BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Ameritech Operating Cos., Revision, Tariff F.C.C. No. 2	)	Transmittal No. 1666
	)	
BellSouth Telecommunications, Inc., Revision, Tariff F.C.C. No. 1	)	Transmittal No. 1121
	)	
Nevada Bell Telephone Co., Revision, Tariff No. 1	)	Transmittal No. 176
	)	
Pacific Bell Telephone Co., Revision, Tariff F.C.C. No. 1	)	Transmittal No. 385
	)	
Southern New England Telephone Co., Revision, Tariff F.C.C. No. 39	)	Transmittal No. 965
	)	
Southwestern Bell Telephone Co., Revision, Tariff F.C.C. No. 73	)	Transmittal No. 3251

REPLY OF TIME WARNER TELECOM INC. AND COMPTEL

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

ATTORNEYS FOR TIME WARNER TELECOM INC.

Mary C. Albert
Karen Reidy
COMPTEL
900 17th Street N.W.
Suite 400
Washington, D.C. 20006
(202) 296-6650

February 7, 2008

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REPLY OF TIME WARNER TELECOM INC. AND COMPTEL

Pursuant to Sections 1.45(c) and 1.727(e) of the Commission's rules (47 C.F.R. §§ 1.45 (c), 1.727(e)), Time Warner Telecom ("TWTC") Inc. and COMPTEL ("Joint Petitioners"), by their attorneys, hereby file this reply in response to *AT&T's Motion to Strike Joint Petition ("Motion to Strike") of COMPTEL and TWTC and AT&T's Opposition to Joint Petition of COMPTEL and TWTC* ("*Opposition*") filed with respect to the above captioned tariff transmittals.

AT&T argues that the Commission should strike Time Warner Telecom's and COMPTEL's Joint Petition to Reject or the Alternative Suspend and Investigate ("*Joint Petition*"), because the Joint Petitioners did not properly serve AT&T *via* facsimile with a copy

of the *Joint Petition*. *See Opposition* at 1-3. After receiving AT&T's *Opposition* on February 6, 2008, the undersigned counsel determined that, due to an inadvertent clerical error, support staff did not fax a copy of the *Joint Petition* to AT&T.[1] However, this omission does not justify striking the *Joint Petition*. This is so for several reasons.

First, as AT&T explains, it received the *Joint Petition* on Monday, February 4 (*see Opposition* at 2), providing it with three business days to draft its *Opposition*. AT&T offers no indication as to how its *Opposition* was limited or AT&T's effort to respond to the *Joint Petition* was prejudiced by this slightly shortened time period. This omission is fatal to its case.

Second, all of the arguments save one raised by the Joint Petitioners were also raised by Sprint Nextel in their petition or by the Joint Petitioners themselves in their prior Petition to Deny, or the Alternative, Suspend and Investigate.[2] For example, both Sprint and the Joint Petitioners argued that (1) AT&T was seeking to impermissibly detariff certain TDM services; (2) AT&T could not cross-reference non-tariffed services in a tariff pursuant to Section 61.54(j), jeopardizing the ability of customers to meet their MARC, resulting in a price increase in violation of Merger Condition 5; and (3) AT&T's mere promise to retain the terms and conditions from its tariffed services in its non-tariffed contracts is insufficient to comply with the merger commitments. Moreover, the first four pages of the *Joint Petition*, in which the Joint

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[1] AT&T argues that it "intended to restore the tariffs for broadband cross-connects in its January 24 filing," but that it "inadvertantly" failed to do so for such services in its volume/term discount plans. *Opposition* at n.8. AT&T filed to correct this mistake on Tuesday, February 5, one day after it had received the *Joint Petition* arguing that it was not permitted to detariff these services. *See id.* Just as TWTC brought AT&T's inadvertent error to its attention in time for correction before the tariff entered into effect, TWTC's should be accorded the same treatment here where its error was similarly inadvertent and harmless.

[2] *See Petition of Time Warner Telecom Inc. and COMPTEL to Reject, Or, In the Alternative, Suspend and Investigate Tariff Filings, Southwestern Bell Telephone Co., Revision, Tariff F.C.C. No. 73, Transmittal No. 3249 et al.*, (filed Jan. 11, 2008).

Petitioners explain that the *AT&T Merger Order* barred detariffing, reiterated arguments the Joint Petitioners made in the previous Petition to Deny AT&T's previous (later withdrawn) tariff transmittal and that Sprint Nextel has made in this proceeding as well. Indeed, the only argument made in the *Joint Petition* that was not also made by Sprint Nextel or made in the Joint Petitioners' previous Petition to Deny concerned the fact that AT&T's reliance on its Business Services Agreement will result in a violation of the merger conditions. *See Joint Petition* at 5-7. Yet AT&T responded to this argument in its *Opposition* (*see Opposition* at n.13), demonstrating that AT&T suffered no harm as a result of Joint Petitioners' inadvertent error.

