49. As encouraged by the Commission, AT&T has been using this transition period to reexamine its wireline broadband product portfolio. Because of this ongoing review, AT&T has not been able to make commitments to its wholesale customers like EarthLink about which products will be available going forward.

50. Nevertheless, AT&T is eager to continue its relationship with EarthLink , and AT&T began discussions with EarthLink a few months ago on a new long-term commercial agreement.. AT&T fully expects to continue negotiations with EarthLink.

51. With respect to New Edge, AT&T has not yet been ready to discuss the specifics of their future relationship – both because of AT&T's transitional planning process but also because **[BEGIN AT&T PROPRIETARY]**

[END AT&T PROPRIETARY]

I hereby declare under penalty of perjury that the foregoing is true and accurate to the best of my knowledge and belief.

Executed on June 19, 2006

Parley C. Casto

Reply Declaration of
William L. Dysart, Ronald
A. Watkins & Brett Kissel

JOINT DECLARATION OF WILLIAM L. DYSART, RONALD A. WATKINS, AND BRETT KISSEL

I, William R. Dysart, hereby declare the following:

I, Ronald A. Watkins, hereby declare the following:

I, Brett Kissel, hereby declare the following:

I. QUALIFICATIONS

1. I, William R. Dysart, am Director – Performance Measurements for AT&T. My organization is responsible for collecting, validating and publishing wholesale performance measurements data associated with interconnection agreements ("ICAs") for AT&T's Southwest region and commercial agreements for the 13 AT&T states for internal and external use. In addition, I am responsible for the negotiation and implementation of changes, additions, or deletions of performance measurements for these ICAs and commercial agreements.

2. I, Ronald A. Watkins, am Director – Service Support for AT&T. AT&T's Service Support group is responsible for properly extracting, sorting, validating, and formatting the data required by AT&T's Federal Regulatory Group and submitting the data to that group.

3. I, Brett Kissel, am a Director – Regulatory Compliance for AT&T. The Regulatory Compliance organization is responsible for assisting in the development, implementation, maintenance and adherence to corporate policies and procedures that ensure compliance with the structural, transactional and non-discrimination requirements of Section 272 of the Telecommunications Act of 1996 ("the Act"). In my current position, I am responsible for coordinating the AT&T Inc. Section 272 biennial audit and participating on the Regulatory Compliance team responsible for overseeing all aspects of Section 272 compliance within the corporation.

II. INTRODUCTION AND OVERVIEW

4. The purpose of this Declaration is to address two claims made by certain opponents of the merger. Some opponents claim that the larger AT&T "footprint" resulting from the merger will increase the Applicants' incentives to discriminate against rivals, causing adverse effects on competition in the markets for mass-market, enterprise, and advanced services customers.[1] In addition, some opponents contend that multiple ILEC "benchmarks" are necessary in order to detect (and prevent) such discrimination by Applicants.[2] In advancing these arguments, merger opponents frequently cite to prior Commission decisions on earlier ILEC mergers. These arguments, however, ignore hard realities.

5. First, the data that AT&T has been reporting since 1999 pursuant to performance plans and voluntary commitments show that AT&T in fact provides UNEs, interconnection, and special access on a nondiscriminatory basis. Data reported pursuant to performance plans, for example, show that AT&T's performance in the provisioning of UNEs and interconnection has improved since this Commission approved the merger of SBC and Ameritech in 1999. Furthermore, the data that AT&T provided to independent auditors during their recently-completed biennial audit under Section 272 demonstrate that AT&T complies with the parity requirements of that statute in the provisioning of special access. Indeed, despite this Commission's invitation, not a single party chose to file comments on AT&T's latest audit report, which covered the period from July 10, 2003, to July 9, 2005.

---

[1] *See* Petition to Deny of Access Point ("Access Point Pet.") at 20-24; Comments of Cbeyond Communications ("Cbyond Comments") at 88-92; Comments of Sprint Nextel Corp. ("Sprint-Nextel Comments") at 6-9; Petition to Deny of Time Warner Telecom ("TWTC Pet.") at 42-45.

[2] *See, e.g.,* Access Point Pet. at 13-20, 24-28; Cbeyond Comments, at 78-88; Petition to Deny of EarthLink, Inc. at 32-36; Comments of New Jersey Division of the Ratepayer Advocate at 18-19; Declaration of Susan Baldwin & Sarah Bosley ¶¶ 199-212; Sprint Nextel Comments at 9-11; TWTC Pet. at 49-72.

6. Second, the relevant marketplace conditions that exist today are substantially different than in 1999, when the FCC last addressed the issues of discrimination and benchmarking in the context of merger proceedings. In contrast to 1999, the ILECs' obligations under the Act with respect to UNEs and interconnection have now been given content by comprehensive performance plans and performance standards approved by state commissions.

