August 21, 2006

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth St., S.W.
Washington, D.C. 20554

Re: AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

Every merger proceeding attracts the participation of some who seek to use (and abuse) the process to gain advantage in private disputes that precede and are unrelated to the proposed merger. The Commission has consistently refused to entertain such claims in prior merger proceedings, and it should do so again here. As detailed below, Time Warner Telecom, Inc.'s advocacy in this proceeding is transparently aimed at obtaining leverage in ongoing business negotiations with AT&T that have nothing to do with the proposed merger, and no amount of table-pounding about inapt theories from 1990s-era mergers can transform Time Warner's wish list into a merger-specific issue.

Time Warner's latest submission[1] confirms that the sole – and patently improper – purpose of its participation is to gain some advantage in its ongoing negotiations with AT&T for a customized wholesale Ethernet contract tariff arrangement. Although Time Warner is among the industry leaders in the provision of retail Ethernet services and has built its lucrative and rapidly growing Ethernet portfolio without purchasing a single dollar of wholesale Ethernet service from AT&T, Time Warner contends that the very existence of its Ethernet business will be threatened unless AT&T both redesigns its Ethernet service to better suit Time Warner's specified business model and technology preferences and offers the service at whatever prices that Time Warner deems appropriate.

As detailed below and in the attached Supplemental Declaration of Parley C. Casto, Time Warner's discussion of its ongoing negotiations with AT&T and the purported impact of AT&T's current proposals on Ethernet services competition is riddled with errors. Indeed, Time Warner's claims are refuted by its own public statements and concessions. The reality is that Time Warner has myriad options for last-mile connectivity to support its Ethernet services, including (i) the use of its own robust and growing local networks, (ii) the purchase of wholesale Ethernet services from many other competing providers, and (iii) continued reliance upon ordinary TDM loops. The latter approach, for example, is one that Time Warner has elsewhere

[1] *See* August 8, 2006 *ex parte* Letter from Thomas Jones, counsel for Time Warner, to Marlene H. Dortch (enclosing Response of Time Warner Telecom, Inc. to AT&T Inc. and BellSouth Corporation Joint Opposition to Petitions to Deny and Reply to Comments ("*TWTC Response*")).

stated "enables us to *cost-effectively* deliver our industry-leading Ethernet portfolio to customers *anywhere*."[2] AT&T recognizes that the successful conclusion of its current negotiations with Time Warner for a new wholesale Ethernet contract would benefit both parties; among those benefits, it would provide Time Warner with yet another option for last-mile connectivity. But the success or failure of those negotiations has no implications for the continued competitiveness of the Ethernet services marketplace that Time Warner properly characterizes as already populated with numerous **[begin TWTC proprietary]**
[3] **[end TWTC proprietary]**

More importantly here, Time Warner's Ethernet claims have nothing to do with the proposed merger of AT&T and BellSouth, as evidenced by Time Warner's evolving theories of "merger-specific" harm. In its Petition to Deny, Time Warner led with the argument that the proposed merger would substantially reduce competition in the provision of the TDM special access services that Time Warner routinely uses for last-mile connectivity to its Ethernet customer locations. Confronted with the facts – specifically, AT&T's limited local fiber facilities and minuscule wholesale special access sales in the BellSouth franchise areas, as well as the existence of many other facilities-based providers (including Time Warner[4]) in the same dense commercial areas of the same large cities (and, indeed, in or near almost all of the same buildings that are connected to AT&T's local fiber networks) – Time Warner has dropped that claim.

Time Warner's sole remaining argument rests on the premise that its dissatisfaction with AT&T's Ethernet proposals somehow proves that this merger raises the same "big footprint" discrimination and "benchmarking" concerns that led the Commission to impose temporary structural separation and nondiscrimination conditions on 1990s-vintage RBOC mergers. But, as AT&T and BellSouth already have shown, regardless of the validity of such objections to these past RBOC mergers, they are most emphatically *not* legitimate objections to *this* merger given the wholly different competitive and regulatory conditions that prevail today.[5] Those prior merger decisions addressed unique conditions that the Commission expressly found would persist for only a few years as it implemented sections 251 and 271 of the 1996 Act and opened markets to competition.[6] Sections 251 and 271 are now fully implemented, and all of the

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[2] Time Warner Telecom, June 6, 2006 Press Release, at 1 ("*Overture Release*") (emphasis added), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/Overture.pdf.

[3] *TWTC Response*, Reply Declaration of Graham Taylor ("*Taylor Reply Decl.*"), ¶ 11 & n.7.

[4] In some metropolitan areas in the BellSouth region, Time Warner alone has more "lit" buildings than AT&T, *see* Joint Opposition of AT&T Inc. and BellSouth Corp. to Petitions to Deny and Reply to Comments ("*Joint Opp.*") at 22-23 (filed June 20, 2006), and Time Warner's recently announced acquisition of Xspedius will bring it more fiber and more buildings.

[5] *See Joint Opp.* at 89-110.

[6] *See* Memorandum Opinion and Order, *In re Applications of Ameritech Corp. & SBC Communications, Inc.*, 14 FCC Rcd. 14712, ¶ 510 (Oct. 8, 1999) (subsequent history omitted) ("*SBC-Ameritech Merger Order*") (rejecting claims that merger conditions should not sunset

relevant markets are irreversibly open to competition. Time Warner's advocacy simply ignores the fundamental fact-specific predicates of the Commission's findings in the old merger orders and the vastly different circumstances that plainly foreclose the application of those findings here.

Indeed, Time Warner's "big footprint" discrimination argument here rests on special access discrimination claims that the Commission did not credit in the old merger orders, presumably because even then special access services had long been subject to both established Commission oversight and facilities-based competition.[7] Instead, as Time Warner readily admits,[8] the Commission focused on the potential for discrimination in the provision of UNE arrangements that had not then (but have now) been fully implemented. Time Warner contends that a different approach is warranted here, because "[t]oday, UNEs are not generally available,"[9] but that is plainly false. UNE loops remain available in *every* area where the Commission has determined that CLECs need them; neither AT&T nor BellSouth have obtained relief from either DS1 or DS3 UNE loop unbundling requirements in about 98 percent of their wire centers.[10] In these circumstances, any special access discrimination claims are appropriately addressed in the Commission's industrywide special access rulemaking proceedings, and not, as Time Warner urges, through *ad hoc* rulings in merger proceedings.[11]

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after three years because there would be a continuing need for discrimination and benchmarking-based conditions: "[w]e find this three-year period of benefit is sufficient for this merger proceeding, given the rapidly changing telecommunications industry").

[7] *See, e.g., id.* ¶¶ 196-247 (finding that merger would increase incentives to discriminate in the provision of mass market advanced services such as xDSL as well as circuit-switched interexchange and local exchange services); *id.* ¶ 100 (rejecting claim that merger would "harm the public interest in the provision of local exchange and exchange access services sold to larger business customers," because "there are a number of significant competitors equally competitive with SBC and Ameritech in these markets"); *id.* ¶ 235 (rejecting exchange access "price squeeze" claims because "[e]xisting regulatory and non-regulatory safeguards greatly reduce the ability of incumbent LECs, such as SBC and Ameritech, to engage in a price squeeze").

[8] *TWTC Response* at 12.

