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September 1, 2006

VIA ECFS

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

**Re: Notice of Written Ex Parte: In the Matter of Review of AT&T Inc. and
BellSouth Corp. Application for Consent to Transfer Control, WC Docket
06-74**

Dear Ms. Dortch:

Fones4All Corporation (“Fones4All”) is writing in response to AT&T’s June 22, 2006 ex parte submission¹ in this proceeding which purports to respond to Fones4All’s May 19 and May 24 ex parte letters.

In the histrionic style that has come to characterize AT&T’s response to *any* opposition in this merger proceeding, AT&T first argues that Fones4All should be precluded from raising in this docket any issues regarding AT&T’s campaign of discriminatory and anticompetitive conduct directed at Fones4All and other small CLECs.² Further, AT&T accuses Fones4All of “twist[ing] the facts and omit[ting] key details” and seeking to relitigate, “through dueling letters, disputes that have been raised in another forum.”³ AT&T argues that by highlighting AT&T’s anticompetitive and discriminatory conduct, Fones4All is somehow attempting to have the Commission rule on issues that are either pending or which have been decided by the California Public Utilities Commission (“CPUC”).⁴ In truth, it is AT&T that is misrepresenting what has transpired between the companies, and further, AT&T is incorrect in arguing that the issues raised by Fones4All in this proceeding are not relevant to the Commission’s consideration of this merger.

¹ Ex Parte Letter from Gary Phillips, General Attorney & Asst. General Counsel, AT&T Services, Inc., WC Docket 06-74 (June 22, 2006) (“June 22 Ex Parte”).

² AT&T June 22 Ex Parte at 1-2, 6-7.

³ *Id.*, 1.

⁴ *Id.*

1. The Issues Raised By Fones4All Are Relevant And Should Be Considered By The Commission As It Examines Whether The Proposed Merger Is In The Public Interest And How It Will Impact Competitors

AT&T argues that the issues raised by Fones4All are not properly raised in this merger proceeding and that Fones4All is somehow seeking to re-litigate disputes that have been decided elsewhere. Nothing could be further from the truth. The issues raised by Fones4All are recent examples of how AT&T has repeatedly abused its dominant market power to stifle competition in California, and are relevant as the Commission conducts the public interest analysis of AT&T's latest merger. AT&T's suggestion that Fones4All is seeking to re-litigate disputes that have been addressed in other proceedings is ridiculous. Fones4All would prefer to expend its very limited resources expanding its network and providing high quality telephone service to low-income Californians rather than being forced to respond to AT&T's unrelenting assaults and attempting to get AT&T to comply with decisions already litigated and decided (*see* Section 3 below). Fones4All lacks the fleet of lawyers and limousines that AT&T has at its disposal, and accordingly, Fones4All has neither the resources nor the desire to "relitigate, through dueling letters" in this docket issues that have been decided elsewhere. In fact, Fones4All is not asking the Commission to reexamine or substantively address in this proceeding any issue now pending or previously addressed in another venue. Rather, as one of the few CLECs in the country that did not enter into a "commercial agreement" with AT&T,⁵ Fones4All is not subject to AT&T's gag provisions which preclude CLECs who are signatories from participating in certain proceedings before this Commission and state commissions. Accordingly, Fones4All is free to participate in this proceeding. AT&T's recent conduct, with respect to Fones4All and other small competitors, is highly relevant to the Commission's analysis of whether this merger is in the public interest and what effect the merger will have on small competitors across the country. AT&T's recent actions in California no doubt foreshadow what lies in store for the competitors in the current BellSouth region should this merger go forward unchecked. In fact, the specific examples raised by Fones4All demonstrate how the SBC/AT&T merger approved last year has already increased the incentive and the ability of AT&T to discriminate against its competitors, including Fones4All, and further demonstrates that approval of the proposed AT&T/BellSouth merger, without appropriate conditions, will provide the merged company with "a greater incentive to engage in discrimination than the combined incentives that the two individual companies would have had in their smaller regions."⁶