7. Pursuant to these performance plans, both AT&T and BellSouth have reported voluminous data on hundreds of metrics that measure virtually every aspect of their performance in the provisioning of UNEs and interconnection.[3] In addition, AT&T has committed to tracking and maintaining (and has tracked and maintained) additional data on its performance in other areas, including data on special access that it provides to the independent auditors who review its compliance with Section 272 of the Act, as well as to carrier customers upon request. AT&T also offers additional performance guarantees in its special access tariffs, including negotiated "contract tariffs" with standards that meet the demands of specific customers.

8. Given the existence of these established reporting mechanisms, as well as the now-extensive historical record of its performance, AT&T has neither the incentive nor the ability to discriminate against competitors going forward. Any discrimination or poor performance by AT&T would be readily apparent from the data it will continue to report and make available for review. The self-executing remedy provisions of its performance plans provide a further disincentive to discriminate by requiring AT&T to pay liquidated damages for substandard performance. In any event, discriminating against CLECs would be contrary to the

---

[3] BellSouth's performance under its performance plans is discussed in the accompanying declaration of Ronald Pate.

economic interests of AT&T, which would stand to lose profits as a result of the business it would lose through such discrimination.

9. The host of data that AT&T reports on its performance also removes any need for "benchmarking" to ensure nondiscriminatory performance. The existing and future data from those reports are more than sufficient to gauge the adequacy of AT&T's performance without any need to "benchmark" it against the performance of other ILECs.

III. AT&T'S WHOLESALE PERFORMANCE IS SUBJECT TO EXTENSIVE DATA REPORTING REQUIREMENTS AND PERFORMANCE STANDARDS WHICH ENSURE THAT IT PROVIDES NONDISCRIMINATORY ACCESS TO UNES, INTERCONNECTION AND SPECIAL ACCESS.

10. Since 1999, AT&T has maintained voluminous data on its performance, both under required performance plans and pursuant to voluntary service guarantees that AT&T has offered to wholesale customers in response to competition. These data make any discrimination or other substandard performance easy to detect, and they remove any ability or incentive for AT&T to discriminate against its competitors. Moreover, they make it unnecessary to "benchmark" AT&T's performance against that of other ILECs.

A. Since 1999, AT&T Has Maintained and Reported Voluminous Data on Its Performance Pursuant To Required Performance Plans and Voluntarily Adopted Service Guarantees.

11. When the Commission was considering the SBC/Ameritech and Verizon/GTE mergers in 1999, performance plans and performance standards regarding UNEs and interconnection had not been fully developed or implemented. In many states, such plans and standards were still in the process of being developed (if they were being developed at all).[4]

---

[4] In its Southwest region, for example, some performance plans had been adopted in arbitration proceedings for individual CLECs (such as AT&T) by 1998. However, a performance plan was not in place for the entire Southwestern Bell region until August 1999, when such a plan was (Continued)

12. The situation today is totally different from that in 1999. The market-opening obligations of ILECs under the 1996 Act regarding UNEs and interconnection have now been given content by comprehensive – and demanding – performance plans and performance standards that have been approved by regulatory commissions and that give both regulators and CLECs the ability to monitor the ILECs' performance in providing UNEs and interconnection. AT&T has also voluntarily committed itself to certain other service guarantees that give customers additional assurances that AT&T will render adequate performance. Furthermore, data regarding AT&T's performance with respect to special access have been tested by independent auditors and made subject to public comment pursuant to Section 272 of the Act. This wealth of information dispels any notion that AT&T has acted in a discriminatory manner in the past or that it could do so in the future without being detected. As a result, there is also no credible basis for a claim that the merger will eliminate any necessary "benchmarks" for AT&T's future performance.

1. Performance Plans and Performance Standards

13. Since 1999, state regulatory commissions – including the commissions in each of the states in AT&T's three BOC regions – have approved performance plans that contain performance standards ensuring that the AT&T ILECs provide wholesale customers with nondiscriminatory access to UNEs and interconnection. Each performance plan requires

---

(Continued from previous page)
included in the Texas 271 interconnection agreement ("T2A") approved by the Texas Public Utility Commission ("TPUC"). That plan was further modified by the TPUC in September 1999. Performance plans in many other states were developed in the context of state Section 271 proceedings. As of the time the Commission issued its decisions on the SBC/Ameritech and Bell Atlantic/GTE mergers, only a few Section 271 applications had been filed with this Commission, and all of them had been rejected. Moreover, many state Section 271 proceedings (and their associated performance plans) were not completed until well after 1999.

AT&T's ILECs to report data for a host of disaggregated measurements, thereby enabling regulators and competitors to determine whether each ILEC's performance meets the statutory standards. Both the performance standards and the reported data are supervised by state regulators. In addition, AT&T maintains data and standards that allow the adequacy of its performance for other offerings, including special access, to be determined.

14. Performance plans are now well-established in every state. Each of these plans contains numerous metrics on UNEs and interconnection for which the AT&T ILECs report data on a regular basis. The performance plans also prescribe performance standards for most of these metrics (either a specific benchmark or parity requirement) that the ILEC is required to meet.

