WOMBLE
CARLYLE
SANDRIDGE
& RICE
A PROFESSIONAL LIMITED
LIABILITY COMPANY

Seventh Floor
1401 Eye Street, N.W.
Washington, DC 20005

Telephone: (202) 467-6900
Fax: (202) 467-6910
Web site: www.wcsr.com

Ross A. Buntrock
Direct Dial: (202) 857-4479
Direct Fax: (202) 261-0007
E-mail: rbuntrock@wcsr.com

December 7, 2004

BY ELECTRONIC FILING

Marlene M. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Notification of Oral Ex Parte, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338 and WC Docket 04-313

Dear Ms. Dortch:

On December 6, 2004, the undersigned, on behalf of Fones4All Corporation ("Fones4All") met with John Stanley, Linda Kinney and Chris Killian of the Office of General Counsel, along with Marcus Maher of the Wireline Competition Bureau and Erin Boone of the Office of Strategic Planning and Policy Analysis. In a separate meeting, the undersigned met with Pamela Arluk and Russell Hanser of the Wireline Competition Bureau, and Jeffrey Carlisle, Chief, Wireline Competition Bureau. During the meetings, the parties discussed the need for the Commission to, at a minimum, preserve UNE-P availability to allow competitive carriers to serve single line residential customers who qualify for universal service subsidies, including Lifeline and Link-Up services. Preserving the availability of UNE-P will further the universal service mandates of Section 254(b) and further, is consistent with *USTA I* and *II.* In accordance with the Commission's rules, Fones4All is electronically filing in the above-referenced dockets this letter, along with the attached materials.

Respectfully submitted,

Ross A. Buntrock

Ross A. Buntrock
Counsel to Fones4All Corporation

cc: Jeffrey Carlisle (email)
John Stanley (email)
Erin Boone (email)
Linda Kinney (email)
Chris Killian (email)
Pamela Arluk (email)
Russell Hanser (email)
Marcus Maher (email)

Fones4All Corp.
Triennial Remand Proceeding
CC Docket 01-338
WC Docket 04-313

Ross Buntrock, Womble Carlyle

Dec. 6, 2004

Overview

- Who is Fones4All?
- What does Fones4All Do?
- The Need For A Narrowly Tailored Exemption Allowing UNE-P For LifeLine Eligible End Users
  - Policy Justification
  - Legal Justification
- Conclusion

Who is Fones4All?

- A UNE-P CLEC based in California.
- Markets to and serves low income single line residential customers who qualify for LifeLine.
- Has signed up 35,000 single line residential LifeLine eligible customers in Southern California in 18 months.
- Without Access to UNE-P, will likely need to exit the market.

What Does Fones4All Do?

- Fones4All actively markets LifeLine service to eligible consumers throughout California.
  - Fones4All uses methods recommended by the Joint Board and adopted by the Commission.
    - Billboards, public transit ads, newspaper, community events, partnerships with public assistance agencies and CBOs.
  - Fones4All has little competition other than ILECs and unscrupulous prepaid phone service providers.
    - ILECs market LifeLine primarily through bill inserts.
    - Prepaid service providers often charge LifeLine eligible customers significantly more than market rates.

The Need For A UNE-P LifeLine Exemption: Policy Justification

- According to FCC's Aug. 2004 *Telephone Subscribership in the United States* report 6.5 million American households are still without POTS service.
- This is the third consecutive report in which the percentage of households in the U.S. with telephone service has actually dropped.
- Minority and poor make up most of the population without POTS service.
- Only one-third of households currently eligible for Lifeline/Link-Up assistance actually subscribe to the program, according to the Commission's April 2004 LifeLine/Linkup Order in WC Docket 03-109.
- Fones4All is achieving the goals of LifeLine program.

