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August 8, 2006

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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
Room TW-325  
445 12<sup>th</sup> Street, S.W.  
Washington D.C. 20554

Federal Communications Commission  
Office of Secretary

Re: In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of  
Transfer Of Control, WC Docket No. 06-74  
Response to Applicants' Joint Opposition to Petitions to Deny

Dear Ms. Dortch:

Time Warner Telecom, Inc ("TWTC") hereby submits its response to the Joint Opposition of AT&T Inc. and BellSouth Corporation to Petitions to Deny and Reply to Comments.<sup>1</sup> Specifically, this response focuses on (1) the Applicants' continuing market power over the facilities required to serve enterprise customers and (2) in light of this market power, the public interest harms that will result from the merger because of the increase in the size of the Applicants' footprint and regulators' diminished ability to monitor and regulate RBOC behavior due to the loss of Bellsouth as a "benchmarking firm".

In addition, we have attached a declaration authored by Graham Taylor<sup>2</sup> of TWTC responding to allegations made by Parly Casto<sup>3</sup> of AT&T with respect to AT&T's refusal to provide advanced services to TWTC on reasonable terms and conditions. Also attached is a paper by Economists Stanley M. Besen and Bridger Mitchell of CRAI<sup>4</sup> further explaining the harms that will result from the expanded footprint of the merged company and the loss of a benchmarking firm.

A confidential version of this response has also been filed with the Secretary.

<sup>1</sup> See Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Dkt. No. 06-74 (filed June 20, 2006) ("*Opposition*").

<sup>2</sup> See Reply Declaration of Graham Taylor, attached hereto as Attachment A.

<sup>3</sup> See Reply Declaration of Parley C. Casto, attached to *Opposition*.

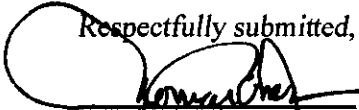
<sup>4</sup> See Joint Declaration of Stanley M. Besen and Bridger M. Mitchell, CRA International, attached hereto as Attachment B (July 19, 2006).

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Please let us know if you have any questions with respect to this submission.

Respectfully submitted,



Thomas Jones  
Jonathan Lechter

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ATTORNEYS FOR TIME WARNER TELECOM INC.

Enclosures

cc: Donald K. Stockdale Jr. (w. encl.)  
William Dever (w. encl.)  
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Gary Remondino (w. encl.)

**RESPONSE OF TIME WARNER TELECOM, INC.**

**TO AT&T INC. AND BELL SOUTH CORPORATION JOINT OPPOSITION**

**TO PETITIONS TO DENY AND REPLY TO COMMENTS**

Time Warner Telecom, Inc. ("TWTC") hereby files its response to arguments made by the Applicants in their Joint Opposition to Petitions to Deny and Reply to Comments.<sup>1</sup>

**1. Introduction and Summary**

TWTC explained in its *Petition to Deny*<sup>2</sup> that AT&T and BellSouth continue to control an overwhelming percentage of the end-user connections needed to serve business customers, and the merger of these two carriers will increase the merged entity's ability and incentive to use its market power over these inputs to raise rivals' costs. The FCC found in its prior RBOC merger orders that the expansion of an RBOC's footprint through merger allows the merged firm to appropriate a larger share of the benefits from raising rivals' costs. As explained in the attached declaration by Dr. Stanley M. Besen and Dr. Bridger M. Mitchell,<sup>3</sup> this is as true of the present merger as it was in past mergers. In this case, the national share of AT&T's switched access lines will increase from 28.62 to 40.29 percent and AT&T will add hundreds of thousands of high capacity loops in the BellSouth region, substantially increasing the size of the merged

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<sup>1</sup> See Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments, WC Dkt. No. 06-74 (filed June 20, 2006) ("*Opposition*").

<sup>2</sup> See Petition to Deny of Time Warner Telecom, WC Dkt. No. 06-74 (filed June 5, 2006) ("*Petition*").

<sup>3</sup> See Joint Declaration of Stanley M. Besen and Bridger M. Mitchell, CRA International, attached hereto as Attachment B (July 19, 2006) ("*Besen/Mitchell Decl.*").

company's footprint.<sup>4</sup> Because the benefits of exclusionary conduct increase with a larger footprint, the merged company's incentive to engage in this conduct also increases. Moreover, there is no question that AT&T has acted on those incentives in the past. TWTC filed as an attachment to its *Petition to Deny* a declaration by Graham Taylor demonstrating that AT&T (already the RBOC with the largest footprint) has overpriced, denied, delayed and degraded TWTC's access to inputs that TWTC needs to provide advanced services such as finished Ethernet services and class of service ("CoS") and quality of service ("QoS") for IP VPN traffic that traverses two carriers' networks.<sup>5</sup> Again, the merger would make this problem much worse.

**[proprietary begin]**

**[proprietary end]** Indeed, as Drs. Besen and Mitchell explain, the merged firm will have the incentive to act in a more discriminatory fashion than even AT&T does currently.

