

Table 1
Internet Traffic Shares: North America Total and Tier 1

Company	Pre-Merger Traffic Shares			Post-Merger Traffic Shares		
	N.A. Traffic	N.A. Share	Tier 1 Share	N.A. Traffic	N.A. Share	Tier 1 Share
Legacy AT&T	52.33	12.58%	18.17%	52.33	12.58%	
Legacy SBC ⁽¹⁾	24.13	5.80%	8.38%	24.13	5.80%	
AT&T Total	76.46	18.38%	26.55%			⁽⁵⁾
Company B	51.31	12.33%	17.81%	51.31	12.33%	
Company C	45.89	11.03%	15.93%	45.89	11.03%	
Verizon ⁽²⁾	39.19	9.42%	13.61%	39.19	9.42%	
Company E	25.46	6.12%	8.84%	25.46	6.12%	
Company F	19.33	4.65%	6.71%	19.33	4.65%	
Company G	15.19	3.65%	5.27%	15.19	3.65%	
Company H ⁽³⁾	15.19	3.65%	5.27%	15.19	3.65%	
Tier 1 Total	288.02	69.24%	100.00%			
BellSouth ⁽⁴⁾						
N.A. Total	416.00			416.00		

Source: RHK Data for the 4th Quarter 2004, as reflected in Annex A to the Reply Declaration of Michael Kende, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75, modified as noted below.

(1) Figures for Legacy SBC have been calculated based upon the ratio of Legacy SBC's traffic to Legacy AT&T's traffic using December, 2004 proprietary data provided by the parties.

(2) Figures for Verizon reflect the combination of Verizon and MCI. Legacy MCI traffic is reported based on RHK data. Traffic for Legacy Verizon has been calculated based upon the Reply Declaration of Michael Kende, *Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, WC Docket No. 05-75.

(3) Figures for Company H are presented assuming the same size as Company G, the 7th largest company surveyed by RHK, in order to reflect a total of 8 Tier 1 Internet backbone providers.

(4) Figures for BellSouth are based on 2006 proprietary data provided by the parties.

(5) Note that this figure represents the combined North American traffic of Legacy AT&T, Legacy SBC, and BellSouth.

Table 2
Internet Revenues Shares: Backbone Related Functions for Tier 1 Internet Backbone Providers
2003 Calendar Year (\$ Millions)

IB Provider	Pre-Merger Revenue Shares		Post-Merger Revenue Shares	
	Backbone Revenue	Revenue Share	Backbone Revenue	Revenue Share
Legacy AT&T (1)				
Legacy SBC (2)				
BellSouth (3)				
AT&T Total				
Verizon (4)	1102		1102	
Sprint	600		600	
Level 3 (5)				
Qwest	170		170	
SAVVIS	107		107	
Global Crossing				
Cogent(6)				
Tier 1 Total				

Source: Unpublished IDC Report, 2004, as reflected in Annex A to the Declaration of Dr. Michael Kende, Verizon Communications, Inc. and MCI, Inc., Applications for Approval of Transfer and Control, WC Docket 05-75

- (1) Figures for Legacy AT&T are based on 2003 proprietary data provided by the parties.
- (2) Figures for Legacy SBC are based on 2003 proprietary data provided by the parties.
- (3) Figures for BellSouth have been omitted from the pre-merger revenue calculations due to fact that BellSouth does not currently qualify as a Tier 1 Internet backbone provider.
- (4) Figures for Verizon reflect the combination of Verizon and MCI. IDC reported 2003 Internet backbone revenues of \$403 million for Legacy Verizon, and \$699 million for Legacy MCI.
- (5) Figures for Level 3 reflect the combination of Level 3 and WilTel. IDC reported 2003 Internet backbone revenues of \$283 million for Level 3, and [] million for WilTel.
- (6) The revenue shares for AT&T and Bell South are conservative, since Cogent's revenues have not been updated to reflect revenue attributable to the businesses of Verio and Fiber Network Solutions, Inc. which Cogent has acquired.

Appendix A:
Detailed Response to
Specific Allegations

APPENDIX A

Detailed Response to Specific Allegations

As noted in the body of Applicants' Joint Opposition and Reply to Comments, the Commission has concluded repeatedly that AT&T and BellSouth have the requisite qualifications to control Commission authorizations.¹ None of the claims of the merger opponents requires a different conclusion here.

A. AT&T Clearly Remains Qualified to Control BellSouth's Authorizations

1. Opponents' Efforts To Relitigate Old Claims Must Be Rejected Summarily

With limited exceptions, the alleged character issues raised by EarthLink were raised by Thrifty Call, Inc. in the Cingular/AT&T Wireless merger² and again by opponents of the merger of SBC and AT&T.³ Similarly, Fones4All seeks to rehash claims first raised by Telscape,⁴

¹ Public Interest Statement at 2 (citing decisions).

² *Cingular/AT&T Wireless Merger Order*, ¶¶ 53-54 (citations omitted) (“[W]e find that many of the Commission actions cited by Thrifty Call are not relevant to a character qualifications analysis. . . . [A] number of the Commission actions cited by Thrifty Call had been taken and were part of the public record when the Commission upheld SBC’s qualifications to hold Commission licenses in September 29, 2000. In all of the cases cited, the Commission has investigated the infractions and taken appropriate enforcement actions against SBC including the imposition of monetary penalties. In no case did the Commission think that license revocation was an appropriate penalty.”).

³ See, e.g., *Petition to Deny of Cbeyond Communications, et al., In re SBC Commc’ns Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Dkt No. 05-65, at 13-16 (Apr. 25, 2005); see also *COMPTEL/ALTS Petition to Deny, In re SBC Commc’ns Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Dkt No. 05-65, at 65-66 (Apr. 25, 2005) (citing a 2004 consent decree settling violations of the E-Rate program rules). As SBC and AT&T stated last year with respect to that allegation, which EarthLink has repeated this year:

The 2004 consent decree demonstrates SBC’s good corporate citizenship. When SBC discovered that it had violated the rules of the E-Rate program, it investigated the violations, self-reported to the Commission, returned the money SBC had received improperly from the Schools and Libraries Division of the Universal Service Administrative Company and implemented remedial measures. No large company is going to achieve perfect regulatory compliance; SBC’s response to the violation is far more probative of its character than the fact of the violation itself.

