3.3.17

Commission’s Secretary

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Re: WC Docket No. 06-210

CCB/CPD 96-20

Under the Administrative Procedures Act the FCC ONLY Resolves Controversies. The FCC has Removed the Case from Circulation and has Properly Determined that there are NO Controversies Within the Scope of the 1995 Referred Controversy of Fraudulent Use.

The DC Circuit Decision by Law Could Only Review Fraudulent Use and that Determination was in Favor of the Inga Companies.

Even if the DC Circuit Decision on Fraudulent Use did not favor the Inga Companies, the FCC and DC Circuit Understood that AT&T still loses as the DC Circuit Decision is Subordinate to the FACT that the Plans were Determined by Judge Politan as Pre-June 17th 1994 Grandfathered.

Petitioners: One Stop Financial, Inc., Winback & Conserve Program Inc., 800 Discounts, Inc., and Group Discounts, Inc. submit the following to confirm the case is over and by Supreme Court Law the Stay is lifted and damages scheduled:

1) There are 4 obligations in question in this case:

Only the first 2 are the ones enumerated within 2.1.8 and the 3rd and 4th are defined as AT&T customer plan obligations under the CSTPII/RVPP definitions.

1. outstanding indebtedness for the service,
2. unexpired portion of any applicable minimum payment period
3. plans revenue commitment (shortfall charges if the revenue Commitment is not met)
4. plans time commitment (termination charges if the time commitment is not met)

2) The overwhelming evidence shows that AT&T’s 1995 through the DC Circuit Courts position was the same as the Inga Companies. Only on a plan transfer do all 4 obligations transfer. On a traffic only transfer the revenue commitment and time commitment must stay with the non-transferred plan.

3) AT&T obviously had to concede that the revenue and time commitments do not transfer to assert its fraudulent use defense. It is obviously impossible to simultaneously assert “fraudulent use” which asserts revenue and time commitments **do not transfer** ----and assert that 2.1.8 requires all 4 obligations to transfer.

4) By law The DC Circuit Court could **only review what the FCC was tasked to interpret.** What the DC Circuit Court was being asked to interpret was whether section 2.2.4 fraudulent use could be used by AT&T to prevent traffic only from transferring---- either under 2.1.8 by direct transfer as used by petitioners or under 3.3.1.Q bullet 4 where one company deletes the end-user locations and the new company adds the end user locations traffic.

5)Here is where the confusion is: When the DC Circuit Court made its decision, it was not addressing which obligations transfer, by law, it was LIMITED to addressing only what the FCC was addressing and that is section 2.2.4 fraudulent use.

The DC Circuit Court stated:

**DC Circuit page 11:**

All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming **any obligations**. The petition for review is granted.

6)The DC Circuit Decision was addressing fraudulent use not obligation allocation. There was no obligation allocation controversy presented to the FCC as the parties agreed that only the two obligations listed within 2.1.8 get transferred on a traffic only transfer.

7)The DC Circuit Court determined that it would be a violation of fraudulent use if there **weren’t any obligations transferred**. AT&T, the Inga Companies and the FCC **all agreed** with that position. If there weren’t any obligations transferred then that would have been a violation of 2.1.8. AT&T never claimed to Judge Politan that the transaction was an attempt to transfer none of the 4 obligations.

8)The DC Circuit properly determined and the evidence conclusively shows that the first two and only two obligations listed within section 2.1.8 **were transferred to PSE**: 1) outstanding indebtedness for the service, 2) unexpired portion of any applicable minimum payment period

9)The DC Circuit was provided a post Oral Argument brief by plaintiffs and in that brief petitioners stated:

Intervenor Inga Companies Post Oral Argument Brief to Correct the Record: Page 6 para 8:

Another serious misstatement was made that Appellant was at risk of being unprotected in the event of nonpayment for services. **For example, the intended transferee of Intervenors accounts, PSE, in fact assumed the obligation for past indebtedness and the un-expired portion of any applicable minimum payment periods.**

10)The above statement by the Inga Companies advised the DC Circuit that the Inga Companies did transfer the first two obligations and those were the only obligations listed. The DC Circuit Decision noted that petitioners attempted to transfer and PSE attempted to assume the only two obligations actuality listed within section 2.1.8:

**DC Circuit page 11 footnote:**

At oral argument, AT&T’s counsel repeatedly stated that Tariff No. 2 expressly required PSE to assume **the volume commitments that form the heart of AT&T’s concern *in this case*.** *See* Transcript of Oral Argument at 11, 13. In a motion submitted after the argument, however, the Inga companies note that the **only obligations enumerated by Section 2.1.8 are “outstanding indebtedness for the service” and “the unexpired portion of any applicable minimum payment period.”**

12)AT&T’s position after the DC Circuit in Judge Bassler’s Court was that it wanted obligations transferred on a traffic only transfer that weren’t even listed within 2.1.8. From 1995 through the DC Circuit Court, AT&T’s position was the same as petitioners and the FCC and Judge Politan that only the two obligations listed within 2.1.8 get transferred on a traffic only transfer. Only on a **PLAN** transfer does the revenue and time commitments also transfer as the plan transfers.

13)By law tariffs must be explicit or the law requires that if not explicit it must be ruled against AT&T.

FCC 2003 Order Page 10 fn 65:

Pursuant to Rule 61.2, titled “Clear and explicit explanatory statements,” as in effect in January 1995, “[i]n order to remove all doubt as to their proper application, all tariff publications must contain clean [sic] and explicit explanatory statements regarding the rates and regulations.” 47 C.F.R. § 61.2 (1994). It is a well settled rule of tariff interpretation that “‘[t]ariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier’s canon of construction.’” *Associated Press Request for a Declaratory Ruling*, 72 FCC 2d at 764-65, para. 11 (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC at 1213, para. 2).

FCC 2003 Order Page 10 fn 65 also noted:

To quote the district court, “Words mean what they say. Rules should not be changed in the middle of the game; and certainly not without notice.” *First District Court Opinion* at 21.

14)The revenue and time commitments were NOT listed within 2.1.8. Furthermore AT&T’s position from 1995 through the DC Circuit Court had always agreed with the petitioners that on traffic only transfer the revenue and time commitments do **not** transfer under 2.1.8. Only the two obligations that are indicated in section 2.1.8 are transferred and that is exactly as the DC Circuit Court indicated were being assumed by PSE.

15)AT&T counsel David Carpenter agreed advised the DC Circuit Court and agreed with the FCC and Inga Companies and asserted that on a PLAN TRANSFER the revenue Commitments transfer and he asserted that on a traffic only transfer they do not transfer.

16)The following is the language AT&T wanted to add to section 2.1.8 when it attempted to RETROACTIVELY change 2.1.8. AT&T’s TR 8179 tariff filing issued February 16th 1995 and scheduled to be effective March 2nd 1995. The following is the text:

“If a customer seeks to transfer, to one or more other Customers, all or **substantially all** of the locations associated with an existing Custom Network Services volume or term plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining locations associated with the volume or term plan or Contract Tariff ( based on the last 12 months of usage) would **not meet the usage and/or revenue commitment of the volume or term plan** or Contract Tariff, the transfer **will be deemed a transfer of the associated volume or term plan** or Contract Tariff to such other Customer(s), and may only be completed in accordance with this section. If the transfer of service of service is to a group of two or more Customers, the new Customer for the volume or term plan or Contract Tariff will be that group. Each Customer in the group will be jointly and severally liable for all of the obligations associated with the transferred service and volume or term plan or Contract Tariff.”

17)In layman’s terms AT&T asserted that it had the right under 2.1.8 to force a plan transfer when substantial traffic but not the plan was transferred. AT&T wanted to force the plan to transfer because that is the only way under the tariff to force the revenue and time commitments to transfer.

