

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

December 5, 2006

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
c/o Natek, Inc.
236 Massachusetts Avenue, N.E.
Suite 110
Washington, D.C. 20002

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

Dear Ms. Dortch:

Time Warner Telecom, Inc. (“TWTC”) continues to view the merger process as a forum to air grievances about its ongoing business negotiations with AT&T for a customized wholesale Ethernet contract tariff arrangement.¹ AT&T and BellSouth (“Applicants”) submit this letter to respond to TWTC’s November 20, 2006 *ex parte* submission,² which purports to provide “factual predicates” for TWTC’s “big footprint” and benchmarking theories of Ethernet merger harm. In fact, the new presentation merely recycles false and irrelevant claims that Applicants have previously refuted in demonstrating that there is *no* legitimate predicate to TWTC’s attempt to use obsolete concerns of a different era to transform its Ethernet wish list into a merger issue.³ The Ethernet marketplace is, and will remain, robustly competitive – as the two internal AT&T documents that are the only new material referenced in TWTC’s presentation confirm. In one of these documents AT&T employees express [**Begin Highly Confidential**]

¹ *But see, e.g.*, Memorandum Opinion and Order, *Applications of Time Warner, Inc., America Online, Inc., & AOL Time Warner Inc.*, 16 FCC Rcd. 6547, ¶ 6 (Jan. 22, 2001) (“*TW-AOL Merger Order*”) (“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”).

² *See Ex Parte* Letter from Thomas Jones (TWTC) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (filed Nov. 20, 2006) (“TWTC Nov. 20 Letter”).

³ *See, e.g.*, *Ex Parte* Letter from Gary L. Phillips (AT&T) and Bennett L. Ross (BellSouth) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (filed Aug. 21, 2006) (“AT&T/BellSouth Aug. 21 Letter”).

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

[End Highly Confidential]; the other document **[Begin Confidential]**

[End Confidential] That AT&T faces such competitive pressure in the well-populated Ethernet space where TWTC has proclaimed itself the “industry leader” counsels in favor of less, not more, regulation.

TWTC tells this Commission a tale of a dead end Ethernet market with no competition and where competitors cannot offer commercially viable Ethernet services without access to wholesale finished Ethernet services from AT&T under the terms that TWTC demands. But TWTC tells its customers and current and potential investors a markedly different story, yet it does not even acknowledge these recent investor reports – where it admits both that the Ethernet services marketplace is, in fact, highly competitive and that TWTC continues to enjoy great success in that marketplace without purchasing *any* tariffed Ethernet service from AT&T – let alone attempt to reconcile them with its contrary assertions here.⁴ TWTC concedes that **[Begin TWTC Confidential]**

⁵ **[End TWTC Confidential]** and that it expects this already robust Ethernet competition to “continue[] to intensify over time.”⁶ And, TWTC predicts that it will “offer ever lower retail Ethernet prices.”⁷ TWTC has even proclaimed itself to be the “industry leader” in this robustly competitive marketplace with a “comprehensive portfolio of Ethernet Services”⁸ – TWTC has admitted that its “strong” financial results are “due to success with Ethernet” sales.⁹

It is thus clear that TWTC has been, and will continue to be, only one of many successful Ethernet suppliers with or without a wholesale Ethernet arrangement with AT&T. In this regard, TWTC’s claim that it cannot effectively rely on TDM special access loops to provide retail

⁴ See, e.g., TWTC Nov. 20 Letter at 6 (“TWTC has not purchased a single Ethernet circuit from AT&T under tariff”).

⁵ See *Ex Parte* Letter from Thomas Jones (TWTC) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (“TWTC Aug. 8 Letter”), Taylor Reply Decl. ¶ 11 n.7 (filed Aug. 8, 2006).

⁶ TWTC Aug. 8 Letter at 18.

⁷ *Id.*; see also *id.* at 17 (“TWTC operates in a competitive retail market”); Joint Opposition, Casto Reply Decl. ¶¶ 14-15 & nn.6-7 (describing Ethernet offerings, both retail and wholesale, of numerous providers including cable companies).