15. In California and the former Ameritech states (now AT&T's Midwest region), for example, the applicable performance plans contain more than 1,000 metrics or submetrics for which AT&T is required to pay liquidated damages if the data it reports show that it has not met the applicable performance standards. The number of such metrics and submetrics in performance plans in other states in AT&T's regions ranges from 165 to 700.[5] Although AT&T is required to report data only for those metrics and submetrics where actual transactions have occurred, AT&T nonetheless regularly reports data for hundreds of separate metrics and submetrics in the states in its region (more than 400 in California and 350 in Illinois, for example).

---

[5] These figures do not include additional metrics in performance plans for which a performance standard has been established, but as to which AT&T is not required under the plan to pay liquidated damages. Nor do these figures include additional "diagnostic" metrics for which no performance standard is established in the plans but which are nevertheless tracked.

16. These metrics and submetrics measure virtually every aspect of AT&T's performance with respect to the pre-ordering, ordering, provisioning, maintenance, and repair of UNEs and interconnection. Each of the performance plans provides remedies, usually in the form of payments or discounts by AT&T, if AT&T does not meet the applicable performance standard for certain metrics. Such remedies are self-executing; that is, the performance plan requires AT&T to pay liquidated damages to customers and/or to a regulatory agency if it fails to meet the performance standard for a particular metric, and the customer or agency is entitled to immediate payment, without the need for regulatory or other intervention.

17. Contrary to the claims of some merger opponents, the liquidated damages and remedies under the performance plans can be substantial. For example, with respect to the installation of an 8db POTS loops (2-wire analog non-design loops) in AT&T's Southwest region, the performance standard is that 95 percent of such loops must be installed by the due date requested by the customer. Under the stand-alone remedy agreement in AT&T's Southwest region,[6] AT&T must pay $125 *per occurrence* for failure to meet the applicable performance standard during the month, $250 per occurrence if AT&T fails to meet the standard for two consecutive months, and progressively higher payments per occurrence with each additional consecutive month of noncompliance. Given current order volumes, AT&T would be required to pay hundreds of thousands, or even millions, of dollars in liquidated damages for poor performance. For instance, if for two consecutive months AT&T failed to install 50 percent of 8

---

[6] Until late 2005, remedy provisions were included in the interconnection agreements ("ICAs") that AT&T entered into with customers in its Southwest region. Since late 2005, AT&T has offered customers in that region a stand-alone remedy agreement (separate from the ICA) that requires AT&T to pay liquidated damages when it does not meet the applicable performance standards. Customers who decide not to enter into the stand-alone remedy agreement may pursue any appropriate legal remedies in court. In AT&T's Midwest and West regions, remedy provisions are still part of the ICAs.

db POTS loops in Texas by the customer-requested due date, the liquidated damages could exceed $1 million.[7]

18. Some of the opponents have also asserted that AT&T "does not pay" the penalties or damages required by state performance plans or remedy plans.[8] Opponents provide no details or elaboration to support their one-sentence assertion. In any event, their accusations are false. AT&T has paid to CLECs the liquidated damages required by performance and remedy plans, within the time limits set by the plans. To the best of AT&T's knowledge, it has never withheld payments or credits that were due to CLECs under the plans.[9]

2. Voluntarily Adopted Service Guarantees

19. As described in AT&T's Public Interest Statement, AT&T faces substantial wholesale and retail competition from carriers who do not depend on AT&T for so-called "bottleneck" inputs. Instead, such carriers have facilities of their own that enable them to serve

---

[7] This scenario assumes that (1) AT&T received 10,000 orders in a given month for 8 db POTS loops (a figure that is close to the actual 9,240 orders for such loops that AT&T received in Texas in March 2006); (2) the 10,000 orders consisted of 200 orders each from 50 CLECs who had entered into the stand-alone remedy agreement; and (3) for each CLEC, AT&T installed only 50 percent of orders by the customer-requested due date. For purposes of this scenario, the "critical value" – the number of orders below which AT&T failed to satisfy the 95 percent standards – was 185 orders for each CLEC under the Binomial Exact Test provided for in the stand-alone remedy agreement. Thus, for the 85 orders per CLEC that fell short of the critical value (185 orders minus the 100 orders that did meet the applicable standard), AT&T could be liable for $1,062,500 in liquidated damages if it failed to meet the standard for each CLEC for two consecutive months (85 orders x $250/order x 50 CLECs).

[8] Cbeyond Comments at 85; Cbeyond Comments, James C. Falvey Declaration ¶¶ 14; Cbeyond Comments, Lisa R.Youngers Declaration ¶ 7.

[9] Similarly, to the extent that AT&T's special access tariffs require the issuance of a credit to the customer when AT&T does not meet certain performance standards with respect to such services, AT&T automatically generates such credits each time its performance fails to meet the standards.

customers without using the "last mile" of AT&T's network. Much of this competition – including wireless carriers, cable companies, and VoIP carriers – did not even exist in 1999.

