terms and conditions because of the extreme imbalance in bargaining power. As the Commission explained:

> In the Local Competition Order, the Commission addressed the requirement of Section 251 that requires an ILEC to provide interconnection and other rights to new entrants, and observed that new entrants have little to offer the incumbent. Rather, these new competitors seek to reduce the incumbent's subscribership and weaken the incumbent's dominant position in the market. An ILEC is likely to have scant, if any, economic incentive to reach agreement. In the Local Competition Order, the Commission determined that a utility stood in a position vis-à-vis the competitive telecommunications provider seeking pole attachment agreements that was virtually indistinguishable from that of the ILEC with respect to a new entrant seeking interconnection agreements under Sections 251 and 252 of the 1996 Act. We find that a utility's demand for a clause waiving the licensee's right to federal, state, or local regulatory relief would be per se unreasonable and an act of bad faith in negotiation. In particular, a request that a pole attachment agreement include a clause waiving statutory rights to file a complaint with the Commission is per se unreasonable.[40]

Similarly, in order for TWTC to obtain a contract for finished Ethernet services which provides even the high rates offered by AT&T, it will likely have to sign a contract with many unjust and unreasonable provisions, including a requirement to purchase other competitive services, such as switched long distance, at above market rates.

3. The Increased Size of the Applicants Footprint Will Unquestionably and Substantially Increase the Applicants' Incentive to Engage In Exclusionary Conduct

In light of the Applicants' continuing market power over the facilities needed by competitors to provide services to the enterprise market, their increased footprint due to merger will increase their incentive and ability to engage in exclusionary behavior. As Drs. Besen and Mitchell explain, the merger of two ILECs enables the merged company

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[40] *Implementation of Section 703(e) of the Telecommunications Act of 1996,* Report and Order, 13 FCC Rcd 6777, ¶ 21 (1998), *aff'd in part, rev'd in part, Gulf Power Co. v. FCC,* 208 F.3d 1263 (11th Cir. 2000) (footnotes omitted).

to capture more of the benefits of their exclusionary behavior making such behavior more attractive to the merged firm. *See Besen/Mitchell Decl.* ¶ 39.

When CLECs with a national scope such as TWTC rely on multiple ILECs for inputs to provide service, the discrimination of one ILEC can harm the CLEC's ability to compete in other regions, but the discriminating ILEC can only capture a portion of these effects. *See id.* ¶ 40. AT&T's discriminatory behavior can both raise the costs of a national CLEC like TWTC and reduce the demand for TWTC's services throughout the country. *See id.* ¶¶ 45-46. AT&T's discrimination can also impact TWTC's economies of scale and scope, increasing its costs nationally. *See id.* ¶ 48. Discrimination in one region can lower the return on investment that TWTC would obtain in all of its markets from product development and research and development, thereby inhibiting both. *See id.* ¶¶ 46-47, 57. However, AT&T currently captures virtually none of the benefits of its discrimination that "spill-over" into BellSouth's region. Following the merger, the merged company can internalize the benefits in the BellSouth region, increasing the incentive and ability for the merged company to engage in discrimination, especially against CLECs such as TWTC which compete in both AT&T's and BellSouth's regions. *See id.* ¶ 49.

Indeed, TWTC's market presence in both AT&T's and BellSouth's regions makes it especially vulnerable to the merged company's increased incentive and ability to discriminate post-merger. For example, depending upon the metric used, a merged AT&T/BellSouth will have a **[proprietary begin]** **[proprietary end]** percent larger footprint in those markets served by TWTC than AT&T had prior to the merger. *See id.* ¶ 55. Moreover, many of TWTC's customers have multiple locations in both regions (*see id.* ¶ 56), and as explained previously, **[proprietary begin]**

[proprietary end] come from customers that are located in both AT&T and BellSouth's regions. *See Petition* at 5. This share will only increase as TWTC is pressured by market demand to increasingly serve most, if not all of its customers' locations across the country. *See id.* The heavy presence of TWTC's customers in both BellSouth's and AT&T's markets materially increases the ability and incentive for the merged company to engage in discrimination against TWTC and other similarly situated CLECs. *See Besen/Mitchell Decl.* ¶ 21.

