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June 22, 2006

VIA ELECTRONIC SUBMISSION
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

Re: Review of AT&T Inc. and BellSouth Corp. Application for Consent to Transfer Control, WC Docket No. 06-74

Dear Ms. Dortch:

Although the Commission has made clear that it will not consider in merger proceedings issues that have been raised and are best decided in other proceedings or fora,[1] Fones4All has decided that it is free to ignore that precedent. Hence it continues to pepper the Commission with a series of ex partes relating to litigation before the California Public Utilities Commission (CPUC). Even if Fones4All's claims with respect to these matters were accurate and complete, they would not raise any issue that is remotely related to the proposed BellSouth/AT&T merger. But they are not. In each of its *ex partes*, Fones4All twists the facts and omits key details, which only underscores why a merger proceeding is an improper vehicle for relitigating, through dueling letters, disputes that have been raised in another forum.

Fones4All's latest salvos are ex parte letters filed on May 19 and May 24.[2] Its May 19 letter raises issues that were litigated before the California Public Utilities Commission (CPUC) relating to Fones4All's failure to comply with the March 11, 2006, deadline established in the

[1] The Commission has held repeatedly that it "will not consider arguments in [merger] proceeding[s] that are better addressed in other Commission proceedings or other legal fora . . . ." *Applications of Craig O. McCaw and American Tel. & Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5904, ¶ 123 (1994); *see also Applications of SBC Communications Inc. & AT&T Corp.*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18380 ¶ 175 & n.493 (2005); *AT&T Wireless Servs, Inc. & Cingular Wireless Corp.*, Memorandum Opinion and Order, 19 FCC Rcd. 21522, 21547-21549, 21551, ¶¶ 49-51, 56 n.222; *Applications of Gen. Motors Corp., Hughes Elec. Corp., & the News Corp.*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 605-607, 609, ¶¶ 304-09. 313-14 (2004); *Applications of Ameritech Corp. & SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14925, 14942-14943, ¶¶ 518, ¶¶ 557-59 (1999).

[2] Ex Parte Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary, FCC, WC Docket 06-74, at 1-2 (May 19, 2006) ("Fones4All May 19 Ex Parte"); Ex Parte Letter from Ross A. Buntrock, Counsel for Fones4All, to Marlene Dortch, Secretary, FCC, WC Docket 06-74, at 1-2 (May 24, 2006) ("Fones4All May 24 Ex Parte")..

TRRO[3] for CLECs to transition away from UNE-P.[4] Its May 24 letter revisits its argument in an earlier ex parte that it was somehow anticompetitive for AT&T California to file a claim with the CPUC seeking recovery of intraLATA access charges overbilled by Fones4All.[5]

Consistent with the Commission's past practice, these allegations should not be considered in the merger review process. AT&T nonetheless takes this opportunity to correct Fones4All's misrepresentations with respect to these matters.

1. Fones4All's claim in its May 19 ex parte that AT&T California has prevented Fones4All and other CLECs from timely transitioning their UNE-P lines is, quite simply, false. As of the March 11, 2006, transition date, AT&T had transitioned more than 92 percent of the approximately 1.25 million UNE-P lines that existed in California prior to the TRRO. And since early March 2006, when Fones4All began seriously transitioning its UNE-P lines, AT&T also has migrated the majority of Fones4All's UNE-P lines.[6] Moreover, it has done so despite Fones4All's repeated delays and mistakes in taking the steps necessary to effect the transition. Of course, even now, to the extent Fones4All seeks to convert its former UNE-P lines to a *bona fide* resale arrangement, it may place orders to do so, and the conversion would occur quickly. Fones4All is well aware of this, as it has told the CPUC, without complaint, that, "since it was precluded from adding new UNE-P lines as of March 11, 2005, Fones4All has actually ordered thousands of resale lines from AT&T."[7]

In any event, it certainly is not the case, as Fones4All claims, that AT&T's own actions prevented Fones4All from submitting orders on a timely basis for transitioning its UNE-P lines. The *TRRO*, released in February 2005, gave CLECs more than 13 months to transition their UNE-P lines to other arrangements. Despite the FCC's ample transition period, Fones4All

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[3] Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (2005) ("*TRRO*"), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir., argued Feb. 24, 2006).