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which the Commission rejected in the SBC/AT&T merger.⁵ EarthLink's efforts to dredge up three other ancient orders (two from the Commission and a third from the Ohio PUC) only demonstrate its own desperation. None of these trivial infractions could justify denial of these applications.⁶

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Joint Opposition and Reply to Comments of SBC Communications Inc. and AT&T Corp., *In re SBC Commc'ns Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Dkt No. 05-65, at 184 (May 10, 2005) (footnote omitted) (discussing *In re SBC Commc'ns Inc.*, Consent Decree, 19 FCC Rcd. 24014, 24016 ¶ 3 (EB Dec. 16, 2004)). The Commission rejected the claim that this consent decree called AT&T's character qualifications into question. *SBC/AT&T Merger Order* ¶ 173 & n.489, and it should do the same again.

⁵ See Fones4All Comments at 21 (repeating virtually word-for-word Comments of Telscape Communications, Inc., *In re SBC Commc'ns Inc. and AT&T Corp. Application for Approval of Transfer of Control*, WC Dkt No. 05-65, at 11-12 (Apr. 25, 2005)).

⁶ *SBC/AT&T Merger Order* ¶ 175 & n.495 (citing the referenced California PUC decision and holding that "we do not believe that this decision demonstrates that SBC is unfit to acquire AT&T's licenses"); *Telscape Communications, Inc. v. Pac. Bell Tel. Co.*, Case No. 02-11-011, Decision No. 04-12-053, slip op. at 28 (Cal. P.U.C. Dec. 16, 2004) ("There is also insufficient evidence to support Telscape's claim that SBC-CA's special winback offers are predatory and anticompetitive."). Fones4All also has claimed that AT&T has violated a California PUC decision, Fones4All Comments at 21; Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, Counsel for Fones4All Corporation, to Marlene Dortch, Secretary, FCC (May 19, 2006), and has mischaracterized a pending dispute between Fones4All and AT&T, see Fones4All Comments at 10 (citing Letter from Ross A. Buntrock, Womble Carlyle Sandridge & Rice, Counsel for Fones4All Corporation, to Marlene Dortch, Secretary, FCC (May 9, 2006)). AT&T has rebutted those claims in a previous pleading, see Letter from Gary L. Phillips, General Attorney & Assistant General Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC (May 19, 2006), and will file a separate ex parte letter to respond to Fones4All's May 19, 2006 letter. Fones4All's claims do not merit any further response here.

⁷ One is a 1996 enforcement order. See *EarthLink Pet., Ex. C.*, at 3 (citing *In re S.W. Bell Tel. Co.*, Notice of Apparent Liability for Forfeiture, 11 FCC Rcd. 13973 (Enf. Div., WTB 1996)). In that case, the Division Chief concluded, "However, because it voluntarily disclosed the violations, the infraction was minor, and the infraction does not raise questions as to SWBT's qualifications to be a Commission licensee, we reduce the forfeiture to \$1,000." *Id.* at 13974 ¶ 6. The second is a consent decree settling a dispute regarding the performance reports SBC filed following the SBC/Ameritech merger, *In re SBC Communications Inc.*, Order, 18 FCC Rcd. 4997 (EB Mar. 20, 2003), and, as a consent decree, does "not call into question [AT&T's] authority to hold Commission licenses and authorizations." *SBC/AT&T Merger Order* ¶ 173. Moreover, the Commission was well aware of this order – and cited it for another purpose – when it approved SBC's character qualifications in *Cingular/AT&T Wireless*. See *Cingular/AT&T Wireless Merger Order* ¶ 53 n.217. The final old order is an Ohio PUC decision imposing a forfeiture for failure to comply with Ohio's Minimum Telephone Service Standards between August 1998 and September 2001. *In re Comm'n-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Tel. Serv. Standards*

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The one new proceeding raised by EarthLink is a January 2006 Notice of Apparent Liability for Forfeiture (“NAL”) issued after AT&T could not produce an annual certificate executed by an officer of AT&T Corp. “that the officer has personal knowledge that AT&T [Corp.] has established operating procedures adequate to ensure compliance with the Commission’s [Customer Proprietary Network Information (“CPNI”)] rules.”⁷ Even EarthLink cannot seriously contend that that omission disqualifies AT&T Inc. from assuming control of BellSouth’s licensees.

2. AT&T Has Conducted Itself Reasonably with Respect to Its Relationship with EarthLink and New Edge

Aside from rehashing previously resolved issues, EarthLink charges that “AT&T has stalled negotiations and/or refused to negotiate any broadband transmission arrangements.”⁸ This charge is a transparent attempt by EarthLink improperly to take advantage of this merger proceeding to gain leverage in its commercial dealings with AT&T. For this reason alone, the Commission should dismiss the claim.⁹

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⁷ See *In re AT&T Chapter 4901: 1-5, Ohio Admin. Code*, Case No. 99-938-TP-COI, Entry on Rehearing, 2002 Ohio PUC LEXIS 564 (Ohio P.U.C. June 20, 2002) (subsequent history omitted). SBC corrected the situation, and the PUC closed the case one month later, concluding that “the shortcomings in the company’s performance have been appropriately addressed . . . [and] proper procedures have been put in place to ensure compliance with the Commission’s MFSS and orders.” *In re Comm’n-Ordered Investigation of Ameritech Ohio Relative to Its Compliance with Certain Provisions of the Minimum Tel. Serv. Standards Set Forth in Chapter 4901: 1-5, Ohio Admin. Code*, Case No. 99-938-TP-COI, Entry, 2002 Ohio PUC LEXIS 662, *9-*10 ¶¶ 12-13 (Ohio P.U.C. July 18, 2002) (subsequent history omitted).

⁸ *In re AT&T Inc. Apparent Liability for Forfeiture*, File No. EB-06-TC-059, Notice of Apparent Liability for Forfeiture, DA 06-221, at 3 ¶ 6 (EB Jan. 30, 2006).