FCC precedent supports the view that, under these circumstances, AT&T has not been prejudiced and its *Motion to Strike* must be denied. For example, in one case, due to an inadvertent clerical error, parties failed to serve a petition to deny a license application on a license applicant. The FCC excused this error because, as is the case here, the party to whom service was due received a copy of the petition in time to file its response.[3] In another instance, the FCC excused a failure to serve a petition for reconsideration in a channel allotment proceeding, because the party to whom service was due, as is the case with AT&T here, "did not

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[3] *See Applications to Assign Wireless Licenses from WorldCom, Inc. (Debtor-in-Possession) to Nextel Spectrum Acquisition Corp.*, Memorandum Opinion and Order, ¶ 18, 19 FCC Rcd 6232 (2004) ("We note that NCI and ITF failed to comply with this [service] requirement because their Petitions to Deny were not served on Nextel, the Assignee of the proposed applications. However, we find that the error was harmless, because Nextel in fact obtained a copy of the Petitions to Deny in sufficient time to file a timely opposition and accordingly suffered no prejudice by virtue of the initial procedural defect.") (citations omitted); *see also MTS and WATS Market Structure; Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board,* Memorandum Opinion and Order, 1 FCC Rcd 431, n.5 (1986) (excusing failure to serve in a timely fashion when the party to be served became aware of the filing and was given an opportunity to respond).

make any specific claims of prejudice due to lack of service."[4] Furthermore, the case cited by AT&T (*see Opposition* at n.6) is not applicable to these circumstances, because there is no indication in that case that the party who was to be served ever received the pleading and therefore ever had notice of the arguments against him or her.[5]

The arguments AT&T raises in its *Opposition* are equally faulty. The Joint Petitioners and Sprint have refuted most of AT&T's arguments in past filings, and there is no need to repeat those arguments here. To the extent that AT&T raises new arguments here, those arguments are clearly without basis.

For example, AT&T argues that counting non-tariffed services towards a tariffed MARC does not violate Section 61.54(j) of the Commission's rules because of the alleged precedent set by the 1996 *Interexchange Forbearance Order*. *See Opposition* at n.26. AT&T is incorrect. The rule announced in that order permitting cross-referencing of certain non-tariffed services in tariffs does not apply to the services in this case, nor did the FCC apply that rule to AT&T in the *Broadband Forbearance Order*.[6] Accordingly, AT&T may not detariff its services subject to a MARC without increasing customers' rates in violation of Special Access Condition 5.

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[4] *Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Arnold and Columbia), California*, Memorandum Opinion and Order, 7 FCC Rcd 6302, ¶ 9 (1992).

[5] *See, e.g., Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations*, Report and Order, 3 FCC Rcd 4840 n.3 (1988) ("In his Motion to Strike, Partridge notes that the former licensee of Station KLBQ filed comments and a counterproposal in this proceeding and KIXK, Inc. did not serve the prior licensee or Partridge with a copy of its reply comments. In view of the fact that KIXK, Inc. failed to comply with Section 1.420(b) of the Rules, the Motion to Strike is hereby granted and the reply comments of KIXK, Inc. will not be considered in this proceeding.").

[6] *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; Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to*

In the *Interexchange Forbearance Order*[7], the FCC, among other things, "modif[ied its] rules to permit nondominant interexchange carriers to cross reference detariffed interstate, domestic, interexchange service offerings in their tariffs for international services for purposes of calculating discounts and minimum revenue requirements." *Interexchange Forbearance Order* ¶ 99. While the rule announced in that situation may be analogous to the situation at hand, it simply does not apply here. Contrary to the situation in that instance, AT&T is acting in its capacity as a provider of special access broadband services here and wishes to cross reference detariffed special access in its tariffs for other special access services.

AT&T argues that, because the FCC cited to the *1996 Interexchange Forbearance Order* in the *Broadband Forbearance Order*, "AT&T's tariff revisions are in full accord with Commission precedent on the use of cross-references to implement detariffing." *Opposition* at n.26. But the FCC did not cite to the *Interexchange Forbearance Order* for that purpose in the *Broadband Forbearance Order*, but rather for the following proposition: "precluding AT&T from tariffing its packet-switched broadband services and its optical transmission services while taking advantage of that relief is necessary to protect consumers and the public interest because in such circumstances will limit AT&T's ability to invoke the filed rate doctrine in contractual disputes with their customers." *Broadband Forbearance Order* ¶ 42 (citations omitted). In support, the FCC in the *Broadband Forbearance Order* cited to paragraph 52 of the *Interexchange Forbearance Order*, but that section has nothing to do with cross-

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Its Broadband Services, Memorandum Opinion and Order, 22 FCC Rcd 18705 (2007) ("*Broadband Forbearance Order*").

