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March 7, 2006

BY ELECTRONIC FILING

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

Re: WC Docket 05-261, WC Docket No. 04-313 and CC Docket No. 01-338
Notification of *Ex Parte* Meeting

Dear Ms. Dortch:

Yesterday, on behalf of Fones4All Corporation ("Fones4All"), the undersigned counsel conducted two separate *ex parte* meetings regarding the above referenced dockets. The first *ex parte* meeting was conducted with the following Staff of the Wireline Competition Bureau: Kirk Burgee, Associate Chief and Marcus Maher, Attorney Advisor. The second ex *parte* meeting was conducted with Ian Dillner, Acting Wireline Legal Advisor to Commissioner Martin. The points set forth in the attached presentations were discussed in both meetings.

In accordance with the Commission's rules, 47 C.F.R. Sec. 1.1206(b)(1), 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: Kirk Burgee (via electronic mail)
Marcus Maher (via electronic mail)
Ian Dillner (via electronic mail)

Fones4All Corp.

Petition for Expedited Forbearance
WC Docket 05-261

Emergency Petition For Interim Waiver Pending Commission Action on Forbearance Petition
WC Docket 04-313
CC Docket 01-338

Ross A. Buntrock

Womble Carlyle

Agenda

- Company Overview
- Forbearance Petition
- Emergency Petition for Waiver
- AT&T Anticompetitive Behavior in California

Company Overview

- Based in California, Fones4All provides service to 85,000 low-income single line residential customers who qualify for Lifeline in California.
- Fones4All is in the midst of deploying its own network, but without access to ULS will need to pull out of wire centers where it does not have a critical mass of customers to warrant facilities.
- In 2005 Fones4All attempted to negotiate a "commercial agreement" with AT&T but terms were onerous and would have effectively eliminated the transition period provided in TRRO; also would have required withdrawal of the Forbearance Petition.
- Fones4All continues to wrestle with AT&T as their tactics become increasingly brazen and the BellSouth merger announced today likely won't soften their tactics.

Procedural Background

- Fones4All filed Forbearance Petition on July 1, 2005; initial comments filed October 14, 2005, replies November 14, 2005 with limited CLEC participation in proceeding because commercial agreements containing gag clauses precluded participation, as confirmed by CompTel.
- Fones4All filed Petition for Interim Waiver on February 24, 2006 asking the Commission to delay final implementation of TRRO revised 51.319(d) pending action on the Forbearance Petition.
- If the Commission needs the full 12 months afforded under Section 160(c) to resolve the important Universal Service issues raised in the Fones4All Petition, then it should grant the Interim Waiver Petition immediately.

Legal Standard for Forbearance is Met

FONES 4 ALL

- Record unequivocally shows that Forbearance from Rule 51.319(d) as it pertains to carriers using ULS for the sole purpose of providing Lifeline service is in the public interest:
  - Not necessary to prevent unjust or unreasonable discriminatory treatment of telecommunications carriers.
  - Not necessary to protect the interests of telecommunications consumers.
- Bells incorrectly argue that elimination of 51.319(d) won't impose affirmative obligation to provide ULS, however Sec. 271(c)(2)(B)(vi) clearly provides an affirmative obligation for provision of ULS.
- As recognized in the *TracFone Order*, Section 254(b) does not express a preference for *which* facilities over which low income consumer are provided with access to telecommunications and information.

Legal Standard Interim Waiver is Met

- Fones4All meets criteria for grant of interim waiver.
- Waiver is appropriate where particular facts would make strict compliance with rules inconsistent with the public interest.
- The Commission has a history of granting interim waivers such as this one, where proceedings are pending which raise complex factual, legal and policy questions (*See eg Emergency Petition for Interim Waiver Pending Commission Review of Petition for Temporary Extension of Waiver*, Order, 1995 FCC LEXIS 5266 (1995)).
- The public interest would be served by allowing the Commission to thoughtfully consider the issues raised in the Forbearance petition within the 12 months provided.
- Strict compliance with 51.319(d) risks disrupting the service of a large number of Lifeline customers in California, due in large part to AT&T California's botched implementation of the transition contemplated under 51.319(d).

AT&T California Botched UNE-P Transition

- The Botched UNE-P Transition
  - In 2005 AT&T California presented a "commercial agreement" proposal that contained onerous pricing terms and which demanded immediate cutover of UNE-P base, effectively obviating the transition period established in TRRO.
  - Despite Fones4All's repeated requests for implementation of batch hot cut processes in Fall 2005, AT&T did not even start implementing the batch hot cut process with Fones4All until late January 2006!
  - After weeks of AT&T delay and failed test orders, Fone4All was not able to successfully cut over it first test customers until February 24, 2006; with only days left, Fones4All has thousands of customers to convert.
  - Other California carriers experienced the same types of problems (see CLEC Responses to SBC Motion to Compel UNE-P Transition).
  - In light of these facts, an interim waiver of Rule 51.319(d) is warranted in California

Anti-Competitive Behavior By AT&T California

- The freshly announced AT&T/BellSouth merger will only likely further embolden AT&T to undertake additional anticompetitive actions against Fones4All and other remaining competitors.
- AT&T's behavior warrants grant of the Interim Waiver.

Conclusion

- The Commission should immediately grant the Petition for Interim Waiver in California.
- Ultimately, the Commission should grant the Fones4All Forbearance Petition as part of its commitment to take all possible steps to ensure that low-income users are not barred from utilizing available support on the basis of the specific technologies they wish to use or the specific business plans pursued by their service providers.

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February 24, 2006

VIA ECFS

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Emergency Petition for Interim Waiver of the Commission's Rules Pending Commission Action on the Fones4All Petition for Expedited Forbearance

Dear Ms. Dortch:

Fones4All Corporation ("Fones4All") respectfully submits via ECFS the attached Emergency Petition for Interim Waiver of the Commission's Rules Pending Commission Action on the Fones4All Petition for Expedited Forbearance. Please contact the undersigned if questions arise regarding this filing.

Sincerely,

Ross A. Buntrock

Ross A. Buntrock
Counsel to Fones4All Corporation

cc: Best Copy and Printing Inc. (via email)
Attached Service List

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Fones4All Corp.	)	
	)	
Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 from Application of Rule 51.319(d) To Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service	)	WC Docket No. 05-261
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket 01-338
	)	
Fones4All Corp. Emergency Petition for Interim Waiver of Section 51.319(d) of the Commission's Rules in the State of California	)	

FONES4ALL CORPORATION EMERGENCY PETITION FOR INTERIM WAIVER OF SECTION 51.319(d) OF THE COMMISSION'S RULES IN THE STATE OF CALIFORNIA PENDING COMMISSION ACTION ON THE FONES4ALL PETITION FOR EXPEDITED FORBEARANCE

Fones4All Corporation ("Fones4All"), by counsel, and pursuant to Section 1.3[1] of the Commission's rules, respectfully requests an interim waiver of Section 51.319(d) of the Commission's rules in the state of California until July 1, 2006 or until such time as the Commission acts upon the pending Petition for Expedited Forbearance Under 47 U.S.C. § 160(c)

[1] 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion or on petition of good cause therefore is shown.")

and Section 1.53 of the Commission's Rules ("Forbearance Petition") filed by Fones4All on July 1, 2005.[2] As set forth herein, Fones4All fully satisfies the special circumstances required for grant of an interim waiver of the Commission's rules, as set forth in *WAIT Radio v. FCC*,[3] which allows the Commission to waive its own rules where particular facts would make strict compliance inconsistent with the public interest. As demonstrated herein, immediate grant of the interim waiver requested herein will afford the Commission the opportunity to fully consider and carefully address the Forbearance Petition during the remaining four months that remain of the twelve month statutory deadline to act on the Forbearance Petition, and accordingly will serve the public interest.