⁹ EarthLink Pet. at 30.

¹⁰ See *Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222 (disregarding a business dispute with Cingular’s authorized dealers).

In any event, EarthLink's claim is meritless. When the Commission adopted its *Wireline Broadband Order*,¹⁰ it provided for a one-year transition period, which is continuing until November 16 of this year, to give the ILECs and other affected entities "sufficient time to adjust to [the Commission's] new [regulatory] framework."¹¹ During that one-year period, the status quo was frozen.¹²

As the Commission envisioned, AT&T has been using this transition period to review its wireline broadband product portfolio.¹³ Nevertheless, AT&T is eager to continue its relationship with EarthLink and looks forward to continued negotiations.¹⁴ Contrary to EarthLink's claims, AT&T's position in dealing with EarthLink has been a reasoned and reasonable response to the *Wireline Broadband Order*, and not some pernicious effort to stifle competition.

3. Fones4All's Other Allegations Lack Merit

Fones4All makes two other complaints, neither of which says anything about AT&T's character or has any other relevance to this proceeding. First, it alleges that its total compensation for serving universal service end users is "in many cases lower than the wholesale 'commercial' rates offered by AT&T" in its Local Wholesale Complete commercial

¹⁰ The *Wireline Broadband Order* was designed "to let wireline broadband Internet access service providers . . . produce new or improved services in response to consumer demands," *Wireline Broadband Order* ¶ 71; see *id.* ¶¶ 71-73, by eliminating the obligation of carriers "to offer the transmission component of wireline broadband Internet access service on a stand-alone common carrier basis," *id.* ¶ 86.

¹¹ *Id.* ¶ 98.

¹² *Id.*

¹³ Casto Reply Decl. ¶ 49.

¹⁴ *Id.* ¶ 50. Further, AT&T was unwilling to hold talks with EarthLink's CLEC subsidiary New Edge Network, Inc. ("New Edge") due to legitimate business reasons described in the Reply Declaration of Parley C. Casto. See *id.* ¶ 51.

agreements¹⁵ really is a quarrel with the regulatory regime and subsidy program.¹⁶ Whatever the merits of those complaints, they are not related to this merger and, thus, do not belong in this docket.¹⁷

Fones4All's other complaint – that AT&T “flex[ed] its monopoly muscles in Los Angeles” and forced the organizers of the 2006 Fiesta Broadway Show to exclude Fones4All as a sponsor¹⁸ – is even less relevant. Event organizers often offer exclusive sponsorships because exclusivity makes the sponsorship a more effective marketing tool, which makes the sponsor willing to pay more for the sponsorship rights. AT&T apparently outbid Fones4All for sponsorship rights to the 2006 Fiesta Broadway Show, which is the free market at work, not an example of anticompetitive conduct.

¹⁵ Fones4All Comments at 19 n.29. “Local Wholesale Complete” is the name of AT&T's UNE-P replacement product.

¹⁶ *See id.* at 11-12.

¹⁷ *AT&T/Comcast Merger Order* ¶ 165 (rejecting alleged harm as not merger-specific); *Global Crossing/Citizens Merger Order* ¶ 10 (rejecting alleged harms as insufficiently merger-specific). Moreover, Fones4All essentially is contending that the universal service programs should prop up inefficient providers of service. *See* Fones4All Comments at 12 (arguing that Fones4All and similarly situated CLICs cannot serve universal service end users in an “economically viable” manner “since there is no way that the CLEC will be able to achieve the economies of scale of the ILEC”). That argument is plain wrong in any docket.

In any event, AT&T has over 140 Local Wholesale Complete agreements with CLECs across the nation and more than 50 in California alone, so more-efficient CLECs obviously find this product “economically viable” even if Fones4All does not. AT&T clearly is not required to subsidize Fones4All's facilities-based services. However, to the extent Fones4All cannot succeed as a facilities-based carrier, it certainly can serve its customers as a reseller – as it, in fact, does in some circumstances: “Fones4All has actually ordered thousands of resale lines from AT&T.” Opening Comments of Fones4All Corporation (U-6638-C) on Decision Confirming the Assigned Administrative Law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell*, Application 05-07-024, at 8 (Cal. P.U.C. May 11, 2006).

¹⁸ Fones4All Comments at 16 & n.26.

B. No Substantial Question Has Been Raised Regarding BellSouth's Qualifications To Control Licensees

The allegations concerning BellSouth's purported misconduct suffer from the same defects: there is no basis to support these claims; and, in any event, they are being addressed in other, more appropriate fora or proceedings.¹⁹ Moreover, none of the issues raised is related to, or will be affected by, the merger with AT&T. They should not be considered in this proceeding.²⁰

I. BellSouth's CLEC Offerings Comply with All Applicable FCC Rules

BellSouth's record clearly shows that it not only meets its obligations under federal and state law, but that it has gone above and beyond those requirements to assist its wholesale customers. As shown below, the opponents' claims are unsupported by the facts and misconstrue BellSouth's legal obligations.

¹⁹ EarthLink attempts to question the character qualifications of BellSouth by suggesting a pattern of non-compliance based on three consent decrees and a Notice of Apparent Liability involving BellSouth. EarthLink Comments, Exh. C. The Commission has stated explicitly in prior merger reviews that "the Commission does not consider matters resolved in consent decrees adjudicated misconduct for the purposes of assessing an applicant's character qualifications." *Cingular/AT&T Wireless Merger Order* ¶ 53. Moreover, two of the consent decrees were entered into more than five years ago, and the July 17, 2003 Consent Decree concerning allegations that BellSouth had marketed and provisioned in-region interLATA services in states prior to being authorized to do so and had improperly rejected orders of CLEC end users seeking to obtain service involved conduct that was discovered, self-reported and voluntarily corrected by BellSouth. *In re BellSouth Corp.*, Order, 18 FCC Rcd. 15135 (July 17, 2003).

