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***Via Hand Delivery***

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: **Special Access Rates for Price Cap Local Exchange Carriers,  
WC Docket No. 05-25, REDACTED FOR PUBLIC INSPECTION**

Dear Ms. Dortch:

AT&T submits this response to fundamentally flawed ILEC-CLEC special access rate comparisons submitted by Time Warner Telecom Inc. (“Time Warner”) in support of its baseless claim of special access market failure.<sup>1</sup> One would expect price comparisons offered for this purpose to be based on accurate and verifiable prices for like services that are actually charged by a representative sample of specified industry participants. And any responsible analysis that did identify real price differences for like services would consider legitimate market-based reasons for such differences before jumping to extreme conclusions, particularly where, as here, the record indisputably establishes that the prices real customers actually pay for ILEC special access services – at all capacities and in all areas – have been rapidly declining for years.

Time Warner adopts a very different approach. Although it claims to compare actual CLEC and ILEC prices, the CLEC “prices” are unverifiable “offers” that Time Warner supposedly received from just four unidentified CLECs, and Time Warner fails even to disclose, where, when or under what conditions these offers were supposedly made. The Time Warner

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<sup>1</sup> Letter from Thomas Jones and Jonathan Lechter (attorneys for TWTC) to Marlene H. Dortch (Secretary, FCC), *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (submitted Sep. 7, 2007) (“Time Warner Sep. 7 Letter”); Letter from Thomas Jones and Jonathan Lechter (attorneys for TWTC) to Marlene H. Dortch (Secretary, FCC), *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (submitted Oct. 11, 2007) (“Time Warner Oct. 11 Letter”). The second letter purports to “explain in more detail the design and content” of the prices initially submitted on Sep. 7, and to try to correct and rehabilitate those comparisons after they were shown to be riddled with obvious errors and inaccuracies. *See, e.g.*, Letter from Craig J. Brown (Qwest) to Marlene H. Dortch (Secretary, FCC), *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (submitted Oct. 2, 2007) (demonstrating that Time Warner’s price comparisons overstate RBOC prices by as much as thousands of dollars).

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prices used in the comparisons are not even actual offers, but supposed internal price floors Time Warner established for its sales agents, and, again, Time Warner provides no information as to when, where or under what terms and conditions any customers actually pay those rates. The ILEC prices used in the comparisons are just plain wrong – indeed, some of the circuit prices Time Warner reports for AT&T are inflated by hundreds or even thousands of dollars over the prices Time Warner and other AT&T customers actually pay. And Time Warner ignores entirely that even the unverifiable, erroneous, apples-to-oranges figures it reports show near parity in prices for the short circuits typical of the dense commercial areas that account for the vast majority of special access demand and that there are legitimate market-driven reasons for any rate or rate structure differences associated with much longer circuits (5-15 miles) – ILEC rates include a mileage component, for example, because ILECs stand ready to provide service to *any* location whereas some CLECs have priced their services to reflect cherry-picking strategies of targeting (at least initially) customers that cost the least to serve. In all events, the nonsensical results of the comparisons starkly confirm that both the methodology that underlies them and the conclusions Time Warner asks the Commission to draw from them are unsound: according to Time Warner, the greatest price disparities, and hence the greatest supposed market failures, exist for high capacity optical and packet-based services, which the Commission and courts repeatedly have found to be among the *most* competitive services.

First, there is quite literally no way for the Commission or interested parties to even begin to assess the significance, if any, of the price differences listed in Time Warner's comparison charts. Time Warner could be comparing rates for different service levels, in different geographic areas, with different volumes, with different bundled service elements, with different related terms and conditions, and with any number of other critical differences. There is no way to know, because Time Warner has withheld that information. The CLEC prices used by Time Warner were apparently plucked from offers that Time Warner supposedly received from four CLECs. That's it, that's all we know about those prices – we do not even know when those offers were made; they could have been made last week, last month, last year, or several years ago. Moreover, Time Warner altered, with no explanation or support, these supposed CLEC offer prices when it filed its Oct. 11 letter purporting to clarify its Sep. 7 letter, which further indicates that these CLEC prices are arbitrary and wholly unreliable. The prices Time Warner reports for itself are just as opaque. Time Warner does tell us that they are *not* actual market prices, but are instead internal pricing thresholds that supposedly reflect the lowest price that a Time Warner sales agent is permitted to charge without managerial approval and “book” and “list” prices that supposedly exist in certain unidentified geographic areas. But whether and how often, and to whom and under what circumstances Time Warner actually charges these prices is left unanswered. In some instances, Time Warner further obscures the prices used in the comparison by combining the unexplained CLEC and Time Warner prices using some – again, unexplained – averaging technique. In short, Time Warner has submitted nothing – not even a sworn affidavit – that would allow anyone (other than Time Warner) to verify the CLEC prices or Time Warner thresholds used in its comparison, leaving everyone else to guess at whether those prices are even comparable to the RBOC prices used in the comparison and whether any of those prices are even accurate.