I. BACKGROUND

Fones4All is a California-based competitive local exchange carrier ("CLEC") that focuses on providing intrastate, interstate and international services to low income consumers, the vast majority of whom qualify for Lifeline service. On July 1, 2005, Fones4All filed a "Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 of the Commission's Rules" asking the Commission to exercise its forbearance authority under Section 10 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 160 to forbear from application of Section 51.319(d) of the Commission's rules, as modified in the *Triennial Review Remand Order*,[4] with respect to requesting carriers who utilize unbundled local switching

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[2] *See Public Notice*, "Pleading Cycle Established for Comments on Petition for Forbearance of Fones4All Corp. Pursuant to 47 U.S.C. § 160(c)." Pursuant to 47 U.S.C.§ 160(c), the Commission has one year after it receives petitions for forbearance; the Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of 47 U.S.C. § 160(a).

[3] *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990).

[4] *See In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC

("ULS") to serve single-line residential end users who qualify for Lifeline service. In light of the urgent need for resolution of the issues raised in the Forbearance Petition in advance of the March 11, 2006 deadline for implementation of Section 51.319(d), and in light of the twelve month deadline for Commission action on forbearance petitions set forth in Section 10(c), Fones4All sought expedited consideration of its Forbearance Petition. On August 15, 2005 the Commission established a pleading cycle seeking public comment on the Forbearance Petition, with an initial comment deadline of October 14, 2005 and a reply comment deadline of November 14, 2005. Since that time, Fones4All has held numerous meetings with Commissioners and Commission staff in order to further address the complex issues raised in the Forbearance Petition.[5] However, it is clear that the Commission needs the full twelve months which it is provided under Section 10(c) in order to fully address the issues raised in the Forbearance Petition. Given the pressing demands upon its resources, the Commission will not be in a position to act upon the Forbearance Petition prior to March 11, 2006, the date that Rule 51.319(d) is scheduled to be fully implemented.

II. THE CRITERIA FOR AN INTERIM WAIVER ARE MET

Under the Commission's rules, a waiver may be granted "for good cause shown."[6] The Commission may exercise its discretion to waive a rule where particular facts would make strict

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Docket NO. 01-338), Order on Remand, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*" or "*TRRO*"), *petitions for review pending, Covad Communications Co. et al. v. FCC et al.* Nos. 05-1095 *et al* (D.C. Cir.).

[5] That said, no reason exists for invoking the 90 day extension period in Section 10(c). A period longer than 12 months is simply not necessary as required by the statute. Moreover, the Commission should recognize that it would be inappropriate for the Bureau to grant the extension on delegated authority.

[6] 47 C.F.R. § 1.3.

compliance inconsistent with the public interest.[7] The waiver provides "a safety valve procedure for consideration of an application for exemption based on special circumstances."[8] Fones4All's petition for an interim waiver of the rules set forth in Section 51.319(d) satisfies this standard. Furthermore, the Commission has a history of granting interim waivers such as this one in instances where the Commission is considering in pending proceedings complex factual, legal and policy questions.[9]

Granting the interim waiver would unquestionably serve the public interest. First and foremost, grant of an interim waiver would serve the public interest by allowing Fones4All to continue to provide its existing Lifeline customers a competitive alternative for Lifeline service pending resolution of the Forbearance Petition. The Commission has recognized that providing telephone service to low-income universal service eligible consumers provides a public benefit.[10] Furthermore, in the *TracFone Order*,[11] the Commission recognized that promotion of competition among providers of telecommunications services to the low income consumers

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7 *WAIT Radio v. FCC*, 418 F. 2d 1153, 1159 (D.C. Cir. 1969); *Northeast Cellular Telephone v. FCC*, 897 F.2d 1164(D.C. Cir. 1990).

8 *WAIT Radio* at 1157.

9 *See eg Emergency Petition for Interim Waiver Pending Commission Review of Petition for Temporary Extension of Waiver*, Order, CC Docket No. 90-263, 1995 FCC LEXIS 5266 (1995) ("It is efficient and in the public interest to maintain the status quo by extending the Pacific Bell tariff waiver past August 3, 1995, to allow time for public comment an our evaluation of the merits of the extension petition. Thus, we are persuaded that there is good cause for extending the existing waiver on an interim basis."); *see also In the Matter of Petition for Interim Waiver of Sections 61.42(g), 61.38 and 61.49 of the Commission's Rules*, Order WCB/Pricing 02-16 (2002)

10 See *Report and Order and Further Notice of Proposed Rulemaking*, WC Docket 03-109, FCC 04-87 at Appendix K (2004).

11 *See* TracFone Wireless, Inc. Petition for Forbearance, Order, CC Docket 96-45, FCC 05-165 (2005) ("*TracFone Order*").

referenced in Section 254(b)(3) of the Act is in the public interest and that the significant benefits of competition should be made available to all Americans.[12]

Second, a waiver would serve the public interest by allowing the Commission to take full advantage of the 12 month period provided under Section 160(c) of the Act for review of petitions for forbearance (which expires on July 1, 2006) to consider fully the issues raised in the Fones4All Forbearance Petition without having the petition effectively mooted by the intervening March 11, 2006 deadline for full implementation of Rule 51.319(d). To the extent that the Commission fails to grant the relief sought herein, there is a significant risk that a great number of the 80,000 Lifeline customers Fones4All serves using ULS will either lose their Fones4All service and/or have their service interrupted. By granting this petition, the Commission will ensure that it has adequate time to fully consider the issues raised in the Forbearance Petition—specifically whether the Commission should forbear from application of Rule 51.319(d) as it pertains to competitive LECs that use ULS to provide single line residential service to end users eligible for and enrolled in the Lifeline program—while at the same time preventing a potential disruption in Lifeline service to a large number of Lifeline customers by application of Rule 51.319(d).

III. A WAIVER IS WARRANTED IN LIGHT OF SBC CALIFORNIA'S INABILITY TO PROCESS BATCH MIGRATION ORDERS IN A FASHION THAT WOULD ALLOW FONES4ALL TO MEET THE MARCH 11, 2006 DEADLINE

Even if the Forbearance Petition were not pending before the Commission, the Commission is compelled to grant the interim waiver requested herein in light of SBC California's inability to handle in a timely fashion the migration of Fones4All's UNE-P lines to other switching facilities. As described more fully in the attached Declaration of Tiffany

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12 *Id.*, ¶ 8.

Chesnosky ("Chesnosky Declaration") which was filed in California Public Utilities Commission Docket A. 05-07-024 today in response to an Emergency Motion of SBC California To Compel UNE-P Transition, SBC California is not capable of completing the transition of Fones4All's UNE-P lines by March 11, 2006. As set forth in the Chesnosky Declaration, to this day, despite months of attempting to work with SBC California on the migration process, Fones4All has not been able to successfully process a single migration order. In light of SBC California's inability to meet the transition deadline the Commission should grant the interim waiver.

IV. CONCLUSION

Wherefore, Fones4All respectfully requests that the Commission grant Fones4All on an expedited basis the interim waiver of Section 51.319(d) of the Commission's Rules in the state of California consistent with the discussion presented herein.

Respectfully submitted,

Ross A. Buntrock
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(202) 467-6900
(202) 261-0007 Fax

Counsel to Fones4All Corp.

February 24, 2006

DECLARATION OF TIFFANY CHESNOSKY ON BEHALF OF FONES4ALL CORPORATION (U 6338) IN OPPOSITION TO THE "EMERGENCY MOTION OF SBC CALIFORNIA TO COMPEL UNE-P TRANSITION"

1. My name is Tiffany Chesnosky. My business address is 6320 Canoga Avenue, Suite 650, Trillium Building, Woodland Hills, California. I am a Vice President for Special Projects for Fones4All Corporation ("Fones4All").

2. My primary responsibilities are supporting Fones4All's network operations. Since September 2005 I have worked with Fones4All on, among other projects, the batch hot-cut ("BHC") migration project to migrate Fones4All's UNE-P lines to Fones4All's own network facilities.

3. Prior to my current position, I was a Sales Support Manager at Pacific Bell Telephone. My responsibilities included supporting and implementing services to Internet Business Customers. Following my tenure with Pacific Bell I was Carrier Relations Implementation Manager at Collo.com in San Francisco, California, where my responsibilities included contract negotiations and development of processes and procedures development for carrier fiber build and equipment implementation into twenty three collocation facilities.