[9] *Id.*

[10] Order on Remand, *In re Unbundled Access to Network Elements*, 20 FCC Rcd. 2533, 2574 ¶ 65 (Feb. 4, 2005) ("*Triennial Review Remand Order*") ("the record indicates that the availability of UNEs is itself a check on special access pricing"), *aff'd Covad Communications* v. *FCC*, 450 F.3d 528, 539 (D.C. Cir. 2006).

[11] *See* Memorandum Opinion and Order, *In re Applications of SBC Communications Inc. & AT&T Corp.*, 20 FCC Rcd. 18290, ¶ 55 (Nov. 17, 2005) ("*SBC-AT&T Merger Order*") (rejecting claims that merger would increase the likelihood of special access discrimination, because such claims "are more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing"); Memorandum Opinion and Order, *In re Applications of Verizon Communications Inc. & MCI, Inc.*, 20 FCC Rcd. 18433, ¶ 55 & n.155 (Nov. 17, 2005) ("*Verizon-MCI Merger Order*") (same).

In any event, Time Warner's effort to portray the marketplace for last-mile connectivity to businesses as essentially unchanged since the 1990s cannot withstand even minimal scrutiny. Among other developments, the past decade has seen both widespread entry by intermodal cable and wireless providers and major expansion by Time Warner and other facilities-based CLECs. Whatever its state many years ago, today the special access marketplace is robustly competitive, nowhere more so than in the large urban centers where Time Warner operates. Moreover, Time Warner entirely ignores the many other developments – including the development of comprehensive UNE performance standards and self-executing remedy plans as well as highly automated provisioning and tariffed performance guarantees for special access services. Any fair description of the current market and regulatory conditions reveals the sheer implausibility of Time Warner's speculation that the proposed merger would give AT&T increased incentives and ability successfully to engage in competition-affecting discrimination against the sophisticated purchasers of these services.

Time Warner's "benchmarking" objections to the proposed merger are equally meritless. Time Warner refutes its own claim that RBOC-to-RBOC benchmarking is a critically important tool for the regulation of special access services by failing, yet again, to identify a *single* modern example of federal or state regulation of special access services that has relied upon such benchmarking. Indeed, Time Warner fails to establish the continued importance in *any* context of benchmarking analyses artificially limited to RBOC-only comparisons. These failures do not reflect a lack of effort on Time Warner's part, but instead its refusal to acknowledge the revolutionary change in the communications landscape from its one-wire origins to today's dynamic marketplace of competing intermodal and intramodal facilities-based providers. In the current environment, market forces generally obviate *any* need for benchmarking-supported regulation. And, in any context where intercompany comparisons might remain useful, no rational benchmarking analysis could ignore competing providers and pretend, as Time Warner does, that the only relevant benchmarks are AT&T, Verizon and BellSouth. That is particularly true with respect to the Ethernet and IP VPN services for which Time Warner claims RBOC-to-RBOC benchmarking-based regulation is most urgently needed: in that intensely competitive space already saturated with cable, CLEC, ILEC and other providers, it should be clear both that regulation is unnecessary and that any RBOC-only benchmarking "analysis" would, in any event, be meaningless.

Time Warner nonetheless contends that its new economist declaration provides proof that the loss of BellSouth as a benchmark firm will have dire consequences.[12] But as Drs. Carlton and Sider demonstrate in their attached supplemental declaration,[13] Drs. Besen and Mitchell can reach this facially absurd conclusion only by making assumptions that bear no resemblance to the real world. Indeed, in virtually every respect, Drs. Besen and Mitchell uncritically repeat the novel economic theories that were advanced in the 1990s-era mergers without acknowledging the unique and transitory circumstances under which the Commission accepted those theories as

[12] *TWTC Response*, Joint Declaration of Stanley M. Besen and Bridger M. Mitchell ("*Besen & Mitchell Decl.*").

[13] Declaration of Dennis W. Carlton and Hal S. Sider ("*Carlton & Sider Supplemental Decl.*") (attached hereto as Exhibit 1).

the basis for temporary merger conditions – circumstances that are completely absent today. And by limiting their contribution to a regurgitation of old theories without any attempt to show that *any* of the predicted effects actually followed from the mergers of the last decade, Drs. Besen and Mitchell only strengthen the conclusion that there can be no serious footprint or benchmarking objections to this merger, which will take place in a competitive and regulatory environment that, by any measure, is far *less* conducive to those speculative harms than the environment of the 1990s.

A. Time Warner Mischaracterizes Both The Status And Competitive Implications Of Its Ongoing Ethernet Negotiations With AT&T.

Time Warner's Response reads as if the parties' Ethernet negotiations have failed (due, of course, to AT&T's "unreasonable" positions) and that Commission intervention now provides the only hope for Time Warner to obtain an allegedly bottleneck input it "needs in order to provide next-generation IP-based services such as Ethernet and IP VPN."[14] The reality is quite different. As an initial matter, the parties' negotiations over commercially reasonable terms for the customized arrangements Time Warner seeks continue on a schedule that is very much apace for complex negotiations of this type; indeed, the business people negotiating the contract tariff arrangement are scheduled to meet again this week. It is thus irresponsible for either party to suggest that the other party's *proposals*, which naturally reflect negotiating positions, demonstrate anticompetitive, discriminatory or otherwise inappropriate behavior. But even if a ripe dispute existed, the Commission could not entertain it in this proceeding: as the Commission has repeatedly cautioned, merger proceedings are not the place to air such grievances with one of the merger applicants.[15]

Moreover, Time Warner's Response starkly confirms that its wish list of terms for AT&T's Ethernet service would be of no public interest even in the context of a ripe dispute in an appropriate proceeding. Time Warner's latest pleading (like its earlier one) readily concedes that the retail market for Ethernet services is robustly competitive, and that Time Warner is only one of many **[begin TWTC proprietary]** **[end**

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[14] *TWTC Response* at 15.

[15] *See, e.g.*, Memorandum Opinion and Order, *In re Applications of Time Warner, Inc., America Online, Inc, & AOL Time Warner Inc.*, 16 FCC Rcd. 6547, ¶ 6 (Jan. 22, 2001) ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — *i.e.*, harms and benefits that are 'merger-specific.' The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act"); Memorandum Opinion and Order, *In re Applications of Southern New England Telecommunications Corp. & SBC Communications, Inc.*, 13 FCC Rcd. 21292, ¶ 29 (Oct. 23, 1998) ("The Commission has regularly declined to consider in merger proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability").

TWTC proprietary] of these services.[16] And, in direct conflict with its claims here that AT&T is withholding essential inputs that Ethernet providers somehow desperately need to offer their services, Time Warner also acknowledges that it expects this already robust Ethernet competition to "continue[] to intensify over time."[17] Consequently, Time Warner predicts that the many other retail providers will "offer ever lower retail Ethernet prices."[18] In short, by Time Warner's own description, the Ethernet marketplace is hardly one that cries out for regulatory intervention.

Indeed, although the focus of the public interest inquiry is preserving and promoting competition, not the interests of individual competitors, Time Warner cannot even seriously claim that AT&T's Ethernet positions have placed *Time Warner* at some special disadvantage. To the contrary, Time Warner has publicly proclaimed that it is an "industry leader" in this robustly competitive marketplace with a "comprehensive portfolio of Ethernet Services."[19] Analysts agree and paint a rosy future for Time Warner's Ethernet business. And just weeks ago, Time Warner reported "strong" second quarter 2006 results "due to success with Ethernet" sales.[20] These real world conditions – which have come about *without* the availability of AT&T wholesale Ethernet service on terms demanded by Time Warner – make it impossible to take Time Warner's "sky is falling" rhetoric seriously.

