.com/pressroom10.htm>; Press Release, USCarrier Telecom LLC, US Carrier Telecom Selects Fujitsu Platforms for E-Max 1000 Long-Haul Wholesale Ethernet Service (February 9, 2004), <http://www.uscarrier.com/pressroom12.htm>.

tariff states, “OPT-E-MAN provides an integrated service consisting of fiber transport connected to an Ethernet device capable of switching [and] provides dedicated bandwidth ranging from 5 Mbps to 1 Gbps. Customers may connect to the service using a router, bridge, or a switch.”⁹ AT&T is deploying the technology that supports OPT-E-MAN on a central office-by-central office basis. AT&T’s interstate OPT-E-MAN is available in [BEGIN AT&T PROPRIETARY]

[END AT&T PROPRIETARY]

AT&T offers the OPT-E-MAN service on a month-to-month basis and under discounted term plans.

17. In addition, for carriers that seek individualized terms and conditions that meet their specific business needs, AT&T stands ready to negotiate terms and conditions for a contract tariff for these Ethernet access services (in pricing flexibility areas once pricing flexibility is granted). AT&T has begun contract tariff negotiations with a number of providers. If AT&T obtains pricing flexibility relief, it will be able to offer the types of customized arrangements that these providers seek. As described in more detail below, AT&T is currently negotiating with TWTC for a contract tariff that includes OPT-E-MAN services.

18. To date, AT&T has sold very little OPT-E-MAN services to unaffiliated carrier-customers. This fact is significant for two reasons. First, it shows that the retail market for Ethernet Services has developed and is highly competitive even *without* the availability of OPT-

⁸ http://www.sbc.com/Large-Files/RIMS/Federal/SWBT/Tariff_No._73/fd730043.pdf.

⁹ Southwestern Bell Tel. Co., Tariff F.C.C. No. 73, § 43.1, 2d Rev. Page 43-1 (eff. May 4, 2005).

E-MAN as an input. Second, AT&T has filed a Petition at the Commission to obtain pricing flexibility for OPT-E-MAN services.¹⁰ The Petition is still pending.

III. AT&T'S OPT-E-MAN SERVICE IS NOT AN ESSENTIAL INPUT TO TWTC'S SUCCESSFUL RETAIL ETHERNET SERVICES.

19. In a press release reporting its results for the first quarter of 2006, TWTC announced that its revenues for data and Internet services grew by 31% compared to first quarter 2005 – an increase that TWTC said was “*due to success with Ethernet and IP-based product sales.*”¹¹ Further, on June 6, 2006, the day after it filed its comments in this proceeding, TWTC issued a press release announcing its new arrangement with Ethernet provider Overture Networks that gives TWTC a “‘branch office’ solution [that] enables us to cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere.”¹² According to TWTC, this “branch office” access is designed to allow TWTC to provide Ethernet services in areas where TWTC does not already have facilities in place to serve a particular customer location and where “it may be uneconomical to directly connect” to TWTC’s network.¹³ In other words, TWTC does not require AT&T’s OPT-E-MAN service (or any other provider’s wholesale Ethernet access service), because this Overture arrangement allows it “to cost-effectively deliver” its Ethernet services “anywhere” using standard special access (loop) facilities. In light of these statements, TWTC’s assertions that it “must obtain access to Ethernet transmission facilities from the ILEC” and cannot “rely on DS1 or DS3 local transmission facilities” ring

¹⁰ SBC *Ex Parte* Letter from Davida Grant to Marlene Dortch, WC Docket No. 03-250 (filed Nov. 15, 2005).

¹¹ Time Warner Telecom, Press Release, at 2, June 6, 2006.

¹² *Id.* at 1.

¹³ *Id.*

hollow. TWTC's public statements confirm that, as described above, TWTC is fully capable of continuing to self-provision retail Ethernet services by using its own loops or leasing special access facilities from incumbent LECs or other competitive providers to connect its customers' networks to TWTC's Ethernet equipment.

20. Further, based on my dealings with TWTC, I can confirm that TWTC has a long history of buying special access services, and then connecting Ethernet equipment to these circuits to provide retail Ethernet services. TWTC's ability to self-provision Ethernet services has been significantly enhanced by a pricing flexibility agreement that it entered into with AT&T only a year ago. **[BEGIN AT&T PROPRIETARY]**

[END AT&T PROPRIETARY]

At the time the contract was signed, TWTC stated that the contract "strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market."¹⁴

21. TWTC complains that if it uses DS1 or DS3 special access circuits, it will "incur extra costs of equipment and encounter service degradation."¹⁵ TWTC's declarant provides no

¹⁴ See "Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement," joint news release issued June 1, 2005, by TWT, AT&T, and SBC, at 2.

