

Decision 07-07-013 July 12, 2007

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Pacific Bell Telephone Company, d/b/a  
AT&T California (U 1001 C),

Complainant,

vs.

Fones4All Corporation (U 6338 C),

Defendant.

Case 06-03-013  
(Filed March 10, 2006)

(See Appendix for a List of Appearances.)

**PRESIDING OFFICER'S DECISION GRANTING COMPLAINT**

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## **PRESIDING OFFICER'S DECISION GRANTING COMPLAINT**

This decision grants the complaint of Pacific Bell Telephone Company, dba AT&T California (AT&T) against Fones4All Corporation (Fones4All) with regard to interconnection billings by Fones4All to AT&T. This decision directs Fones4All to reimburse \$2,627,236.67 to AT&T, plus interest, for Fones4All's billings to AT&T during the period September 2003 to August 2005. Fones4All shall modify its subsequent and future billings so that they reflect actual AT&T traffic carried by Fones4All over its system, consistent with the interconnection agreement between Fones4All and AT&T.

### **1. Summary of AT&T's Complaint and Fones4All's Reply**

AT&T filed this complaint against Fones4All to recover alleged overcharges AT&T paid to Fones4All for termination of intra-Local Access Transport Area (intraLATA) toll traffic. The related billings from Fones4All for these services date from September 2003 through August 2005 and total about \$2.6 million. AT&T paid the bills and states it subsequently determined that they were not based on actual traffic volumes carried by Fones4All for AT&T. AT&T does not dispute the rate Fones4All charged. AT&T states its delay in determining the appropriate billings occurred because it did not have the technology needed to verify the minutes of traffic that were subject to the Fones4All billings until August 2005. AT&T believes the terms and conditions of Fones4All's subject billings are governed by the interconnection agreement (ICA) between Fones4All and AT&T California.

In its reply to the complaint, Fones4All replies that the subject charges were proper because they were calculated according to a verbal agreement between AT&T and its managers, which was made as a part of an agreement under which Fones4All would formally support AT&T's application to operate

as a long distance carrier filed in a proceeding before the Federal Communications Commission (the application was filed by SBC California, the local exchange carrier that merged with AT&T, then a long distance carrier). In its brief, Fones4All argues that the charges are proper because AT&T did not provide the information necessary to calculate actual traffic volumes and an accurate bill. It believes the billings are not subject to the terms of the ICA and that AT&T failed to dispute the billings in a timely matter, according to the terms of Fones4All's tariff. Fones4All argues that the terms of the ICA do not apply to billing disputes for the subject services because the filed rate doctrine provides that all tariffed services are governed exclusively by the tariffs, in this case those Fones4All filed with this Commission.

## **2. Background**

Fones4All initially provided telecommunications service in California by reselling AT&T services. In late 2002, Fones4All decided to provide service using the unbundled network element platform (UNE-P). In order to do so, Fones4All entered into an ICA with AT&T, which would specify the terms and conditions of the two companies' business arrangement. On October 8, 2002, Fones4All opted into the ICA titled "Interconnection Agreement between SBC Pacific Bell Telephone Company and MCImetro Access Transmission Services, LLC" (Underlying MCImetro ICA). Fones4All and AT&T then negotiated Amendment No. 1 to the Underlying MCImetro ICA, titled Appendix: Reciprocal Compensation" (Reciprocal Compensation Amendment or Amendment). On November 19, 2002, AT&T filed for Commission approval of the ICA and the Amendment. Together, the Underlying MCImetro ICA and the Reciprocal Compensation Amendment constitute the ICA between Fones4All and AT&T.

Fones4All also has tariffs on file with the Commission that designate rates for termination of intraLATA traffic by carriers such as AT&T.

This complaint arises from a dispute over the accuracy of the intraLATA call volumes for which Fones4All billed AT&T. AT&T filed this complaint on March 10, 2006, following unsuccessful negotiations with Fones4All. The Commission provided a mediator to the parties in late 2006 but the parties were unable to reach an agreement in mediation. On January 19, 2007, Fones4All filed a motion for partial summary judgment, which the Commission did not, and could not have, addressed prior to evidentiary hearings, because of insufficient time. Hearings were conducted on February 5 and 6, 2007. The matter was submitted with the receipt of briefs on March 30, 2007.