20. Because of the presence of facilities-based intramodal and intermodal competition, AT&T offers additional services and service guarantees that are designed to retain its existing customers and attract new ones. Two examples of such competition-driven offerings are: (1) AT&T's Local Wholesale Complete ("LWC") offering, which is designed to provide competitive local service providers with a commercial replacement for the former UNE platform ("UNE-P"); and (2) the various service guarantees and volume discounts that AT&T offers under its access service tariffs.

a. AT&T's Local Wholesale Complete ("LWC") Offering

21. LWC, which is offered to competitors throughout AT&T's 13-state region, includes local telephony service as well as traditional switch-based vertical features and other services such as operator service and directory assistance. Although AT&T is under no regulatory obligation to provide LWC, AT&T began offering it in April 2004 as a commercial alternative to the UNE-P for those wholesale customers who might otherwise use alternative service arrangements or providers.

22. To date, AT&T has entered into approximately 100 LWC Agreements with competitors. Pursuant to those agreements, competitors have used LWC to win millions of retail access lines. As of March 2006, unaffiliated wholesale customers who have LWC agreements with AT&T served more than 2,400,000 lines via LWC in AT&T's 13-state region.[10]

---

[10] This figure does not include lines served by competitors who were purchasing the UNE-P from AT&T prior to the Commission's *Triennial Review Remand Order* but have not entered into LWC Agreements. Although AT&T no longer provides UNE-P as such to these customers (having been relieved of the obligation to provide UNE-P by the *Triennial Review Remand Order*), AT&T now provides them with Wholesale Local Switching ("WLS"), which is the
(Continued)

23. As part of its LWC offering – and in response to the pressures of competition – AT&T voluntarily offers a "Service Assurance Plan" which includes certain metrics that measure AT&T's performance at key stages of the pre-ordering, ordering, provisioning, and maintenance processes. The Service Assurance Plan sets forth performance standards for each metric and requires AT&T to give credits to the customer for certain substandard performance.

24. The six metrics in the "generic" Service Assurance Plan are: (1) OSS Interface Availability; (2) Mechanized Order Completion Notification Timeliness; (3) Percent AT&T-Caused Missed Due Dates; (4) Installation Quality; (5) Repeat Trouble Report Rate; and (6) Out of Service Within 48 Hours. A table providing the definitions of these metrics and the performance standard for each metric is attached hereto as Attachment 1. AT&T's business rules governing these metrics are attached hereto as Attachment 2. AT&T included these particular metrics and standards in the Service Assurance Plan because it believes that they ensure quality service both to wholesale customers and to their end-user-customers.

25. Under the generic Service Assurance Plan, AT&T may be required to pay "service level assurance payments," or "service credits," to a particular LWC customer for failure to meet the performance standards for the four metrics in the plan that are directly end-user customer-affecting: Percent of Missed Installation Due Dates, Installation Quality, Repeat Trouble Report Rate and Out of Service Within 48 Hours. The details of the payment plan are

---

(Continued from previous page)
functional equivalent of the UNE-P and LWC. Like LWC, WLS is offered to these wholesale customers in order to give them an incentive to continue satisfying their service needs through AT&T (and to avoid a migration of their retail customers to a competing facilities-based provider, which might well occur if AT&T no longer offered a UNE-P equivalent to wholesale customers except through LWC agreements). As of the end of March 2006, these former UNE-P customers served more than 350,000 lines via WLS throughout AT&T's 13-state region.

set forth in the Appendix to the LWC Service Assurance Plan, which is attached hereto as Attachment 3.

26. As an alternative to the "generic" Service Assurance Plan, AT&T offers individual LWC customers the opportunity to negotiate their own Service Assurance Plan with AT&T. In fact, at least two LWC customers (MCI and Birch) have negotiated their own separate Service Assurance Plans with AT&T.

b. AT&T's Access Service Tariff

27. In order to remain competitive in the special access market, AT&T has also incorporated performance guarantees and volume discounts into the access service tariffs that its BOC affiliates, such as Southwestern Bell, have filed with this Commission. For example, the Access Service Tariff provides that *all* access service customers – including special access customers -- are entitled to credits for (1) missed installation on a confirmed due date; and (2) service interruptions at least 30 minutes in duration. *See, e.g.*, Southwestern Bell Telephone Company Tariff F.C.C. No. 73 ("FCC Tariff"), §§ 2.5.5, 2.5.6. Relevant portions of Southwestern Bell's Access Service Tariff are attached hereto as Attachment 4. The Access Service Tariff provides *additional* credits for service interruptions if the outage exceeds the applicable Service Assurance Warranty ("SAWS") threshold for service interruptions within a 12-hour time period. *Id.* §§ 2.5.6(B)(2), 2.5.7.[11]

28. *The Managed Value Plan.* For larger customers who are willing to make a term and volume commitment, AT&T's Access Service Tariff establishes a Managed Value Plan

[11] The "SAWS credit" is applied to the customer's bill in addition to the existing monthly service rates and any existing credit allowances. *See* Attachment 4, § 2.5.7. The applicable SAWS thresholds, and the credit allowance per interruption, vary depending on the particular service involved and the date when the customer began purchasing the service from AT&T. *Id.*