4. Existing Regulations Will Not Ameliorate the Effects of an Increased Footprint and Loss of a Benchmarking Firm

The Applicants' increased incentive to engage in anticompetitive conduct combined with competitors' increased reliance on the Applicants' local transmission facilities to provide IP-based services would create an even greater need for regulation. But, of course, the elimination of a benchmark RBOC would make that regulation far less effective.

Consequences of the Merger. As Drs. Besen and Mitchell explain, there are substantial public interest harms that will result from the loss of BellSouth as a benchmarking firm. The merger will result in a loss of information provided to regulators in several ways. *First*, a merged firm may adopt a common practice and therefore regulators will lose a source of independent RBOC behavior. *Second*, even where the firm retains somewhat different practices among its legacy companies, it may only report its practices at the firm level, thus providing less information. *Third*, even if the merged company reports "sub-company" data, this data is often less useful to regulators. *See id.* ¶ 86.

Drs. Besen and Mitchell explain in detail how this loss of information caused by the merger diminishes the ability of regulators to perform both "best-practice" and "average practice *benchmarking." For example, assuming four RBOCs,*[41] *the loss of one of these four to merger* would reduce the likelihood of a firm adopting a best practice (different from the remaining firms) by half. *See id.* ¶ 91. This impact on "average practice benchmarking" caused by the merger is also severe for two reasons. *First*, with fewer firms and therefore data points, it becomes more difficult to calculate an "average." *See id.* ¶ 93. *Second*, this loss of information will (rightly) reduce the confidence of regulators in making the decision and therefore make them less likely to employ average practice benchmarking at all. *See id.*

The Inadequacy of Existing Regulation. Notwithstanding the harmful consequences of the merger for regulation, the Applicants blithely assert that benchmarking is unnecessary. For example, the Applicants' argue that, even if they retain "residual market power over certain DSn-level facilities," the "full implementation" of Sections 251 and 271 prevents any further discrimination. This is purportedly so because (1) local transmission facilities are now available to TWTC and other competitors as UNEs and (2) the Applicants are subject to performance standards for UNEs as well as other interconnection and access services for which state and federal regulatory processes are mature. *See Opposition* at 92-95. These assertions are makeweight.

To begin with, as explained, advanced packetized services such as Ethernet loops are unavailable as UNEs. Under the impairment tests established in the TRRO, DSn loops and transport are also unavailable as UNEs in wire centers in which there is little assurance that competitive opportunities exist. Indeed, the Commission's reliance on the number of collocators

[41] As we argued in our *Petition*, this merger will result in the loss of 1 out of 3 RBOC benchmark firms because Qwest is too small and different than the remaining RBOCs to provide a benchmark comparison in many cases. *See Petition* at 62-63.

in a wire center to predict whether a competitor has or could construct a lateral facility to a building is obviously extremely unreliable. TWTC's experience is that there are many buildings in those areas where the FCC has determined that CLECs are not "impaired" without access to unbundled loops to which it is not economic to deploy laterals due to the absence of adequate revenue opportunities or other entry barriers. This is true even in wire centers in which TWTC has deployed transport and collocated equipment in an ILEC central office.

But even where DSn loops and transport are subject to *de jure* unbundling requirements, ILEC exclusionary conduct has often prevented their *de facto* availability. As TWTC explained previously, the ILECs have relied effectively on simple refusals to deal to prevent CLECs from exercising their rights to UNEs. *See Petition* at 43. Such "slow rolling" of inputs needed by competitors is extremely difficult to detect and remedy through regulation. For example, the FCC recognized "incumbent LECs [relying on largely specious claims of no facilities available] sometimes do not permit competitors to obtain new circuits as UNEs, and only permit the competitive LEC to convert facilities obtained as special access to UNEs after a 'holding period' of one to several months." *TRRO* ¶ 64 (footnote omitted). Moreover, "Verizon sometimes imposes large, nonrecurring charges on UNEs that are not imposed on special access." *Id.* n.183 (internal citations omitted). BellSouth and AT&T (SBC) have engaged in similar tactics.[42] For these reasons, the Commission determined that many carriers purchase special access because ILECs refused to offer UNEs in a non-discriminatory fashion.