Time Warner's Response also confirms *why* the parties' ongoing negotiations could have no possible adverse effect on the robustly competitive retail Ethernet services business. Time Warner's competition argument rests on the false premise that wholesale Ethernet service from AT&T is an essential input for Time Warner's retail Ethernet services. As AT&T and BellSouth have previously demonstrated, however, Time Warner, in truth, has myriad alternative last-mile connectivity options, as confirmed by the fact that it has built and grown its Ethernet business without *any* reliance whatsoever on wholesale Ethernet service purchased from AT&T.[21] Time Warner no longer disputes this fact. Indeed, Time Warner now admits that it uses "1) its on-net facilities," "2) TDM loops purchased from AT&T" and 3) "competitive facilities" (either wholesale TDM special access services or wholesale Ethernet services offered by the many other

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[16] *Taylor Reply Decl.* ¶ 11 n.7.

[17] *TWTC Response* at 18.

[18] *TWTC Response* at 17-18 ("TWTC operates in a competitive retail market"); *see also Taylor Reply Decl.* ¶¶ 11 n.7 & 13; *Joint Opp*, Reply Declaration of Parley Casto ("*Casto Reply Decl.*"), ¶¶ 14-15 & nn.6-7 (filed June 20, 2006) (describing Ethernet offerings, both retail and wholesale, of numerous providers including cable companies).

[19] *Overture Release* at 1.

[20] *See* Press Release, *Time Warner Telecom Reports Strong Second Quarter 2006 Results*, July 31, 2006 ("*TWTC 2Q Press Release*"), *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q2_2006_Earnings_Release.pdf; *see also Joint Opp.* at 97 (describing Time Warner announcements).

[21] *See, e.g.*, *Joint Opp.* at 96-97, 99 & *Casto Reply Decl.* ¶¶ 19-20; Supplemental Declaration of Parley Casto ("*Casto Supplemental Decl.*") (attached hereto as Exhibit 2 ¶¶ 4-5.

providers) to reach its Ethernet customers today.[22] If Time Warner ultimately deems AT&T's wholesale Ethernet service terms unacceptable, all of those other connectivity options will remain available to it – as will UNE loop arrangements that Time Warner has, to date, chosen not to utilize. It is precisely for this reason that AT&T has every incentive to negotiate commercially reasonable terms for the provision of wholesale Ethernet services to Time Warner and why the Commission should allow those negotiations to proceed instead of endorsing Time Warner's improper attempt to use the merger as a vehicle for gaining undue leverage in those negotiations.

Time Warner nonetheless complains that something simply must be done about AT&T's wholesale Ethernet prices, because Time Warner is dissatisfied with the prices of each of its other options as well. In Time Warner's view, *no* supplier offers reasonable prices. It claims that BellSouth's Ethernet terms are **[begin TWTC proprietary]** [23] **[end TWTC proprietary]** Similarly, in locations where "non ILEC wholesalers offer Ethernet services," Time Warner "has not purchased" their services,[24] even where they purportedly **[begin TWTC proprietary]** **[end TWTC proprietary]**.[25] And, according to Time Warner, TDM special access service prices are an abomination: "even in the most advantageous locations, the cost of the AT&T TDM loop itself (not counting additional costs in electronics and maintenance) **[begin TWTC proprietary]** [26] **[end TWTC proprietary]**. If Time Warner's rhetoric is to be believed, the retail Ethernet business is the worst of businesses, with every new customer bringing more losses: how odd then that entry is rampant and Time Warner is telling its investors that its "strong" results are "due to success with Ethernet."

Time Warner directs most of its fire at its TDM special access services option for last-mile connectivity. That is a poor choice given its very recent public claim that it can use TDM loops and Ethernet electronics provided by its third party vendor Overture to "cost-effectively deliver [its] industry-leading Ethernet portfolio to customers *anywhere*" – even where "it may be uneconomical to directly connect" to Time Warner's network.[27] Indeed, Time Warner

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[22] *Taylor Reply Decl.* ¶ 9.

[23] *Taylor Reply Decl.* ¶ 10; *id.* ¶ 28 **[begin TWTC proprietary]** **[end TWTC proprietary]**.

[24] *Taylor Reply Decl.* ¶ 7.

[25] *Taylor Reply Decl.* ¶¶ 6-8.

[26] *TWTC Response* at 16.

[27] *Compare Overture Release* at 1 (describing an arrangement with Ethernet provider Overture Networks that gives Time Warner a "'branch office' solution [that] enables us to cost-effectively deliver our industry-leading Ethernet portfolio to customers anywhere") *with Taylor Reply Decl.* ¶ 23 **[begin TWTC proprietary]** **[end TWTC proprietary]**; *see also Casto Supplemental Decl.* ¶ 13.

apparently provisions service to nearly *three quarters* of its Ethernet customer locations today over TDM connections supplied by others.[28] Faced with these facts, Time Warner cannot seriously contend that TDM loop-connectivity is not a cost-effective Ethernet solution today – Time Warner's conduct and statements prove that it is. Instead, Time Warner now speculates that Ethernet over TDM may cease to be a cost-effective option in the future. Again, Time Warner's conduct proves that it does not believe its own rhetoric. Time Warner admits that it **[begin TWTC proprietary]** [29] **[end TWTC proprietary]**, actions that are impossible to reconcile with a conviction that TDM loop-provisioning of Ethernet services will soon become "increasingly unviable."[30]

In any event, the "additional costs and inefficiencies" that Time Warner claims in its submission to the Commission (but omits or contradicts in its statements to its shareholders and potential investors) accompany Ethernet over TDM are not predictions of future costs and inefficiencies, but instead costs and inefficiencies that Time Warner contends *already* exist. Thus, even if Time Warner had its facts straight, there would be no rational basis to conclude that these supposed "costs and inefficiencies" do (or ever would) render reliance upon TDM loops unviable. All last-mile connectivity options have advantages and disadvantages relative to the others; the retail service provider must determine which option is best for each customer arrangement. And, as Time Warner's experience confirms, reliance on TDM loops remains a routine and cost-effective solution for Ethernet providers, notwithstanding the costs and inefficiencies Time Warner claims are associated with that approach.

As it happens, Time Warner does not have its facts straight. For example, Time Warner claims that it might not be able to continue offering Ethernet over TDM because it needs to buy additional electronics that may become prohibitively expensive. In support of this argument, Time Warner asserts that, using electronics supplied by Time Warner's partner, Overture, can add **[begin TWTC proprietary]** **[end TWTC proprietary]** in cost per circuit.[31] That assertion is flatly inconsistent with Time Warner's June 2006 press release, which Time Warner continues to ignore and in which it stated that its arrangement with Overture would allow it to provide a "cost-effective" Ethernet service "anywhere."[32] It is also inconsistent with Time Warner's statements to AT&T during the parties' ongoing negotiations: there, Time Warner told AT&T that the Overture electronics add only about **[begin TWTC proprietary]** **[end TWTC proprietary]** to the cost of an Ethernet over TDM circuit.[33] And it is

[28] *Taylor Reply Decl.* ¶ 4.