### **3. The Presiding Officer's Decision and Appeal**

The presiding officer issued a decision ruling in favor of AT&T on April 6, 2007. On May 4, 2007, Fones4All filed a timely appeal to the presiding officer's decision. On May 21, 2007, AT&T filed a timely response to Fones4All's appeal. The appeal does not provide any arguments, evidence or analysis that is compelling or is not already addressed and properly resolved in the presiding officer's decision.

### **4. Issues for Resolution**

Although many of the circumstances and facts presented in this case are complex, the issues for resolution are straightforward:

- What document or documents govern the terms and conditions of service to AT&T by Fones4All for intraLATA calls terminated by Fones4All?
- What are the appropriate charges for Fones4All's intraLATA carriage, according to the governing document or documents?

- If Fones4All's subject billings to AT&T were improper according to the terms of the relevant document or documents, does equitable consideration justify a departure from the otherwise appropriate billings?

#### **4.1 What Document or Documents Govern Terms and Conditions of Service?**

A threshold issue in this proceeding is whether the billings to AT&T from Fones4All are governed by the ICA or Fones4All's tariffs. The determination of whether the tariff or the ICA governs the terms and conditions of Fones4All's subject service is significant because the two documents differ as to the rights and obligation of the parties in the case of a dispute.

AT&T claims that the ICA exclusively governs the terms and conditions for service between Fones4All and AT&T for termination of intraLATA toll traffic. Fones4All believes that the terms of its services to AT&T for intraLATA traffic are governed by Fones4All's tariffs and not the ICA.

The ICA between Fones4All and AT&T was filed with this Commission, which subsequently approved it. The ICA includes a number of provisions relating to "intercarrier compensation," including compensation for intraLATA toll traffic. These provisions are primarily contained in the Reciprocal Compensation Amendment. The purpose of that Amendment is set forth in its recitals, which provide:

WHEREAS, Fones4All Corporation (CLEC) filed Advice Letter No. 5 seeking to adopt the provisions of the Interconnection Agreement between SBC Pacific Bell Telephone Company (PACIFIC) and MCImetro Access Transmission Services, LLC (MCI);

WHEREAS, CLEC and Pacific agreed to exempt from the adoption request the rates, terms and conditions set forth in Attachment Reciprocal

Compensation and the Amendment Superseding Certain Reciprocal Compensation, Interconnection and Trunking Terms to such Agreement.

WHEREAS, PACIFIC and CLEC are hereby filing this amendment (Amendment) to incorporate rates, terms and conditions relating to intercarrier compensation into the Parties' Interconnection Agreement. (Emphasis added.)

The Amendment defines its "Scope of Traffic" to include intraLATA toll traffic and includes a section dedicated to "Reciprocal Compensation for Termination of IntraLATA Toll Traffic." Thus, the Amendment is intended to cover the compensation due to the parties for traffic traded between the parties (i.e., both ways), including intraLATA toll traffic. The Amendment nowhere indicates that it covers traffic terminated by AT&T, but not traffic terminated by Fones4All.

Fones4All and AT&T dispute the extent to which non-rate provisions of the ICA apply to the calculation of AT&T's bills and the other rights and obligations of the parties. Fones4All argues that the absence of the intraLATA toll termination service description clearly supports the proposition that the ICA was never meant to address issues where Fones4All was the provider of intraLATA service for AT&T and governs only the carriage of Fones4All's intraLATA traffic by AT&T.

However, the ICA states clearly that its provisions apply to "reciprocal compensation for termination of intraLATA toll traffic." The term "reciprocal" in this context anticipates that the parties will carry each other's calls. The first section of the Amendment clearly establishes that the traffic exchanged "will be

classified as either Local Traffic, Transit Traffic, IntraLATA toll Traffic, or interLATA toll Traffic.”<sup>1</sup> Further, the second section of the amendment establishes that “each Party,” is responsible for properly calculating the terminating interconnection minutes.<sup>2</sup>