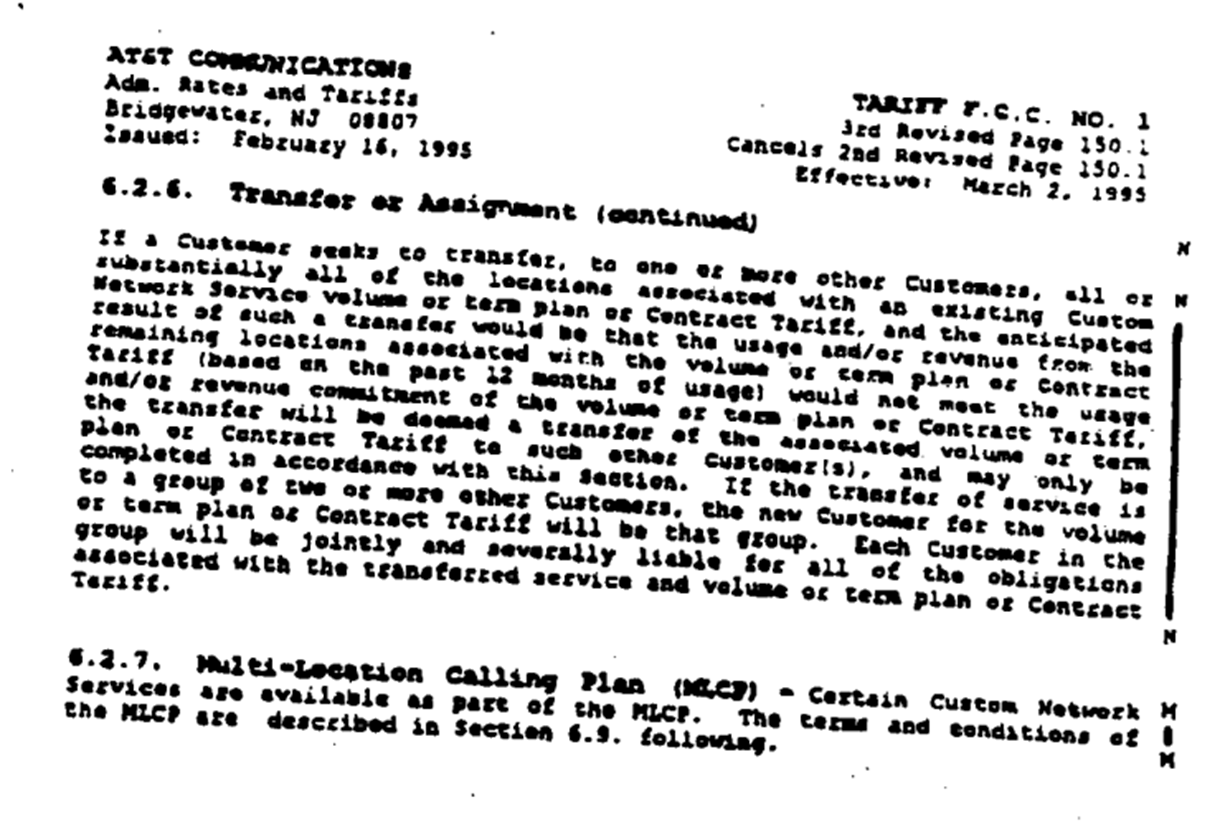
18)AT&T understood revenue and time commitments do not transfer unless the entire **plan** transferred so it proposed forcing the plan to transfer. Only since Judge Bassler’s Court does AT&T take the position that plan obligations (revenue and time commitment) which are not even listed within 2.1.8, must transfer under 2.1.8 on a traffic only transfer. AT&T created a new controversy in 2005 to claim that was the reason it denied the 1995 transfer. That is why the FCC Jan 12th 2007 Order denied Judge Bassler’s 2006 referral it as being outside the scope of the original controversy of fraudulent use.

19) If revenue and time commitments transferred on a traffic only transfer in 1995 then why didn’t AT&T simply assert that in 1995 instead of attempting to retroactively change the language of 2.1.8? Makes no sense because it is an intentional fraud and of course AT&T has no evidence as evidence does not exists.

20)There would have been no reason to retroactively change the terms and conditions of section 2.1.8 if 2.1.8 already mandated that plan obligations get transferred on a traffic only transfer. If plan obligations did transfer on a traffic only transfer in 1995 –why did AT&T try to change 2.1.8? AT&T’s post DC Circuit brand new controversy and fraud with attempt to cover-up the fraud regarding which obligations transfer on a traffic only transfer is an insult to the intelligence of the FCC. That is why the FCC Pricing Line Division sent the case to the FCC ethics staff to deal with AT&T counsels intentional misrepresentations.

21) If a language change to a tariff is done it is a **prospective change** if it changes the terms and conditions of the tariff and the Inga Companies would have been grandfathered if Tr8179 went into effect. The only time a carrier can obtain a retroactive change in the tariff language is when the terms and the conditions are not changing but merely being **codified** and **clarified** as towhat existing tariffs terms and conditions actually meant.

This is AT&T’s Tr8179 filing….



22) The FOIA notes show AT&T’s Tr8179 proposal was rejected by the FCC’s Randolph Smith. Mr Smith advised AT&T should not be allowed to speculate that CCI was going to deprive AT&T from collecting shortfall charges on the revenue and time plan commitments that under the tariff those plan commitments must stay with the non-transferred plan.

23)AT&T was advised by the FCC that it was going to deny Tr8179 if AT&T did not withdraw Tr. 8179 so AT&T withdrew Tr8179. AT&T counsel Mr. Carpenter conceded to the Third Circuit that AT&T lost its AT&T’s TR8179 Substantial Cause Pleading.

Third Circuit Oral Pg. 43 AT&T’s Counsel David Carpenter:

The FCC asked us to withdraw the complaint because theFCC thought we **had done more** in the tariff language than codifywhat the tariff already meant

24)AT&T counsel David Carpenter was conceding to the Third Circuit that AT&T had no right to force a plan transfer to force the revenue and time commitments to transfer when substantial traffic was transferred. David Carpenter never asserted to the Third Circuit nor did any AT&T counsels assert Judge Politan in 1995 that section 2.1.8 was being violated by not transferring **any obligations**.

25)It was always understood and non-controversial that just the first two obligations (indebtedness and minimum payment period) transferred for the accounts that transferred under 2.1.8. The revenue and time commitments that were not even on the AT&T TSA form did not transfer on a traffic only, non-plan transfer. That is of course why AT&T tried to retroactively change 2.1.8. because there was nothing about plaintiffs 2.1.8 order that was in violation of 2.1.8. AT&T’s only defense was 2.2.4 fraudulent use to stop as permissible 2.1.8 transfer.

26)The fact that the Commission ended up interpreting fraudulent use in the first place is ridiculous. AT&T’s fraudulent use defense was predicated on its speculation that the tariff mandated non-transferred revenue commitment could not be met by petitioners. That was a 1995 issue. By 1996 Judge Politan determined the plans were June 17th 1994 grandfathered and AT&T had NO MERIT in the first place to speculate it was going to be deprived of shortfall when the plans were IMMUNE FROM SHORTFALL.

27)The DC Circuit Judge Ginsburg during oral argument also addressed the issue of whether AT&T’s fraudulent use defense even had merit to begin with as the plans as determined by Judge Politan were pre-June 17th 1994 grandfathered!

28)The FCC shouldn’t have even decided the fraudulent use case in the first place because Judge Politan did not refer the June 17th 1994 issue as there was no controversy that the plans were immune from shortfall and termination charges as the revenue and time commitments could be restructured/refinanced/upgraded. In tariff terms, it is referred to as a Discontinuation without Liability.

29)The FCC should have advised the Court in 1996 that its decision on fraudulent use was a waste of time as the District Court had already decided that AT&T had no merit to raise the fraudulent use defense.

30) Additionally, the Commission understands that if one tariff section is conditioned upon another, it must, by law, be explicitly referred to. Neither section 2.1.8 nor section 3.3.1Q bullet 4 (delete from former customer plan and add to the new customer plan) were conditioned upon first meeting the requirements of section 2.2.4 fraudulent use. Section 2.1.8 and 3.3.1Q bullet 4 would have to explicitly say that any location movement is subjected to first meeting the requirements of section 2.2.4 fraudulent use:

FCC 2003 Order Page 10 FN 67:

As discussed in n.65, *supra*, Commission Rule 61.2 requires that tariff provisions be **explicit**. Rule 61.54(j) further required that “[a] special rule, regulation, exception or condition affecting a particular item or rate ***must be specifically referred to in connection with such item or rate.”***47 C.F.R. § 61.54 (1994) (emphasis added).

31)AT&T’s position to the DC Circuit was not that revenue and time commitments transfer on a traffic only transfer. AT&T tried to mischaracterize the transaction as a **plan** transfer and **if** it was a **plan** transfer then all 4 obligations must be transferred, not just the first 2 obligations! AT&T was simply going back to its original failed assertion to the FCC on Tr.8179. AT&T again in 2003 took the position to the FCC that it has the right to decide based upon how much traffic was being transferred would necessitate a PLAN transfer. Even though the FCC had already denied AT&T’s “close enough” horse shoe assertion under Tr8179 AT&T still asserted that the transaction was a **plan** transfer when petitioner’s transaction was a traffic only transfer.

**(DC Circuit page 7-8)**

“There, AT&T noted in passing that “**in this case** the relevant WATS services are **the CSTP II Plans.”**....[Section 2.1.8], by its terms, allows a transfer of CCI’s service to PSE only if PSE agreed to assume **all obligations** under those **plans**.

32) Above AT&T has simply decided this case is not a traffic only, non-plan transfer BUT a **plan** transfer and under that mischaracterization states not only does it want the two obligations listed in 2.1.8 to be transferred, but it also wants the revenue and time commitments not listed within 2.1.8 transferred. AT&T and the Inga Companies agreed that the tariff mandated revenue and time commitments must transfer ON A PLAN TRANSFER----AT&T simply misstated the facts of the case. There was never a controversy in 1995 on which obligations transfer under 2.1.8 for traffic only or plan transfers. AT&T needed to misrepresent the facts because AT&T counsels understood there was a difference as to which obligations transfer based upon whether it was a traffic only or a plan transfer. Basically AT&T was re-arguing its already FCC defeated Tr8179 argument that AT&T counsel Carpenter conceded to the Third Circuit AT&T lost.

33)The FCC, AT&T and Inga Companies all agreed that all 4 obligations transfer if it was a PLAN transfer—but it was not a plan transfer.

34)AT&T counsel made his position clear how the tariff works agreeing with the Inga Companies—he simply lied to the DC Circuit that it was a plan transfer.

Here is AT&T counsel Carpenters position on how the tariff works:

AT&T Counsel Carpenter during Third Circuit Oral:

We point out in our brief that there’s a **distinction** between transfers of **entire plans**, and transfers of individual end-users locations. That when the “**plan”** is transferred, **"all the obligations"** have to go along with it. (Pg. 15 line 9)

35)You can’t get more explicit than this. There is a **distinction** between an end-user location traffic only transfer compared to when the entire plan with 100% of all the end-user locations are transferred.

AT&T Counsel Carpenter during DC Circuit Court:

Mr. Carpenter: Now what obligations they are going to end up assuming **will vary depending** on what service is being transferred. **(11/12/04 DC Circuit ORAL Argument pg.12 Line 12**

Yes, it varies based upon whether it’s a plan transfer or a traffic only transfer.

