BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of
Ameritech Operating Cos., Revision, Tariff F.C.C. No. 2
BelSouth Telecommunications, Inc., Revision, Tariff F.C.C. No. 1
Nevada Bell Telephone Co., Revision, Tariff No. 1
Pacific Bell Telephone Co., Revision, Tariff F.C.C. No. 1
Southern New England Telephone Co., Revision, Tariff F.C.C. No. 39
Southwestern Bell Telephone Co., Revision, Tariff F.C.C. No. 73

Transmittal No. 1666
Transmittal No. 1121
Transmittal No. 176
Transmittal No. 385
Transmittal No. 965
Transmittal No. 3251

PETITION OF TIME WARNER TELECOM INC. AND COMPTEL TO REJECT OR, IN THE ALTERNATIVE, SUSPEND AND INVESTIGATE TARIFF FILINGS

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January 31, 2008
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PETITION OF TIME WARNER TELECOM INC. AND COMPTEL TO REJECT OR, IN  
THE ALTERNATIVE, SUSPEND AND INVESTIGATE TARIFF FILINGS  

Time Warner Telecom Inc. ("TWTC") and COMPTEL, by its attorneys and pursuant to  
Sections 201(b) and 204(a)(1) of the Telecommunications Act of 1996 ("Act") and Section 1.773  
(47 C.F.R. § 1.773) of the Commission’s rules, hereby petitions the Commission to reject or, in  
the alternative, suspend for the full five month period permitted under Section 204(a) of the Act
and investigate various tariff transmittals\(^1\) (hereinafter “broadband tariffs”), which were submitted by AT&T on January 24, 2008.

I. \textbf{INTRODUCTION AND SUMMARY}

Like the nearly identical tariff transmittals submitted on January 8\(^{th}\) which were later withdrawn, AT&T’s latest tariff transmittals seek to “withdraw certain broadband transmission services…as required by the Commission upon use of the forbearance relief pursuant to FCC Memorandum Opinion and Order No. 07-180…”\(^2\) As was the case with its prior tariff filings, AT&T’s latest transmittals must be rejected because withdrawal of the tariffs in question would violate the express conditions of the AT&T/BellSouth Merger Order\(^3\) and, in any case, some of the tariffs concern expanded interconnection services for which AT&T did not seek forbearance and which the FCC did not address in the Forbearance Order.\(^4\)


\(^2\) See, e.g., SWBT Revision, Cover Letter at 2.

\(^3\) See AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (“Merger Order”).

\(^4\) Petition of AT&T Inc. for Forbearance and Petition of BellSouth Corporation for Forbearance, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) (“Forbearance Order”). It is also worth noting that nothing in the Forbearance Order requires that AT&T offer its business broadband services on a non-dominant, detariffed basis. Rather, the Forbearance Order merely allows AT&T to offer business broadband services on a non-dominant basis at such time as it may and does withdraw its tariffs. Forbearance Order ¶ 42.
II. DISCUSSION

TWTC demonstrated in detail in its petition for declaratory ruling regarding the *Forbearance Order* that AT&T may not withdraw any broadband tariffs until the expiration of the conditions established in the *Merger Order*.\(^5\) In those conditions, AT&T committed not to “give effect to” any forbearance that “diminishes” or “supersedes” its obligations or responsibilities under any of the other conditions set forth in the order. As TWTC has explained in its petition for declaratory ruling, special access conditions two through nine, by their terms, require the maintenance of broadband tariffs. Moreover, many conditions, such as condition seven, which requires mediation or accelerated docket treatment of disputes concerning tariffed services, would be rendered meaningless without publicly available tariffs. For these reasons, eliminating AT&T’s broadband tariffs, as AT&T proposes in its transmittals would “diminish” or “supersede” these Merger Conditions. Accordingly, AT&T’s request to withdraw its broadband tariffs must be rejected.

The text of the *Forbearance Order* and the Commissioners’ accompanying statements reinforce the conclusion that AT&T cannot withdraw its broadband tariffs until the expiration of the Merger Conditions. In the *Forbearance Order*, the Commission reaffirmed that AT&T’s existing tariffing, price freeze, pricing flexibility, and facilities discontinuance requirements continue to apply to AT&T, holding that “[t]he limited forbearance relief granted herein does not affect in any way the full force and effect of the merger conditions adopted in the

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AT&T/BellSouth Order.” Forbearance Order ¶ 2. Most importantly, in a statement issued with the Commission’s order, Commissioner Robert M. McDowell explained that AT&T has a continuing obligation to comply with its “existing tariffing, price freeze and facilities discontinuance requirements for non-TDM-based business broadband services” until December 29, 2010 when its merger commitments expire. Id., Separate Statement of Commissioner McDowell, at 1. Given Commissioner McDowell’s statement and the fact that Commissioners Copps and Adelstein voted against the petition, a majority of the Commissioners believed that the broadband tariffs may not be withdrawn until 2010.

The statements of the sponsors of the Merger Order conditions support the same conclusion. At the time of that order, AT&T was subject to dominant carrier tariff obligations. Yet both Commissioners Copps and Adelstein concluded that more comprehensive regulation, in addition to existing tariff-filing obligations were necessary to “rectify years of decisions that have undercut competition” (Merger Order, Concurring Statement of Commissioner Adelstein, at 1) and to compensate for the Commission’s failure to comply with its “obligation to encourage the kind of fair competition necessary to protect consumers.” Merger Order, Concurring Statement of Commissioner Copps at 1. The purpose of the Merger Conditions was therefore to make the existing tariffing regime more effective with price controls and other regulations. There is no question that eliminating the tariff requirements upon which these requirements were based would “diminish” or “supersede” AT&T’s obligations under the special access conditions.

Notwithstanding its obligation under the Merger Conditions to retain its tariffs for Ethernet, OCn and other business broadband special access services, AT&T states in the description and justification (“D&J”) of its latest tariff filing that it will somehow abide by the terms of the Merger Conditions notwithstanding the absence of tariffs. Even if such a promise
were sufficient, and it assuredly is not, AT&T has already provided good reason to believe that it has no plan at all to abide by the Merger Conditions in the absence of tariffs.

On December 20, 2007, AT&T notified its customers that, pursuant to the *Forbearance Order*, it would begin withdrawing its tariffs for frame relay service, ATM service, Ethernet-based service and other broadband services in early January 2008. The Customer Notice states that, once the tariff withdrawal is effective, the rates, terms and conditions for business broadband services will be moved to AT&T’s Interstate Guidebook and tariff references will be treated as “references to the Guidebook.” Because the “Guidebook” is not yet available, it is impossible to compare the Guidebook language to the existing tariff language to determine whether the rates, terms and conditions are in fact identical.

For customers that do not subscribe to contract tariffs or tariff term plans, however, AT&T has stated that it will provide business broadband service on a month-to-month basis under the “Business Service Agreement.” The Business Service Agreement specifically states that the services covered are those “optical and packet-switched special access services subject to relief from federal tariff requirements as provided” in the *Forbearance Order*. Pursuant to Paragraph 5.b of the Business Service Agreement, AT&T reserves the right to “increase prices by giving [the customer] at least thirty (30) days notice before the increase goes into effect.”

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6 A copy of the AT&T’s Customer Notice is attached hereto as Appendix A.

7 A copy of AT&T’s notice with respect to the unavailability of the Guidebook is attached as Appendix B.

8 A copy of AT&T’s Business Service Agreement is attached to the Customer Notice in Appendix A.

9 *See* Business Service Agreement ¶ 1.e.
This provision seems to indicate that AT&T has every intention of violating Merger Condition 5 and AT&T’s stated commitment not to raise special access rates.

AT&T claims in the D&J submitted with its tariff withdrawal that it “will abide by all of the special access merger commitments set forth in the [Forbearance Order], including but not limited to commitments that contain references to ‘tariffs,’ such as those addressing pricing, dispute resolution, and access service ratio terms.”\(^\text{10}\) But AT&T’s commitment in its D&J not to raise rates has no legally binding effect. AT&T is free under its of Paragraph 5.b of the Business Service Agreement to raise rates at any time on 30 days notice.

In any event, the Business Service Agreement does not acknowledge or inform customers that the Forbearance Order and the Merger Conditions prohibit AT&T from raising rates for services before the expiration of the Merger Conditions. In the absence of a tariff, the Commission cannot possibly monitor AT&T’s “commitment” not to raise rates or its compliance with the Merger Conditions. Moreover, customers would have no idea whether the rates AT&T offers them are the same as those being offered in December 2006.

The Business Services Agreement also demonstrates that allowing AT&T to withdraw its tariffs prior to the expiration of the Merger Conditions will also negate Merger Condition 7. That condition precludes AT&T from opposing “any request by a purchaser of interstate special access services for mediation by Commission staff of disputes relating to AT&T/BellSouth’s compliance with the rates, terms and conditions set forth in its interstate special access tariffs and pricing flexibility contracts, or to the lawfulness of the rates, terms and conditions in such tariffs and contracts.” Merger Order, Appendix F 152. Given the text of the Business Services

\(^{10}\) See e.g., SWBT Revision, Description and Justification.
Agreement, AT&T’s contention that it will abide by this condition is meaningless. Paragraph 12 of the Business Services Agreement provides that AT&T may change the Agreement as well as the terms of the Guidebook applicable to the services at any time. That same paragraph provides that a customer’s only option if the customer is unhappy with any changes is to terminate service with AT&T. It is hard to see how a customer could request mediation of a change in “rates, terms and conditions” if the customer’s only option specified in the legally binding contract is to terminate service.

AT&T’s transmittals must also be rejected because AT&T is seeking to withdraw tariffs for services, specifically its expanded interconnection cross connect services, that were not addressed in the Forbearance Order. In its initial tariff transmittals, SWBT’s revised FCC tariff No. 73, § 25.7.5(A) to request detariffing of the “interconnection cross connect” for OC3, OC12, OC48, OC192, OPT-E-MAN, GigaMAN, DecaMAN and CSME services. These cross connects are provided pursuant to SWBT’s “expanded interconnection” obligations. AT&T did not ask for and did not receive forbearance from its expanded interconnection obligations. This is unsurprising, as the FCC has long held that these services are not subject to competition (and therefore would likely not qualify for forbearance) because they provide a connection between the ILEC’s network and the CLEC’s network in the central office. Only the ILEC is capable of providing such a service. The availability of these interconnection services is a necessary

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11 Compare Southwestern Bell Telephone Company, Revision, Tariff F.C.C. No. 73, Transmittal No. 3249, Tariff § 25.7.5(A) (filed Jan. 7, 2008), with Southwestern Bell Telephone Company, Tariff F.C.C. No. 73, Base Tariff Transmittal, Tariff § 25.7.5(A) (filed Dec. 4, 2007) (“SWBT Base Tariff”).

prerequisite to special access competition. Moreover, the obligation to provide expanded interconnection services is an obligation of all “Class A” carriers (of which AT&T is one), not just dominant carriers. Therefore, the FCC’s determination in the Forbearance Order to treat AT&T as non-dominant with respect to the services for which it received forbearance has no effect on its ongoing obligations to tariff its expanded interconnection services.