#### **4.1.1 The Terms of the ICA Govern IntraLATA Services for Both Parties**

Contrary to Fones4All’s claims, intraLATA toll provisions can be included in an ICA. Although incumbent local exchange carriers (ILECs) such as AT&T California are required to negotiate only regarding obligations under Section 251(b) and (c) of the Telecommunications Act of 1996 (’96 Act), the parties to an ICA may include interconnection issues not listed in Section 251(b) and (c).<sup>3</sup>

The Fifth Circuit’s holding is consistent with the ’96 Act’s clear preference for negotiated agreements.<sup>4</sup> It is also consistent with this Commission’s conclusion, reached prior to the ’96 Act, “that negotiated contracts offer a superior alternative to tariffing of interconnection services.”<sup>5</sup> Prior to the ’96 Act, this Commission determined that negotiated resolutions are preferable to tariffs for reasons which apply here.

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<sup>1</sup> Exh. 1, McPhee Opening Testimony at Appendix Reciprocal Compensation, § 1.1.

<sup>2</sup> Id. at Appendix Reciprocal Compensation, § 2.5.

<sup>3</sup> *Coserv L.L.C. v. Southwestern Bell Telephone Company*, 350 F.3d 482, 485 (5<sup>th</sup> Cir. 2003) (citations omitted).

<sup>4</sup> *MCI v. Bell Atlantic*, 271 F.3d 491 (3<sup>rd</sup> Cir. 2001).

<sup>5</sup> *Re Local Exchange Competition*, Decision No. 95-12-056, *Interim Opinion*, 63 Cal. P.U.C.2d 700, *mimeo*, at 14 (1995).

Moreover, this Commission specifically has acknowledged that an ICA may include provisions relating to toll traffic. In resolving an ICA arbitration between Pacific Bell and Pac-West Telecomm, Inc., this Commission approved Pac-West's proposed ICA provision that intraLATA interexchange traffic not be limited by the rates in Pacific Bell's switched access tariff.<sup>6</sup> Implicit in the Commission's decision was a determination that provisions regarding toll traffic are properly included within an ICA. This Commission also upheld an intraLATA toll provision in the ICA Fones4All opted into here, affirming again that intraLATA toll provisions are appropriate in an ICA.<sup>7</sup> Numerous additional ICAs approved by this Commission include provisions governing intraLATA toll.<sup>8</sup>

#### **4.1.2 Enforcing the IntraLATA Toll Provisions Does Not Violate the Filed Tariff Doctrine**

As both federal and state laws provide that parties may choose to include intraLATA toll provisions in an ICA, enforcing intraLATA toll provisions in an ICA does not violate the filed tariff doctrine. Interconnection agreements have routinely departed from the terms and conditions of tariffs since the passage of the Telecommunications Act of 1996. Section 251 (a)(5) of the Telecommunications Act of 1996 addressing "Interconnection - Reciprocal Compensation" states, "Each telecommunications carrier has the duty ... to

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<sup>6</sup> *Re Pacific Bell*, Decision No. 99-06-088, *Opinion*, 1999 WL 719780 (Cal.P.U.C.), at \*31 (1999).

<sup>7</sup> Decision No. 02-02-048, *Order Denying Rehearing of Decision 01-09-058*, 2002 WL 485713 (Cal. P.U.C. Feb. 21, 2002).

<sup>8</sup> *See, e.g.*, Exh. 2a, McPhee Reply Testimony, at 5.

establish reciprocal compensation arrangements for the transport and termination of telecommunications.” This provision does not place limits on the kinds of traffic (local, intraLATA or interLATA) for which reciprocal compensation must be established.

Neither does the GO 96-A bar contracts that vary from tariffs, if approved by the Commission. GO 96-A establishes the Commission’s authority to approve contract arrangements that vary from the general tariff rules, states that a utility provider may make contract arrangements if it first obtains the authorization of the Commission to carry out the terms of the contract, arrangement or deviation.<sup>9</sup>

Fones4All argues that all elements of its tariff govern its subject services to AT&T and that the “filed rate doctrine” provides that modifications to the tariff are void as a matter of law. However, Fones4All cites no legal authority to supports its claim that state regulatory services are prohibited from incorporating into ICAs the terms and conditions of intraLATA service between carriers, and the tariff itself expressly acknowledges that Fones4All can enter into customer-specific contracts that vary from the terms and conditions of its tariff.<sup>10</sup>

It is undisputed that the ICA between Fones4All and AT&T has been approved by this Commission. Therefore the ICA and its intraLATA toll provisions govern the services between the Fones4All and AT&T, pursuant to the Commission’s authority under GO 96-A.