As TWTC explained in its *Petition*, changes in demand patterns for Ethernet and IP VPN will make the effects of the merger even more harmful than would otherwise be the case. As TWTC further explained, customers with locations in both the BellSouth and AT&T ILEC regions already account for **[proprietary begin]**

**[proprietary end]** in those two regions. *See Petition* at 5. Customers increasingly demand that TWTC serve all, not just a subset, of the customers' locations so that their IP networks can be

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<sup>4</sup> *See* RBOC Market Share Chart, *Petition* App. B.

<sup>5</sup> *See* Declaration of Graham Taylor on Behalf of Time Warner Telecom, Inc., *Petition* App. A ("*Taylor Decl.*").

*better managed and integrated. In many cases in the past, TWTC only served those locations that it could connect to with its own network. In the future, as TWTC is increasingly required to provide Ethernet and IP VPN services to all of a customer's locations, TWTC will have no choice but to rely increasingly on the ILECs' local transmission facilities. See id. at 48.* Moreover, because few or no price and non-price regulations apply to ILEC Ethernet or IP VPN service, the Applicants' ability to discriminate without detection will increase.

The loss of BellSouth as a benchmark against which to judge the conduct of other large ILECs, including AT&T, will also substantially reduce the FCC's ability to fashion regulations governing the inputs required by TWTC and other CLECs to provide IP-based services. Given that Qwest is far smaller than either Verizon or a merged AT&T/BellSouth and qualitatively different than the other RBOCs in many ways, it is likely that only two RBOCs will remain against which to benchmark post-merger. *See id. at 62-63.* As Drs. Besen and Mitchell explain, this will likely eliminate the utility of benchmarking completely. *See Besen/Mitchell Decl.* ¶ 102. This is a very serious and harmful consequence of the merger. State regulators and the FCC have continued to rely on RBOC-to-RBOC benchmarking since the last RBOC mergers (*see Petition at 53-56*) and the increasing deployment of advanced services that the Commission has little experience regulating will significantly increase the need for benchmarking in the future.

Repeating arguments made in their public interest statement, the Applicants make two general arguments in their opposition as to why the FCC should not be concerned about the increased footprint of the combined entity or the loss of a benchmarking firm. *First*, they allege that they no longer have market power over the transmission facilities and other inputs needed to serve the enterprise market and therefore do not have the ability to discriminate against

competitors. *Second*, they argue that whatever harms result from an increased footprint and the loss of a benchmarking firm are remedied by existing regulations, and that any additional regulations can be fashioned through “parity” comparisons. These claims have no merit.

**2. The Applicants Have Substantial And Persisting Market Power Derived From Their Control Over Bottleneck Transmission Facilities Needed To Serve Business Customers**

The Applicants argue that the Commission need not be concerned about the enormous increase in the merged company’s footprint because “RBOCs no longer have monopoly control over the inputs that competing carriers need.” *Opposition* at 91. The overwhelming market evidence demonstrates that this assertion is simply untrue.

**Retail Competition.** The Applicants argue that “the provision of high-capacity local services is intensely competitive.” *Id.* at 92. They allege that because “foreign-based companies, competitive LECs, cable companies, systems integrators, equipment vendors and value-added resellers” are competing in the enterprise market, the RBOCs no longer control bottleneck facilities needed to provide enterprise services. *See id.* at 93. This is a non-sequitur. All of these classes of companies (and by definition resellers and systems integrators), must rely completely or almost completely upon RBOC last mile facilities to provide enterprise class services to businesses.

The Applicants also assert that recent press releases regarding the geographic expansion of CLEC service offerings is evidence that CLECs are no longer reliant on ILEC facilities. As they did in the *Special Access Pricing NPRM* and *Triennial Review Remand* proceeding, the Applicants attempt to equate CLEC retail service offerings with the deployment of facilities used to provide these services. But as the Commission well knows, offering service at retail is entirely different from deploying the underlying facilities needed to provide retail service. For

example, while Cbeyond may have “boasted of capturing its 20,000<sup>th</sup> small/medium business customer” and Pac-West is “executing on a planned expansion” (*see id.* at 40-41), Cbeyond does not deploy any of its own loop facilities<sup>6</sup> and “Pac-West serves all customers via facilities obtained from other carriers, with much of that being obtained from the ILECs.”<sup>7</sup> Moreover, while Xspedius may have “revealed growth plans” throughout the South (*id.* at 40), (1) most of Xspedius “on-net” locations actually serve IXC POPs, LEC wire centers and carrier hotels, not end user locations;<sup>8</sup> (2) Xspedius cannot build a fiber “unless customer demand [ ] exceeds at least 3 DS3s of capacity;” (*Falvey Decl.* ¶ 25) and (3) and “it almost never is economic for Xspedius to construct its own wireline DS-1 loop facilities” (*id.* ¶ 26).