²⁰ See *In re Applications of XO Communications, Inc., for Consent to Transfer Control of Licenses and Authorizations Pursuant to Sections 214 and 310(d) of the Communications Act and Petition for Declaratory Ruling Pursuant to Section 310(b)(4) of the Communications Act*, Memorandum Opinion, Order and Authorization, 17 FCC Rcd. 19212, 19217 ¶ 13 (IB/WTB/WCB Oct. 3, 2002) (explaining the FCC's policy "when evaluating transfer of control applications under section 310(d) ... 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").

a. STS's UNE-P-Replacement Solution

There is no basis for Saturn Telecommunication Services, Inc.'s ("STS") allegation that BellSouth deliberately sought to harm STS's business by forcing STS to spend large sums of money to implement a network solution to replace STS's UNE-P lines, and then informing STS that the solution needed to be replaced with more expensive network components.²¹ As STS's comments indicate, BellSouth and STS worked collaboratively to design, develop and implement a facilities-based serving arrangement as a UNE-P replacement.²² STS has migrated the majority of its customers to the new network facilities using unbundled DS1 loops commingled with special access services provided on the fiber ring. For the remaining customers, STS and BellSouth initially planned that STS could use non-designed unbundled DS0 loops commingled with special access services. In February 2006, as soon as BellSouth realized these plans were technically infeasible, it informed STS, and the parties began discussing alternatives. Notably, one month later, the Executive Vice President of STS, Keith Kramer, wrote BellSouth praising the companies' cooperation.²³ BellSouth has also made a detailed settlement proposal that would permit STS to provide service to its customers on a cost-effective basis, and BellSouth remains open to further discussions with STS. In any event, STS has filed a complaint regarding this matter with the Florida Public Service Commission;²⁴ therefore, this matter should not be considered here.²⁵

²¹ STS Comments at 13.

²² *Id.* at 2-7.

²³ E-mail from Keith Kramer, STS, to Donna G. Harley, BellSouth (March 31, 2006) (stating that "[o]nce we get past this last problem, I think that we can all say that both companies have worked very hard to show that the new rules really are in the best interest of competition, and the consumers. . . . [T]he network that has been installed has worked extraordinarily well.>").

²⁴ See *Saturn Telecommunication Services Inc. d/b/a STS Telecom [STS] (Gold) - Emergency Petition Against BellSouth Telecommunications, Inc. to Require BellSouth to Honor*

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b. Restoration of Service Following Hurricane Wilma

Equally without merit is STS's claim that, following Hurricane Wilma in 2005, BellSouth informed STS's customers that service could be restored immediately if they switched to BellSouth.²⁶ In the aftermath of that storm, STS notified BellSouth in writing that it believed BellSouth had engaged in discrimination with respect to eight STS customers. In the one instance where STS provided sufficient information for BellSouth to investigate the claim, BellSouth fully examined STS's claims of alleged discrimination and demonstrated they were unfounded. In all other instances, despite BellSouth's requests, STS failed to provide sufficient information for BellSouth to conduct an investigation. Moreover, BellSouth discussed the complaints with STS, and STS did not pursue its complaints further.

c. SwiftTel Outages

SwiftTel's allegation that its relationship with BellSouth has been "plagued" with problems because of "BellSouth's alleged failure to adhere to the terms and conditions" of the parties' interconnection agreement is wrong.²⁷ BellSouth worked diligently with SwiftTel to try to identify and isolate the problem and assist with any solution in each of the "occasions" about

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Commitments and to Prevent Anticompetitive and Monopolistic Behavior, Florida PSC Docket No. 060435, Document No. 04824-06 (June 5, 2006), available at <http://www.floridapsc.com/library//FILINGS/06/04824-06/04824-06.PDF>.

²⁵ See *WorldCom/MCI Merger Order* ¶ 215 (finding that an unresolved claim being adjudicated in U.S. District Court was "not a sufficient basis to conclude that the merger is not in the public interest"); *McCaw/AT&T Merger Order* ¶ 123 (holding that the Commission "will not consider arguments in [merger] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora . . ."); see also *SBC/AT&T Merger Order* ¶ 175 & n.493; *Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222; *GM/Hughes Merger Order* ¶¶ 304-09, 313-14; *SBC/Ameritech Merger Order* ¶¶ 518, ¶¶ 557-59.

²⁶ STS Comments at 14.

²⁷ SwiftTel Comments at 2.

which SwiftTel complains.²⁸ Moreover, SwiftTel's complaints about a service outage relates to a situation in which the service loss stemmed solely from SwiftTel's failure to pay its invoices in a timely manner, despite numerous warnings from BellSouth. As soon as SwiftTel made the required payments, BellSouth restored service. In any event, these claims are the subject of a lawsuit SwiftTel filed in the Superior Court of Fulton County, Georgia,²⁹ and are unrelated to this merger.

d. BellSouth's Marketing Practices

Image Access, Inc.'s arguments that BellSouth's customer retention and winback practices are "designed to discriminate and eliminate its resale competition"³⁰ are inaccurate and misconstrue the law. These parties challenge BellSouth's cash-back incentives and bundling promotions on the grounds that they are discriminatory and violate the Commission's rules.³¹ However, BellSouth's marketing practices are consistent with the plain language of the 1996 Act, the Commission's rules and orders and at least one federal court decision. First, the Commission has made it clear, by defining "promotions" to refer "only . . . to *price discounts from standard offerings that will remain available for resale at wholesale rates, i.e., temporary*

²⁸ In several cases, the problems raised by SwiftTel were caused by SwiftTel's, not BellSouth's, network. In addition, SwiftTel implies it was singularly affected by an equipment failure that in fact caused a service interruption for other customers served by the same equipment, which BellSouth repaired as quickly as possible.

²⁹ Because the lawsuit is a matter within the primary jurisdiction of the Georgia Public Service Commission ("GPSC"), BellSouth has asked the court to dismiss the lawsuit or, in the alternative, stay it while SwiftTel's claims are addressed in administrative proceedings before the GPSC. *See SwiftTel Commc'ns, Inc. and Cybersouth Networks, Inc. v. BellSouth Telecomms., Inc.*, Defendant's Motion to Dismiss or, in the Alternative, for a Stay, Civ. A. No. 2005-CV-99434 (Ga. Super. Ct. Fulton County June 9, 2005).