Further, in Verizon Delaware, Inc. v. Covad Comm. Co., the Ninth Circuit addressed whether Verizon could pursue state law claims for damages over and

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<sup>9</sup> GO 96-A, Section X.A.

<sup>10</sup> Exh. 27, Fones4All tariff, at Original Sheet 27.

above the specific compensation set forth in the parties' ICAs.<sup>11</sup> The Ninth Circuit described the "tariffs" at issue as being "contained in the Interconnection Agreements (IAs),"<sup>12</sup> not generic tariffs in conflict with the ICAs.<sup>13</sup> Because the IAs set forth rates, terms and conditions that were available to all, were approved by regulators, and filed for inspection and copying, the Ninth Circuit held that the IAs' rates were "tariffs" and applied the filed rate doctrine on the IAs rates, terms and conditions.<sup>14</sup> Thus, the *Verizon* case actually supports AT&T's position that its ICA with Fones4All is binding on the parties.

#### **4.1.3 In Amendment 1 of the ICA Both Parties Agreed to Uphold the ICA Terms and Conditions for IntraLATA Traffic**

Amendment 1 of the ICA signed by Fones4All and AT&T includes terms and conditions specifically governing the carriage of intraLATA traffic, including responsibility for the accuracy and quality of data, information to be included in each terminated call, billing for calls passed without the originating calling party number, compensation for intraLATA toll free calls, the proper calculation of terminating minutes, and the proper measurement of trunk group minutes. It states that the rate each carrier will charge is the prevailing rate in the carrier's tariffs. The preamble to these negotiated ICA terms states "EXCEPT AS MODIFIED HEREIN, ALL OTHER TERMS AND CONDITIONS OF THE

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<sup>11</sup> 377 F. 3d 1081, 1086 (9th Cir. 2004).

<sup>12</sup> *Id.*

<sup>13</sup> A careful examination of the facts recited by the Ninth Circuit further confirms this conclusion because the only terms and conditions discussed were those contained in the ICAs; there were no generic tariff terms at issue. *Id.* at 1085-86.

<sup>14</sup> *Id.* at 1089.

UNDERLYING AGREEMENT SHALL REMAIN UNCHANGED AND IN FULL FORCE AND EFFECT.” *[Upper cases are as written in the ICA.]* The underlying agreement in this instance is the MCIMetro ICA. The modifications in Amendment 1 do not modify the dispute procedures in the underlying MCIMetro ICA, or defer to Fones4All’s tariffs for any term or condition except rates. For the foregoing reasons, we find that the ICA between Fones4All and AT&T governs all aspects of the intraLATA carriage carried by Fones4All on behalf of AT&T.

**4.1.4 ICA’s Terms and Conditions and Not the Doctrine of Laches Govern the Process of Dispute Resolution**

Having found that the ICA governs this service relationship between Fones4All and AT&T, we find that AT&T used the appropriate process for disputing Fones4All’s billings. Section 29.13.1.2 of the Underlying MCIMetro ICA (and therefore, the ICA that applies to AT&T and Fones4All) provides that either party is entitled to dispute billings within 24 months of the bill “due” date. Although Fones4All contends that AT&T waived its right to a dispute under the terms of Fones4All’s more restricted tariffs (which this decision has found do not apply except as to rates), both parties agree that AT&T presented its dispute to Fones4All within 24 months of the earliest bill due date.

Fones4All argues that AT&T is barred from recovering any claims under the doctrine of laches. The doctrine of laches bars a claim where a party unreasonably delays the assertion of a right in a way that causes substantial prejudice. AT&T, however, presented its claim to Fones4All within the 24-month time period set forth in the ICA that Fones4All signed and filed with the Commission. Under the circumstances, AT&T asserted a timely claim.

In conclusion, the ICA governs the procedures applicable to this dispute and under the terms of the ICA, the doctrine of laches does not apply to AT&T's claim.

