**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEW JERSEY**

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| COMBINED COMPANIES, INC., a Florida corporation,  and  Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc., New Jersey corporations,  Plaintiffs,  v.  AT&T Corp., a New York corporation.  Defendant. | :  : : : : : : :  : : : : : : : : : : | Civil Action No. 95-908 (WGB)  Case 2:95-cv-00908-WGB-MF |

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**BRIEF IN SUPPORT**

**PER 2007 FCC ORDER JUDGE BASSLER’s 2006 REFERRAL IS MOOT AS IT DID NOT EXPAND THE SCOPE OF THE THIRD CIRCUIT REFERRAL**

**MISREPRESENTATIONS ON NJFDC JUDGES BASSLER AND WIGENTON**

**PLAINTIFFS’ MOTION TO LIFT STAY AND SCHEDULE DAMAGES**

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**FCC’s 2007 Order Determined Judge Bassler’s 2006 Referral was Moot**

**As AT&T No Defenses As Per Section 2.1.8 in Jan 1995**

1) The FCC released an *Order* determining Judge Bassler’s referral was moot. EXH B in EXH A. The reason why AT&T was never able to present Judge Bassler or this Court evidence that “all obligations” transfer on a traffic transfer is that no evidence exists. It was all a hoax on Judges Bassler and this Court that AT&T also tried on the FCC in 2006 and the FCC 2007 Order determined the FCC knew better. The FCC 2007 Order explains that under the Administrative Procedure Act the FCC removes uncertainty and terminates controversies. The 2007 Order determined there was no controversy in 1995 in regards to Judge Bassler’s referral on which obligations transfer under section 2.1.8. All parties in 1995 agreed that the CCI-PSE traffic transfer mandated that CCI must keep its revenue and time commitment. Only on a plan transfer do all the obligations transfer. In fact AT&T’s sole defense in 1995 was fraudulent use under a different tariff section 2.2.4 which conceded that under the tariff CCI must keep its plan obligations. The FCC 2007 Order explicitly advised Judge Bassler’s 2006 referral question on 2.1.8 obligation allocation has already been “already extensively briefed” and lists comments of the parties at FN 13 of the 2007 FCC Order as both parties agreed CCI must keep its plan obligations. Here are just a few statements from the record.

Politan March 1996 **EXH L pg.17 fn. 7**: “Indeed, **AT&T's own counsel** focused the issue by indicating that the tariffed obligations “*involved herein*” are all **tariffed obligations**, for which **“CCI, not PSE”** would be obligated.

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**

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)

AT&T 3/21/1995 cross examination of Mr. Inga:

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

AT&T reply brief to DC Circuit 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.**

DC Circuit Judge Ginsburg understood CCI keeps its customer plan obligations but understood the plans were 6.17.94 penalty immune and completed the FCC’s counsels’ question (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**.

2) AT&T counsel Meade agreed that plaintiffs where adhering to obligation allocation under section 2.1.8.—that is why AT&T tried to retroactively change 2.1.8 by filing Tr. 8179. AT&T changed 2.1.8 prospectively by adding under Tr9229 the security deposits against potential shortfall.

Meade certification See pg.7 para 15: **EXH W in EXH A**

“On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the **CCI-PSE** transfer--- **the segregation of assets (locations) from liabilities (plan commitments) ---** in the following manner.

Meade certification to Judge Politan pg.7 para 16 **EXH W in EXH A**

The Deposit for Shortfall Charges included in Transmittal No. 9229 is a **“new concept”** that meets **AT&T's business concern** more directly, without addressing the question of **intent.** Because this is **new,** it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the **CCI/PSE transfer**.

Also see 6 certifications from AT&T customers all stating plan obligations do not transfer on traffic only transfers. See EXH **EXHIBITS G---L in EXH A**

3) The FCC was advised that this Court advised plaintiffs seek a writ of mandamus to force the FCC to rule on Judge Bassler’s obligations question. **The FCC told plaintiffs to go review the FCC 2007 Order.** The reason the FCC did not issue a decision was because the 2006 referral on obligation issues “did not expand the scope” of the original referral by the Third Circuit on AT&T’s sole defense of fraudulent use under a different tariff section 2.2.4.

“Because AT&T did not act in accordance with the **“fraudulent use”** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. **AT&T does not rely upon** **“any other provisions of its tariff”** to justify its conduct.” **EXH A in EXH A FCC Pg.10 para 13**

4) The FCC 2007 Order eliminated all AT&T’s 2.1.8 defenses as outside the scope of the case as AT&T’s only defeated defense in 1995 was section 2.2.4 fraudulent use. Based upon AT&T’s 2.1.16 FCC Comments plaintiff’s realized AT&T sliced and diced sections of the 2007 FCC Order and intentionally misrepresented it to this Court in 2014. AT&T’s 2.1.16 Comments to the FCC brief on page 5 stated.

“AT&T included a block quote of that Order in its opposition to petitioners’ 2014 motion to lift the stay and attached the Order as an exhibit.”