[7] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, Second Report and Order, 11 FCC Rcd 20730 (1996) ("*Interexchange Forbearance Order*").

referencing non-tariffed services in tariffs.[8] The fact that the FCC established an explicit rule permitting the cross-referencing of tariffs for services at issue in the *Interexchange Forbearance Order* yet failed to establish such a rule for the services subject to the *Broadband Forbearance Order* indicates that no such exception to Section 61.54(j) exists in this case.

This is not to say that AT&T has no way to comply with the rules while maintaining its MARC. Among other things, in order to comply with the Merger Conditions and the requirement not to raise price as well as Section 61.54(j), AT&T might have altered its MARC so that the tariffed MARC would be reduced in an amount proportional to the customer's purchases of non-tariffed services while another MARC could be established in the non-tariffed contracts for non-tariffed services. But AT&T did not do this, and that shortcoming is fatal to the instant proposed tariff revisions.

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.

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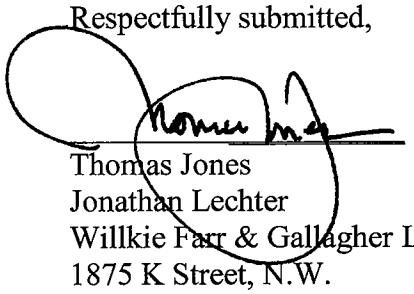
[8] *See Broadband Forbearance Order* at n.161 ("*See* Interexchange Forbearance Order, 11 FCC Rcd at 20760, para. 52 (emphasis added) (finding that 'not permitting nondominant interexchange carriers to file tariffs with respect to interstate, domestic, interexchange services will enhance competition among providers of such services, promote competitive market conditions, and achieve other objectives that are in the public interest, including eliminating the possible invocation of the filed rate doctrine by nondominant interexchange carriers, and establishing market conditions that more closely resemble an unregulated environment.')").

Respectfully submitted,



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

ATTORNEYS FOR TIME WARNER TELECOM INC.

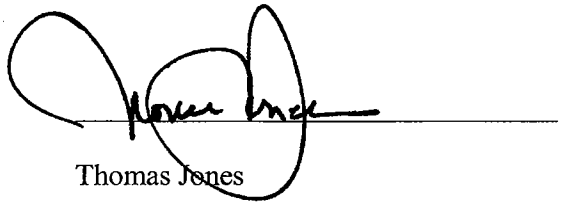
Mary C. Albert
Karen Reidy
COMPTEL
900 17th Street, N.W.
Suite 400
Washington, D.C. 20006
(202) 296-6650

February 7, 2008

CERTIFICATE OF SERVICE

I, Thomas Jones, do hereby certify that on this 7th day of February, 2008, I caused to be served true and correct copies of the foregoing Reply to the following parties:

Marlene H. Dortch Secretary Federal Communications Commission Room TW-325 445 12th Street, SW Washington, D.C. 20554 (via ETFS)	Dana R. Shaffer Chief Wireline Competition Bureau Federal Communications Commission Room 5C345 445 12th Street, SW Washington, D.C. 20554 (via e-mail)
Best Copy and Printing, Inc., (BCPI) Portals II Room CY-B402 445 12th Street, SW Washington, D.C. 20554 (via e-mail)	Albert Lewis Chief Pricing Policy Division Wireline Competition Bureau Federal Communications Commission Room 5A207 445 12th Street, SW Washington, D.C. 20554 (via e-mail)
AT&T Linda Quarles Associate Director - Tariff Administration AT&T 3535 Colonnade Parkway North, Room E3D1, Birmingham, Alabama 35243 Fax: (214) 858-0639 (via U.S. mail and fax) Shandee R. Parran Jack S. Zinman Gary L. Phillips Paul K. Mancini AT&T Services 1120 20th Street, NW Suite 1000 Washington, DC 20036 Fax: (202) 457-3074 (via fax and overnight mail)	Pamela Arluk Assistant Division Chief Pricing Policy Division Wireline Competition Bureau Federal Communications Commission Room 5A207 445 12th Street, SW Washington, D.C. 20554 (via e-mail)



Thomas Jones