The Applicants imply that because CLECs can and do in some cases deploy OCn-level services, the Commission has held that CLECs can provide DSn-level services to any location through channelization. *Opposition* at 93. This is not what the FCC held. Rather, the Commission determined that channelization is possible, but only at that limited number of locations at which customers already demand very high capacity connections.<sup>9</sup>

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<sup>6</sup> Cbeyond explains that all of its customers are served by DS1 loops provided by ILECs because it is never economically rational for Cbeyond to deploy DS1 facilities. *See* Declaration of Richard Baatelan on behalf of Cbeyond, attached to Comments of ALTS, WC Dkt. Nos. 04-313 *et al.*, App. C ¶ 5 (Oct. 4, 2004).

<sup>7</sup> *See Ex Parte* Letter of Richard M. Rindler, Counsel, Pac-West, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-338 *et al.*, at 2 (Sept. 7, 2004).

<sup>8</sup> *See* Declaration of James C. Falvey, on behalf of Xspedius Communications, attached to Comments of Loop and Transport CLEC Coalition, WC Dkt. Nos. 04-313 *et al.*, ¶ 20 (Oct. 4, 2006) (“*Falvey Decl.*”).

<sup>9</sup> *See Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 154 (2005) (“*TRRO*”). (“[C]arriers can sometimes economically serve lower-capacity customers (e.g., customers at the DS1 capacity level) in multi-tenant buildings because the incremental costs of providing channelized capacity over a higher-capacity fiber loops are minimal when one

**Competitors' Deployment of Local Transmission Facilities.** The Applicants argue that CLEC deployment of thousands of miles of local fiber and the connection of thousands of buildings to these local fiber networks proves that, "there are no significant barriers to the deployment of local fiber networks and thus the provision of Type I special access services in BellSouth's region."<sup>10</sup> But subsequently in their own opposition, the Applicants observe that fiber *transport* networks are a necessary, but not sufficient, condition for CLECs to serve end-user customers. Elsewhere in their opposition, they state that, "As the DOJ explained, 'two of the most important factors in determining whether entry is likely in a given building are the proximity of competitive fiber to that building and capacity required by the building.' 'The closer a building is to a competitor's fiber, the less it is likely to cost that competitor to install additional fiber to reach that building' and the 'larger the demand for capacity in a building, the greater the expected revenues.'"<sup>11</sup> The FCC came to the same conclusion in the *TRO* and *TRRO*.<sup>12</sup> Applying this analysis, the FCC has held that CLECs cannot deploy DS1 and DS3 *loop* facilities in most instances. See *TRRO* ¶ 166. In the *TRRO*, the FCC specifically rejected as non-probative ILEC supplied maps showing dozens of CLEC fiber *transport* networks and

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or more other customers in a building are already served by competitive fiber of sufficient capacity, or the likelihood of capturing customers at higher capacity justifies deployment of facilities that can be channelized to the DS1 level.") (footnote omitted).

<sup>10</sup> Reply Declaration of Dennis W. Carlton and Hal S. Sider, attached to *Opposition*, ¶ 24 ("Carlton/Sider Decl.").

<sup>11</sup> *Opposition* at 20 & n.69 (citing DOJ Response to Public Comments at 23 n.40; 24).

<sup>12</sup> See *TRRO* ¶ 150; *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order, 18 FCC Rcd 16978, ¶ 206 (2003), *subsequent history omitted* ("TRO").



*thousands of miles of CLEC deployed fiber rings and CLEC lit buildings (usually relying on ILEC loops) as evidence of the ability of CLECs to deploy their own loop facilities on a widespread basis.*<sup>13</sup> The Applicants' reliance on CLEC fiber mileage and number of buildings served (regardless of the owner of the loop) in this proceeding is unpersuasive for the same reasons.

The available market evidence demonstrates that ILECs in general and the Applicants in particular control the vast majority of loop transmission facilities needed to serve business customers. Less than two years ago, the RBOCs stated in their "UNE Fact Report" that competitors served 31,669 buildings<sup>14</sup> with their own fiber loops as compared to the hundreds of thousands or millions of buildings served by ILEC fiber.<sup>15</sup> More recently, Verizon claimed that CLECs have deployed loops serving "31,467+" buildings nationwide.<sup>16</sup> Clearly, the overall competitive landscape has not changed appreciably, if at all, over the last few years. Verizon

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<sup>13</sup> *TRRO* ¶ 187 ("The maps provided by the incumbent LECs do not specify the capacity of service demanded in particular locations along the competitive routes identified; if those locations require capacity only at multiple DS3 or higher capacities, and are providing revenues commensurate with those capacities, then the presence of competitive routes is not relevant to the question whether it is economic to deploy to serve customers at the DS1, or even the single DS3, capacity level. Similarly, as described above, the costs of deployment will depend in part on the length of the lateral that must be constructed between the building being served and the splice point on the fiber ring. The incumbent LECs' maps do not indicate the placement of splice points, rendering evaluation of such costs impossible.").