Moreover, the cases cited by AT&T in support of the proposition that Fones4All should be precluded from raising issues of AT&T's anticompetitive conduct are inapposite. Unlike the parties in the cases cited by AT&T in its June 22 Ex Parte, Fones4All is not asking the Commission to make a ruling on the merits of any specific dispute between AT&T and Fones4All, nor is Fones4All arguing that the Commission should resolve broader issues now pending in any other Commission proceeding. Rather, Fones4All is providing relevant examples

⁵ See AT&T June 22 Ex Parte, n. 22 citing its "commercial agreements" with Sage Telecom and Granite Telecommunications.

⁶ See *Applications of Ameritech Corp. & SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, ¶ 60 (1999) ("SBC/Ameritech Order").

of AT&T's anticompetitive behavior, which will only be further exacerbated if the appropriate conditions are not placed on the AT&T/BellSouth merger.

2. AT&T California's Botched UNE-P Transition Affected The Entire Industry In California, Not Just Fones4All

AT&T once again provides its incomplete, erroneous and self-serving account of the history of the UNE-P transition in California. Fones4All finally completed its transition of its AT&T UNE-P lines in late July and the issue is now moot, so there is little point in debating "who shot John." That said, to date AT&T has failed to answer the broader questions raised by Fones4All regarding the UNE-P transition that go beyond the specific circumstances of AT&T's failures as they related to Fones4All. In fact, while AT&T would prefer to discuss Fones4All's alleged mistakes and delays, the UNE-P transition issues described by Fones4All were not unique to Fones4All, but plagued carriers industry-wide in California including: California Catalog & Technology, Inc.; Telscape Communications, Inc.; U.S. Telepacific Corp.; Utility Telephone, Inc.; Wholesale Air-Time, Inc.; Symtelco, LLC; Call America, Inc.; Curatel, LLC; DMR Communications, Inc.; TCast Communications, Inc.; and Tri-M Communications, Inc. d/b/a TMC Communications and Telekenex, all of whom experienced many of the same issues that affected Fones4All (and which were detailed by those carriers in filings before the California Public Utilities Commission). Therefore, AT&T's attempt to spin its botched handling of the UNE-P transition in California as either being the sole fault of Fones4All, or an issue that was limited only to Fones4All is simply a gross mischaracterization of reality. In fact, the CPUC has already ruled that AT&T was at fault in failing to conduct the transition in an way that would have allowed California carriers to meet the transition deadline.⁷

Nonetheless, in its June 22 Ex Parte AT&T once again selectively responds to certain of the issues raised by Fones4All in the Chesnosky Declaration.⁸ But glaringly absent from any of AT&T's responses in this docket, or anywhere else for that matter, is an explanation of why AT&T failed to implement an effective and workable bulk hot cut process like the one implemented by BellSouth.⁹ The fact is that AT&T exercised its monopoly power and made a

⁷ See ALJ's Ruling Denying SBC California's Emergency Motion to Compel (Mar. 8, 2006) http://www.cpuc.ca.gov/word_pdf/RULINGS/54267.pdf. That the other affected carriers are not now before this Commission is not a sign that they were satisfied with AT&T's performance, but more likely as a result of their being subject to the gag provisions of their "commercial agreements" with AT&T. In its June 22 Ex Parte AT&T makes the ludicrous suggestion that Fones4All delayed its UNE-P transition while seeking relief from the Commission. That allegation is patently absurd and does not warrant a response.

⁸ See Reply Declaration of Tiffany Chesnosky (Exhibit B to Fones4All's May 19 Ex Parte in WC Docket 06-74).