4. The purpose of my declaration is to respond to the factually incorrect statements, assertions and characterizations contained in SBC California's February 13, 2006 self-styled "Emergency Motion to Compel UNE-P Transition" which incorrectly lists Fones4All as a CLEC that has not followed through on its transition plan. Herein, I detail the numerous obstacles SBC has placed in the way of Fones4All as the company has attempted to meet the March 11, 2006 transition deadline. My declaration sets forth the history of Fones4All's attempts to work with SBC to ensure an orderly and timely

transition of Fones4All's UNE-P lines to Fones4All's own switching arrangements beginning in mid 2005 to the present day. I explain that despite Fones4All's efforts to work closely and cooperatively with SBC to manage the complex transition task, SBC to date has failed to devote adequate resources to either the BHC process generally and has dragged its feet on providing Fones4All with competent account team support in the transition process. I conclude that to the extent the March 11, 2006 deadline for completion of the transition of Fones4All's lines is not met, it will be due in large part to the lack of responsiveness of Fones4All's SBC account team.

5. In the *Triennial Review Remand Order*, based upon the advocacy of SBC and the other RBOCs, the FCC found that the hot cut process for the vast majority of mass market lines (i.e. UNE-P lines) would not create impairment. In making this finding the FCC specifically stated: "We find that the new hot cut processes developed by each of the BOCs significantly addresses these difficulties. Particularly in light of these new, improved hot cut procedures, we concluded that the commenters' concerns largely are speculative..."[1] The FCC specifically cited SBC's "Enhanced Daily Process" for batch hot cuts and noted that SBC places "no limitations on the number of local service requests that a competitive LEC may submit. Its 'Defined Batch Process" allows competitive LECs to order up to 100 hot cuts per day per central office with a standard provisioning interval under two weeks, resulting in 20-25 hot cuts per hour."[2] The FCC noted specifically, however that the 12 month transition period for the UNE-P conversion adopted in the *Triennial Review Remand Order* "is based on the incumbent LECs'

[1] TRRO, ¶ 210.
[2] TRRO, ¶ 211.

asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers."[3]

6. On October 20, 2005 I requested on behalf of Fones4All via email from me to our SBC Account Manager, Cheryl Labat, the SBC Batch Hot Cut contract that SBC requires CLECs execute in order to utilize any BHC offering, along with any other information necessary to move forward with the BHC process. I did not receive any response from Ms. Labat for more than three weeks, despite that fact that I made numerous requests via email to Ms. Labat including, but not limited to inquiries via email on November 10, 2005; November 15, 2005; November 16, 2005 regarding the status of the BHC contract and stressing the need to immediately move forward with the process in light of the March 11, 2006 transition deadline. In fact, almost all of my written communications to Ms. Labat sounded a note of urgency in light of the rapidly approaching March 11, 2006 deadline. Finally, after my numerous inquiries, on November 21, 2005, just prior to the Thanksgiving holiday, and over one month after the initial request was made, SBC provided me with the Batch Hot Cut contract. I promptly worked to both review the contract and gather the information necessary to complete the contract and returned it to Ms. Labat so that SBC could file the executed BHC contract with the California Public Utilities Commission ("CPUC"), as per SBC's normal and established protocol. However, SBC failed to file the contract with the CPUC for 9 weeks. I learned in a subsequent communication with Ms. Labat on January 5, 2006 that SBC had not yet filed the BHC contract with the CPUC and SBC had taken no steps to implement the contract with Fones4All. Shortly after this date SBC filed the BHC contract with the CPUC.

[3] TRRO, ¶ 227.

7. On January 19, 2006 Fones4All posed six questions relating the BHC process and implementation thereof to Ms. Labat via email. Ms. Labat indicated in her response that she was unable to provide me with answers to four of my six questions and she referred me to another SBC employee by the name of "Ann Marie." On January 26, 2006, having received no response from Ms. Labat to Fones4All's outstanding questions, Fones4All once again corresponded via email with Ms. Labat regarding a question relating to the SBC's Trap and Trace product, which the SBC web site indicates requires execution of an NDA. Ms. Labat indicated that SBC no longer requires execution of an NDA in order to review information related to the product, however Ms. Labat was not capable of providing Fones4All with any additional information regarding the Trap and Trace product, including it's functionality or how the product is accessed by wholesale customers. As of February 6, 2006, Fones4All had still received no word from Ms. Labat regarding Fones4All's outstanding BHC implementation questions, nor had Fones4All received any response from "Ann Marie" regarding BHC questions. As of today, those questions remain unanswered.

8. SBC California's failure to implement the BHC contract with Fones4All in a timely fashion has needlessly delayed implementation of Fones4All's migration plan. Fones4All's migration plan called for beta migration to begin on February 15, 2006 with 10 LSRs that would have a FOC date of February 21, 2006. However, the initial 10 orders failed to go through SBC's systems because SBC had apparently failed to update its systems with Fones4All's new UNE-L OCN number. After the failure of these orders to go through the SBC California system I repeatedly asked Ms. Labat for her assistance in troubleshooting the issue. However, as of February 22, 2006 the issue, despite having

been escalated, had not been resolved. Finally, after having sought the assistance of legal counsel, I received word from Ms. Labat yesterday, February 23, 2006 that the issue arose from a transcription error. As of today, however, Fones4All still has not received any word regarding whether the order was successfully processed. SBC's lack of attention to this issue for seven calendar days, coupled with SBC's foot dragging in getting the BHC contract executed and filed, has hopelessly and unnecessarily hobbled Fones4All's migration plans.

9. Fones4All has redoubled its efforts in an attempt to recover from these set backs that are beyond the company's control, however, until SBC is willing or able to do the same Fones4All is in grave danger of missing the March 11, 2006 deadline.

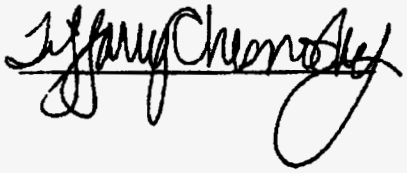
10. In light of these facts, SBC California's allegation that Fones4All is not following through on its transition plan are disingenuous. SBC states that it "does not see any significant queuing of orders from these carriers that would indicate the carriers are focused on completing the transition of its UNE-P lines in an orderly fashion pursuant to its transition plan prior to March 11, 2006." *See* Smith Declaration at ¶ 15. In Fones4All's case, the reason that its orders are not showing up is not because Fones4All is not executing its transition plan, but rather because SBC California is not doing its part to implement the plan.

17. Fones4All has attempted to work with SBC California on scheduling an orderly transition of its UNE-P lines, however SBC California has been either unwilling or unable to provide the necessary information and follow up in order for Fones4All to have any hope of meeting the March 11, 2006 deadline. SBC California's will have no

one to blame but itself if it finds itself facing a glut of orders on the eve of the migration deadline.

18. This concludes my declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed at Burlingame, California this 24th day of February, 2006.



CERTIFICATE OF SERVICE

I, Edilma Carr, hereby certify that on this 24th day of February 2006, I served copies of the foregoing **"Emergency Petition for Interim Waiver of the Commission's Rules Pending Commission Action on the Fones4All Petition for Expedited Forbearance"** by electronic filing and to the following parties by first-class mail, postage prepaid:

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Edilma Carr

+ ***Via electronic filing***
* ***Via electronic mail***

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.	A.05-07-024

RESPONSE OF PACIFIC CENTREX SERVICES, INC. TO THE EMERGENCY MOTION OF SBC CALIFORNIA TO COMPEL UNE-P TRANSITION

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February 24, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement Changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.	A.05-07-024

RESPONSE OF PACIFIC CENTREX SERVICES, INC. ON THE EMERGENCY MOTION OF SBC CALIFORNIA TO COMPEL UNE-P TRANSITION

Pursuant to Rule 45 of the Commission's Rules of Practice and Procedure, and to instructions issued by Administrative Law Judge Karen Jones' ruling of February 16, 2006 granting an extension of time to respond, Pacific Centrex Services, Inc. ("PCS 1") through counsel, hereby submits its response to the Emergency Motion of SBC California ("SBC") to compel PCS 1 to transition its embedded base of UNE-P lines to alternative arrangements by the March 11, 2006.

