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October 4, 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:

In a series of *ex partes*, Fones4All has claimed that AT&T California is “engaged in a campaign of discriminatory and anticompetitive conduct directed at Fones4All and other small CLECs.” In its prior responses to these *ex partes*, AT&T showed that Fones4All’s claims are misleading and inaccurate and that in all events, they relate to issues that were or are now before the California Public Utilities Commission (CPUC) and which are not even remotely relevant to this merger proceeding. In a September 1, 2006 *ex parte*, Fones4All purports to respond to this showing by characterizing AT&T’s *fact-based* responses as “histrionics,” reiterating its earlier claims, and making new but equally inaccurate allegations. Although these latest allegations are so clearly irrelevant that they do not warrant Commission consideration, AT&T files this brief response to set the record straight.

A. Fones4All’s Claims are Not Relevant to and Should Not be Considered in this Merger Proceeding

In our prior responses, we showed that Fones4All is seeking to inject into this merger proceeding disputes that have been or are now, before the CPUC and that are unrelated to the merger in all events. We noted that this merger proceeding is not an appropriate forum in which to relitigate these matters through dueling *ex partes* – all the more so, given that Fones4All persists in presenting the facts in a misleading and inaccurate fashion. In its September 1 response, Fones4All terms this argument “ridiculous” and insists that it is not asking the Commission to reexamine or substantively address in this proceeding any issue now pending or previously addressed in another venue. Instead, it argues, it is merely asking the Commission to conclude that AT&T “has repeatedly abused its dominant market power to stifle competition in California” and that merger conditions are necessary to prevent an exacerbation of this conduct. Quite obviously, however, the Commission could not reasonably reach such a conclusion without examining the facts and substantively addressing Fones4All’s claims and AT&T’s response to those claims. Thus, notwithstanding Fones4All’s hollow claim to the contrary,

Fones4All is asking the Commission to address issues that have been raised, and that are better decided, in other fora.

In all events, these issues have no relevance to the merger. AT&T has commercial relationships with nearly 150 CLECs. Those relationships are based to varying degrees on business-to-business negotiations and regulatory requirements. Occasionally, disputes arise between the parties with respect to those relationships, particularly when regulatory requirements underlying those relationships are unclear. However, the mere fact that the parties may not see eye-to-eye on the scope of their respective rights and obligations is not *per se* evidence of bad faith, much less abusive conduct. Nor is the initiation of legal action to defend or advance one's interests or to collect money one believes is owed anticompetitive or improper.

What *is* improper is making false or misleading statements in a judicial or regulatory forum and, unfortunately, Fones4All continues to do just that. It not only presents a misleading and inaccurate version of its underlying disputes with AT&T (as shown in our earlier responses and, again, below), but recklessly claims that AT&T has imposed a "gag order" on CLECs with which it has commercial agreements that prevent them from participating in this merger proceeding. For the record, that claim is completely false. There is no such restriction in *any* of AT&T's commercial agreements. *All* CLECs, including those that are party to commercial agreements with AT&T, are free to oppose or support this merger as they see fit – a fact that is underscored by the participation of dozens of CLECs in this docket.

B. AT&T did not "Flout" any CPUC Order

Also misleading is Fones4All's claim that AT&T "openly defied" (and has admitted openly defying) the order of the CPUC by seeking to charge market rates for UNE-P lines that were not converted by the March 11, 2006, conversion deadline, in lieu of total resale rates, as ordered by the CPUC. As AT&T previously explained, the rate that AT&T developed was not a market rate, but rather a "proxy" resale rate that blended the varying resale rates that could apply to a particular UNE-P line. Unlike UNE-P rates in California, resale rates vary by customer class (residential versus business) and the particular calling plan selected by the customer. They also may include usage sensitive charges. Development of an appropriate resale rate for UNE-P lines thus requires that various assumptions be made. The rate that AT&T developed was a product of those assumptions and was not, as Fones4All maintains, a market rate. Indeed, the CPUC itself repeatedly characterized AT&T's proposed rate as a proxy resale rate, and it expressly adopted AT&T's methodology and model for calculating that rate, even as it rejected certain (but not all) of the assumptions underlying AT&T's calculation.¹ Notably, the CPUC also rejected the rates

¹ See 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 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 (May 25, 2006) (largely affirming, with some modifications, ALJ ruling with respect to AT&T's proposed proxy resale rate). See also *id.*, Appendix A at 4 ("AT&T's methodology to develop its proxy rate is more comprehensive than that used by the CLECs so I will use AT&T's model.") And see *id.* at 6: ("To summarize, I have adopted AT&T's assumptions in its model for the price for the access line, the number of custom calling features, and the inclusion of the EUCL I have reduced the local usage charges for business customers to 500 minutes at \$2.70 per month, rather than the \$23.00 proposed by AT&T, which includes unlimited *cont'd*

that were advocated by Fones4All and other CLECs, opting instead for a rate that was lower than that proposed by AT&T, but higher than that proposed by the CLECs.²