⁹ As described in the Reply Declaration Chesnosky, the labor intensive system required by AT&T California is an industry anomaly for bulk processes, and stands in stark contrast to the highly automated system utilized by BellSouth. As the BellSouth UNE-P to UNE-L Bulk Migration CLEC Information Package, Version 5 August 22, 2005 (Attachment A to Reply Declaration) shows, the BellSouth system allows CLECs to migrate up to 200 lines per central office per day, in contrast to the 150 that AT&T purportedly allows. See page 4 of Attachment A. Furthermore, BellSouth's systems allow CLECs to schedule bulk orders via an automated system without the need to orally negotiate due dates, as AT&T California requires. Further, unlike AT&T California, BellSouth provides a true bulk conversion process which allows the migration of multiple UNE-P lines without requiring that the CLEC

calculated decision not to implement a bulk transition system that was actually capable of handling the large volume of bulk transitions, despite its representations to the CPUC and this Commission that it had. In fact, but for numerous carriers entering into “commercial agreements” with AT&T and thereby obviating the need to cut over hundreds of thousands more lines, the UNE-P transition in the AT&T California territory would have been an even larger unmitigated disaster than it was. The bottom line is that the experience of carriers in California with AT&T’s bulk process is contrary to AT&T’s representations here and elsewhere. AT&T California’s bulk process neither allowed “bulk” transitions, nor could it be called a “process.” AT&T’s decision to hobble its competitors by failing to implement an effective bulk transition process capable of allowing carriers to meet the March 11, 2006 transition deadline and then defying the CPUC and charging what AT&T considered to be “market” rates instead of the resale rates ordered by the CPUC for unconverted UNE-P lines post-March 11 is a breathtaking example of the lengths with which AT&T will go to stifle competition. Any claim by AT&T that implementation of such a system was not possible is belied by BellSouth’s own successful implementation of just such a system. Accordingly, the Commission must carefully consider these facts as it analyzes the merger application of AT&T Inc. and BellSouth Corp. and the applicants’ claims that the merger will not harm competition and will be in the public interest.

3. AT&T’s Ability And Willingness To Openly Defy The CPUC’s Decisions Is Evidence Of Its Abuse Of Market Power And Willingness To Stifle Competition

In its June 22 Ex Parte AT&T admits,¹⁰ as it must, that it openly defied the California Commission’s decision, D. 06-01-043,¹¹ in which the CPUC required AT&T to charge CLECs only the total resale rates, and not the so-called “market” rates that AT&T sought to charge for UNE-P lines that remained unconverted as March 11, 2006 UNE-P conversion deadline. AT&T argues that it was justified in doing so because it believes that the CPUC’s ruling was incorrect, and that the California Commission should have instead adopted AT&T’s “market” rate proposal, as the state commissions of Ohio, Michigan and Illinois did. AT&T characterizes its

submit individual LSRs for each line. *See* Attachment A, p. 7, Section 4. Under BellSouth’s system, CLECs use the automated electronic scheduling interface to reserve dates and upon completion of the reservation, the CLEC submits a bulk order with the reserved dates. The entire bulk order is then mechanically validated, with any rejects mechanically generated to the CLEC. *See* Attachment A, p. 13, steps 2-3. Unlike AT&T California’s manual system, which requires CLECs to submit individual LSRs for each line, BellSouth’s automated ordering systems accept bulk orders and “break the individual PONs into separate LSRs and populate the remaining LSR fields from OSS prior to sending the individual LSRs downstream to the Local Number Portability Gateway.” *Id.* at 13, step 4. The LNP Gateway performs second level validations and any of the individual PONS that must be clarified are sent back to the CLEC, “business as usual,” unlike the AT&T California process which rejects the entire order and requires it to be rescheduled by the CLEC with new due dates. *Id.* at 13, step 5. In addition, unlike AT&T California, which in effect allows migrations to occur on only three of the five working days of the week, BellSouth’s systems allow CLECs to place orders not only on the five business days, but also to request after-hours and weekend migrations when needed. *See* Attachment A at 9. Furthermore, to the extent that BellSouth’s system fails to perform, it is subject to the relevant Performance Assurance Plan in the state.