The Need For A UNE-P LifeLine Exemption: Legal Justification

- Competitors Are Impaired In Providing Universal Service to Eligible End Users Because Reimbursement of Competitors Is Tied to ILEC Retail Rates
  - Under state and federal law, carrier reimbursement rates for all carriers providing universal service are based upon ILEC cost factors
  - USTA courts recognize that subsidized, below cost retail rates can create impairment in markets where state regulation holds rates below cost.
  - Particularly true for competitive carriers serving the universal service eligible market because reimbursement of CLECs from state and federal universal service funds is tied, by law, to ILEC retail basic exchange service.
  - Therefore, even a completely facilities based carrier can never be fully reimbursed for the costs it incurs in providing the service in the same way that ILECs are.

The Need For A UNE-P LifeLine Exemption: Legal Justification

- USTA II court acknowledged that regulated below-cost retail rates could properly be considered by the Commission as a factor that may 'impair' CLECs, but told the Commission that it must tie inclusion of this criteria in the impairment test to "a policy that it can reasonably say advances the goals of the Act."
- The *USTA II* court did not fault the Commission for including below cost retail rates as a source of impairment, but rather faulted the Commission for failing to "connect this barrier to entry with either structural features that would make competitive supply wasteful or *with any other purposes of the Act*."
- Section 254 establishes principles upon which the Commission shall base policies for the preservation and advancement of universal service.
  - Consumers in all regions of the Nation, including low-income consumers, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas
  - Available at rates that are reasonably comparable to rates charged in urban areas. These principles also recognize that ensuring rates are affordable is a national priority

The Need For A UNE-P LifeLine Exemption: Legal Justification

FONES 4 ALL

- Completely Eliminating UNE-P Across the Board Would Violate USTA
- The Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria) at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them."
- Clearly the universal service market stands in stark contrast to the mainstream residential market.

The Need For A UNE-P LifeLine Exemption: Legal Justification

- Low income customers cannot afford even unsubsidized basic wireline service.
- Any of the intermodal alternatives are clearly out of reach for low income subscribers.
  - VoIP requires a broadband connection that, according to *UNE Fact Report*, costs between $72-$90 per month.
  - Cable telephony requires cable service availability and means to subscribe—often no cable plant in these areas.
  - Wireless service requires credit checks and long term contracts and does not provide consumer protections of wireline service.
  - Most of the plant in poor urban areas has not been upgraded to support broadband services with no plans for future upgrades.

Conclusion

- Without competitive providers of ULTS/LifeLine/LinkUp low income subscribers will be forced to rely on either unscrupulous prepaid providers or ILECs.
- ILECs have little incentive to serve high-cost, low income customers.
- Competitors cannot economically serve low income populations without access to UNE-P.
- Resale and UNE-L are not viable substitutes.

Conclusion

- At a minimum, the Commission should preserve UNE-P availability for low income (ULTS/LifeLine/LinkUp eligible) customers.

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Ross A. Buntrock
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Marlene M. Dortch, Secretary
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Re: Written Ex Parte Presentation, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket 01-338 and WC Docket 04-313

Dear Ms. Dortch:

Fones4All Corporation ("Fones4All") through counsel, hereby submits this written ex parte presentation for filing in the above-referenced dockets to urge the Commission to preserve UNE-P availability to allow competitive carriers to serve single line residential customers who qualify for universal service subsidies. Under any formulation of the impairment test competitors are impaired in their ability to provide basic local telephone service to universal service eligible consumers, and accordingly, the Commission must ensure the continued availability of UNE-P for these disadvantaged consumers who otherwise might have no telephone service at all. State mandated subsidized retail rates constitute an insurmountable economic barrier to competitive carriers seeking to provide service to residential customers who qualify for universal service support because the baseline for reimbursement from both state and federal universal service funds is tied to the retail rate for ILEC basic local exchange service, even if these rates are below cost.[1] The fact that that competitive carriers' universal service rates are capped at the ILEC retail rate effectively precludes competitors that deploy their own facilities from serving universal service eligible end users.

