

REDACTED - FOR PUBLIC INSPECTION

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May 31, 2011

**VIA HAND DELIVERY**

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

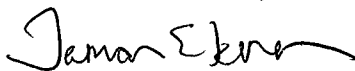
Kathy Harris  
Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street S.W.  
Room 6329  
Washington, DC 20554

**Re: Applications of AT&T Inc. and Deutsche Telekom AG For Consent  
To Assign or Transfer Control of Licenses and Authorizations\  
WT Docket No. 11-65**

Dear Ms. Dortch and Ms. Harris:

On behalf of EarthLink, Inc. and certain of its operating subsidiaries, enclosed please find information related to company revenues, expenses, operations, and other highly confidential information. This information is being filed pursuant to the Protective Order issued in this proceeding. Please contact the undersigned if you have any questions.

Sincerely,



Tamar E. Finn

Counsel for EarthLink, Inc.

Attachments

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May 31, 2011

**VIA HAND DELIVERY**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street S.W.  
Washington, DC 20534

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Mobility Division  
Wireless Telecommunications Bureau  
Federal Communications Commission  
445 12th Street S.W.  
Room 6329  
Washington, DC 20554

**Re: Applications of AT&T Inc. and Deutsche Telekom AG For Consent  
To Assign or Transfer Control of Licenses and Authorizations  
WT Docket No. 11-65**

Dear Ms. Dortch and Ms. Harris:

Pursuant to the Protective Order issued in the above-referenced proceedings on April 27, 2011,<sup>1</sup> please find attached in Exhibit A an Affidavit of Steven Brownworth in support of the Petition to Deny of EarthLink, Inc., dated May 31, 2011, which contains certain confidential and proprietary information related to EarthLink, Inc. and its subsidiaries DeltaCom, Inc., Business Telecommunications, Inc. and One Communications Corp. (collectively, "EarthLink"). Specifically, to assist the Commission's review of the above-referenced Applications, EarthLink provides certain confidential revenue, expense, business operation, and other highly confidential information.

EarthLink seeks confidential treatment of the information provided in Exhibit A under the Protective Order. Notwithstanding the Protective Order, the information provided in Exhibit A is entitled to confidential, non-public treatment under the Freedom of Information Act (FOIA) and related provisions of the Commission's rules. *See* 47 C.F.R. §§ 0.457 and 0.459; 5 U.S.C. § 552, *et seq.* The attached information contains

<sup>1</sup> *See Applications of AT&T Inc. and Deutsche Telekom AG For Consent To Assign or Transfer Control of Licenses and Authorizations*, WT Docket No. 11-65, DA 11-753 (rel. Apr. 27, 2011) ("Protective Order").

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**REDACTED - FOR PUBLIC INSPECTION**

EarthLink's highly sensitive revenue, expense, business operation, and other highly confidential information. The Commission has consistently held that such data satisfy the requirements of FOIA Exemption 4 (trade secrets or commercial/financial information).<sup>2</sup>

EarthLink treats the revenue, expense, business operation, and other highly confidential information in Exhibit A as highly confidential and does not customarily release such information to the public. EarthLink also limits the internal circulation of this information to only those persons with a legitimate need for such information. Moreover, information in the possession of a public entity is considered to be "confidential" if disclosure is likely to substantially harm the competitive position of the person from whom the information was obtained.<sup>3</sup>

EarthLink is subject to actual and potential competition with respect to communications products and services. The information in Exhibit A provides a roadmap detailing certain information concerning the company's revenues, expenses, and operations. The cumulative nature of this information is also such that competitors reviewing the data could gain access to EarthLink's confidential market strategies, revenue targeting, and other operational business plans. Release of the information contained in Exhibit A will give EarthLink's competitors an unfair advantage by providing them a picture of EarthLink's business strategies. As a result, the information in Exhibits A is sensitive and commercially valuable, and its disclosure would substantially harm EarthLink's competitive position.

In support of its request for confidential treatment of Exhibit A, EarthLink submits the following more specific information pursuant to FCC Rule 0.459:

(1) Identification of Confidential Materials: EarthLink seeks confidential treatment for certain figures (for example, prices and circuit counts) in Exhibit A, which contains confidential and proprietary information related to EarthLink's revenue, expense, business operation, and other highly confidential information. Pursuant to the Protective Order, EarthLink has marked each page of the non-redacted version of this filing with the legend: **"CONFIDENTIAL INFORMATION - SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 11-65 BEFORE THE FEDERAL**

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<sup>2</sup> See, e.g., *Cox Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,160, ¶6 (2004); *Comcast Cable Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,165, ¶6 (2004); *Time Warner Cable; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,170, ¶ 5 (2004); *Altrio Communications, Inc.; Request for Confidentiality for Information Submitted on Forms 325 for the Year 2003*, 19 FCC Rcd 12,176 ,¶¶ 4-5 (2004).

<sup>3</sup> See *National Parks and Conservation Ass 'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 873 (D.C. Cir. 1992).

**REDACTED - FOR PUBLIC INSPECTION**

**COMMUNICATIONS COMMISSION.”** Each page of the redacted version of this filing is marked with the legend “**REDACTED - FOR PUBLIC INSPECTION.**”

(2) Circumstances Giving Rise to Submission of Information: See the above-referenced Commission docket. To provide relevant market information to the Commission in order to facilitate its review of the Applications, EarthLink hereby voluntarily provides the confidential information provided in Exhibit A.

(3) Degree to Which Information is Commercial or Financial: The information in Exhibit A includes particularized expense, revenue, and operational data. This information is highly sensitive financial, trade and commercial information as it contains data and information concerning EarthLink’s revenues and financial condition. The information is granular and considered highly confidential. EarthLink treats this data as a confidential trade secret and would not submit the data to the Commission without assurances that the information will be kept confidential. It would be highly inappropriate for the data to be disclosed to the public or third parties absent the protection of a non-disclosure agreement.

(4) Degree to Which the Information Concerns a Service Subject to Competition: The highly confidential information contained in Exhibit A contains information on the level of EarthLink’s business activities and operational plans. Such information is directly related to EarthLink’s service offerings which are subject to substantial competition from numerous other communications service providers, including but not limited to IP-enabled service providers, wireless providers, CLECs and ILECs.

(5) How Disclosure Could Result in Substantial Harm: Disclosure of EarthLink’s financial information and related highly confidential information would enable EarthLink’s competitors to determine sensitive information concerning the Company’s business and operational status, trends, projections, and plans. Public disclosure could give competitors a significant competitive advantage.

(6) Measures Taken to Prevent Disclosure: EarthLink holds the information provided in this submission in strict confidentiality. EarthLink has limited the number of persons with access to this information in order to lessen the chance of inadvertent or unauthorized disclosure. The document has also been specifically labeled as described above to prevent inadvertent disclosure.

(7) Public Access to Information, Third Party Disclosure: EarthLink has not made this information publicly available through previous disclosures.

(8) Justification of the Period During Which the Material Should Not be Publicly Available: EarthLink requests that the Commission hold this information out of public view for five years. Release of this information before that time would cause substantial harm to EarthLink as it would detail the Company’s confidential financial information.

Based on the foregoing, EarthLink requests confidential treatment of Exhibit A pursuant to FCC Rules 0.457 and 0.459 and the Protective Order. Pursuant to the Protective Order,

**REDACTED - FOR PUBLIC INSPECTION**

EarthLink is delivering two copies of the confidential version of this filing, via courier, to Kathy Harris with the Mobility Division of the Commission's Wireless Telecommunications Bureau. One copy of the confidential version and two public, redacted versions of this filing are also being filed by courier with the Commissions Secretary's Office. One copy of the public version of this filing is being filed electronically through the Commission's Electronic Comment Filing System. Finally, one copy of the confidential version of this filing is being transmitted by courier to the Commissions Secretary's Office for time-stamp return by courier to EarthLink.

Should you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in black ink, appearing to read "Tamar E. Finn". The signature is fluid and cursive, with the first name "Tamar" being the most prominent part.

Tamar E. Finn

Counsel for EarthLink, Inc.

Attachments

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

|   |   |                     |
|---|---|---------------------|
| In the Matter of                          | ) |                     |
|   | ) |                     |
| Applications of AT&T Inc. and             | ) |                     |
| Deutsche Telekom AG                       | ) | WT Docket No. 11-65 |
|   | ) | DA 11-799           |
| For Consent To Assign or Transfer Control | ) |                     |
| of Licenses and Authorizations            | ) |                     |

**PETITION TO DENY OF EARTHLINK, INC.**

Jerry Watts  
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and Industry Affairs  
EarthLink, Inc.  
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May 31, 2011

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## **Executive Summary**

The proposed merger raises vertical and horizontal concerns, promises to restrict rather than promote competition, and is contrary to the public interest. The underlying purpose of the Telecommunications Act of 1996 was to promote competition. Just over one year ago, the FCC's seminal National Broadband Plan, endorsing this overarching theme, recommended that the Commission take "expedited action" to reform its wholesale competition regulations and "ensure widespread availability of inputs, [such as cost effective unbundled network elements and special access facilities,] for broadband services."<sup>1</sup> EarthLink agrees with these objectives and respectfully submits that, as a matter of sound public policy, the Commission should first complete pending reform of such regulations before beginning its consideration of whether to allow AT&T to complete yet another merger that will exacerbate the current anti-competitive conditions in both the wireline and wireless sectors.