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[42] *See, e.g., Falvey Decl.* ¶ 38 ("Xspedius has recently experienced a significant increase in the number of UNE orders rejected by SBC Texas because there were 'no facilities' available, and it would ostensibly require more than 'routine network modifications.' Yet when ordered as Special Access, the same circuits are provisioned with alacrity."); *id.* ¶ 39 (noting that, "when Xspedius attempted to convert special access circuits to UNE loops," BellSouth charged Xspedius an over $800 per circuit non-recurring charge).

As TWTC has also explained, contrary to the Applicants' assertion, the Applicants' incentive to discriminate is not eliminated or even reduced after Section 271 approval has been granted. As the FCC observed, the grant of Section 271 authority *creates* incentives to discriminate against interexchange carriers. *See Petition* at 31. The proposed merger will increase this incentive because more traffic will both originate and terminate in the merged company's territory, allowing the internalization of external effects.[43] As the Commission concluded, "[e]ven after receiving section 271 authority, the threat of discrimination remains in force." *SBC/Ameritech Order* ¶ 242.

The Applicants argue further that benchmarking is not necessary for the regulation of special access because "TWTC does not cite a single recent instance in which [RBOC-to-RBOC benchmarking] has been relied upon [ ] concerning either the lawfulness or the adequacy of an ILEC's provisioning of special access." *Opposition* at 106. This is like arguing that law enforcement is not needed because there are no recent examples of police apprehending criminals. The absence of recent regulatory detection of unreasonable special access rates and practices does not mean that such detection should not and would not occur in the future (indeed, it should occur now given supracompetitive RBOC special access rates). As the Applicants recognize, the entire point of benchmarking is to monitor differences in RBOC behavior to determine what a reasonable form of regulation should be *in the future*. *See Opposition* at 105. As long as the Applicants retain their market power over loops, independent benchmarking

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[43] *Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 14032, ¶ 188 & n.429 (2000) ("*Bell Atlantic/GTE Order*").

comparisons among multiple RBOCs are needed to determine both whether regulation is necessary *in the first place and what form that regulation should take.*

The Applicants are correct that benchmarking currently does not guide special access rate regulation. But this again misses the point. As the Applicants state, "TWTC recognizes that the relevant issue is whether there is a need for benchmarking 'going forward.'" *Id.* As TWTC argued, in considering future regulation of ILEC special access, the FCC has asked for evidence based on industry wide productivity that will place it in a position to be able to perform average practice benchmarking to set ILEC price cap rates in the future. *See Petition* at 59-60. With the reduction in the number of RBOCs, the ability of the FCC to perform such average practice benchmarking will be drastically diminished or eliminated entirely.

The Applicants argue that "a host of company specific factors" prevent the use of RBOC special access *prices* to set prices prospectively. *Opposition* at 108. But at least as to price caps, the FCC has not set prices based on an average of ILEC *prices*, but rather based on industry-wide *productivity*. Because RBOCs' regions span huge swaths of both urban and rural areas, any differences in productivity between carriers cannot be based on conditions in a particular locality. Because the FCC requested productivity data from the RBOCs, there is every indication it will need to use average-practice benchmarking, and, in doing so, will compare RBOCs' productivity, not their prices. In any event, benchmarking is fully appropriate as a basis for comparing ILEC prices for special access *rate structures* (such as **[proprietary begin]**

[proprietary end] and even rate levels so long as any relevant differences among carriers are accounted for.

Regulators' Continued Reliance on Benchmarking. The Applicants criticize and attempt to distinguish the examples of benchmarking TWTC provided in its petition, yet these attacks are misplaced. *First*, the Applicants argue that "three of the cases TWTC cites are clearly irrelevant because they pertain to an RBOC's satisfaction of the Section 271 checklist." *Id.* at 103. Yet, as TWTC noted in its petition to deny, the FCC has held that benchmarking provides an important tool to prevent "possible backsliding by RBOCs" in their compliance with the provisions of Section 271. *See SBC/Ameritech Order* ¶ 148.