⁸ Time Warner Telecom, June 6, 2006 Press Release at 1 (“*Overture Release*”), available at <http://www.twttelecom.com/Documents/Announcements/News/2006/Overture.pdf>.

⁹ See Press Release, *Time Warner Telecom Reports Strong Second Quarter 2006 Results*, July 31, 2006, available at http://www.twtelecom.com/Documents/Announcements/News/2006/TWTC_Q2_2006_Earnings_Release.pdf; see also Joint Opposition at 97.

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

Ethernet services¹⁰ also cannot be squared with its own prior statements. TWTC has raved about its ability to use TDM loops with Ethernet electronics to “cost-effectively deliver industry-leading Ethernet portfolio to customers *anywhere*” – even where “it may be uneconomical to directly connect” to TWTC’s network.¹¹ Indeed, TWTC apparently provisions service to nearly *three quarters* of its Ethernet customer locations over third-party TDM connections.¹² TWTC further admits that it **[Begin TWTC Confidential]**

¹³ **[End TWTC Confidential]** and that, in addition to using TDM loops purchased from AT&T or other competitors, it provisions Ethernet services using “1) its on-net facilities” and 2) “competitive facilities.”¹⁴ If TWTC ultimately deems AT&T’s wholesale Ethernet service terms unacceptable, all of these other connectivity options will remain available to it – as will UNE loop arrangements that TWTC has, to date, chosen not to utilize.

These undisputed real world conditions make it impossible to take TWTC’s “sky is falling” rhetoric seriously.¹⁵ And, it is obvious that there is no basis for Commission intervention in the ongoing AT&T-TWTC commercial negotiations for a customized wholesale Ethernet service contract tariff.¹⁶

TWTC’s attempt to tie its fabricated Ethernet woes to this merger is entirely baseless. As always, TWTC begins with a litany of supposed special access allegations, but, as always, TWTC ignores the record facts that establish that this merger will not impact special access

¹⁰ See, e.g., TWTC Nov. 20 Letter at 8-9.

¹¹ *Overture Release* at 1.

¹² See TWTC Nov. 20 Letter at 2; Taylor Reply Decl. ¶ 4.

¹³ Taylor Reply Decl. ¶ 25 (emphasis added). As AT&T has previously explained, there is also no merit to TWTC’s claims that “additional electronics,” “mileage charges,” or alleged “additional points of failure” impede the viability of TDM-based Ethernet services. See, e.g., AT&T/BellSouth Aug. 21 Letter, at 8, 9, 11; cf. *Overture Release* at 1.

¹⁴ Taylor Reply Decl. ¶ 9.

¹⁵ TWTC’s specific complaints about AT&T’s current proposals in the ongoing negotiations are specious. According to TWTC, **[Begin TWTC Confidential]**

[End TWTC Confidential].

¹⁶ See, e.g., *TW-AOL Merger Order*, ¶ 6 (“discourag[ing] the temptation . . . 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”).

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

competition. The unrefuted record evidence shows that AT&T is an insignificant wholesale special access supplier in the BellSouth region, that many other facilities-based suppliers compete in the few metropolitan areas in the BellSouth region where AT&T operates local networks, and that there are at most a handful of buildings scattered throughout BellSouth's region that could even potentially be adversely affected by the transaction.¹⁷ TWTC never addresses these dispositive facts, and instead complains generally about the Commission's pricing flexibility regime and alleged pre-merger incumbent LEC incentives to increase prices. None of these claims has merit, as Applicants and others have demonstrated in the industry-wide proceedings that the Commission has repeatedly held are the only appropriate fora for such claims.¹⁸ As Applicants have likewise repeatedly demonstrated, relabeling these arguments as "big footprint" and benchmarking allegations adds nothing. TWTC still relies solely on 1990s merger orders premised on a long gone environment in which there was no significant competition and the market-opening provisions of the 1996 Act had not yet been implemented. Those orders simply have no application to today's radically different environment.¹⁹ And TWTC still has not proffered a single recent instance in which RBOC-to-RBOC benchmarking played *any* role in special access regulation to address *any* regulatory issue that has ongoing significance.²⁰