Furthermore, continued UNE-P availability for the purpose of allowing competitive carriers to provide service to low income residential consumers is not only consistent with the critiques in the *USTA I*[2] and *USTA II*,[3] which require the Commission to consider narrow alternatives to address impairment, as well as to consider the costs and the benefits of unbundling, but it is also consistent with the statutory requirements of Section 254 of

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1 Importantly, however, TELRIC-compliant rates are not below cost. *See Verizon Communications Inc. v. FCC*, 122 S.Ct. 1646, 1649-1651. (2003).

2 *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) (*USTA I*).

3 *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004). ("*USTA II*").

the Communications Act of 1934, as amended.[4] Preserving UNE-P availability to allow competitive carriers to serve the most overlooked and underserved consumers—low income single line residential end users who qualify for universal service—will meet any definition of impairment, and most importantly, will further the universal service goals of the Commission, as set forth in Section 254(b), which requires the Commission to base policies for the preservation and advancement of universal service upon the principles that consumers in all regions of the nation, including low-income consumers, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged in urban areas, and recognizes that affordable rates for low income consumers is a national priority.[5] At a time when the Commission's telephone penetration statistics show the number of households in the United States with basic telephone service in decline for the first time ever, the Commission must ensure that every mechanism is in place to slow the decline, including the availability of UNE-P to serve low income universal service eligible end users.[6]

I. Background of Fones4All

Fones4All is a competitive local exchange carrier ("CLEC") based in Woodland Hills, California whose focus is to provide basic local telephone service to low income end users who qualify for universal service support. In mid-2003, following the California Public Utilities Commission's ("CPUC") adoption of UNE-P rates for SBC and Verizon that made it economically feasible to do so, Fones4All began marketing single line basic local residential telephone service to end-users in California who qualify for universal service subsidies. Fones4All has developed innovative, multi-faceted, grass-roots marketing efforts that mirror the methods recommended by the Joint Board and adopted by the Commission it its recent universal service order, including use of targeted advertising, mailings, and a presence in places where low-income eligible consumers are likely to frequent, including government aid agencies and public transportation outlets.[7] In fact, the success of Fones4All's outreach program led the state universal service marketing board in California to seek information regarding Fones4All's methods. Fones4All has been effective because it seeks out universal service eligible households where they live and work, and educates them about the availability of subsidized telephone

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[4] Pub. L. No. 104-104, 110 Stat. 56. The Telecommunications Act of 1996 (the 1996 Act) amended the Communications Act of 1934 ("the Act").

[5] 47 U.S.C. Sec. 254(b).

[6] *See Telephone Subscribership In The United States (Data through March 2004)*, Alexander Belinfante (released Aug. 2004), available at http://www.fcc.gov/wcb/iatd/stats.html. ("*Telephone Subscribership In The United States*"). A copy of the report is attached hereto for inclusion in these dockets.

[7] See *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket 03-109, FCC 04-87 at para. 45-46 (Apr. 29, 2004) ("*April 2004 Universal Service Order*") attached hereto. "The first recommended guideline is that states and carriers should utilize outreach materials and methods designed to reach households that do not currently have telephone service. States or carriers may wish to send regular mailings to eligible households in the form of letters or brochures. Posters could be placed in locations where low-income individuals are likely to visit, such as shelters, soup kitchens, public assistance agencies, and on public transportation. Multi-media outreach approaches could be utilized such as newspaper advertisements, articles in consumer newsletters, press releases, radio commercials, and radio and television public service announcements."

service. In the 18 months since Fones4All first began its intensive marketing efforts, the company has provisioned single line residential UNE-P service to approximately 35,000 low income households, the vast majority of whom had never before received basic wireline telephone service.

In the absence of Fones4All's efforts, the 35,000 low income consumers currently served by Fones4All, in all likelihood, would have remained without the knowledge that subsidized POTS service was available to them and would have continued to struggle without one of the most basic of tools of modern life: a telephone to call an ambulance, a child's school, or a potential employer. Instead, these low income consumers would likely have no phone service at all unless they purchased overpriced pre-paid service from any number of unscrupulous pre-paid providers who prey upon low income, credit challenged consumers. The experience of Fones4All in the low-income marketplace, along with the disturbing trend of declining telephone penetration in the U.S., is proof of the critical need for the Commission to maintain UNE-P availability as a vital means of ensuring the availability of telephone service to low income households that qualify for universal service support under the Commission's Lifeline and LinkUp programs, as well as complementary state universal service programs. On-going availability of UNE-P to serve universal service eligible consumers is critical, particularly at a time when the FCC's statistics demonstrate a shocking decline in the number of households with basic telephone service.