[29] *Taylor Reply Decl.* ¶¶ 4, 25 (emphasis added).

[30] *Taylor Reply Decl.* ¶ 9.

[31] *Taylor Reply Decl.* ¶ 18.

[32] *See Overture Release* at 1.

[33] *See Casto Supplemental Decl.* ¶ 15.

inconsistent with the Commission's own findings that the cost of electronics does not render TDM loops uneconomic or warrant the unbundling of "packetized" loops.[34]

Time Warner's claim that "mileage" charges will render Ethernet over TDM unviable in the near future is similarly meritless.[35] Special access service mileage charges that reasonably reflect the increased costs of providing longer connections are routine and have not prevented Time Warner and other Ethernet providers from making effective use of Ethernet over TDM arrangements. Moreover, if Time Warner is dissatisfied with the levels of mileage charges, it is fully within Time Warner's control to minimize those charges by deploying more points of interconnection ("POIs") with AT&T.[36] And where Time Warner chooses to save money by deploying fewer and more dispersed POIs, it can and should expect to pay more in mileage charges. In fact, Time Warner has deployed sufficient POIs to keep its mileage charges relatively low, and its position may well improve with its recent acquisition of Xspedius and that company's additional POIs with AT&T.

Time Warner's claim that it "must purchase much more TDM capacity than it needs" is particularly disingenuous.[37] According to Time Warner, for a customer that wants a 50 Mbps Ethernet service, Time Warner must purchase two DS3 facilities (of 45 Mbps capacity each) if it provides service over TDM.[38] Of course, virtually all products are sold in fixed capacity increments, and Time Warner's complaint here is of no greater moment than a complaint that light bulb manufacturers act unreasonably when they offer 40 and 60-watt bulbs, but not 55-watt bulbs. Communications suppliers must routinely deal with inputs that do not come in the precise "sizes" that individual customers may prefer, and this plainly raises no competitive issue. Not surprisingly, Time Warner's extreme example has no real world significance – as Time Warner has explained to AT&T, customers are more than willing to accept **[begin TWTC proprietary]**

[end TWTC proprietary].[39] Moreover, the same fixed

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[34] *See, e.g.*, Report and Order, *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 288 (2003) ("we . . . do not require incumbent LECs to provide unbundled access to any electronics or other equipment used to transmit packetized information over hybrid loops").

[35] *See Taylor Reply Decl.* ¶ 19.

[36] Time Warner is no different than any service provider in this regard: it can either expend more capital and have more facilities closer to its customers or it can expend less capital but incur more mileage-based charges. These trade-offs are inherent whenever a provider seeks to expand the geographic reach of its services. *See Casto Supplemental Decl.* ¶ 16. Indeed, much of Time Warner's complaints about using TDM circuits boil down to the unremarkable point that it is more costly for Time Warner to serve customers located away from the urban core. However, all wireline carriers, including AT&T, face similar difficulties.

[37] *Taylor Reply Decl.* ¶¶ 20-22.

[38] *Id.* ¶ 20.

[39] *See Casto Supplemental Decl.* ¶ 17.

capacity constraints necessarily exist with Ethernet services that are not provided over TDM. For example, Ethernet ports come in standard 10/100 MB and 1 GB sizes, so that an Ethernet supplier that seeks to meet a customer's demand for 1.2 GB of bandwidth, for example, must purchase more than one port.[40] In sum, Time Warner's claim that obtaining wholesale Ethernet service from AT&T on Time Warner's terms is essential to the continued competitiveness of its retail Ethernet services business is nothing but empty rhetoric. Even if AT&T flatly refused to provide wholesale Ethernet service to Time Warner, which it has not done, that would have no impact whatsoever on the intensity of retail competition in the provision of any service by Time Warner.

But the reality is that AT&T affirmatively wants to provide wholesale Ethernet services to Time Warner, albeit on commercially reasonable terms that are fair to both parties and not simply on whatever terms Time Warner demands. AT&T has worked hard to understand Time Warner's needs and to develop a specialized arrangement that meets those needs.[41] Negotiations for specific terms and prices for finished Ethernet services are ongoing, and AT&T is committed to offering a proposal that is commercially reasonable and that reflects market-based prices.

Time Warner's principal complaints about AT&T's proposals in the ongoing Ethernet discussions relate to price. But Time Warner has expressed a completely different view in the parties' business-to-business communications. **[begin TWTC proprietary]**

[end TWTC proprietary][42] Time Warner's Response does not even attempt to square its pricing complaints here with its statements in negotiations.

Time Warner's specific pricing claims, which take the form of bare assertions that in some hypothetical arrangements AT&T's proposed wholesale Ethernet prices would be higher than prices Time Warner claims to have offered to some retail customers, prove nothing. As an initial matter, Time Warner's claims about its retail prices are completely unverifiable; indeed, Time Warner has refused to allow AT&T even to discuss Time Warner's allegations with any of the AT&T business people who would be in a position to dispute them. Moreover, even apart

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[40] *See Casto Supplemental Decl.* ¶ 17. Nor can Time Warner's claim that "additional points of potential failure" will make Ethernet over TDM an unviable option be reconciled with the real world marketplace experience. *Taylor Reply Decl.* ¶ 24. As noted, many, if not most, Ethernet service arrangements are provisioned today over TDM loops and Time Warner provides not a shred of evidence that Ethernet providers have experienced competition-impacting service problems over these arrangements. *Casto Supplemental Decl.* ¶ 18. In fact, TDM special access services are very mature and automated products. Both AT&T and BellSouth maintain exemplary performance in providing these services, and, contrary to Time Warner's suggestion, when problems do occur, they can generally be isolated and troubleshooting can occur without the need for "truck-rolls." *Id.*

[41] *See Casto Reply Decl.* ¶ 26 (describing, among other things, the three questionnaires with 183 questions that Time Warner posed to AT&T about AT&T products).

[42] Time Warner Counter Proposal to AT&T, May 8, 2006, p. 2 (emphasis added).

from the obvious evidentiary problems, these claims do not, in any event, present any cognizable issue. As best AT&T can determine, Time Warner is suggesting that AT&T's wholesale prices create some sort of price squeeze, but to be even theoretically viable, such a claim would require, *inter alia*, an impossible showing that AT&T's wholesale services are an essential input and a comparison of AT&T's wholesale prices with *AT&T's*, not Time Warner's, retail prices. In any event, even under its hypothetical and unverifiable construct, Time Warner is able to claim that AT&T's proposed wholesale prices are higher than Time Warner's retail prices only by including charges that AT&T has offered to waive entirely by crediting Time Warner's payment of any such charges against Time Warner's purchases of other AT&T services.[43]

Finally, Time Warner also continues to gripe about a few minor technical issues.[44] Remarkably, Time Warner failed even to raise some of these minor technical issues with AT&T before including them in its filings here.[45] In other cases, Time Warner made initial inquiries, but then failed to pursue the issues.[46] In each case, Time Warner's technical issues concern specialized requests that deviate from AT&T's standard offerings. As detailed in Mr. Casto's Supplemental Declaration, AT&T has nonetheless made significant efforts to accommodate Time Warner's requests.[47] **[begin TWTC proprietary]**

[48] **[end TWTC proprietary]**

In sum, Time Warner's Ethernet claims are baseless, opportunistic attempts to abuse the merger process to gain commercial advantage. The Commission should leave these issues where they belong, at the negotiating table.