In its 22-state incumbent territory, AT&T already dominates the upstream market for backhaul facilities that the Commission has long recognized is a critical input to the success of mobile broadband. The proposed combined company, with a wireless market share of 40% and plans to offer "wireline-quality" wireless broadband to 97% of Americans, would have even greater incentive and ability to undermine competition in the downstream wireless and wireline markets by, among other things, raising the price of its competitors' backhaul. This is a real concern for emerging competitive wireless carriers, which may not be able to offer a competitive wholesale wireless broadband product without the vertical integration and economies of scale that a combined AT&T/T-Mobile would enjoy. It is also an unacceptable situation for competitive broadband providers such as EarthLink, which must (1) purchase from AT&T viable

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<sup>1</sup> FCC, *Connecting America: The National Broadband Plan*, at 36 (2010) ("*National Broadband Plan*").



wholesale mobile broadband inputs in order to compete for retail customers and (2) rely heavily on AT&T's wireline wholesale products—whether special access, unbundled network elements, or “deregulated” high capacity offerings—as last mile connections to offer broadband to end users.

As the importance of wireless broadband within AT&T's product set and customer base grows, its wireline incumbent LECs will have even greater incentive and ability to increase their wireline and wireless competitors' costs (including special access backhaul) and decrease the availability of wholesale inputs to wireline broadband services (such as copper loops, DSL transmission and the limited access today to fiber last mile facilities). Even today, before considering the cumulative consequences of the proposed merger, EarthLink has experienced such discrimination first hand. For example, EarthLink's subsidiary DeltaCom has been unable to market a 4MB broadband product because AT&T's price for the wholesale input is three times AT&T's standard retail price for its 6MB broadband service and eleven times its current promotional rate. Because the proposed merger would further enhance AT&T's incentive and ability to discriminate against its competitors, it fails to promote competition and fails to satisfy the threshold public interest standard necessary for the Commission to endorse the merger.

Time-limited and narrowly calibrated merger conditions do not and cannot correct the underlying problems that exist in the wholesale market today and will be exacerbated by the proposed merger. For example, the Commission's long-delayed special access reform has provided AT&T with supra competitive profits and the ability to engage in a variety of anticompetitive conduct against its wireline rivals. The prolonged delay has effectively deprived EarthLink, its customers and other ratepayers of their statutory right to just and reasonable rates, which, by some estimates, could result in savings totaling \$5 billion per year. Similar concerns

exist as to the longstanding requests pending before the Commission seeking to prevent AT&T and other incumbents from abandoning copper facilities, rather than make them available to competitive carriers.

Rather than consider adopting time-limited, merger-specific wholesale access or pricing conditions that will relatively quickly expire, the Commission should, as a first principle and rational administrative sequencing, complete reform of its pending wholesale competition reforms, before considering AT&T's request for further horizontal and vertical integration. EarthLink calls upon the Commission to finalize its wholesale reforms prior to consideration of the proposed merger. Moreover, because the consequences, both intended and unintended, of the continued concentration of the largest players in the communications industry are yet to be determined, the public interests will benefit from delaying consideration of this merger until the Commission completes its pro-competitive broadband reforms and has more data to review from prior mergers.

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
)  
Applications of AT&T Inc. and )  
Deutsche Telekom AG ) WT Docket No. 11-65  
) DA 11-799  
For Consent To Assign or Transfer Control )  
of Licenses and Authorizations )

**PETITION TO DENY OF EARTHLINK, INC.**

Pursuant to the Public Notice issued by the Federal Communications Commission (“Commission” or “FCC”) in the above-captioned proceeding on April 28, 2011,<sup>2</sup> and for the reasons noted below, EarthLink, Inc., on behalf of its operating subsidiaries,<sup>3</sup> (“EarthLink” or “Petitioner”), petitions the Commission to deny the above-captioned applications (the “Applications”) of AT&T, Inc. (“AT&T”) and Deutsche Telekom AG (“DT”) for consent to the transfer of control of the licenses and authorizations held by T-Mobile USA, Inc. and its wholly-owned, majority-owned, and controlled subsidiaries (“T-Mobile,” and together with AT&T and DT, the “Applicants”) to AT&T, for the reasons set forth in this Petition.

**I. STATEMENT OF INTEREST OF EARTHLINK**

EarthLink is a leading provider of Internet Protocol (“IP”) and telecommunications infrastructure and services to businesses, enterprise organizations and retail consumers across the

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<sup>2</sup> FCC Public Notice, *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, DA No. 11-799 (rel. Apr. 28, 2011) (“Public Notice”). This Petition is filed in reference to the following application File Numbers referenced in the Public Notice: 0004669383, 0004673673, 0004673727, 0004673730, 0004673732, 0004673735, 0004673737, 0004673739, 0004675960, 0004703157, 6013CWSL11, 6014CWSL11, 6015ALSL11, 6016CWSL11, 0004698766, ITC-T/C-20110421-00109, ITC-214-20020513-00251, ITC-T/C-20110421-00110, ITC-T/C-20110421-00111, ITC-214-20061004-00452 ITC-T/C-20110421-00112, and ITC-214-19960930-00473.

<sup>3</sup> EarthLink, Inc.’s operating subsidiaries include New Edge Networks, Inc., DeltaCom, Inc., Business Telecom, Inc., and the operating subsidiaries of One Communications Corp.

United States.<sup>4</sup> EarthLink's Consumer Services segment is an Internet service provider ("ISP"), providing nationwide Internet access and related value-added services to individual and small business customers in competition with, among other providers, AT&T and T-Mobile.<sup>5</sup> Among other products, EarthLink's consumer service offerings are narrowband and broadband (high speed) Internet access, search, advertising and VoIP services. EarthLink provides its portfolio of services to approximately 1.5 million U.S. customers through a nationwide network of dial-up points of presence and a nationwide broadband footprint.<sup>6</sup>

EarthLink's Business Services segment provides integrated communications services to a wide variety of businesses, enterprise organizations and communications carriers. These services include data services, including managed IP-based network services and broadband Internet access services; voice services, including local exchange, long-distance and conference calling; mobile data and voice services; and web hosting.<sup>7</sup> The Company's Business Services segment also sells transmission capacity to other communications providers on a wholesale basis. EarthLink operates its Business Services segment through its regulated operating companies.<sup>8</sup> These regulated companies must necessarily interconnect in extensive locations with AT&T, purchase special access services from AT&T, sell special access services to T-Mobile and the few other non-Bell wireless carriers, purchase wholesale wireless products to complement their wireline offerings, and compete directly with AT&T and T-Mobile in multiple retail markets,

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<sup>4</sup> Confidential Affidavit of Steven Brownworth, at 1-2, attached hereto as Exhibit A ("Brownworth Affidavit").

<sup>5</sup> *Id.*, at 2.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

both wireline and wireless.<sup>9</sup> The proposed merger, for many reasons, could therefore negatively impact EarthLink's ability to compete in both retail broadband markets and wholesale special access markets.

## II. INTRODUCTION

The information the Applicants provide about the actual and potential competition between AT&T and T-Mobile on the one hand, and other market participants on the other, shows that substantial harms to competition will result from the proposed merger. Such harms include the removal of one of a very small number of independent facilities-based wireless carriers that are actual competitors (and backbone facility purchasers) in AT&T's incumbent wireline and wireless territories as well as increased incentive and ability of the Applicants to discriminate against their rivals post-merger.

The proposed merger raises vertical and horizontal concerns. As the Commission recently stated in the *Comcast/NBC Universal Merger Order*:

A vertical transaction involves firms and their suppliers, customers, or other sellers of complements. A horizontal transaction involves firms that sell products or services that are substitutes to buyers. The same transaction can have both vertical and horizontal elements. Both types of transactions can reduce competition among the firms participating in a relevant market, potentially leading to higher prices to buyers, a reduction in product quality, or a reduced likelihood of developing new, better, or cheaper products and services.<sup>10</sup>

The proposed merger raises vertical concerns because AT&T is, among other things, a primary supplier of wireline special access service to T-Mobile that is used as an input in T-Mobile's voice and broadband data wireless services. At the same time, it raises equally disturbing horizontal concerns because AT&T and T-Mobile are direct competitors in the

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<sup>9</sup> *Id.*, at 2.

<sup>10</sup> *Application of Comcast Corp., General Electric Co. and NBC Universal, Inc.*, Memorandum Opinion and Order, MB Docket No. 10-56, ¶ 27 (rel. Jan. 20, 2011) (footnotes omitted).

residential and enterprise retail markets for wireless broadband Internet access services and the reduction in the number of nationwide competitors in this market from four to three is presumed on its face to harm consumers. Based on the increasing substitution of wired and wireless broadband data services, and the importance of a provider's capability to offer anytime, anywhere voice and broadband capabilities to its enterprise customers, it also raises significant horizontal concerns in the retail market for enterprise voice and data services generally.