("MVP") that not only provides billing discounts, but also entitles such customers to additional discounts if AT&T fails to meet MVP Service Level Assurance levels ("SLAs") specified in the tariff. *Id.* § 38.1. A customer qualifies for such discounts if it has at least $10 million in annual billing for these services for the particular AT&T region involved (for example, AT&T's Southwest region), and agrees to maintain a predetermined annual recurring billing amount (a minimum annual revenue commitment, or "MARC") for a five-year period. *Id.* §§ 38.1, 38.3(A)-(B). AT&T offers two types of MVP billing discounts to MVP customers: commitment discounts (which are a specified percentage of the annual MARC) and SLA discounts. *Id.* § 38.3(E).

29. MVP customers are entitled to the additional SLA discount if AT&T fails to meet specified parameters during the term of the MVP agreement for three metrics: (1) On-Time Provisioning ("OTP"), *i.e.*, the percentage of customer requests for new service and modifications of existing service that were not completed by the due date for reasons attributable for AT&T; (2) Failure Frequency ("FF"), *i.e.*, the percentage of the MVP customer's total annual access circuit failures; and (3) Time To Restore ("TTR"), *i.e.*, the ratio of measured outages (troubles) that are less than or equal to 3 hours in the reporting period to the total number of troubles in that same period. *Id.* § 38.3(G).

30. The Access Service Tariff offers two separate types of MVP SLA discounts: MVP-SLA Level 1 ("SLA Level 1") and MVP-SLA Level 2 ("SLA Level 2"). Each SLA discount is 1 percent of the customer's MARC. For purposes of the SLA Level 1 discount, the tariff sets forth specified performance targets for OTP, FF, and TTR for three services: high-capacity service (DS-1s), which is the service that special access customers purchase from AT&T more than any other service combined; voice grade service ("VGS"); and MegaLink data

service ("DDS"). The customer is entitled to an SLA Level 1 discount if AT&T fails to "earn" a minimum number of points under a point value system (which assigns a certain number of points to AT&T for meeting particular standards per quarter and annually). *Id.* § 38.3(G)(2). If a customer receives the 1 percent SLA Level 1 discount (due to AT&T's failure to meet the 100-point minimum), it may also qualify for the additional Level 2 discount (which is an additional 1 percent of the MARC) if AT&T's performance in the provisioning of DS-1s falls below certain specified levels.[12]

31. *Other Contract Tariff Offers With Service Level Assurances.* In addition to the MVP, AT&T's Access Service Tariff offers customers the opportunity to enter into specialized contracts, pursuant to contract offers set forth in AT&T's tariffs, which include negotiated SLAs and remedies (different from those under the MVP) that govern AT&T's performance for that contracting customer. AT&T has entered into such agreements separately with other carriers. One such contract tariff establishes four SLAs with respect to services offered within certain pricing flexibility Metropolitan Statistical Areas ("MSAs"): (1) Percent Network Availability; (2) Mean Time To Repair ("MTTR") of DS-1 Circuits; (3) Mean Time to Repair ("MTTR") of DS-3 and OCn Circuits; and (4) On-Time Delivery/Due Date. The five-year contract establishes performance targets for each SLA, which become more demanding over the term of the contract.[13] AT&T must give the customer a specified annual credit of $100,000 for each SLA as to which it does not satisfy the applicable target during the year.[14]

---

[12] *See* Attachment 4, § 38.3(E)(4), (G)(2), (G)(3). For example, the Level 2 target for DS-1s for On-Time Performance is 62.1 percent for years 3 through 5, as compared to the Level 1 targets of 95.6, 96.2, and 96.7 percent for the same metric. *Id.*

[13] *See, e.g.*, Pacific Bell Telephone Company Tariff F.C.C. No. 1, § 33.56.5(E) – Contract Offer No. 56 (Attachment 5 hereto). Although Time Warner now criticizes this contract and corresponding tariff provisions in its comments (*see* TWTC Pet. at 70), those criticisms are (Continued)

32. Another contract tariff provides that the customer will receive volume discounts in exchange for certain revenue commitments by the customer. More importantly, the contract sets a "Network Availability cumulative annual target" of 90 percent that AT&T must meet for all services defined as "Contributory Services" under the contract. If AT&T fails to meet the 90 percent target for twelve consecutive months, the customer has the right to terminate the contact without incurring any termination liability unless AT&T rectifies the problems within 60 days after receiving the customer's notice of its intent to terminate.[15]

3. Special Access Metrics and Standards Under the FCC's Non-Accounting Safeguards Order

33. As of 1999, the Commission had not approved any Section 271 application by AT&T or its predecessor companies to provide in-region, interLATA service in any of the states in its region. Thus, AT&T was not subject to the requirements of Section 272 regarding separate long-distance affiliates of Bell Operating Companies, including Section 272(d)(1)'s requirement that the BOC submit to an independent audit to determine its compliance with Section 272. The Commission did not approve a Section 271 application for any of the states in AT&T's region until June 2000, when it approved Southwestern Bell's application for Texas.