---AT&T 3/21/1995 cross examination of Mr. Inga agreeing the revenue and time commitments and their associated liabilities for shortfall and termination charges on those plan commitments does not transfer when the plan does not transfer:

Whitmer: Q: Mr Inga, you know, do you not that if the service, **except for the home account**—or Mr. Yeskoo called it the **“lead account**” ---is transferred to PSE **the shortfall and termination liabilities remain** with Winback & Conserve, **isn’t that correct?**

Inga: Yes

36) The following is AT&T’s brief to the DC Circuit explaining that on a traffic only transfer under section 2.1.8 the revenue and time commitments do not transfer:

---AT&T reply brief to DC Circuit Court pg 9:

“Section 2.1.8 “addresses” the transfer of end-user traffic ***without***the associated liabilities.”

---DC Circuit Judges Tatel and Ginsburg both understood “all obligations” don’t transfer unless the whole plan is transferred: D.C. Oral Argument Page 10

JUDGE GINSBURG: Well, you said “all obligations”.

JUDGE TATEL: Well, that's **only if the whole plan is transferred.**

37) The DC Circuit Decided that plaintiffs did a traffic only transfer not a plan transfer. The DC Circuit Court did not see on the face of 2.1.8 that it allowed traffic only transfers as it missed the “any number” of locations language but agreed with AT&T and the petitioners that 2.1.8 allowed traffic only transfers.

DC Circuit Court page 7:

AT&T’s basic argument before this court is that “traffic,” even if it is not the same thing as a tariffed *plan*, is a type of Wide Area Telecommunications *Service* covered by Section 2.1.8. **In transferring traffic**, the parties sought to **reassign particular end-user businesses from CCI to PSE, so that calls to these businesses would be billed under PSE’s lower rates.** Thus, CCI asked AT&T to transfer the billed telephone numbers (corresponding to individual end-user locations) included in each CSTP II plan. *See* Transfer of Service Agreement Forms. It must be — AT&T argues — that what the parties sought to transfer is a type of service covered by the tariff; that is why they used the Transfer of *Service* forms.

38) The DC Circuit understood that plaintiffs did a traffic transfer and did use section 2.1.8 did allow traffic only transfers.

The DC Circuit Decision stated on pg.8:

“Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass transfers of traffic alone.”

and the DC Circuit Decision stated on pg.10:

“As the foregoing discussion indicates, we find the Commission’s interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans.”

DC Circuit Decision pg 11.

“In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No.2 does not apply to a transfer of "traffic."

39) AT&T itself asserted to the FCC in 1996 that the fraudulent use issue is a **disputed facts judgment call** not a tariff interpretation. The FCC stated the NJFDC must handle the 6.17.94 immunity that is **prior to** the Jan 1995 traffic only transfer. Judge Politan’s 1996 determination was that the plans were shortfall immune and AT&T had **no merit** to suspect being deprived of shortfall and is the law of the case. Judge Politan made this call w/o the knowledge that AT&T also violated the Oct 23, 1995 FCC Order, which precludes AT&T from raising any defenses.

40) Even the DC Circuit believed the cart was before the horse as Judge Ginsburg understood CCI keeps its customer plan obligations and does not transfer the plan obligations to PSE but understood the plans were 6.17.94 grandfathered and penalty immune and actually completed the FCC’s counsels’ question (Oral argument Pg. 27 Line 2):

MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this** that the **Commission didn't rule on**. I mean, for instance -- JUDGE GINSBURG: Whether they were **grandfathered?** MR. BOURNE: **Right.** So it could well be that there were little or **no shortfall charges.**

41) It's obvious the DC Circuit Court clearly understood AT&T’s fraudulent use position that the first two obligations actually listed within 2.1.8 were being transferred and assumed by PSE but the revenue commitment and its associated obligation for shortfall on the revenue commitment did not transfer under the tariff.

42) The DC Circuit Court understood that the Inga Companies transaction was a traffic only, non-plan transfer under 2.1.8 and 2.1.8 allowed traffic only transfers. The DC Circuit Court Decision clearly understood plaintiffs did transfer all the obligations listed within 2.1.8:

1. outstanding indebtedness for the service,
2. unexpired portion of any applicable minimum payment period

43) The DC Circuit Court’s position on the Fraudulent use was if there weren’t any obligations transferred then it would be a violation of fraudulent use, but the facts in this case show plaintiffs did transfer the first two obligations which were the only ones listed. AT&T agreed that only these two needed to be transferred on a traffic only non-plan transfer.

44) Whether the tariff allowed AT&T to prevent a permissible transfer under 2.1.8 using 2.2.4 fraudulent use only speaks to tariff interpretation. It does not speak to the facts of this case. Judge Politan had determined that the plans were pre-June 17th 1994 ordered and this was also noted by the FCC 2003 Order. Thus, the facts of this case were the plans were immune from the shortfall AT&T asserted it suspected under its sole defense of fraudulent use.

45)Additionally, the fiscal year revenue commitments had already been met at the time of the traffic transfer. Thus, the bottom-line is Judge Politan had determined in 1996 that AT&T had no merit to raise a fraudulent use defense in the first place. The FCC denied the fraudulent use due to illegal remedy.

46) The FCC also noted that AT&T would also lose its fraudulent use defense as any rate or regulation must be expressly referred to. So, if section 2.1.8 or 3.3.1Q bullet 4 delete and add were conditioned by section 2.2.4 fraudulent use then sections 2.1.8 or 3.3.1Q bullet 4 would have to explicitly refer to section 2.2.4 fraudulent use. This is not relevant now that the DC Circuit has ruled against AT&T on fraudulent use.

47) Post DC Circuit Decision AT&T creates a new controversy. AT&T incredibly asserts that the 1995 controversy was not about fraudulent use where AT&T stressed revenue and time commitments do not transfer. AT&T claimed to Judge Bassler that AT&T prohibited the 1995 traffic only non-plan transfer because under 2.1.8 because the revenue and time commitments must transfer.

48) During the DC Circuit Oral argument AT&T counsel Carpenter did advise the DC Circuit that 2.1.8 allowed traffic only transfers and that only on a plan transfer did the plan obligations transfer; not on a traffic only transfer. AT&T counsel was in a real bind. He could not possibly assert to the DC Circuit that the Inga Companies used section 2.1.8 and did transfer the only 2 obligations (outstanding indebtedness for the service, unexpired portion of any applicable minimum payment period) as AT&T’s argument makes the case for the Inga Companies.

49) So Mr Carpenter needed to again falsify the facts of the case. AT&T understood that section 2.1.8 only listed the two obligations and not the revenue and time commitment. What AT&T counsel bogusly asserted was the 2nd obligation (unexpired portion of any applicable minimum payment period) also INCLUDED the 3rd and 4th obligations of revenue and time commitment. Then under that false pretense AT&T counsel further lied to the facts of the case asserting NO OBLIGATIONS WERE TRANSERRED:

50)The Inga Companies filed the post Oral Argument Brief to correct the Record (Tr.11, line 19.)

9. Mr. Carpenter made numerous statements during oral argument that PSE did not assume any of the obligations. Mr. Carpenter: “They didn't assume the obligation even for past indebtedness on the locations, because all they wanted transferred was the traffic on the plans without the concomitant obligations, and the tariff says you have to assume both the outstanding indebtedness and the unexpired part of the volume commitments, and neither of those things were transferred.” (Tr.11, line 19.) This statement is incorrect because the TSA form shows that the two obligations to be assumed – indebtedness and unexpired time period were assumed by PSE. Appellant’s argument is based on the notations on the AT&T transfer form and ignores the fact that the TSA form as signed results in the assumption of all obligations. The notations made on the TSA actually states “Traffic only move all BTN’s except 181-000-0142-457, 131-134 0230-254 CSTP/Keep Plan # 3663 Intact. (J.A.at 175. Similar notations on other TSAs may be found at J.A. at 176 through 183). Appellant modified the actual notations to read “Traffic only…” then argued that the aggregator only wanted to move traffic and wasn’t assuming the obligations. Appellant seeks to persuade the Court that these notations meant that the aggregator intended to separate the indebtedness on the accounts from the traffic revenue on the accounts. The tariff doesn’t offer the customer the option of separating the traffic revenue from potential indebtedness on the same account. What the notations mean is that Appellant was being asked to move all the traffic except for 2 accounts and leave the existing CSTP plans intact.

10. The supplemental brief will show that notations were necessitated due to the fact that this one TSA form is used by AT&T for multiple purposes because under section 2.1.8 different types of transactions were allowed using the same form.

51) There is nothing in the record from 1995 up to the DC Circuit in which AT&T ever asserted that the traffic only transfer order mandated that zero obligations transfer. The cover letter that went with the TSA forms to AT&T by PSE’s processing manager Pat Bello explicitly stated it was doing a “proper order”---as it had always done.

52)Mr Carpenter simply could not possibly tell the truth that the Inga Companies had used 2.1.8 and PSE assumed the only 2 obligations needed for a traffic only transfer so he intentionally lied to the DC Circuit regarding the facts of the case.