Moreover, the only prices in the comparisons that AT&T could verify – those Time Warner claims represent what it pays AT&T – are wrong. AT&T has reviewed its billing

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records and tariffs and has confirmed that Time Warner inaccurately reports and generally significantly overstates the DS<sub>n</sub>, OC3, and Ethernet rates it reports for AT&T. For DS<sub>n</sub> circuits, Time Warner's comparisons generally overstate AT&T's prices, and the amounts that Time Warner actually paid to AT&T for some of the circuit configurations are actually at parity with what Time Warner reports as the "Competitor" price.<sup>2</sup> The AT&T prices that Time Warner reports for high mileage (5 and 10 mile) circuits – the circuit configurations where Time Warner claims substantial price differences – are particularly misleading. Although Time Warner purchases very few such circuits from AT&T, customers that do so typically purchase circuit configurations that utilize higher capacity transport and then use multiplexing equipment at or near the customer location to deliver the DS1 or DS3 service (yielding much lower unit prices). For OC<sub>n</sub> services, Time Warner purports to compare AT&T's tariffed prices under short term arrangements to unspecified internal Time Warner pricing thresholds on the premise that Time Warner buys these circuits "on only one year terms because customer demand patterns do not permit a longer commitment."<sup>3</sup> In fact, the vast majority of OC<sub>n</sub> circuits Time Warner purchases from AT&T are under five year plans, and Time Warner's actual prices are substantially lower than the prices Time Warner reports – and, in some cases, are lower than the prices Time Warner claims it offers.<sup>4</sup> The prices Time Warner claims it would pay for AT&T Ethernet services are literally thousands of dollars higher than the prices Time Warner would actually pay under its

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<sup>2</sup> None of the DS<sub>n</sub> rates in Time Warner's comparisons reflect AT&T's current rates. Rather, Time Warner admits (at 2) that all of its DS<sub>n</sub> rate comparisons rely on older tariffs that do not reflect the rate reductions in the revised tariffs filed by AT&T in the Spring of 2007. But, as noted, even under these outdated tariffs, Time Warner's comparisons confirm that **[Begin Confidential]**

**[End**

**Confidential]**

<sup>3</sup> Time Warner Letter at 3.

<sup>4</sup> **[Begin Confidential]**

**[End Confidential].**

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existing contracts with AT&T if it actually purchased any of those services from AT&T (as it does not), and, again, the actual prices Time Warner would pay for Ethernet services are, in some cases, lower than the prices Time Warner claims it offers for the same configurations.<sup>5</sup>

In any event, even if Time Warner's comparisons could be verified and were not obviously misleading and based on inaccurate data, Time Warner's apples-to-oranges comparisons still would be meaningless. As noted, the CLEC prices in Time Warner's comparison are prices supposedly contained in *offers* by four unnamed CLECs, supposed *internal pricing* thresholds for Time Warner, and RBOC prices (albeit inaccurate) that Time Warner *actually pays*. But if Time Warner wants to compare pricing offers, it should use *offers* by CLECs *and* RBOCs. If it wants to compare internal pricing thresholds it should use internal pricing *thresholds* for both CLECs *and* RBOCs, and, if it wants to compare real-world *market prices* paid by Time Warner it should use actual prices Time Warner pays to CLECs *and* RBOCs. It is meaningless to compare – as Time Warner has done – one carrier's supposed offer to another carrier's internal pricing thresholds to another carrier's actual price. Recent events illustrate this point. **[Begin Confidential]**

**[End Confidential]** Moreover, AT&T sells these services to other customers at prices significantly lower than those paid by Time Warner. Time Warner's comparison thus not only fails to capture the lower prices being *offered* by the RBOCs when it makes comparisons to CLEC offers, but Time Warner omits the critical fact that competition for special access has become so intense that AT&T is offering ever lower prices and that Time Warner and other CLECs can afford to reject lower priced offers by the RBOCs. In all events, as noted, Time Warner makes matters worse by failing to disclose the terms and conditions under which the CLEC offers, Time Warner internal thresholds, and RBOC actual prices are provided.

