BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of Application Pursuant to Section 214 of the Communications Act of 1934 and Section 63.04 of the Commission's Rules for Consent to the Transfer of Control of BellSouth Corporation to AT&T, Inc.	)))))))	WC Docket No. 06-74 DA 06-2035

COMMENTS OF TIME WARNER TELECOM INC.

Pursuant to the Public Notice issued by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding on October 13, 2006,[1] Time Warner Telecom Inc. ("TWTC") hereby provides its comments on the proposed conditions not directly related to special access that were recently submitted into the record by AT&T Inc. ("AT&T") and BellSouth Corporation ("BellSouth") (jointly, the "Applicants").[2] These comments supplement the joint comments of parties concerned with the impact of the merger on special access to which TWTC is a signatory. Those joint comments address the Applicants' proposed conditions that concern special access.

I. DISCUSSION

Most of the conditions proposed by the Applicants concerning matters other than special access seem designed merely to distract attention from that fundamental issue. Moreover, as

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[1] *Commission Seeks Comment on Proposals Submitted by AT&T Inc. And BellSouth Corporation,* Public Notice, DA 06-2035 (rel. Oct. 13, 2006).

[2] Time Warner's comments on the proposed merger conditions related to special access have been submitted with the Comments of the Special Access Coalition.

explained below, the non-special access conditions would not yield any significant consumer welfare benefits.

Promoting Accessibility of Broadband Service.

> *By December 31, 2007, AT&T/BellSouth will offer broadband Internet access service (i.e., Internet access service at speeds in excess of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory. To meet this commitment, AT&T/BellSouth will offer broadband Internet access services to at least 85 percent of such living units using wireline technologies (the "Wireline Buildout Area"). The merged entity will make available broadband Internet access service to the remaining living units using alternative technologies and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies. AT&T/BellSouth further commits that at least 30 percent of the incremental deployment after the Merger Closing Date necessary to achieve the Wireline Buildout Area commitment will be to rural areas or low income living units."*
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> *AT&T/BellSouth will provide an ADSL modem without charge (except for shipping and handling) to residential subscribers within the Wireline Buildout Area who, during calendar year 2007, replace their AT&T/BellSouth dial-up Internet access service with AT&T/BellSouth's ADSL service and elect a term plan for their ADSL service of twelve months or greater.*
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> *AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area who have not previously subscribed to AT&T's or BellSouth's ADSL service broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of $10 per month.*

There is no basis for thinking that the consumer broadband "commitments" will yield any significant consumer welfare benefits. Indeed, they seem designed to do little more than to distract attention from the consumer welfare losses that the instant merger will cause.

First, the Applicants' broadband deployment commitment is an attempt to credit as a merger condition the investment that the Applicants have largely already made and would soon have completed absent the merger or any purportedly offsetting merger conditions. Most fundamentally, the Applicants have a powerful profit-maximizing incentive to deploy broadband to as many residential customers as possible. As AT&T stated in its Annual Report, "[w]e have found that when customers add broadband to a basic package, they are 40 percent less likely to switch to another provider, and average revenue per customer jumps nearly 120 percent. If you add both broadband and joint-billed Cingular Wireless to the bundle, customers are more than 60 percent less likely to switch, and revenue jumps more than 350 percent."[3] Reaping a 120 to 350 percent increase in revenue per customer appears to be reason enough to spur the Applicants toward increasing their broadband network coverage.

It is not surprising, then, that the Applicants had already claimed that a central purpose of the merger was to allow the Merged Firm to bring broadband to 100 percent of their in-region residences. Specifically, the Applicants discussed their plans to deploy broadband services ubiquitously via AT&T's Project Lightspeed. Public Interest Statement at 21-25. BellSouth also attested to an impending fiber upgrade that would reach 75 percent of BellSouth's households by the end of 2009.[4] With regard to Project Lightspeed, even absent the merger AT&T expected to invest more than $4 billion in network-related deployment costs and capital expenditures beginning in 2006 through 2008. Public Interest Statement at 21. AT&T also expected to deploy 40,000 miles of new fiber. *Id.* It expected to bring its fiber-based services to 18 million households by the end of 2008, well within the 30-month term of the proposed merger conditions. *Id.* at 22.