#### **4.2 What are the Appropriate Charges According to the Governing Document or Documents?**

Having determined that the ICA governs the terms and conditions of Fones4All's carriage of intraLATA traffic for AT&T, we address how the related charges should be calculated according to the ICA. The parties do not dispute that the Fones4All's tariff rate applies here according to the ICA. Instead, at issue is the accuracy of the relevant call volumes.

AT&T alleges that the Reciprocal Compensation Amendment of the ICA specifies the proper basis for calculating terminating interconnection minutes is with Automatic Message Accounting (AMA) recordings made within each network. On this basis, AT&T claims that Fones4All may only bill AT&T for actual traffic and not with estimates.

##### **4.2.1 AT&T Met its Obligation to Make Usage Information Available to Fones4All**

AT&T claims the underlying estimated volumes are substantially different from actual volumes and that the terms of the ICA required Fones4All to ensure the accuracy of its bills. AT&T did not have an AMA system in place to verify Fones4All's billings until August 2005. Shortly after it developed the AMA system, AT&T compared its AMA-based calculation with the number of minutes billed by Fones4All, a process it states it has applied to all carriers beginning in August 2005. On the basis of the AMA recordings, AT&T alleges the Fones4All bills it paid between September 2003 and August 2005 should have been \$56,655.00 rather than the approximate \$2.68 million Fones4All billed.

Fones4All claims that AT&T failed to perform its obligations to provide usage information to Fones4All.<sup>15</sup> Fones4All first claims AT&T violated its obligations under Section 34.9 of the ICA.<sup>16</sup> However, Section 34.9.2 provides that Fones4All must first make a written request to establish file transmission for the Daily Usage File (DUF).<sup>17</sup> Fones4All did not submit a written request for the DUFs.<sup>18</sup> Instead, Fones4All requested an ISAV report, which was unavailable to UNE-P providers.<sup>19</sup> Fones4All also requested JANE reports,<sup>20</sup> and AT&T ultimately provided those to Fones4All.<sup>21</sup>

Fones4All further claims that AT&T had a separate duty to provide DUF under Section 6.11 of the Amendment.<sup>22</sup> However, Section 6.11 does not refer to the DUF. Instead, it references “Switched Access Detail Charge Data.” Because the ICA elsewhere specifically defines the DUF,<sup>23</sup> “Switched Access Detail Charge Data” is by definition something different.

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<sup>15</sup> Fones4All Opening Brief at 7, 15, 29-43, 58-59.

<sup>16</sup> *Id.* at 30.

<sup>17</sup> Exh. 1, McPhee Opening Testimony, at Attachment A, GT&C, §§ 34.9.1-34.9.2.

<sup>18</sup> Fones4All Motion at Attachment 4, ¶ 9 (Ms. Cardona alleges only that she “personally requested” the DUF).

<sup>19</sup> *Id.* at 34; Exh. 23, Barker Deposition, at 111:1-112:5, 113:16-114:13; Hearing Tr. at 124:15-26 (Barker for AT&T California).

<sup>20</sup> Fones4All Opening Brief at 35.

<sup>21</sup> Exh. 23, Barker Deposition, at 17:4-9; Hearing Tr. at 113:23-114:19 (Barker for AT&T California).

<sup>22</sup> Fones4All Opening Brief at 31.

<sup>23</sup> Exh. 1, McPhee Opening Testimony, Attachment A, GT&C, at § 34.9.1.

In addition, Section 6 is inapplicable to this dispute because it sets forth the specific requirements applicable to traffic to or from an IXC Meet Point Billing arrangement, not intraLATA toll traffic. AT&T explained this distinction at hearing.<sup>24</sup> The Section 6.1 refers to an arrangement established between the parties to the ICA (Fones4All and AT&T) to provide Switched Access Services to a third-party IXC via AT&T's Access Tandem switches.<sup>25</sup> Subsequent subsections refer to billing such third-party IXCs.<sup>26</sup> This is in stark contrast to Section 5 of the Amendment, which plainly addresses compensation for the exchange of intraLATA toll traffic between the parties.<sup>27</sup> Thus, contrary to Fones4All's claim Section 6 does not apply here.