(Continued from previous page)
without merit. As discussed in the accompanying declaration of Parley Casto, Time Warner agreed only one year ago to the same tariff provisions that it now criticizes.

[14] *See* Attachment 5, § 33.56.5(F). Like MVP, the contract requires the customer to make an annual minimum revenue commitment in exchange for the SLAs and credits. *See id.* § 33.56.4 (A) (requiring MARC of at least $26.5 million for first year of contract).

[15] *See, e.g.*, Ameritech Operating Companies Tariff F.C.C. No. 2, § 22.90.13(B) – Contract Tariff No. 90 (Attachment 6 hereto). Under the contract, "Contributory Services" include Interstate Special Access (such as Voice Grade, DS-0, DS-1, and DS-3), Interstate Switched Transport (Entrance Facility and Direct Transport), Intrastate Special Access, Intrastate Switched Access, and Advanced Services (Frame Relay). *Id.* § 22.90.5.

34. In its applications for Section 271 authority, SBC and its affiliates committed that SBC would maintain data, for all of the states in SBC's regions for which the Commission had granted Section 271 authority ("Section 271-authorized states"), for the seven service categories and units of measure (metrics) that the Commission had proposed in its Further Notice of Proposed Rulemaking in the 1996 *Non-Accounting Safeguards Order* as a means of determining whether an ILEC with a Section 272 affiliate is in compliance with the parity requirements of Section 272(e)(1).[16] SBC also agreed that it would provide these data to the auditors conducting the independent biennial audit required by Section 272(d)(1), as well as to carrier customers upon request.

35. Consistent with its commitment, SBC/AT&T has maintained data for the metrics proposed under the *Non-Accounting Safeguards Order* for each Section 271-authorized state in its region since the approval of its Section 271 application in Texas in 2000. The seven metrics for which data are maintained by AT&T, and the subcategories into which those data are disaggregated, are as follows: (1) Successful Completion According to Desired Due Date; (2) Time from BOC Promised Due Date to Circuit Being Placed in Service; (3) Time to Firm Order Confirmation; (4) Time from PIC Change Request to Implementation; (5) Mean Time to Restore

[16] *See In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* CC Dkt. No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21095, 22082-86, ¶¶ 371-382 & Appendix C (Dec. 24, 1996). Section 272(e)(1) of the Act requires that any Bell Operating Company and BOC affiliate "fulfill any requests from an unaffiliated entity for telephone exchange service and exchange access within a period no longer than the period in which it provides such telephone service and exchange access to itself and to its affiliates." 47 U.S.C. § 272(e)(1). Although the Commission had not formally adopted the metrics that it proposed in the *Non-Accounting Safeguards Order*, SBC agreed in its Section 271 applications that it would maintain such data once the Commission approved any of its applications, until the Commission issued final rules in the *Non-Accounting Safeguards* proceeding. *See Report of Independent Accountants on Applying Agreed-Upon Procedures -- AT&T Inc.*, dated December 15, 2005 ("*2005 Biennial Audit Report*"), Appendix C, at 51, 54.

and Trouble Duration; (6) Time to Restore PIC After Trouble Report; and (7) Mean Time To Clear Network/Average Duration of Trouble. A table setting forth the definition of each metric and the levels of disaggregation for each metric is attached hereto as Attachment 7.

36. For each of these seven metrics, AT&T tracks results for three entity categories: (1) Section 272 affiliates (AT&T's long-distance affiliates); (2) AT&T's BOC and Other Affiliates (which includes the AT&T BOCs, its Internet affiliates, its wireless affiliates, its messaging companies, and ASI); and (3) Nonaffiliates (non-affiliated telecommunications providers). Using these data, both regulators and carriers unaffiliated with AT&T can readily determine whether the timeliness of AT&T's performance for the seven metrics for nonaffiliates as a whole is at parity with its performance for itself and its affiliates (including the Section 272 affiliate).

37. The data reported for these metrics enable auditors and regulators to determine, among other things, whether AT&T is providing special access to unaffiliated purchasers on a nondiscriminatory basis. Five of these metrics are related to special access services. Four of them are disaggregated by DS-0s, DS-1s, and DS-3s and above, and a fifth is disaggregated by DS-0s and DS-1s. *See* Attachment 7 hereto.

38. Also consistent with its Section 271 commitments, since mid-2000 AT&T has provided the data it has compiled for the seven metrics to the independent auditors who have conducted the biennial audit of its Section 272 performance. The auditors perform the audit in accordance with the General Standard Procedures for Section 272 audits agreed to by the Commission and each of the RBOCs.