Apparently recognizing its prior error, AT&T’s latest transmittal does not seek to detariff any of the OCn and Ethernet cross-connects listed in the expanded interconnection section of its base access tariff (see e.g., SWBT Base Tariff § 25.7.5(A)). However, AT&T now seeks to eliminate these same cross connects from its special access volume/term discount plans. For example, AT&T proposes to eliminate OCn cross-connects from SWBT’s “MVP” plan tariff sections. See SWBT Revision, Tariff, § 38.3(D). Elimination of cross-connects from tariffed volume/terms plans is clearly outside of the scope of the relief described in the Forbearance Order. AT&T’s attempt to detariff its cross-connect services in these plans should therefore be rejected for the reasons explained above.

Furthermore, AT&T’s insistence on detariffing its OCn and Ethernet cross-connects and indeed all of its OCn and Ethernet services from its volume/term discount plans will almost

\[\text{\textsuperscript{13}} \textit{See id.} \textsuperscript{\textbf{¶} 93 (“We believe that interconnection to the broadest array of special access services is in the public interest because it facilitates competition for all these services. The initial tariffing requirement was limited to DS1 and DS3 services only to promote rapid implementation…”").}

\[\text{\textsuperscript{14}} \textit{See 47 C.F.R.} \textsuperscript{§} 64.1401 (“Every local exchange carrier that is classified as a Class A company...and that is not a National Exchange Carrier Association interstate tariff participant...shall offer expanded interconnection for interstate access services at their central offices that are classified as end offices or serving wire centers, and at other rating points used for interstate special access.”)

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certainly cause AT&T to violate its stated commitment not to raise rates in the absence of tariffs. Under its proposed tariff changes, AT&T’s customers’ spending on Ethernet and OCn services will not count towards the MVP plan minimum annual revenue commitment (“MARC”), and customers will no longer be able to count these services toward the 95 percent “access service ratio.” See id. §§ 38.1-38.3. Nor can SWBT later revise its tariff to include non-tariffed services as counting toward the MARC because this would violate Section 61.54(j) of the Commission’s rules. That section requires that all rates, terms and conditions of a tarifffed service be included in the tariffs.\footnote{See 47 C.F.R \S 61.54(j)(“Rates and general rules, regulations, exceptions and conditions. The general rules (including definitions), regulations, exceptions, and conditions which govern the tariff must be stated clearly and definitely. All general rules, regulations, exceptions or conditions which in any way affect the rates named in the tariff must be specified... Rates must be expressed in United States currency, per chargeable unit of service for all communication services... and no rate, rule, regulation, exception or condition shall be included which in any way attempts to substitute a rate, rule, regulation, exception or condition named in any other tariff.”).} By definition, a detariffed service which might contribute to a tariff MARC cannot be described in a tariff.\footnote{For example, the FCC has rejected a tariff pursuant to Section 61.54(j) because the tariff did not state “the types of access services it would make available nor the corresponding rates and charges.” \textit{GTE Telephone Operating Companies Tariff F.C.C No. 1, Transmittal No. 988, Order 11 FCC Rcd 3698, ¶ 7 (1995).} In another case, the FCC found that a new tariff term violated Section 61.54(j) because “the new provision uses the term ‘estimated,’ but does not identify how the estimates, which are necessary to determine the level of these additional deposits, will be developed or by whom. In the absence of this information, the transmittal fails to state clearly the charges that will apply when a customer orders service.” \textit{AT&T Communications Tariff F.C.C. No. 12, Order, Transmittal No. 4233, 7 FCC Rcd 5604, ¶ 5 (1992).}}

Accordingly, in order to meet its MARC and continue to receive the same discount on DS1 and DS3 services that it received prior to detariffing, a SWBT customer would have to substantially increase its spending on services still under tariff (\textit{e.g.}, DS1 and DS3s). If a
customer’s overall special access spending remained the same, it would lose its MVP discount on DS1 and DS3 services and its rates would increase. Similarly, if the services subject to forbearance no longer count toward its access service ratio, a customer may lose its MVP discount and face increased rates if their eligible spending remains the same. Such rate increases would serve as a clear violation of Merger Condition 5.\textsuperscript{17}

AT&T also seeks to detariff DSn services, services which are clearly outside of the scope of the Forbearance Order. \textit{See Forbearance Order} ¶ 12. For example, DS1 and DS3 elements are used in concert with SWBT’s Dedicated Sonet Ring Service (“DSRS”). The SWBT base tariff identifies DS1 Ports and DS3 Ports as “Accepted Interfaces” for DSRS. The rates for these DSn elements are listed in the DSRS tariff section. \textit{See SWBT Base Tariff} § 29.4(C). All of these tariff pages are eliminated in AT&T’s latest transmittal. \textit{See SWBT Tariff Revision}, Revised Tariff Pages 29-24 to 29-28. AT&T also proposes to detariff the “DS3 Transmux” which “provides the ability to aggregate multiple DS1s to a DS3 within the SONET Ring and also on a single card. DS1s are aggregated across the SONET network and terminated into a single DS3 card at a ring node. The hand-off will be a channelized DS3.” \textit{SWBT Base Tariff} § 29.3.A(3); \textit{SWBT Tariff Revision}, Revised Tariff Page 29-10. These are only two of

\textsuperscript{17} \textit{See Merger Order}, Appendix F at 151 (“No AT&T/BellSouth ILEC may increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T/BellSouth in-region territory, as set forth in tariffs on file at the Commission on the Merger Closing Date, and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments.”).
many DSn based services which AT&T seeks to detariff.\textsuperscript{18} AT&T attempt to detariff DSn-based services must be rejected as beyond the scope of the \textit{Forbearance Order}.

\textbf{III. CONCLUSION}

For the foregoing reasons, the Commission should reject or, in the alternative, suspend for the full five month statutory period and investigate AT&T’s transmittals which seek to withdraw its broadband tariffs.

Respectfully submitted,

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January 31, 2008

\textsuperscript{18} For example, under its base tariff, customers can buy an add/drop multiplexing function which permits an OCN customer to “add/drop a lower speed channel” which could include a DS1 or DS3. The charge for an “add/drop” per DS3 is $150 per month. \textit{See SWBT Base Tariff} § 40.3(A)(4). This service and the pricing description has been eliminated from AT&T’s latest tariff transmittal. \textit{See SWBT Revision, Revised Tariff} Page 40-23.
**CERTIFICATE OF SERVICE**

I, Thomas Jones, do hereby certify that on this 31st day of January, 2008, I caused to be served true and correct copies of the foregoing Petition to Reject or, in the Alternative, Suspend and Investigate to the following parties:

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Thomas Jones

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APPENDIX A
December 20, 2007

NOTICE OF AT&T'S WITHDRAWAL OF ITS TARIFFS FOR CERTAIN BROADBAND SERVICES

Dear Valued AT&T Business Customer:

AT&T currently provides you with certain broadband services pursuant to the terms of tariffs that AT&T has on file with the Federal Communications Commission (FCC). A recent FCC decision authorizes AT&T to offer these services on a non-tariffed basis. Accordingly, in early January 2008, AT&T will file documents with the FCC withdrawing these tariffs with an effective date no earlier than January 22, 2008. AT&T's withdrawal of these tariffs will not affect the rates, terms or conditions applicable to your services.

Once the tariff withdrawal is effective, the rates, terms and conditions for your broadband services that are now in AT&T's tariffs will be moved to AT&T's Interstate Guidebook, with the exception of contract tariffs. The Guidebook will be located at http://att.com/guidebook.

If you currently subscribe to a contract tariff or a tariff term plan with AT&T for your broadband services, AT&T will continue to provide these services to you pursuant to the terms of your contract tariff or tariff term plan. Upon the effective date of the tariff withdrawal, however, references to the “tariff” in your contract tariff or tariff term plan will be treated as references to the Guidebook. You need not take any action at this time.

If you do not currently subscribe to a contract tariff or tariff term plan for your broadband services, or your current contract tariff or tariff term plan expires without a successor, AT&T will provide your broadband services on a month-to-month basis under an agreement known as the Business Services Agreement for Broadband. This Agreement, among other things, incorporates the terms of the Guidebook. The Agreement can be found at http://att.com/guidebook. A copy of the Agreement is also enclosed with this letter. The Agreement will not change your current rates or services, but it does contain important terms and conditions related to your broadband services. Please take a moment to review the Agreement. If you accept the terms of the Agreement, simply continue to use your broadband services. No further action is required of you, as your continued use of the broadband services constitutes acceptance of the Agreement. If you do not accept the terms of the Agreement, please terminate your services by informing your AT&T Sales Representative of your termination and discontinuing your use of the services before the effective date of the tariff withdrawal or upon expiration of your current contract tariff or tariff term plan. You may also contact your AT&T Sales Representative to discuss alternatives.

If you have any questions about this notice, please contact your AT&T Sales Representative or call the toll free number on your billing statement.

Thanks for being a valued customer of AT&T.

1 The broadband services referenced in this letter are the following types of optical and packet-switched broadband transmission services provided by the AT&T operating companies: Frame Relay Service; Asynchronous Transfer Mode Service; Remote Network Access Service; Ethernet-Based Service; Video Transmission Service; Optical Transport Services; Optical Networking Service; and Frame-Based Transport Service.

2 Memorandum Opinion and Order, in the Matter of Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Docket No. 06-125 (Rel. October 12, 2007).

3 Contract tariffs will be maintained in their current form in an archive, which can be found at http://www.att.com/search/tariffs.jsp?category=FEDERAL
PLEASE READ THIS IMPORTANT MESSAGE

AT&T BUSINESS SERVICES AGREEMENT FOR BROADBAND

The AT&T Services Agreement for Broadband (Agreement) is the AT&T Broadband Services Terms of Service that you agree to by using the Services provided by AT&T. Read this Agreement carefully before proceeding. Use the AT&T Online Services Plan (OASP) application to log into the Services, or use the AT&T Online Services Plan (OASP) application to log into the Services, and you shall be bound by the terms and conditions of this Agreement. AT&T copyright notice and trademark information are also provided on the Services, and you shall be bound by the terms and conditions of this Agreement.

By using the Services, you agree to be bound by all of the terms and conditions of this Agreement, including the mandatory dispute resolution provisions contained herein and the AT&T Business Services Agreement for Broadband, as amended from time to time.

1. ACCESS TO SERVICE/NETWORK

1.1. Access to Network: AT&T services and network enjoy a high level of availability. However, AT&T reserves the right to access any service or network at any time for any reason, including maintenance or repairs, and you hereby agree that AT&T shall not be liable to you or any third party for any interruption of network service or for any loss or damage caused therein.

2. TERMS OF USE

2.1. Use of Services: AT&T services are available to you subject to availability and service limitations of AT&T, AT&T services may be discontinued, modified, or otherwise altered at any time without notice, and you agree that AT&T shall not be liable to you or any third party for any interruption of network service or for any loss or damage caused therein.

3. MODIFICATIONS TO THIS AGREEMENT

3.1. AT&T reserves the right to modify this Agreement at any time without notice. You may review the most current version of this Agreement by accessing the AT&T Online Services Plan (OASP) application.