B. Time Warner's "Big Footprint" Discrimination Claims Are Also Baseless.

Time Warner struggles mightily to fabricate some connection between its Ethernet services wish list and any merger-specific effects that would be the only proper subject of this merger proceeding. Its principal remaining argument is that the Commission's 1990s merger orders support a finding that by increasing AT&T's ILEC "footprint," the merger will increase

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[43] *Casto Supplemental Decl.* ¶ 26.

[44] Petition to Deny of Time Warner Telecom ("*TWTC Petition*"), App. A, Declaration of Graham Taylor on Behalf of Time Warner Telecom, Inc. ("*Taylor Decl.*") ¶ 39 (filed June 5, 2006); *Taylor Reply Decl.* ¶¶ 30-32, 35-40.

[45] *Casto Supplemental Decl.* ¶ 31.

[46] *Casto Supplemental Decl.* ¶¶ 29-30.

[47] *Casto Supplemental Decl.* ¶¶ 27-29.

[48] *Id.*; *Casto Reply Decl.* ¶¶ 36-37.

AT&T's incentives and ability to discriminate in the provision of last-mile connectivity to businesses. The old merger orders do no such thing.

Time Warner never confronts the limited findings of the old ILEC merger orders. The big footprint discrimination claims raised by opponents of the 1990s RBOC mergers were based on novel economic theories that had not at the time – and have never since – been shown to have real world validity. Recognizing the speculative nature of these claims, the Commission accepted them only where it was convinced that two key predicates existed: (i) the merging ILECs retained "*monopoly* control over key inputs that rivals need in order to offer retail services"[49] that gave the ILECs the unquestioned ability to discriminate and (ii) regulatory authorities had not finished implementing the market opening provisions of the 1996 Act that were thought necessary to prevent such discrimination.[50] The Commission expressly found these conditions would persist only for a few years,[51] which is why it imposed merger conditions of limited duration that have long since expired.

Accordingly, as Time Warner recognizes,[52] the Commission's findings were limited to arenas that had been closed to competition, where there was virtually *no* intramodal or intermodal competition, and where UNE regulation that was thought necessary to prevent discrimination was not yet fully implemented. The Commission thus focused on effects on "competitive providers of local exchange services to mass market customers,"[53] and found no issue with high capacity special access services used to serve business customers that had long been subject to both facilities-based competition and effective and established Commission oversight. Because all communications markets are now irreversibly open to competition, because intramodal and intermodal competition are now prevalent and growing rapidly, and because the market-opening provisions of the 1996 Act have been fully implemented, the predicates for the Commission's findings in the old ILEC mergers do not exist today in *any* communications market.

That is nowhere more evident than with respect to the special access-related services upon which Time Warner focuses here. Even in the 1990s, when competition was much less developed and UNE arrangements were still being implemented, the Commission did not find big footprint discrimination problems in those markets. Time Warner's lone attempt to respond to this problem is its argument that the Commission should abandon the 1996 Act implementation predicate of its prior orders, because "[t]oday, UNEs are not generally available."[54] But that is simply false. DS1 and DS3 UNE loops (and all other UNEs) remain

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[49] *SBC-Ameritech Merger Order* ¶ 189.

[50] *Id.* ¶¶ 197, 242.

[51] *Id.* App. C ¶ 74; Memorandum Opinion and Order, *In re Applications of GTE Corp. & Bell Atlantic Corp.*, 15 FCC Rcd. 14032, App. D ¶ 64 (June 16, 2000).

[52] *TWTC Response* at 12.

[53] *SBC-Ameritech Merger Order* ¶¶ 188, 236, 246.

[54] *TWTC Response* at 12.

available everywhere except in the few areas where the Commission has determined that actual and potential facilities-based competition makes them unnecessary. AT&T and BellSouth have been relieved of DS3 UNE loop unbundling requirements, for example, in only about two percent of their wire centers (and of DS1 UNE loop unbundling requirements in far fewer wire centers), and the small number of areas where these UNEs are no longer available, not coincidentally, also are the very dense urban areas that Time Warner and other CLECs have blanketed with their own competitive fiber. Time Warner may choose not to obtain last mile connectivity through UNE arrangements, preferring instead to use its many other last-mile connectivity options, but those arrangements remain available, as is confirmed by the substantial UNE purchases by other CLECs.[55] In sum, Time Warner's discrimination claims here lack any support in the Commission's prior ILEC merger orders.[56]

Time Warner's long-winded complaints about lingering ILEC special access market power – which repeat virtually verbatim claims that Time Warner and other CLECs are actively pursuing in the industrywide special access rulemaking proceedings that are the proper fora for such claims – are thus beside the point. Even if these claims had merit – and they do not, as AT&T, BellSouth and others have demonstrated in the special access rulemaking proceedings – Time Warner cannot establish the key predicate to the Commission's big footprint discrimination findings, because the 1996 Act provisions designed to prevent any discrimination are fully implemented. Regulators now have a decade of experience with these mature regulatory schemes.

Moreover, Time Warner fails altogether to confront the wealth of evidence in this record regarding the fully implemented regulatory structure that addresses the discrimination it claims to fear and the actual performance trends that further confirm the implausibility of its discrimination theories. AT&T and BellSouth are subject to comprehensive performance standards in all phases of UNE access, including pre-ordering, ordering, provisioning, billing, and maintenance and repair of network elements and interconnection.[57] The performance plans

[55] Time Warner complains that its current special access pricing flexibility contract with AT&T limits its use of UNEs, but it was Time Warner's choice to enter that arrangement, which provided it with a steep discount off AT&T's special access prices, and subsequently encouraged Time Warner to publicly state that "[t]he deal . . . strengthens Time Warner Telecom's ability to compete effectively for the nationwide business market." Joint News Release, *Time Warner Telecom, AT&T, SBC Extend Long-Term Service Agreement*, June 1, 2005, *available at* http://www.twtelecom.com/news_info/twtc_news_05.html.

[56] Time Warner argues that the "full implementation" of Sections 251 and 271 does not prevent further discrimination because "advanced packetized services such as Ethernet loops are unavailable as UNEs." But the Commission's well reasoned decision not to require UNE unbundling of "packetized" loops is of no moment given the continued availability of the TDM DS1 and DS3 loops (through both UNE and special access arrangements). As demonstrated above, these TDM loops, which Time Warner transforms into "Ethernet loops" merely by adding its own or its third party vendors' electronics, are a cost-effective last-mile Ethernet solution, as Time Warner's own experience confirms.

[57] *Joint Opp.* at 94.

contain automatic remedies should AT&T or BellSouth fail to meet the standards imposed.[58] And AT&T and BellSouth have steadily improved the quality of their UNE provisioning and now routinely achieve extremely high satisfaction of the demanding performance standards.[59] Special access services are likewise subject both to mature and automated provisioning, maintenance and repair processes and tariffed performance guarantees. In these circumstances, any attempt by the merged entity to reverse this trend and engage in actual competition-affecting discrimination against Time Warner or the other sophisticated purchasers of these services would be easily detected and met with swift and significant remedies, which explains why Time Warner's criticisms have taken the form of merger proceeding rhetoric rather than formal complaints.[60] Of course, if Time Warner's complaints about existing special access regulation had merit – and they do not – then those concerns would be addressed in the special access rulemaking proceedings. In truth, the robust record in those proceedings demonstrates that less, not more, regulation is the appropriate response in today's competitive environment.