AT&T California provides all CLECs with the same choices for DUF delivery, and CLECs are allowed to select from various available options.<sup>28</sup> On

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<sup>24</sup> Hearing Tr. at 42:12-15 (Barker for AT&T California); *Id.* at 211:17-21 (Read for AT&T California).

<sup>25</sup> *Id.* at Attachment B (Appendix Reciprocal Compensation), at § 6.1 ("The Parties will establish MPB arrangements in order to provide Switched Access Services to IXCs via PACIFIC's Access Tandem switches in accordance with the MPB guidelines adopted by and either contained in, or upon approval to be added in future to, the Ordering and Billing Forum's MECOD and MECAB documents.")

<sup>26</sup> Amendment § 6.2 indicates the rates the parties will charge IXCs; § 6.3 addresses billing to IXCs for MPBs jointly provided by the Parties; § 6.5 requires the exchange of information to bill IXCs for traffic jointly provided by the parties via MPB; § 6.8 addresses errors discovered by the IXC or the parties; § 6.10 requires provision of IXC billing information; and § 6.14 and § 6.15 provide for estimated billing "to the IXCs,"

<sup>27</sup> *Id.* at § 5.

<sup>28</sup> Fones4All Opening Brief at 35.

May 5, 2003, prior to the time period covered by this complaint,<sup>29</sup> AT&T provided Fones4All with detailed information regarding four options for receiving DUF information.<sup>30</sup> In August of 2003, Fones4All inquired about one of the options, but did not take any affirmative actions to pursue the available options.<sup>31</sup> Because Fones4All did not select one of the available options, AT&T did not provide the DUF, but AT&T states it made available to Fones4All a “daily usage file” (DUF) that provides data for the purpose of determining actual volumes, and that this data file was available to Fones4All on the same basis that it was available to all UNE-P providers. Fones4All admits that it did not use DUF files in calculating AT&T’s bills.<sup>32</sup>

Fones4All claims that it was necessary to calculate AT&T’s subject bills based on estimated volumes because AT&T did not provide the information required by the ICA for confirming actual traffic volumes. It argues that AT&T had an obligation to provide that information under the terms of the ICA (although Fones4All also argues that the ICA does not govern intraLATA traffic carried by Fones4All for AT&T). AT&T’s failure to provide the DUF files, according to Fones4All, bars any recovery by AT&T.

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<sup>29</sup> This complaint seeks refunds dating back to September, 2003. Complaint at App. C; Exh. 5a, Barker Opening Testimony, at Att. B.

<sup>30</sup> Exh. 19, Cardona Deposition, at 21:23-25:9, Exh. 5.

<sup>31</sup> Exh. 19, Cardona Deposition, at 29:14-19; 21:25-25:9, Exh. 5-6 (Mr. Sarem testified Fones4All “looked into software.”); Exh. 20, Sarem Deposition, at 66:1-17; Fones4All Opening Brief at 35.

<sup>32</sup> Cal. Civ. Code, § 3390, subd. 3; 23 Cal.Jur. p. 423; *Restatement of the Law of Contracts*, § 368; *Tropico Land, etc., Co. v. Lambourn* (1915), 170 Cal. 33, 39; *Title Guarantee, etc., Co. v. Henry* (1929), 208 Cal. 185.

**4.2.2 Because Fones4All's Estimates are Unsubstantiated and AT&T's Calculation of are Undisputed, AT&T's Calculations are Reasonable**

AT&T seeks the amount it overpaid – the difference between (1) the amount Fones4All was entitled to for termination of actual intraLATA toll traffic, and (2) the inflated amount Fones4All billed AT&T. Fones4All does not present any evidence to suggest that AT&T's AMA data is unreliable, nor does it refute AT&T's claim that the volumes for which Fones4All billed AT&T are much higher than one would expect on the basis of the industry data AT&T presents. Fones4All alleged an oral agreement allowing it to bill based on an assumption of a fixed amount of minutes of use per line, per month.<sup>33</sup> Though that amount changed during the course of the proceeding,<sup>34</sup> and even disputed by Fones4All's "consultant,"<sup>35</sup> Fones4All did not provide a basis for the amount of minutes per line, nor provide any explanation why such a key term would be left to an oral agreement.<sup>36</sup> Because Fones4All presents no alternative calculation that would conform to the terms of the ICA this Commission therefore finds AT&T's calculation of its actual liability to be reasonable. Accordingly, the billings to AT&T for the period in quest should have been \$56,655. The amount of overbillings is therefore \$2,627,236.67, as AT&T asserts.