¹⁰ June 22 Ex Parte at 4 (“AT&T California did, in fact, develop and assess a proxy resale rate for all non-transitioned CLEC lines.”).

¹¹ Decision Adopting Amendment to Existing Interconnection Agreements, D.06-01-043 (Cal. PUC Jan. 26, 2006).

defiance of the CPUC's order as "standing up" for its position and insists that it has "every right to vigorously defend its positions before the CPUC."¹²

No one, including Fones4All, has ever suggested that AT&T may not exercise its appeal rights or defend its positions, however AT&T did more than that: it willfully violated the CPUC's order. Despite AT&T's apparent belief to the contrary, it is the CPUC, not AT&T, that is the arbiter of such decisions. Once a state commission has ruled, that the commission's decision is binding on all parties, including AT&T, until such time as an appeal may reverse the decision. AT&T seems to believe, however, that it is justified in resorting to self-help measures with respect to state commission decisions with which it disagrees. The fact that AT&T feels absolutely comfortable ignoring the CPUC's valid orders and using self-help demonstrates conclusively that the company is already abusing its market power. Increasing the size and market power of the company certainly is not going to curtail such actions. AT&T's willingness and ability to simply ignore state commission orders and then force competitors to engage in time consuming and expensive litigation to attempt to enforce commission decisions will only be exacerbated by the merger and is another example the adverse effect the merger will have on small competitors.

4. AT&T's CPUC Case Against Fones4All Is Baseless, Unsupported By Evidence, And Violates AT&T's Agreement With Fones4All Pursuant To Which Fones4All Supported AT&T's Section 271 Applications

In its June 22 Ex Parte AT&T argues that its baseless lawsuit against Fones4All now pending before the CPUC is not an anticompetitive harassment tactic, but a legitimate intercarrier dispute and that Fones4All has no business discussing the case in this docket. Again, AT&T neither tells the whole story, nor addresses all of the relevant facts. In the case initiated by AT&T against Fones4All at the CPUC, AT&T alleges that Fones4All "overbilled" AT&T by approximately \$2.6 million for intraLATA toll termination. Further AT&T alleges that Fones4All's invoices violated the interconnection agreement between the companies which required Fones4All to bill AT&T for intraLATA toll termination based upon actual minutes of use ("MOUs") rather than usage assumptions. AT&T claims that the Daily Usage Files ("DUF") generated by AT&T's switch prove that Fones4All overbilled AT&T. Again, AT&T conveniently omits the relevant facts both in its CPUC case as well as in its June 22 Ex Parte. Fone4All fills in the gaps left by AT&T here.

As Fones4All has shown in sworn testimony, from day one AT&T knew that Fones4All was billing AT&T for intraLATA toll termination based upon MOU assumptions and not actual MOUs as set forth in the DUF. AT&T knew this for several reasons. First, AT&T knew that from April 2003 to the present day, it has never provided Fones4All with the DUF information that would have allowed Fones4All to provide an invoice based on actual MOUs.¹³ Second, AT&T knew that it had struck an agreement with Fones4All pursuant to which Fones4All

¹² June 22 Ex Parte at 4.

¹³ AT&T first provided Fones4All with DUF information for November 2005 in January 2005 when the parties were involved in dispute resolution negotiations.