Second, in an attempt to show that regulators no longer employ benchmarking, the Applicants mischaracterize several of the cases that TWTC cited to show that states and the FCC continue to benchmark one RBOC against another. The Applicants argue that the Indiana commission did not rely on benchmarking to order SBC to carry Level 3's traffic over a single trunk group. Instead they assert that "the Indiana Commission never mentions Level 3's benchmarking argument in its analysis" (*Opposition* n.423.). Regardless of whether the commission's actual conclusion was in the "position of the parties" section, rather than in the portion entitled "conclusion," the Indiana commission clearly took BellSouth's activities into account in reaching its conclusion that SBC was required to provide the same level of service. As the commission explained,

> BellSouth voluntarily agreed with Level 3 to exchange all traffic, including interLATA toll and IP Enabled Traffic, ***over a single trunk group.*** This point alone substantially if not completely justifies approval of Level 3's request. According to FCC Rule 51.321(c), 'a previously successful method ***of obtaining interconnection*** or access to unbundled network elements at any particular premises ***or point on any incumbent LEC's network is substantial evidence that such method is technically feasible*** in the case of substantially similar network premises or points.' (emphasis in original)[44]

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[44] *Level 3 Communications, LLC's Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, and the*

The Applicants argue that the Colorado commission did not use benchmarking as a basis for requiring Qwest to submit to a particular billing practice. Instead, the Applicants argue that the Colorado commission "merely held that the parties should negotiate a separate billing arrangement." *Opposition* at n.435. The Applicants neglect to mention that the Colorado commission mandated that Qwest negotiate such an arrangement because SBC had separately negotiated a billing agreement with AT&T, a clear example of benchmarking:

> AT&T seeks to have all arrangements with Qwest for billing and collection dealt with in the context of a separate agreement...AT&T notes that it received better terms than Qwest proposes in a separately negotiated contract with SBC, and argues that Qwest should not be allowed to leverage this arbitration to avoid such a negotiation or to force its one-sided terms on AT&T. We are persuaded by AT&T that billing for alternatively billed calls is better dealt with through a separate agreement. We note that AT&T has entered into a separate agreement for alternatively billed calls with SBC Communications Inc. This separate agreement is much more elaborate than Qwest's proposed interconnection agreement language.[45]

The Applicants argue that the FCC rejected Verizon's position with respect to structure sharing in the *Virginia TELRIC Arbitration Order*, because of "Verizon's own cost evidence." *Opposition* at 104. This is true, but it is irrelevant to the argument that the FCC engaged in RBOC-to-RBOC benchmarking. The cost model that the FCC *actually chose* for structure

Applicable State Laws for Rates, Terms, and Conditions of Interconnection with Indiana Bell Telephone Company d/b/a SBC Indiana, Opinion, Cause No. 42663 INT-01, 2004 Ind. PUC LEXIS 465, at *67-8 (Dec. 22, 2004).

[45] *Petition of Qwest Corporation for Arbitration of an Interconnection Agreement with AT&T Communications of the Mountain States, Inc. and TCG-Colorado Pursuant to 47 U.S.C. § 252(b)*, Initial Commission Decision, Dkt. No. 03B-287T, Decision No. C03-1189, 2003 Colo. PUC LEXIS 1149, at *149 (Oct. 14, 2003).

sharing, put forth by AT&T, was based upon BellSouth's cost study submitted to the Kansas and Louisiana state Commissions.[46]

Despite the Applicants' assertions to the contrary, it remains clear that states and the FCC continue to use benchmarking analysis, despite the fact that "Sections 271 and 251" have been "fully implemented."

Relevance of Benchmarking to Advanced Services. In a rather lame attempt to divert the Commission's attention away from the critical consequences of the proposed merger for regulation, the Applicants imply that all provisioning issues regarding advanced services have been resolved and that past reliance on benchmarking to resolve these disputes is therefore irrelevant.[47] This is of course not true. Telecommunications networks are not frozen in time. As competitors develop new services they require new inputs from ILECs. Mr. Taylor provides numerous clear examples of new inputs required for the provision of IP-based services. The difficulty that TWTC has experienced obtaining reasonable interconnection for Ethernet services

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[46] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration in the Matter of Petition of AT&T Communications of Virginia Inc., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 17722, ¶¶ 289-291 (2003).