4. USER ACCOUNTS

4.1. User Account: You will be provided with a User Account to access the Services. You are responsible for maintaining the confidentiality of your User Account and for all activities that occur under your User Account. You agree not to use the Services in any manner that could damage, disable, overburden, or impair the Services. You agree not to use the Services for any illegal or unauthorized purposes.

5. PRIVACY POLICY

5.1. Privacy Policy: AT&T's privacy policy for the Services is subject to change, and you agree to be bound by any such changes.

6. DISCLAIMER OF WARRANTIES

6.1. AT&T makes no warranty or representation of any kind, whether express or implied, as to the correctness, accuracy, reliability, or completeness of the information or data provided by or through the Services.

7. INDEMNIFICATION

7.1. You agree to indemnify and hold AT&T harmless from any claim or demand made by any third party arising out of or in connection with your use of the Services.

8. TERMINATION AND SERVICE SUSPENSION

8.1. You may terminate this Agreement at any time by disconnecting from the Services. If you terminate the Agreement, you agree to pay all amounts due to AT&T for the Services provided to you under this Agreement. AT&T reserves the right to terminate your Services at any time without notice if you fail to pay any amounts due to AT&T for the Services provided to you under this Agreement.

9. LIMITATION OF LIABILITY

9.1. AT&T is not liable for any damages or losses arising out of or in connection with the Services, including but not limited to, indirect, incidental, or consequential damages.

10. DISCLOSURES OF BUSINESS SERVICES

10.1. AT&T may disclose your account information or provide services to third parties, including but not limited to, AT&T authorized service providers, AT&T business partners, or AT&T affiliated companies.

11. TERMINATION

11.1. AT&T reserves the right to terminate this Agreement at any time without notice if you fail to pay any amounts due to AT&T for the Services provided to you under this Agreement.

12. GOVERNMENTAL REGULATIONS

12.1. AT&T is subject to various governmental regulations and requirements, including but not limited to, the Communications Act of 1934, as amended from time to time, the Federal Communications Commission, and other applicable laws and regulations.

13. MISCELLANEOUS

13.1. AT&T reserves the right to change the terms and conditions of this Agreement at any time without notice.

14. ATTORNEY'S FEES

14.1. AT&T is entitled to recover, in addition to any other relief to which you may be entitled, attorneys' fees and costs incurred in enforcing any of its rights under this Agreement.

15. ENTIRE AGREEMENT

15.1. This Agreement constitutes the entire agreement between you and AT&T and supersedes all prior negotiations, agreements, representations, and understandings, whether written or oral, relating to the subject matter or entered into in connection with the transaction of the Services.
8. THIRD PARTY CLAIMS

A. By AT&T, you agree to indemnify and hold harmless AT&T from any claims against you or claims asserted against you where the claims allege that a service violates any patent, trademark, copyright or trade secret, except where the claim arises out of your or your user's current or former modifications to the Services by you or third parties, or from any failure or non-performance of the Services with any software or products not provided by AT&T or AT&T affliates to you under your agreement with AT&T.

B. By AT&T, AT&T may waive any claim it may have against the AT&T entity which is subject to this Agreement if AT&T believes that waiving the claim will not adversely affect AT&T's business or customers.

8. LIMITATION OF LIABILITY

A. AT&T does not warrant that the Services will be uninterrupted or error-free; nor does AT&T make any representation whatsoever about the accuracy or completeness of any information that is provided through the Services.

B. AT&T shall not be liable to you or any third party for any breach of this Agreement or for any damages arising from or related to the use of the Services, including without limitation, loss of data, damage to property or physical injury.

9. SERVICE REGULATIONS

A. AT&T reserves the right to change or discontinue the Services at any time without notice, and AT&T shall not be liable for any direct, indirect, special, incidental or consequential damages that result from the discontinuation of the Services.

B. AT&T shall not be liable for any delays, failures or defects in the Services caused by factors beyond AT&T's control.

10. GENERAL PROVISIONS

A. Confidentiality and Ownership. Each party shall be responsible for maintaining the privacy of all information provided to it and the confidentiality of its confidential information, and shall use such information in accordance with the terms of this Agreement.

B. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

C. Entire Agreement. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

D. Amendments. This Agreement may be amended only by a written instrument signed by both parties.

E. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

F. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

G. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

H. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

I. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

J. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

K. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

L. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

M. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

N. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

O. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

P. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

Q. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

R. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

S. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

T. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

U. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

V. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

W. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

X. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.

Y. Governing Law. This Agreement shall be governed by the laws of the State of [State Name] without regard to its conflicts of law provisions.

Z. Governing Law. This Agreement constitutes the entire agreement between AT&T and you concerning the subject matter hereof, and supersedes all prior and contemporaneous communications and proposals between the parties.
APPENDIX B
AT&T HAS NOT YET WITHDRAWN ITS TARIFFS FOR BROADBAND SERVICES COVERED BY THE FCC's BROADBAND FORBEARANCE ORDER

Updated: January 21, 2008

The rates, terms and conditions applicable to your interstate broadband services subject to the FCC's Broadband Forbearance Order (Memorandum Opinion and Order, WC Docket No. 06-125 (Rel. Oct. 12, 2007)) are currently set forth in AT&T's FCC tariffs. The tariffs can be found at http://att.com/search/tariffs.jsp. On the effective date of tariff withdrawal, those rates, terms and conditions will be moved into AT&T's Interstate Guidebook (the Guidebook). The Guidebook will be posted here on or before the effective date of tariff withdrawal. AT&T's withdrawal of its tariffs will not change the rates, terms and conditions applicable to your services. Until the Guidebook is posted, please consult the tariffs for the rates, terms and conditions that apply to your services.

As of January 21, 2008, the effective date of the FCC tariff withdrawal is expected to occur no earlier than February 7, 2008. This is a change from previously provided information.

Please call your AT&T Sales Representative if you have any questions.
BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of

Petition for AT&T Inc. for Forbearance
Under 47 U.S.C. § 160(c) from Title II
and Computer Inquiry Rules with
Respect to Its Broadband Services

Petition of BellSouth Corporation for
Forbearance Under Section 47 U.S.C.
§ 160(c) from Title II and Computer
Inquiry Rules with Respect to Its
Broadband Services

WC Docket No. 06-125

EMERGENCY PETITION FOR
A DECLARATORY RULING OF TIME WARNER TELECOM INC.

November 21, 2007
Pursuant to Section 1.2 of the Commission’s regulations, 47 C.F.R. § 1.2, Time Warner Telecom Inc. ("TWTC"), by its attorneys, respectfully files this emergency petition seeking an expedited declaration clarifying the scope of the forbearance relief granted in the above-captioned proceedings in light of the merger commitments assumed by AT&T Corporation and legacy BellSouth Corporation (collectively, "AT&T") and in light of the terms of the forbearance order itself.

INTRODUCTION AND SUMMARY

In the conditions adopted in connection with the FCC’s approval of the AT&T-BellSouth merger, the merging parties committed not to “give effect to” any forbearance that “diminishes” or “supersedes” any of the other conditions set forth in the order. In the order adopted in this proceeding, the Commission partially granted AT&T relief from dominant carrier regulation with regard to non-TDM services such as Ethernet and OCn services. In that forbearance order, however, the Commission reaffirmed that AT&T’s existing tariffing, price freeze, pricing flexibility, and facilities discontinuance requirements continue to apply to AT&T, holding that “[t]he limited forbearance relief granted herein does not affect in any way the full force and effect of the merger conditions adopted in the AT&T/BellSouth Order.”¹ Moreover, in a statement issued with the Commission’s order, Commissioner Robert M. McDowell explained that AT&T has a continuing obligation to comply with its “existing tariffing, price freeze and facilities discontinuance requirements for non-TDM-based business broadband services” until December 29, 2010 when its merger commitments expire. Id.

On November 15, 2007, however, AT&T sent a letter advising broadband providers that it “will no longer be offering new Pricing Flexibility Contract Tariffs for certain services.” This is a clear violation of AT&T’s duty to continue to offer non-TDM-based broadband services under tariff until the expiration of the merger conditions. AT&T has also indicated that it will no longer comply with its existing tariffing or pricing flexibility requirements for non-TDM-based business broadband services.  

As TWTC explained during the AT&T forbearance proceedings, AT&T has a continuing obligation to comply with its merger commitments. The Commission expressly adopted these commitments to protect the “public interest.” Section 10 of the Communications Act only allows the Commission to grant forbearance when doing so would further the “public interest.” Accordingly, the Commission cannot eliminate the merger commitments without running afoul of Section 10 of the Communications Act and the Administrative Procedure Act. As part of its

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5 See In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, 22 FCC Red 5662, ¶¶ 19-22 (2007) (“AT&T/BellSouth Order”) (the Commission adopts narrowly-tailored, transaction-specific conditions to ensure that the public interest is served by the transaction); 47 U.S.C. §310(d) (2007); see also 47 U.S.C. § 214 (2007).

6 See AT&T Forbearance Order at ¶ 16 (forbearance only where it would further the public interest); 47 U.S.C. § 160(a) (2007) (same).

obligation to comply with the merger commitments, AT&T must maintain its tariffs for all special access services, including Ethernet and OCn services. The Commission conditioned the grant of forbearance to AT&T on its elimination of tariffs for the services subject to the forbearance order. Thus, compliance with the merger conditions in this case precludes AT&T from taking advantage of any part of the forbearance order. In light of AT&T's recent announcement, TWTC respectfully asks the Commission to promptly clarify that AT&T must continue to offer its Ethernet and OCn special access services subject to dominant carrier regulation, including the existing tariffing, price freeze, pricing flexibility, and facilities discontinuance requirements applicable today, until the expiration of the AT&T-BellSouth merger conditions.

DISCUSSION

Tariffs are vital to maintaining competition and protecting the public interest. Threats to competition derive not only from higher tariff rates but also from discriminatory tariff rates that favor affiliated parties as well as other favored customers. For example, the "filed-rate doctrine" exists "to prevent discrimination among consumers" purchasing tariffed services.\(^8\) As the Supreme Court has explained, "[i]t is that anti-discriminatory policy which lies at the heart of the common-carrier section of the Communications Act."\(^9\)

In adopting the merger commitments, the Commission required AT&T to comply with its existing tariffing requirements for non-TDM-based business broadband services until December 29, 2010. See AT&T/BellSouth Merger Order, App. F; AT&T Forbearance Order, Statement of

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\(^8\) *Bryan v. BellSouth Comms'ns, Inc.*, 377 F.3d 424, 429 (4th Cir. 2004); see *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004); *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1998).

Commissioner Robert M. McDowell. As discussed above, the merger commitments forbid AT&T from “giv[ing] effect to” any forbearance grant that would “diminish” the merger commitments. A number of merger commitments, however, would be diminished if AT&T failed to comply with its existing tariffing requirements. In particular, the AT&T/BellSouth Merger Order’s “special access” conditions impose a host of tariff-related requirements.