PCS 1 finds this latest tactic by SBC California to be not only unreasonable, but absolutely incredible. PCS has spent millions of dollars and has thirty full-time staff dedicated to transitioning its UNE-P lines to UNE-L. SBC California is fully aware of the massive undertaking that this has been for all CLECs including PCS 1, yet suggests that CLECs are somehow gaming the system. The truth is quite the opposite.

PCS 1 began its process to transition lines back in the third quarter of 2004. SBC California has placed roadblock after roadblock preventing PCS 1 from successfully transitioning lines. Moreover, SBC California routinely fails to migrate PCS 1's lines correctly. As a result, PCS 1

has lost approximately 50% of its customers that have been processed through SBC California's migration systems. In effect then, SBC is asking this Commission to speed up the process whereby SBC California can take more of PCS 1's customers.

The Commission should deny SBC's motion in total and initiate an investigation into the process by which SBC is migrating CLEC UNE-P customers to UNE-L or other alternative arrangements. The Commission should also grant additional time to PCS 1 and the other CLECs named by SBC for the migration to occur at a reasonable pace, a pace that SBC California's systems can handle.

1. As a threshold matter, it should be noted that SBC's motion should be denied in its entirety because of a lack of harm presented. In the worst case, the customers that SBC fails to migrate per the CLECs' request would merely be shifted from UNE-P rates to resale rates. Given the fact that SBC is primarily to blame for the UNE-P lines that are yet to be migrated, this hardly warrants the Commission granting any emergency relief to SBC.

2. PCS 1 began its transition plans to move its UNE-P customers to its own facilities via UNE-L well before the *Triennial Review Remand Order* ("TRRO")[1] became final and the one year transition period to March 11, 2006 set. Plans for the migration were begun not only because of regulatory action/uncertainty, but also because it simply made business sense for PCS 1 to move to its own facilities. PCS 1 followed the expected regulatory trajectory by building a customer base with UNE-P and always intended to move to UNE-L. The TRRO surely

[1] *See In the Matter of Unbundled Access to Network Elements* (WC Docket No. 04-313); *review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), Order on Remand, 20 FCC Rcd 2533, *(TRRO"), petitions for review pending, Covad Communications Co, et al. Nos. 05-1095 et al (D.C. Cir.).*

accelerated these plans, but SBC's suggestion that CLECs are dragging their feet certainly does not apply to PCS 1.

3. PCS 1 has spent many millions of dollars and has thirty staff members devoted to its migration to UNE-L. PCS 1 currently has its own collocated equipment lit and functioning in twenty-four central offices, and is in the process of lighting an additional twenty-two for forty-six total. In order to expand its footprint further, PCS 1 is working closely on a deal with another CLEC that would expand its total serving central offices by adding an additional one hundred and twenty-four collocations. PCS 1 has purchased a class 4 switch and class 5 softswitch, and currently has 600 channel banks currently in operation. PCS 1 is moving as fast as possible to establish UNE-L arrangements for all its customers. As will be discussed below, SBC is primarily responsible for any foot dragging due to slow response times and operations support system limitations.

4. PCS 1 is prevented from transitioning customers to UNE-L due to SBC's inability to efficiently and correctly perform the migration. PCS 1 is constantly in contact with SBC's Operations Support Systems team, specifically Area Manager Sharon Halley. Ms. Halley appears to be doing her best to assist PCS 1, but SBC's systems are simply incapable of migrating large numbers of lines. SBC maintains a hard limit of 200 line migrations per central office per day. The hot cuts are scheduled on a first come, first serve basis. If an order is placed that exceeds this limit, it is simply rejected. This makes SBC's concerns that thousands of orders will flood SBC's systems just prior to March 11, 2006 all the more silly. SBC has no mechanism in place to accept any more than a minimal amount of migration orders anyway.

5. Given the large number of lines that PCS 1 wanted to migrate, PCS 1 sought a batch hot cut contract from SBC. It took an unreasonable amount of time just to get to get the contract, and then when the batch process was attempted, it was a miserable failure. Upon PCS 1's first

attempt at a batch hot cut, SBC issued a due date scheduled for five days later. Given SBC's lack of dexterity in the process thus far, this seemed to PCS 1 to be rather ambitious. PCS 1's fears were realized. When the due date arrived, the vast majority of orders were not completed. For those orders that were migrated, over 80% of the orders were not converted correctly. The affected lines suffered from being simply down totally; to being crossed; experiencing sporadic or no dial tone; or having no calling features present. Of these lines that were incorrectly migrated with such problems, PCS 1 lost more than 50% of those customers to SBC California.[2] It is impossible for PCS 1 to know if the mistakes were intentional,[3] or just a result of SBC's poor planning and system functionality.

6. PCS 1 would be thrilled if SBC could actually migrate its customers in a timely fashion. At this point, however, even if SBC could actually convert 200 lines a day for PCS 1, given an average 20 day work month, that would result in only 4000 customers per month being migrated. At that rate, it would take well into 2008 to migrate all of PCS 1's customers. None of this is PCS 1's fault and in fact, PCS 1 would love it to go faster, particularly if SBC would do it right and stop making mistakes that result in SBC regaining those customers.

7. It should be noted that the FCC relied upon SBC's specific assurances regarding its batch hot cut process in the TRRO.[4] The one year deadline imposed by the FCC was contingent upon "the incumbent LECs' asserted ability to convert the embedded base of UNE-P customers to UNE-L on a timely basis while continuing to meet hot cut demand for new UNE-L customers."[5] SBC has proven to be incapable of efficiently migrating customers, and now seeks emergency relief to protect itself from its own incompetence.

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[2] PCS 1 reserves all right in regards to this issue.
[3] If so, this is certainly a dubious winback program.
[4] *TRRO*, par. 211.
[5] *TRRO*, par. 227.

8. SBC also argues that because the parties have not agreed to a formal "transition plan," PCS 1 is thereby ignoring its responsibilities and intends to keep its customers on UNE-P. As shown above, nothing could be further from the truth.

9. This Emergency Motion represents another example of SBC's general policy towards PCS 1—squeeze from all sides. In addition to failing to implement a reasonable UNE-P migration plan, SBC is also engaging in unreasonable collections actions regarding its UNE re-look bill. PCS 1 has made substantial payments to SBC and is in negotiations on various billing disputes. Despite this, SBC is refusing to accept a reasonable payment plan and refusing to investigate PCS 1's outstanding UNE-P billing issues.[6] Now SBC seeks additional self-help ith this motion.

The Emergency Motion should be denied and seen for what it is, just one more harassment tactic directed towards UNE-P CLECs.

Respectfully Submitted,

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Dated: February 24, 2006

[6] SBC has even been sending disconnect notices on circuits that are allegedly underpaid by only $35.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the RESPONSE OF PACIFIC CENTREX SERVICES, INC. TO THE EMERGENCY MOTION OF SBC CALIFORNIA TO COMPEL UNE-P TRANSITION (PUBLIC REDACTED) on all known parties to this proceeding by electronic mailing to those parties with an electronic email address and by mailing a properly addressed copy by first-class mail with postage prepaid to each party without an electronic email address.

Executed on February 24, 2006, at San Leandro, California.

Kristopher E. Twomey

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of Pacific Bell Telephone Company, d/b/a SBC California for Generic Proceeding to Implement changes in Federal Unbundling Rules Under Sections 251 and 252 of the Telecommunications Act of 1996.	Application 05-07-024

RESPONSE OF

CALIFORNIA CATALOG & TECHNOLOGY, INC. (U 5607 C)
TELSCAPE COMMUNICATIONS, INC. (U 6586 C)
U.S. TELEPACIFIC CORP. (U 5721 C)
UTILITY TELEPHONE, INC. (U 5807 C)
WHOLESALE AIR-TIME, INC. (U5751 C)

TO THE EMERGENCY MOTION OF SBC CALIFORNIA
TO COMPEL UNE-P TRANSITION

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Date: February 24, 2006

Pursuant to Rule 45 of the Commission's Rules of Practice and Procedure, and the February 16, 2006, e-mail ruling of Assigned Administrative Law Judge Karen Jones establishing the date for responses, California Catalog & Technology, Inc. dba CCT Communications, Telscape Communications, Inc., U.S. TelePacific Corp., Utility Telephone, Inc., and Wholesale Airtime, Inc. ("CLECs") respectfully respond to the emergency motion of SBC California ("SBC") to compel UNE-P transitions.