39. Under these agreed-upon procedures, the auditors test whether the data for the seven metrics were calculated in accordance with AT&T's business rules, and then compare the

differences in monthly results for each metric for the same service between the Section 272 affiliates and nonaffiliates, and between other AT&T affiliates and nonaffiliates.[17] The auditors note and disclose in their report any differences in time in fulfilling each type of request for the same services from the Section 272 Affiliates, AT&T's BOC and other affiliates, and nonaffiliates. For those instances where fulfillment of requests from nonaffiliates took longer than for the Section 272 affiliates, the auditors request an explanation from AT&T.[18]

40. The auditors file their final report with this Commission and with the state commissions for each of the states for which AT&T maintains such data, as required by Section 272(d)(2). The report – which sets forth the results of the data maintained by AT&T for the seven metrics – is made available by these commissions for public inspection, and any party is entitled under the Act to submit comments on the report. Thus, if a party wishes to point out that the data maintained by AT&T showed that the time intervals reflected in the data were shorter for AT&T and its affiliates than for nonaffiliates, it may do so in its comments.

41. Three independent audits of AT&T for Section 272 compliance have been conducted since mid-2000. The first audit encompassed the period from July 10, 2000, to July 9, 2001. The second audit covered the period from July 10, 2001, to July 9, 2003. The third, and most recent, audit encompassed the period from July 10, 2003, to July 9, 2005. Neither this Commission nor any state commission has taken any action as a result of the comments filed

---

[17] *See, e.g., 2005 Biennial Audit Report,* Appendix A, at 46.

[18] As part of their analysis of Section 272(e)(1) issues, the auditors also document the processes and procedures AT&T follows in each of the states in its region to provide information regarding the availability of facilities used in the provision of special access to AT&T's Section 272 affiliates, AT&T's BOCs and other affiliates, and nonaffiliates. The auditors note any such differences in the audit report. *2005 Biennial Audit Report,* Appendix A, at 43 & Appendix C, at 52.

with regard to these audit reports; indeed, no party even filed comments with regard to AT&T's latest audit report.

B. The Implementation of Performance Plans and Performance Standards Since 1999 Removes Any Ability or Incentive for AT&T To Discriminate, As Well As Any Need To "Benchmark" AT&T's Performance Against That of Other ILECs.

42. As shown below in Part IV, the data maintained by AT&T show that it has consistently rendered high-quality, nondiscriminatory performance – and that its performance has continued to improve since it began reporting such data. That level of performance should not be surprising, because the reporting requirements deny AT&T the ability to discriminate without detection and eliminate any incentive to do so. Moreover, because the reported data thoroughly measure the adequacy of AT&T's performance, there is no longer any need – if the need ever existed – to benchmark AT&T's performance against that of other ILECs.

43. First, any discriminatory performance by AT&T would be a violation of the Act's prohibitions against discrimination against CLECs – and could be easily detected by examining the mounds of performance data that AT&T reports. For example, any provisioning of UNEs or interconnection that gave AT&T meaningfully better treatment than that afforded to wholesale customers would be readily detectable in the data that AT&T provides pursuant to state-approved performance plans.

44. Similarly, if AT&T did not provide the same performance to nonaffiliated long-distance carriers as it does to its own long-distance affiliate, such conduct almost certainly would be detected, since AT&T's treatment of long-distance competitors is reflected in the data scrutinized by independent auditors as part of the biennial audit required by Section 272 of the Act.

45. Second, because any discriminatory performance by AT&T could be detected from its reported performance data, discrimination would harm AT&T itself. In particular, such performance would cause AT&T to lose business. As described in the Public Interest Statement, AT&T faces substantial wholesale competition from carriers who do not depend on AT&T for so-called "bottleneck" inputs. These carriers have facilities of their own that enable them to serve customers without using the "last mile" of AT&T's network. Much of this competition – including wireless carriers, cable companies, and VoIP carriers – did not even exist in 1999.

46. Because of the existence of these competitive providers, discriminatory performance for AT&T's wholesale customers would only *reduce* AT&T's profits. If AT&T provided a wholesale customer with discriminatory performance, that customer would be able to confirm the lack of parity in AT&T's reported data – and might well switch to an alternative provider. Furthermore, any poor service to the wholesale customer is likely to drive the access customer's *retail* customer to move to an intermodal provider, thus defeating the assumed purpose for engaging in any such tactic. Thus, if AT&T were in fact to discriminate in such situations, AT&T would simply lose the revenues it previously collected from the wholesale customer, without an opportunity to win the retail customer's business, thereby creating a "lose-lose" result.

47. Practicing discrimination (or otherwise providing substandard performance) would likely also require AT&T to pay liquidated damages under the performance plans and service guarantees to which it is subject. If, for example, the data AT&T reported under a state-approved performance plan showed that AT&T failed to meet the parity requirement or benchmark for particular metrics, AT&T would likely be required to pay substantial liquidated damages to customers and/or to regulatory authorities. Those liquidated damages are an

expenditure that no company, regardless of its size, could reasonably incur in an era of intermodal competition.[19]

48. Although opponents assert that such liquidated damages are merely a modest "cost of doing business" for a company of AT&T's size, such an assertion overlooks the realities of AT&T's operations. Because of AT&T's budgetary process, the AT&T departments responsible for the actual provisioning of customer-requested service have ample incentive to meet all applicable performance standards. Under that process, any liquidated damages – regardless of their size – must be paid from the budget that has been approved for the AT&T department that was responsible for such performance. All departments operating on a specified budget thus have every reason to avoid unnecessary expenditures – and the payment of liquidated damages can readily be avoided by satisfying the performance standards.