But even if it were relevant, Time Warner's attempt to portray the marketplace for last-mile connectivity as unchanged since the 1990s – indeed, *less* competitive – is pure fantasy. By any measure, special access competition has indisputably and substantially increased in the many years since the Commission's special access rules were last updated.[61] Time Warner's own story is illustrative. At the beginning of 1999, Time Warner claimed that it had less than 7,000 route miles of (local and long-haul) fiber and about 4,300 "lit" buildings in 19 metropolitan areas.[62] Last month, it announced that it has 6,400 lit buildings, a number that is growing 17 percent annually,[63] and, following completion of its merger with Xspedius, it will have over 16,000 miles of local fiber in more than 70 markets.[64] In some areas of BellSouth's region, Time Warner has apparently amassed more lit buildings than any other competitive provider, including AT&T and MCI.[65] And Time Warner has announced plans to expand its Atlanta metro fiber network, enabling it to offer "communications solutions to more than 6,000 additional businesses located

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[58] *Id.*

[59] *Joint Opp.* at 95.

[60] *Id.*

[61] *See* Comments of BellSouth, *In re Special Access Rates For Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 13-36 (June 13, 2005).

[62] Time Warner Telecom LLC, Form 10-K, For The Fiscal Year Ended Dec. 31, 1998, at 4.

[63] *TWTC 2Q Press Release* at 1.

[64] Time Warner Telecom, *Acquisition of Xspedius Communications*, July 2006, *available at* http://www.twtelecom.com/investors/presentations.html.

[65] Reply Comments of BellSouth, *In re Special Access Rates For Price Cap Local Exchange Carriers*, WC Docket No. 05-25, Declaration of Stephanie Boyles at 5 (July 29, 2005).

in the Atlanta area."[66] Other CLECs have been similarly expanding their local networks in recent years.

ILECs also face widespread and growing intermodal competition for last-mile connectivity to businesses that did not exist in the 1990s, particularly with respect to the Ethernet services that are the focus of Time Warner's advocacy here. All of the major cable operators now offer their own Ethernet access services using their ubiquitous networks.[67] For example, Cox Communications offers its "Transparent Lan Service" at speeds from 1.0 Mbps up to 1.0 Gbps over its fiber and hybrid fiber coaxial network.[68] Other carriers increasingly are using broadband wireless to provide dedicated transmission services to buildings.[69] First Avenue Networks is one such company offering "[h]igh capacity services (TDM, ATM, or Ethernet) up to 600 Mbps and beyond."[70] The company specifically markets itself to enterprise service providers, enabling them to access "the 'un-served' . . . enterprises that can't get high capacity services because their buildings lack fiber."[71] These facts demonstrate that whatever may have been the case in the 1990s, competition from cable, broadband wireless and CLECs is widespread and increasing.

Time Warner's 60-page economic declaration adds nothing. Despite the parade of horribles Time Warner would have the Commission believe resulted from the earlier RBOC mergers, Time Warner provides no empirical evidence – or even anecdotes – that indicate that those mergers had *any* real world negative effect on the growth of CLECs.[72] In fact, examination

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[66] Press Release, *Time Warner Telecom Extends Atlanta Fiber Network*, Jan. 20, 2006, *available at* http://www.twtelecom.com/Documents/Announcements/News/2006/Atlanta_Extension_Final_1_06.pdf.

[67] *Casto Reply Decl.* ¶ 14 & n.6.

[68] Information Sheet, *Cox Transparent Lan*, *available at* http://www.coxbusiness.com/products/data/transparentlan.html. Time Warner expressly recognizes that cable companies such as Cox and Time Warner Cable offer wholesale last-mile Ethernet connectivity. *Taylor Reply Decl.* ¶ 8.

[69] *Joint Opp.* at 93. Time Warner (at 12) contends that the fact that wireless services employing WCS and BRS spectrum have not yet been widely deployed demonstrates that wireless services are not widely available to serve commercial buildings. In fact, many carriers have long used 38/39 GHz and other spectrum for effective last-mile connectivity to enterprises.

[70] Information Sheet, *Enterprise Services, Wireless Access, available at* http://www.firstavenet.com/interior.php?section=EnterpriseServices&subsection=WirelessAccess1.

[71] *Id.*

[72] The only empirically related discussion by Besen and Mitchell regarding their footprint theory (at ¶¶ 58-62) is merely a weak and unpersuasive attack on the Carlton-Sider measure of CLEC activity. What Besen and Mitchell fail to point out, however, is that Carlton and Sider, and others that have used this measure, recognize that despite its shortcomings, the measure is worthwhile as the best available measure of CLEC activity. *Carlton & Sider Supplemental Decl.*

of any number of indicators, including growth in fiber miles (intra and inter city), lines, business penetration, and number of cities served by CLEC fiber, demonstrates that there has been enormous CLEC *growth* in the wake of the earlier RBOC mergers.[73] Again, Time Warner is a prime example – long after the prior ILEC merger conditions expired, Time Warner continues to grow in terms of revenues, investments, infrastructure, and communities served. Faced with a dearth of economic support for its position, Time Warner relies on and repeats the same outdated economic theories that were proffered in 1998 by those opposing the SBC-Ameritech merger. In particular, although Time Warner asserts that its economic declaration shows that the Commission's concerns in the past mergers are "as true of the present merger,"[74] the economists uncritically repeat arguments made during the SBC/Ameritech merger without a shred of empirical support and without even confronting the vastly different circumstances that exist today and that require a different outcome here.[75]

C. The Proposed Merger Raises No Benchmarking Concerns.

Time Warner's claims that the loss of BellSouth as an independent benchmark will leave only "two RBOCs . . . against which to benchmark post-merger," that this will "eliminate the utility of benchmarking completely," and that this "is a very serious and harmful consequence of the merger,"[76] are likewise wrong in all respects.

First, any suggestion that RBOC-to-RBOC benchmarking plays a significant role in federal or state regulation of special access services is baseless. Indeed, Time Warner has effectively conceded this issue by failing to proffer a single recent instance in which RBOC-to-RBOC benchmarking played *any* role in special access regulation.

Moreover, despite the fact that it apparently scoured state commission decisions and Commission orders, Time Warner has not been able to come up with recent examples even outside the special access context of federal or state regulators relying on RBOC-to-RBOC benchmarking to address *any* regulatory issue that has ongoing significance. Time Warner first attempts unsuccessfully to rehabilitate the claimed "examples" of benchmarking that it cited in its Petition to Deny and that Applicants proved flawed and irrelevant in their Joint Opposition.[77]

¶¶ 15-16. Moreover, Besen & Mitchell fail to show that any imperfections bias the Carlton-Sider measure toward undermining the footprint theory. *Id.* ¶ 16.

[73] *Carlton & Sider Supplemental Decl.* ¶¶ 10-11.

[74] *TWTC Response* at 1.

[75] *Carlton & Sider Supplemental Decl.* ¶ 6. Besen and Mitchell also fail to address the fundamental tension between their assumptions that increased merger-related discrimination would (i) be sufficiently strong to deter CLEC entry, yet (ii) go undetected by regulators. *Id.* ¶ 10.