[4] Order on Remand, *Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (2005) ("*TRRO*"), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095, *et al.* (D.C. Cir., argued Feb. 24, 2006). Specifically, Fones4All claims "that the primary reason CLECs were unable to submit UNE-P transition orders by the March 11 deadline related to AT&T's own failures and errors in managing the UNE-P transition, as well as severe limitations on AT&T's system's ability to handle bulk migrations." Fones4All May 19 Ex Parte at 2. It claims, further, that "AT&T California is acting in direct defiance of an arbitration decision of the . . . CPUC" requiring that UNE-P lines that a CLEC has failed to transition to a lawful arrangement as of March 11, 2006 be billed at a total service resale rate. *Id.*; *see* Decision Adopting Amendment to Existing Interconnection Agreements, *Application of Pacific Bell*, Decision 06-01-043, at 47 (Jan. 27, 2006) ("CPUC TRRO Decision"), *at* www.cpuc.ca.gov/word_pdf/FINAL_DECISION/53194.pdf.

[5] Fones4All claims AT&T California filed a "specious" complaint seeking recovery of overbilled intraLATA access charges. Fones4All May 24 Ex Parte at 1.

[6] *See* Ex Parte Letter from Jim Lamoureux, Senior Counsel, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-261 et al., at 1 (Mar. 10, 2006). Fones4All has designated the precise number of its non-transitioned UNE-P lines as confidential in its CPUC filings. *See* Fones4All May 19 Ex Parte, Ex. A at 10. AT&T would be happy to provide that confidential number upon request by the Commission, pursuant to the protective order in this proceeding.

[7] Opening Comments of Fones4All Corporation (U-6638-C) on Decision Confirming the Assigned Administrative Law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell*, Application 05-07-024, at 8 (CPUC filed May 11, 2006).

waited more than seven months after the *TRRO* was released – until October 20, 2005 – even to *initiate* contact with AT&T California regarding an amendment to its existing interconnection agreement to provide for a batch hot-cut transition.[8] Fones4All then accused AT&T California of not responding to this initial contact for three weeks, but, in fact, AT&T California responded within approximately three hours. Fones4All then failed to respond to AT&T's communication, and dialogue on this issue resumed only after AT&T proactively contacted Fones4All.[9] Later, when Fones4All executed and forwarded the necessary contract documents in early December 2005, it incorrectly identified its own carrier identification number, thus requiring correction and an accompanying delay in final execution.[10]

But Fones4All's errors and delays did not end there. Success in processing hot-cut transition orders requires that the CLEC's "OSS systems are properly programmed and that the carrier submits complete and correct orders."[11] To that end, AT&T California repeatedly consulted with Fones4All and provided it with extensive support.[12] Fones4All subsequently complained that its test batch cut orders – which Fones4All did not get around to scheduling until late February 2006, just weeks before the transition deadline – failed to complete due to an incorrect carrier identification number in AT&T California's systems. But that error was in fact attributable to "Fones4All's failure to submit an updated CLEC profile reflecting its new carrier number, as set forth in AT&T's processes."[13] In addition, as Fones4All acknowledges in its ex parte, its "third party switch vendor" will not "be fully capable of accepting all of Fones4All's capacity" until at least "July 1."[14] But AT&T California had nothing to do with Fones4All's failure to seek third-party switching facilities on a timely basis or the problems that may have resulted from that failure.

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[8] Declaration of Cheryl Labat ¶ 4, attached to Opposition of AT&T to Fones4All Corporation's Emergency Petition for Interim Waiver of Section 51.319(d) in the State of California Pending Commission Action on the Fones4All Petition for Expedited Forbearance, *Fones4All Corp. Petition for Expedited Forbearance*, WC Docket No. 05-261 (Mar. 6, 2006).

[9] *Id.* ¶¶ 5-6.

[10] *See id.* ¶ 7.

[11] *Id.* ¶ 8.

[12] *See id.*

[13] *Id.* ¶ 9.