Additionally, the Applicants have already committed to providing ubiquitous broadband in other contexts. For example, Edward Whitacre, CEO of AT&T, touted Lightspeed's commitment to bringing broadband to rural and low-income areas back in May of this year

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[3] AT&T, Inc., Annual Report (Form 10-K) at 10 (Mar. 1, 2006) ("AT&T 2005 Annual Report").

[4] Smith Decl. ¶¶ 5-6; BellSouth Corp., Annual Report (Form 10-K), at 17 (Feb. 28, 2006) ("BellSouth 2005 Annual Report").

during a keynote address to the members of the Detroit Economic Club.[5] During this speech, he announced the imminent availability of satellite, WiMAX, and other fixed-wireless broadband offerings that are intended to extend AT&T's broadband reach to 100 percent of its residential and rural service area. *Id.* In the AT&T ILEC territory, these initiatives are expected to reach 11.5 million additional homes and businesses. *Id.* Whitacre also affirmed the company's intent to make Lightspeed's video services available to more than 5.5 million low-income households as part of its initial build within three years, which is also well within the term of the proposed merger conditions.

Nor do the Applicants have much further work to do in order to meet the promise of providing DSL to 85 percent of the residences in the Merged Firm's territory. The FCC's most recent high-speed services report indicates that the in-region states in BellSouth territory already average 79 percent DSL coverage, while the in-region states in AT&T territory average 74 percent DSL coverage.[6] By the end of 2003, BellSouth could tout a 70 percent coverage rate of the households in its service area "and 85% of our most valuable customers, providing us a significant opportunity for further penetration of our retail customer base."[7]

In sum, the Applicants' own statements and the evidence of their DSL deployment thus far show that the commitment to deploy broadband to consumers will yield no or virtually no incremental consumer welfare benefits.

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[5] See Press Release, AT&T Corp., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 6, 2006) *at* http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22272. ("May 6 Press Release").

[6] Industry Analysis and Technology Division, Wireline Competition Bureau, FCC, High-Speed Services for Internet Access: Status as of December 31, 2005, at Table 14 (July 2006).

[7] BellSouth Corp., Annual Report (Form 10-K) at 24 (Feb. 24, 2004).

Second, the free modem and the $10 rate are yet more bread-and-circus-style ploys. Both BellSouth and AT&T offer free modems today with any residential subscription to high-speed service.[8] These promotions do not appear to have ended after a single year, as the proposed merger condition appears to. Additionally, the $10 rate is hardly an astonishing concession. It differs little from any other promotional offering that AT&T or BellSouth would hawk in their efforts to compete with the cable companies in the mass market.[9] In fact, AT&T currently offers a permanent rate of $14.99 for speeds of up to 768 kbps via its partnership with Yahoo[10] and offered an even lower one-year promotional rate of $12.99 for speeds of up to 1.5 Mbps.[11] Finally, a price of $10 for 200 kbps does not seem much to offer, given that AT&T's lowest high-speed service runs at 384 kbps, while BellSouth offers at least 256 kbps. (Public Interest Statement 105-07).

Public Safety and Disaster Recovery.

> *By June 1, 2007, AT&T will complete the steps necessary to allow it to make its disaster recovery capabilities available to facilitate restoration of service in BellSouth's in-region territory in the event of an extended service outage caused by a hurricane or other disaster.*
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> *In order to further promote public safety, within thirty days of the Merger Closing Date, AT&T/BLS will donate $1 million to a section 501(c)(3) foundation or public entities for the purpose of promoting public safety.*

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[8] *See* BellSouth, "BellSouth® FastAccess® DSL," http://www.bellsouth.com/consumer/inetsrvcs/index.html (last visited Oct. 23, 2006); AT&T, "AT&T DSL Service Home," http://www.usa.att.com/dsl/index.jsp?index=8082 (last visited Oct. 23, 2006).

[9] *See* Jim Hu, "SBC offers $19.95 DSL with a catch," CNET.COM, Oct. 28, 2004, http://news.com.com/SBC+offers+19.95+DSL+with+a+catch/2100-1034_3-5431243.html.

[10] *See* http://promo.yahoo.com/att/ (last visited Oct. 20, 2006). Verizon offers the same $14.99 option as well. *See* http://promo.yahoo.com/verizon/ (last visited Oct. 20, 2006).

[11] Marguerite Reardon, "AT&T brings new low to DSL prices," CNET.COM, Feb. 3, 2006, http://news.com.com/AT38T+brings+new+low+to+DSL+prices/2100-1034_3-6034788.html.