[47] *See Opposition* at 102 ("[T]he market opening requirements of the 1996 Act that the Commission previously regarded as too immature in 1999 and 2000 to supplant the need for benchmarking against multiple independent RBOCs have now been 'fully implemented.' Thus, the provisioning disputes over the services that the Commission regarded in 1999-2000 as candidates for RBOC-to-RBOC benchmarking comparisons (*e.g.*, loop testing and provisioning, number portability, cageless collocation, technically feasible points of interconnection) have all but disappeared. Both ILEC unbundling and obligations concerning the OSS and other systems that must be used to provision UNEs are well-defined from both a technical and regulatory perspective.") (footnotes omitted).

and the difficulties that TWTC has had in attempting to obtain CoS and QoS for its IP VPN services only underscore the need for continuing RBOC benchmarking. *See generally Taylor Reply Decl.; Taylor Decl.* **[proprietary begin]**

[proprietary end] demonstrates that RBOC-to-RBOC comparisons are particularly useful in detecting discrimination for advanced services. More generally, the inability of the FCC to "foresee every possible type of discrimination, especially with evolving technologies," (*SBC/Ameritech Order* ¶ 206), makes "reliance on existing regulatory safeguards [ ] misplaced." (*Id.*)

The Applicants' misunderstanding of the forward-looking role of benchmarking can be seen in their criticism of TWTC's use of several of the benchmarking decisions that pertain to "line splitting" and NGDLC unbundling. *See Petition* at 54-55. The Applicants argue that these cases are irrelevant to the continued need for benchmarking because they involve "issues that were settled by the Commission's unbundling orders." *Opposition* at 103 (footnotes omitted). But TWTC does not cite these examples to indicate that the same problems exist today but rather to show the effectiveness of benchmarking (the Applicants themselves concede this point (*see id.*) by claiming that the problems first raised in multiple state proceedings have been resolved by an FCC rule) and to show that state and federal authorities continued to use benchmarking following the FCC's previous RBOC merger orders.

Even the Applicants admit that states often update their performance requirements to take into account changed circumstances. *See id.* at n. 389. Regulators cannot have experience regulating services that are being developed for the first time, and current regulations and regulatory experience will provide little help in fashioning such regulation. As Drs. Besen and *Mitchell explain:*

> [Even if the Commission were to believe that it can prevent serious abuses in the standard] provision of 'plain-vanilla' access...[future interconnection and access issues will be much more difficult to resolve. For existing interLATA arrangements,] policy makers have built up experience over a number of years in detecting and addressing problems [with the provision of access...The situation is quite different] for access that is needed to support new services...For these arrangements, policy makers do not have the benefit of long experience in detecting and correcting problems...if the merged AT&T and BellSouth were refused to provide efficient new access arrangements, or delayed or slowed deployment of those arrangements, or reduced the quality of access below the efficient level, regulators would face significant difficulties in detecting these distortions and inducing the merged entity to correct its misbehavior. *Besen/Mitchell Decl.* ¶¶ 35-36.

The problems that TWTC has encountered in obtaining Ethernet transmission facilities and CoS and QoS for IP VPN service illustrate exactly this point.

Applicants' Incentive to Collude. As with so many other issues, the Applicants respond to TWTC's assertion that the merger will increase their incentive to cooperate to undermine the effectiveness of regulation by mischaracterizing the problem. As TWTC explained (*see Petition* at 66-67), the Commission held in a previous RBOC merger order that a reduction in the number of benchmarking firms may "increase the incentive and opportunity for collusion and concealment of information among the few remaining incumbent LECs." *SBC/Ameritech Merger Order* ¶ 184. The Applicants respond that all four RBOCs are aggressively competing in each other's territory (*see Opposition* at 109), but this is of course irrelevant to TWTC's argument. As TWTC explained in its petition, the type of collusion and coordination at issue involves (1) an agreement to settle on a lower benchmark or (2) concealing information concerning operating practices and dealings with competitors. *See Petition* at 66 (citing *SBC/Ameritech Merger* ¶¶ 121-123). As Drs. Besen and Mitchell explain, there is little doubt that the proposed merger would increase the likelihood of this kind of conduct. *See Besen/Mitchell Decl.* ¶¶ 120-124. The Applicants do not even attempt to argue otherwise.