II. Telephone Penetration Rates in the United States Are Falling

With all the discussion in this docket of the availability of intermodal alternatives to basic telephone service, the Commission may be losing sight of the fact that the Commission's most recent *Telephone Subscribership in the United States* report, issued in August 2004, shows that 6.5 million American households are still without POTS service, let alone VoIP, cable or wireless service, or any kind of advanced service for that matter.[8] **In fact, the FCC's report is the third consecutive report in which the percentage of households in the U.S. with telephone service has actually dropped.** The report shows that penetration rates for African American and Hispanic households are significantly lower than white households. The report stated that households headed by whites had a penetration rate of 94.9%, while those headed by African Americans had a rate of 90.1% and those headed by Hispanics had a rate of 90.5%.[9] Not surprisingly, subscription levels also vary by income level. As a general rule, the greater the household income, the greater chance that the household has telephone service. In light of these sobering statistics, the Commission should preserve UNE-P availability for competitive carriers that provide single-line residential telephone service to low income households who qualify for federal or state universal service support.

As the Commission noted in one of its most recent universal service orders, "we believe there is more that we can do to make telephone service affordable for more low-income households. Only one-third of households currently eligible for Lifeline/Link-Up assistance

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8 *Id.*

9 *See "FCC Releases New Telephone Subscribership Report,"* News Release (Aug. 13, 2004).

actually subscribe to this program."[10] Based on the Commission's own recognition and the fact that universal service penetration is down in three consecutive reporting periods, it is imperative that the Commission act on its words and do something to increase universal service subscribership. Specifically, the Commission can act on its concerns regarding universal service subscribership by preserving a narrowly tailored exemption that mandates UNE-P be required in the instance where a carrier's customer qualifies for universal service support.

II. There Is Significant Impairment in the Low-Income Residential Universal Service Eligible Market

A. Competitive Carriers Seeking To Provide Universal Service Are Impaired Because Reimbursement from State and Federal Universal Service Funds Is Tied to ILEC Retail Rates For Basic Exchange Service

The *USTA* courts have held that subsidized, below cost retail rates can create impairment in markets where state regulation holds rates below costs. This is particularly true for competitive carriers serving the universal service eligible market because reimbursement of CLECs from state and federal universal service funds is tied, by law, to ILEC retail basic exchange service, even if those rates are below cost. As a result, state-mandated below cost retail rates constitute an insurmountable economic barrier and source of impairment for competitive carriers providing service to residential customers who qualify for universal service.

Pursuant to state and federal law, carrier reimbursement rates for all carriers providing universal service are based upon ILEC cost factors. For instance, in California the CPUC ties the rate of competitive carrier reimbursement from the state universal service fund to the ILEC rate for basic local exchange service.[11] That is, competitive carriers in California calculate their universal service reimbursement by subtracting the amount the carrier collects from the universal service subscriber from the ILEC rate for basic local exchange service. As a result, a competitive carrier providing universal service consistent with its obligation to do so cannot be fully reimbursed by the universal service fund for the costs it incurs in providing the service in the same way that ILECs are. Rather, competitors providing the universal service are inextricably tied to the ILEC rate structure. Therefore, even if a carrier serving universal service eligible customers deployed its own switch-based network it could never recoup its costs.

In light of the *USTA II* decision and the apparent demise of UNE-P, Fones4All has sought out alternatives to ILEC provided switching from competitive providers of switching in order to continue providing universal service to its 35,000 customers. But because Fones4All's low income customer base is spread across economically depressed residential

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[10] *April 2004 Universal Service Order*, para. 1.