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<sup>33</sup> Fones4All Answer at ¶ 9.

<sup>34</sup> Exh. 16, Cardona Opening Testimony, at 7:8.

<sup>35</sup> *Id.* at 12:21-13:1. Exh. 17, Sarem Testimony, at 5:25-27.

<sup>36</sup> Exh. 19, Cardona Deposition, at 31:14-32:16, 35:9-17.

### **4.2.3 Fones4All's Invoices are Unsustainable**

AT&T has proven the elements of its complaint, including that Fones4All breached the ICA. However, Fones4All has not substantiated the calculation of their invoices. Under the ICA, Fones4All is responsible for accurate billing and thus bears the burden of providing some support for its invoices.

Fones4All has not met this burden. As discussed above Fones4All's alleged usage estimates were inflated and inconsistent. Further, Fones4All did not produce calculations used to prepare its invoices.<sup>37</sup> On the other hand, AT&T has submitted extensive evidence that Fones4All's invoices are inflated. As discussed above, AT&T provided undisputed evidence that its calculations of Fones4All's actual usage are consistent with industry averages. AT&T's automated validation system indicates that from September 2003 through August 2005, Fones4All's actual usage was lower, but similar to, industry averages. Further, AT&T's calculations are far closer to industry averages than the minutes per line billed by Fones4All.<sup>38</sup>

AT&T requests interest at the rate of 10% per annum on the amounts Fones4All overbilled, and AT&T overpaid. Public Utilities Code Section 734 gives the Commission authority to include interest in awards of reparation. Because the amount in question is substantial and Fones4All has had the use of those funds for a long period, this decision adds interest to the reparations AT&T is awarded. A reasonable rate is that which we apply to awards of intervenor compensation, which is at the rate earned on prime, three-month commercial

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<sup>37</sup> Exh. 19, Cardona Deposition, at 43:24-44:11, Exhs. 9-10.

<sup>38</sup> *Id.* at 5, A9.

paper, as reported in Federal Reserve Statistical Release H.15 effective on the date of this decision. The interest shall accrue from March 10, 2006, when AT&T filed its complaint, until Fones4All refunds AT&T's overpayments.

#### **4.3 Do Equitable Considerations Justify a Departure from the Otherwise Appropriate Billings?**

Having determined that AT&T's claim is proper under the terms of the ICA and that its estimate of overbillings is reasonable, we address whether the billed amounts anticipated by the ICA and actual traffic volumes should be reduced or waived as a matter of equity, as Fones4All proposes.

Fones4All believes AT&T is entitled to no recovery of overbillings, believing that AT&T breached the terms of the ICA when it failed to affirmatively provide Fones4All with DUF records that would permit an accurate calculation of relevant traffic volumes. Fones4All states the appendix to the ICA permits Fones4All to estimate traffic if AT&T fails to provide use data in a timely fashion, which Fones4All states it did in calculating the subject bills. Fones4All also believes that legal theories of equitable estoppel and "unclean hands" present a bar to AT&T's recovery of overbilled amounts.

AT&T arguably should have provided DUF files to Fones4All under the terms of the ICA, but Fones4All also failed to order the DUF's. Moreover, Fones4All's lack of accurate data upon which to calculate AT&T's billings does not justify estimated billings that differ wildly from actual billings. Having insufficient data upon which to base its bills, Fones4All should have followed the terms of the ICA, which provides that where AT&T does not provide actual traffic data, the two companies "will cooperatively work together to estimate the billing...in accordance with (Fones4All's) Access Tariffs for estimating usage."

Fones4All did not show that it worked cooperatively with AT&T to estimate usage.

While Fones4All argues that AT&T is barred from recovering overcharges on the basis of several legal theories, Fones4All has presented no evidence or argument to convince us that AT&T should not be permitted to recover improperly charged funds.