The Insufficiency of Parity Regulation. The Applicants imply that there is no need for benchmarking because the FCC has purportedly held that parity standards are always superior.[48] This argument is belied by the evidence and past FCC precedent. As the Joint Competitive Industry Group ("JCIG") has explained in the context of special access, many states have adopted JCIG's recommended performance metrics[49] which, as the Applicants acknowledge, contain many objective benchmarks. *See Opposition* n.447. As the Commission has recognized with respect to 271 compliance, objective, non-parity standards are required to monitor RBOC performance: "Where no retail analogue exists to compare SWBT's performance towards competing carriers to SWBT's performance to its retail operations, we evaluate SWBT's showing to ascertain whether SWBT affords competing carriers a meaningful opportunity to compete. As a result, *we sometimes rely on performance measurements that use a benchmark instead of a parity standard*." (emphasis added).[50]

[48] *See Opposition* at 109-110 (regarding the use of parity regulation with respect to special access services).

[49] *See* JCIG *Ex Parte* Presentation, submitted by Gil M. Strobel, Counsel, JCIG, to Marlene Dortch, Secretary, FCC, WC Docket No. 01-321 (June 7, 2004) (updating FCC staff on the status of state actions requiring performance measurements of ILEC special access performance, including adoption of JCIG plans in many states).

[50] *Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, n.514 (2001), *aff'd in part, remanded, Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001).

Parity standards are useless for services (1) not yet offered by the RBOC[51] or (2) for which the competitor requires an input that the RBOC does not require when providing the service at retail.[52] These conditions are most likely to occur for new and innovative services. As explained by Drs. Besen and Mitchell, a CLEC "can offer [an innovative] service efficiently only if it obtains a particular type of access arrangement from the ILEC. The ILECs' refusal to provide that access in a timely fashion can raise the entrant's costs or reduce the quality of its service offerings, thus limiting its ability to compete." *Besen/Mitchell Decl.* ¶ 26. Regulation "can only imperfectly detect and correct such conduct," and the ability to fashion any regulation to restrict that conduct will be further reduced by diminishing the number of benchmarking firms. *Id.* ¶ 34. Moreover, the likelihood of harm with respect to advanced services is exacerbated because the Applicants already have an increased incentive to "deny special accommodations required by competitive LECs seeking to offer innovative advanced services that the incumbent may not even offer." *SBC/Ameritech Order* ¶ 107 (footnote omitted). The Applicants do not debate any of these propositions except to say that they no longer have market power with respect to advanced services, which is untrue as explained above. *Opposition* at 108.

TWTC's experience with AT&T in attempting to obtain inputs for IP-based services illustrates the insufficiency of parity regulation. **[proprietary begin]**

See Taylor Reply Decl. ¶¶ 38-40; *Taylor Decl.* ¶ 42.

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[51] For example, the FCC found that RBOC discrimination over the inputs needed by CLECs to provide DSL service (a service which CLECs generally offered before ILECs), "delayed competitive provision of these services." *SBC/Ameritech Order* ¶ 197.

[52] In either case, there is no retail analog. *See Besen/Mitchell Decl.* ¶¶ 103-106.

See Taylor Reply Decl. ¶¶ 30-32; *Taylor Decl.* ¶¶ 39-41.

See Taylor Reply Decl. ¶ 33; *Taylor Decl.* ¶ 38. **[proprietary end]** These services are only required by wholesale purchasers like TWTC. Parity regulation is therefore of no assistance to regulators in limiting the Applicants' opportunities to exploit competitors' reliance on these services to provide IP-based services.

[proprietary begin]

See Taylor Decl. ¶ 41.

See Taylor Reply Decl. ¶¶ 31-32.

[proprietary end]

TWTC also requires CoS and QoS for its IP VPN traffic that traverses AT&T's IP network facilities. This service is essentially an interconnection service, that, by definition, AT&T need only provide to other carriers at wholesale (and not to itself). **[proprietary begin]**

(*see Taylor Decl.* ¶ 42)

See Taylor Reply Decl. ¶¶ 38-40.

See id. ¶¶ 39-40.

See id. ¶ 39.

See id.

[proprietary end] CoS and QoS for IP VPN traffic that traverses two carriers' IP networks is again an example of where benchmarking regulation can be used and in which parity regulation is of no use.

[proprietary begin]

(*see id.* ¶ 33),

See id.