For the reasons discussed herein, the Commission cannot now conclude that grant of the application as filed would serve the public interest. Rather, before reviewing, let alone considering granting the proposed merger, the Commission must first complete reform of its pending wholesale competition regulations. As T-Mobile has itself previously argued, time-limited merger conditions do not and cannot correct the underlying problems caused by the Commission's failure to correct deficiencies in its existing regulatory regime.<sup>11</sup> It is only rational and sound administrative decision-making that the Commission addresses its wholesale competition reforms prior to considering an unprecedented merger that will exacerbate anti-competitive conditions in the broadband market.

### **III. STANDARD OF REVIEW**

As a threshold standard, the Commission must determine whether the proposed transfer of control of Commission licenses will further the public interest, convenience and necessity.<sup>12</sup> As part of that determination, it must consider whether the transfer of control could result in public interest harms by substantially frustrating or impairing the objectives or implementation

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<sup>11</sup> See *infra* Section IV.B.

<sup>12</sup> *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-65, ¶ 16 (rel. Nov. 17, 2005) ("*SBC/AT&T Merger Order*").

of the Communications Act.<sup>13</sup> Its public interest evaluation includes “a deeply rooted preference for preserving and enhancing competition in relevant markets.”<sup>14</sup> Competition is not only national legislative policy overarching the telecom market, it is also, as a practical matter, clearly in the public interest because it lowers rates for consumers, increases efficiency, and spurs the introduction of new services, packages, and features by existing competitors and new entrants.

In determining the competitive effects of the proposed merger, the Commission is informed by, but not limited to, traditional antitrust principles.<sup>15</sup> It is well established that among the issues to be considered is “whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets and the merger’s effect on future competition.”<sup>16</sup>

The Commission has long recognized that:

the same consequences of a proposed merger that may be beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.<sup>17</sup>

As the Commission has held, “the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.”<sup>18</sup> If “the

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, at ¶ 17.

<sup>15</sup> *Id.*, at ¶ 18.

<sup>16</sup> *Id.*

<sup>17</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, ¶ 12 (rel. Mar. 26., 2007) (“*AT&T/BellSouth Merger Order*”).

<sup>18</sup> *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, FCC 10-87, ¶ 9 (rel. May 21, 2010) (“*Frontier/Verizon Merger Order*”).

record presents a substantial and material question of fact, [the Commission] must designate the applications for hearing.”<sup>19</sup>

The Commission “considers whether a transaction will enhance, rather than merely preserve, let alone denigrate, existing competition.”<sup>20</sup> In evaluating merger applications, the Commission asks “whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination.”<sup>21</sup> Significantly, claimed benefits must be transaction-specific or merger-specific.<sup>22</sup> The claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>23</sup> “Efficiencies that can be achieved through means less harmful to competition than the proposed merger ... cannot be considered to be true pro-competitive benefits of the merger.”<sup>24</sup> Claimed benefits must also be verifiable.<sup>25</sup> The Applicants must demonstrate that the proposed merger “is a reasonably necessary means” to achieve the purported benefits.<sup>26</sup> “A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *SBC/AT&T Merger Order*, ¶ 182.

<sup>22</sup> *Id.*, ¶ 184.

<sup>23</sup> *Id.* (citing *Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 189 (2002) (“*EchoStar/DirecTV Order*”)).

<sup>24</sup> *Id.* n.517 (citing *In the Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 158 (1997) (“*Bell Atlantic/NYNEX Merger Order*”)).

<sup>25</sup> *Id.* ¶ 184.

<sup>26</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 267 (1999) (“*SBC/Ameritech Merger Order*”).



show that such a benefit is merger specific.”<sup>27</sup> “[S]peculative benefits that cannot be verified will be discounted or dismissed.”<sup>28</sup> The Commission applies a sliding scale approach under which substantial and likely harms require that claimed benefits show a higher degree of magnitude and likelihood than it would otherwise demand.<sup>29</sup>

The proposed merger fails this standard. Rather than enhancing competition, it would only further strengthen AT&T’s dominant market position in both wireline and wireless sub-markets, thereby diminishing competition and increasing AT&T’s incentive and ability to discriminate against its rivals in retail markets for wireline and wireless, voice and data services. Unless and until the Commission moves decisively to reform and update its fiber and copper UNE, and special access regulatory regime to constrain AT&T’s ability to engage in such anti-competitive discrimination, the Commission should not consider the proposed merger. To do so will make any future effort to reform UNE and special access considerably more difficult to accomplish. EarthLink urges the Commission to finalize its Special Access and other local competition dockets promptly.

#### **IV. THE COMMISSION MUST COMPLETE REFORM OF ITS WHOLESALE COMPETITION POLICIES PRIOR TO CONSIDERING THE MERGER**

The proposed merger will increase AT&T’s incentive and ability to leverage its control over wholesale inputs to discriminate against its wireline and wireless competitors in retail broadband markets. Because these harms cannot be cured or ameliorated by time-limited or narrowly calibrated merger conditions, the Commission must take steps to ensure that AT&T’s wholesale access offerings are just, reasonable, and non-discriminatory and its wholesale prices

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, ¶ 185; *see id.*, ¶ 256 (1999) (citing *Bell Atlantic/NYNEX Merger Order*, ¶ 157).

are cost-based. In fact, AT&T has recently demonstrated that time-limited merger conditions will not constrain it from undertaking anti-competitive conduct over the long term, and disrupting the telecommunications market in the process. For example, as part of the term limited conditions following the acquisition of BellSouth, AT&T was required by the FCC to provide pricing flexibility in Full Service Relief and Limited Service Relief MSAs effective April 5, 2007 through June 30, 2010. AT&T pricing in these MSAs was restored to the original FCC rates effective July 1, 2010.<sup>30</sup> During this period AT&T offered no changes to its pricing or discount structure with DeltaCom.<sup>31</sup> This increase impacted a significant number of DeltaCom's subsidiaries DS1 loops, DS1 interoffice circuits, and DS1 interoffice miles, with significant resulting economic impacts.<sup>32</sup>

**A. The National Broadband Plan Recommended "Expedited Action" to Complete Wholesale Reforms**

Just over one year ago, the Commission's National Broadband Plan recognized the fundamental value of competition in broadband markets:

Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices.<sup>33</sup>

Independent analysis confirms that in markets in which customers have more choices from suppliers, prices are lower. In the residential broadband market, for example, in markets where customers have a choice of three providers, subscribers pay 18% more than subscribers

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<sup>30</sup> Brownworth Affidavit, at 4.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *National Broadband Plan*, at 36.

with a choice of four or more providers.<sup>34</sup> In markets where there are only two providers, the price differential as compared with markets where there is a choice of four providers increases to 33%.<sup>35</sup> This evidence is consistent with the development of additional competition in the MVPD market as incumbent cable operators have been subject to increased competition from ILECs and direct broadcast satellite providers,<sup>36</sup> as well as in the mobile wireless market once the Commission licensed personal communications systems to compete with the cellular duopoly.<sup>37</sup>

The Plan therefore recommended that the Commission take “expedited action” to ensure wholesale inputs to broadband services are made available to competitive carriers:

- The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.
- The FCC should ensure that special access rates, terms and conditions are just and reasonable.
- The FCC should ensure appropriate balance in its copper retirement policies.
- The FCC should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection where efficient.<sup>38</sup>

To date, of the above list, the Commission has only clarified interconnection rights by issuing a declaratory ruling affirming that rural LECs are obligated to comply with their section

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<sup>34</sup> Pew Internet & American Life Project Home, Broadband Adoption 2009, at 27 (2009), *available at* <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx>.

<sup>35</sup> *Id.*

<sup>36</sup> *See Ex Parte* of DOJ, GN Doc. No. 09-51, at 15-16 (filed Jan. 4, 2010) (“DOJ 1/4/10 *Ex Parte*”).

<sup>37</sup> *Id.* at 17-19.

<sup>38</sup> *National Broadband Plan*, at 36.

251(a) and (b) duties.<sup>39</sup> The Commission has yet to complete action on the IP-IP interconnection issue, special access, and copper retirement.

**B. The Commission Should Complete Wholesale Competition Reforms before Reviewing the Merger**

EarthLink agrees with T-Mobile that because “merger-specific conditions are time-limited,” “[t]hey provide only limited relief from anticompetitive activities and do not address the underlying problems of the existing regulatory framework or special access marketplace failure.”<sup>40</sup> Rather than adopt time-limited merger conditions that will expire and return the industry to today’s unacceptable status quo (if not worse), the Commission must first complete its reform of wholesale competition regulations prior to consideration or approval of yet another AT&T merger.

Although the National Broadband Plan put forth an ambitious agenda and action plan, the groundwork for completing the wholesale competition reforms has already been laid. For example, earlier this year, the Commission requested comment on how to incent the transition to IP-IP interconnection, the second interconnection recommendation. EarthLink and a number of other competitors showed the need and legal basis for a Commission ruling that incumbent LECs are required to offer IP-IP interconnection under sections 251/252 today.<sup>41</sup> The Commission has other open dockets with developed records on issues such as copper retirement and the need for

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<sup>39</sup> See *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, A National Broadband Plan for Our Future, Developing a Unified Inter-carrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, FCC 11-83 (rel. May 26, 2011).

<sup>40</sup> T-Mobile USA, Inc. Comments, WC Docket 05-25, at 4 (filed Aug. 8, 2007).