Eliminating these tariffs would gut the effectiveness of the merger commitments and thereby “diminish” AT&T’s obligations under the merger commitments. See AT&T/BellSouth Merger Order, App. F, Forbearance Condition No. 2. Accordingly, the Commission should issue a declaration requiring AT&T to continue to comply with its existing tariffing requirements and continue to file tariffs with the Commission. Moreover, under the terms of the AT&T Forbearance Order, AT&T must offer any tariffed service subject to the full panoply of dominant carrier regulation.

I. The Merger Commitments Require That AT&T Continues To File And Maintain Dominant Carrier Tariffs With The Commission.

As an initial matter, the merger commitments themselves require AT&T to continue to file tariffs with the Commission. For example, Special Access Condition No. 2 states that AT&T shall not increase rates for services offered “pursuant to, or referenced in TCG FCC Tariff No. 2.” Id., App. F, Special Access Condition No. 2. Accordingly, Condition No. 2 expressly requires AT&T to retain TCG FCC Tariff No. 2.

Similarly, the rate freeze and rate reduction requirements in Special Access Condition Nos. 5 and 6 impose limits on AT&T’s ability to increase the prices for OCn and Ethernet. Id., App. F, Special Access Condition Nos. 5 & 6. These provisions are expressly drafted as requiring implementation through filed tariffs. Condition No. 5 states that “[n]o AT&T/BellSouth ILEC may increase the rates in its interstate tariffs, including contract tariffs,
for special access services that it provides in the AT&T/BellSouth in-region territory, as set forth in tariffs on file at the Commission on the Merger Closing Date, and as set forth in tariffs amended subsequently in order to comply with the provisions of these commitments.” Id., App. F, Special Access Condition No. 5 (emphasis added). Special Access Condition No. 6 likewise requires that AT&T reduce the Ethernet services offered in its “tariffs.” Id., App. F, Special Access Condition No. 6 (emphasis added). Indeed, as modified by the March 26, 2007 Order on Reconsideration, Condition No. 6 requires AT&T to reduce its rates for DS1, DS3 and Ethernet by filing “all tariff revisions necessary to effectuate” this requirement and by maintaining reduced rates “until 39 months after the day the AT&T/BellSouth incumbent LECs file with the Commission the final tariff revisions necessary to effectuate this commitment.”

Moreover, such tariffs must be dominant carrier tariffs. If AT&T were to cease filing dominant “interstate tariffs” and “contract tariffs,” then various regulations, such as notice periods before the tariff becomes effective, would be eliminated. This would gut the effectiveness of special access rate protections. See 47 U.S.C. § 203 (2007); 47 C.F.R. §§ 61.1-61.193. Under the dominant carrier tariffing process, customers are provided 15 days notice before a tariffed rate increase becomes effective (see 47 U.S.C. § 204(a)(3) (2007)) and can petition to have the tariff suspended before the rate change goes into effect. This allows the customers to seek a suspension and investigation of the tariff, pursuant to which the customer receives a refund for rates deemed unlawfully high. A rate increase for a service subject to nondominant tariff filing requirements need only be filed on one day’s notice. See 47 C.F.R. § 61.23 This essentially means that the purchaser must file a complaint challenging the rate after the tariff takes effect and wait many months (see Order ¶ 36) before the complaint is resolved. In the meantime, the customer must pay substantial sums to AT&T for what may be an illegally
priced service. Moreover, because the burden of proof falls on the complainant in a formal complaint, the customer is less likely to be able to recoup these losses than would be the case if it had the opportunity to challenge the tariff, for which the carrier bears the burden of proof, before it takes effect.\textsuperscript{10} Such an outcome would obviously "diminish" AT&T's obligations under these merger commitments in violation of the \textit{AT&T/BellSouth Merger Order}.\textsuperscript{11} Accordingly, AT&T has a continuing obligation to file and maintain dominant carrier tariffs with the Commission for its special access services, and the Commission should issue a declaration requiring it to do so.

II. **Eliminating Tariffs Would “Diminish” The Effectiveness Of The Rate Reduction And Rate Freeze Requirements In The Merger Conditions.**

Eliminating tariffs would also "diminish" the effectiveness of the rate reduction and rate freeze requirements in the merger conditions. \textit{See id.}, App. F, Special Access Condition Nos. 5-6. As discussed above, tariffs are essential to preventing rate discrimination in favor of affiliated entities and against unaffiliated entities.\textsuperscript{12} Accordingly, AT&T has an obligation to continue to comply with its existing tariffs under the \textit{AT&T/BellSouth Merger Order}.


\textsuperscript{11} \textit{See AT&T/BellSouth Merger Order}, App. F, Forbearance Condition No. 2 (prohibiting AT&T from giving effect to any forbearance order that would diminish its merger commitments).

\textsuperscript{12} \textit{Bryan v. BellSouth Commc'ns, Inc.}, 377 F.3d 424, 429 (4th Cir. 2004); \textit{see Hill v. BellSouth Telecomm's., Inc.}, 364 F.3d 1308, 1316 (11th Cir. 2004); \textit{Marcus v. AT&T Corp.}, 138 F.3d 46, 58 (2d Cir. 1998). Indeed, Footnote 7 of the merger commitments states that the reference to services provided to AT&T's separate affiliates in the merger commitments "shall not be construed to require AT&T/BellSouth to provide any service through a separate affiliate if AT&T/BellSouth is not otherwise required by law to establish such separate affiliate." \textit{See id.}, App. F, Special Access Condition No. 4 n.7. Such a statement is conspicuously absent with regard to AT&T's tariff-filing obligations, yielding the obvious inference that the conditions should be interpreted as requiring continued tariff-filing obligations.
Without tariffs, AT&T could make an offer to an affiliated customer without other customers having any knowledge of or ability to benefit from such an offer. Most obviously, AT&T could charge itself low rates for Ethernet/OCn special access as an input to finished Ethernet/OCn services that include both special access services and other components, such as long-haul service. Absent tariffs, competitors could find themselves in a price squeeze, and the rate reduction and rate freeze requirements in the merger conditions would effectively be useless to a competitor seeking to rely on the services subject to the merger condition rate regulations as a means of competing with AT&T.

Price squeezes are hardly a remote concern for the Commission. In fact, concerns over BOC price squeezes, including AT&T-led price squeezes, caused the Commission to condition the grant of non-dominant treatment of BOC in-region long distance services, including long-distance Ethernet and OCn services, on the BOCs imputing to their retail long-distance services the rates for special access.13 Absent tariffs, such imputation requirements would be unenforceable for special access services, because there would be no set special access rate – only a series of negotiated rates, each one potentially different from the next. The threat to competition is very real. As TWTC demonstrated in the AT&T forbearance proceeding, AT&T’s wholesale Ethernet and OCn prices far exceed competitive wholesalers’ rates.14 It is logical to infer that AT&T’s rates are far above AT&T’s costs. Accordingly, absent tariffs, AT&T could retain these high wholesale rates for competitors while charging itself only the costs of providing the services. In doing so, AT&T could engage in a classic price squeeze by


14 See e.g., Letter of Thomas Jones, Counsel, Time Warner Telecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-125 (filed Sept. 18, 2007).
charging prices for its downstream retail Ethernet/OCn service that are lower than its upstream special access Ethernet/OCn prices. Nor is there any basis in the AT&T Forbearance Order for concluding that facilities-based provision of Ethernet/OCn special access would prevent AT&T from engaging in this conduct. This is because the FCC never analyzed the level of competition in this market. It instead relied exclusively on the level of competition in the downstream, mostly long distance, retail market as the basis for granting AT&T forbearance. See AT&T Forbearance Order ¶¶ 21-22.

Absent tariffs, no statutory provision prevents AT&T from engaging in harmful competitive practices, such as price squeezes. For example, although Section 202(a) prohibits unreasonable discrimination in charges and services, this provision does not impose a meaningful constraint on the conduct of a non-dominant carrier that is free of tariff-filing requirements. See, e.g., Orloff v. FCC, 352 F.3d 415 (D.C. Cir. 2003) (upholding FCC order allowing non-dominant mobile wireless carriers to engage in widespread discrimination).

Thus, eliminating tariff-filing requirements would give AT&T carte blanche to lower prices for OCn and Ethernet services selectively in a manner that would harm competition. Eliminating tariffing would “diminish” the effectiveness of the rate freeze and rate reductions in the AT&T-BellSouth Merger Order, because it would allow AT&T to offer itself much steeper rate reductions than are available to competitors. In other words, the rate reductions and freezes required by the merger commitments would be substantially less meaningful in the absence of tariff-filing obligations. Indeed, in the absence of tariffing obligations, the merger commitments could only be effective if AT&T had been required to charge Ethernet/OCn at cost-based rates – thus eliminating the risk of a price squeeze. AT&T, however, currently has no obligation to do so.
Accordingly, AT&T has an obligation to continue to comply with its existing tariffing obligations under the AT&T/BellSouth Merger Order. Failing to comply with existing tariffing obligations would diminish the merger commitments, which the Commission designed to promote competition in the telecommunications marketplace.

III. AT&T’s Failure to File Tariffs Would Also “Diminish” the Effectiveness of Other Merger Commitments.

AT&T’s failure to file tariffs would also “diminish” the effectiveness of other merger commitments. For example, Special Access Condition No. 3 prohibits AT&T from providing any “special access offerings” to its wireline affiliates that are not available to other similarly-situated special access customers “on the same terms and conditions.” This provision would be virtually impossible to enforce absent tariffs. Without tariffs, neither similarly-situated customers nor the Commission itself would know what special access services AT&T has provided to its wireline affiliates. They would instead be left to trust AT&T to comply with the requirement. Indeed, the very existence of merger conditions such as Special Access Condition No. 4 shows that trusting AT&T (in light of its unwholesome incentives) is insufficient.

Condition No. 4 requires AT&T to certify that it has provided “contract tariffed services” to “unaffiliated customer[s]” before providing services to a Section 272 affiliate. This provision demonstrates that the Commission determined that enforcement through certification and tariff-filing obligations was necessary to give meaning to Condition No. 3. Accordingly, eliminating AT&T’s tariffing obligations would diminish Special Access Condition No. 3, and it would also effectively eliminate key protections provided in Condition No. 4.

Similarly, Special Access Condition No. 7 requires AT&T to accept mediation for any disputes (1) “relating to AT&T/BellSouth’s compliance with the rates, terms and conditions set forth in its interstate special access tariffs,” and (2) relating “to the lawfulness of the rates, terms,
and conditions in such tariffs.” See id., App. F, Special Access Condition No. 7. These requirements are only meaningful if the rates, terms and conditions at issue are set forth in tariffs, because they only apply to such rates, terms, and conditions. Moreover, in the absence of tariff-filing requirements, a purchaser would likely be unaware of the terms and conditions included in service arrangements entered into between AT&T and other customers for OCn/Ethernet. Accordingly, the purchaser could not feasibly challenge such rates, terms, and conditions in a mediation proceeding. In this manner, the mediation provision would be “diminished” absent tariff-filing requirements.