<sup>14</sup> See *UNE Fact Report 2004*, Prepared for and Submitted by BellSouth, SBC, Qwest, and Verizon, Dkt. Nos. 04-313 *et al.*, at III-4 (Oct. 4, 2004).

<sup>15</sup> See *TRRO* ¶ 157 (stating that the record indicates that there are between 700,000 and 3 million commercial buildings in the nation).

<sup>16</sup> See Verizon Comments, WC Dkt. No. 05-25, Attach. D, Declaration of Quintin Lew, at App. B, (June 13, 2005).

indicates that back in 1996 there were fully 24,000 buildings "served directly by CLEC fiber."<sup>17</sup> In other words, in nearly 10 years, CLECs have added connections to only approximately 8,000 buildings. This only underscores the difficulty of loop deployment and the ILECs' continuing dominance of the special access marketplace.

The Applicants make much of the fact that TWTC increased the number of buildings served by its own fiber by 17 percent last year. *See Opposition* at 23. It is true that TWTC now serves 6,185 buildings over its own fiber facilities. Yet, TWTC remains heavily reliant on ILEC loop facilities. While TWTC serves 6,185 buildings on-net, it provides service to another 16,865 buildings via leased (usually ILEC) special access loops.<sup>18</sup> Therefore TWTC serves only 26.8 percent of its customer locations using its own facilities, while it must rely on other carriers (almost exclusively the ILECs) 73.2 percent of the time.

By any measure, the market for local transmission facilities is overwhelmingly dominated by the ILECs (and of course the Applicants in their regions). If, as the ILECs asserted, CLECs in 2005 served 32,000 of the 700,000 to 3 million locations that demand enterprise level services, CLECs only possessed a 1.1 to 4.6 percent of the high capacity transmission loop facilities needed to provide TDM and packetized services to enterprises. Assuming that CLECs as a whole, like TWTC, were able to increase the number of buildings that they served by 17 percent (and there is no indication that this is the case, especially with the elimination of an independent AT&T and MCI), CLECs would now serve 37,440 buildings or between 5.3 and 1.2 percent of

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<sup>17</sup> *See* Verizon Comments, WC Dkt. No. 05-25, Attach. C, Declaration of William E. Taylor, at Table 10, (June 13, 2005).

<sup>18</sup> *See* Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended Mar. 31, 2006, at 24 (filed May 10, 2006).

buildings nationwide. In any market characterized by high entry barriers and in which one company controls 95 percent of that market, that company must be considered to be dominant and able to exercise its market power.

TWTC does not dispute the fact that non-ILEC special access wholesalers exist (*see id.* at 98). In fact, TWTC itself offers special access at wholesale. But neither TWTC nor other non-ILEC wholesalers can deploy loop facilities to most buildings. Indeed, as Mr. Taylor explains, TWTC has purchased or is in the process of purchasing access to non-ILEC Ethernet loops to [proprietary begin] [proprietary end]<sup>19</sup> These [proprietary begin]

[proprietary end] represent less than [proprietary begin] [proprietary end] of the locations to which TWTC currently provides Ethernet service at retail.<sup>20</sup> Therefore, TWTC must rely almost completely on the ILECs for last mile facilities to connect to locations for which TWTC cannot deploy its own loops. Moreover, other competitors report the same experience. Sprint/Nextel and T-Mobile state that they must rely on the ILECs for the fiber connection between their wireless towers and mobile switching centers 99 percent

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<sup>19</sup> See Reply Declaration of Graham Taylor, attached hereto as attachment A, ¶ 7 (“*Taylor Reply Decl.*”).

<sup>20</sup> As Mr. Taylor explains, [proprietary begin]

[proprietary end] *See id.*

and 94 percent of the time respectively.<sup>21</sup> Numerous carriers have made similar statements regarding their dependence on ILEC facilities in the past and in this proceeding.<sup>22</sup>

Obviously desperate to find examples of competitors deploying local transmission facilities, the Applicants tout TWTC's expansion of its Atlanta fiber network to demonstrate that any competitor can build local transmission facilities to any location. *See Opposition* at 22. If anything, however, TWTC's experience in Atlanta illustrates the ILECs' enduring power in the provision of local transmission facilities. Even after its network expansion, TWTC will remain reliant on BellSouth's loop facilities to provide "communications solutions to more than 6,000 additional businesses located in the Atlanta area."<sup>23</sup> Indeed, the same press release cited by the Applicants states that TWTC's network only "passes 350 buildings," (*see id.* & n.79)

[proprietary begin]

[proprietary end] But a [proprietary begin]

[proprietary end] is not actually served by TWTC loop facilities; [proprietary begin]

[proprietary end] are lit with TWTC fiber. To serve [proprietary begin]

[proprietary end] would require a substantial capital investment and,

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<sup>21</sup> *See* Sprint/Nextel Comments, WC Dkt. No. 06-74, at 9 (June 5, 2006); T-Mobile USA Response, WC Dkt. No. 06-74, at 5 (June 20, 2006).