<sup>41</sup> See, e.g., Reply Comments of EarthLink, Inc., WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 07-135, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45, WC Docket No. 03-109, at 2-5 (filed May 23, 2011).

regulated, wholesale broadband offerings such as network elements offered under section 271.<sup>42</sup> With such developed records, these pending dockets are ready for Commission action.

Lowering BOC special access prices to just and reasonable rates is a prime example of a developed and fulsome record awaiting Commission action. In 2002, AT&T Corp. (then an IXC with no BOC affiliates) filed a petition for rulemaking requesting that the Commission revoke pricing flexibility rules and revisit the CALLS plan because competition had not emerged to discipline price cap LECs' special access rates.<sup>43</sup> In 2005, the Commission initiated the *Special Access Proceeding* seeking comment on whether to maintain or modify the Commission's pricing flexibility rules for special access services and what interim relief, if any, was necessary to ensure that special access rates remain reasonable. The Commission again sought comment on the reasonableness of special access rates again in 2009.<sup>44</sup> As EarthLink's subsidiary, New Edge, demonstrated in early 2010:

The record fully shows that the BOCs' special access rates far exceed a benchmark comparison of forward-looking TELRIC-based rates for functionally equivalent DS1 and DS3 services that would exist if the marketplace were truly competitive. The BOCs' rates also significantly exceed the rates Competitive Access Providers (CAPs) offer for similar services. In fact, "price cap and pricing flexibility rates are typically two to three times higher" than what competitive carriers offer for an equivalent service. Moreover, the rates exceed rate-of-return special access rates of NECA member companies that do not enjoy the BOCs' economies of scale... If anything, these forward-looking rates are on the high end of any zone of reasonable rates for DS1 or 1.544 Mbps services that Section 201 would allow. Record evidence shows that Verizon and

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<sup>42</sup> See FCC, Public Notice, *Pleading Cycle Established for Comments on Petitions for Rulemaking and Clarification Regarding the Commission's Rules Applicable to Retirement of Copper Loops and Copper Subloops*, RM-11358, DA 07-209 (rel. Jan. 30, 2007); FCC, Public Notice, *Pleading Cycle Established for Comments on Petition for Expedited Rulemaking Regarding Section 271 Unbundling Obligations*, WC Docket No. 09-222, DA 09-2590 (rel. Dec. 14, 2009).

<sup>43</sup> *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

<sup>44</sup> See FCC Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, WC Docket No. 05-25, RM-10593, DA 09-2388 (rel. Nov. 5, 2009).

AT&T are charging their *retail customers* between \$54.99 and \$35.00 per month for services reaching much higher speeds of 15 Mbps and 6 Mbps, respectively. A forward-looking cost structure that applies to the BOCs' DS1 special access services should result in wholesale rates that are *lower, not higher* than what the BOCs currently charge their retail customers for comparable services.<sup>45</sup>

Indeed, according to one economist, for every year that passes without rate reform, price cap ILECs are able to assess \$5 billion in excessive special access charges.<sup>46</sup>

While the Applicants provide no discussion of the effect of the proposed merger on special access rates (let alone copper or fiber UNE rates), it is clear that special access rates will be impacted adversely by the merger because of the negative effect that the combined company will have on the special access market through its vertical integration and the loss of a significant special access purchaser in the market. Given that rates that are already unreasonable, the strain the proposed merger will place on special access rates, and its ensuing impact on competition, the Commission must, as a first priority, reduce AT&T's special access rates to just and reasonable levels promptly, and before it even considers whether to approve the proposed merger.

**C. The Proposed Merger Would Harm Competition in Retail Broadband Markets**

1. *The Role of Wholesale Inputs in Retail Broadband Markets*

A merger may be subject to challenge because it facilitates the raising of rivals' costs.<sup>47</sup>

As the Commission has explained, "cost-efficient access to adequate backhaul will be a key

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<sup>45</sup> Reply Comments of PAETEC, TDS, TelePacific, Masergy, and New Edge, WC Docket No. 05-25, RM-10593, at 63-64 (filed Feb. 24, 2010) (citations omitted).

<sup>46</sup> Ad Hoc Comments. WC Docket 05-25, at Attachment B - LONGSTANDING REGULATORY RULES CONFIRM BOC MARKET POWER: A defense of ARMIS, at A-1 (filed Jan. 19, 2010).

<sup>47</sup> See *Comcast/NBC Universal Order*, ¶ 34 & n. 77 (citing Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L. J. 209, 234-38 (1986)).

factor in promoting robust competition in the wireless marketplace.”<sup>48</sup> In short, AT&T’s ability to impose high backhaul costs on independent wireless companies threatens competition in the wireless market.

Because special access is a key input in retail wireless broadband offerings, the proposed combined entity will have an even greater incentive and ability to use special access pricing to discriminate against its competitors. As T-Mobile itself explained:

T-Mobile, like many other mobile providers, attempts to use alternative backhaul suppliers where available. Nonetheless, in many rural markets especially, independent mobile providers like T-Mobile still must rely extensively on special access services provided by the ILECs for backhaul. In these areas, competition is insufficient to discipline the prices and conditions for special access imposed by the ILEC. This ultimately thwarts competition in the special access market as the largest, vertically integrated mobile providers, AT&T and Verizon, supply special access to competing mobile providers through their ILEC operations. Earlier Commissions’ premature deregulation of special access services has only exacerbated the problem.<sup>49</sup>

In its comments in the AT&T/BellSouth merger proceeding, T-Mobile accurately predicted that the merger would give AT&T “strong incentives and great ability to discriminate against wireless competitors and their customers in providing special access services on which those competitors rely.”<sup>50</sup> Likewise, the proposed AT&T/T-Mobile merger threatens wireless and wireline competitors with the same problem, but in a more consolidated market.

As part of its advocacy in the special access docket, AT&T has repeatedly pointed to T-Mobile as a carrier that purchases non-ILEC special access facilities and claimed these

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<sup>48</sup> *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Fourteenth Report, FCC 10-81 ¶ 296 (rel. May 20, 2010) (“*Fourteenth Report*”).

<sup>49</sup> T-Mobile USA, Inc. Comments, WT Docket No. 09-66, at 27 (filed Sept. 30, 2009).

<sup>50</sup> T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 4 (filed Oct. 24, 2006).

competitive purchases place pricing pressure on the ILECs' special access offerings. For example, AT&T argued:

The record shows that AT&T, Verizon, Qwest, Sprint, T-Mobile, and others are already purchasing tens of thousands of special access lines from cable operators throughout the country, and that AT&T, Verizon and Qwest, all are lowering prices and taking other measures to retain customers and to win back customers lost to this increasingly intense competition.<sup>51</sup>

T-Mobile is one of the largest purchasers of BOC special access and it appears to be one of the two largest purchasers of special access that is not affiliated with a BOC. T-Mobile purchases approximately 8-10% of its special access services from non-ILEC providers.<sup>52</sup> But if the Commission approves the merger, AT&T will no longer need to lower prices and take other measures to win back T-Mobile's business from independent backbone providers, such as EarthLink. One of the Applicants' claimed public interest benefits is "a reduction in interconnect and toll expenses as a result of *switching to AT&T where possible for transport.*"<sup>53</sup>

As explained above, this proposed consolidation is likely to increase T-Mobile's nominal costs given that competitive special access is typically priced lower than BOC special access. Of course, because of vertical integration, the T-Mobile cost increase should be more than offset by the supra competitive profit AT&T makes by selling its special access services. Applicants are presumably planning to make the switch, notwithstanding this nominal cost increase, "where possible" in order to drive out the small and limited competitors in the special access market.

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<sup>51</sup> AT&T *Ex Parte*, WC Docket No. 05-25, at 13 (filed Feb. 21, 2008).

<sup>52</sup> Reply Comments of T-Mobile USA, Inc., WC Docket No. 05-25, at 2 (filed Feb. 24, 2010) ("T-Mobile 2010 Reply Comments").

<sup>53</sup> *AT&T Inc. and Deutsche Telekom AG Seek FCC Consent to the Transfer of Control of the Licenses and Authorizations Held by T-Mobile USA, Inc. and Its Subsidiaries to AT&T Inc.*, WT Docket No. 11-65, Application Public Interest Statement, at 52 (filed Apr. 22, 2011) (emphasis added) ("Public Interest Statement").



The proposed merger will eliminate T-Mobile as one of the few large buyers of special access from non-BOC sellers, such as EarthLink, that invested in facilities to serve T-Mobile cell sites and mobile switching centers. T-Mobile recently told the FCC that it “has contracted for alternative backhaul services at only approximately 20 percent of its cell sites today.”<sup>54</sup> Sprint, by contrast, said last year that it buys only 2% of its DS-1 backhaul from independent providers.<sup>55</sup> Thus, the loss of T-Mobile is much greater than reflected by its share of the wireless market. Today, T-Mobile is the third largest customer of EarthLink’s EarthLink Carrier service business.<sup>56</sup> Even if some of T-Mobile’s special access is outside of AT&T’s 22-state incumbent region, because a merger with T-Mobile would increase AT&T’s nationwide market share to 40%, it may give AT&T greater incentives to self-provide backhaul it may have previously purchased from third parties out-of-region. Both actions will reduce the number of special access circuits purchased from independent providers, thus diminishing the claimed pressure on BOC special access pricing and harming the ability of independent backhaul providers to maintain revenue and invest in new facilities.