Special Access Condition No. 8 likewise prohibits AT&T from including a bar on purchasing UNEs in a tariffed special access service offering (including one for OCn or Ethernet). See id., App. F, Special Access Condition No. 8. Again, this prohibition would have no effect absent tariff-filing requirements. Similarly, Special Access Condition No. 9 requires AT&T to “file one or more interstate tariffs that make available to customers of . . . Ethernet service reasonable volume and term discounts without minimum annual revenue commitments (MARCs) or growth discounts.” See id., App. F, Special Access Condition No. 9. This provision would be nullified if AT&T could withdraw its tariffs for Ethernet services.

IV. Enforcement Of The Merger Condition Tariff-Filing Requirement Precludes AT&T From Taking Advantage Of Any Aspect Of The Forbearance Order.

In the AT&T Forbearance Order, the Commission explained that it “condition[ed] the forbearance relief granted to AT&T on its not filing or maintaining any interstate tariffs for its specified broadband services.” AT&T Forbearance Order ¶ 42. Indeed, the Commission concluded that this condition was “necessary to protect consumers and the public interest.” Id. It follows therefore, that compliance with the merger conditions precludes AT&T from taking advantage of any aspect of the relief granted in the AT&T Forbearance Order until the merger
conditions expire. This means that the full panoply of dominant carrier regulations must apply to AT&T’s provision of OCN and Ethernet special access services until the expiration of the merger conditions.

In sum, the merger commitments make clear that AT&T has a continuing obligation to file and maintain tariffs with the Commission. In this context, tariffs essentially create a transparent marketplace that ensures compliance with rate reduction and rate freeze requirements while protecting against discrimination and other consequential harms. If AT&T fails to maintain tariffs with the Commission, however, a host of merger commitments would either be nullified outright or at least have their effectiveness diminished substantially. In the absence of tariff-filing protections, AT&T could simply (1) refuse to offer the services protected by the merger commitments, (2) discriminate against unaffiliated broadband providers, and (3) keep prices, terms, and conditions hidden, thus raising significant burdens to enforcing the merger commitments effectively. Absent tariffs, competition would suffer, and the public interest would suffer as well. These harms would be particularly damaging because they would negatively impact broadband deployment to business customers and undermine the Commission’s goal of expanding broadband penetration throughout the United States. Moreover, under the terms of the AT&T Forbearance Order, compliance with the merger conditions requires that AT&T continue to offer OCN and Ethernet special access services subject to dominant carrier regulation. Accordingly, the Commission should promptly issue a declaration requiring AT&T to continue to comply with such dominant carrier regulation.

**CONCLUSION**

Accordingly, the Commission should promptly issue a declaration requiring AT&T to continue to comply with its merger commitments, and this obligation further requires that AT&T
offer OCn and Ethernet special access services subject to the full panoply of dominant carrier regulations.

Respectfully submitted,

/s/

Thomas Jones
Jonathan Lechter
Benjamin Shapiro

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1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM INC.

November 21, 2007
EXHIBIT
AT&T 13-STATE - New Non-Dominant Broadband Forbearance Pricing Contract Process

Date: November 15, 2007

Number: ACCESS07-085

Category: Special Access

Issuing ILECS: AT&T Illinois, AT&T Indiana, AT&T Ohio, AT&T Michigan, AT&T Wisconsin, AT&T California, AT&T Nevada, AT&T Arkansas, AT&T Kansas, AT&T Missouri, AT&T Oklahoma, AT&T Texas and AT&T Connecticut (collectively referred to for purposes of this Accessible Letter as “AT&T 13-State”)

Contact: Account Manager

Effective November 15, 2007, pursuant to the FCC’s Memorandum Opinion and Order, In the Matter of Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules With Respect to Its Broadband Services, WC Docket. No. 06-125 (released October 12, 2007) (“Broadband Forbearance Order”), AT&T 13-State, will no longer be offering new Pricing Flexibility Contract Tariffs for certain services. Instead, AT&T 13-State will be offering new Non-Dominant Broadband Forbearance Pricing Contracts (Broadband Service Agreements) for such services. In connection with that change, AT&T 13-State will implement a new Non-Dominant Broadband Forbearance Pricing Contract Process. The new process will only affect optical services and packet-switched services operating at speeds of 200Kbps or greater ordered under Broadband Service Agreements.

As part of the new contract process, a unique nine-digit contract number will be assigned to each Broadband Forbearance Agreement, and the customer must place that number in the PNUM (promotional number) field on all access service requests (ASRs) to ensure the appropriate contract price is applied to the service or services ordered. If the customer fails to include its nine-digit contract number on the ASR, in the PNUM field, the appropriate contract price will not be applied to the service or services ordered. Here is an example of the unique nine-digit contract number:

PCS070001 (PC represents ‘per contract’; S represents the Southwest region; 07 represents 2007; 001 represents the contract number) (NOTE: S=Southwest; W=West; M=Midwest; E=East)

AT&T 13-State reserves the right to make any modifications to or cancel the above information prior to the proposed effective dates. Should any modifications be made to the information, these modifications will be reflected in a subsequent letter. AT&T 13-State will incur no liability to the customer if such information, mentioned above, is cancelled or is not ultimately put into effect.

Please refer all questions to your Account Manager.
APPENDIX D
BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of

Petition of AT&T for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services

BellSouth Petition for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services WC Dkt. No. 06-125

CompTel Petition for Declaratory Ruling

Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc.

REPLY COMMENTS OF TIME WARNER TELECOM

Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, D.C. 20006
(202) 303-1000

ATTORNEYS FOR TIME WARNER TELECOM INC.

January 11, 2008
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BEFORE THE
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WASHINGTON, D.C.

In the Matter of

Petition of AT&T for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services

BellSouth Petition for Forbearance Under 47 U.S.C. § 160 From Title II and Computer Inquiry Rules with Respect to its Broadband Services

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Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc. WC Dkt. No. 06-125

REPLY COMMENTS OF TIME WARNER TELECOM

Time Warner Telecom Inc. ("TWTC"), by its attorneys, hereby files reply comments in support of its petition for declaratory ruling and CompTel’s similar petition for declaratory ruling filed in the above referenced docket.¹

I. INTRODUCTION AND SUMMARY

When the FCC approved the merger between AT&T and BellSouth in December 2008,² Commissioner Copps pointed out, that it was “the largest telecommunications

¹ See Emergency Petition for a Declaratory Ruling of Time Warner Telecom Inc., WC Docket No. 06-125 (filed Nov. 21, 2007) ("TWTC Petition"); CompTel Petition for Declaratory Ruling, WC Dkt. No. 06-125 (filed Nov. 13. 2007).

² See AT&T Inc. and BellSouth Corporation Application for Transfer of Control, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) ("Merger Order").
merger ever."³ There were only four Commissioners at the time, two of whom (Chairman Martin and Commissioner Tate) had supported approval of the merger without conditions. In order to garner the majority required for approval, however, AT&T and BellSouth had needed to convince either Commissioner Copps or Commissioner Adelstein that the proposed merger was in the public interest. Yet both of those Commissioners concluded that conditions were necessary to address the threat to consumer welfare posed by the merger. The need for conditions was especially necessary "to rectify years of decisions that have undercut competition,"⁴ and the Commission's past failure to comply with its "obligation to encourage the kind of fair competition necessary to protect consumers." *Copps Merger Order Statement* at 169. As Commissioner Copps explained, "[n]owhere" had "the FCC's folly in de-regulating without ensuring competition [been] more apparent than in the special access market."

*Id.* at 173. Accordingly, in order to obtain Commissioner Copps' and Commissioner Adelstein's support, AT&T agreed to comply with a comprehensive set of Special Access Merger Conditions designed to "restore balance by reinstating price caps," prevent "anti-competitive contract conditions" and otherwise constrain AT&T's exercise of market power. *Id.*

At the time the Commission adopted the Special Access Merger Conditions, AT&T was subject to dominant carrier tariffing obligations for all of its special access service offerings. Commissioners Copps and Adelstein concluded, however, that such

³ *Merger Order*, Concurring Statement of Commissioner Michael J. Copps, at 169 ("*Copps Merger Order Statement*").

⁴ *Merger Order*, Concurring Statement of Commissioner Jonathan S. Adelstein, at 175 ("*Adelstein Merger Order Statement*").
regulation was insufficient because it was “well-documented” that AT&T and BellSouth abused their market power in the provision of special access services, and the proposed merger made this problem even worse. *Id.* at 170. The Special Access Merger Conditions therefore expressly relied upon the continued application of tariffs and required that AT&T comply with additional regulations designed to make the existing regulatory framework more effective. Moreover, because Commissioners Copps and Adelstein knew that the Commission might well continue its “folly of de-regulating without ensuring competition” in future forbearance proceedings, the Merger Conditions state that AT&T may not “give effect to any future grant of forbearance that diminishes or supersedes” AT&T’s obligations under the Merger Condition (hereinafter the “Forbearance Merger Condition”).

Unfortunately, just as Commissioners Copps and Adelstein anticipated, AT&T is now trying to use a decision yielded by the obviously flawed forbearance process to avoid complying with the commitments it made in order to obtain approval of its merger with BellSouth. Relying on the FCC grant of forbearance with regard to business broadband special access service, AT&T just this week filed with the FCC tariff transmittals which seek to withdraw its tariffs for Ethernet, OCn and other business broadband special access services. Although this is precisely the type of action

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prohibited by the Forbearance Merger Condition, AT&T argues strenuously that the prohibition on giving effect to forbearance does not mean what it says.

AT&T asserts that CompTel’s and TWTC’s requests for a declaratory ruling prohibiting AT&T from withdrawing its tariffs are in fact untimely petitions for reconsideration of the Forbearance Order since CompTel and TWTC purportedly seek to change the “effective date” of that order. This is plainly wrong. The prohibition against giving effect to the Forbearance Order does not change the “effective date” of that order for purposes such as the deadline for filing appeals and reconsideration petitions. In any event, AT&T does not believe its own argument since it concedes that the Merger Conditions prevent it from giving effect on the “effective date” set forth in the Forbearance Order to at least some of the relief (e.g., the freedom from rate regulation) otherwise available under the non-dominant classification granted in that order.

AT&T also argues that the terms of the Forbearance Order unambiguously state that the Merger Conditions have no bearing on the relief otherwise available under the Forbearance Order. But that order expressly states that it “does not affect in any way” enforcement of the Merger Conditions. Given that Commissioner McDowell clarified that AT&T is not “relieved from existing tariffing” obligations until “the expiration of the voluntary merger conditions” and Commissioners Adelstein and Copps voted against relieving AT&T of its tariffing obligations, a majority of the Commission agrees that the Forbearance Order in no way permits AT&T to withdraw its tariffs until the expiration of the Merger Conditions.

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2008); Southwestern Bell Telephone Company, Revision, Tariff F.C.C. No. 73, Transmittal No. 3249 (filed Jan. 7, 2008).

AT&T next asserts, implausibly, that Commissioners Copps and Adelstein did not think that tariffs were a necessary underpinning of the Merger Conditions. But Commissioners Copps and Adelstein insisted on the Special Access Merger Conditions because past FCC regulation of AT&T’s special access, which included dominant carrier tariff-filing requirements, was insufficient to constrain AT&T’s market power. Tariffs form the very foundation of the further obligations established in the Merger Conditions. It is therefore fantasy to assert that Commissioners Copps and Adelstein considered tariffs unnecessary to enforce the Conditions.