[76] *TWTC Response* at 3.

[77] *See Joint Opp.* at 103-06.

None of the cited examples holds up. With respect to the Indiana decision[78] – the only case cited by Time Warner where BellSouth was proposed as a benchmark for SBC – Time Warner candidly acknowledges that it is characterizing an argument of one of the parties as the rationale of the state commission. But Time Warner's assertion that the Indiana commission "clearly took BellSouth's activities into account in reaching its conclusion"[79] is mere wishful thinking. Time Warner fails to cite any language in the Indiana commission's explanation of its decision that supports that claim, and there is none. Therefore, if anything, the Indiana decision is an instance in which the state commission *declined to adopt* a proffered benchmarking argument. Similarly, the Commission's *Virginia TELRIC Arbitration Order*,[80] hardly is a clear example of RBOC-to-RBOC benchmarking. In addressing structure sharing costs, the Commission merely chose one of the two approaches put before it by the parties in a "best offer" arbitration – one supported by various evidence including a BellSouth study – even though it concluded that "a more nuanced approach . . . might be superior."[81] Indeed, the Commission specifically held that it did not find "the BellSouth cost studies dispositive of the appropriate feeder/distribution structure sharing for Verizon."[82] The Colorado example is even less compelling, because the state commission did not – as Time Warner asserts – "mandate[]" that Qwest negotiate a particular billing arrangement with AT&T because SBC had done so.[83] Rather, the language that the Colorado commission adopted for the parties' interconnection agreement merely provided that *if* the parties wanted to have an arrangement on the billing issue, they should enter into a separate agreement.[84]

Time Warner is no more successful in its attempt to find additional examples that it claims illustrate RBOC-to-RBOC benchmarking "[i]n [p]ractice."[85] For example, with respect to both the Illinois[86] and Tennessee[87] decisions that Time Warner cites,[88] it again mischaracterizes a

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[78] *In re Level 3 Communications, LLC's Petition for Arbitration*, 2004 Ind. PUC LEXIS 465 (Ind. Utility Reg. Comm'n Dec. 22, 2004), discussed in *TWTC Response* at 31.

[79] *TWTC Response* at 31.

[80] Memorandum Opinion and Order, *In re Petition of WorldCom, Inc. Pursuant to Section 252(e)(5)*, 18 FCC Rcd. 17722 (2003), discussed in *TWTC Response* at 32-33.

[81] *Virginia TELRIC Arbitration Order*, ¶ 291 n.262.

[82] *Id.* ¶ 291.

[83] *TWTC Response* at 32.

[84] *Petition of Qwest Corporation for Arbitration*, 2003 Colo. PUC LEXIS 1149, at *150 (Colo. Pub. Util. Comm'n Oct. 14, 2003).

[85] *Besen & Mitchell Decl.* ¶¶ 76-84.

[86] *Covad Communications Co. Petition for Arbitration*, 2000 Ill. PUC LEXIS 660, at *36 (Ill. Commerce Comm'n Aug. 17, 2000).

[87] *Generic Docket to Establish UNE Prices for Line Sharing*, 2002 Tenn. PUC LEXIS 196, at *9 (Tenn. Reg. Util. Comm'n June 27, 2002). This order is also inapposite because the Tennessee commission was merely addressing BellSouth's petition to stay an earlier order. Thus, BellSouth already had been ordered to act in the earlier decision for reasons entirely unrelated to benchmarking, and here the Tennessee commission simply upheld its earlier decision.

mere argument of one of the parties as the analysis or holding of the state commission. In neither order did the state commission either rely on or mention the "benchmarking" argument in the analysis supporting its decision. Similarly, in the Louisiana[89] decision, Time Warner merely cites a statement in a staff recommendation, where there is no indication in the order that the state commission relied on that statement in making its determination. In any event, the staff recommendation was based on numerous findings and rationales, and hardly focused on benchmarking.

Time Warner also cites decisions that pertain to an RBOC's satisfaction of the Section 271 checklist,[90] a regulatory issue that has long been resolved and will not recur "in practice." While Time Warner parrots the statement from the *SBC/Ameritech Merger Order* that benchmarking is required to prevent "'possible backsliding by the RBOCs,'"[91] this argument ignores that any possible reversion to noncompliance by an RBOC would be detected through the comprehensive performance measures plans or, even more simply, through a comparison between the RBOC's current behavior and its prior actual behavior, not a horizontal comparison between the RBOC's conduct and that of other carriers.[92]

At the end of the day, however, it matters little whether Time Warner has shown that RBOC-to-RBOC benchmarking has been used on rare occasions in recent years (which is the most that Time Warner's handful of examples could show), or whether Applicants have shown that it effectively is no longer used at all. Either way, it is clear that RBOC-to-RBOC benchmarking has at most been used rarely, and that it is just one tool that sophisticated and

[88] *Besen & Mitchell Decl.* ¶¶ 80-81.

[89] *Louisiana Performance Metrics Order*, 2000 La. PUC LEXIS 234, at *20-21 (Louisiana Pub. Serv. Comm'n Oct. 9, 2000), cited in *Besen & Mitchell Decl.* ¶ 82.

[90] *Besen & Mitchell Decl.* ¶ 83 & n. 66 (citing *Southwestern Bell 271 Order*, 15 FCC Rcd. 18354, ¶ 274 (2000), and *Qwest Colorado 271 Order*, 17 FCC Rcd. 26303, ¶ 110 (2002)).

[91] *TWTC Response* at 31 (quoting *SBC-Ameritech Merger Order* ¶ 148).

[92] Time Warner's economists also cite instances in which state commissions employed "average" practice benchmarking to determine the cost of capital in TELRIC proceedings by using a "proxy group" to determine that cost. *Besen & Mitchell Decl.* ¶¶ 76-77. But as AT&T pointed out in its Reply Comments and as Time Warner's examples confirm, the proxy groups are not limited to RBOCs and include other companies as well. *See In re Application of Cincinnati Bell Telephone*, 1999 Ohio PUC LEXIS 620, at *26 (Ohio Pub. Util. Comm'n Nov. 4, 1999), and *Implementation of the District of Columbia Telecommunications Competition Act of 1996 and Implementation of the Telecommunications Act of 1996*, 2002 D.C. PUC LEXIS 421, at *179 (D.C. Pub. Serv. Comm'n Dec. 6, 2002). That the California commission employed a narrower proxy group in a particular case, *see Joint Application of AT&T Communications of California, Inc. (U 5002 C) and WorldCom, Inc.*, 2004 Calif. PUC LEXIS 476, at *220-21 (Cal. Pub. Util. Comm'n Sept. 23, 2004), does not detract from the fact that broader proxy groups are routinely used for this purpose. Indeed, in the *Virginia TELRIC Arbitration Order*, the Commission adopted a cost of capital based in large part on a proxy group of the S&P 500. *Virginia TELRIC Arbitration Order* ¶¶ 88, 90.

innovative regulators can consider and rely upon for decisionmaking. In this context, it would be arbitrary and capricious for the Commission to disallow the merger or impose conditions based on an entirely speculative risk of a potential decrease in the usefulness of RBOC-to-RBOC benchmarking.