<sup>22</sup> *See, e.g.*, Paetec Comments, WC Dkt. No. 06-74, at ii (June 4, 2006) (stating that Paetec relies on ILEC special access for 95 percent of its last-mile connections to end-users); CompTel Petition to Deny, WC Dkt. No. 06-74, at 9 (June 5, 2006) (stating that "[w]ireless carriers are major consumers of ILEC special access services, because they have no choice") (*citing* AT&T Wireless Services Comments, RM-10593, at 2-3 (Dec. 2, 2002)); *id.* at 11 (stating that "even the competitive carriers with the largest networks must buy over 90% of their total special access circuits from the incumbents").

<sup>23</sup> *Opposition* at 22 & n.79 (*citing* Time Warner Telecom, Inc. Press Release, *Time Warner Telecom Extends Atlantic Fiber Network* (Jan. 20, 2006)).

in many cases, depending upon the demand and distance to the building, would not be economically rational.

The available evidence indicates that the market for broadband transmission facilities serving enterprises is even more concentrated in BellSouth's territory than the nation as a whole. As the Applicants admit, there are 219,000 commercial buildings demanding enterprise class services in BellSouth's territory. See *Carlton/Sider Decl.* ¶ 22. Yet, in the *Triennial Review Remand* proceeding, BellSouth stated that CLEC fiber loops serve only approximately 2,200 buildings in all of BellSouth's service area or 1 percent of the market.<sup>24</sup> Assuming that competitors have increased the number of buildings served by CLEC fiber by 17 percent to 2574 buildings since then (an extremely aggressive assumption), competitors would only retain a 1.2 percent market share in BellSouth's region. Considering this minuscule CLEC market-share of wireline transmission facilities, it is hard to see how the Applicants could argue that BellSouth does not maintain market power over these bottleneck inputs needed to serve the enterprise market in its region.

The Applicants attempt to argue, as they did in their public interest statement, that "cable companies. . . have significant business offerings." *Opposition* at 36. As TWTC explained in its *Petition*, however, the FCC has repeatedly found that *cable modem service* does not provide the level of service quality that most businesses require. See *Petition* at 35. To the extent that cable

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<sup>24</sup> See *Ex Parte* presentation of BellSouth, attached to Letter of Glenn T. Reynolds, Vice President, Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, FCC, CC Dkt. No. 01-338, at 4 (Aug. 18, 2004) ("In BellSouth's region: more than 2,200 buildings are served by non-ILEC fiber.").

companies serve enterprise customers, they do so largely using fiber optic facilities,<sup>25</sup> not hybrid fiber coax facilities, and therefore face the same barriers as other CLECs.<sup>26</sup> It is no doubt true that, as the Applicants argue, some businesses purchase some cable modem service for some uses. However, the FCC found that this fact does not show that cable modem service is a replacement for wireline loops for most business applications. *See TRRO* n.511. With respect to wireless services, the RBOCs themselves, despite having held licenses for WCS and BRS spectrum for many years, are only now rolling out wireless broadband services in extremely limited circumstances where there may be no other viable options (such as rural and disaster-stricken areas). *See Opposition* at 73-74. Clearly, even the Applicants do not believe that these services can replace the ILECs wireline facilities to serve enterprise customers.

**Treatment of Special Access In Past Merger Orders.** The Applicants argue that in earlier RBOC mergers, the FCC did not focus on merger-specific effects on special access services and therefore there is no need for the FCC to be concerned in this instance. *See id.* at 92. But the Commission focused in the past on ensuring the availability of UNEs and not special access simply because it considered UNEs fully sufficient inputs for the advanced and other service offerings being provided at the time.<sup>27</sup> Today, UNEs are not generally available for

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<sup>25</sup> *See Opposition* at 37 (“In April 2006, Charter Communications announced the ‘deployment and implementation of an *optical* solution...’”) (emphasis added).

<sup>26</sup> *See TRRO* nn.511, 514.

<sup>27</sup> *See e.g., In re Applications of Ameritech Corp. and SBC Comm. Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission’s Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 370 (1999), *subsequent history omitted* (discussing condition to prevent RBOC discrimination with respect to the use of UNEs for “interim line sharing”) (“*SBC/Ameritech Order*”); *id.* ¶ 372 (discussing condition mandating discount for UNE loops used for advanced services until merged company can develop an advanced services OSS system).

purposes of providing Ethernet and other IP services. In the absence of UNEs and non-ILEC sources of supply, competitors have no choice but to rely on special access as the means of purchasing local transmission facilities needed to provide Ethernet and other IP-based services. Moreover, in light of the ILECs' resistance to allowing competitors' access even to the TDM UNEs to which they are entitled (*see TRRO* ¶ 64) (and for other reasons as well), CLECs have increasingly relied on special access for DS1 and DS3 loops and transport since the time of the last RBOC mergers. Indeed, the ILECs, including SBC, pointed to the CLECs' heavy reliance on special access facilities in the Triennial Review Remand proceeding in an attempt to show that CLECs no longer require access to UNEs.<sup>28</sup>