[proprietary end]

It is also important to point out that AT&T apparently offers Ethernet as an intrastate service in some cases (*see id.* ¶ 34) and is therefore able to set its retail prices far below even the rates that would apply if retail customers (again, such customers do not pay for cross-connects) purchased the service under AT&T's federal tariff or its negotiated federal contract tariffs. This is because AT&T's intrastate Ethernet services are not subject to meaningful regulation. For example, in Ohio, the terms of the contracts for intrastate services AT&T offers to its retail customers must be made available to all "similarly situated customers." OAC § 4901:1-6-19(A). However, AT&T argues that TWTC is not "similarly situated" to its own retail end users (because it is a wholesale customer) and therefore, cannot not take advantage of these contract prices.

In many states there is no way for regulators to even detect whether AT&T is offering much lower rates than it offers under its FCC tariff or in its negotiated FCC contract tariffs. Again, Ohio illustrates the point. In the past, AT&T was required to file intrastate contracts with the Ohio commission. *See id.* Without issuing a formal order or waiver, the PUC now allows AT&T to forego submission of these contracts and allows AT&T merely to file a spreadsheet that lists the contract number, type of service, length of contract, and tariff references.[53] Other AT&T region states, such as Illinois, have similar statutory provisions which preclude in most cases CLECs from taking advantage of contract rates[54] Therefore, if AT&T is placing TWTC

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[53] *See e.g.*, Ohio PUC, Case No. 06-0931-TP-CTR, *available at* http://dis.puc.state.oh.us/dis.nsf/(CaseNoLookup/06-0931?OpenDocument (listing weekly contract spreadsheets filed by AT&T Ohio). In addition to the spreadsheet, AT&T must file an affidavit stating that the total price of the contract (including all contracted services whether regulated or unregulated) exceeds the total incremental cost of all regulated contracted services. *See id.* This affidavit requirement is meant to prevent AT&T cross-subsidizing its competitive services with its regulated services; it in no way precludes AT&T from providing special access services to its end users at a rate well below its FCC tariff or FCC contract rates.

[54] Under Illinois law, a telecommunications carrier can negotiate to provide competitive telecommunications services, including intrastate special access, without regard to any tariffs it may have on file with respect to such services. *See* 220 ILCS § 5/13-509. Carriers must file a notice of the negotiated contract (*see id.*), but CLECs have no way of knowing what the prices in the contract are as the contracts themselves are generally accorded confidential treatment. *See id.* More importantly, carriers would obviously have no right to opt-into these rates.

and other CLEC wholesale customers in a price squeeze through gaming the tariffing system, *this conduct cannot be addressed through parity regulation.*

The Applicants' only response to TWTC's argument that parity is insufficient and benchmarking crucial for the regulation of advanced services is to cite the recent RBOC/IXC merger orders in which the Commission found that a "wide and heterogeneous array of competitors 'ensure that there is sufficient competition' for Frame Relay, ATM, and Gigabit Ethernet and similar based transmission services." *Opposition* at 108 (citations omitted). But as explained above, the real source of the Applicants' ability and incentive to discriminate (incentives upon which AT&T unquestionably acted) is their control over local transmission facilities. That market power remains today and the proposed merger would only increase it by eliminating AT&T as an independent competitor in the BellSouth region. The Applicants have no answer to this point.

As TWTC observed in its petition, the Commission stated in its review of the last RBOC mergers that "a merger that reduced the number of major incumbent LECs from four to three would so severely diminish the Commission's ability to benchmark, it is difficult to imagine that any potential public interest benefit could outweigh such a harm." *Petition* at 50 (citing *Bell Atlantic/GTE Order* ¶ 170). The Applicants respond that "such diversity needed to be preserved only 'during the transition to competition.'" *Opposition* at 101 & n.117 (*citing Bell Atlantic/GTE Order* ¶ 172). TWTC agrees. However, as TWTC has shown, that transition is nowhere near complete. Nor does the proposed merger implicate potential public interest benefits that could possibly outweigh the harm caused by the elimination of benchmarking regulation.

Respectfully submitted,

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ATTORNEYS FOR TIME WARNER TELECOM

August 8, 2006

ATTACHMENT A

Reply Declaration of Graham Taylor

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer Of Control	)	WC Docket No. 06-74

REPLY DECLARATION OF GRAHAM TAYLOR ON BEHALF OF TIME WARNER TELECOM, INC.