## **5. Conclusion**

This decision finds that the ICA between Fones4All and AT&T governs the calculation of bills for the carriage of intraLATA traffic that is the subject of this dispute. We find that Fones4All improperly billed AT&T for intraLATA traffic for the period in question because it estimated call volumes that were substantially different from actual volumes. We also determine the amount that AT&T should have been billed by applying the actual traffic volumes to the Fones4All billings. We find that any reparations to AT&T should include interest.

## **6. Assignment of Proceeding**

Rachelle B. Chong is the assigned Commissioner and Kim Malcolm is the assigned Administrative Law Judge and Presiding Officer.

## **Findings of Fact**

1. The ICA between AT&T and Fones4All includes a number of provisions that refer to reciprocal compensation for intraLATA carriage between AT&T and Fones4All.

2. The ICA sets the rate for intraLATA carriage according to each carrier's tariff but does not defer to the carrier's tariff for other terms and conditions of service.

3. The parties do not dispute the rate that is applicable to AT&T's intraLATA calls, only the volumes for which Fones4All billed AT&T during the period in question.

4. The Telecommunications Act anticipates that carriers will establish reciprocal compensation arrangements for the transport and termination of calls, including intraLATA calls.

5. The ICA provides that a carrier may dispute past changes within 24 months of the due date of the disputed bill.

6. AT&T disputed the billings that are the subject of this complaint within 24 months of the due date on the first disputed bill.

7. The ICA directs that each party will bill for intraLATA traffic on the basis of actual call volumes.

8. Fones4All did not bill AT&T according to actual call volumes. It estimated call volumes that are substantially higher than actual volumes and industry averages.

9. AT&T did not have AMA capability until August 2005. It had DUF files prior to August 2005, which it did not review in the case of Fones4All's billings and which Fones4All did not order.

10. Fones4All does not dispute AT&T's records, which show that AT&T should have been billed \$56,655.00 rather than \$2.68 million for call volumes during the period in dispute.

11. AT&T paid Fones4All \$2,627,236.67 that it did not owe Fones4All during the period in dispute.

12. Fones4All has had the use of the funds AT&T paid but did not owe.

13. Fones4All did not cooperatively work with AT&T to estimate relevant billings.

### **Conclusions of Law**

1. The terms of the ICA govern the intraLATA carriage that is the subject of this complaint.

2. The filed rate doctrine is not relevant to this dispute because the Telecommunications Act anticipates private agreements between carriers for their carriage of telecommunications traffic.

3. By initiating this dispute within 24 months of the due date on the first disputed bill, AT&T used the proper procedure for initiating this dispute according to the terms of the ICA.

4. The doctrine of laches is not applicable to this dispute because AT&T initiated its dispute according to the terms of an agreement Fones4All signed.

5. AT&T's failure to affirmatively provide Fones4All with DUF files when Fones4All had not requested them does not bar AT&T's recovery of disputed amounts.

6. Fones4All should be ordered to pay interest on any amounts owed to AT&T, which should accrue from the date AT&T filed this complaint.

7. There are no extenuating circumstances to justify a reduction to the amounts AT&T should be entitled to recover.

8. Fones4All should be ordered to pay AT&T \$2,627,236.67 plus interest as set forth herein.

### **O R D E R**

1. Fones4All Corporation (Fones4All) shall pay Pacific Bell Telephone Company, d/b/a AT&T California (AT&T) \$2,627,236.67 plus interest at the rate reported in Federal Reserve Statistical Release H.15 effective on the date of this

decision. Interest shall accrue beginning March 10, 2006 and continue until full payment is rendered to AT&T.

2. All billings for intra-Local Access Transport Area (intraLATA) toll services to AT&T issued after August 2005 shall conform to the findings and conclusions of this decision until and unless the subject services are provided under a new and different authorized agreement. Fones4All shall credit AT&T any charges for intraLATA toll services that do not conform to the findings and conclusions of this decision and adjust bills to AT&T in a manner that is consistent with this decision.

3. Case 06-03-013 is closed.

This order is effective today.

Dated July 12, 2007, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
TIMOTHY ALAN SIMON  
Commissioners

**APPENDIX**

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**(END OF APPENDIX)**