52)The FCC in 2003 clearly understood as did Judge Politan and AT&T from 1995 up to the DC Circuit Court that customers were ordering a traffic only transfer, not a plan transfer----and there were no notations in the order mandating that there should be any modification of which obligations should or should not transfer. FCC 2003 Order Page 3:

AT&T sold inbound and outbound services under Contract Tariff 516 (CT 516) to PSE, an aggregator/reseller unrelated to either the Inga Companies or CCI.[[1]](#footnote-1) With an annual commitment of $4 million, which included 15 million minutes of 800 services per year, the CT 516 discount available to PSE was 66 percent off AT&T’s regular tariffed rates.[[2]](#footnote-2) CCI wanted the CT 516 discount, which was significantly larger than that available under its CSTP II/RVPP plans. Accordingly, CCI and PSE jointly executed and submitted to AT&T nine TSA forms for each of the nine plans.[[3]](#footnote-3) **At the bottom of each TSA, in handwriting, these parties directed AT&T to move the “traffic only” on each plan to PSE.[[4]](#footnote-4)** The January 13 letter, under which these nine TSAs were forwarded, directs AT&T to **“move the locations associated with these plans [but] not ... in any way to discontinue the plans.**”[[5]](#footnote-5) In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSI CSTP II/RVPP plans, **but not to move the actual plans themselves**.[[6]](#footnote-6) Having refused to recognize the original transfer from the Inga Companies to CCI, AT&T also refused to move the traffic from CCI to PSE

53) AT&T counsel Carpenter misrepresented that the second enumerated obligation (unexpired portion of any applicable minimum payment period) which is defined is defined in the tariff as One day was somehow a **revenue volume** commitment.

54) AT&T needed to argue against the FCC’s erroneous belief that 2.1.8 did not allow traffic only transfers; however, if AT&T argued that 2.1.8 allowed traffic only transfers and only the two obligations were transferred it would lose the case. AT&T counsel Carpenter was also misrepresenting that the transfer was a PLAN transfer and not a traffic only transfer because under a plan transfer all 4 obligations must transfer.

55) Since 2.1.8 did not list all 4 obligations AT&T counsel simply lied that the 3rd and 4th obligation not listed within 2.1.8 were **somehow included within the 2nd obligation**! Then continued the fraud by asserting for the first time ever in the case that zero obligations were transferred. You can’t make up this nonsense if you tried. Here is AT&T Counsel Carpenter believing that the DC Circuit would never require a customer to assume the revenue and time commitments that were not even listed within 2.1.8 to SHOE HORN the 3rd and 4th obligations NOT listed into the 2nd obligation.

56) So AT&T counsel Carpenter lies to the DC Circuit that it’s a **plan** transfer---- after he had already conceded to the Third Circuit that the FCC told him it is NOT a plan transfer! The he misrepresents what is included in the 2nd obligation and then to top it off he claims that petitioners didn’t transfer any obligations. DC Circuit Court Ethics staff head Nancy Dunn has all the evidence and waiting for the case to be finalized so her ethics staff can deal with Mr Carpenter ethics issues.

57) The DC Circuit Court reviewed the AT&T transfer forms with Cover letter from PSE that ordered a PROPER TRANSFER and was also advised by the Inga Companies that PSE was assuming all the obligations listed in 2.1.8: Intervenor Brief Page 6 para 8:

“For example, the intended transferee of Intervenors accounts, PSE, in fact assumed the obligation for past indebtedness and the un-expired portion of any applicable minimum payment periods.”

58) The DC Circuit having reviewed the AT&T transfer forms obviously paid no attention to AT&T counsels lie that zero obligations were being transferred as it noted first two were indeed transferred. Decision at fn 11:

In a motion submitted after the argument, however, the Inga companies note that the **only obligations enumerated by Section 2.1.8 are “outstanding indebtedness for the service” and “the unexpired portion of any applicable minimum payment period.”**

59)After the DC Circuit AT&T creates the new controversy that under 2.1.8 not only do the only two listed obligations transfer on a traffic only transfer---- but AT&T wanted the non-transferred plans revenue and time commitment to also transfer. It no longer asserts fraudulent use as the DC Circuit determined that only if there weren’t any obligations transferred it would violate fraudulent use. AT&T simply creates a new controversy that was never heard in 1995 and that is why the FCC January 12th 2007 order denied it as outside the scope of the original referral.

60) The DC Circuit agreed the Inga Companies did transfer the only 2 obligations listed on 2.1.8. In Judge Wigenton’s Court the Inga Companies referenced the no obligations were transferred misrepresentation of facts that AT&T counsel Carpenter attempted on the DC Circuit.

AT&T Counsel Joseph Guerra asserted to Judge Wigenton what AT&T counsel Mr. Carpenter argument to the DC Circuit was:

AT&T’s 3.21.16 brief to Judge Wigenton page 33:

“Counsel’s point was that PSE had not agreed to accept “all” of the obligations, not that it was assuming “zero” obligations.

61) AT&T counsel Guerra knew that AT&T counsel David Carpenter was only asserting all 4 obligations must transfer on a **PLAN** transfer **not** a traffic only transfer. So, when AT&T asserted that all 4 obligations must transfer it was under its mischaracterization that petitioners traffic only transfer was a plan transfer—as AT&T Counsel Carpenter detailed there was a **distinction** in which obligations transfer **varies** depending upon whether it’s a plan transfer or a traffic only transfer.

62)AT&T counsel Guerra knew that that AT&T counsel David Carpenter needed to misrepresent that zero obligations were transferred to falsify the facts of the transfer, because AT&T was arguing that under 2.1.8 the revenue and time commitment do **not** transfer on a traffic only transfer to assert AT&T’s sole defense of fraudulent use under section 2.2.4. Well at least Mr Guerra now agrees with eth DC Circuit that the only 2 obligations listed within 2.1.8 were transferred.

63) Judge Bassler understood that it was a traffic only transfer and the 2 obligations listed were transferred. Judge Bassler 2006 referral on which obligations transfer did not expand the scope of the original referral on fraudulent use. There are no other open issues within the scope of the case.

64) What happened was Judge Bassler did not understand that the DC Circuits statement was NOT ITS REVIEW of which obligations transfer, as that was not reviewable by the DC Circuit. The statement made by the DC Circuit was its fraudulent use position for any parties participating in a traffic only transfer.

All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming **any obligations**. The petition for review is granted.

65) Judge Politan, the Inga Companies, the FCC and the DC Circuit all understood PSE was assuming the only 2 obligations listed within 2.1.8. AT&T’s brief to the DC Circuit did not state that PSE was assuming zero obligations. Mr Carpenter made that misrepresentation only during DC Circuit Oral Argument. There was never an AT&T assertion before Judge Politan in 1995 nor to the FCC in 2003 that PSE was not assuming the two obligations listed within 2.1.8.

66) Judge Bassler did recognize that PSE was assuming the two obligations listed in 2.1.8 agreeing with the DC Circuit; but AT&T created a brand-new controversy and fraud that under 2.1.8 all 4 obligations must transfer on a traffic only transfer. Of course, AT&T engaged in a cover-up by misquoting the actual language in 2.1.8 and engaged in the intentional fraud despite knowing it had **no evidence to support its brand-new assertion.**

67)AT&T in Judge Wigenton’s Court also asserted PSE only assumed the two obligations and the Inga Companies agree with that as that is all PSE under 2.1.8 needed to assume on a traffic only transfer. AT&T of course can’t provide one statement to Judge Wigenton in which AT&T stated to Judge Politan in 1995: “For traffic only transfers under section 2.1.8 it requires that the revenue and time commitments must also transfer.” AT&T cannot provide Judge Wigenton one statement from AT&T’s briefs in 1995 or to the FCC that PSE is refusing to accept the only two obligations listed with 2.1.8. AT&T and petitioners agreed from 1995 through the DC Circuit Court how obligations get allocated for both traffic only and plan transfers. That is why Judge Politan’s statement was the case controversy was fraudulent use.

68) AT&T obviously could not have been asserting that nonsense as it was asserting revenue and time commitments **do not transfer**, to assert it fraudulent use defense. Therefore the FCC 2007 Order determined that “the June 2006 referral from the Judge Bassler did not expand the scope of the original referral.” The FCC 2003 Order explicitly states the only controversy was “fraudulent use,” under 2.2.4.

69)As DC Circuit Legal Director Martha Tomich pointed out the DC Circuit could only review what the FCC was asked to interpret. The DC Circuit took the fraudulent use position that it would only be fraudulent use if a party refused to accept assume **any** obligations. Obviously, the DC Circuit Court recognized the 2 obligations listed on the AT&T TSA form, that mimicked section 2.1.8 verbatim, were transferred. The DC Circuit did not say **the** parties ***in this case*** were participating in a traffic transfer **under section 2.1.8** in which there weren’t **any obligations** being transferred—as the DC Circuit explicitly stated the only two obligations listed within 2.1.8 were assumed by PSE:

70) Notice the DC Circuit doesn’t reference the parties names when it states what its fraudulent use belief would be if there weren’t **any obligations** transferred:

All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming **any obligations**. The petition for review is granted.

71)Before the word: “parties” it doesn’t even say “**THE** PARTIES.” The DC Circuit is simply saying that under 2.1.8 it doesn’t allow a traffic only transfer without assuming **any** obligations!

Obviously, that is not the facts of ***this case***. The overwhelming evidence shows that in 1995 all parties agreed PSE was assuming the only two obligations listed on the AT&T TSA form which mimicked 2.1.8. (1) outstanding indebtedness for the service, (2) unexpired portion of any applicable minimum payment period.

72)AT&T agreed that on a traffic only transfer only the obligations listed within 2.1.8 get transferred and the 3rd and 4th Customer plan obligations (3) plans revenue commitment (shortfall charges if the revenue Commitment is not met) (4) plans time commitment (termination charges if the time commitment is not met)----ONLY come into play when the **PLAN** is transferred. That is why AT&T tried to retroactively modify 2.1.8 under Tr8179 and the FCC denied AT&T.