¹⁵ Taylor Decl. ¶ 26; *see id.* ¶ 43.

description or quantification of these “extra costs.” He certainly makes no effort to quantify these supposed costs or to explain how they have impeded TWTC’s provision of Ethernet services. It is true that, compared to a carrier that purchases “finished” Ethernet access services like AT&T’s OPT-E-MAN, a carrier that self-provisions Ethernet services over its own loops or special access circuits will need to purchase Ethernet electronics to be placed at the customer’s premises and at its collocation facilities or POP. But these facilities must also be deployed if the retail provider purchases a finished Ethernet access service. In that case, it is the wholesale Ethernet provider that purchases and deploys the Ethernet electronics, the costs of which are then included in the overall rate for the finished Ethernet access service. Thus, the so-called “extra costs” discussed by TWTC are not really “extra” at all. They are simply the costs that any provider incurs in order to offer end users the features and functionality associated with Ethernet services.

22. I also do not agree with TWTC’s claim that the commonplace use of DS1 and DS3 special access circuits to provide retail Ethernet services leads to “service degradation.”¹⁶ This argument is certainly undercut by the fact that a number of carriers, including TWTC, AT&T and others, currently – and quite successfully – use special access circuits to provide Ethernet services to end users.¹⁷ In addition, it is important to note that when Ethernet providers lease special access circuits, they obtain use of the entire circuit. As such, the Ethernet providers control the traffic that flows over the circuits, and would be able to install Ethernet equipment that could establish class of service and prioritization commitments for IP and other traffic.

¹⁶ *Id.* ¶ 26.

¹⁷ See Taylor Decl. ¶ 43 (“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.”).

IV. TWTC'S COMPLAINTS REGARDING AT&T PRICES AND TERMS FOR FINISHED ETHERNET ACCESS ARE A TRANSPARENT NEGOTIATING PLOY, NOT A VALID CLAIM OF DISCRIMINATION.

23. Despite its ability to self-provision Ethernet services, TWTC argues that it requires access to AT&T's OPT-E-MAN services, and that i) TWTC "has been negotiating for over a year to obtain reasonable rates for Ethernet services, without success;" ii) TWTC "cannot possibly compete by relying [on] Ethernet [access] under the prices, terms, and conditions offered by AT&T; and iii) AT&T has engaged in "discrimination" against TWTC.¹⁸ These claims are untrue.

A. AT&T Has Not Stonewalled Negotiations With TWTC.

24. [BEGIN TWTC PROPRIETARY]

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¹⁸ TWTC Comments at 46-47, 49.

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B. AT&T's Pricing Offers For Ethernet Access Services Are Reasonable.

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¹⁹ TWTC Counter Proposal to AT&T, May 8, 2006, p. 2 (emphasis added).

²⁰ Taylor Decl. ¶ 32.

²¹ Taylor Decl. ¶ 35.

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²² *Id.*

²³ Taylor Decl. ¶¶ 36-37.

C. AT&T Has Not Stonewalled TWTC On The Few Technical Issues That The Parties Have Not Yet Resolved In Their Ongoing Negotiations.

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²⁴ *Id.* ¶ 39.

²⁵ Taylor Decl. ¶ 40.

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²⁶ *Id.* ¶ 42.

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[END TWTC PROPRIETARY].

V. THERE IS NO MERIT TO TWTC'S CLAIMS REGARDING SPECIAL ACCESS PERFORMANCE METRICS.

41. TWTC contends that “BellSouth provides substantially better performance metrics and pricing terms in its contract tariffs than AT&T.”²⁸ TWTC’s criticisms of the AT&T contract tariff, however, have no merit. In the first place, the various provisions of the AT&T tariff that TWTC criticizes reflect the five-year contract tariff which was negotiated *and agreed to* by TWTC with AT&T just one year ago.²⁹

²⁷ Taylor Decl. ¶ 38.

²⁸ TWTC Comments at 70.

²⁹ See TWTC Comments at 70 n.125 (“These contract tariffs are the publicly available versions [of] agreements by TWT with AT&T and BellSouth”).

42. AT&T entered into this contract for the specific benefit of TWTC, which preferred such a contract to using the provisions of AT&T's access service tariff which are available to all customers, including the Managed Value Plan and performance guarantees regarding missed installations and service interruptions.³⁰ When the parties jointly announced their agreement in June 2005, TWTC – far from characterizing it as “extremely onerous” – stated that the contract “strengthens Time Warner Telecom’s ability to compete effectively for the nationwide business market.”³¹

43. In fact, as I recall, TWTC’s declarant was personally involved in negotiating the terms of the contract tariff related to performance measurements. TWTC specifically agreed in the contract that when AT&T did not meet the applicable performance targets, any credits (funds) due to TWTC would be used to improve service delivery and performance, rather than be paid directly to TWTC.³² TWTC’s current view that such an arrangement is unreasonable is specious. Given a choice between using the funds to improve performance, on the one hand, and receiving the funds directly (with performance continuing at its present level), on the other, a customer could reasonably prefer the former – which was exactly what TWTC agreed to just one year ago.