When combined with AT&T’s anti-competitive policies of using long-term contracts and tariffs to lock-up special access customers—its existing special access market share is over 90% in its 22 state territory<sup>57</sup>—the merger would make it increasingly difficult for independent special

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<sup>54</sup> T-Mobile *Ex Parte*, WC Docket No. 05-25, at 1 (filed May 6, 2010).

<sup>55</sup> Sprint Nextel Comments WC Docket 05-25 at ii (filed Jan 19, 2010).

<sup>56</sup> Brownworth Affidavit, at 3.

<sup>57</sup> See GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 12 (Nov. 2006) (“GAO Report”) (“In the 16 major metropolitan areas we examined, facilities-based competition for dedicated access services exists in a relatively small subset of buildings. Our analysis of data on the presence of competitors in commercial buildings suggests that competitors are serving, on average, less than 6 percent of the buildings with at least a DS-1 level of demand.”); Comments of PAETEC Holding Corp., WC Docket No. 05-25, at 5 (May 28, 2010) (“Indeed, nearly every measure of (1) the physical connections to commercial buildings shows that incumbent LECs control over 90 percent of those connections, (2) the Type 1 DS3 services market

access competitors to achieve a minimum viable scale. As T-Mobile has advised the Commission, “wireless providers and other [special access] customers are hindered in their ability to negotiate reasonable arrangements in those areas where the ILECs are the sole suppliers of special access.”<sup>58</sup> Because AT&T’s lock-up contracts relegate alternative providers to competing largely for growth, that magnifies T-Mobile’s importance in the special access market even more. Not only is T-Mobile a disproportionately large buyer from alternative providers today, because T-Mobile expects data traffic on its network in 2015 to be at least 20 times its 2010 level,<sup>59</sup> without the merger, it would be an even larger buyer over the next few years. The few existing non-Bell competitors could be forced to exit the special access market altogether or reduce their investment in competitive special access facilities. The absence or reduction of alternative special access providers will enable the combined AT&T-Mobile to increase further their competitors’ costs for special access services.

This is especially a concern for emerging competitive wireless wholesale carriers that may not be able to offer a competitive wholesale wireless broadband product without the vertical integration and economies of scale that a combined AT&T-Mobile would enjoy. It is also a concern for competitive broadband providers such as EarthLink, who must (1) purchase viable wholesale mobile broadband products in order to compete for retail customers and (2) rely heavily and necessarily on AT&T’s wireline wholesale products—whether special access, unbundled network elements, or “deregulated” offerings—as last mile connections to offer broadband to end users.

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shows that incumbent LECs control over 80 percent of that market, and (3) the Type 1 DSI market shows that incumbent LECs control over 90 percent of that market.”).

<sup>58</sup> T-Mobile 2010 Reply Comments, at 11.

<sup>59</sup> Larsen Declaration, ¶ 15 (“By 2015, T-Mobile USA expects data traffic on its network to be at least 20 times that of the 2010 level”).

As the importance of wireless broadband within AT&T's product set and customer base grows, its wireline incumbent LECs will have even greater incentives to increase their wireline and wireless competitors' costs (including special access backhaul) and decrease the availability of wholesale inputs to wireline broadband services (such as copper loops and DSL transmission). Because the merger would enhance AT&T's incentive and ability to discriminate against its competitors, it fails to promote competition and is not in the public interest.

2. *The Merger Would Reduce Consumer Choices in the Facilities-based Wireless Broadband Market*

Because the proposed merger would reduce the number of national, facilities-based wireless competitors from four to three, the Commission must start with a presumption that consumers will be significantly harmed by the proposed merger.<sup>60</sup> As the Applicants admit, "T-Mobile USA is the fourth largest [wireless] carrier nationally, serving roughly 34 million subscribers, or about 11 percent of national [wireless] subscribers."<sup>61</sup> Together, AT&T and T-Mobile would have approximately 40% market share serving an estimated 130 million users nationwide.<sup>62</sup> Verizon's market share (including Alltel) is approximately 37%.<sup>63</sup> In contrast,

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<sup>60</sup> In prior mergers, AT&T has argued that the market is a *national* one ("the geographic scope of competition in the provision of wireless calling plans should be analyzed as *national*"). *AT&T Wireless Services, Inc. and Cingular Wireless Corporation Application for Transfer of Control*, WT Docket No. 04-70, at Public Interest Exhibit, 30 (emphasis added). In the Centennial merger in 2009, AT&T once again argued that "the evidence shows that the predominant forces driving competition among wireless carriers operate at the *national* level" and that AT&T develops "its rate plans, features and prices in response to competitive conditions and offerings at the *national* levels." *AT&T Inc. and Centennial Communications Corp. Application for Transfer of Control*, WT Docket No. 08-246 at Public Interest Exhibit, 28-29 (emphasis added).

<sup>61</sup> Declaration of Dennis W. Carlton, Allan Shampine, and Hal Sider, at ¶ 121 ("Carlton Declaration"); 2010 Annual Report of Deutsche Telekom Group, at 88-89 (As of December 31, 2010, T-Mobile USA "had 33.7 million customers").

<sup>62</sup> *Fourteenth Report*, at 31, Table 3 and Chart 1 (May 20, 2010). As of late 2008, T-Mobile ranked fourth in wireless customers and wireless revenues behind Verizon Wireless, AT&T, and Sprint Nextel. *Id.*; Edward Wyatt, *AT&T and T-Mobile Chiefs Field Skeptical Questions on Capitol Hill*, The New York Times (May 11, 2011) (The merger "would create a carrier that controls and estimated 43 percent of the cellular-phone market."); Declaration of Dennis W. Carlton et al., at ¶ 121 ("T-Mobile USA is the fourth

Sprint's national revenue share of 16.6% would make it a distant third in the national wireless market.<sup>64</sup> Moreover, “[i]f the fifth largest carrier, merged with every single remaining regional and local wireless carrier, they would still be smaller than T-Mobile.”<sup>65</sup> In effect, the merger would create a duopoly in the national wireless market. Moreover, based on the Pew Center's research, consumers should expect an 18% price increase due to the reduction from four to three national wireless providers.<sup>66</sup>

The presence of a total of at least four facilities-based providers is critical to avoid the dangers of undue concentration—including both a monopoly or even a duopoly, which, for consumers and competition, is scarcely better than a monopoly. Under the horizontal merger guidelines adopted by the Antitrust Division of the DOJ and the Federal Trade Commission, even a market with three to four providers is still highly concentrated. The DOJ, in analyzing mergers, “starts from the presumption that in highly concentrated markets, consumers can be significantly harmed when the number of strong competitors declines from four to three.”<sup>67</sup> More importantly the DOJ asserts that “consumers can enjoy substantial *benefits* when the number of strong competitors rises from three to four.”<sup>68</sup>

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largest [wireless] carrier nationally, serving roughly 34 million subscribers, or about 11 percent of national [wireless] subscribers.”); 2010 Annual Report of Deutsche Telekom Group, at 88-89 (As of December 31, 2010, T-Mobile USA “had 33.7 million customers” in 2010); Press Release, Leap Wireless (May 24, 2011); Paul Barbagallo, *Leap Wireless Comes Out Against Proposed Merger of AT&T and T-Mobile*, BNA Daily Report for Executives, 101 DER A-9 (May 24, 2011).

<sup>63</sup> *Fourteenth Report*, , at 31, Table 3 and Chart 1 (May 20, 2010).

<sup>64</sup> *Id.*

<sup>65</sup> Paul Barbagallo, *Regulatory Approval of AT&T - T-Mobile Deal Could Hinge on Market Definition*, Daily Report for Executives, BNA, 99 DER C-1 (May 23, 2011).

<sup>66</sup> Pew Internet & American Life Project Home, *Broadband Adoption 2009*, at 27 (2009), available at <http://www.pewinternet.org/Reports/2009/10-Home-Broadband-Adoption-2009.aspx>.

<sup>67</sup> T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 2 (filed Oct. 24, 2006).

<sup>68</sup> *Id.*

While AT&T attempts to paint T-Mobile as an ineffective competitor, it fails.<sup>69</sup> Prior to submitting the Application, T-Mobile described its role as an actual and potential competitor of AT&T's as follows:

T-Mobile is one of the few remaining independent national wireless carriers, with a rapidly growing base of mass market and business customers throughout the United States. T-Mobile is a major customer of AT&T and BellSouth for special access telecommunications services in these ILECs' respective service areas. Nationally, T-Mobile is a retail competitor of the Applicants and their Cingular wireless affiliate, and T-Mobile is poised to become an important competitor in the emerging "intermodal" marketplace for local exchange services of which these ILECs are the dominant providers in their regions.<sup>70</sup>

AT&T's 2010 Annual Report reflects that AT&T had 17,755,000 broadband landline connections<sup>71</sup> and at least 41.5 million wireless data customers.<sup>72</sup> Although the corresponding data are not available in T-Mobile's 2010 Annual Report, the Annual Report states that T-Mobile USA derived 16.1 billion Euros in total revenue,<sup>73</sup> which represents a very substantial number of T-Mobile data customers.