³⁰ Image Access Comments at 7.

³¹ *Id.* at 7-9.

price discounts,”³² that BellSouth is not required to resell marketing incentives to CLECs, contrary to Image Access’s claims. This interpretation of the Commission’s rules was recently confirmed by the United States District Court for the Western District of North Carolina.³³

Second, nothing in the Act requires that ILECs offer for resale at wholesale discounts “any telecommunications service that the [ILEC] provides at retail to subscribers who are not telecommunications carriers.”³⁴ As the statute itself makes clear, the resale obligation does not extend to non-telecommunications services that the ILEC provides, or to any services provided by an entity other than the ILEC. Consequently, there is no obligation for the ILEC to resell bundles consisting of telecommunications and non-telecommunications services.³⁵

2. BellSouth Has Faithfully Implemented the Commission’s *Wireline Broadband Order* and Is Prepared To Negotiate Commercial Agreements for a Variety of Broadband Services

EarthLink and the Federation of Internet Solution Providers of the Americas, Inc. (“FISPA”) assert that BellSouth has imposed several allegedly anticompetitive restrictions

³² *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15970 ¶ 948 (Aug. 8, 1996) (emphasis added). The Commission further concluded that “short-term promotional prices,” which are defined as “promotions of up to 90 days,” “do not constitute retail rates for the underlying services and are thus not subject to the wholesale rate obligation.” *Id.* ¶ 949; *see also* 47 C.F.R. § 51.613(a)(2). Thus, only promotional pricing lasting for periods greater than 90 days must be offered for resale at the wholesale discount.

³³ *BellSouth Telecomms., Inc. v. Sanford et al.*, No. 3:05CV345-MU, slip op. at 6 (W.D.N.C. May 15, 2006), notice of appeal (June 9, 2006).

³⁴ 47 U.S.C. § 251(c)(4)(A); *see In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 16 FCC Rcd. 7418, 7425 ¶ 12 (Mar. 30, 2001) (authorizing ILECs to sell bundles including local and enhanced services, subject to safeguards including the obligation to offer “local exchange service separately on an unbundled tariffed basis if they bundle the service”).

³⁵ An ILEC must, however, offer for resale each component of a mixed bundle that constitutes a telecommunications service being provided by the ILEC at the tariffed rate for the stand-alone service minus the wholesale discount. BellSouth meets that obligation.

regarding wholesale broadband services.³⁶ For example, EarthLink claims that BellSouth required EarthLink to accept allegedly anticompetitive restrictions as a condition for renewal of the RBAN agreement. EarthLink conveniently omits crucial details of those negotiations. EarthLink was not only seeking an extension, but also lower RBAN rates. In consideration for lower RBAN rates and a multi-year extension, BellSouth asked for, and EarthLink agreed to, a resale restriction and a class of service provision under which RBAN is to be provisioned on residential BellSouth voice lines.³⁷

Similarly, EarthLink's claims that BellSouth conditioned an RBAN agreement with New Edge, an EarthLink subsidiary, on the alleged "removal of all collocated facilities" and an "agreement not to offer VOIP services in the BellSouth region"³⁸ are untrue. During the negotiations, BellSouth expressed concern about and sought a "better understanding of" New Edge's plans potentially to offer VoIP over the RBAN platform, but BellSouth made clear that it was not asking "New Edge to restrict their customer's use of third party VoIP service."³⁹ So too, although the parties discussed the "opportunity for New Edge to redeploy its existing collocation arrangements" in BellSouth's central offices to areas outside the BellSouth region, this discussion was in the context of BellSouth's desire for "New Edge to maximize the number of subs on the RBAN platform," which New Edge was willing to consider in exchange for a "very long-term commitment from [BellSouth] to have continued access to [BellSouth's] network."⁴⁰

³⁶ EarthLink Comments at 29-30; FISP Comments at 1.

³⁷ The resale restriction ensures that EarthLink does not create a secondary market for the lower-priced RBAN, while the residential line requirement was in direct response to EarthLink's representations that lower RBAN rates were necessary to serve the residential market, which EarthLink claimed was its primary market.

³⁸ EarthLink Comments at 30.

³⁹ E-mail from Kent Dallas, BellSouth, to Rob McMillin, New Edge (Feb. 28, 2006).

⁴⁰ *Id.*

With respect to the allegations that BellSouth is refusing to provide certain wholesale DSL services, BellSouth is in the process of eliminating a specific form of DSL, known as Permanent Virtual Circuit or PVC-based DSL, for both its retail operations and for third-party customers of wholesale DSL, because it conflicts with the new, upgraded DSLAM cards that are being deployed in the BellSouth network.⁴¹ EarthLink's subsidiary New Edge is, therefore, not uniquely affected by this technology-based decision. Moreover, consistent with the FCC's *Wireline Broadband Order*, BellSouth is not required to separate out and offer as a common carrier service the underlying DSL transport component of its wireline broadband Internet access services and is not required to offer existing services to new customers or to existing customers at new locations.⁴² As contemplated by the *Wireline Broadband Order*, effective May 17, 2006, BellSouth stopped accepting orders for PVC-based circuits at new customer locations. On November 16, 2006 (one year from the effective date of the *Wireline Broadband Order*), BellSouth will begin disconnecting any remaining PVC-based subscribers.⁴³

⁴¹ BellSouth is deploying these new, upgraded DSLAM cards as part of BellSouth's efforts to build out and enhance its transport network to meet the growing broadband demands of its customers. By contesting the elimination of PVC-based DSL, EarthLink is effectively seeking to thwart BellSouth's network upgrades and infrastructure improvements, which is in direct conflict with EarthLink's purported desire for greater "innovation throughout networks." EarthLink Comments at 36.

⁴² *Wireline Broadband Order* ¶ 86.