INTRODUCTION

The Commission should reject SBC's motion. There is no emergency. The sky is not falling and the world, as SBC knows it, is not going to end if all CLECs have not transitioned off of UNE-P on or before March 10, 2006.[1] Moreover, as is shown in this response and the attached declarations,[2] the plain fact of the matter is that SBC has been primarily responsible all along for the circumstances that have caused CLECs to delay converting UNE-P services to other arrangements. Thus, the brunt of any consequences from transitioning delays should be borne by SBC, not by CLECs and not by any end users.

I. A FUNDAMENTAL CAUSE OF UNE-P TRANSITIONING DELAYS HAS BEEN SBC'S REFUSAL TO ABIDE BY THE CONVERSION PRICING RULES MANDATED BY THE TRO.

In the *TRO,* the FCC determined that charges for converting tariffed services to UNEs, or *vice versa,* are, in large, unlawful. As the FCC, explained:

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[1] In truth, there simply is no reason to believe that all UNE-P lines will not be transitioned by the *TRRO* deadline. SBC's allegation that CLECs have done nothing or are abandoning their conversion plans is utterly false. Indeed, in Utility Telephone's case, its SBC account manager was fully apprised of its plans and even objected internally to SBC's naming Utility Telephone as a respondent. Yet, despite that objection from its own employee, SBC went ahead submitted a declaration, *under penalty of perjury*, that Utility Telephone had done nothing.

[2] *See,* Exhibit A (Declaration of Kelly Pool), Exhibit B (Declaration of Kevin Reno), Exhibit C (Declaration of Jeff Compton), and Exhibit D (Declaration of Nancy Lubamersky).

> Because incumbent LECs are never required to perform a conversion in order to continue serving their customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms, and conditions. [Cite omitted.] Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any such person or class of persons (e.g., competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.[3]

However, notwithstanding this holding, which, along with other non-appealed provisions of the *TRO,* became effective in October 2003, SBC steadfastly refused during the entire UNE-P transition period preceding the issuance of D.06-01-043 to abide by the FCC's ruling.

This refusal to honor the FCC's holding on conversion charges has been one of the most significant factors leading to transitioning delays over the past year. Instead of providing a financially-friendly environment to encourage UNE-P transitions in accordance with the intent of the *TRRO,*[4] SBC, throughout the past year, threatened CLECs with exorbitant service order and installation charges for even the most simple "as-is" migrations from UNE-P to resale. The attached Declaration of Kelly Pool shows, for example, that CCT Communications was quoted a transition rate of $70 per conversion and, later, was actually charged an average of $43.59 per line for conversions of UNE-P to resale. When Wholesale Air-Time, attempted to obtain confirmation of what SBC's charges would be, SBC refused to even quote its charges

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[3] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-989; *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC No. 03-36 (2003) ("*TRO*") ¶ 587.

[4] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313; CC Docket No. 01 338, Order on Remand, FCC 04-290 (2005) ("*TRRO*").

until after Wholesale Air-Time agreed to commit to a transition schedule. Other CLECs, too, have had the very same experience.

What is more, during the negotiations and arbitration of the *TRO/TRRO* Amendment in this docket, SBC refused to agree to retroactive application of any provisions relating to conversion charges, which placed the entire financial risk and burden for early conversions on CLECs until the *TRO/TRRO* Amendment went into effect. In light of SBC's position, the only reasonable course of action for most CLECs was to postpone their transition plans until the conversion pricing issue was settled, which actually occurred only a few days ago.[5]

It should be noted, however, that some CLECs were not in positions to wait. Because Telscape elected to transition UNE-P accounts to UNE-L, it was forced to go forward with most of its UNE-P conversions before the *TRO/TRRO* Amendment was adopted, which resulted in Telscape being billed approximately $145,000 in charges that the *TRO/TRRO* Amendment would now preclude. Although Telscape was able to defer conversion of a small number of its accounts that will be transitioned to resale, Telscape is now out-of-pocket a significant amount for conversions to UNE-L with no certainty at all that it will be able to obtain a refund from SBC. Other CLECs undoubtedly are in similar positions

According to assertions that SBC made during the course of this proceeding, its pre-existing interconnection agreements with CLECs allowed it to charge for conversions that were undertaken prior to the adoption of the *TRO/TRRO* Amendment. However, there, in fact, is nothing in SBC's interconnection agreements with CCT Communications, Wholesale Air-Time,

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[5] Although D.06-01-043 was issued on January 26, 2006, final *TRO/TRRO* Amendment language on this issue was not agreed upon until the early afternoon of February 15, 2006. Indeed, earlier that day, SBC

(footnote continued)

Telscape, Utility Telephone, or many, if not most, other CLECs that specify charges for conversions from UNE-P to resale. Instead, in these agreements, the only provisions relating to charges for "conversions" consist solely of references to SBC's Tariff Schedule 175-T. In the cases of these agreements, then, no amendment was ever needed in order to give effect to the FCC's rule because the referenced tariff charges governing conversions were clearly rendered unlawful no later than the effective date of the *TRO,* if not earlier.[6] Thus, SBC actually had no right at all to assess charges for these conversions prior to adoption of the *TRO/TRRO* Amendment.

What is more, it should be noted that there is nothing in the *TRO* that purports to condition the effectiveness of the conversion charge rule on completion of contract amendments effecting changes of law. The FCC's holding on conversion charges, unlike the purported preemption of state unbundling requirements, is not a change of law. The applicable law, i.e., the provisions of 47 U.S.C. § 251(c)(3), 47 U.S.C. § 201(b), and 47 U.S.C. § 202(a), never changed – unreasonable, discriminatory charges have always been unlawful.

However, even if the change-of-law provisions applied to the *TRO* conversion charge ruling, the change-of-law provisions in the responding CLECs' agreements require that: "the affected provision shall be invalidated, modified, or stayed, *consistent with the action of the legislative body, court, or regulatory agency . . . .*"[7] In order to be consistent with the *TRO* conversion charge ruling, any agreement modifications needed to carry out the FCC's action

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attempted to introduce language into the Amendment that would have allowed it to impose potentially substantial conversion service order charges, even for conversions for which no physical work is required.

[6] SBC's tariffs do not have "change-of-law" provisions that allow SBC to continue to charge unlawful rates until such time, if ever, that it gets around to changing its tariff.

[7] Interconnection Agreement, General Terms and Conditions, section 29.18 (emphasis added).

must, necessarily, prohibit conversion charges no later than the date those charges were determined by the FCC to be unlawful; that is, the date the *TRO* became effective.

In any event, it is inexplicable how SBC possibly could contend, on one hand, that CLECs were obligated to begin UNE-P transition activities arrangements before their interconnection agreements were amended, while contending, on the other hand, that SBC had no obligation at all during this same period to abide by the FCC's earlier determination that conversion charges are unlawful. More importantly, had SBC not been so insistent on imposing punitively-high conversion charges on CLECs who were otherwise willing to comply with the spirit of the *TRRO*'s transition requirements prior to having the *TRO/TRRO* Amendment in place, SBC, CLECs, and the public would not be in the position that SBC claims we are in today. SBC, in its mean-spirited, anti-competitive way, singlehandedly created this predicament, and SBC, alone, should suffer any consequences.

II. SBC'S UNREASONABLE COMMERCIAL NEGOTIATION TACTICS ALSO HAVE CONTRIBUTED TO TRANSITIONING DELAYS.

Another factor that has contributed substantially to transitioning delays has been SBC's failure to engage in good faith negotiation of reasonable "commercial" agreements for the provision of UNE-P replacement arrangements. CLECs, accepting at face value SBC's repeated representations that it was willing to negotiate commercial agreements, deferred transition decisions while they attempted to negotiate alternatives. CLECs, such as Telscape, engaged in numerous efforts to find common ground with SBC, such as proposing prices that are specific to California, proposing zone prices that would recognize inherent cost differences in serving efforts, and proposing other provisions that would enable SBC to offer something other than its standard, nationwide price. However, SBC has refused to negotiate with CLECs. Ultimately,

most CLECs gave up their efforts to reach mutually-agreeable "commercial" agreements; but, not without first deferring transition plans while they fruitlessly attempted to negotiate with SBC.