AT&T and T-Mobile are both large, rapidly growing providers of broadband Internet service. Indeed, the declarations submitted by the Applicants show that T-Mobile's data traffic is expected to grow more than twice as fast as AT&T's between 2010 and 2015.<sup>74</sup> The negative

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<sup>69</sup> Public Interest Statement, at 13 ("AT&T is more focused on Verizon and Sprint than on T-Mobile USA..."). See also *id.* at 70 ("T-Mobile USA and AT&T are not close competitors...").

<sup>70</sup> T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 2 (filed Oct. 24, 2006).

<sup>71</sup> AT&T 2010 Annual Report at 30. This includes in-region DSL, in-region U-Verse, High Speed Internet access lines, satellite broadband, and 3G laptop connect cards.

<sup>72</sup> AT&T's 2010 Annual Report shows that AT&T had 68,041,000 postpaid wireless customers, of which 61% (or approximately 41,500,000) had data plans. *Id.* at 26, 34. the Annual Report does not disclose how many of AT&T's 11,645,000 reseller wireless customers also had data plans. See *id.* at 34.

<sup>73</sup> T-Mobile USA, Inc. 2010 Annual Report at 89.

<sup>74</sup> Compare Larsen Declaration, ¶ 15 ("By 2015, T-Mobile USA expects data traffic on its network to be at least 20 times that of the 2010 level") with Moore Declaration, ¶ 6 ("By 2015, AT&T estimates that mobile data traffic on its network will reach eight to ten times what it was in 2010").

consequences flowing from loss of competition from T-Mobile as an independent broadband provider is heightened by the fact that, as stated on its website, “T-Mobile has the fastest nationwide network in the top 100 U.S. markets.”<sup>75</sup>

Few ISPs offer high speed broadband suitable for viewing bandwidth-intensive content such as movies and television. FCC data reflect that as of June 30, 2010, only 14% of households reside in census tracts with 3 or more fixed-location or mobile wireless providers of high-speed broadband (at least 6 mpbs downstream and 1.5 mbps upstream).<sup>76</sup> The proposed merger eliminates T-Mobile as an actual or potential competitor in this very high-speed broadband market, further increasing market concentration and AT&T’s ability to discriminate against its remaining rivals.

3. *The Proposed Merger Threatens Wireline and Intermodal Broadband Competition*

The loss of T-Mobile as an actual and potential competitor and the ability of the merged entity to offer wireline-quality wireless broadband service to 97% of Americans<sup>77</sup> have implications for competition in wireline and intermodal markets as well. The latest Commission data shows that mobile wireless broadband connections make up 46.5% of all connections as of June 30, 2010<sup>78</sup> and that “subscribers with mobile wireless devices and data plans for full Internet access increased by 27% (from 56 million to 71 million)” in the first half of 2010

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<sup>75</sup> T-Mobile, *Want the Fastest Nationwide Data Network? It’s Right Here at T-Mobile*, available at: <http://t-mobile-coverage.t-mobile.com/hspa-mobile-broadband> (last visited May 19, 2011),

<sup>76</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Internet Access Services: Status as of June 30, 2010*, at 8, 15 (March 2011).

<sup>77</sup> Public Interest Statement, at 14.

<sup>78</sup> Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, *Internet Access Services: Status as of June 30, 2010*, at 23 (March 2011).

alone.<sup>79</sup> In contrast, “fixed-location Internet access connections increased by only 1% (from 81 to 82 million).”<sup>80</sup>

As the Department of Justice has noted, “[e]merging fourth generation (‘4G’) services may well provide an alternative sufficient to lead a significant set of customers to elect a wireless rather than wireline broadband service.”<sup>81</sup> In short, “the fact that some customers are willing to abandon the established wireline providers for a wireless carrier suggests that the two offerings may become part of a broader marketplace.”<sup>82</sup> Chairman Genachowski recently noted that the National Broadband Plan “placed unprecedented emphasis on mobile broadband, because few sectors of our economy offer greater opportunities for economic growth and improvements to our quality of life.”<sup>83</sup> The Chairman reaffirmed the importance of mobile broadband because it “is being adopted faster than any computing platform in history. The number of smartphones and tablets being sold now exceeds the number of PCs.”<sup>84</sup> And President Obama confirmed its importance by “setting an ambitious goal for the country of connecting 98 percent of Americans to 4G.”<sup>85</sup>

Through the proposed merger, AT&T is touting its ability to deliver on this ambitious goal and betting its future on the fact that improved wireless broadband offerings, such as Long Term Evolution (“LTE”), will result in consumers “cutting the cord” for wireline broadband. A

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<sup>79</sup> *Id.*, at 1.

<sup>80</sup> *Id.*

<sup>81</sup> DOJ 1/4/10 *Ex Parte*, at 8.

<sup>82</sup> *Id.*, at 10.

<sup>83</sup> Chairman Julius Genachowski, “*The Clock is Ticking*,” *Remarks on Broadband*, at 4 (Mar. 16, 2011) available at: [http://transition.fcc.gov/Daily\\_Releases/Daily\\_Business/2011/db0316/DOC-305225A1.pdf](http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0316/DOC-305225A1.pdf) (“Chairman Genachowski March 2011 Speech”).

<sup>84</sup> Chairman Genachowski March 2011 Speech, at 5.

<sup>85</sup> Chairman Genachowski March 2011 Speech, at 2.

core claimed merger benefit discussed by the Applicants is the ability of LTE to become the broadband connection that “operates on a par with some of today’s wireline broadband platforms.”<sup>86</sup> Applicants tout LTE’s “uniquely low latency rate” for its ability to support delay-sensitive applications such as distance learning, video conferencing and data transfers for cloud computing, making wireless devices “dramatically more useful to consumers” and ensuring that “rural areas are not left behind.”<sup>87</sup> In short, AT&T envisions expanding its footprint to deliver *wireless* broadband to nearly all Americans, including those served by its *wireline* competitors.

As the importance of wireless broadband within AT&T’s product set and customer base grows, its wireline incumbent LECs will have even greater incentives to increase their wireline competitors’ costs (including special access) and decrease the availability of wholesale inputs to wireline broadband services (such as copper loops and DSL transmission). Indeed, the low latency of LTE makes it a viable option for offering voice-grade services. Thus there is a risk that AT&T will retire wireline loops in its incumbent territory and replace them with LTE loops, further diminishing the availability of wireline loops for inputs in competitive voice and broadband services.

As Mr. Brownworth explains, EarthLink has experienced such AT&T discrimination first hand. For example, three months after the *Wireline Broadband Order* was released, BellSouth required EarthLink, as a condition for renewal of its Regional Broadband Aggregation Network (“RBAN”) service (RBAN is a service whereby AT&T transports data traffic from DSL lines to one or more access points in their network), to accept several anticompetitive restrictions on the

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<sup>86</sup> Public Interest Statement, at 60.

<sup>87</sup> Public Interest Statement, at 58.



use of the service.<sup>88</sup> BellSouth also decided to cease offering Layer 2 DSL services to one of EarthLink's subsidiaries, New Edge, after May 17, 2006, effectively ending the ability of New Edge to offer businesses in BellSouth an alternative Virtual Private Network service using ATM-over-DSL.<sup>89</sup>

More recently, when DeltaCom renewed its RBAN agreement with AT&T, AT&T refused to renegotiate the DSL price, which is significantly above AT&T's retail prices. Other services included in the agreement are similarly above retail. For example, the wholesale price for a 4MB service is three times the standard retail price for AT&T's 6MB retail service and eleven times AT&T's promotional price.<sup>90</sup> Because DeltaCom was not able to market the products at these rates, it lost customers and fell below its commitment. AT&T agreed to decrease the commitment level, but only if DeltaCom replaced the lost revenue to AT&T by purchasing other AT&T products.<sup>91</sup> AT&T is also insisting on being made revenue whole as EarthLink's subsidiaries negotiate to consolidate their RBAN agreements. This "revenue whole" concept allows AT&T to leverage its market position to increase its competitors' spend and provides competitors such as EarthLink less flexibility to consider and migrate to other competitive providers.<sup>92</sup> These types of anticompetitive actions by AT&T are likely to continue post merger and become more egregious due to the increased market power of AT&T. As Mr. Brownworth indicates in his affidavit, AT&T is currently using a negotiating strategy that requires its wholesale customers to make it whole on revenue when seeking changes in existing

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<sup>88</sup> Brownworth Affidavit, at 5. *See also* Declaration of Christopher Putala, Executive Vice President, Public Policy, EarthLink, WC Docket No. 06-74 (filed June 5, 2006).

<sup>89</sup> *Id.*, at 5-6.

<sup>90</sup> Brownworth Affidavit, at 6-7.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*, at 7-8

agreements by purchasing more unrelated services. These requirements are reminiscent of AT&T's historical monopoly practices and can only be utilized by a company that already has unacceptable market power. A post merger AT&T/T-Mobile with significantly increased market power will be capable of engaging in even worse anti-competitive behavior that could seriously harm both its wholesale and retail customers.