AT&T argues that the purpose and logic of the Merger Order and the Forbearance Order justify eliminating tariffs. But the purpose of the Merger Conditions was to constrain AT&T’s ability to exploit its control over “the only choice most companies have for business access services.” Copps Merger Order Statement at 169. Indeed, Commissioners Copps and Adelstein both rejected the analysis of the market in the Merger Order as fatally flawed, and they insisted on conditions notwithstanding that analysis. Moreover, AT&T’s own concession that it must comply with price limits in the Merger Conditions that are completely inconsistent with non-dominant classification shows that the purpose and logic of the Forbearance Order is irrelevant. Accordingly, the purpose of the Merger Conditions must control the analysis, and that purpose would be substantially frustrated without tariff filings. Without tariff filings, AT&T would be free to abuse its market power by engaging in price discrimination, including price squeeze tactics, and the imposition of unreasonable contract terms without detection.

In all events, the terms of the Special Access Merger Conditions on their face demonstrate that elimination of tariffs would diminish or supersede AT&T’s obligations
under the Conditions. Many of the Special Access Conditions (including Conditions 2, 4, and 5) apply only to the services AT&T offers under tariffs, virtually none of them can be sufficiently enforced without tariffs, and even AT&T admits that one of them expressly requires that AT&T file tariffs. The Commission should therefore issue a declaratory ruling clarifying that the Merger Conditions prohibit AT&T from withdrawing its broadband business tariffs until the expiration of the Conditions. Moreover, the Commission must do so promptly given that AT&T has already filed notice of the withdrawal of its broadband business special access tariffs.

II. THE TWTC AND COMPTEL PETITIONS FOR DECLARATORY RULING ARE NOT UNTIMELY PETITIONS FOR RECONSIDERATION

AT&T argues that the petitions for declaratory ruling should be treated as untimely petitions for reconsideration of the Forbearance Order, because TWTC and CompTel purportedly seek to change the Forbearance Order by delaying its “effective date” until 2010. But this is not so. The fact that the Forbearance Order “took effect” pursuant to its ordering clauses on October 11, 2007 has no bearing on whether AT&T may give effect to that forbearance and withdraw its tariffs. This is so for several obvious reasons.

First, AT&T’s argument rests on the assumption that the date on which AT&T may “give effect” to the relief granted in the Forbearance Order is in all respects the same as the “effective date” set forth in the ordering clauses. This is incorrect. The effective date of the Forbearance Order serves several critical functions, such as starting the clock for filing petitions for review and reconsideration, that have nothing to do with

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8 Opposition of AT&T Inc. to Petitions for Declaratory Ruling Filed by CompTel and Time Warner Telecom, WC Dkt. No. 06-125, at 5 (filed Dec. 21, 2007) (“AT&T Opposition”).
when AT&T may give effect to the relief granted therein. It follows that TWC’s and CompTel’s petitions seeking clarification that AT&T may not “give effect” to the relief granted in the Forbearance Order are not in fact requests that the FCC change the “effective date” of October 11, 2007 set forth in the order itself.

Indeed, the ordering clauses of FCC orders often state that an order is “effective” immediately or following Federal Register publication, thus starting the clock for filing appeals and petitions for reconsideration, even though parties are precluded from giving effect to the outcome prescribed in the order until a later date. For example, the ordering clauses in the Commission’s order granting in part Qwest’s petition for forbearance from UNE obligations in Omaha state that the order became “effective” on September 16, 2006, one day following its release.⁹ However, the order also stated that Qwest was required to continue providing UNEs to competitors for six months following the effective date of the order. See Qwest Omaha Order ¶ 74. Qwest itself filed a petition for review of the order within the time allotted from the “effective date” of the order even though Qwest was still required to provide UNEs to competitors at that time. This delay in the relief provided by the order was nowhere to be found in the order’s ordering clauses.

Similarly, the FCC granted AT&T’s petition for forbearance from dominant carrier regulation for its integrated in-region interexchange operations, but that relief took

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⁹ See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area, Memorandum Opinion and Order, 20 FCC Rcd 19415, ¶ 114 (2005) ("Qwest Omaha Order").
effect only if and when AT&T complied with several conditions. This was so despite
the fact that the ordering clauses stated that the order would be effective (with respect to
AT&T’s forbearance petition) the day after its release. See id. ¶ 141.

Second, and perhaps most fundamentally, AT&T’s argument contradicts its own
interpretation of the Merger Conditions. AT&T concedes, as it must, that it must comply
with the price limits and prohibitions on anti-competitive contract terms in the Merger
Conditions. See AT&T Opposition at 6. But a “fully effective” forbearance order would
of course free AT&T entirely from such regulation. Moreover, nothing in the
Forbearance Order’s ordering clauses states that AT&T may not give effect to the
freedom to increase prices or include certain types of provisions in its contracts until the
merger conditions expire. This omission only underscores the fact that the “effective
date” of the forbearance order is irrelevant to the question at hand.

Third, the language of the Forbearance Condition supports the conclusion that it
applies even if the FCC grants AT&T forbearance in an order with an effective date prior
to the expiration of the merger conditions. That Condition states that AT&T may not give
effect to forbearance. This restriction is only meaningful after a forbearance order takes
effect. If the FCC were to delay the effective date of a forbearance order until the
conclusion of the merger conditions, the prohibition against AT&T giving effect to the
forbearance order would be irrelevant. It is therefore entirely “credible,” indeed
eminently logical, for CompTel and TWTC to seek enforcement of the prohibition

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10 See Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements
et al., Report and Order and Memorandum Opinion and Order, 22 FCC Rd 16440, ¶ 95
(2007) ("Interexchange Non-Dominance Order").
against AT&T giving effect to the *Forbearance Order* without at the same time seeking reconsideration of that order.

III. **THE FORBEARANCE ORDER AS WELL AS THE PURPOSE AND TEXT OF THE MERGER CONDITIONS SUPPORT THE TWTC AND COMPTEL PETITIONS FOR DECLARATORY RULING**

In its attempt to avoid complying with its obligations under the Merger Conditions, AT&T offers only overblown rhetoric and unreasonable, self-serving interpretations of the purpose and terms of the *Forbearance Order* and the Special Access Merger Conditions themselves.

A. **The Terms And Context Of The *Forbearance Order* Support The Conclusion That AT&T May Not Withdraw Its Broadband Business Tariffs**

AT&T asserts that the FCC’s statement in paragraph two of the *Forbearance Order* that the relief granted therein “does not effect in any way the full force and effect of the merger conditions” is clear on its face and means that those conditions would not be diminished or superseded by the elimination of tariffs. *See AT&T Opposition* at 6. As TWTC explained in its petition, it is equally logical to interpret this statement to mean that the full force and effect of the merger conditions apply *notwithstanding* the relief granted in the *Forbearance Order*. Moreover, the context in which the Commission made this statement confirms that TWTC’s interpretation is the correct one. *See TWTC Petition* at 3-4.

To begin with, while Commissioner McDowell voted in favor of the *Forbearance Order*, he clarified in his separate statement that the merger commitments prevent AT&T from giving effect to the relief otherwise available under the *Forbearance Order*. As Commissioner McDowell explained, “Upon the expiration of the voluntary merger conditions agreed to by AT&T as the result of its merger with BellSouth, after December
29, 2010, AT&T will be relieved from existing *tariffing*, price freeze and facilities discontinuance requirements for non-TDM-based business broadband services.”

*McDowell Statement* at 45. AT&T’s only response to Commissioner McDowell’s statement is to demean his intelligence, arguing that he was “presumably unaware of the history and context of these merger commitments.” *AT&T Opposition* at n.42. This is ridiculous. Commissioner McDowell obviously knew exactly what he was doing and was fully aware of the context and import of his statement.

In fact, given Commissioner McDowell’s position, three (a majority) of the Commissioners voted either to deny the AT&T forbearance petition outright (as Commissioners Copps and Adelstein did) or clarified that AT&T could not give effect to the forbearance grant until the expiration of the merger conditions. Therefore, three Commissioners believed that AT&T should comply with tariffing requirements for its broadband services until the merger conditions expired.

The views and intent of commissioners must be accounted for in clarifying the meaning of an order. Indeed, AT&T itself agrees that Commissioners’ statements are important guides to the meaning of agency orders.\(^\text{11}\) Moreover, courts routinely rely on commissioner statements to determine the meaning of administrative decisions.\(^\text{12}\) Given Commissioner McDowell’s statement and Commissioner Copps’ and Adelstein’s

\(^{11}\) *See id at 7* (relying on AT&T’s (incorrect) interpretation of Commissioners Copps and Adelstein’s separate statements on the *Merger Order*).

\(^{12}\) *See Allied Broad, Inc. v. FCC*, 435 F.2d 68, 71 (D.C. Cir. 1970) (concluding that the Commissioner’s “statement clearly indicated that CATV would be considered a medium of mass communications…”); *Cellnet Communication, Inc. v. FCC*, 965 F.2d 1106, 1110 (D.C. Cir. 1992) (relying on a single dissenting Commissioner’s view of the meaning of the majority’s order to interpret that order); *Democratic Nat’l Comm. v. FCC*, 717 F.2d 1471, 1479 (D.C. Cir. 1983) (relying on commissioners’ concurring statements to interpret an FCC order); *Northeast Broad. v. FCC*, 400 F.2d 749, 760 (D.C. Cir. 1968).
rejection of the petition and their clear preference for tariffing, there can therefore be no question that a binding plurality of the FCC’s commissioners voted to maintain tariffs on AT&T’s broadband services until 2010.

B. The Merger Conditions Themselves Prohibit AT&T From Withdrawing Its Broadband Business Service Tariffs

AT&T offers a series of unpersuasive arguments in support of its interpretation of the terms of the Merger Conditions in its attempt to show that those obligations are not in any way diminished or superseded by the withdrawal of its tariffs. The more logical and natural reading of the conditions is that they preclude AT&T from withdrawing its tariffs.

First, AT&T argues that the “champions” of the merger conditions, Commissioners Copps and Adelstein, understood the conditions “to impose a price ceiling or limit, rather than an obligation to file or maintain tariffs.” AT&T Opposition at 7. There is no basis for this assertion in either the text of the Commissioners’ separate statements or in basic logic. Commissioner Copps’ statement that the FCC reinstituted “price caps” in those areas where AT&T had previously received pricing flexibility means that the FCC effectively reimposed price cap regulation, a system that “operates through the tariff review process.” Commissioner Adelstein similarly sought to impose a “price freeze” to ensure that the Commission impose more effective tariff regulation on AT&T than had existed prior to the conditions. Moreover, it is also clear that Commissioners Copps and Adelstein believed that tariffs were necessary to prevent the inclusion of anticompetitive terms in AT&T’s contracts.