[11] See General Order 153, the administrative regulation governing administration of the California state universal service program, which provides at section 8.3.2: "Each utility, on a per ULTS customer basis, may collect from the ULTS Fund an amount of lost revenues equal to the difference between (a) ULTS rates and charges, and (b) the lesser of the following: (i) the utility's regular tariffed rates and charges, or (ii) **the regular tariffed rates and charges of the ULTS customer's incumbent local exchange carrier.**" (emphasis added). General Order 153 can be viewed in its entirety at: http://www.cpuc.ca.gov/PUBLISHED/GENERAL_ORDER/40482.htm.

metropolitan areas and in some rural pockets of California, Fones4All has been unable to find commercial arrangements from competitive providers of switching that would allow it to continue its operations. Over 95% of Fones4All customers are served by wire centers where no other facilities-based carrier other than the ILEC provides service. This is because the areas that Fones4All serves are in low income and tier 2 rural markets in California.

In addition to seeking competitive sources of switching, Fones4All has evaluated the cost of deploying its own network consisting of soft switches and leased DS0 loops and transport. For the same reasons as described above, the fact that universal service reimbursement to all carriers is tied to the ILEC retail rates, this model is not economically viable. That is, if Fones4All or any similarly situated CLEC were to deploy a switch-based network in poor or rural area, it would never be able to recoup the cost of providing service since there is no way that the CLEC will be able to achieve the economies of scale of the ILEC. This is the case because a CLEC that deploys the expensive switching equipment will need to duplicate the ILEC network and not be able to fill it in the same manner as the ILEC. Even if a CLEC could deploy infrastructure in discrete areas where it has some concentrations of customers, without the availability of UNE-P, the disparity becomes even more pronounced, and has the effect of frustrating one of the most important public policy goals of the Act: to ensure that all Americans have access to both basic telecommunications service,[12] as well as advanced services. There are simply no other competitive alternatives to UNE-P that allow a competitive carrier to serve the universal service market.

Carriers like Fones4All, who provide universal service to single line rural and low income consumers, are most definitely impaired without access to unbundled local switching. The Commission should recognize the impairment of such carriers in this proceeding in order to ensure that basic telecommunications services, to say nothing of advanced services, are available to "all the people" of the United States through state and federal universal service programs.[13] Th Commission can clearly connect consideration of the impairment presented by subsidized ILEC retail rates to the "purpose" of the Act, as demanded by the *USTA* courts.

The *USTA II* court explicitly acknowledged that below cost retail rates are a legitimate type of impairment that clearly exists in many, if not most, markets where state regulation holds rates below historic costs. The court stated that this type of impairment that can be considered by the Commission in conducting its impairment analysis for unbundled local

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[12] According to the Universal Administrative Company, administrator of the Lifeline and LinkUp programs, one of the FCC's primary missions is: "to ensure that telecommunications services are available to "all the people" of the United States. The Low Income support mechanism assists eligible low-income consumers to establish and maintain telephone service by discounting services provided by local telephone companies." See USAC web site (http://www.universalservice.org/li/overview/mission.asp) (visited Dec. 4, 2004).

[13] 47 U.S.C. Sec. 706(a) In General.--The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

switching. In *USTA I* the court specifically observed that the Commission had correctly identified cross-subsidized, below cost retail rates as a source of impairment. In *USTA II*, citing its opinion in *USTA I*, the court noted that: "In the name of 'universal service,' state regulators have commonly employed cross-subsidies, tilting rate ceilings so that revenues from business and urban customers subsidize residential and rural ones."[14] The court acknowledged that such regulated below-cost retail rates could properly be considered by the Commission as a factor that may 'impair' CLECs, but told the Commission that it must tie inclusion of this criteria in the impairment test to "a policy that it can reasonably say advances the goals of the Act."[15]