In proposing public safety and disaster recover conditions, the Applicants have again sought to claim credit as a merger condition for something to which they have already committed. Indeed, the Applicants had held out the disaster recovery redundancies as a central public interest benefit in the original merger application. Public Interest Statement at 32-40. Moreover, although the Applicants have now offered a June 1, 2007 deadline, it is unclear as to whether the Applicants have promised to speed or slow the implementation of the disaster recovery benefits. With regard to the promised donation to an undetermined charity, it should be noted that the merger is likely to cost the two companies hundreds of millions dollars to close.[12] While the charitable gesture is laudable, it seems as though $1 million is not much to spend in order to ensure an investment of hundreds of millions. Indeed, AT&T on its own earns $1 million in revenue *every 12 minutes*. The Merged Firm would likely earn $1 million in about *8 minutes*.

UNEs.

Time Warner incorporates by reference here the comments of the UNE Coalition regarding the Applicants' proposed UNE-related conditions.

Special Access.

Time Warner incorporates by reference here the comments of the Special Access Coalition regarding the Applicants' proposed special access-related conditions.

Wireless.

> *AT&T/BellSouth shall initiate ten new trials of broadband Internet access service using 2.3 GHz or 2.5 GHz spectrum by the end of 2007. At least five of those trials will be conducted in BellSouth's in-region territory.*

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[12] The SBC-AT&T merger cost $866 million. Press Release, AT&T Corp., The New AT&T Delivers Strong Fourth Quarter, with Growth in Wireless and Broadband, Expansion in Business Services (Jan. 26, 2006) *at* http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22058.

As with most of the other proposed conditions, the commitment to test wireless spectrum commits the Merged Firm to something they would already have done and which yields no material consumer welfare benefits. In fact, AT&T has already experimented with WiMAX or other fixed wireless services in several Texas communities as well as in Alaska, Georgia, and New Jersey. Several pilot offerings are currently running.[13] It is likely that the Merged Firm could claim that it has already run trials in both territories and therefore the condition provides little use as a regulatory tool. In any event, testing wireless service obviously does not mean that the Merged Firm would provide such service. Accordingly, consumers will see no benefit from this condition.

Transit Service.

> *The AT&T and BellSouth incumbent LECs will not increase the rates paid by existing customers for their existing tandem transit service arrangements that the AT&T and BellSouth incumbent LECs provide in the AT&T/BellSouth in-region territory.*

It is well established that current prices charged by ILECs for transit service are well above cost.[14] Moreover, the Commission has acknowledged that "the unavailability of transit service at reasonable rates, terms, and conditions could pose a barrier to entry."[15] Indeed, transiting through the ILEC is the only feasible method of exchanging traffic with the vast

[13] *See* May 26 Press Release. ("AT&T's new fixed wireless deployments, which will be launched this summer in Pahrump, Nevada, and Red Oak and Midlothian, Texas…The new communities will join AT&T's existing fixed wireless deployments in Alaska, Georgia and New Jersey. In addition, AT&T in mid-April launched a limited service offering of wireless broadband Internet access in the North Texas communities of Frisco, McKinney, Prosper, Centennial, and Little Elm.").

[14] *See, e.g.,* Reply Comments of TDS, at 14-16, WC Docket No. 01-92 (filed Jul. 20, 2005); Reply Comments of Cox, at 9-10, WC Docket No. 01-92 (filed Jul. 20, 2005); Comments of Time Warner Telecom, Conversent Communications Inc., Cbeyond Communications LLC and Lightship Telecom, at 45-46, WC Docket No. 01-92 (filed May 23, 2005).

[15] *See Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 129 (2005).

majority of other competing carriers in a region in the absence of third-party transit providers. Given the high prices for and essential nature of transit service, the Applicants have an incentive to exploit transit service rates to harm competition. For example, as with special access prices, the Merged Firm could use above-cost transit rates to price squeeze competitors. Capping prices at current levels does nothing to foreclose the Merged Firm from acting in this manner.

ADSL Service.

No comment.

Net Neutrality.

No comment.

Forbearance.

Time Warner incorporates by reference here the comments of the Special Access Coalition regarding the Applicants' proposed condition on forbearance petitions.

Annual Certification.

No comment.

III. CONCLUSION

For the reasons discussed above, the Commission should reject the conditions proposed by the Applicants and impose meaningful conditions that will address the public interest harms posed by the merger.

Respectfully submitted,

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