These conclusions comport with Commissioners’ Adelstein and Copps’ underlying (and correct) convictions that the AT&T and BellSouth merger “would result

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in a new company . . . controlling the only choice most companies have for business access services” (Copps Merger Order Statement at 169), that such an entity would “use its stranglehold over business access services” (id. at 173) and that conditions were therefore necessary to “protect against the loss of competition” caused by the merger. Adelstein Merger Order Statement at 178. These are the same convictions that caused these two Commissioners to vote against AT&T’s request that it be relieved of tariff filing obligations. It is not plausible to assert, as AT&T does, that either Commissioner Copps or Commissioner Adelstein believed that the Special Access Merger Conditions would be just as effective without tariffs, the central mechanism for preventing the abuse of market power in the Communications Act, as with tariffs.

Second, AT&T asserts that enforcing the merger conditions is inconsistent with the purpose of the Merger Order (in which, AT&T argues (see AT&T Opposition at 16) that the FCC found that “the merger raised no competitive issues with respect to packet-switched and optical broadband services”) and the Forbearance Order (in which, AT&T asserts (see id.) that the FCC concluded that elimination of tariffs “would result in substantial public interest benefits”). This argument misses the point of the Merger Conditions.

Commissioners Copps and Adelstein made very clear in their separate statements in the Merger Order that the merger conditions were intended to address a pattern of flawed, baseless FCC decisions to eliminate constraints on AT&T’s exercise of market power. Both Commissioners stated that they did not agree with the analysis in the Merger Order. Moreover, as Commissioner Copps explained, that flawed analysis was part of a broader pattern of FCC decisions in which the FCC “couldn’t act quickly
enough to approve every call to deregulate” but in which the FCC “studiously avoided our obligation to encourage the kind of fair competition necessary to protect consumers in a deregulated world.” Copps Merger Order Statement at 169. Commissioner Copps went on to state that “[n]o where is the FCC’s folly in de-regulating without ensuring competition more apparent than in the special access market.” Id. at 173. The special access conditions were therefore designed to address this problem by, among other things, “reinstituting price caps” (and the need for tariffs that those price caps require) and prohibiting anticompetitive provisions in AT&T’s special access contracts. Id. Commissioner Adelstein agreed, emphasizing that the merger conditions were intended to “try to rectify years of decisions that have undercut competition.” Adelstein Merger Order Statement at 175.

Of course, both Commissioner Copps and Commissioner Adelstein were well aware that “the FCC’s folly in de-regulating without ensuing competition” could well continue after the enactment of the Merger Conditions, and that forbearance was a likely context in which this would be the case. Accordingly, they insisted that AT&T agree “not to use [the] forbearance procedures to evade or frustrate any of the commitments” made in the merger. Copps Merger Order Statement at 174.

It is clear therefore that the Forbearance Condition was designed to prevent flawed FCC decisions-making in the forbearance process from undermining the effectiveness of merger conditions that were themselves designed to prevent any further erosion of the regulatory protections against AT&T’s abuse of market power. The Forbearance Order could not be a more obvious example of flawed decision-making in the forbearance process. As Commissioners Copps and Adelstein explained in their Joint
Statement, the forbearance process is “a risky and messy business” in which “there are no requirements on the parties to be explicit in their requests or detailed in the data they provide.”\textsuperscript{14} Moreover, the Commissioners stated that the \textit{Forbearance Order} eliminated tariffing requirements for special access services even though “there is substantial data available in this and other proceedings to indicate that the special access market is anything but competitive.” \textit{Id.} They therefore voted against the “decision to forbear from rules [most importantly tariffing rules] that provide critical pricing protection.” \textit{Id.} at 43.\textsuperscript{15} The point here is not to revisit the merits of the \textit{Forbearance Order}, but rather to explain that prohibiting AT&T from giving effect to the \textit{Forbearance Order} is entirely consistent with Commissioners Copps’ and Adelstein’s purpose in adopting the Forbearance Condition.

Nor is the purported purpose of the \textit{Forbearance Order} controlling here. As mentioned, even AT&T admits that it has no choice but to comply with the price and contract term requirements of the Special Access Conditions. Yet such regulation is flatly inconsistent with the analysis (flawed as it was) upon which the FCC relied to grant

\textsuperscript{14} \textit{Forbearance Order}, Joint Statement of Commissioner Michael J. Copps and Jonathan S. Adelstein, Dissenting, at 42.

\textsuperscript{15} It is an illustration of just how “messy” the forbearance process truly is in that AT&T and Qwest both filed similar forbearance petitions, but Qwest, which lacks AT&T’s political clout, was unable to strong-arm the FCC into granting its petition. Qwest therefore withdrew its petition (to avoid rejection). \textit{See, e.g., Kelly Teal, FCC Shelves Forbearance Petitions at Monthly Meeting, PhonePlusmag.com, Sept. 12, 2007, at http://www.phoneplusmag.com/hotnews/79h12103330.html}. The FCC then promptly granted AT&T petition, even though AT&T did not support the petition with any greater demonstration of competition than did Qwest. The only conclusion that can be reached from this divergent result is that AT&T’s political power (itself a product of the merger with BellSouth) was the key to the success of its petition.
AT&T non-dominant classification in the *Forbearance Order*.\textsuperscript{16} It cannot be, therefore, that the underlying purpose of the *Forbearance Order* determines the question of whether the Merger Conditions apply.

For all of these reasons, the original purpose of the Special Access Merger Conditions must control the analysis of whether they would be diminished or superseded by the elimination of tariff obligations. Properly understood, that purpose was to prevent AT&T from exploiting its dominant position in the market that it derives from its “stranglehold over business access services.”

*Third*, AT&T offers a series of rather strained interpretations of text of the Special Access Merger Conditions in its attempt to show that eliminating tariffs would not diminish or supersede its obligations thereunder. These arguments suffer from obvious and fatal flaws. For example, AT&T repeatedly asserts that there is no requirement in the Special Access Merger Conditions to retain tariffs for the sake of retaining tariffs. *See AT&T Opposition* at 7. But this is not the standard. The standard is whether withdrawing tariffs would “diminish or supersede” AT&T’s obligations under the conditions. That issue must be examined in context. The Merger Conditions were imposed at a time when AT&T’s special access Ethernet and OCn service offerings were subject to dominant carrier obligations. There was therefore no need for the Commission to establish express, detailed tariff filing obligations in the Merger Conditions. But this does not mean that the elimination of tariff-filing requirements would not diminish AT&T’s obligations under the conditions by depriving regulators and competitors of the central mechanism for enforcing price regulations in the Communications Act.

\textsuperscript{16} *See Forbearance Order* ¶¶ 23-25 (concluding that competition and other regulated alternatives were sufficient to constrain AT&T’s pricing of business broadband services).
In any event, the terms of the conditions themselves demonstrate that the authors viewed tariffs as a central component of the obligations established therein. In fact, given that the original purpose of the Special Access Merger Conditions, described above, must control the analysis, the ill-effects of detariffing such services must be taken into account. As TWTC explained in its petition, “[t]hreats to competition derive not only from higher tariff rates but also from discriminatory tariff rates that favor affiliated parties as well as other favored customers.” *TWTC Petition* at 4. As TWTC also explained at length, absent tariffs, AT&T could engage in an undetected price squeeze by charging itself or favored customers low rates while charging its competitors high rates. *See id.* at 8-9.

Moreover, AT&T’s assertions with regard to each of the specific special access conditions are unpersuasive. AT&T argues that the reference in Special Access Condition 2 to TCG’s tariffs is merely for the purpose of identifying the price level above which it may not increase its prices. *See AT&T Opposition* at 7. But, as TWTC has explained, this provision can just as easily be read to refer only to services offered in the AT&T/BellSouth territory “pursuant to, or referenced in, TCG Tariff No. 2.” *TWTC Petition* at 5. Once the services are no longer offered under this tariff, the condition no longer applies on its face. Indeed, this is the more logical reading given Commissioner Copps’ and Commissioner Adelstein’s concern that the conditions prevent AT&T from abusing its market power.

AT&T also implies (*AT&T Opposition* at 8) that the FCC should not be concerned that it will no longer be required to file TCG tariffs, because TCG is a CLEC. But the Merger Conditions apply only in the AT&T ILEC territory and Special Access Condition
2 merely ensures that services offered by TCG in AT&T's newly expanded ILEC territory (now including BellSouth) remain subject to rate regulation.

AT&T insists that elimination of tariffs is "irrelevant" to Special Access Condition 3 because that condition does not explicitly refer to tariffs and that TWTC's argument to the contrary is simply an attack on AT&T's trustworthiness (which is of course highly questionable, as Level 3 et al. demonstrated in their comments\(^\text{17}\)). See AT&T Opposition at 8-9. AT&T fails even to address the problem that Condition 3, which prohibits AT&T from providing "any special access offerings" to its wireline affiliates that are not available to unaffiliated entities "on the same terms and conditions," is far more difficult to enforce without tariffs. At the time the merger conditions were adopted, all of AT&T's "special access offerings" were offered pursuant to tariffs and the most effective way to ensure that a dominant firm continues to offer special access "on the same terms and conditions" to unaffiliated parties is via tariffs. This is true regardless of whether the condition expressly refers to tariffs. Indeed, if annual certification were sufficient to constrain an ILEC's market power, the Commission would do away entirely with tariffs, an obviously absurd suggestion.

Special Access Condition 4 clearly states that AT&T may not provide a new "contract tariff service" to its affiliate unless or until it certifies that it provides that same service "pursuant to that contract tariff" to an unaffiliated customer. It is hard to fathom how this requirement would not be diminished or at least superseded by the elimination of "contract tariff[s]." Undeterred, AT&T insists that the Commission must focus on the purpose of this provision, namely that "AT&T could improperly favor its own affiliates

\(^{17}\) See Comments of Level 3 Communications, LLC et al., WC Dkt. No. 06-125, at 6-9 (filed Dec. 21, 2007).
over unaffiliated carriers in the provision of special access services.” *Id.* at 9. AT&T claims that it can meet this “purpose” without tariffs. But the purpose of this condition itself reveals that the Commission is concerned that AT&T has the incentive, as AT&T admits (*id.* at 9-10), to discriminate in the provision of special access. The most appropriate means of diminishing the risk of discrimination is by requiring tariffs. Absent the tariffs upon which the Condition places express and unambiguous reliance, the AT&T’s obligations would be diminished and superseded by a different, less effective means of detecting or deterring discrimination (one that would not include the transparency of contract tariffs). ¹⁸

Special Access Condition 5 explicitly prohibits AT&T from increasing the rates in its tariffs for special access, and Special Access Condition 6, as revised by the reconsideration order, similarly relies expressly on the existence of tariffed rates, and indeed even sets a deadline for AT&T to file “all tariff revisions necessary to effectuate this commitment.” ¹⁹ AT&T argues that it can comply with these conditions without tariffs (*see AT&T Opposition* at 9-10) but this is not so. AT&T cannot comply with the Condition 5 prohibition against “increasing the rates in its interstate tariffs” if such tariffs no longer exist. Nor can AT&T retain the “tariff revisions necessary to effectuate” Condition 6 if it does not have tariffs on file. In any case, the obvious intent of

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¹⁸ In footnote 29, AT&T cites to the FCC reliance on a “bright-line rule” to address discrimination instead of tariffs (*see AT&T Opposition* at n.29), but in fact the rule specifically contemplates the filing of contract tariffs: “Before the price cap LEC provides a contract tariffed service…to one of its long distance affiliates…the price cap LEC certifies to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer.” 47 C.F.R. § 69.727(a)(iii).