49. Any discriminatory conduct reflected in the reported data could also subject AT&T to additional consequences. For example, if the data that AT&T maintains on the metrics proposed in the *Non-Accounting Safeguards Order* disclosed discriminatory conduct against competing long-distance providers, those competitors could file complaints with state commissions or with this Commission. If filed with this Commission, any such complaint would

---

[19] The Commission recognized this fact in its *SBC/Ameritech Merger Order*, which mandated – as one condition of its approval of the SBC/Ameritech merger – a "Carrier-to-Carrier" Performance Plan that required SBC/Ameritech to publicly report data for 20 different measurement categories for each of the states in their regions, and to either achieve the performance standards set forth in the plan or make "incentive payments." *See SBC/Ameritech Merger Order*, 14 FCC Rcd. 14712, 14867-69, ¶¶ 377-380 (1999). The Commission determined that these requirements would "provide[] heightened incentive for the company not to discriminate in ways that would be detected through the measures. . . . If the results [of the reported data] reveal unequal treatment, the voluntary payment scheme . . . will 'create a direct economic incentive for SBC/Ameritech to cure performance problems quickly.'" *Id.* at 14890, ¶ 432 (quoting comments of NorthPoint).

be resolved expeditiously, since it is our understanding that Section 271(d)(6) gives the Commission only 90 days to decide complaints alleging violations of Section 272. In addition, in response to any discriminatory conduct indicated in the results of the biennial audit report performed under Section 272, state or federal regulators could institute investigations of AT&T's conduct or take other actions.

50. In short, AT&T cannot discriminate – and has no reason to discriminate -- because such discrimination would be apparent from its reported data, and would be contrary to AT&T's own interests. Although merger opponents suggest that AT&T might be willing to provide itself poor service in order to provide competitors with poor service,[20] that simply makes no sense. As a major provider of long-distance service, with an established reputation for providing high-quality services, AT&T naturally wishes to provide quality service to its Section 272 affiliates. The parity requirements of the Act, together with the data that AT&T maintains on the metrics proposed in the *Non-Accounting Safeguards Order*, ensure that long-distance competitors will receive the same high quality of service as AT&T's own affiliates.

51. AT&T's reporting of performance data also eliminates any need to "benchmark" its performance against that of other ILECs. The metrics for which AT&T reports data are sufficient by themselves to identify whether AT&T is providing UNEs, interconnection, and special access in a nondiscriminatory and commercially reasonable manner. Moreover, the performance plans, tariffs, and regulatory orders that set forth performance standards provide self-executing remedies in the event that the ILEC fails to meet those standards.

52. Access Point and other opponents assert that existing performance measurements do not remove the need for benchmarking because they are not "adequate to protect against

---

[20] TWTC Pet. at 67.

anticompetitive behavior" and are "obsolete" in view of technological developments since their original adoption.[21] As we have described, however, the current performance plans and remedies are more than adequate to deter the Applicants from engaging in discrimination or other anticompetitive conduct.

53. Furthermore, to the extent that opponents believe that the current performance measurements are "obsolete," they have the right to seek new or changed measurements to reflect the new developments that they describe. In most of the states in its regions, AT&T's interconnection agreements require periodic reviews of the performance measurements, at which the CLEC can seek addition, modification, or deletion of measurements from the current plans.[22] These reviews, which are held every six months in AT&T's Midwest region and annually in AT&T's Southwest region, include participation not only by AT&T and the CLECs but also by representatives of the applicable state commission.[23] In AT&T's Southwest region, for example, at least three such reviews have been conducted, resulting in substantial modifications of the measurements, some of which were sought by the CLECs (including the addition of measurements regarding EELs and DSL). To the extent the parties cannot reach agreement on

---

[21] Access Point Pet. at 27-28.

[22] In Nevada, such a review is required by statute to be held every three years. In California, a review of the performance measurements was held in 2004 pursuant to the agreement of AT&T and the other parties to the California Performance Measurement Joint Partial Settlement Agreement ("JPSA"). Although the JPSA does not provide for further reviews, any party is free to request such a review at any time.

[23] For example, AT&T's standard interconnection agreement for Texas provides that "A workshop and/or conference shall be organized and held annually for the purpose of evaluating the existing performance measures and determining whether any measures should be deleted, modified or any new measures added. provided, however, no new measures shall be added which measures activities already governed by existing measures. [The] CLEC may actively participate in this annual workshop with SBC Texas, other CLECs, and Commission representatives." Texas ICA, Attachment 17, ¶ 3.0.