73) Let me further clarify the DC Circuit Court confusion:

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Be that as it may, proceeding by analogy does not change the fact that **CCI and PSE** did request a *transfer* — a transaction on its face at least potentially **within the reach of Section 2.1.8,** which governs “Transfer or Assignment” — **instead of dropping and adding traffic in separate transactions.**

74) The DC Circuits position is that because CCI/Inga transferred traffic only to PSE under 2.1.8 and instead of dropping and adding traffic in separate transactions (Section 3.3.1.Q Bullet 4) it was within the reach of 2.1.8. The DC Circuit was not saying that petitioner’s transaction was under 2.1.8 would constitute fraudulent use---the only controversy it legally could review. The DC Circuit stated it was within the reach because it did not know which obligations get transferred. It understood that the only two obligations listed within 2.1.8 were transferred but it speculated on a **non-reviewable issue** of which obligations get transferred and maybe 4 obligations get transferred on a traffic only transfer, so it simply stated it was **within the reach** of 2.1.8. If the DC Circuit found that petitioners transfer under 2.1.8 refused any of the 4 obligations, then the DC Circuit would have stated the parties in this case violated fraudulent use under 2.1.8.

75) The following DC Circuit Statement **ERREONOUSLY SPECULATES** that **NO OBLIGATIONS** would transfer under the Commissions theory that traffic could be transferred **OUTSIDE 2.1.8** using section 3.3.1Q Bullet 4 by petitioners deleting and PSE adding the location traffic:

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Accordingly, even if small scale transfers of traffic were **outside the scope of Section 2.1.8,** allowing***this* transaction** to go through would create an obvious end-run around the unquestioned rule that new Customers had to “assume all obligations” in transferring WATS plans. Any reseller could **circumvent Section 2.1.8** simply by asking AT&T to move its business one billed telephone number at a time. Using such a **scheme**, a reseller could move every component of a plan, **save its obligations** to AT&T. The transfer provision would then have no effect except in those cases where the transferor foolishly fell within its scope by phrasing its request in terms of the tariffed plans themselves. The FCC itself recognized that the “purpose” of Section 2.1.8 “was to maintain intact the balance of obligations and benefits between parties under the tariff when **one customer stepped into the shoes of another.**” FCC Order at 7. The Commission’s interpretation eviscerates this very purpose, allowing PSE to take up essentially all of CCI’s resale business without assuming **so much as one** of CCI’s obligations to AT&T.

76) The DC Circuit stated that it would be a fraudulent use scheme **IF** the transfer was done OUTSIDE 2.1.8 and **IF** it was done where PSE did not assume **SO MUCH AS ONE** of CCI’s obligations. The DC Circuit is referring to a hypothesized transfer under 3.3.1 Q bullet 4! Under that hypothesized delete and add transfer under 3.3.1Q Bullet 4 the DC Circuit somehow believes that no obligations would transfer.

77) First of all petitioners transaction was not done **outside 2.1.8** and there is nothing in the record where the FCC ever stated that under a 3.3.1Q Bullet 4 delete and add account movement scenario that PSE would not receive **any** obligations. The FCC was not even asked to interpret which obligations get allocated as there was no controversy between the parties as to the allocation of obligations in 1995.

78) Because the FCC was not asked to interpret obligation allocation the DC Circuit should not have reviewed it and SPECULATED what the FCC would have interpreted as to obligation allocation **under 3.3.1Q bullet 4**. The FCC was not asked to interpret obligation allocation under 3.3.1Q-bullet 4. The FCC Order explicitly shows that it agreed with Judge Politan and the parties that for traffic only transfers the only 2 obligations listed within 2.1.8 were attempting to be transferred. The FCC’s brief to the DC Circuit said for traffic only transfer 2.1.8 “had meaning” due to its obligation allocation language as the FCC agreed with AT&T, petitioners and Judge Politan that all the obligations listed within 2.1.8 were transferred to PSE. It is not relevant at this point that the DC Circuit erroneously speculated on what would have been the case under a 3.3.1.Q bullet 4 transfer, as the DC Circuit at least understood that petitioners used 2.1.8 and that the only two obligations listed within 2.1.8 were transferred by petitioners.

79) The FCC 2003 Order EXPLCITLY shows that it agreed with petitioners, AT&T and Judge Politan that PSE was assuming the only two obligations listed within 2.1.8. and revenue and time commitments do not transfer on a traffic only transfer. The FCC even explicitly advised the DC Circuit in its brief that even though it did not see that traffic only could transfer under 2.1.8 **it used 2.1.8** in agreeing with the parties and Judge Politan that the two obligations listed in 2.1.8 were transferred and revenue and time commitments did not transfer. It was pure erroneous speculation on the DC Circuit Court that a delete and add transfer outside 2.1.8 using 3.3.1 Q bullet 4 would result in **no obligations** being transferred. It must be noted that section 3.3.1 Q bullet 4 does not even have a obligations allocation transfer language. When one part deletes an end-user location and the new customer adds the location OF COURSE the new customer is going to be liable for the BAD debt if that location does not pay its bill to AT&T. The DC Circuit Decision that there would not be any obligations transferred was based upon pure speculation as the FCC was never tasked to interpret which obligations transfer under 3.3.1Q Bullet 4 (delete and add).

80) AT&T and Petitioners **both agree** that under 3.3.1Q bullet 4 that **if** locations were deleted from petitioners and added by PSE then PSE of course would of course have had to be assume the responsibility for the bad debt on the accounts under its plan. The DC Circuit Court thus stated that **IF** the transaction was done **OUTSIDE 2.1.8** and **IF** there were **no** obligations transferred, it would be a fraudulent use scheme. That of course is incorrect speculation on a NON-REVIEWABLE CONTROVERSY as to which obligations transfer under 3.3.1Q bullet 4.

81) AT&T own Counsel Charles Fash on July 7th 1995 stated that 3.3.1 Q bullet 4 delete and add was the way to move accounts:

“The proper way to move traffic (i.e. a subset of locations on a plan) between plans is to submit service orders to **delete the locations from one plan and add the locations to another**.”

82) AT&T certainly wasn’t proposing an account movement scenario in which the new party would not receive **any obligations** on the traffic moved to its plan. The Charles Fash letter only stated that on a 3.3.1 Q bullet 4 transfer the revenue and time commitment does not transfer.

83) So, we ended up with a DC Circuit Decision in which it decided that it would only be fraudulent use **under 2.1.8** if the new customer didn’t assume **any obligations**. In this case PSE was assuming all the obligations listed within 2.1.8 and AT&T agreed there was no violation of 2.1.8., in 1995. AT&T of course tried to retroactively modify 2.1.8 under Tr8179 as it understood PSE was assuming all the obligations listed in 2.1.8.

84) Only after the DC Circuit did AT&T create its new controversy that not only did it want on a traffic only transfer the obligations LISTED on 2.1.8 ---it also wanted the 3rd and 4th obligations not listed on 2.1.8.

85) You also must remember at this point the DC Circuit is NOT EVEN TAKING INTO ACCOUNT THAT THESE ARE PRE-JUNE 17th 1994 PLANS AND ARE THUS TOTALLY IMMUNE FROM THE REVENUE AND TIME COMMITMENTS NOT LISTED IN 2.18!!! The DC Circuit is deciding fraudulent use but Judge Politan had already determined in 1996 that AT&T had no merit to being deprived of shortfall.

86) The reason why the case was **not remanded** was the DC Circuit could only review fraudulent use and its reviewed and agreed with the Inga Companies that petitioners did transfer the only two obligations listed within 2.1.8.

87) The DC Circuit agreed the only two obligations listed in 2.1.8 were assumed by PSE but outside the DC Circuit review speculatedwhether revenue and time commitments not listed within 2.1.8 should also transfer on a traffic only transfer.

88) The DC Circuit completely ignored all the evidence in the case showing actual traffic only transfers in which the revenue and time commitments did not transfer. The DC Circuit completely ignored Judge Politan’s Decision non-vacated May 1995 decision in which all the parties agreed revenue and time commitments don’t transfer. The DC Circuit completely ignored AT&T’s own counsel David Carpenter who advised the DC Circuit that revenue and time commitments don’t transfer on a traffic only transfer. The DC Circuit completely speculated that under 3.3.1 Q bullet 4 no obligations would transfer.

89) The DC Circuit even erroneously **PRESUMED** what AT&T’s position would be as to which obligations transfer on a traffic only transfer and not a PLAN Transfer. Below AT&T was simply asserting to the FCC that **IF** petitioners were doing a **PLAN** transfer not a traffic only transfer---then under a plan transfer “all the obligations under the plans” would transfer. Yes, it is true that **IF** the traffic only transfer was a **PLAN** transfer then the plans revenue and time commitments must transfer.