Even in a case where a CLEC, such as TelePacific, has been willing, albeit begrudgingly, to enter into a commercial agreement at the prices dictated by SBC, SBC's unwillingness to compromise on other key terms has resulted in roadblocks. In TelePacific's case, it can accept SBC's commercial pricing for only certain customers, but not for most others. However, because SBC will not deviate from its standard requirement that all UNE-P lines in existence as of the date the commercial agreement is executed be converted to the commercial arrangements, TelePacific must convert to resale all UNE-P lines that it does not want to be covered by the new agreement before it can sign the new agreement. Moreover, until the UNE-P to resale conversion is completed, which should be soon, TelePacific has no certainty at all that a commercial agreement will continue to be feasible for the remaining UNE-P lines if SBC decides, unilaterally, to change the prices or other terms of its non-negotiable offering. If this occurs, TelePacific's transition plans might have to change.

If SBC had no legal obligation to enter into "commercial" agreements, CLECs' reliance on SBC's asserted willingness to negotiate such agreements might be dismissed as unreasonable. However, SBC's offering such agreements is not optional. SBC has an obligation under 47 U.S.C. § 271 to provide CLECs with local switching, loop transmission, and transport at "just and reasonable" prices. More importantly, SBC has an obligation under state law to provide those elements in UNE-P combinations until such time, if ever, that SBC requests and obtains approval from this Commission, not the FCC, to discontinue providing access to UNE-P-type arrangements at prices established by the Commission.

Indeed, SBC's failure to request and obtain such approval is a violation of Ordering Paragraph No. 2 of Decision No. 02-12-081. As is explained in detail in the pleadings submitted to date in C.05-03-012, and also in briefs and comments in this proceeding, the requirements of that ordering paragraph have never been met and were not preempted by the *TRRO*. Moreover, under Public Utilities Code § 1708, the requirements of that Ordering Paragraph cannot be modified or ignored unless, upon SBC's request or upon the Commission's own motion, notice and an opportunity to be heard *as in the case of complaints* is first given to all parties, which, too, has never occurred.

Thus, CLECs cannot be blamed for having delayed plans to transition UNE-P services while they attempted to negotiate with SBC. CLECs had no obligation to do anything at all until the *TRO/TRRO* Amendment was adopted three weeks ago. In the meantime and continuing through today, CLECs have had, all along, a right to demand that SBC provide them with access to UNE-P at TELRIC prices under this Commission's orders issued pursuant to Public Utilities Code § 709.2 (c)(1).[8]

Quite clearly, had SBC not ignored this Commission's orders and California state law, there would be no need at all for CLECs to be expending time, effort, and money responding to SBC's current motion. Instead, those CLECs desiring to convert to non-section 251(c)(3) UNE-P-type arrangements at *lawful* prices could easily have done so by now. Only because SBC has refused to comply with the laws of California, is there now supposedly an

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[8] This code section requires the Commission to ensure that, "all competitors have fair, nondiscriminatory, and mutually open access to exchanges currently subject to the modified final judgment and interexchange facilities, including fair unbundling of exchange facilities, as prescribed in the commission's Open Access and Network Architecture Development Proceeding (I.93-04-003 and R.93-04-003)."

emergency situation. Again, SBC, not the Commission, not CLECs, and certainly not the public, is to blame.

III. EXCESSIVELY BURDENSOME ORDERING REQUIREMENTS ARE CONTINUING TO SLOW DOWN AND DELAY TRANSITIONS

Still another factor that has led to transitioning delays, and one that is ongoing, is SBC's imposition of burdensome ordering processes for conversions from UNE-P to resale. Rather than enabling CLECs to submit simple "as-is" migration requests, SBC has designed its OSS in a manner that requires every CLEC conversion order to be submitted as a "CLEC-to-CLEC" "conversion with change" even though the CLEC is staying the same and no change in the actual service configuration is being requested. This requirement means that each local service request ("LSR") submitted by a CLEC must contain complete customer location information and codes for all features as if the order were for entirely new service. Any error or failure to include an existing feature on the LSR will result in the end user's losing service.

SBC's failure to have in place a mechanism designed for "seamless" conversions, as envisioned by the FCC in the *TRO*,[9] places a very heavy burden on CLECs. The order submission process is extremely time-consuming and tedious, and it creates significant potential for error. Thus, in contrast to the conversion process assumed by the *TRO,* SBC's process almost ensures that end users will lose features and, in some cases, dialtone. Moreover, this lack of transparency for end users most assuredly will be blamed on the CLEC, thus adding significant insult to already substantial economic injury.

SBC's arduous process has forced CLECs to devote unnecessarily large portions of their resources to the preparation and tracking of the thousands of LSRs that must be

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[9] *See, TRO,* ¶ 586.

submitted in order to carry out the UNE-P transition. Although CLECs are working diligently to meet the March 10, 2006, goal of the *TRRO,* they hardly can be blamed for not having the resources at hand that are now needed to ensure that this goal is met.

IV. SBC HAS NO EQUITABLE OR LEGAL RIGHT TO OBTAIN RELIEF.

It is a fundamental policy of state law that a party seeking relief must come to the forum with "clean hands."[10] Where the party seeking relief is responsible, as the result of the party's own misconduct, for the circumstances giving rise to the claim, the doctrine of unclean hands is available to the other party as a defense.[11]

Here, SBC effectively forced CLECs to delay taking transition measures by threatening to impose, and indeed imposing, unlawful conversion charges. Further, SBC failed to even negotiate with CLECs for access to state-law-mandated substitute UNE-P-like arrangements, much less provide them with access to such arrangements at Commission-approved TELRIC prices. Instead, SBC has offered such arrangements only at non-negotiable prices that are two or more times higher than the Commission-approved prices and only, then, if CLECs also agree to other unfair and unreasonable conditions, such as requirements to convert all UNE-P services to such arrangements and to waive their rights to seek enforcement of SBC's state-law unbundling obligations.

SBC, not any CLEC, is the party that is responsible for the supposed "emergency" that SBC now asserts as the basis for its motion. SBC's hands are not clean and it is not entitled to obtain relief from CLECs for the consequences of its own misconduct.

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[10] "No one can take advantage of his own wrong." Cal. Civ. Code § 3517.

[11] *See, e.g., Unilogic, Inc. v. Burroughs* (1992) 10 Cal. App. 4th 612.

Further, SBC has failed to show why any relief at all from the Commission is even necessary. SBC's fear is that CLECs will over-burden its OSS with conversion orders, thereby causing its systems to shut down. However, the logical response to this concern is not to seek an order requiring CLECs to accelerate their transition activities. Instead, the logical response would be to ask CLECs to refrain from submitting UNE-P-to-resale conversion requests so that there can be assurance that SBC's OSS is not overloaded. Following the cessation of conversion requests by CLECs, SBC ought to be able to then easily convert remaining UNE-P lines to resale, on an entire CLEC billing account basis, rather than on an individual service order basis. This would completely eliminate any continuing problems stemming from SBC's imprudent failure to provide for flow-through of "as is" conversion orders, and would eliminate the burden that SBC's process, so far, has placed on CLECs.

CONCLUSION

As the foregoing response shows, SBC has failed to demonstrate that it has met the requisite requirements for granting the relief it requests. In determining whether to issue injunctive relief, the Commission applies the same standards as the courts. This means, among other things, that SBC, as moving party, must be reasonably likely to prevail on the merits, the requested relief must be necessary to avoid irreparable injury, and the relief must be consistent with the public interest."[12]

However, SBC, quite clearly, is not likely to prevail on the merits – to the contrary, SBC is to blame for the situation in which it now finds itself. CLECs actually tried months ago, *despite having no real obligation at that time,* to begin the transition process; but,

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[12] Decision No. 01-07-033 at p. 4, citing *Consumers' Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905.

SBC put up roadblocks that it had to know would force most to CLECs to delay conversions, and, in the cases of CLECs that nonetheless went forward with conversions, SBC slammed them with outrageous and unlawful conversion charges. Further, the relief SBC requests is not at all necessary. Indeed, it is precisely the opposite of what is needed in order to forestall the type of emergency that SBC asserts is imminent. Finally, granting SBC's motion would not be consistent with the public interest, but would reward SBC for all of its anti-competitive and unlawful behavior that led CLECs to defer submitting conversion orders in the first place.