As AT&T previously noted, AT&T believes that the CPUC's decision was inconsistent with federal law and that, as of the March 11, 2006, transition date, former UNE-P lines could be priced at market rates. Nevertheless, AT&T complied with what it viewed to be an unlawful CPUC decision, and it applied the proxy resale rate ordered by the CPUC to non-transitioned UNE-P lines. Fones4All's attempt to manufacture a merger issue out of this regulatory dispute is frivolous.³

C. Fones4All's Other Claims Also are Inaccurate and Irrelevant to the Merger

Fones4All also reiterates other bogus claims it has previously presented as so-called "merger issues." For example, it repeats its claim that AT&T failed to implement an effective bulk transition process during the UNE-P transition in California. Notably, however, Fones4All does not refute a single fact set forth by AT&T in its June 22 response to this charge, which demonstrates beyond dispute that Fones4All's own delays and mistakes were responsible for Fones4All's failure to complete its UNE-P transition by the March 11 implementation date instead, implicitly conceding this showing, Fones4All now claims that its own mistakes are beside the point because the UNE-P transition issues described by Fones4All "plagued" carriers industry-wide in California. It states that other carriers would undoubtedly be reporting their problems to the FCC were they not bound by alleged gag provisions in their commercial agreements with AT&T. Of course, as noted previously, there are no gag provisions in AT&T's commercial agreements that would prevent any carrier from raising issues relating to the UNE-P transition. Beyond that, Fones4All's claim on behalf of these other CLECs is belied by the fact that, as of the March 11 implementation date, AT&T had transitioned 92% of the approximately 1.25 million UNE-P lines that existed in California prior to the *TRRO*. Fones4All's claim about a "botched" transition is thus nothing more than empty rhetoric.

Finally, Fones4All repeats its charge that AT&T's lawsuit before the CPUC for recovery of intercarrier compensation overbilling by Fones4All represents "an anticompetitive harassment tactic." This charge as well is baseless. The relevant facts are as follows: In the summer of 2005, after comparing Fones4All's invoices to AT&T's internal traffic recordings, AT&T discovered that Fones4All billed AT&T charges for call volumes that were inconsistent with the quantities that AT&T's records showed terminated to Fones4All. Based upon further investigation and discussions with Fones4All, AT&T learned that Fones4All was not basing its

usage. I have also eliminated the access charges proposed by AT&T, since most CLECs use another carrier to provide long distance service. The result is a blended rate of \$25.19.")

² *Id.*

³ It is also remarkably hypocritical, given that on August 22, 2006, Fones4All sent AT&T a letter claiming that Fones4All's then-pending forbearance petition had been deemed granted by the Commission notwithstanding that the Wireline Competition Bureau had extended until September 28, 2006, the deadline for deciding that petition. Apparently, even as Fones4All tries to make a merger issue out of misleading accusations that AT&T willfully ignored a decision of the CPUC, Fones4All considers itself free to ignore Bureau orders with which it takes issue.

bills on terminating recordings, as required by its Interconnection Agreement (ICA), but was rendering bills based on unwarranted assumptions that were unrelated to the actual traffic exchanged between the parties. Fones4All claims that AT&T never provided Fones4All with the Daily Usage Files (DUF) information that would have allowed Fones4All to provide an invoice based on actual MOUs. That claim is specious. In broad terms, DUFs are files that AT&T provides to carriers using its switching products to allow such carriers to render bills for calls carried over their networks. AT&T contacted Fones4All on numerous occasions advising Fones4All of the availability of the DUFs and of the process by which Fones4All could obtain them. Fones4All failed to implement those processes. Fones4All claims that it was justified in basing its intraLATA toll termination toll charges on MOU assumptions rather than actual DUF information because AT&T agreed to allow it to do so, notwithstanding the terms of their ICA. AT&T is not aware of any such agreement, and its ICA with Fones4All requires that all amendments to the parties' ICA be in writing and signed by an officer of each party. Fones4All has not produced or alleged the existence of any such amendment. Thus, far from representing an anticompetitive harassment tactic, AT&T's lawsuit against Fones4All is based on and consistent with the express terms of the parties' ICA. It raises no issue even remotely relevant to this merger.

For all of its pandering about meager resources, Fones4All has littered the record of this proceeding with baseless and misleading allegations that have no bearing on the issues raised by the merger of BellSouth and AT&T. And for all of its disingenuous rhetoric about AT&T's "flouting" of a CPUC order, Fones4All evidently is itself intent on flouting *inter alia* the Commission's admonition that it will not consider in merger proceedings allegations that are better addressed in other fora. As AT&T has previously noted, this holding by the Commission was, not only correct, but indispensable to efficient merger review processes. Consistent with that precedent, the Commission should reject Fones4All's attempts to bog down the merger review process with misleading and extraneous allegations.

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: Dan Gonzalez
Michelle Carey
Jessica Rosenworcel
Scott Deutschman
Scott Bergmann
Ian Dillner
Nick Alexander