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<sup>5</sup> Time Warner has dropped its erroneous assertion that it would have to pay **[Begin Confidential]** **[End Confidential]** for 1 Gigabit cross-connects, given that AT&T's tariffs confirm that AT&T's cross-connect prices are no higher than \$21.50 in the legacy BellSouth region and only \$100 in the legacy SBC region (for the AT&T Opti-Man service). See AT&T FCC Tariff No. 2, §§ 16.5(4)(B) & 24.2 (AT&T Midwest); AT&T FCC Tariff No. 1, §§ 16.74 & 25.7.5(A) & 35.2 (AT&T West); AT&T FCC Tariff No. 73, §§ 43.2 (AT&T Southwest); AT&T FCC Tariff No. 1, § 25.5.23(A) (legacy BellSouth region). Nonetheless Time Warner continues to vastly overstate AT&T's prices. For example, in the legacy SBC territory an Ethernet configuration with one 1 Gigabit loop, one 50 Megabit loop, and cross connects for a one year term would cost **[Begin Confidential]** **[End Confidential]** as Time Warner claims, and, moreover, AT&T's price is lower than Time Warner's price of **[Begin Confidential]** **[End Confidential]** for that same configuration. Likewise, in the legacy BellSouth territory, an Ethernet Configuration with one 500 Megabit loop, one 50 Megabit loop and cross connects for a one year term would cost **[Begin Confidential]** **[End Confidential]** as Time Warner claims, and moreover that price too is lower than Time Warner's price of **[Begin Confidential]** **[End Confidential]** for that same configuration.

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In this regard, AT&T's services include a rich suite of features, industry leading performance, and one of the most secure networks backed by state of the art disaster recovery technology and a top rated customer service organization.<sup>6</sup> By contrast, some CLECs have a different model that sacrifices quality and features for lower prices. Any valid price comparison must therefore account for the terms and conditions under which the underlying services are being offered. Time Warner's comparison does not.

Finally, even if Time Warner had submitted verifiable, accurate, apples-to-apples comparisons, the mere existence of price differentials hardly suggests any market failure, much less the clear and substantial market failure necessary to justify the onerous, investment chilling regulation that Time Warner advocates. Even significant rate differences among established and new competitors are commonplace in competitive markets.<sup>7</sup> And here for the 0-mile circuits typically associated with the downtown and other commercial areas where special access demand is concentrated, even Time Warner's jerry-rigged comparisons indicate very little difference between RBOC and CLEC prices. Rather, most of the price disparities in Time Warner's comparison occur in longer circuits, and even then only because Time Warner asserts that CLECs charge no more for longer circuits than for short ones. But if that is true, it would undermine the CLECs' entire case in this proceeding, which is premised on their claims that buildings more than a few hundred feet from existing fiber are not contestable. Of course, the more likely reason for any such price differentials is that they reflect that the CLECs whose prices are reflected in the comparison have fewer longer circuits in their existing portfolios than

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<sup>6</sup> See, e.g., AT&T Wholesale Receives Frost & Sullivan's 2007 Company of the Year Award, available at <<http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23312>> (presenting the "AT&T Wholesale organization" with "the 2007 Company of the Year Award for its leadership in product innovation and market advancement."); AT&T Wins Four U.S. Wholesale Carrier Excellence Awards: Leadership in Network Performance, Voice Product Quality and Brand Quality Affirmed by Customer Ratings in ATLANTIC-ACM Report, available at <<http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23457>> (recognizing AT&T's superior provision of wholesale services); AT&T Business Continuity and Disaster Recovery Services Named Best Product Line by Frost & Sullivan, available at <<http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23574>> ("present[ing] AT&T with the 2007 North American Business Continuity and Disaster Recovery Services Product Line Strategy Award, extending AT&T's reputation as an industry leader in business continuity and disaster recovery services"); AT&T Wins Cisco Service Provider Partner Award for "Excellence In Managed Security," available at <http://www.att.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=23831> (recognizing "AT&T's innovation and excellence in delivering managed security services leveraging Cisco technology and having invested in training to obtain expertise in selling, designing, installing, managing and supporting comprehensive network security solutions").

<sup>7</sup> See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 85, n.278 (2003) (acknowledging that regulation should "account for any countervailing [competitor] advantages, such as being able to sell other services, avoid costs, achieve qualitative advantages unavailable to the incumbent LEC, cherry-pick profitable customers or markets, and use more efficient equipment and network architectures").