[14] Reply Declaration of Tiffany Chesnosky ¶ 16 (CPUC filed May 18, 2006) (attached as Ex. B to Fones4All May 19 Ex Parte). Ms. Chesnosky catalogs a number of other alleged failings by AT&T to process the orders submitted by Fones4All only after the transition deadline had passed, yet she acknowledges that "it is correct" that Fones4All cancelled certain of its orders "because of trouble a [Fones4All] vendor was experiencing." *Id.* ¶ 11. Because this is not a complaint proceeding, AT&T California will not seek to rebut each of Fones4All's erroneous allegations. The simple fact is that none of Fones4All's allegations explains why Fones4All delayed so long in taking the material steps necessary to effect a timely transition. *See, e.g.*, Declaration of Connie Hernandez ¶ 7 ("Fones4All has never committed to a documented transition plan that would allow both Fones4All and AT&T California to anticipate high volumes of cut overs on particular days and schedule resources accordingly. Most CLECs that have successfully transitioned off UNE-P submitted transition plans to AT&T California that were useful to the transition. For its part, Fones4All did not follow the 'conversion timeline' it submitted to AT&T California on October 21, 2005, nor did Fones4All adhere to the transition forecast it provided in response to a request by ALJ Jones on March 1, 2006."), attached to AT&T California's (U 1001 C) Reply Comments on the Draft Decision of ALJ Jones Confirming the Assigned Administrative law Judge's Ruling Granting in Part the Motion for Enforcement of Decision 06-01-043, *Application of Pacific Bell* (CPUC filed May 16, 2006) ("AT&T Hernandez Decl.")..

In short, as AT&T California's affiant explained to the CPUC, "Fones4All did not begin serious efforts to transition its UNE-P lines until early March 2006, about a week before the FCC deadline of March 11 for UNE-P conversions."[15] To the extent some of its lines were not converted by the deadline, it is not AT&T California that is to blame.[16] Be that as it may, AT&T has worked – and will continue to work – diligently with Fones4All (as well as any other CLEC) to transition any remaining UNE-P lines in order to comply with this Commission's mandate in the *TRRO*.

2. Fones4All further claims in its May 19 letter that AT&T California's actions "effectively forc[ed] CLECs to engage in time-consuming and expensive litigation merely to force AT&T to comply with the CPUC decision."[17] Fones4All complains, in particular, that AT&T California flouted the CPUC's requirement that it assess a "total resale" rate on non-transitioned UNE-P lines, and Fones4All further faults AT&T California for seeking rehearing of that decision. Fones4All's first claim is false, and its second is frivolous.

Contrary to Fones4All's assertion, AT&T California did, in fact, develop and assess a proxy resale rate for all non-transitioned CLEC lines.[18] Although Fones4All took issue with the way in which that rate was developed, it is simply untrue that AT&T California insisted on imposing a market-based rate in contravention of the CPUC's order; in any case, the CPUC is the proper venue for resolution of such claims, not this merger proceeding. Equally important, AT&T has every right vigorously to defend its positions before the CPUC.[19] AT&T firmly

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[15] AT&T Hernandez Decl. ¶ 6.

[16] At the same time that Fones4All was failing to take timely steps to effect the *TRRO*-mandated transition of its UNE-P lines, it was seeking forbearance at the FCC from having to effect the transition at all. Fones4All filed, first, a July 1, 2005, petition for forbearance of the FCC's vacatur of its rule requiring unbundled switching as applied to Fones4All's "lifeline" customers. Petition for Forbearance, *Fones4All Corp. Petition for Expedited Forbearance*, WC Docket 05-261 (FCC filed July 1, 2005). It then filed a February 24, 2006 "emergency" petition for waiver seeking essentially the same relief (because the petition for forbearance had not yet been acted upon and the March 11, 2006 transition deadline was imminent). 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 Corp. Petition for Expedited Forbearance*, WC Docket 05-261 (FCC filed Feb. 24, 2006). AT&T certainly does not quarrel with Fones4All's right to file those pleadings, although AT&T strongly believes they lack merit and should not be granted. To the extent, however, Fones4All may have delayed taking the necessary steps to effect the transition in the hopes that it might not have to transition at all, such delay was misguided and certainly cannot be attributed to AT&T.

[17] Fones4All May 19 Ex Parte at 1.

[18] AT&T California developed a proxy rate based on certain reasonable assumptions because it is infeasible to create line-specific resale rates for unconverted UNE-P lines. UNE-P and resale are different offerings. Unlike UNE-P, resale rates vary depending on the type of customer, minutes-of-use, and the number of vertical features; and, in a resale arrangement, the ILEC is entitled to collect access charges from interexchange carriers. Because of those variations, AT&T California's industry-standard, FCC-approved "CABS" billing system used to bill UNE-P cannot bill a line-specific resale rate. *See California 271 Order*, 17 FCC Rcd 25650, ¶ 93 (2002) (finding that AT&T California's "CABS bills follow the industry standard Billing Output Specification (BOS) guidelines").