³⁰ These performance guarantees, including the credits that are paid and the additional credits available to customers when service outages exceed the applicable Service Assurance Warranty threshold, are described in detail in the Dysart/Watkins/Kissel Declaration. TWTC, in fact, can still receive these credits in addition to the credits available under its contract with AT&T.

³¹ See “Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement,” joint news release issued June 1, 2005, by TWT, AT&T, and SBC, at 2.

³² See TWTC Comments at 70; Pacific Bell Telephone Company Tariff FCC No. 1, § 33.56.5(F)(1) (“AT&T Tariff”).

44. Moreover, TWTC neglects to mention benefits that it derives from the AT&T tariff that it does not receive from BellSouth's.³³ For example, the performance standards for each of the metrics (the Service Level Assurances, or "SLAs") in the AT&T tariff become more stringent over the term of the five-year contract, whereas the performance standards in BellSouth's tariff remain the same during the three-year tariff period.³⁴ AT&T's tariff also waives all non-recurring charges associated with the purchase of the services subject to the contract, whereas the BellSouth contract tariff cited by TWTC does not.³⁵ In view of these and other benefits that it receives under the AT&T tariff, it is hardly surprising that TWTC agreed to the specific tariff provisions of which it now complains.

45. Once again, TWTC ignores the big picture. It selects isolated terms from an entire tariff or agreement, and then compares AT&T's position on that single term with the offers made by other carriers. This approach ignores the fact that, for other terms, AT&T's offer is more favorable, and that a reasonable retail provider could decide that, on balance, the advantages that it can obtain from the AT&T-favorable terms outweigh the disadvantages associated with the terms that other providers offer more favorably.

³³ Contrary to TWTC's assertion that "AT&T only agreed to three" metrics (*id.*), AT&T agreed to four metrics: network availability, Mean Time to Repair (DS-1 only), Mean Time to Repair (DS-3 and OCN), and On-Time Delivery – Due Date (DS-1 – OCN). See AT&T Tariff, § 33.56.5(E) (Table E).

³⁴ AT&T Tariff, § 33.56.5 (Table E); BellSouth Tariff F.C.C. No. 1, §§ 25.29.1(A)(1), 25.29.2(B). For example, under AT&T's tariff, the SLA with respect to network availability is 99.93% during the first year of the contract, 99.96% during the second and third years of the contract, and 99.99% in the fourth and fifth years of the contract. For On-Time Delivery – Due Date, the SLAs are 96% during the first year, 96.5% during the second and third years, and 97% during the fourth and fifth years. *Id.*

³⁵ AT&T Tariff, § 33.56.5(C).

VI. EARTHLINK’S CLAIMS REGARDING BROADBAND TRANSMISSION ARRANGEMENTS ARE AN IMPROPER ATTEMPT TO TAKE ADVANTAGE OF THIS MERGER PROCEEDING TO GAIN LEVERAGE IN ITS COMMERCIAL RELATIONSHIP WITH AT&T.

46. EarthLink and its CLEC subsidiary, New Edge Network, Inc. (“New Edge”) have contracts for broadband transmission services from AT&T. However, in light of the FCC’s recent deregulation of these broadband transmission services,³⁶ EarthLink and New Edge have sought to enter into new long-term commercial agreements with AT&T.

47. The *Wireline Broadband Order* created a revolutionary change in the regulatory framework governing the provision of broadband transmission services. In particular, it eliminated the obligation of carriers like AT&T “to offer the transmission component of wireline broadband Internet access service on a stand-alone common carrier basis.”³⁷ The FCC took these steps “to let wireline broadband Internet access service providers . . . produce new or improved services in response to consumer demands.”³⁸

48. To give providers and customers “sufficient time to adjust to [the Commission’s] new [regulatory] framework” – to determine which services they want to provide or obtain and to put the necessary agreements into place – the Commission adopted a one-year transition period, until November 16 of this year, during which the status quo has been frozen.³⁹

³⁶ See *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (2005) (“*Wireline Broadband Order*”), appeal docketed sub nom. *Time Warner Telecom v. FCC*, No. 05-4769 (3d Cir.).

³⁷ *Id.* at 14899, ¶ 86.

³⁸ *Id.* at 14890, ¶ 71; see *id.* at 14891-92, ¶¶ 71-73.

³⁹ *Id.* at 14905 ¶ 98.