supported AT&T's Section 271 application at both the CPUC and this Commission.¹⁴ In exchange for Fones4All's support, AT&T assisted Fones4All with its transition from a total resale carrier to a UNE-P carrier. Among the assistance AT&T agreed to provide to Fones4All in exchange for its Section 271 endorsement was assistance in opting into a new, facilities-based interconnection agreement in almost record time, agreeing to a negotiated intraLATA toll reciprocal compensation amendment which allowed Fones4All to charge its own tariffed rates for intraLATA termination instead of AT&T's, and "early implementation" of the entire new interconnection agreement, along with settlement of a number of billing disputes that had been lodged against AT&T by Fones4All. In addition, AT&T agreed to allow Fones4All, as a UNE-P carrier, to bill AT&T for switched access, and assisted Fones4All by providing information regarding where to send the bills, to AT&T and how to format them, and allowed Fones4All to render invoices for intraLATA termination based on reasonable MOU assumptions rather than actual DUF information, which AT&T to this day has never provided. From April 2003 until September 2005, AT&T and Fones4All observed the Section 271 agreement and AT&T paid the invoices Fones4All rendered based on reasonable MOU assumptions. Again, AT&T knew that the Fones4All invoices were not based on actual MOUs because AT&T knew that it had never provided any of the MOU information to Fones4All. In fact, AT&T did not have the ability to ascertain terminating MOUs for UNE-P carriers in any event.

Then, in September 2005, AT&T notified Fones4All that it was disputing Fones4All's intraLATA toll invoices going back to 2003, allegedly because Fones4All had rendered invoices utilizing the wrong rate for intraLATA toll termination. AT&T claimed that Fones4All was required by the interconnection agreement to use AT&T's tariffed rate for intraLATA toll termination, when in fact AT&T had agreed as part of the overall agreement to allow Fones4All to use its own tariffed rate to bill AT&T for intraLATA toll termination. When Fones4All reminded AT&T of this fact, AT&T withdrew the original dispute letter, but immediately issued a new letter, this time changing the basis for the dispute and alleging that an "internal traffic" study conducted by AT&T showed that Fones4All had overbilled AT&T. In response to the dispute, Fones4All reminded AT&T of the Section 271 agreement between them (including allowance for summary MOU information to be used by Fones4All), evidenced by a course of dealing between the companies over two-and-a-half years and numerous other day-to-day communications between the companies recognizing and acknowledging the agreement. In addition, Fones4All asked to be allowed to see the raw data AT&T used to compile its "internal traffic" study which ostensibly formed the basis for the dispute. However, despite repeated requests by Fones4All going back to the date of receipt of the dispute letter from AT&T in September 2005, AT&T has refused to provide the traffic study data.

In fact, the usage files that AT&T claims it used to conduct the "internal traffic study" in connection with Fones4All's invoices have either been destroyed or are not available. In reality, AT&T never had the ability to create or maintain a record of the disputed terminating access

¹⁴ In fact, AT&T provided Fones4All with a template to use to draft its 271 comments supporting AT&T's federal 271 Application. Indeed, Fones4All was the only CLEC who filed comments in support of AT&T's 271 application at the FCC. See http://gullfoss2.fcc.gov/cgi-bin/websql/prod/ecfs/comsrch_v2.hts.

MOUs for Fones4All, and that is no doubt the reason that AT&T has refused to provide the information that it used to create its so-called “internal traffic study.” At bottom, AT&T has ginned up a case against Fones4All for which it has no evidence and which is contrary to its Section 271 agreement and a course of dealing with Fones4All over two-and-a-half years. Only in late 2005 did AT&T repudiate the agreement and apparently decide to retaliate against Fones4All for whatever reason—whether as a result of a Fones4All filing critical of the SBC/AT&T merger or some other reason—is unclear. Whatever the case maybe, AT&T is clearly acting anticompetitively and in bad faith.

* * * * *

Despite AT&T’s claims that Fones4All is trying to “gain leverage” by bringing these issues to the attention of the Commission in this proceeding, this dispute, as well as the other tactics described by Fones4All in this letter and elsewhere in this docket are highly relevant to the Commission’s consideration of the proposed merger.

Respectfully submitted,

/s/

Ross A. Buntrock

cc: Chairman Martin
Commissioner Copps
Commissioner Adelstein
Commissioner Taylor Tate
Daniel Gonzalez
Michelle Carey
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