[19] "As the Commission previously has concluded, an applicant's lawful exercise of its rights does not raise character concerns[.] *Applications of SBC Communications Inc. & AT&T Corp.*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, 18380 ¶ 174 (2005) (quoting *Applications of Ameritech Corp. & SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14950 ¶ 571 (1999) (subsequent history omitted)); *see also United Mine Workers* v. *Pennington*, 381 U.S. 657, 669-70 (1965); *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-40 (1961); *White* v. *Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000) ("While the

believes that the CPUC had no authority to set any rate for non-transitioned UNE-P lines. As other state commissions have correctly held, this Commission's requirement in the *TRRO* that carriers migrate their embedded base of customers served by UNE-P onto alternative arrangements by March 11, 2006, means that any non-transitioned UNE-P lines may be re-priced by an ILEC to market rates.[20] Those other state commission decisions are fully consistent with – indeed, compelled by – this Commission's holding that, when a particular network element or arrangement is no longer subject to unbundling under § 251(c)(3), the rates, terms, and conditions for such elements need not be included in interconnection agreements established pursuant to the process set forth in § 252.[21] Standing up for that position at the CPUC is not anticompetitive, nor is it a merger issue.[22]

Noerr-Pennington doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition and therefore, with [an exception relating to sham litigation in the labor law context], applies equally in all contexts.").

[20] *E.g.*, Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment*, 2005 WL 3018712, Case No. 05-887-TP-UNC, at 51 (Ohio PUC Nov. 9, 2005) ("[I]f the ULS/UNE-P arrangements are still in place at the conclusion of the 12-month transition period while SBC has completed all of the tasks necessary to complete a requested conversion or migration, the CLECs shall be responsible for the failure to take the appropriate steps to transition their embedded base customers to alternative arrangements. Accordingly, we find that these arrangements shall be re-priced at market-based rates until the CLECs take the appropriate action to transition or disconnect these arrangements."); Arbitration Decision, *In re Access One*, 2005 WL 3359097, No. 05-0442, at *67 (Ill. Comm. Comm'n Nov. 2, 2005) ("the Commission concludes that the proposed language of SBC advocating market-based rates should be adopted" for non-transitioned UNE-P lines); Order, *Collaborative Proceeding*, 2005 WL 2291952, Case No. U-14447, at 21 (Mich. PSC Sept. 20, 2005) ("[S]hould the transition not be completed by the transition period end date, the Commission is persuaded that the process and billing proposed by SBC should be implemented.").

[21] *See* Memorandum Opinion and Order, *Qwest Communications Int'l Inc.*, 17 FCC Rcd 19337, ¶ 8 & n.26 (2002) (holding that the various provisions of § 252 apply to "only those agreements that contain an ongoing obligation relating to section 251(b) or (c)"); *see also* Arbitration Order, *Petition of Verizon New England*, DTE 04-33, at 85 (Mass. DTE July 14, 2005) ("When the FCC determines that an element need not be unbundled under § 251(c)(3), access to such network element is no longer subject to compulsory negotiation and arbitration, because there is no ongoing obligation to unbundle it."); Arbitrator's Report and Decision, *Petition for Arbitration*, Docket No. UT-043013, Order No. 17, at 49 (Wash. UTC July 8, 2005) ("As access to and rates for these elements are no longer governed by Section 251, or subject to the Section 252 process, Verizon may establish by appropriate tariff or commercial arrangements the price for these delisted elements."), *aff'd in relevant part*, Final Order, *Petition for Arbitration*, Docket No. UT-043013, Order No. 18 (Wash. UTC Sept. 22, 2005).

[22] Fones4All also recites (at 2) the CPUC's statement that market rates would be "unduly punitive." But this claim is belied by the fact that AT&T has entered into commercial agreements for UNE-P-type arrangements with more than 140 CLECs and more than fifty CLECs in California alone. *See*, *e.g.*, Press Release, Sage Telecom, *Sage Telecom and SBC Reach Wholesale Telecom Services Agreement* (Apr. 5, 2004) ("Dennis M. Houlihan, Sage Telecom CEO, said, 'Taking care of customers is our number one priority at Sage. We are proud to have achieved a commercially reasonable agreement that enables us to expand on that priority.' "), *available at* http://www.sagetelecom.net/news.html?newsid=35; Press Release, SBC Communications Inc. & Granite Telecommunications, *SBC and Granite Telecommunications Sign Long-term Commercial Agreement* (Jan. 3, 2005) ("Rob Hale, president of Granite Telecommunications, said, 'We are pleased to solidify our future with SBC. Granite has already signed new commercial agreements with three other ILECs, completing the UNE-P replacement program for our nationwide coverage. This will give our customers stability and clarity for years to come. Strong service, useful software and meaningful savings will continue for our growing base of customers.' "), *available at* http://www.granitenet.com/documents/SBC-GranitereleaseFINAL010305.doc.