Instead of granting SBC's motion, the Commission *sua sponte* should take immediate action to redress the harms caused by SBC's wrongful conduct.

First and foremost, the Commission should immediately extend the time within which CLECs must complete the submission of UNE-P to resale conversion requests so that this process can be undertaken in a manner that does not result in disruption of service to any end users, whether customers of CLECs or customers of SBC. As explained above, following the cessation of such requests, SBC should then be able to carry out such conversions on a basis that eliminates any necessity for submitting conversion requests on a line-by-line basis and that obviates any on-going concern about the lack of an "as-is" conversion process.

Second, the Commission should order SBC to immediately refund to CLECs all non-recurring charges assessed for conversions from UNE-P to resale that took place during the applicable *TRRO* transition period but prior to adoption of the *TRO/TRRO* Amendment and to show cause why its charges for conversions of UNE-P to UNE-L or other arrangements that took place during that same period should not be deemed unlawful to the extent they would now be precluded by the *TRO/TRRO* Amendment.

Third, the Commission should grant the long-pending motion for interim relief and complaint in C.05-03-012 and, as requested therein, find that the prices offered by SBC under its "commercial" wholesale offerings are unjust and unreasonable, and order SBC immediately to recommence accepting and completing CLECs' new, move, and migration orders for UNE-P, at the existing TELRIC prices established by the Commission, until such time as SBC has obtained authorization to cease doing so in accordance with the requirements of D.02-12-081.

Finally, the Commission should provide such other and further relief that it deems appropriate in order to compensate CLECs and make them whole for the harm and expense incurred by them as the result of SBC's unfounded motion and unlawful behavior.

Respectfully submitted this 24th day of February 2006 at San Francisco, California.

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By */s/ John L. Clark*
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EXHIBIT A

DECLARATION OF KELLY POOL

DECLARATION OF KELLY POOL
ON BEHALF OF CALIFORNIA CATALOG & TECHNOLOGY, INC.
dba CCT TELECOMMUNICATIONS

I, Kelly Pool, state:

1. I am Director of Operations for California Catalog & Technology, Inc. dba CCT Telecommunications ("CCT").

2. CCT provides telecommunications services to its customers using a variety of serving arrangements, including UNE.

3. Following SBC's announcement that it would no longer offer UNE-P in California, CCT attempted to negotiate with SBC for replacement service under a "Local Wholesale Complete" or "LWC" contract. However, the price that SBC proposed for LWC lines was extremely high, and SBC was unwilling to negotiate a lower price. As a result, CCT found that it currently has no choice but to convert its UNE-P lines to resale.

4. We began the conversion process with SBC in August, 2005. After we converted a few lines, we were shocked to receive billings for new line and feature installations that the customer already had. We contacted our account manager, who told us that SBC would charge CCT approximately $70 for each UNE-P line that we converted to resale.

5. I contacted our regulatory attorney and he advised us that the FCC had announced that these types of conversion charges are illegal. However, he said that SBC may be taking the position that it did not have to comply with the FCC's order until CCT's interconnection agreement was amended pursuant to an arbitration proceeding that had just begun. He advised that we should dispute SBC's charges.

6. A number of months later, SBC rejected our billing dispute arguing that until our interconnection agreement is amended, the charges set forth in our interconnection agreement

would govern conversions. However, to date, SBC never has identified any provisions in our interconnection agreement that establish the charges that apply to conversions from UNE-P; nor has SBC provided any other justification for denying our dispute.

7. Because of the way that SBC was billing for conversions, CCT had no real choice but to stop submitting conversion orders until such time as the SBC was willing to abide by the FCC order.

8. After our attorney notified us in the end of January 2006 that the CPUC had issued an order adopting amendments to interconnection agreements with conversion prices that are in compliance with the FCC's order, we began submitting migration orders. However, as other CLEC representatives explain in their declarations, SBC's refusal to allow us to submit "as is" orders has made the conversion process very tedious and time-consuming. In addition, like other CLECs, we are very concerned about errors, both on our part and on SBC's part. In fact, in response to our very first conversion order that we submitted after the new amendment became effective, SBC, for some reason, dispatched a technician to the site and our customer ended up without dialtone. We have no idea why a simple conversion from UNE-P to resale would require field work; all that we know is that whatever work was done, apparently was not done correctly.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was sign by me on this the 22 day of February 2006.

Kelly Pool

Kelly Pool

2991/009/X75356.v1

EXHIBIT B

DECLARATION OF KEVIN RENO

DECLARATION OF KEVIN RENO
ON BEHALF OF WHOLESALE AIR-TIME, INC.

I, Kevin Reno, state:

1. I am the Vice President of Operations for Wholesale Air-Time, Inc. ("WAT").

2. WAT provides telecommunications services to its customers using a variety of serving arrangements, including UNE-P.

3. As with other CLECs, WAT has had little cooperation from SBC in attempting to convert our UNE-P lines to alternative arrangements. We attempted to negotiate "commercial" arrangements with SBC, but those negotiations went nowhere. Therefore, for the time being, we are going ahead and converting our lines to resale.

4. Since last fall, I have been in periodic contact with our account representative to plan for the conversion of our UNE-P lines to resale. However, while she was very persistent in trying to obtain WAT's commitment to a conversion schedule, she refused to provide any commitment with regard to the charges that SBC was intending to assess for the conversions. In fact, she told me that SBC would not negotiate the amount of those charges until WAT committed to a transition schedule.

5. In light of our account representative's refusal to provide us with an appropriate pricing proposal, our understanding, based on discussions with other CLECs, that SBC's conversion charges would be high, and based on our regulatory attorney's advice that SBC was opposing retroactive application of new conversion pricing rules that were being arbitrated by the CPUC, WAT had little choice but to delay its conversion plans until that arbitration was completed.

6. As soon as the CPUC's arbitration decision was issued, we contacted SBC and have gone forward with the conversion of our UNE-P lines.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was sign by me on this the 23 day of February 2006.

Kevin Reno

2991/009/X75361.v1

EXHIBIT C

DECLARATION OF JEFF COMPTON

DECLARATION OF JEFF COMPTON
ON BEHALF OF TELSCAPE COMMUNICATIONS, INC.

I, Jeff Compton, state:

1. I am Vice-President - Regulatory and Carrier Relations for Telscape Communications, Inc. ("Telscape").

2. Telscape is a competitive local carrier based in Monrovia, California. Our focus is on the provision of local and long distance telephone service to Spanish-language dominant Hispanic households. We currently serve approximately 100,000 residential customers in California, predominantly using our own switching facilities in combination with unbundled loops. In accordance with Congress' intent in enacting the Telecommunications Act of 1996 and the CPUC's policies governing local competition, we, historically, have used UNE-P as an interim means to gain entry and serve customers in geographic locations where we do not have our own facilities. However, in order to provide the service qualities that make Telscape unique, our over-arching goal has always been to transition customers in a given geographic area to our own facilities as soon as it becomes economically feasible to do so.

3. Once the TRRO was adopted by the FCC, we immediately began considering alternatives to UNE-P that would enable us to continue to provide service in areas where we do not have facilities. In response to SBC's public announcements that it would enter into agreements to provide UNE-P-type services at commercially-reasonable prices, we initially engaged in a substantial effort to negotiate "commercial" UNE-P prices. We made a number of attempts to couple pricing proposals with creative restrictions and limitations that we felt would enable SBC to offer pricing that would work for both SBC and Telscape. For example, because our customers typically reside in dense, inner-city neighborhoods, which, typically, are served by

SBC using old, fully depreciated loop plant and older switches, we proposed affordable UNE-P pricing that would be restricted to these types of areas. Under our pricing proposals, SBC would have retained a significant competitive cost advantage over Telscape in these areas, but, even with that advantage being retained and even though the revenue opportunities are much lower in these areas (due, among other things, to there being a very high proportion of ULTS customers), SBC absolutely refused to budge from its set, nationwide price. I continue to contact SBC periodically to see if they are willing to negotiate, but the answer is always "no."