The Applicants attempt to waive away TWTC's assertions regarding the Applicants' market power over local transmission facilities as a "rehashing [of] the arguments [that] it and other CLECs are currently advancing in the Commission's ongoing review of special access pricing and provisioning." *Opposition* at 92. They argue that the FCC held in the SBC/AT&T merger that "these claims must be raised in ongoing proceedings not in this merger." *Id.* (footnote omitted). But as Drs. Mitchell and Besen explain, TWTC raises the Applicants' overwhelming dominance over special access facilities not to advocate for special access price and performance regulation *per se*, but rather because this market power increases the incentive and ability for the Applicants to discriminate post-merger through an increased footprint and the loss of a benchmarking firm. *See Besen/Mitchell Decl.* n.15. The Applicants' existing market

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<sup>28</sup> *See, e.g.*, SBC Comments, WC Dkt. No. 04-313, at 9 (Oct. 4, 2004) ("CLECs have already shown by their wide reliance on special access that they can compete profitably when they use special access as an input."); SBC Reply Comments, WC Dkt. No. 04-313, at 38-40 (Oct. 19, 2004).

power establishes the precondition for the merger specific harms (larger footprint, loss of benchmarking firm) that are the focus of TWTC's advocacy in this proceeding.

**Entry Barriers.** The Applicants argue that the Commission need not be concerned about the lack of FCC regulation over packetized services (such as Ethernet) because the FCC allegedly held in the *Triennial Review Order* that "there are no significant barriers to deploying such [equipment and services.]" See *Opposition* n.388. This assertion is easily rejected.

*First*, in eliminating unbundling for the packetized capabilities of hybrid loops in the *Triennial Review Order*, the Commission did not rely on the absence of barriers to entry for these services. Rather, the Commission eliminated packetized UNEs because it found such deregulation would encourage CLEC and ILEC investment in new, advanced facilities and because the Commission retained unbundling for the TDM features of these loops. See *TRO* ¶¶ 289-290. The Commission believed that the continued availability the TDM-based functionality of packetized loops would provide CLECs a viable alternative to packetized loop UNEs. However, the Commission's predictions regarding increased CLEC deployment of packetized loops and the ability of carriers to employ TDM loops for Ethernet services are both unfounded. There is no evidence that the pace of CLEC loop deployment increased after the *TRO*. In addition, because of the added costs and inefficiencies of TDM loops, TWTC cannot utilize AT&T's TDM loops to provide Ethernet services to many customer locations. See *Taylor Reply Decl.* ¶¶ 17-25.

*Second*, as the Applicants' declarant Parley C. Casto admits, aside from the type of electronics placed on the loop itself, there is no real difference between a finished Ethernet loop



and a TDM loop.<sup>29</sup> Therefore the barriers to facilities based entry are largely the same whether the loop carries TDM or Ethernet traffic.<sup>30</sup> As the FCC held in the *TRRO*, CLECs cannot deploy DS1 or DS3 facilities in most locations because the revenue opportunity does not compensate for the cost of deploying the fiber. *See TRRO* ¶ 166. Similarly, it is not economic for TWTC to deploy finished Ethernet loops at lower capacities and at longer distances where the cost of construction cannot be recouped. For that reason, as Mr. Taylor explains, TWTC is just as dependant upon AT&T and BellSouth's transmission facilities to provide finished Ethernet services as it is to provide TDM-based services. *See Taylor Reply Decl.* ¶¶ 7-9.

**AT&T's Exercise of Market Power.** AT&T's behavior in its ongoing negotiations regarding the inclusion of Ethernet services in TWTC's volume and term discount plan confirm that AT&T possesses and exercises substantial and persisting market power over broadband transmission facilities. As Graham Taylor explained in his initial declaration, AT&T has denied, delayed, degraded and overpriced the inputs TWTC needs in order to provide next-generation IP-based services such as Ethernet and IP VPN. The Applicants offer numerous responses to those arguments in a futile effort to show that AT&T has not exercised market power. Those responses are clearly without merit.

*First*, in his reply declaration, Mr. Casto argues that Mr. Taylor has overstated the problems TWTC faces in expanding its provision of Ethernet services. He argues that TWTC is able to compete in the retail Ethernet market using either "finished" Ethernet loops under

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<sup>29</sup> *See Reply Declaration of Parley C. Casto, attached to Opposition, ¶ 21 ("Casto Decl.")*.