3. Fones4All's May 24 ex parte revisits a claim that Fones4All asserted in a May 9 ex parte, arguing that it was somehow anticompetitive for AT&T California to file a complaint with the CPUC alleging that Fones4All had over-billed AT&T for intraLATA toll termination. AT&T filed this complaint when its Daily Usage Files showed that Fones4All had billed AT&T terminating access charges for many more minutes of use ("MOU") than actually originated with AT&T California's customers. In its May 24 ex parte, Fones4All purports to find an inconsistency between AT&T California's position in that complaint proceeding and in the resale proxy rate proceeding. Specifically, Fones4All claims that AT&T's reliance in the resale proxy rate proceeding on the CPUC's assumption in setting UNE-P rates of an average retail end use of 1400 local MOUs per line per month (the reasonableness of which was buttressed by multiple FCC decisions),[23] is inconsistent with AT&T California's claim in the complaint proceeding that Fones4All's actual intraLATA toll MOUs are far less than the 250 MOU billed by Fones4All. This argument is nonsensical as it invokes an apples to oranges comparison.

First, the 1400 MOU assumption on which AT&T relied in the resale rate proceeding was for *local* traffic only, while the complaint proceeding concerns only intraLATA *toll* traffic.[24] There is no reason why local calling volumes should equal intraLATA toll calling volumes. *Second*, even apart from Fones4All's illogical comparison of local and toll MOU, the resale proxy assumption was for local traffic to *any* carrier, while the access charge proceeding concerns intraLATA toll traffic originated *only* by AT&T California customers to Fones4All customers. Third, AT&T California's resale proxy rate was derived based on an average MOU *assumption* for local calls made by customers of any carrier, while the access charge proceeding concerns the *actual* intraLATA toll calls placed only by customers of AT&T California to customers of Fones4All.[25]

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The bottom line is that Fones4All's attempts to use this merger proceeding to gain leverage with respect to issues that have been or are being litigated in other fora should be rebuffed by the Commission. Not only is Fones4All's presentation of these issues misleading and incomplete, but its claims have no relevance to this merger by any account. Although Fones4All attempts to label AT&T California's conduct discriminatory, there was nothing discriminatory about it: these were simply disputes over the parties' obligations with respect to the UNE-P transition and the billing of intercarrier compensation. These disputes have been brought before the CPUC, and it is that agency that should decide them, subject to both parties' rights to seek rehearing or judicial review of any decision. As noted, the Commission has repeatedly held that it "will not consider arguments in [merger] proceeding[s] that are better addressed in other Commission proceedings, or other legal fora . . . ."[26] Although Fones4All

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[23] *See* Fones4All May 24 ex parte at 3-4 & nn.5 & 11.
[24] As Fones4All notes, the CPUC had assumed 700 toll MOU when setting UNE-P rates. *See id.* at 3 n.5.
[25] As explained above, certain assumptions needed to be incorporated into the resale proxy rate because the billing system used to bill UNE-P is not programmed to generate charges that vary according to type of customer, minutes of use, and number of features used. *See supra* n.18. In contrast, the intraLATA toll access charges at issue in AT&T California's complaint against Fones4All should be calculated based on actual usage under the terms of the parties' interconnection agreement, not based on any assumptions.
[26] *See supra*, n. 4.

seems intent on ignoring these Commission precedents, they are fundamentally correct – indeed, indispensable to an efficient merger review process – and they should be faithfully followed in this proceeding.

If you have any further questions or seek additional information about this matter, please do not hesitate to contact me.

Sincerely,
/s/
Gary L. Phillips

cc: Daniel Gonzalez
Jessica Rosenworcel
Scott Deutchman
Scott Bergmann
Ian Dillner
Aaron Goldberger
Dana Shaffer
Donald Stockdale
William Dever
Nicolas Alexander
Gary Remondino