Even if wireless broadband offerings such as LTE do not rival wireline broadband in the near future, competitive telecommunications providers need access to wholesale wireless options in order to compete in the converging communications market. Telecommunications providers "are becoming increasingly and imperatively dependent upon an 'equal access requirement' to major mobile networks if they are to be competitive in the Anywhere, Anytime, Any Network environment for business communications."<sup>93</sup> EarthLink's subsidiary DeltaCom has recognized this need, and negotiated wireless resale agreements to meet its customers' demands for integrated communications services.<sup>94</sup> Other EarthLink subsidiaries also rely on wireless resale arrangements or intend to negotiate such arrangements in the near future.<sup>95</sup>

Cox is another example of a broadband provider that saw a need to expand its offerings to include wireless options. Applicants tout Cox Communications as a source of "intense competition" because Cox has "begun aggressively marketing wireless plans to its existing cable subscribers in a growing number of markets."<sup>96</sup> While Cox constructed its own 3G network in several cities, in large part Cox's wireless service was enabled through an MVNO arrangement with Sprint Nextel, and recent reports confirm that Cox intends to decommission its own 3G

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<sup>93</sup> Alan Pearce, Martyn Roetter, and Barry Goodstadt, *AT&T/T-Mobile Deal May Have Hidden Implications for Business Communications*, Daily Report for Executives, May 24, 2011.

<sup>94</sup> Brownworth Affidavit, at 4.

<sup>95</sup> *Id.*

<sup>96</sup> Public Interest Statement, at 12-13.

infrastructure and instead rely solely on Sprint Nextel's CDMA network to provide wireless services.<sup>97</sup> Because Applicants recognize that the FCC must focus on facilities-based competition when evaluating the impact of the merger, Cox is not the "intense" competitor relevant in the merger analysis.<sup>98</sup>

The loss of T-Mobile would leave non-BOC broadband providers, including EarthLink and Cox, with one less option for wholesale wireless service as part of an integrated communications package and/or competing in the broadband market head-to-head with a merged AT&T/T-Mobile. Notably, while Applicants indicate that "*consumers* will have the option to keep their current T-Mobile USA pricing plans for existing services,"<sup>99</sup> they make no such promises with respect to new services or existing T-Mobile wholesale customers. As Mr. Brownworth explains, although EarthLink has negotiated wireless resale agreements, AT&T has not offered a wholesale product that permits broad resale without conditions.<sup>100</sup>

Although Applicants point to Clearwire and LightSquared as emerging providers offering wholesale wireless broadband services, the proposed merger endangers their nascent offerings. Applicants claim that "LightSquared, Clearwire, and the companies that use their spectrum 'can 'leapfrog' existing carriers by deploying 'next generation' technologies without needing to dedicate spectrum and network assets to serving existing subscribers.'"<sup>101</sup> As the Antitrust Division of the DOJ recently noted, however, a "merged firm can more readily harm competition

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<sup>97</sup> See Phil Goldstein, *Cox Backpedals on 3G Network, Will Remain Sprint MVNO*, FierceWireless (May 24, 2011), available at: <http://www.fiercewireless.com/story/cox-communications-decommission-3g-wireless-network/2011-05-24>.

<sup>98</sup> Public Interest Statement, at 74-75.

<sup>99</sup> Public Interest Statement, at 9 (emphasis added).

<sup>100</sup> Brownworth Affidavit, at 5.

<sup>101</sup> Public Interest Statement, at 51 (citations omitted).

when its rivals offer new products or technologies whose competitive potential is evolving. Nascent competitors may be relatively easy to quash.”<sup>102</sup>

**V. CONCLUSION**

AT&T’s acquisition of T-Mobile would harm the markets for wholesale inputs to competitive broadband services, reduce the number of national facilities-based wireless carriers from four to three, and would thereby substantially harm consumers. The Commission should not begin consideration of the Application until it completes reform of its wholesale competition policies.

Respectfully submitted,

/s/

Jerry Watts  
Vice President Government  
and Industry Affairs  
EarthLink, Inc.  
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Washington, DC 20006  
Counsel for EarthLink, Inc.

Dated: May 31, 2011

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<sup>102</sup> *U.S. et al., v. Comcast Corp. et al.*, Case No. 1:11-cv-00106, Competitive Impact Statement, at 21 (D.D.C. Jan. 18, 2011).

**REDACTED -FOR PUBLIC INSPECTION  
SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 11-65  
BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**

**EXHIBIT A**

**REDACTED - FOR PUBLIC INSPECTION**  
**SUBJECT TO PROTECTIVE ORDER IN WT DOCKET NO. 11-65**  
**BEFORE THE FEDERAL COMMUNICATIONS COMMISSION**

**Before the**  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

|   |   |                     |
|---|---|---------------------|
| In the Matter of                          | ) |                     |
|   | ) |                     |
| Applications of AT&T Inc. and             | ) |                     |
| Deutsche Telekom AG                       | ) | WT Docket No. 11-65 |
|   | ) | DA 11-799           |
| For Consent To Assign or Transfer Control | ) |                     |
| of Licenses and Authorizations            | ) |                     |

**AFFIDAVIT OF STEVEN BROWNORTH**

I, Steven Brownworth, on oath, state and depose as follows:

**I. INTRODUCTION**

1. My name is Steven Brownworth. I currently serve as Vice President, Network Planning of EarthLink, Inc. I am submitting this Affidavit on behalf of EarthLink, Inc. and its operating subsidiaries, New Edge Networks, Inc., DeltaCom, Inc., Business Telecom, Inc., and the operating subsidiaries of One Communications Corp. (collectively, "EarthLink"). I am submitting this Affidavit in support of the factual statements in the Petition to Deny of EarthLink, Inc. filed in the above-referenced proceeding on May 31, 2011 ("Petition to Deny"). I have personal knowledge of the facts set forth in the Petition to Deny and herein.

**II. COMPANY BACKGROUND**

2. EarthLink is a provider of Internet Protocol ("IP") and telecommunications infrastructure and services to businesses, enterprise organizations and retail consumers across the United States.

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3. EarthLink's Consumer Services segment is a leading Internet Service Provider ("ISP"), providing nationwide Internet access and related value-added services to individual and small business customers in competition with, among other providers, AT&T and T-Mobile.
4. EarthLink's consumer service offerings are narrowband and broadband (high speed) Internet access, search, advertising and VoIP services. EarthLink provides its portfolio of services to approximately 1.5 million US customers through a nationwide network of dial-up points of presence and a nationwide broadband footprint.
5. EarthLink's Business Services segment provides integrated communications services to a wide variety of businesses, enterprise organizations and communications carriers. These services include data services, such as managed IP-based network services and broadband Internet access services; voice services, including local exchange, long-distance and conference calling; mobile data and voice services; and web hosting.
6. The Company's Business Services segment sells transmission capacity to other communications providers on a wholesale basis. EarthLink operates its Business Services segment through its regulated operating companies.

**III. MARKET ACTIVITIES**

7. EarthLink's regulated companies extensively interconnect with AT&T incumbent local exchange carriers ("ILECs"), purchase special access services from AT&T's ILECs, sell special access services to T-Mobile, and compete directly with AT&T and T-Mobile in multiple retail markets.

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8. EarthLink's subsidiary, DeltaCom, Inc. offers wholesale services to telecommunication service providers under the name EarthLink Carrier (previously known as Interstate FiberNet). T-Mobile is currently DeltaCom's third largest customer billing \*\*\*BEGIN CONFIDENTIAL\*\*\*  
\*\*\*END CONFIDENTIAL\*\*\* per month, representing \*\*\*BEGIN CONFIDENTIAL\*\*\*  
\*\*\*END CONFIDENTIAL\*\*\* of total carrier revenue. This revenue involves various carrier services, mainly consisting of DS1, DS3 and SONET OC-3/OC-12 point to point facilities.
9. DeltaCom has recently had several opportunities to bid on access arrangements with T-Mobile to replace entrance facilities currently being provided by AT&T. Due to the pending merger, there is no incentive for T-Mobile to enter into new agreements nor is there an incentive for DeltaCom to make capital investments associated with the opportunities. Carrier services for which EarthLink Carrier bills AT&T and its affiliates is \*\*\*BEGIN CONFIDENTIAL\*\*\*  
\*\*\*END CONFIDENTIAL\*\*\* per month. Services DeltaCom provides to T-Mobile can be provided by AT&T; therefore DeltaCom anticipates AT&T will migrate a substantial portion of these services to their own network as a part of their synergy initiatives.
10. EarthLink's subsidiary, DeltaCom, Inc. relies almost exclusively on AT&T special access services for end-user access of DeltaCom products in areas not available or covered by Interconnection Agreements, including non-impaired offices and the non-metro or rural areas of AT&T's footprint. DeltaCom has the majority of its special access under multi-year volume and term commitments to



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avoid tariffed month-to-month rates. The need to commit 100% of volume to get the full discounted rates and limited number of alternative providers in the Southeastern U.S. gives DeltaCom limited alternatives other than the continued use of AT&T special access.