The *USTA II* court did not fault the Commission for including below cost retail rates as a source of impairment, but rather faulted the Commission for failing to "connect this barrier to entry with either structural features that would make competitive supply wasteful or *with any other purposes of the Act*."[16] Promotion of universal service, and the availability of both basic and advanced telecommunications services to all American is clearly one of the primary purposes encompassed in the Act. Section 254 of the Communications Act of 1934, as amended,[17]codified the Commission's and the states' historical commitment to advancing the availability of telecommunications services for all Americans. Section 254(b) establishes principles upon which the Commission shall base policies for the preservation and advancement of universal service. As the Commission has often noted, "these principles state that consumers in all regions of the Nation, including low-income consumers, should have access to telecommunications and information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged in urban areas. These principles also recognize that ensuring rates are affordable is a national priority."[18] Clearly then, under the *USTA* cases, as well as the Commission's and the Act's long-standing universal service policy, the Commission must consider below cost retail rates as a source of impairment, so long as the Commission identifies how such rates create a barrier to achieving any of the principle purposes of the Communications Act, such as providing access to both basic and advanced services to all Americans.

One might surmise that it really does not matter if competitors are able to provide universal service to eligible end users. But whether one believes that to be the case depends on whether the Commission is serious about its obligation to ensure that all Americans have access to not only basic, but advanced telecommunications capabilities. As stated above, the last three telephone penetration rate studies released by the Commission show an increase in the number of people without basic telephone service in the United States. Companies like Fones4All pursue this customer base and educate them about universal service. The net result is that over the last 18 months Fones4All has connected 35,000 single line residential universal service eligible households that did not have phone service before.

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14 *USTA II* at 573, citing *USTA I*, 290 F.3d at 422.
15 *Id.*
16 *Id.*
17 47 U.S.C. Sec. 254.
18 *April 2004 Universal Service Order*, para. 3.

Companies like Fones4All are helping the Commission achieve one of the fundamental promises and priorities of the Communications Act: to provide affordable telecommunications service to all Americans. Without access to UNE-P to serve single line residential universal service eligible customers, Fones4All and every other carrier seeking to service the universal service eligible market, are impaired and will not be able to provide service. Ultimately, lower income Americans will suffer since they will not be actively pursued and educated about basic telephone service needed to function in our society. Fones4All is mindful of the court's concern in *USTA II* that "in competitive markets, an ILEC can't be used as a piñata."[19] But while the mainstream residential market may be competitive, where larger companies are actively marketing bundled packages of local, long distance, and data services, the universal service market is not a competitive one, as evidenced by the fact that in many states, only the ILEC provides service to that market.[20] In general, universal service customers do not have broadband access, and often use calling cards to make long distance calls, since there is usually a toll blocking restriction on the universal service line. At bottom, it is clear that below cost retail rates preclude competitors from providing service to universal service eligible customers.

B. Completely Eliminating UNE-P Across the Board Would Violate USTA

In *USTA I*, the court held that "the Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria) at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them."[21] The *USTA II* court continues to insist that the Commission not "loftily abstract[ ] away from all specific markets," but must instead implement a 'more nuanced concept of impairment.'"[22] Rather, the "Commission is obligated to establish unbundling criteria that are at least aimed at tracking relevant market characteristics and capturing significant variation."[23] Clearly the universal service market stands in stark contrast to the mainstream residential market. As the record in this proceeding amply demonstrates, VoIP alternatives, which require a broadband connection costing anywhere from $32 to $92 per month, as well as expensive cable and wireless alternatives, are far beyond the reach of low income universal service customers.[24] Accordingly, the Commission should heed the lessons of *USTA I* and *II* before completely eliminating the availability of UNE-P altogether and consider the compelling need for UNE-P availability to serve universal service eligible customers, particularly at a time when the Commission's statistics show the number of households with basic telephone service falling. A more nuanced alternative to completely eliminating UNE-P for all residential

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19 *USTA II*, 573.

20 USAC's Lifeline Support web site (http://www.universalservice.org/li/consumers/lifeline_support.asp) which provides consumers with contact information for the phone companies in their area that provide Lifeline and Link Up demonstrates that except in rare instances where a wireless carrier has obtained ETC certification, only the ILEC is providing Lifeline and Link Up service in many states.