90) There was never a controversy in 1995 that only on **plan** transfer---- as the one between Inga Companies and CCI ----that the two obligations listed within 2.1.8 would transfer and because the Inga Companies were a FORMER AT&T CUSTOMER -----CCI would assume all the obligations of the FORMER customer under the plans. So, the (revenue and time commitments of the plans) would also transfer. See:

91) Let’s carefully walk through this and it will be deciphered…

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AT&T, however, argues persuasively that the FCC misinterpreted its comment. Immediately following the alleged concession, AT&T’s submission noted that:

[Section 2.1.8], by its terms, allows a transfer of CCI’s service to PSE only if PSE agreed to assume all obligations under those **plans.** *Yet CCI explicitly amended the transfer* *of services form to read “Traffic Only.”* By expresslydeclaring that it did not intend to effectuate a transfer of **all obligations under the plans** to PSE . . . *the proposed transfer, on its face, violated the terms of Section 2.1.8.*

Comments of AT&T Corp. at 10–11 (emphasis added) (citation omitted). It appears quite clear, then, that AT&T did not concede the inapplicability of Section 2.1.8 to transfers of traffic only. **Indeed, had AT&T** been willing to make such a concession, it **presumably** would not have contested the meaning of this provision before the Commission. Accordingly, the FCC’s reliance on AT&T’s comment is plainly misplaced.

92) The DC Circuit **presumed** that AT&T’s position on a traffic only transfer would be that under 2.1.8 the all the obligations under those plans would transfer and AT&T would mandate revenue and time commitments to also transfer. Which obligations are allocated under 2.1.8 was not within the DC Circuit Courts review but it was totally nonsensical for the DC Circuit Court to **presume** that AT&T’s position would be that under 2.1.8 the revenue and time commitments must transfer on a traffic only transfer.

93) It did not make sense to **presume** this when AT&T’s position in 1995 was that revenue and time commitments **do not transfer** on a traffic only transfer under 2.1.8 and that is the very reason why it bogusly asserted fraudulent use under 2.2.4.

94) Look at this conflicting scenario based upon the DC Circuit Court’s obligation allocation presumption outside the scope of the case on the traffic only transfer: DC Circuit page 4

AT&T balked at this second transfer as well. AT&T maintained that Section 2.1.8 applied to the transaction, and that **PSE thus had to assume CCI’s obligations** in order for the transfer to go through. **In addition**, AT&T argued that the proposed transfer violated the tariff’s **“fraudulent use”** provisions, as CCI almost certainly would fall short of **its volume commitments** once the traffic was moved to PSE’s account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties.

95) The DC Circuit first **presumes** that it would have been AT&T’s position under 2.1.8 that PSE should assume the revenue and time commitments on a traffic only transfer. But right after that the DC Circuit states it **was AT&T’s actual position** that the revenue and time commitment **do not transfer** on a traffic only transfer and thus AT&T was asserting fraudulent use as CCI/Inga would not have sufficient assets to pay the resulting shortfall penalties on the non-transferred revenue commitment.

96) Incredibly based upon the DC Circuits **presumption** the DC Circuit Court amazingly believed that AT&T in 1995 was simultaneously asserting to Judge Politan that on a traffic only transfer under 2.1.8 that the revenue and time commitment **must transfer and don’t transfer!** Judge John Roberts must have thought Judge Politan was a total fool to have a defendant simultaneously argue that its tariff mandates the plan commitments must transfer and that it mandates the plan obligations don’t transfer.

97) A defendant is obviously able to have as many defenses as it wants BUT AT&T’s underlying position as to the terms and conditions of section 2.1.8 can’t SIMULATANEOUSLY be that for traffic only transfers that 2.1.8 both mandates revenue and time commitments **both transfer and don’t transfer!** Obviously AT&T in 1995 was only asserting that revenue and time commitments do not transfer under 2.1.8. However, it was fortunate that the DC Circuit position was that PSE assumed the only two obligations listed within 2.1.8 and decided it would be fraudulent use under 2.1.8 if a party did not transfer any of the obligations.

98) Based upon The DC Circuit Courts total confusion on obligation allocation that was NOT EVEN WITHIN ITS REVIEW---- AT&T took that total confusion to Judge Bassler Court and scammed his Court silly by asserting the DC Circuit Decision was a **remand** and created a brand-new controversy that revenue and time commitments **must transfer** under 2.1.8 on a traffic only transfer. AT&T pulled off the fraud despite knowing it was an intentional lie ----as there has never been a traffic only transfer in the history of AT&T in which the non-transferred plans revenue and time commitments also transferred.

99) AT&T counsels simply hijacked the credibility of current Supreme Court Justice John Roberts even though AT&T counsels clearly understood that Judge John Roberts confusion on non-reviewable issues regarding obligation allocation were based upon speculation and presumption. Obviously AT&T was not simultaneously asserting to Judge Politan in 1995 that under 2.1.8 revenue and time commitment both transfer and don’t transfer! A federal Judge would have to be a complete moron or corrupt to entertain such an AT&T position—especially when AT&T did not have any evidence to show –despite AT&T counsel Fred Whitmer during oral argument having advised Judge Politan that AT&T had done literally thousands of traffic only transfers.

100) In 1995 AT&T’s only position was revenue and time commitments don’t transfer and petitioners agreed with this and thus there was no controversy in 1995 as to the allocation of obligations on a traffic only transfer. Therefore, the FCC’s January 12th 2007 order explicitly stated that the June 2006 referral was outside the scope of the 1995 case and is thus moot and therefore the FCC never ruled on Judge Bassler’s 2006 obligation allocation referral.

FCC’s January 12th 2007 Order:

The district court's June 2006 order does not expand the scope of the issue previously presented.

101) The previous controversy was only fraudulent use in 1995 but Judge Politan determined petitioner’s plans were pre-June 17th 1994 shortfall immune. Judge Politan determined AT&T had no merit to speculate under fraudulent use (2.2.4) that it was going to be denied of shortfall on the non-transferred plans revenue commitment.

102) The DC Circuits speculation and presumption opened the door for AT&T to pull off the fraud on Judge Bassler and now on Judge Wigenton. The DC Circuit Decision itself notes that it was limited to reviewing only fraudulent use as that is the only 1995 controversy between the parties.

DC Circuit:

---“The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass.”** 47 U.S.C. Section 405(a).” (DC Circuit Decision in Plaintiffs initial briefpg. 10 fn1.

--- “How this enumeration affects the requirement that new customer assume “*all* obligations of the former Customer” (emphasis added) is **beyond the scope of our opinion**.” **DC pg. 11 fn2**

---“We also do not decide precisely which obligations should have been transferred in this case, as this question was **neither addressed by the Commission** nor adequately presented to us.” **DC Circuit Page 11**

103) **The only reviewable issue of fraudulent use was determined by the DC Circuit Court**. Its position was that it would only be fraudulent use if PSE refused to accept **ANY of the OBLIGATIONS**. That obviously was not the facts of **this transaction** as PSE assumed **all the obligations** that were listed on the AT&T TSA form that mimicked 2.1.8 verbatim:

1. outstanding indebtedness for the service,
2. unexpired portion of any applicable minimum payment period

104) The Inga Companies, AT&T and Judge Politan’s Court all agreed which obligations transfer in 1995—**no controversy**. The DC Circuit Decision is a ruling against AT&T as the DC Circuit Court Determined that it would only constitute fraudulent use if PSE wasn’t assuming **any obligations**. If PSE was not assuming the only two obligations listed on the AT&T TSA form in 1995 AT&T would have asserted such a controversy **in 1995.**

105) But AT&T clearly understood that PSE was assuming all the obligations listed within 2.1.8 and thus tried to retroactively change 2.1.8. Even if the DC Circuit had ruled that AT&T had the right under its tariff to use fraudulent use to stop a permissible 2.1.8 transfer---- AT&T would still lose THIS CASE ANYWAY! As Judge Politan already determined there was NO MERIT TO RAISE 2.2.4 in the first place

106) As DC Circuit Legal Director Martha Tomich said: The DC Circuit could only review what the FCC was asked to interpret and that was fraudulent use. Ms. Tomich said “If AT&T had a problem with the DC Circuit Decision it was incumbent upon AT&T to appeal it. DC Circuit Legal Director Martha Tomich understood that the DC Circuit determination was on fraudulent use and it was against AT&T. DC Circuit Legal Director Martha Tomich also said she understands Judge Roberts made an error in his speculation of which obligations transfer under 2.1.8 on a traffic only transfer—which was non-reviewable speculation and presumption.

107) The only controversy in 1995 was AT&T’s **fraudulent use** defense and that issue has been decided against AT&T by the DC Circuit Court. AT&T itself in 1996 asserted to the FCC that fraudulent use is a FACT-BASED issue that the NJFDC must first resolve before any tariff interpretations are referred. The cart was put before the horse in this case but the DC Circuit ended up ruling against AT&T anyway without the benefit of taking into consideration the plans were immune from shortfall as they were pre-June 17th 1994 ordered as the 2003 FCC decision noted.

108) The FCC was not ask to interpret the June 17th 1994 immunity but the fact that it noted it in the FCC Order was a tacit way to inform the Court these plans were immune! There was no reason for the FCC to explicitly state that these plans were ordered prior to June 17th 1994 than to make it known to the Court without asking that these were special immune from shortfall plans.