¹⁹ *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Order on Reconsideration, 22 FCC Red 6285, Appendix A at 5 (2007).
Conditions 5 and 6 is to constrain AT&T’s market power in the provision of special access, and years of Commission precedent teach that this is more effectively accomplished with tariffs than without. Eliminating the tariffs upon which these conditions expressly rely would therefore diminish the AT&T’s obligations and cause them to be superseded by a less effective regime that relies on AT&T’s certification alone.

Special Access Condition No. 7 also expressly relies upon the existence of tariffs, since it prohibits AT&T from opposing mediation requests or accelerated docket requests concerning the prices, terms and conditions in its “interstate special access tariffs and pricing flexibility contract.” Absent such tariffs and contract tariffs, this condition has no meaning on its face. AT&T proposes to replace this condition with a promise not to oppose mediation or accelerated docket treatment for services offered under private contracts. See AT&T Opposition at 11. As TWTC explained, AT&T’s obligations under this condition will clearly be reduced under its proposed approach because no customer will have a basis for requesting mediation or accelerated docket treatment for a discrimination claim since customers will be unaware of the rates, terms and conditions AT&T offers to other customers under its private contracts. See TWTC Petition at 11. At most, AT&T seeks to “supersede” Condition 7 with a new, less viable commitment in which discrimination cannot be detected.

Indeed, by definition, whether AT&T is discriminating against competitors requires an examination of the relative prices, terms and conditions offered by AT&T. Relative differences can only be detected by comparing two or more pricing plans or tariffs or the rates received by two or more companies from the same tariff (for example,
different prices set to different volume levels). Without a tariff filing requirement, carriers will have no way to know what terms and conditions other carriers, including AT&T’s affiliates, may be receiving and therefore whether they are being discriminated against. 20 Without such knowledge, competitors will not know when or whether an accelerated docket complaint is appropriate. Therefore, the absence of tariffing conditions unquestionably “diminishes” condition seven. By contrast, if tariffs continue to be required, TWTC could view the tariff once it is filed, determine whether its structure or pricing level was discriminatory and file a complaint just days after the tariff is filed or even move to suspend the tariff before it goes into effect. Indeed, AT&T filed just such a complaint against BellSouth’s TSP tariff. 21

20 For example, by examining BellSouth’s TSP discount plan to determine different prices paid by most carriers versus BellSouth’s own affiliate, the FCC determined that the structure of the tariff discriminated in favor of the affiliate. See AT&T Corp., Complainant, v. BellSouth Telecommunications, Inc., Defendant, Memorandum Opinion and Order, 19 FCC Rcd 23898 (2004) (“TSP Order”) (Although this FCC order was struck down on appeal, (see BellSouth Telecoms., v. FCC, 469 F.3d 1052 (D.C. Cir 2006)) this does not diminish its power in showing how the tariffing process protects against discrimination). In private negotiations, it is entirely possible that AT&T will not provide a wholesale customer with a table of discount percentages depending on the volume provided, but would rather make particularized offers to each carrier depending upon the circumstances. Indeed, this is how Verizon has negotiated with TWTC after it received default forbearance for its broadband services. In such a scenario, it would be impossible for the wholesale customer to know whether the service it was receiving is priced in a discriminatory fashion.

21 See TSP Order ¶ 17 (“On July 1, 2004, AT&T filed the instant Complaint. In brief, AT&T alleges that: (1) the TSP is unlawfully discriminatory, in violation of section 272 of the Act, because it provides volume discounts to BellSouth Long Distance that are neither cost-based nor proportional to the discounts available to BellSouth Long Distance’s larger competitors; (2) the TSP is unjust and unreasonable, in violation of section 201(b) of the Act, because it facilitates anticompetitive conduct and non-market-based pricing; and (3) the TSP discriminates unreasonably, in violation of section 202(a) of the Act, because it unreasonably restricts the availability of volume discounts, offers different prices and terms for like services without reasonable justification, and
Special Access Condition No. 8 establishes a prohibition against certain “access service ratio terms,” but the prohibition only applies to “any pricing flexibility contract or tariff filed with the Commission.” Absent such contract tariffs and tariffs, the condition has no meaning and imposes no obligation on AT&T. AT&T promises now not to include the access service ratios in question in private contracts, but that commitment (1) diminishes the effect of Condition 8, because it will be impossible to detect violations of this commitment in private contracts, especially (as seems likely) if they are not made available to interested parties, and (2) supersedes this commitment with a different commitment, one prohibiting inclusion of the offending access service ratios in private contracts instead of tariffs and contract tariffs.

Finally, AT&T concedes (see AT&T Opposition at 12) that Special Access Condition 9 requires it to file a tariff, but rather absurdly asserts that the condition can be satisfied by filing and then withdrawing the tariff. AT&T offers no evidence that its approach squares with the intent of the Condition 9. Simply because the condition does not say that the tariff may not be withdrawn does not mean that tariff maintenance is not an implicit requirement of the condition. The far more plausible interpretation is that the absence of a statement in the condition that AT&T may withdraw the tariff means that AT&T must retain the tariff until the expiration of the merger commitments. In addition, the FCC could have stated that AT&T would have to simply make an “offer” to available competitors without a MARC, but it did not do so and keyed the requirement directly to the filing (and maintenance) of a tariff.

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unreasonably seeks to improve the competitive position of smaller carriers.”) (internal citations omitted).
C. The History Of The Forbearance Merger Condition Proposals Does Not Support AT&T’s Position

Apparently recognizing the weakness of its proposed interpretation of the Merger Conditions themselves, AT&T tries to buttress its position with farfetched and incoherent inferences. In particular, AT&T argues that the Forbearance Condition cannot be read to require retention of AT&T’s business broadband tariffs because (1) that interpretation would mean that AT&T’s broadband business forbearance petition was actually “forestall[ed],” “pre-judg[ed],” and “nullifi[ed]” by the merger conditions (see id. at 2, 15), and (2) Commissioners Copps and Adelstein decided not to adopt parts of the forbearance condition language proposed by CompTel that would purportedly have more clearly required rejection of AT&T’s broadband business forbearance petition. See id. at 13-14. None of these arguments has merit.

To begin with, enforcement of the Merger Conditions does not in any sense prevent the FCC from granting AT&T’s forbearance petition.22 Rather, as explained, those conditions merely prevent AT&T giving effect to that grant, including detariffing, until the Merger Conditions expire.

In addition, AT&T’s inferential arguments, like their other arguments, ultimately rest on an unsustainable inconsistency. Again, AT&T concedes that certain relief (the

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22 In a letter prior to the adoption of the Order, TWTC argued that AT&T’s Petition violated the merger condition not to “seek” any forbearance that would “diminish” or “supersede” its merger obligations. See Letter of Thomas Jones, Counsel, TWTC, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 06-125, 06-74 (filed Oct. 8, 2007). TWTC believed that AT&T’s petition should be dismissed on that basis. The FCC did not agree, and adopted the order anyway. TWTC is not addressing that issue in this proceeding, but merely seeks clarification that AT&T must continue to file tariffs or else the merger commitments would be “diminished” or “superseded.” Therefore, in this proceeding, TWTC is only arguing that AT&T must delay the date by which it can give effect to detariffing until the expiration of the merger commitments, not that the FCC must “reject” or “nullify” AT&T’s petition.
freedom to increase prices) provided by the Forbearance Order may be lawfully delayed by the merger conditions, while arguing that other relief (elimination of tariffs), may not. See AT&T Opposition at 6. AT&T provides no explanation as to why Merger Conditions that temporarily prevent AT&T from increasing prices post-forbearance would not unlawfully “forestall” or “pre-judge” or “nullify” its forbearance petition, while the conditions which preclude AT&T from detariffing would “forestall,” “pre-judge,” or “nullify” its forbearance petition.

AT&T makes much of the fact that Commissioners Copps and Adelstein decided not to adopt CompTel’s proposed language that would have required AT&T to withdraw its petition for forbearance pending at the time. See id. at 13. But AT&T’s business broadband forbearance petition as filed addressed both interexchange and special access business broadband services. It is entirely plausible that Commissioners Copps and Adelstein did not support withdrawal of the petition because they thought it appropriate to forbear from regulating AT&T’s interexchange services. Indeed, both Commissioners voted in favor of granting AT&T conditional forbearance for long distance broadband services eight months after the adoption of the merger conditions.23

Nor do other aspects of the history of the Forbearance Condition support the view that the merger conditions permit elimination of broadband business tariffs prior to December 2010. On October 13, 2006, AT&T proposed a set of conditions.24 The only

23 See Interexchange Non-Dominance Order at 113, Separate Joint Statement of Commissioner Copps and Commissioner Adelstein, Concurring in Part, Dissenting in Part (“We support this relief, with the conditions and commitments included herein, because the Commission must take into account the changing long-distance market.”).

condition relating to forbearance proposed by AT&T was related to UNE obligations.\textsuperscript{25} In response, CompTel argued that this single commitment was too narrow and proposed language which would have barred AT&T from “giv[ing] force or effect to any present or future grant of forbearance, or any other decision of the Commission or a court, in a manner that in any way reduces, alters, or otherwise affects their duties under the conditions and commitments of this merger,” (emphasis in original).\textsuperscript{26} The final version of the condition excluded CompTel’s language regarding the impact of non-forbearance decisions as well as the terms relating to action that would “alter or otherwise affect” AT&T’s duties under the conditions.

AT&T seems to argue (see AT&T Opposition at 14) that these revisions support the inference that Commissioners Copps and Adelstein believed that the Merger Conditions do not preclude elimination of AT&T’s broadband business tariffs. But there is no basis for this assertion. It is entirely plausible to conclude that Commissioners Copps and Adelstein viewed the terms “diminish or supersede” as fully sufficient to prevent elimination of tariffs until the expiration of the Merger Conditions. Commissioners Copps and Adelstein likely rejected the term “affect” because they viewed it as unnecessary to ensure retention of tariffing and other key aspects of the merger commitments. Moreover, the portion of CompTel’s proposal that Commissioners Copps and Adelstein rejected as too broad (e.g., the bar on giving effect to non-

\textsuperscript{25} See id. at 6 (“For thirty months from the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the ‘Act’) 47 U.S.C. 160, or any other petition altering the status of any facility being currently offered as a loop or transport UNE under section 251(c)(3) of the Act.”).

\textsuperscript{26} CompTel Comments, WC Dkt. No. 06-74, at 19 (filed Oct. 25, 2006).
forbearance decisions that would impact the merger conditions) has no bearing on whether AT&T must retain its services under tariff. Finally, no relevant inference can be drawn from the use of the word “diminishes” instead of “reduces.” At least with respect to whether AT&T is prohibited from detariffing its broadband services, there is no practical difference between these terms.

IV. CONCLUSION

For the forgoing reasons, the FCC should grant TWTC’s and CompTel’s petitions for declaratory ruling.

Respectfully submitted,

/s/
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January 11, 2008