It is thus not surprising that TWTC's "factual predicates" that purportedly support its benchmarking and footprint allegations are all irrelevant and wrong. Contrary to TWTC's allegations, the record evidence confirms that AT&T's and BellSouth's special access rates have

¹⁷ See, e.g., Public Interest Statement at 55-62 & Carlton/Sider Decl. ¶¶ 103-118; Joint Opposition at 12-35 & Carlton/Sider Reply Decl. ¶¶ 16-53; *Ex Parte* Letter from Gary L. Phillips (AT&T) to Marlene H. Dortch (FCC) WC Docket No. 06-74 (filed Sept. 28, 2006); Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T's Acquisition of BellSouth: Investigation Concludes That Combination Would Not Reduce Competition at 2 (Oct. 11, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/218904.pdf ("[i]n each metropolitan area where [Applicants] have significant overlapping facilities, . . . postmerger, [they] would have several competitors with extensive local networks" and the "merged firm would have existing or potential facilities-based competition at nearly all of the buildings served by AT&T before the merger").

¹⁸ See Memorandum Opinion and Order, *Applications of SBC Communications Inc. & AT&T Corp.*, 20 FCC Rcd. 18290, ¶ 15 (Nov. 17, 2005) ("to the extent that certain incumbent LECs have incentive and ability under our existing rules to discriminate against competitors using special access inputs, such concern is more appropriately addressed in our existing rulemaking proceedings on special access performance metrics and special access pricing").

¹⁹ See Joint Opposition at 90-100; AT&T/BellSouth Aug. 21 Letter at 11-16.

²⁰ See Joint Opposition at 100-111; AT&T/BellSouth Aug. 21 Letter at 16-21.

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

been falling, not increasing.²¹ TWTC’s contrary “evidence” consists of a meaningless rate comparison (by Global Crossing) of AT&T’s and BellSouth’s rack rates (*i.e.*, rates with no discounts) to the fully discounted rates of AT&T’s and BellSouth’s many competitors,²² and a series of meaningless ARMIS-based and other claims that proponents of special access reform made – and AT&T, BellSouth and others long ago refuted – in the Commission’s ongoing special access rulemaking proceedings.²³

TWTC’s Ethernet-specific “factual predicates” are likewise baseless. As “evidence” that AT&T’s Ethernet prices are too high, TWTC cites an email in which an AT&T employee expresses **[Begin Highly Confidential]**

²⁴ **[End Highly Confidential]**

Confidential] But the appropriate consumer-focused response to this concern is *more*, not less, pricing flexibility to allow AT&T to respond to the intense competition in the provision of Ethernet services.

Nor is there merit to TWTC’s claims that AT&T’s proposed wholesale Ethernet prices would “[p]lace TWTC in a price squeeze.”²⁵ A price squeeze could potentially exist *only if* (1) AT&T’s wholesale Ethernet service was a bottleneck input to TWTC’s retail Ethernet service *and* (2) AT&T’s wholesale prices were set at levels above AT&T’s retail prices. TWTC cannot satisfy either of these predicates. There is plainly no bottleneck, because TWTC has become an

²¹ Joint Opposition at 31; Reply Comments of SBC, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 27-31 (July 29, 2005) (“SBC Special Access Reply”); Reply Comments of BellSouth, *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 10-19 (July 29, 2005) (“BellSouth Special Access Reply”).

²² See, e.g., *Ex Parte* Letter from Gary L. Phillips (AT&T) and Bennett L. Ross (BellSouth) to Marlene H. Dortch (FCC), WC Docket No. 06-74 (filed Nov. 13, 2006).