⁴³ Similarly, as to FISPAs claim that BellSouth does not make available for wholesale the 256 Kbps or 6 Mbps versions of DSL, FISPAs Comments at 1-2, BellSouth is under no obligation to do so. BellSouth's 6 Mbps DSL service became available to end users after the effective date of the *Wireline Broadband Order*; thus, there is no requirement that BellSouth make available the 6 Mbps transport component available to FISPAs or any other third party. Regarding the 256 Kbps service, consistent with the *Wireline Broadband Order*, BellSouth is continuing to provide the service at locations in existence as of the effective date of that order but is not offering the service at new end-user locations.

Cbeyond's complaint concerning BellSouth's willingness to negotiate line sharing agreements is misguided. Cbeyond Comments at 8. The FCC has made it abundantly clear that BellSouth is not required to provide line sharing under Section 251, *Triennial Review Order* ¶¶ 255-63, nor is line sharing required under Section 271. Furthermore, there is relatively little

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3. BellSouth's Retail and Wholesale Pricing Fully Complies with State and Federal Requirements

Access Integrated Networks, Inc. ("AIN") claims that BellSouth's effective retail prices are substantially lower than the wholesale rates AIN must pay under the agreement currently in place between BellSouth and AIN. AIN suggests "a pricing formula or cap be created to ensure that wholesale prices available to CLECs . . . are linked to the retail prices."⁴⁴ BellSouth's retail rates are fully consistent with state regulatory requirements and provide no basis for Commission action in this proceeding. Moreover, rates in commercial agreements between BellSouth and CLECs reflect market conditions and pricing at the time of their negotiation. By negotiating a commercial agreement, AIN secures consistent pricing over the term of the agreement regardless of subsequent changes in market conditions. It is not surprising that, over that same period, BellSouth's retail prices may rise or fall. AIN seeks to have its cake and eat it too: it wants the advantages of a term commitment with none of the risk. There is no legal or policy justification for the Commission to intervene in this deregulated commercial negotiation.

Likewise, there is no basis to COMPTTEL's and other parties' allegations that, among other things, the discount provisions of BellSouth's special access contracts effectively require customers to purchase from BellSouth all of their special access circuits - even those for which there are competitive alternatives.⁴⁵ COMPTTEL and other parties have made nearly identical arguments in their comments in the Commission's rulemaking on special access rates for price

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demand for line sharing in BellSouth's region, and BellSouth has negotiated a commercial line sharing agreement with the only carrier with any significant number of arrangements in place.

⁴⁴ AIN Comments at 3.

⁴⁵ COMPTTEL Pet. at 2; Sprint Nextel Comments at 15.

cap ILECs.⁴⁶ As explained in detail in that proceeding, those arguments rely on the faulty premise “that there is minimal or no competition [for special access services] and that the ILECs have market power.”⁴⁷ This assertion was effectively rebutted by BellSouth in that proceeding,⁴⁸ and by Applicants in the Public Interest Statement⁴⁹ and in the Joint Opposition and Reply to Comments.⁵⁰ It is also inconsistent with the Commission’s finding that, except in limited circumstances, there is substantial competition for special access services, so regulatory intervention is unwarranted. In all events, however, whether BellSouth’s pricing structure for special access services is improper is unrelated to the merger, is already the subject of another Commission proceeding and should not be addressed here.

C. The New Jersey Ratepayer Advocate’s Complaints about Declines in Service Quality Are Misleading and Irrelevant

The New Jersey Ratepayer Advocate, which asked the New Jersey Board of Public Utilities to approve the merger expeditiously in the state for which the New Jersey Ratepayer Advocate is responsible, nonetheless has opposed the merger here and presented to this Commission a misleading attack on service quality in AT&T’s and BellSouth’s regions. This attack is based on a skewed selection of statistics and is devoid of any consideration of the relevant state regulatory regimes. For example, the New Jersey Ratepayer Advocate

⁴⁶ *In re Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (Jan. 31, 2005).

⁴⁷ See Reply Comments of BellSouth, *In re Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, at 44 (July 29, 2005).

⁴⁸ *Id.* at 19-40.

⁴⁹ Public Interest Statement 55-57, 59-60.

⁵⁰ Joint Opposition and Reply to Comments at 16-17, 22-25; see also Carlton/Sider Reply Decl. ¶¶ 23-26; 35-36.

“illustrative[ly]”⁵¹ cites Commission statistics for one state - Kansas - for two years, 2000 and 2005, to support its claim that “[s]ervice quality is declining in AT&T[’s] region[.]”⁵² But, this analysis is neither valid nor illustrative. In fact, Commission data show the contrary is true.⁵³

The New Jersey Ratepayer Advocate also suggests that consumers are experiencing declining service levels in Florida and uses the average installation interval in Florida for residential customers as purported evidence for its conclusion.⁵⁴ The increase in the reported interval from 1.2 days from 2000 through 2003 compared to 1.5 in 2004 and 1.7 in 2005 is not an indication of any type of decline in the overall level of service that BellSouth provides to consumers. In 2004 and 2005, BellSouth’s region generally, and Florida specifically, experienced devastating hurricane seasons, including hurricanes Frances, Ivan and Jeanne in 2004 and Katrina, Rita and Wilma in 2005. While some hurricanes may not affect a particular state such as Florida directly, the recovery efforts necessary to respond to a hurricane place a strain on BellSouth’s resources region-wide due to a need to redeploy personnel to the most affected areas. Responding to these hurricanes caused a slight increase in BellSouth’s average

⁵¹ Baldwin & Bosley Decl. ¶ 238.

⁵² NJRPA Comments at 20; *see* Baldwin & Bosley Decl. ¶ 237.

⁵³ For instance, the average repair interval across all of AT&T’s region dropped from 36.1 hours in 2000 to 26.5 hours in 2005 - a decrease of more than 26 percent. FCC Report 43-05, the ARMIS Service Quality Report, Average Service Interval in Days, AT&T (formerly SBC), Business & Residence (run date June 8, 2006). And, repeat out-of-service trouble reports as a percentage of initial out-of-service reports similarly declined, from 20.9 percent in 2000 to 15.5 percent in 2005. FCC Report 43-05, the ARMIS Service Quality Report, Repeat Out-of-Service Trouble Reports as a Percentage of Initial Out-of-Service Trouble Reports, AT&T (formerly SBC), Business & Residence (run date June 8, 2006). Finally, contrary to the implication of the New Jersey Ratepayer Advocate’s “illustrative” analysis, AT&T had no significant increase across its region in the average installation interval metric from 2000 to 2005. Indeed, measured from 2001 to 2005, the interval actually declined, from 2.0 days to 1.8 days. FCC Report 43-05, the ARMIS Service Quality Report, Average Installation Interval in Days, AT&T (formerly SBC), Business & Residence (run date June 8, 2006).