FCC 2003 Order page 2

AT&T is a telecommunications carrier regulated under Title II of the Communications Act of 1934, as amended (the Act). At the time these events occurred, AT&T was a dominant provider of interstate telecommunications services and, as such, offered the services at issue under tariffs, which it filed with the Commission pursuant to section 203 of the Act.[[7]](#footnote-7) The Inga Companies were non-facilities- based aggregator/resellers of AT&T’s inbound 800 Wide Area Telecommunications Service (WATS).[[8]](#footnote-8) **Prior to June 17, 1994,** the Inga Companies completed and signed AT&T’s “Network Services Commitment Form” for WATS under AT&T’s Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T’s regular tariffed rates.[[9]](#footnote-9) The CSTP II was set forth in AT&T’s Tariff FCC No. 2 (Tariff).[[10]](#footnote-10) The Inga Companies committed to aggregate $54 million worth of 800 services per year under their nine CSTP II plans.[[11]](#footnote-11) This volume of traffic qualified for a discount of 28 percent off AT&T’s regular tariffed rates – a 23 percent discount under the CSTP II plan, combined with an additional 5 percent discount available under the tariffed Revenue Volume Pricing Plan (RVPP).[[12]](#footnote-12) The Inga Companies resold their AT&T’s WATS service at a discount off AT&T’s tariffed rates to third-party end-users, generally smaller business customers using 800 lines, which could not qualify individually for volume discounts.[[13]](#footnote-13) These small businesses were the Inga Companies’ customers.[[14]](#footnote-14) The Inga Companies aggregated these end-users’ 800 traffic under the CSTP II/RVPP

109) Despite the fact that Judge Politan never referred the June 17th 1994 issue to the FCC because he did not need to as it was conclusive, the Commission INTENTIONALLY noted the plans were pre-June 17th 1994 order for a reason. It was advising the District Court that the plans were immune from shortfall and termination charges and thus AT&T had no merit in the first place, to suspect under its 2.2.4 fraudulent use provision of being deprived of shortfall on the revenue commitment that does not transfer under 2.1.8., on a traffic only transfer.

110) The tariff interpretation on fraudulent use had even less merit when the Commission itself noted that this was a TEMPORARY TRANSFER and the FISCAL YEAR REVENUE COMMITMENTS HAD ALREADY BEEN MET!!!

111) AT&T intentionally lied to each Court and created bogus defenses which had no merit. If section 2.2.4 did allow AT&T to prevent a 2.1.8 or 3.3.1Q Bullet 4 account transfer it would not have needed to try and change 2.1.8 via TR8179. It would not have needed to replace Tr8179 with Tr9229 in November 1995 which mandated that security deposits against potential shortfall must be posted by the FORMER CUSTOMER when substantial traffic is transferred. AT&T’s own actions show that 2.2.4 could NOT be used to prohibit a 2.1.8 or 3.3.1Q Bullet 4 transfer.

112) Even if the FCC and DC Circuit had ruled against petitioners on the fraudulent use controversy all that GETS TRUMPED BY THE FACT AT&T HAD **NO MERIT** TO RAISE THAT DEFENSE IN THE FIRST PLACE!!! That is a FACT ISSUE that has ALREADY BEEN ESTABLISHED by the NJFDC as it did not need to refer the June 17th 1994 issue to the FCC.

This is the Law of the Case:

**A)** Judge Politan: “Commitments and shortfalls are little more than **illusionary concepts** in the reseller industry—concepts which constantly undergo renegotiation and restructuring. Theonly “tangible” concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that **AT&T’s demand for fifteen million dollars’ security is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction **nor properly substantiated by AT&T**. pg 19 para 1

**B)** Judge Politan: **“**Suffice it to say that, with regard to **pre-June, 1994 plans**, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T’s own tariff.” May 1995 Decision pg. 11

**C)** Judge Politan: “In answer to the court’s questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T.” May 1995 pg. 24

113) March 1996 Judge Politan Decision Page 16 para 1:

The Court finds **nothing** in the Tariff F.C.C. No. 2 which prevents fractionalization, and contemplates a like finding by the F.C.C. Cleary, therefore, plaintiffs have established a strong likelihood of success on the merits.

**NOTHING** INCLUDES AT&T’s SOLE DEFNSE OF FRAUDULENT USE!

**114) This case was technically OVER in March 1996 when Judge Politan determined the plans were pre-June 17th 1994 immune and did not need to refer that issue. It killed AT&T’s sole defense of fraudulent use---as Judge Politan determined AT&T had no merit to raise fraudulent use, even if the tariff permitted AT&T to use it. As AT&T conceded in 1996 that it did not make a bit of difference what the FCC or DC Circuit stated on fraudulent use interpretation.**

115) As per the FCC FOIA NOTES ---The FCC’s AT&T Tariff guru R.L Smith advised the FCC case manager Judith Nitche in 1995 that this whole issue is a waste of the FCC’s time because HOW DOES AT&T HAVE THE RIGHT TO SUSPECT FRAUDULENT USE IN THE FIRST PLACE.

R.L Smith commenting on AT&T’s fraudulent Use claim:

“Two things to keep in mind about this one. First **it indicates intent to** and that is a **judgment call** which would have to be decided in a complaint case if the matter came up. And **‘it does not even take intent into account but assumes it is there”**

116) Yes, it was a fact-based judgement call of Judge Politan and based upon the evidence his Court determined the plans were shortfall immune and AT&T’s fraudulent use speculation had no merit in the first place. Judge Politan offered AT&T the right to come back to his Court with evidence to show why it should impose a $15 million-dollar security deposit on the March 1996 injunction ----when the plans were immune from AT&T’s so called fraudulent use shortfall speculation. AT&T ended up violating its tariff in June 1996 which of course is 18 months after the denied Jan 1995 traffic only transfer. AT&T in June 1996 stated that the plans could no longer be restructured as of that date. The tariff shows that AT&T is wrong and the plans were shortfall immune through 2001. However, even using AT&T’s June 1996 assertion with the fact that these are fiscal year revenue commitments----Why then if AT&T took the position that the plans were immune to at least June 1996---how could AT&T possibly assert in January 1995 that AT&T was going to be deprived under fraudulent use of shortfall---when AT&T itself conceded the plans were ordered prior to June 17th 1994 and immune from shortfall. It’s now irrelevant that the DC Circuit has ruled against AT&T’s fraudulent use defense---but the whole FCC and DC Circuit tariff interpretation meat absolutely NOTHING when it was already determined that there was absolutely NO MERIT to raise that fraudulent use defense in the first place!!!

117) DC Circuit Court Judge Ginsburg and FCC counsel Nicholas Bourne both understood revenue commitments didn’t transfer on a traffic only transfer but the issue of AT&T’s raising a fraudulent use defense of suspecting shortfall had **no merit** as Judge Ginsburg completed the sentence of the FCC’s attorney Nick Bourne:

The FCC explained to the DC Circuit Court the “Commission didn’t rule on” the June 17th 1994 immunity provision that grandfathered plaintiff’s plans. (Pg. 27 Line 2):

MR. BOURNE: Well, **CCI still had the obligation to pay its shortfall charges,** and there's, there are **other aspects to this** that the **Commission didn't rule on.** I mean, for instance -- JUDGE GINSBURG: Whether they were **grandfathered?** MR. BOURNE: **Right.** So, it could well be that there were little or **no shortfall charges**.

118) Judge Ginsburg understood revenue commitments do not transfer on a traffic only transfer and understood AT&T’s fraudulent use defense had no merit to begin with—a fact based issue already decided by Judge Politan.

119) As the FCC’s R.L Smith noted AT&T had no merit to simply assert its sole defense of fraudulent use in the first place! “Two things to keep in mind about this one. First it indicates intent to and that is a judgment call which would have to be decided in a complaint case if the matter came up. And ‘it does not even take intent into account but **assumes it is there**.”

120) DC Circuit Court Judge Ginsburg and FCC counsel Nick Bourne the FCC’s tariff guru R.L. Smith and Judge Politan in March 1996 **all understood** AT&T had NO MERIT to assert its sole defense of fraudulent use in the first place. AT&T jumped to second base without getting to 1st base.

FCC 2003 Order page 8 para 11:

Based upon our review of AT&T’s tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the “fraudulent use” provisions of its tariff – **which we do not decide** – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE

121) The FCC understood that it did not make a difference whether the tariff allowed AT&T to use 2.2.4 Fraudulent use to prohibit a permissible 2.1.8 transfer because the FCC knew the NJFDC had to first decide whether there was any merit to use this defense –which it does not decide!!! Judge Politan already decided this and did not need to refer it to the FCC. As the evidence conclusively indicates Judge Politan determined that AT&T had no merit to suspect being deprived of shortfall in the first place.

**By Supreme Court Law The Stay is Lifted**

122) The Supreme Court has set forth a two-part test for identifying a final agency action.  "First, the action must mark the consummation of the agency's decision making process -- it must not be of a merely tentative or interlocutory nature.  And second, the action must be one by which 'rights or obligations have been determined' or from which 'legal consequences flow.'" Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed. 2d 281 (1997) (citations omitted).  See also, Abbott Labs., 387 U.S. at 148-49, 87 S.Ct. 1507 (observing that the "problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration"). The FCC consummated its action from the Judge Politan/Third Circuit referral and that was a final agency action ripe for review under the Administrative Procedure Act (APA) 5. U.S.C. s. 704, See Top Choice Distribs., Inc. v. United States Postal Serv., 138 F.3d 463, 466 (2d Cir. 1998).  It had to be a final action or it could not have been reviewed by the DC Circuit.  DC Circuit decided the fraudulent use issue in petitioners favor as PSE was not participating in a transfer under 2.1.8 in which it refused to assume any obligations---as PSE assumed the only two obligations identified by section 2.1.8. The DC Circuit also determined that 2.1.8 allowed traffic only transfers without the plan agreeing with the Inga Companies and AT&T—a non-controversy in any effect. **The proceeding was over**.  It can only have been continued if (1) the court explicitly issued an order of remand; (2) the FCC decided to take the matter up on its own; or (3) one of the parties filed to ask for a clarification.  **None of these things happened.**

123) The DC Circuit simply substituted its judgment of what AT&T's tariff meant for that of the FCC's and thereby declared the law on the issues presented.  So, there’s nothing for the FCC left to do on these issues as stated by the FCC’s 2007 Order. The FCC determined here is **no remand** as to the issues **the DC Circuit Court itself determined.**  The DC Circuit Court determined the one issue that was asked – could traffic only transfer without the plans and what would constitute fraudulent use. Hence, there is nothing for the FCC to decide on the main issues that were before it in the proceeding and therefore the FCC has not and legally can’t rule. The FCC under the Administrative Procedures Act can only interpret controversies that are within the scope of the original referral 1995 fraudulent use referral. There are no controversies to resolve as the fraudulent use controversy has been determined by the DC Circuit against AT&T and there isn’t any controversy between the Inga Companies and AT&T that 2.1.8 allows traffic only transfers without the plan. Since there was never a controversy in 1995 as to which obligations transfer under 2.1.8 that 2005 post DC Circuit Court controversy was properly determined by the FCC January 12th 2007 Order as not expanding the scope of the original fraudulent use referral. By Supreme Court Law the stay must be lifted as there are no other controversies resolve that were within the scope of the original referral and the case should proceed to damages. The FCC believed that its Jan 12th 2007 Order was supposed to clearly convey to a Court that the 2006 referral is moot but it did not.