²³ See, e.g., Joint Opposition, at 33-34; SBC Special Access Reply, at 37 (ARMIS data “will always yield, even in the best of circumstances, somewhat arbitrary results given the need to allocate shared and common costs”); *id.* at 26-27 (2004 Uri/Zimmerman paper cited by TWTC accounts only for term discounts and fails to account for the substantial volume and other contract discounts); *id.* at 34 (CLEC/ILEC rate comparisons cited by TWTC ignore that CLECs are free to enter only the highest density (lowest cost) areas, whereas ILECs serve both high and low cost areas); BellSouth Special Access Reply, Furtchgott-Roth/Hausmann Decl., at 6-8 (explaining that the rate comparisons put forward by CLECs improperly compare rates in pricing flexibility areas to rates in non-pricing flexibility areas and also contain significant “measurement error”).

²⁴ ATT-FCC-00342879.

²⁵ TWTC Nov. 20 Letter at 7.

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

“industry leader” with a “comprehensive portfolio of Ethernet Services,” notwithstanding that it “has not purchased a single Ethernet circuit from AT&T under AT&T’s tariff.”²⁶ With regard to retail prices, TWTC merely asserts that **[Begin TWTC Confidential]**

27

²⁸ **[End TWTC Confidential]**

Finally, TWTC’s claim that **[Begin Confidential]**

²⁹ **[End Confidential]** That AT&T found it necessary to implement such an incentive program is further evidence of the significant competition for such services. In short, there is no factual predicate – or merger connection – to TWTC’s Ethernet advocacy.³⁰

Information in this letter is both commercially and financially sensitive and is proprietary information that AT&T and TWTC would not in the normal course of business reveal to the public or their competitors. This letter contains information regarding AT&T’s “future plans to compete for a customer or specific groups or types of customers . . . specifically including [AT&T’s] future pricing strategies, product strategies, or marketing strategies.”³¹ AT&T is designating such information as Highly Confidential pursuant to the Second Protective Order. In addition to the Highly Confidential Information just described, this letter discusses AT&T’s plans to compete for certain customers in the recent past. AT&T is designating the latter type of information as Confidential Information pursuant to the First Protective Order.³² Finally, this letter contains information that TWTC has designated as Confidential Information pursuant to the First Protective Order or has provided to AT&T on a confidential basis in their negotiations.

²⁶ *Overture Release*, at 1; TWTC Nov. 20 Letter at 6.

²⁷ TWTC Nov. 20 Letter at 8.

²⁸ **[Begin TWTC Confidential]**

[End TWTC Confidential]

²⁹ ATT-FCC-00344411.

³⁰ Contrary to TWTC’s suggestion, AT&T’s retail rate reductions were implemented through tariffs and are available for resale through intrastate retail tariffs or interconnection agreements.

³¹ Second Protective Order, *AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control*, WC Dkt No. 06-74, DA 06-1415, at 2 ¶ 5 (rel. July 7, 2006) (defining “Highly Confidential Information”) (“Second Protective Order”).

³² Protective Order, *AT&T Inc. & BellSouth Corp. Applications for Approval of Transfer of Control*, WC Dkt No. 06-74, DA 06-1032 (rel. May 12, 2006).

**REDACTED – FOR PUBLIC INSPECTION IN WC DOCKET NO. 06-74 before the
Federal Communications Commission**

In addition to this filing with the Secretary, AT&T is providing to the Staff copies of the unredacted filing. Counsel for parties to this proceeding may review the unredacted filing at the offices of Crowell & Moring LLP and should contact Jeane Thomas of that firm at (202) 624-2877 to coordinate access.

Sincerely,

/s/ Gary L. Phillips

AT&T Inc.
1120 Twentieth Street, N.W.
Suite 1000
Washington, D.C. 20036
Tel: (202) 457-3055

/s/ Bennett L. Ross

BellSouth Corporation
1133 Twenty-First Street, N.W.
Suite 900
Washington, D.C. 20036
Tel: (202) 463-4113