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 8, 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:

Today, the undersigned, on behalf of Fones4All Corporation ("Fones4All"), spoke by telephone to Christopher Libertelli regarding the need for the Commission to preserve UNE-P availability to allow carriers to provide service to Lifeline and Link Up eligible end users. In accordance with the Commission's rules, Fones4All is electronically filing the attached materials which were provided to Mr. Libertelli via e-mail, along with this letter.

Respectfully submitted,

Ross A. Buntrock
Counsel to Fones4All Corporation

cc: Christopher Libertelli (e-mail)
Scott Bergmann (e-mail)
Matthew Brill (e-mail)
Daniel Gonzalez (e-mail)
Jessica Rosenworcel (e-mail)

Carr, Edilma

Subject: FW: Fones4All Corp. Presentation: WC 04-313; CC Docket 01-338
Importance: High

-----Original Message-----
From: Buntrock, Ross
Sent: Wednesday, December 08, 2004 4:36 PM
To: 'christopher.libertelli@fcc.gov'
Subject: Fones4All Corp. Presentation: WC 04-313; CC Docket 01-338
Importance: High

Christopher,
Thank you for your call this morning. As per our conversation, attached, please find the presentation I provided to Matt Brill this morning. As I indicated in our call this morning, under *USTA*, Section 251(d)(2)'s "at a minimum language" allows the commission to consider factors besides "necessary" and "impair" in making unbundling determinations, so long as the factors are ***reasonably and responsibly tied to the statute***. Promotion of the of the universal service goals set forth in Section 254(b) are clearly reasonable and responsible, and provide a basis for the Commission to continue to require UNE-P availability for the sole purpose of allowing carriers to provide single line LifeLine/Link-up services.

As the Chairman recognized in the April 2004 LifeLine order in WC Docket 03-109, over one third of the eligible LifeLine/Link-up end users are not enrolled in the program, and "too many people are foregoing" the essential connection of basic telephone service. Fones4All Corp., a carrier focused on LifeLine consumers and who has enrolled 35,000 LifeLine customers in the last 18 months (the vast majority of whom had never received service before) are a testament to the value that limited UNE-P availability to further the universal service mandates of Section 254.

Feel free to contact me at (202) 857-4479 if you have any questions regarding this issue or this transmittal.

Regards,
Ross A. Buntrock
Womble Carlyle Sandridge & Rice PLLC

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

Ross Buntrock, Womble Carlyle

Dec. 7, 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

- Section 251(d)(2) provides that "the Commission shall consider, *at a minimum,* whether…the failure to provide access to network elements would impair the ability of carriers seeking access to provide the services that it seeks to offer."
- *USTA I* said Commission can consider factors besides 'necessary' and 'impair' in making unbundling determination so long as factors are reasonably and responsibly tied to the statute.
- Promotion of universal service goals of Sec. 254(b) clearly meets "reasonable/responsible" test, and Commission should require UNE-P availability for purpose of providing single-line residential universal service

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

- 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.

Proposed Rule

51.319 (c) An incumbent LEC shall, in accordance with 51.311 and section 251(c)(3) of the Act, provide nondiscriminatory to local circuit switching capability using single line DS0 capacity local loops and subloops and nondiscriminatory access to signaling, call-related databases and shared transport, which is defined as the transmission facilities shared by more than one carrier, including the incumbent LEC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the incumbent LEC network, to Requesting Carriers who certify that the combination of unbundled network elements will be used for the the sole purpose of providing either: (1) Lifeline, or (2) Link-Up, or (3) enhanced Lifeline and Link-Up to qualifying end users to provide pursuant to Part 54 of the Commission's Rules, or a Lifeline program administerd by any State Commission. Requesting carriers shall provide certification to the ILECs that the switch, loop, and transport combination will serve a single line residential Universal Service eligible customer. The rates for this combination of elements shall be based on TELRIC and shall be the rates in effect in each state upon the effective date of this order.

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.