I. INTRODUCTION

1. My name is Graham Taylor. My business address is 10475 Park Meadows Drive, Littleton, CO 80124.

2. I am Senior Vice President for Marketing at Time Warner Telecom, Inc. ("TWTC"). I have over 25 years of telecommunications industry experience in marketing, sales, corporate development, management and operations. I spent 15 years specifically in the local network services competitive environment with TCG, AT&T Local, LOGIX Communications and TWTC. I was responsible for the planning, construction and implementation of many of TCG's networks and markets.

3. The purpose of this declaration is to (1) respond to the reply declaration of Parley C. Casto[1] generally; (2) describe how TWTC can only serve Ethernet customers at retail in AT&T's ILEC region if it is able to obtain finished Ethernet services at just and

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[1] *See* Reply Declaration of Parley C. Casto, attached to AT&T, Inc. and BellSouth Corporation Opposition to Petitions to Deny and Reply to Comments, WC Dkt. No. 06-74 (filed June 20, 2006) ("*Casto Declaration*").

reasonable rates, *terms and conditions; and (3) describe why TWTC cannot rely on TDM* loops purchased from AT&T along with TWTC-supplied TDM electronics to provide Ethernet Services.

II. TWTC's Business And Network

4. TWTC was established in 1993. It is a leading provider of managed voice and data networking solutions for business customers, carriers, and Internet service providers ("ISPs") in 22 states and 44 metropolitan areas around the country. TWTC provides these services over its own loop and transport transmission facilities wherever possible. However, there are many locations where TWTC is unable to achieve the revenue and return on investment required to deploy its own loop and transport transmission facilities. For example, TWTC serves only 26.8 percent of its customer buildings using its own facilities, while it must rely on other carriers 73.2 percent of the time.[2] Where TWTC cannot built its own transmission facilities in the BellSouth and AT&T ILEC territories, TWTC must rely almost completely on BellSouth's and AT&T's loops and transport (generally special access services). This is because, in the vast majority of the commercial buildings to which TWTC cannot deploy and has not deployed its own loops in the BellSouth and AT&T ILEC territories, BellSouth and AT&T have respectively deployed their own loops. In fact in TWTC's experience, BellSouth and AT&T own the *only* loops serving most of these commercial buildings in their respective territories.

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[2] *See* Time Warner Telecom, Inc., SEC Form 10-Q Quarterly Report for the Period Ended Mar. 31, 2006, at 24 (filed May 10, 2006).

III. RESPONSE TO PARLY CASTO'S ALLEGATIONS

5. Mr. Casto makes five general arguments in response to my initial declaration.[3] **[proprietary begin]**

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6.

See Casto Declaration ¶ 25.

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[3] *See* Declaration of Graham Taylor, attached to Petition to Deny of Time Warner Telecom, WC Dkt. No. 06-74 (filed June 5, 2006) ("*Taylor Declaration*").

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7.

See Casto Declaration ¶ 28. **[proprietary end]** It is true that there are other carriers providing wholesale finished Ethernet services, but these providers generally do not own loop transmission facilities and do not offer wholesale Ethernet in the locations in which TWTC cannot economically self-deploy loops. Notwithstanding TWTC's strong interest in identifying and relying upon wholesale providers of finished Ethernet other than AT&T and other ILECs, TWTC has purchased or is in the process of purchasing **[proprietary begin]** **[proprietary end]** finished Ethernet loops at wholesale from non-ILEC wholesalers. Given that TWTC currently serves **[proprietary begin]** **[proprietary end]** customer locations with Ethernet services (both on-net and off-net), these **[proprietary begin]** **[proprietary end]** loops account for **[proprietary begin]** **[proprietary end]** percent of the Ethernet loops TWTC needs to compete. There are a limited number of locations in the AT&T region in which non-ILEC wholesalers offer Ethernet service, and in which TWTC has not purchased Ethernet from these non-ILECs. **[proprietary begin]**

[5]

[proprietary end]

8. It is important to emphasize, however, that in those few places where non-ILECs offer finished Ethernet loops at wholesale, **[proprietary begin]**

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[5] *See* SWBT Tariff F.C.C. No. 73 § 41.48.4(D)