Recognizing that it has failed completely in its attempt to show that RBOC-to-RBOC benchmarking has been an important regulatory tool in recent years, Time Warner contends that even if such benchmarking is not necessary now, it will be in the future.[93] But Time Warner has the trend exactly backwards. Benchmarking and other tools of centralized regulation have been on the wane because competition – particularly facilities-based intermodal competition over broadband facilities that have the capability to provide a wide range of communications and entertainment services – has been sharply on the rise. In an environment marked by vigorous intermodal competition, market forces plainly obviate any need for benchmarking to detect and discourage discrimination. The expansion of competition is accelerating, not reversing, and thus, if, as Time Warner suggests, predictive judgments about the future need for benchmarking must guide the Commission's decision here, then the only rational conclusion is that RBOC-to-RBOC benchmarking comparisons that have only rarely been employed in recent years (and apparently never in the context of special access services) will have even less utility in the future as all markets become increasingly competitive.[94]

Moreover, in any context in which intercompany comparisons might remain useful in today's environment, it would make no sense for regulators to limit their comparisons to RBOCs only, and ignore the wide and heterogeneous array of competitors that offer the services at issue. This is particularly true with respect to advanced services such as Ethernet and IP VPN – contexts that Time Warner asserts "underscore the need for continuing RBOC benchmarking."[95] In a marketplace in which cable companies, CLECs, ILECs and other providers compete vigorously with the RBOCs, any RBOC-only benchmarking would be meaningless. Accordingly, it is absurd to suggest that the elimination of one RBOC will have any effect on the ability of federal and state officials to regulate advanced services (in the unlikely event they conclude that regulation is necessary in the first place).

Time Warner's economists also make several arguments about the abstract value of different forms of benchmarking and the theoretical effects of mergers on benchmarking, but these arguments are ultimately beside the point because they ignore the real-world changes in

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[93] *See, e.g., TWTC Response* at 33-35.

[94] Time Warner's claim (*TWTC Response* at 30) that "there is every indication [the Commission] will need to use average-practice benchmarking" to determine the productivity adjustment for price cap regulation is wholly speculative. It assumes both that the Commission will continue to employ price cap regulation for special access services and that it will continue to use a productivity adjustment – matters that are far from certain. In any event, Time Warner's argument wholly ignores that while the Commission previously used an "industry average" to determine the productivity adjustment for price cap regulation, it abandoned that approach several years ago. *See* 47 C.F.R. § 61.45(b)(1)(iii)-(iv).

[95] *TWTC Response* at 34.

technology and market structure.[96] In addition, the theoretical analysis of Time Warner's economists is based on an "unrealistic view" of the regulatory process that "exaggerates the importance of the number of ILEC benchmarks."[97] Specifically, their analysis makes "the highly unrealistic assumption that the information available to regulators can be approximated based on the number of independent ILECs alone," and ignores the numerous other sources of information that are available to regulators, including information on changes in performance over time, performance measures data, and the accumulated knowledge of regulators based on their prior experience.[98] At the end of the day, Time Warner's economists have not shown that the previous mergers actually have had any negative effects on regulatory oversight or competition,[99] and they fail to acknowledge that any negative effects are entirely implausible with this merger because competition has largely replaced benchmarking and other tools of centralized regulation as a means of ensuring efficiency and consumer benefits.

Time Warner's economists also rehash the Commission's concern in the *SBC-Ameritech Merger Order* that the merger will increase the remaining RBOCs' incentives to collude.[100] Again, the analysis of Time Warner's economists simply ignores the fact that the market and regulatory conditions underlying that concern no longer exist. In today's highly competitive marketplace, marked by intense intermodal competition and enormous investment in innovation, RBOCs have overwhelming incentives to meet their customers' needs as effectively as possible and to innovate whenever possible – or risk losing those customers to other providers. Indeed, in the *SBC-AT&T Merger Order*, the Commission rejected opponents' claims that collusion or mutual forbearance would result from the merger, based in part on the existence of numerous competitors with local facilities.[101]

Finally, Time Warner argues that parity standards, which compare the RBOC's performance in providing service to itself and its performance in providing service to others, are insufficient to ensure nondiscriminatory performance.[102] Time Warner's position here, however, is at odds with its advocacy and that of other CLECs in support of parity standards in the Commission's ongoing special access performance standards proceeding, *In re Performance Measurements and Standards for Interstate Special Access*, CC Docket No. 01-321.[103]

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[96] *See Carlton & Sider Supplemental Decl.* ¶¶ 19-22.

[97] *Id.* ¶ 16.

[98] *Id.* ¶¶ 17-18.

[99] *Id.* ¶ 23.

[100] *TWTC Response* at 35-36 (citing *SBC-Ameritech Merger Order* ¶¶ 121-23, 184); *Besen & Mitchell Decl.* ¶¶ 120-23.

[101] *SBC-AT&T Merger Order* ¶¶ 53-54 (wholesale special access services); *id.* ¶ 79 (enterprise services).

[102] *TWTC Response* at 36-40.

[103] *See* Comments of Time Warner Telecom and XO Communications, Inc., CC Docket No. 01-321, at 24 (Jan. 22, 2002) ("The point of performance rules is to facilitate the detection of

In sum, Time Warner's Ethernet complaints are flawed, and Time Warner, in all events, fails to identify any harm from the proposed merger, which should be approved expeditiously and without conditions.

This letter and its exhibits contain information that is both commercially and financially sensitive to AT&T and Time Warner and that AT&T and Time Warner would not in the normal course of business reveal to the public or their competitors. Accordingly, the letter has been redacted pursuant to the Protective Order in this proceeding.[104] AT&T is filing with the Secretary today, under separate transmittals, a CD-ROM containing one copy of the complete unredacted letter and exhibits. AT&T is also providing to the Staff the copies of the unredacted letter and exhibits. The unredacted letter and exhibits will be made available for inspection, pursuant to the terms of the Protective Order at the offices of Crowell & Moring LLP. Counsel

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discrimination in favor of the ILEC's end users and affiliates as well as discrimination among competitors. Accordingly, any meaningful performance requirements must include a basis for comparing the level of service quality provided to specific competitors with the service quality provided to (1) the ILEC's end users and affiliates, and (2) all competitors."); Comments of Focal Communications Corporation, Pac-West Telecomm, Inc., and US LEC Corp., CC Docket No. 01-321, at 13-14 (Jan. 22, 2002) ("[F]ederal rules can, and must, assure that ILEC provisioning of special access . . . to CLECs is on parity with its provisioning of special access . . . to itself, its affiliates, or its retail customers. . . . The objective level of quality or cost of service from the ILECs is less important to the Joint Commenters than the fact that CLECs obtain bottleneck facilities from the ILEC on a performance level *equivalent* to the service it provides to itself.") (emphasis in original). Time Warner complains that the Joint Competitive Industry Group ("JCIG") performance metrics proposal in the special access performance standards proceeding contains "many objective benchmarks" as well as parity standards. *TWTC Response* at 36. But the straightforward objective standards in that proposal do not involve the use of "benchmarking" as the parties are using that term here: making comparisons between or among RBOCs. No party is proposing such RBOC-to-RBOC comparisons in the special access performance standards proceeding.

[104] *In re AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control,* WC Dkt No. 06-74, Protective Order, DA 06-1032 (rel. May 12, 2006).

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