<sup>30</sup> The barriers to loop construction largely stem from the cost of laying the fiber itself, not the electronics used to light the fiber. *See TRRO* n. 493; *TRO* ¶ 381. However, as Mr. Taylor explains, the need to purchase *both* TDM and Ethernet electronics when utilizing AT&T TDM facilities to provide Ethernet often makes it uneconomic to provide Ethernet service at retail using such facilities. *See Taylor Reply Decl.* ¶ 18.

contract prices that are currently being negotiated by TWTC and AT&T or TDM loops that TWTC can purchase under its existing 2005 agreement with AT&T, coupled with Ethernet electronics supplied by TWTC. *See Casto Decl.* ¶¶ 4,10, 15, 19-22. This is not true.

To begin with, TWTC has relied on TDM loops in the past to provide Ethernet service, but this strategy is quickly becoming untenable. As explained in detail in Mr. Taylor's declaration, the high cost of even discounted TDM loops, the need to purchase two sets of electronics (TDM and Ethernet) and the inefficiencies of converting signals from TDM to Ethernet precludes the use of TDM facilities for Ethernet service in most instances. *See Taylor Reply Decl.* ¶¶ 17-25. In even the most advantageous locations, the cost of the AT&T TDM loop itself (not counting additional costs in electronics and maintenance) **[proprietary begin]**

**[proprietary end]**

*See id.* ¶¶ 20-23.

Moreover, changes in customer demand patterns are magnifying the significance of the inefficiencies associated with relying on TDM loops. As explained in its petition, TWTC must increasingly serve all of its customers' locations and the high price of TDM loops to provide Ethernet service eliminates many potential customers from TWTC's addressable market for Ethernet service. *Petition* at 48-49. Given that the average TWTC customer has **[proprietary**

**begin]** (*see Taylor Decl.* ¶ 20)

(*see id.* ¶ 22), **[proprietary end]** it is clear that TWTC must increase substantially the number of locations it must serve per customer in order to meet changing customer demands. In fact, TWTC's customers currently have **[proprietary begin]**

**[proprietary end]** in areas where TWTC does not have any fiber deployed at all. *See id.* ¶ 21.

TWTC would need to serve all of those locations today exclusively via ILEC local transmission facilities. Given that it is only economically rational to purchase AT&T TDM loops to provide Ethernet service to TWTC customers **[proprietary begin]**

, **[proprietary end]** many of these customer locations cannot be served using AT&T TDM loops. This could very well lead to the loss of current TWTC Ethernet customers and the inability to serve many prospective Ethernet customers.

Nor is it possible for TWTC to rely to any significant degree on “finished” Ethernet loops offered by AT&T, **[proprietary begin]**

**[proprietary end]**

*See Taylor Reply Decl.* ¶ 8. TWTC cannot rely on AT&T’s finished Ethernet services at AT&T’s extremely high tariffed rates, and indeed, TWTC has never purchased any circuits at these rates. In those few instances where TWTC is able to obtain finished Ethernet loops from non-ILEC wholesalers, such wholesalers’ prices are **[proprietary begin]**

**[proprietary end]** *See id.*

As Mr. Taylor shows, **[proprietary begin]**

**[proprietary end]** TWTC offers a range of Ethernet rates at retail that it believes, based on competition in the marketplace and its own costs, enable it to be profitable. TWTC’s rates range from its **[proprietary begin]**

**[proprietary end]** Because TWTC operates in a competitive retail market, the more competition in a certain area or for a certain customer, the lower TWTC’s retail prices must be

for it to remain competitive. It is likely that as competition continues to intensify over time, TWTC will be forced to offer ever lower retail Ethernet prices.<sup>31</sup>

Based on Mr. Taylor's analysis, **[proprietary begin]**

*Id.* ¶ 12.

*See id.* ¶ 11.

*See id.* ¶ 15.

*See id.* ¶ 11.

*Id.* ¶ 13

(emphasis added).

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<sup>31</sup> **[Proprietary Begin]**

**[Proprietary End]** *See Taylor Reply Decl.* n.6.

*Id.* ¶ 16.

*See id.* ¶ 7.

*See Taylor Decl.* ¶ 37.

*See*

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32

*See id.* ¶ 14.

*See id.*

*id.*

*See Taylor Reply Decl.*

¶ 27.

*See id.*

*See*

*id.*

*See*

*id.*

*See id.*

*See id.* ¶ 7.

**[proprietary end]**

AT&T's exorbitant "off-the-shelf" finished Ethernet prices also demonstrate its market power. AT&T sets its month-to-month and term tariff finished Ethernet rates at absurdly high levels. Indeed, the latter prices are so high that, as Mr. Casto notes, few carriers purchase any

Ethernet facilities from AT&T. *See Casto Decl.* ¶ 18. Such a pricing structure comports with economic theories regarding the behavior of monopolists. As former FCC Chief Economist Joseph Farrell explains: “[W]hen a monopoly offers proportional or relative discounts off its undiscounted prices in order to induce customers to agree to exclusionary provisions, it has an incentive to set the undiscounted price above even the monopoly level (because rather than simply deterring demand, an increase above the monopoly level steers customers into the discount plans and also brings the discount prices closer to the monopoly level).”<sup>33</sup>