21 *USTA I*, 425-426.

22 *USTA II*, 569.

23 *Id.*, 563.

24 Not only are these technologies expensive, but they are generally not available over the ungroomed ILEC network that serves poor areas; cable modem are only available to those who subscribe to cable television.

customers would be to preserve UNE-P availability for competitive carriers that provide single-line residential telephone service to low income households who qualify for federal or state universal service support. There can be no doubt that competitors are impaired in attempting to provide service to these consumers, and failure to do so would run afoul of the *USTA* line of cases. Elimination of UNE-P would deprive low-income populations of critical phone service and would frustrate the goal of providing basic telephone service to all Americans. Accordingly, the Commission should preserve UNE-P availability to allow carriers to provide basic single-line residential telephone service to low income households who qualify for federal or state universal service support.

Furthermore, a limited exception for the availability of UNE-P, as the *USTA II* court noted, "is essential in light of our admonition in *USTA I* that the Commission must balance the costs and benefits of unbundling."[25] The Commission has recognized that providing telephone service to low income universal service eligible consumers provides a benefit. As the Commission staff noted in its Lifeline Staff Analyisis: "There is a benefit to increasing the number of Lifeline participants, and also a cost. The obvious benefit would be that some of those added Lifeline subscribers would newly receive telephone service. The cost at the federal level would be the additional federal dollars spent on the additional Lifeline enrollees."[26]

Clearly, *USTA II,* regardless of whatever impairment standard the Commission decides upon, requires the Commission to examine both the benefits and the costs of unbundling. Allowing a limited amount of unbundling of local switching combined with unbundled loops and transport in order to further the universal goals of Section 254 of the Act universal service is both compelled as a matter of public policy, and warranted in light of the *USTA II's* admonition that "a rule is irrational [ ]if a party has presented to the agency an alternative that has all the same advantages and fewer disadvantages and the agency has not articulated any reasonable explanation for rejecting the proposed alternative."[27]

Without UNE-P availability to serve the universal service eligible low-income consumers will be forced to either obtain service from the ILECs, who do not actively market universal service availability; obtain service from pre-paid providers that charge exorbitant prices, or forego basic service altogether. As Chairman Powell, and the entire Commission have recognized, universal service has "improved people's lives by making everything from jobs, to healthcare to emergency services available to program participants. And while overall telephone penetration in the United States remains extremely high, too many people, particularly on tribal lands and in rural areas, forgo this essential connection."[28] Maintenance of UNE-P availability will ensure that the goals of Section 254(b) of the Act are furthered. That is, preserving a narrowly tailored exemption that mandates UNE-P be required in the instance where a carrier's customer qualifies for universal service support will ensure that the national priority seeking to provide consumers in all regions of the nation with access to telecommunications and

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25 *USTA II* citing *USTA I*, 290 F.3d at 429

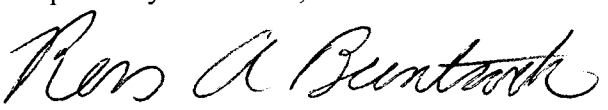
26 *See April 2004 Universal Service Order*, Appendix K.

27 *USTA II*, 571.

28 *See April 2004 Universal Service Order*, Statement of Chairman Michael K. Powell.

information services that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged in urban areas. Fones4All is electronically filing in the above-referenced dockets this letter, along with the attached materials.

Respectfully submitted,



Ross A. Buntrock
Counsel to Fones4All Corporation

cc: Scott Bergmann
Matthew Brill
Daniel Gonzalez
Christopher Libertelli
Jessica Rosenworcel
John A. Rogovin
Paula Michelle Ellison
Linda I. Kinney
Austin C. Schlick
Richard K. Welch
John Stanley
Jeffrey Carlisle
Michelle Carey
Russ Hanser
Jeremy Miller
Marcus Maher
Tim Stelzig
Tom Navin
Ian Dillner
Gail Cohen
Carol Simpson
Cathy Zima
Christina Langlois