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

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

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

[58] T-Mobile 2010 Reply Comments, at 11.

[59] Larsen Declaration, ¶ 15 ("By 2015, T-Mobile USA expects data traffic on its network to be at least 20 times that of the 2010 level").

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

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

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

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

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

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

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

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

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

[63] *Fourteenth Report*, , at 31, Table 3 and Chart 1 (May 20, 2010).

[64] *Id.*

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

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

[67] T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 2 (filed Oct. 24, 2006).

[68] *Id.*

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

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

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

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

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

[70] T-Mobile USA, Inc. Comments, WC Docket No. 06-74, at 2 (filed Oct. 24, 2006).

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

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

[73] T-Mobile USA, Inc. 2010 Annual Report at 89.

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

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

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

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

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

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

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

[77] Public Interest Statement, at 14.

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

alone.[79] In contrast, "fixed-location Internet access connections increased by only 1% (from 81 to 82 million)."[80]

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

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

[79] *Id.*, at 1.

[80] *Id.*

[81] DOJ 1/4/10 *Ex Parte*, at 8.

[82] *Id.*, at 10.

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

[84] Chairman Genachowski March 2011 Speech, at 5.

[85] Chairman Genachowski March 2011 Speech, at 2.

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

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

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

[86] Public Interest Statement, at 60.

[87] Public Interest Statement, at 58.

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

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

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

[89] *Id.*, at 5-6.

[90] Brownworth Affidavit, at 6-7.

[91] *Id.*

[92] *Id.*, at 7-8

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

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

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

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

[94] Brownworth Affidavit, at 4.

[95] *Id.*

[96] Public Interest Statement, at 12-13.

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

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

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

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

[98] Public Interest Statement, at 74-75.

[99] Public Interest Statement, at 9 (emphasis added).

[100] Brownworth Affidavit, at 5.

[101] Public Interest Statement, at 51 (citations omitted).

when its rivals offer new products or technologies whose competitive potential is evolving. Nascent competitors may be relatively easy to quash."[102]

V. CONCLUSION

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

Respectfully submitted,

/s/

Jerry Watts
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Counsel for EarthLink, Inc.

Dated: May 31, 2011

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

EXHIBIT A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

AFFIDAVIT OF STEVEN BROWNWORTH

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

I. INTRODUCTION

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

II. COMPANY BACKGROUND

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

3. EarthLink's Consumer Services segment is a leading Internet Service Provider ("ISP"), providing nationwide Internet access and related value-added services to individual and small business customers in competition with, among other providers, AT&T and T-Mobile.

4. EarthLink's consumer service offerings are narrowband and broadband (high speed) Internet access, search, advertising and VoIP services. EarthLink provides its portfolio of services to approximately 1.5 million US customers through a nationwide network of dial-up points of presence and a nationwide broadband footprint.

5. EarthLink's Business Services segment provides integrated communications services to a wide variety of businesses, enterprise organizations and communications carriers. These services include data services, such as managed IP-based network services and broadband Internet access services; voice services, including local exchange, long-distance and conference calling; mobile data and voice services; and web hosting.

6. The Company's Business Services segment sells transmission capacity to other communications providers on a wholesale basis. EarthLink operates its Business Services segment through its regulated operating companies.

III. MARKET ACTIVITIES

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

8. EarthLink's subsidiary, DeltaCom, Inc. offers wholesale services to telecommunication service providers under the name EarthLink Carrier (previously known as Interstate FiberNet). T-Mobile is currently DeltaCom's third largest customer billing ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** per month, representing ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** of total carrier revenue. This revenue involves various carrier services, mainly consisting of DS1, DS3 and SONET OC-3/OC-12 point to point facilities.