*Second*, the Applicants attempt to show that non-price terms in its volume/term agreements are not an exercise of market power. In its *Petition*, TWTC argued that certain volume/term special access contracts explicitly demand that four percent of a customer’s circuit commitment with legacy SBC must be transferred from a competitive wholesaler. *See Petition* at n.23.<sup>34</sup> Such provisions are anticompetitive and indicative of AT&T’s market power over special access. The Applicants respond that the requirement that competitors limit their purchases from non-ILEC providers was included in only one contract arrangement and that that contract is not representative of most plans. *Opposition* at 31-32. Although it may be true that most of AT&T’s contracts do not explicitly require a reduction in purchases from CLEC wholesalers, the presence of a MARC in many of AT&T special access contracts (including its

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<sup>33</sup> Reply Declaration of Joseph Farrell on Behalf of CompTel, attached to Reply Comments of CompTel, Global Crossing and NuVox, WC Dkt. No. 05-25, ¶ 4 (July 29, 2005).

<sup>34</sup> *See* CompTel/ALTS, Global Crossing North America, Inc., and NuVox Communications Comments, WC Dkt. No. 05-25, at 18 (June 13, 2005) (noting that SBC Tariff No. 15 “requires that a ‘minimum of 4% of [the annual commitment] must come from services previously provided by a carrier other than Southwestern Bell Telephone Company and its affiliates.’ Failure to document this 4% minimum transfer of service will require customers to suffer the full termination penalty under the tariff – repayment of all discounts given plus 25% of the committed revenue for each remaining year.”).

popular “MVP” plan),<sup>35</sup> has the exact same effect. **[proprietary begin]**

**[proprietary end]** See *Taylor Reply Decl.* ¶ 7.

In addition, AT&T’s current contract with TWTC does not permit TWTC to purchase more than a minimal number of UNEs. If TWTC fails to meet this condition, it loses the offered discounts.<sup>36</sup> TWTC’s contract is not unique; numerous AT&T contract tariffs including the “MVP” plan contain a similar requirement.<sup>37</sup> The FCC found that 11 CLECs subscribed to the MVP plan in SBC’s region prior to its merger with AT&T.<sup>38</sup> Although TWTC is one of the few carriers that does not purchase UNEs, it seems extremely unlikely that at least 11 carriers in SBC’s region would willingly give up their right to obtain transmission facilities at forward looking prices if AT&T did not continue to retain market power over the special access inputs needed by carriers to compete.

*Third*, Mr. Casto argues that TWTC’s willingness to sign its 2005 special access contract and its announcement at the time that the deal “strengthens Time Warner Telecom’s ability to compete effectively for the nationwide business market” proves that TWTC happily accepted all

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<sup>35</sup> See SWBT Tariff F.C.C. No. 73 § 38.3(C) (explaining the MARC provisions of the MVP contract tariff).

<sup>36</sup> See SWBT Tariff F.C.C. No. 73 § 41.48.3 (E) (explaining that CLEC customers can only purchase two percent of their access services from SWBT as UNEs or they will lose the discount on special access services).

<sup>37</sup> See SWBT Tariff F.C.C. No. 73 § 38.3(C) (explaining that CLEC customers can only purchase five percent of their access services from SWBT as UNEs or they will lose the discount on special access services).

<sup>38</sup> *SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion & Order, 20 FCC Rcd 18290, ¶ 43 (2005).



of its terms. *See Casto Decl.* ¶ 20. According to AT&T, TWTC's agreement to sign the contract *is prima facie evidence that all of the terms in the contract are reasonable. This is fatuous.*

TWTC simply has no choice but to purchase local transmission facilities from AT&T. TWTC decision to sign a volume-term agreement with discounts only shows that those discounts are preferable to higher AT&T tariff prices for the same inputs; it in no way demonstrates that the somewhat reduced prices and other terms and conditions of the agreement are reasonable or even close to those that would prevail in a competitive market.<sup>39</sup>

For example, Mr. Casto alleges that **[proprietary begin]**

*See Casto Decl.* ¶ 43.

*See Taylor Reply Decl.* ¶ 29.

*See id.*

**[proprietary end]**

The Commission has recognized in other contexts that the mere signing of a contract between two parties with unequal bargaining power does not *ispo facto* mean that the contract terms are just and reasonable. For example, the Commission allows carriers to demand arbitration with the Commission *following* the signing of a pole attachment agreement. The Commission recognized that utility pole owners have little incentive to negotiate on reasonable

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<sup>39</sup> *See Besen/Mitchell Decl.* ¶ 14. ("Entrants need interconnection with ILECs such as AT&T and BellSouth far more than do AT&T and BellSouth need interconnection with CLECs such as Time Warner Telecom. This is because AT&T and BellSouth serve far more end users than any CLEC. If negotiations over interconnection were to break down, a CLEC would likely be forced out of business as the result of being unable to offer its customer the ability to make calls to, and receive calls from, the ILEC's network.").