124) The FCC’s counsel Austin Schlick determined the case was not a remand in 2005 and it still is not today. AT&T scammed Judge Wigenton into believing it was arguing in 1995 that revenue commitments transfer on a traffic only transfer under 2.1.8 when in reality, AT&T created that controversy in 2005. Even more absurd was the new controversy took the direct opposite position of which obligations transfer under 2.1.8.

125) Not only was it a new controversy that was moot as it did not expand the scope of the fraudulent use issue ----but AT&T it was a completely bogus one at that -----as AT&T’s counsels were simply able to intentionally scam Judge Wigenton knowing it had no evidence to support its 2005 created “all obligations of the transferor” fraud. AT&T counsel Fred Whitmer in 1995 advised Judge Politan that AT&T has done thousands of traffic only transfers and AT&T still persisted with the intentional fraud on Judge Wigenton.

126) Email from FCC General Counsel in 2005 when the FCC stated the case is not a remand and the FCC has found nothing within Judge Bassler’s 2006 referral that changes that position. The DC Circuit Court has simply decided that 2.1.8 allows traffic only transfers –agreeing with the Inga Companies and AT&T.

127) The DC Circuit Court determined that it would only be fraudulent use if there weren’t any obligations transferred. The DC Circuit and Judge Bassler determined and AT&T conceded that all the obligations listed within 2.1.8 were being transferred by petitioners and assumed by PSE.

128) The FCC in 2005 determined that the DC Circuit Court case was NOT A REMAND. It was a final determination that it would be fraudulent use if there weren’t any obligations transferred under 2.1.8. Petitioners used 2.1.8 and the DC Circuit noted that it did transfer all the obligations within 2.1.8.

129) The below emails between FCC General Counsel and petitioners confirmed the FCC’s position in 2005 that the DC Circuit Decision was not a remand. The FCC has again taken that same position that the fraudulent use controversy is closed.

The below have been rearranged in chronological order so they can be read from top down ------so when one of the emails from Mr Inga states: “May I use the email below, as is, in a letter to Judge Bassler.” That email is now ABOVE not BELOW.

-----Original Message-----  
**From:** Al [<mailto:ajdmm@optonline.net>]   
**Sent:** Friday, April 15, 2005 2:22 PM  
**To:** Austin Schlick; John Ingle  
**Subject:** Mr. Schlick & Mr. Ingle

Gentleman

Is there some time point where the FCC will put in writing that it is not treating the DC Courts decision as a remand?

Mr Arleo was told by John Ingle of this FCC position, but Judge Bassler in the NJ District Court may want to see something in writing. If the FCC will not declare in writing the FCC proceedings are over will the FCC respond to a letter from Judge Bassler? If the FCC will answer the Judge to whom at the FCC can the Judge address his question to? I hope you appreciate the situation that the Inga Companies are in. Generally Judges are not apt to act on verbal stances.

I have not been able to retain Mr. Arleo as of yet and part is because he does not want to represent to the Judge the FCC's verbal position.

Please understand my predicament.

Al Inga

Inga Companies

----- Original Message -----

**From:** [Austin Schlick](mailto:Austin.Schlick@fcc.gov)

**To:** [Al](mailto:ajdmm@optonline.net)

**Cc:** [John Ingle](mailto:John.Ingle@fcc.gov)

**Sent:** Friday, April 15, 2005 3:12 PM

**Subject:** RE: Mr. Schlick & Mr. Ingle

Any letter from the court to the FCC, or from a party in litigation to the FCC concerning the litigation, could be directed to me:

Austin C. Schlick

Acting General Counsel

Federal Communications Commission

Washington, D.C.  20554

-----Original Message-----  
**From:** Al [<mailto:ajdmm@optonline.net>]   
**Sent:** Friday, April 15, 2005 6:01 PM  
**To:** Austin Schlick  
**Subject:** Re: Mr. Schlick & Mr. Ingle

Mr Schlick

May I use the email below, as is, in a letter to Judge Bassler.

**From:** [Austin Schlick](mailto:Austin.Schlick@fcc.gov)

**To:** [Al](mailto:ajdmm@optonline.net)

**Cc:** [John Ingle](mailto:John.Ingle@fcc.gov)

**Sent:** Friday, April 15, 2005 6:05 PM

**Subject:** RE: Mr. Schlick & Mr. Ingle

Yes.

**From:** Al [<mailto:ajdmm@optonline.net>]   
**Sent:** Friday, April 15, 2005 6:09 PM  
**To:** Austin Schlick  
**Cc:** John Ingle  
**Subject:** Re: Mr. Schlick & Mr. Ingle

Thank you

Al Inga

The Inga Companies

130) As per the Administrative Procedures Act there are no controversies within the scope of the original referral that the FCC can address and thus the FCC has removed the case from circulation after a 13-month review. Even though AT&T kept sending in its Washington DC based counsels into the FCC on personal visits to implore the Commissioners to rule on the case, the Commissioners understood the DC Circuit ruled against AT&T on the only 1995 controversy of fraudulent use. The case should have NEVER BEEN INTERPRETED BY THE FCC in the first place as Judge Politan understood AT&T had no merit to raise its sole defense of fraudulent use.

131) Thank you for understanding why petitioners are SO FRUSTRATED. We understand the Commissions frustration with the AT&T fraud too. We both have the right to be frustrated. Yes AT&T counsels got away with no justice for over 22 years on its this intentional fraud and did it with no evidence while engaging in an intentional cover-up. The ethics staffs will soon be able to move on this now that the case is off circulation. The FCC Ethics staff is willing to help the DC Circuit Court, the NJ Office of Attorney Ethics, and the DC Bar Counsel in the AT&T attorney ethics investigation.

Al Inga President

Group Discounts, Inc.

1. *See First District Court Opinion* at 4-5; Petition at 10-11. According to the record, PSE “combine[d] outbound calling services with its [800] IWATS resale operations, and thus – presumably – can cater more to the overall needs of the small businesses it services.” *First District Court Opinion* at 4-5. [↑](#footnote-ref-1)
2. *See First District Court Opinion* at 5; AT&T Contract Tariff FCC No. 516 at § 3 (eff. Oct. 20, 1993). [↑](#footnote-ref-2)
3. *First District Court Opinion* at 10; *see* Exhibit H to Petition. [↑](#footnote-ref-3)
4. *See First District Court Opinion* at 10; Exhibit H to Petition. [↑](#footnote-ref-4)
5. *See* Exhibit H to Petition. [↑](#footnote-ref-5)
6. *See First District Court Opinion* at 10. [↑](#footnote-ref-6)
7. *See First District Court Opinion* at 2 n.2. Subsection 203(a) of the Communications Act requires every common carrier to file with the Commission “schedules,” *i.e.*, tariffs, “showing all charges” and “showing the classifications, practices, and regulations affecting such charges.” 47 U.S.C. § 203(a). [↑](#footnote-ref-7)
8. *See Third Circuit Opinion* at 2; *First District Court Opinion* at 3. [↑](#footnote-ref-8)
9. Joint Petition for Declaratory Ruling, Internal File No. CCB/CPD 96-20 (filed July 15, 1996) (Petition) at 9; *see* Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, CCB/CPD 96-20 (filed Aug. 26, 1996) (Opposition) at 4; *First District Court Opinion* at 3-4. [↑](#footnote-ref-9)
10. *First District Court Opinion* at 3; *see generally* AT&T Corp. Further Comments, CCB/CPD 96-20 (filed Apr. 2, 2003) (AT&T Further Comments) at Attachment 1 (AT&T Tariff FCC No. 2 at § 3.3.1.Q. (AT&T 800 Customer Specific Term Plan II), 18th rev. p. 61.16 (eff. Dec. 12, 1994), 6th rev. p. 61.16.1 (eff. Mar. 11, 1994), 12th rev. p. 61.17 (eff. Mar. 11, 1994)). [↑](#footnote-ref-10)
11. *See First District Court Opinion* at 7, 8 n.8; *cf*. Petition at 11 (Inga Companies committed to a volume of $4 million per month). [↑](#footnote-ref-11)
12. *See First District Court Opinion* at 3-5. [↑](#footnote-ref-12)
13. *First District Court Opinion* at 3-4. [↑](#footnote-ref-13)
14. *See First District Court Opinion* at 3; AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback and Conserve Program, Inc.*, File No. E-97-02, Memorandum Opinion and Order, 16 FCC Rcd 16074, 16075, para. 3 (2001)). [↑](#footnote-ref-14)