⁵⁴ Baldwin & Bosley Decl. ¶¶ 235-236.

installation intervals and is not an indication of poor service quality as the New Jersey Ratepayer Advocate erroneously suggests.

With respect to Kansas, the New Jersey Ratepayer Advocate fails to note that the data from which it cites show that AT&T is within the regulatory service standards set by the state.⁵⁵ The New Jersey Ratepayer Advocate also overlooks that the Kansas Corporation Commission recently decided not to increase regulation of service quality, finding that “the market place, together with the existing standards will serve as the most effective regulator.”⁵⁶ In that proceeding, even the Citizen’s Utility Ratepayer Board (the New Jersey Ratepayer Advocate’s counterpart in Kansas) “seemed to admit that there are no glaring problems regarding service quality in Kansas.”⁵⁷

D. Cbeyond’s Allegations That the Merger Will Diminish Service Quality Are Unfounded, as Are Its Claims About Applicants’ Ordering Processes

Cbeyond alleges that the merger will result in the “standardization” of “unfair” or “anticompetitive” practices.⁵⁸ Cbeyond supplies no evidence to support its claims and cannot, for they are baseless. Like the allegations of specific misconduct discussed in the *SBC/AT&T Merger Order*, the alleged “anticompetitive practices” of Applicants should not be considered in

⁵⁵ Compare *In re General Investigation into Modification of the Quality of Service Standards*, Dkt No. 05-GIMT-187-GIT, Order (Kan. Corp. Comm’n Dec. 24, 1996) (establishing a quality of service plan with an Average Repair Interval standard of 30 hours) with FCC Report 43-05, the ARMIS Service Quality Report, Average Service Interval in Days, AT&T (formerly SBC), Business & Residence (run date June 8, 2006) (showing AT&T’s service interval in Kansas as between 11.7 and 27.1 hours for every reported year from 1994 to 2005).

⁵⁶ *In re General Investigation into Modification of the Quality of Service Standards*, Order on Motions of Sprint, SWBT, and Cox, Docket No. 05-GIMT-187-GIT ¶ 33 (Kan. Corp. Comm’n Aug. 5, 2005).

⁵⁷ *Id.* ¶ 31.

⁵⁸ See Cbeyond Comments at 7-8, 83, 95; Falvey Decl. ¶¶ 10-14; Youngers Decl. ¶ 6.

this merger proceeding because this conduct is independent of the merger and can be addressed in other proceedings.⁵⁹ In any event, these allegations do not withstand the slightest scrutiny.

Contrary to C'eyond's claim,⁶⁰ AT&T does not "refuse" to expedite LNP orders. As AT&T states in its CLEC Handbook, and, thus, as CLECs are aware, AT&T processes requests and orders for LNP using the industry standard due date intervals recommended by the North American Numbering Counsel ("NANC").⁶¹ Adherence to the NANC process complies with the Commission's guidelines for Inter-Service Provider LNP Operations Flows.⁶²

Likewise, AT&T's "requirement" that CLECs submit orders individually, rather than via spreadsheet,⁶³ simply reflects the ordering requirements that the industry (including the CLECs) adopted in Ordering and Billing Forum ("OBF") standards and other collaborative fora. Under those generally agreed-upon requirements, CLECs must submit individual orders (whether a Local Service Request or Access Service Request) when requesting a wholesale product from another carrier. AT&T's operations support systems follow these industry requirements.

⁵⁹ *SBC/AT&T Merger Order* ¶ 175 & n.493; *accord Cingular/AT&T Wireless Merger Order* ¶¶ 49-51, 56 n.222; *GM/Hughes Merger Order* ¶¶ 304-09, 313-14; *SBC/Ameritech Merger Order* ¶¶ 518, 557-59; *WorldCom/MCI Merger Order* ¶ 215; *McCaw/AT&T Merger Order* ¶ 123.

⁶⁰ *See* Falvey Decl. ¶ 10.

⁶¹ *See, e.g.,* SBC (Missouri, Oklahoma, Kansas, Arkansas & Texas) Local Number Portability (LNP), at 8, *available at* https://elec.att.com/clec_documents/unrestr/hb/swbt/1181/SW%20LNP.doc. AT&T's interconnection agreements with the CLECs (including Xspedius, whose declaration asserts that AT&T "refuses" to expedite LNP orders) also state that AT&T will implement number portability consistent with the NANC guidelines. *See* AT&T – Xspedius Texas ICA, Attachment 14, § 2.1; *see also* North American Numbering Council, *Inter-Service Provider LNP Operations Flows – Provisioning* (Apr. 25, 1997), *available at* <http://www.fcc.gov/web/tapd/Nanc/gnflw14.ppt> (setting forth the applicable NANC guidelines).

⁶² *In re Tel. No. Portability*, Second Report and Order, 12 FCC Rcd. 12281, 12315-16 ¶¶ 56-58 (1997) (adopting the NANC recommendations).

⁶³ *See* Falvey Decl. ¶ 11.