11. As part of the term limited conditions following the acquisition of BellSouth, AT&T was required by the FCC to provide pricing flexibility in Full Service Relief and Limited Service Relief MSAs effective April 5, 2007 through June 30, 2010. Pricing in these MSAs was restored to the original FCC rates effective July 1, 2010. During this period AT&T offered no changes to its pricing or discount structure with DeltaCom. This increase impacted approximately \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*/END CONFIDENTIAL\*\*\* DS1 loops; \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*/END CONFIDENTIAL\*\*\* DS1 interoffice circuits; and \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*/END CONFIDENTIAL\*\*\* DS1 interoffice miles, with the resulting adverse economic impact DeltaCom estimated to be \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*/END CONFIDENTIAL\*\*\* per month. The average increase in special access mileage costs was approximately \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*/END CONFIDENTIAL\*\*\* per DS1. Additionally, AT&T special access pricing used for data services limits the company's ability to offer data services away from larger cities, as the mileage components of special access can cause a DS1 circuit to exceed \$1,000 per month.
12. DeltaCom has negotiated wireless resale agreements with Telispire, an MVNO of Verizon, to offer wireless services to those customers who prefer integrated

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communications services. Other EarthLink subsidiaries also rely on wireless resale arrangements or intend to negotiate such arrangements in the near future.

13. During its vendor selection process in the second half of 2008 for wireless resale, DeltaCom engaged multiple providers, taking into consideration AT&T, T-Mobile, Sprint and Verizon. AT&T was only willing to offer services and rates for DeltaCom's administrative and corporate traffic. DeltaCom's interest in T-Mobile was limited due to its Seattle, Washington location and lack of MVNO product for service providers like DeltaCom. Sprint, at the time, was re-evaluating its position in the market-place as an MVNO. Verizon was ultimately selected due to coverage and automation advantages. DeltaCom subsequently moved the wireless service to Telispire, an MVNO of Verizon. While AT&T recently has made presentations to DeltaCom on limited use of its wireless network for data on a fixed location only, the level of commitment, pricing and terms are still unknown. DeltaCom's agreement with Telispire does not place additional restrictions on the use of its data network when compared to Verizon retail products. Further, EarthLink subsidiary, New Edge Networks, has a current agreement with Sprint for wireless data services, without any additional limitations or restrictions as compared to Sprint's retail products.
14. Three months after the *Wireline Broadband Order* was released, BellSouth required EarthLink, as a condition for renewal of its Regional Broadband Aggregation Network ("RBAN") service (RBAN is a service whereby AT&T transports data traffic from DSL lines to one or more access points in their

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network), to accept several anticompetitive restrictions on the use of the service.<sup>1</sup> BellSouth also decided to cease offering Layer 2 DSL services to one of EarthLink's subsidiaries, New Edge, after May 17, 2006, effectively ending the ability of New Edge to offer businesses in BellSouth an alternative VPN service using ATM-over-DSL. AT&T's failure to offer reasonable terms and conditions for its broadband transmission services resulted in EarthLink discontinuing certain products that had relied on these inputs and thus a reduction of competitive choice for customers in these areas.

15. In April of 2009, DeltaCom entered into negotiations with AT&T on renewal of its RBAN Agreement that was set to expire May 31, 2009. At that time, DeltaCom's agreement called for a \*\*\*BEGIN CONFIDENTIAL\*\*\*  
\*\*\*END CONFIDENTIAL\*\*\* minimum commitment on DSL lines at a  
1.544Mb x 256kb rate of \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END  
CONFIDENTIAL\*\*\* per month. AT&T's position was the product is no longer  
being developed and because no other replacement wholesale product was  
available, AT&T allowed a new agreement to be executed with AT&T's only  
concession being minor modifications to dispute and assignment language.  
AT&T was not willing to refresh the market-based rates nor were they willing to  
negotiate a new commitment level, only to extend the same \*\*\*BEGIN  
CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* line commitment and  
the \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* per

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<sup>1</sup> See, e.g., Declaration of Christopher Putala, Executive Vice President, Public Policy, EarthLink, WC Docket No. 06-74 (June 5, 2006).

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month rate. The other rates in this agreement are significantly above retail rates offered by AT&T. For example, DeltaCom's pricing for the 4mb DSL product is \*\*\*BEGIN CONFIDENTIAL\*\*\* per month, while AT&T's standard pricing for its 6mb product is \$109.95 per month and AT&T's current one year promotional rate is \$30.00 per month. As DeltaCom's current rate structure is significantly above AT&T's pricing to its retail customers, DeltaCom has been unable to market this product and as such has seen actual billing drop from over \*\*\*BEGIN CONFIDENTIAL\*\*\* DSL lines to a current level of approximately \*\*\*BEGIN CONFIDENTIAL\*\*\* DSL lines; just 1 year into this agreement. Recently, AT&T has been willing to modify this agreement to decrease the company's commitment from \*\*\*BEGIN CONFIDENTIAL\*\*\*, but not change the pricing of the base. This comes with the condition that DeltaCom commit to providing additional revenue on wholesale voice network. This commitment to other services is part of AT&T's position in negotiations to be made "revenue whole" where AT&T will only negotiate decrease in rates when commitments for other products and services make up for the difference in the change of revenue. This was seen in recent negotiations for selected broadband services in March of this year, where rate reductions were given on broadband facilities connecting DeltaCom and AT&T locations only after DeltaCom agreed to increase its commitment on a totally unrelated product involving AT&T Metro Ethernet Service to make AT&T "revenue whole".

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16. Currently, two EarthLink subsidiaries, New Edge Network and DeltaCom, are combining their RBAN agreements into one negotiation with AT&T. AT&T's position, at this time, is only to reduce RBAN rates with increased commitments for new services in other non-related products (e.g. broadband, switching and special access). This concept of "revenue whole," allows AT&T to leverage its market position to increase a carrier's spend and provides a carrier less flexibility to consider and migrate to other competitive providers.
17. EarthLink's consumer division has an RBAN agreement with the base rate of \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* and in this one case AT&T did discount the EarthLink rate to \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* which is a slight discount to AT&T's recent one year promotional rates of \$14.99 to its retail market. Although this appears to be in line with the Bellsouth/AT&T merger agreement on ADSL Transmission Service to provide rates to ISPs not greater than the retail rate, the features offered for these rates is different. For the \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* regular rate and \*\*\*BEGIN CONFIDENTIAL\*\*\* \*\*\*END CONFIDENTIAL\*\*\* promotional rate, EarthLink gets access from the customer to its network. EarthLink still needs to provide the Internet Access, e-mail addresses, spam/virus protection, web-services, customer ordering/care and bad debt responsibilities. AT&T includes all of these services in its \$14.99 price to its retail customers. Additionally, AT&T provides its customers access to AT&T's wireless Wi-Fi network at no additional cost. When EarthLink asked that either

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Wi-Fi be made available or reduce the rates by the cost of providing Wi-Fi,  
AT&T refused to discuss this aspect of the service.

**IV. DECLARATION**

18. I declare that I created this Affidavit with the assistance of persons under my direct supervision and that, to the best of my knowledge, the facts represented herein are true and accurate.

  
\_\_\_\_\_  
Steven Brownworth

Dated: May 31, 2011

**SERVICE LIST**

I, M. Renee Britt, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Petition to Deny of EarthLink, Inc. to be served, as specified, upon the parties listed below:

|   |  |
|---|--|
| <p>Peter J. Schildkraut<br/>Scott Feira<br/>Arnold &amp; Porter LLP<br/>555 Twelfth Street NW<br/>Washington, DC 20004<br/>peter_schildkraut@aporter.com<br/>scott_feira@aporter.com<br/><i>Outside Counsel to AT&amp;T Inc.</i><br/><b>(Via Electronic Mail - REDACTED)</b></p>            | <p>Nancy J. Victory<br/>Wiley Rein LLP<br/>1776 K Street NW<br/>Washington, DC 20006<br/>nvictory@wileyrein.com<br/><i>Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.</i><br/><b>(Via Electronic Mail - REDACTED)</b></p>                                       |
| <p>Kathy Harris, Mobility Division<br/>Wireless Telecommunications Bureau<br/>Federal Communications Commission<br/>445 12th Street, S.W.<br/>Washington, D.C. 20554<br/>kathy.harris@fcc.gov<br/><b>(Via Hand Delivery - CONFIDENTIAL)</b><br/><b>(Via Electronic Mail - REDACTED)</b></p> | <p>Kate Matraves<br/>Spectrum and Competition Policy Division<br/>Wireless Telecommunications Bureau<br/>Federal Communications Commission<br/>445 12th Street, S.W.<br/>Washington, D.C. 20554<br/>catherine.matraves@fcc.gov<br/><b>(Via Electronic Mail - REDACTED)</b></p> |
| <p>David Krech, Policy Division<br/>International Bureau<br/>Federal Communications Commission<br/>445 12th Street, S.W.<br/>Washington, D.C. 20554<br/>david.krech@fcc.gov<br/><b>(Via Electronic Mail - REDACTED)</b></p>   | <p>Jim Bird, Office of General Counsel<br/>Federal Communications Commission<br/>445 12th Street, S.W.<br/>Washington, D.C. 20554<br/>jim.bird@fcc.gov<br/><b>(Via Electronic Mail - REDACTED)</b></p>   |
| <p>Best Copy and Printing, Inc.<br/>445 12th St., S.W.<br/>Washington, D.C. 20554<br/>FCC@BCPIWEB.COM<br/><b>(Via Electronic Mail - REDACTED)</b></p>   |  |

/s/ M. Renee Britt