9. DeltaCom has recently had several opportunities to bid on access arrangements with T-Mobile to replace entrance facilities currently being provided by AT&T. Due to the pending merger, there is no incentive for T-Mobile to enter into new agreements nor is there an incentive for DeltaCom to make capital investments associated with the opportunities. Carrier services for which EarthLink Carrier bills AT&T and its affiliates is ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** per month. Services DeltaCom provides to T-Mobile can be provided by AT&T; therefore DeltaCom anticipates AT&T will migrate a substantial portion of these services to their own network as a part of

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

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

12. DeltaCom has negotiated wireless resale agreements with Telispire, an MVNO of Verizon, to offer wireless services to those customers who prefer integrated

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

13. During its vendor selection process in the second half of 2008 for wireless resale, DeltaCom engaged multiple providers, taking into consideration AT&T, T-Mobile, Sprint and Verizon. AT&T was only willing to offer services and rates for DeltaCom's administrative and corporate traffic. DeltaCom's interest in T-Mobile was limited due to its Seattle, Washington location and lack of MVNO product for service providers like DeltaCom. Sprint, at the time, was re-evaluating its position in the market-place as an MVNO. Verizon was ultimately selected due to coverage and automation advantages. DeltaCom subsequently moved the wireless service to Telispire, an MVNO of Verizon. While AT&T recently has made presentations to DeltaCom on limited use of its wireless network for data on a fixed location only, the level of commitment, pricing and terms are still unknown. DeltaCom's agreement with Telispire does not place additional restrictions on the use of its data network when compared to Verizon retail products. Further, EarthLink subsidiary, New Edge Networks, has a current agreement with Sprint for wireless data services, without any additional limitations or restrictions as compared to Sprint's retail products.

14. Three months after the *Wireline Broadband Order* was released, BellSouth required EarthLink, as a condition for renewal of its Regional Broadband Aggregation Network ("RBAN") service (RBAN is a service whereby AT&T transports data traffic from DSL lines to one or more access points in their

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

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

[1] *See, e.g.*, Declaration of Christopher Putala, Executive Vice President, Public Policy, EarthLink, WC Docket No. 06-74 (June 5, 2006).

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

16. Currently, two EarthLink subsidiaries, New Edge Network and DeltaCom, are combining their RBAN agreements into one negotiation with AT&T. AT&T's position, at this time, is only to reduce RBAN rates with increased commitments for new services in other non-related products (e.g. broadband, switching and special access). This concept of "revenue whole," allows AT&T to leverage its market position to increase a carrier's spend and provides a carrier less flexibility to consider and migrate to other competitive providers.

17. EarthLink's consumer division has an RBAN agreement with the base rate of ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** and in this one case AT&T did discount the EarthLink rate to ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** which is a slight discount to AT&T's recent one year promotional rates of $14.99 to its retail market. Although this appears to be in line with the Bellsouth/AT&T merger agreement on ADSL Transmission Service to provide rates to ISPs not greater than the retail rate, the features offered for these rates is different. For the ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** regular rate and ***BEGIN CONFIDENTIAL*** ***END CONFIDENTIAL*** promotional rate, EarthLink gets access from the customer to its network. EarthLink still needs to provide the Internet Access, e-mail addresses, spam/virus protection, web-services, customer ordering/care and bad debt responsibilities. AT&T includes all of these services in its $14.99 price to its retail customers. Additionally, AT&T provides its customers access to AT&T's wireless Wi-Fi network at no additional cost. When EarthLink asked that either

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

IV. DECLARATION

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

Steven Brownworth

Dated: May 31, 2011

SERVICE LIST

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

Peter J. Schildkraut Scott Feira Arnold & Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter_schildkraut@aporter.com scott_feira@aporter.com *Outside Counsel to AT&T Inc.* **(Via Electronic Mail - REDACTED)**	Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com *Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.* **(Via Electronic Mail - REDACTED)**
Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov **(Via Hand Delivery - CONFIDENTIAL)** **(Via Electronic Mail - REDACTED)**	Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov **(Via Electronic Mail - REDACTED)**
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/s/ M. Renee Britt