4. After it became clear that SBC had no intent to negotiate with CLECs, we immediately began planning for and carrying out the process of transitioning our customers to UNE-L arrangements. Because doing so requires substantial lead time to obtain collocation arrangements, install equipment and transport facilities, and, once all necessary equipment and facilities are in place, to convert customers UNE-L, we could not wait until our interconnection agreement had been amended to clarify what charges would apply and still be able to meet the March 11, 2006 deadline for completing the conversions. As a result, we now have been billed approximately $150,000 in charges that the *TRO/TRRO* Amendment adopted by the CPUC on January 26, 2006 does not permit SBC to assess for conversions. However, because the CPUC refused to adopt the CLECs' recommendation to apply the conversion charge provisions retroactively, we now are left with having to undertake the time and expense to bring a complaint to dispute SBC's charges. To the extent that SBC is permitted to keep the amounts it billed, our good faith in going forward with the transition process will be rewarded by our being placed at a competitive disadvantage vis-à-vis other CLECs and otherwise being penalized for not delaying the transition process until a signed agreement was in place.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was sign by me on this the 24th day of February 2006.

Jeff Compton

2991/009/X75421.v1

EXHIBIT D

DECLARATION OF NANCY LUBAMERSKY

DECLARATION OF NANCY LUBAMERSKY

ON BEHALF OF U.S. TELEPACIFIC CORP.

I, Nancy Lubamersky, state:

1. I am Vice-President, Public Policy & Strategic Initiatives for U.S. TelePacific Corp. ("TelePacific").

2. TelePacific provides telecommunications services to business customers using our own switching facilities in combination special access facilities that we lease from Pacific Bell Telephone Company ("SBC") or other carriers. In addition, we have purchased about 5000 UNE-P lines as "add ons" for FAX machines, alarms services and single voice lines to augment our T1-based services.

3. At the end of March 2005, very shortly after the FCC decided to allow ILECs to discontinue offering UNE-P, our Product Manager contacted our SBC account manager to discuss the potential conversion of our UNE-P lines to SBC's "Local Wholesale Complete" or "LWC" product, which was being touted as a commercially-competitive replacement for UNE-P. Initially, we exchanged e-mails regarding the conversion process, but we did not actually begin product negotiations until late summer. In the beginning of September, we met with a number of SBC representatives to discuss the LWC product, but SBC would not provide any details until we negotiated a nondisclosure agreement ("NDA"). Once the lengthy NDA was in place, SBC provided a short five-page overview of its LWC product, but did not include a draft agreement or any other details beyond the overview.

4. On September 15, 2005, our SBC account manager asked for our UNE-P transition plan even though she knew that SBC had provided us only a very sketchy LWC overview.

5. The next week, I contacted our SBC account team to request LWC terms that would meet TelePacific's needs. In my request, I said:

"I would like to negotiate a UNE-P replacement contract which reflects the fact that TelePacific Communications only offers service in California (and a very small presence in Nevada). I want a contract which is representative of California market conditions, both in terms of UNE-P volumes and market-based rates. The current LWC offer assumes a 13 state presence including 13 state aggregate volume thresholds and market-based rates reflective of much higher retail and UNE-P rates in the other SBC states. I appreciate your prompt attention to this request."

6. Two weeks later, SBC declined my request to negotiate, stating:

"We are offering the LWC contract as a 13 state agreement. I believe Telepacific is in receipt of the term sheets associated with this offer. We have not developed a state specific version of the agreement and we have no plans to do so. The LWC agreement is designed to provide service over several years and includes discounts for growing your LWC business. Increased use of LWC is not a criteria however and you can migrate your 5000 lines to LWC while continuing to order new service as resale, or LWC. Please feel free to call me if you would like to discuss. Thanks."

7. After receiving SBC's response, we decided that we would convert most of our UNE-P lines to resale, and would convert only about 500 lines to LWC. We notified SBC of our plan and that we would complete the conversion in March 2006.

8. Once we began trying to work out the details of the conversion project with SBC, we learned that finalizing the arrangements for the lines we decided to convert to LWC would have to be

deferred. Although we were ready and willing to enter into the LWC agreement for specific UNE-P lines, SBC refused to allow TelePacific to limit the LWC to only certain lines, but, instead, would have required that all UNE-P lines in existence as of the date the LWC agreement was signed be converted to the significantly higher priced LWC. This meant that we would need to complete the conversions of all other lines to resale before we could sign the LWC agreement. However, in the meantime, we would have no LWC price assurance from SBC (other than seeing the price go up every month), and no assurance that other key terms would not be changed.

9. Aside from this need to delay LWC conversions, we soon encountered difficulty with the resale conversion process, as well. While SBC indicated that the conversions would be treated as a "project", and required we identify each order with a project code, SBC was unwilling to work with us to develop a batch process of any sort. The "project" designation would only be used to identify the conversions, but the orders would still have to be submitted one by one. In December 2005, I tried to escalate this issue within SBC, but received no indication of any willingness to help, only continuing insistence on conversion forecast updates. During the past two months, we have sent numerous emails to SBC requesting information about the conversion process, have had several conference calls, and have engaged in other discussions with SBC. But SBC's responses have been slow and incomplete.

10. Because of our inability to obtain information from SBC, we hired four BOC retirees to help us work, account by account, through the imprecise UNE-P line conversion process that SBC has documented on its website. However, despite acquiring this expertise, SBC's conversion process continues to be highly problematic. The primary reason for the difficulty we are encountering, now, is that SBC, inexplicably failed to design its conversion support mechanisms in a way that

would allow "as-is" conversions from UNE-P to resale. With an "as-is" conversion, SBC's OSS would automatically transfer a line from UNE-P to resale with out changing any of the existing features or other service characteristics. However, under the process that is actually in place, the features and other attributes of the converted resale line will only reflect what TelePacific has actually specified on the local service request ("LSR") for the line. This means that if there is any error or failure to precisely mirror on the LSR every single feature and attribute of the customer's existing service, the feature or other attribute will be disconnected or lost. What is more, SBC has advised us that if a customer encounters a problem following conversion, we will have no access to the information needed to validate the services on the line SBC.

11. Because of these issues, the process that we must follow to convert UNE-P lines to resale is very tedious and time-consuming. As of February 10, 2006, we have converted 300 single line accounts from UNE-Ps to resale, and we are now in the process of converting about 1700 multi-line accounts to resale. However, despite our efforts, we are very concerned that some features, hunting arrangements, and other critical attributes to our customers' lines will not work properly following conversion, and that SBC will not be helpful in resolving any problems on a timely basis.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this declaration was sign by me on this the 24th day of February 2006.

Nancy E Lubamersky

Nancy Lubamersky

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CERTIFICATE OF SERVICE

I, Jan Van Dusen, certify that I have on this 24th day of February 2006 caused a copy of the foregoing

RESPONSE OF
CALIFORNIA CATALOG & TECHNOLOGY, INC. (U 5607 C)
TELSCAPE COMMUNICATIONS, INC. (U 6586 C)
U.S. TELEPACIFIC CORP. (U 5721 C)
UTILITY TELEPHONE, INC. (U 5807 C)
WHOLESALE AIR-TIME, INC. (U5751 C)
TO THE EMERGENCY MOTION OF SBC CALIFORNIA
TO COMPEL UNE-P TRANSITION

to be served on the parties listed on the most recent service list available from the CPUC website for docket number A.05-07-024, via email to the parties whose email addresses are listed, and via U.S. mail to the parties without email addresses. I also caused courtesy copies to be hand-delivered to the parties indicated below:

The Hon. Michael R. Peevey, President
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

The Honorable Karen Jones, ALJ
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

The Honorable Rachelle Chong
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

The Honorable Dian Grueneich
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

The Honorable Geoffrey Brown
California Public Utilities Commission
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The Honorable John Bohn
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Mr. Lester Wong
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Ms. Kelly Hymes
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

Mr. Aram Shumavon
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

I declare on penalty of perjury under California law that the foregoing is true.

Executed this 24th day of February 2006 at San Francisco, California.

/s/ Jan Van Dusen

Jan Van Dusen

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