AT&T's position is plainly reasonable. Without the expenditure of substantial resources, the multiple spreadsheet formats used by CLEC's would prevent AT&T from ensuring that a set of orders includes all the information necessary to process the orders unless AT&T personnel familiarized themselves with the format and content of every spreadsheet used by each CLEC. Moreover, AT&T would be required, upon receiving the spreadsheet, to input the data for each order into AT&T's OSS for the CLEC. The responsibility (and accompanying costs) of order preparation would effectively be shifted from the CLEC to AT&T, whereas OBF standards make order preparation the responsibility of the ordering party.⁶⁴

The charges Cbeyond presses against AT&T's dispute resolution process⁶⁵ similarly ignore the facts. First, it is unclear whether the opponents are referring to AT&T's Billing Adjustment and Claims Process, or to the dispute resolution process defined in the interconnection agreement. In either event, the opponents' assertions are flatly wrong. AT&T's Billing Adjustment and Claims process is "clearly defined." It is based on special collaborative sessions during the CLEC User Forum, and it is posted on AT&T's CLEC Online Website.⁶⁶ The process gives a CLEC the option of submitting its billing claims via either the standardized form or the online Exclaim system. AT&T even provides a training package to CLECs for the Exclaim system.

⁶⁴ See, e.g., Alliance for Telecommunications Industry Solutions, *Local Service Request (LSR) Form Preparation Guide - Local Service Ordering Guidelines Industry Support Interface*, ATIS Document No. ATIS-0405071-0012 (issued Nov. 4, 2005), § 3.1, at 3-1 ("Exhibit 1 depicts an LSR [Local Service Request] form with each of the entry fields numbered. . . . This form is prepared by the customer and is submitted to the Service Center (SC) for the ordering of local service") (emphasis in original).

⁶⁵ Cbeyond Comments at 78-79; Falvey Decl. ¶ 13.

⁶⁶ The CLEC Online Website is located at <https://clec.sbc.com/clec/hb/shell.cfm?section=187&hb=1151>.

Furthermore, the opponents' assertion that AT&T "simply denies" CLEC billing disputes⁶⁷ is a conclusory statement without reference to a single specific instance in which this is alleged to have happened.⁶⁸ CLECs must provide specified data for AT&T to process the billing claim. If those data are insufficient for AT&T to determine the validity of the claim, it will be denied without prejudice, to permit the resubmission of the claim with more complete information. If the resubmission provides enough information to process the claim, AT&T will do so, and will provide the CLEC with a resolution letter and any appropriate credits or adjustments. In addition, if a CLEC disagrees with AT&T's disposition of its claims, all of AT&T's interconnection agreements set forth specific dispute resolution procedures.

Moreover, merger opponents' bald claim that AT&T "does not pay" the penalties or damages required by state performance or remedy plans⁶⁹ is untrue. AT&T has paid to CLECs the liquidated damages required by performance and remedy plans, within the time limits set by the plans. Any suggestion that AT&T has deliberately withheld payments due under these plans is unfounded.⁷⁰

C'beyond's complaints with respect to BellSouth's practices are equally unfounded. For example, C'beyond complains that BellSouth's UNE provisioning, provisioning intervals and loop modification policies are inferior to AT&T's.⁷¹ But many of the policies referenced by C'beyond – and the apparent differences between Applicants – are dictated by state requirements: for example, UNE provisioning intervals are set forth in the performance plans ordered by the

⁶⁷ Falvey Decl. ¶ 13.

⁶⁸ *Cf.* 47 U.S.C. § 309(d)(1) (requiring petitions to deny to be accompanied by an affidavit containing "specific allegations of fact").

⁶⁹ Falvey Decl. ¶ 14; Youngers Decl. ¶ 7.

⁷⁰ Dysart, Watkins & Kissel Reply Decl. ¶ 18

⁷¹ C'beyond Comments at 84-85; Falvey Decl. at 4-6; Youngers Decl. at 3.

state commissions. Similarly, loop modification procedures are subject to state regulatory requirements.⁷² Moreover, Cbeyond's comparisons are based on faulty or incomplete information. BellSouth does not have a ten-day special access provisioning interval; rather the class of service, complexity of the request and facility availability dictate the appropriate interval.⁷³ BellSouth's DSI special access interval is between five and eight business days.⁷⁴

Cbeyond's remaining allegations are based on misleading comparisons. While BellSouth does not provide commercial agreements for tariffed services including loops and transport, BellSouth is willing to negotiate specific volume and term discounts for tariffed services. Indeed, BellSouth has already negotiated several such agreements.⁷⁵ Likewise, BellSouth performs loop modification for CLFCs in the exact same manner that it performs such modifications for itself, demonstrating neither anti-competitive intent nor effect. Further, BellSouth's security deposit requirements are consistent with industry norms, intended only to protect against potential losses for uncollectible revenue. Cbeyond's suggestion that such policies are out of the ordinary or are anti-competitive⁷⁶ does not withstand scrutiny.

⁷² See, e.g., *Petition Regarding the Establishment of a Generic Proceeding on Change of Law and Nondiscriminatory Pricing for UNEs*, Final Order Resolving Disputed Issues, Alabama Docket No. 29543, at 60, 62-63 (Apr. 20, 2006) (Issues 26-27); *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes in Law*, by BellSouth Telecommunications, Inc., Second Order on Generic Proceeding, Florida Docket No. 041269-TP, Order No. PSC-06-0299-FOF-TP, at 84, 87 (Issues 26-27) (Apr. 17, 2006).

⁷³ *BellSouth Guide To Interconnection*, Section 1.2.3 – Provisioning Intervals, Table Special Access Service Intervals, at http://interconnection.bellsouth.com/reference_library/guides/leo/getic001/index.htm.

⁷⁴ *Id.*

⁷⁵ Pate & Graulich Reply Decl. ¶¶ 5, 23.

⁷⁶ Cbeyond Comments at 84-85.

Vague criticisms of BellSouth's ordering system based on asserted differences between AT&T and BellSouth's systems are equally unconvincing.⁷⁷ BellSouth's LENS and CAFÉ systems comply fully with all applicable requirements under Sections 251 and 271, providing CLEC's with nondiscriminatory and timely access to BellSouth's ordering facilities. Similarly, BellSouth provides CLEC's with a straightforward means to request expedited treatment for a Local Service Request at the time of submission of the order to BellSouth. Mr. Falvey's unsupported suggestion that this process "is extremely poor" is simply untrue.⁷⁸

⁷⁷ Falvey Decl. ¶ 7.

⁷⁸ *Id.* ¶ 10.

Appendix B:
Customer Statements