RBOCs because these CLECs initially pursued a cherry-picking strategy, which focused on the lowest cost buildings to serve. Consequently, these CLECs have lower average costs (*i.e.*, many low-cost buildings and only a few high-cost buildings) than the RBOCs, which explains why these CLECs today may have lower prices than the RBOCs. Of course, over time, as CLEC portfolios become more uniformly mixed between low and high cost buildings, their average costs and hence prices for longer circuits would be expected to rise (either by implementing mileage charges or through overall average price increases). In all events, the Commission has rejected Time Warner's claims that RBOC mileage charges are in any way indicative of market failure.<sup>8</sup>

Given the myriad problems with the prices used in Time Warner's price comparisons it is not surprising that the results of those comparisons themselves starkly confirm that they are meaningless. According to the results of Time Warner's comparison, the greatest price disparities – and hence the greatest alleged market failures – are for the OCn and Ethernet services. For example, Time Warner's comparison concludes that AT&T's 0-mile DS1 prices are **[Begin Confidential]**

**[End Confidential]**. But, for OCn circuits, Time Warner's comparison indicates that AT&T's prices are **[Begin Confidential]**

**[End Confidential]** However, every relevant prior Commission and court finding recognizes that OCn-level and Ethernet services as among the *most* robustly competitive. As far back as 2003, the Commission found that, for OCn-level services, the “[r]ecord evidence reflects competitive deployment of loops at the OCn level” “nationwide, including Tier II and Tier III markets.”<sup>9</sup> And these findings were repeatedly upheld in subsequent Commission orders and by reviewing courts.<sup>10</sup> Similarly, with respect to Ethernet services, the Commission

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<sup>8</sup> See, e.g., *Petition of AT&T Inc. for Forbearance*, Memorandum Opinion and Order, FCC 07-180, WC Docket No. 06-125, ¶ 26 (rel. Oct. 12, 2007) (“*AT&T Broadband Forbearance Order*”) (“We . . . reject Time Warner Telecom’s argument that the fixed and variable mileage rates charged by the BOCs make it uneconomical for competing carriers to rely on TDM inputs, and that forbearance should be denied because the BOCs therefore have monopoly power over such inputs. Rather, we agree . . . that the increased mileage costs for providing longer connections has not prevented Time Warner Telecom from using Ethernet over TDM arrangements; and further, that Time Warner Telecom could minimize those charges by interconnecting at additional points.”); see also *id.* (rejecting complaints about fixed capacity increments for Ethernet-related services because “any transmission services typically are offered in fixed capacity increments, which may not be the precise capacities particular customers prefer.”).

<sup>9</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, ¶ 315 (2003) (“*Triennial Review Order*”); see also *id.* ¶ 202 (“With regard to the highest capacity loop facilities, *i.e.*, OCn loops, we [the Commission] conclude that no impairment exists on a nationwide basis. At the OCn level, requesting carriers have the ability to economically self-provision their own loops or are able to obtain unbundled dark fiber and light it at the OCn level.”).

<sup>10</sup> *USTA v. FCC*, 359 F.3d 554; 573 (D.C. Cir. 2004) (noting that the Commission in the *Triennial Review Order* found the provision of OCn services to be competitive and that “all petitioners [who appealed that order] appear to accept that finding”); *Unbundled Access to Network Elements; Review of the Section 251 Un-bundling Obligations of Incumbent Local*

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repeatedly has held that “competitive carriers *lead* incumbent LECs in the deployment of Gigabit Ethernet switches.”<sup>11</sup> Indeed, the Commission previously has pointed out that assertions by Time Warner of any lack of competition for Ethernet services are patently “inconsistent with Time Warner Telecom’s public statements that Time Warner Telecom can cost-effectively deliver Ethernet services to customers anywhere, even where it may be uneconomical to build facilities connecting Time Warner Telecom’s network to the customers’ premises.”<sup>12</sup> Given the obvious incorrect conclusions produced by Time Warner’s price comparisons, it is clear that these comparisons do indeed present a classic case of “garbage in, garbage out,” and certainly cannot legitimately be relied upon to support any new onerous special access regulations.

Sincerely,

/s/ Gary L. Phillips

cc: Dana Shaffer  
Al Lewis

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*Exchange Carriers*, 20 FCC Rcd 2533, ¶ 149 (2005) (upholding its prior findings that OCn-level services are highly competitive and “not[ing] that the [D.C. Circuit] . . . did not disturb our conclusions regarding . . . OCn loops” and that the Commission’s “finding regarding the lack of impairment for the highest capacity loops in the *Triennial Review Order* was never challenged.”); *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006) (upholding the Commission’s findings in the *Triennial Review Remand Order*, which in turn upheld the Commission’s prior findings that OCn services are competitive).

<sup>11</sup> *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 537-39 (2003) (emphasis added); see also Qwest Petition for Waiver of Pricing Flexibility Rules for Advanced Communications Networks Services, 22 FCC Rcd 7482, ¶ 6, n.23 (2007) (same).

<sup>12</sup> *Petition of ACS of Anchorage Forbearance Petition*, FCC 07-149, WC Docket No. 06-109, 2007 FCC LEXIS 6046, ¶ 102 (2007).