5) The fact that AT&T obviously did not want the FCC to see the contents of AT&T’s “block quote” led plaintiffs to research what AT&T represented to this Court. **Here as EXH B** is Plaintiffs February 5, 2016 FCC Comments pages 6 -10 paras 23-37 that details the AT&T deception on this Court and AT&T never responded. **Exh F in Exh J** is an email to AT&T and all FCC Commissioners and counsels asking AT&T counsel Mr. Brown why AT&T intentionally manipulated and misled this Court regarding the FCC 2007 Order. AT&T has not responded. The FCC 2007 Order was written by the FCC case manager Deena Shetler and plaintiffs confirmed with her that Judge Bassler’s referral on which obligations transfer was not within the scope of the original Third Circuit referral on fraudulent use. Ms. Shetler said that if Judge Bassler’s referral on which obligations transfer was actually within the scope of the case any Judge would certainly know that the FCC would not list for counsels at fn 13 where they could find the answers to a pending referral! The following is the key paragraph from the 2007 FCC Order where the FCC is advising the District Court that under the Administrative Procedures Act the 2006 Judge Bassler obligations referral was not a controversy and it has “already been extensively briefed” and the Judge Bassler 2006 referral “did not expand the scope” of the original fraudulent use controversy. In 2014 before this Court AT&T counsel manipulates by leaving out the first two sentences and part of the third. This was left out…

FCC2007 Order: EXH B in EXH A (pg. 2 para 3)

“As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to **terminate a controversy or remove uncertainty**. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to **assist the referring court** by resolving issues arising under the Act. That is our goal here. **The district court's June 2006 order does**

6) AT&T did not quote the first 2 sentences above and then quotes from the middle of the 3rd sentence and leaves out the words: **“The district court’s June 2006 order does**” and AT&T starts its quote here and adds emphasis to the last line to further distract….

“not expand the scope of the issue previously presented. Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T’s Tariff No. 2, a matter already extensively briefed by the parties. Accordingly, we will not extend the reply comment period in this proceeding to await further direction from the district court. We grant a brief extension to the parties to file reply comments, ***which should be informed by this reminder as to the scope of the matter presented here.”***

7) AT&T counsel clearly understood what the FCC 2007 Order meant and intentionally misrepresented it to this Court in 2014. That’s why the FCC did not rule. Moot issue! The emphasis of course should be on the first two sentences of the paragraph and the words “The District court’s June 2006 order does” that were all left out by AT&T. AT&T did not want to emphasize the words “Rather” or emphasize “a matter already extensively briefed by the parties.” The FCC was simply saying we were resolving the only controversy under 2.2.4 fraudulent use but now you **rather** have us doing a brand new 2006 created controversy under 2.1.8. The FCC advised the NJFDC that the 2006 referred issue on which obligations transfer was “**a matter already extensively briefed by the parties**” when the parties agreed what the obligations allocation was! There was no controversy to terminate and no uncertainty to remove. Obviously it would be totally inconsistent for the FCC in its 2003 Order to explicitly state that the scope of the Third Circuit Referral was fraudulent use under 2.2.4 and then release an Order in 2007 and say the scope of the case was about which obligations transfer under section 2.1.8. The FCC’s Ms. Deena Shetler said that she wrote the Order for Thomas Navin and she believed that any Judge would understand “does not expand the scope’ and “already extensively briefed” within the 2007 FCC Order.

8) AT&T in 2014 misled this Court into believing that the FCC 2007 Order stated the scope of the case was on which obligations transfer. The reason AT&T did not provide the block quote to the FCC in its February 1st 2016 comments and has refused to respond at the FCC is because AT&T counsels are now concerned of being FCC sanctioned or giving the FCC more ammunition for ethics charges. The reason why AT&T graciously advised this Court that it would not oppose a writ of mandamus to force the FCC to rule is AT&T already knew the 2006 obligation referral was determined as moot—it was an AT&T trap. The FCC 2007 Order by stating AT&T created a new controversy in 2006 before Judge Basler is tantamount for acknowledging that Judge Bassler had to have been deceived in 2006 by creating a new defense that was never in Judge Politan’s Court. All defenses raised by AT&T under 2.1.8 were not there in 1995. In a thinly veiled effort to dissuade plaintiffs from going back to this Court to correct the record and supply new evidence AT&T counsel threatened sanctions. The only controversy was fraudulent use (2.2.4) in 1995 not obligations 2.1.8 and by 1996 no controversy existed**.[[1]](#footnote-1)**

**Security Deposits Against Shortfall On Traffic Only Transfers was Conclusive New Evidence that AT&T Counsel Misled this Court that it Had to Do with Inga-to CCI “Plan” Transfer**

The Court Page 10:

Judge Wigenton: Is it accurate, just from my understanding of looking at the history, the security deposit was in lieu of transferring the obligations?

MR. GUERRA: **Not quite, your Honor.**

Judge Wigenton: Okay.

**MR. GUERRA: Because the security deposit fight was over the first leg of the transfer.**

9) This Court asked about transferring obligations in reference to the CCI-PSE transfer. AT&T counsel Mr. Guerra evaded the **conclusive Tr9229 security deposit tariff evidence** that answers Judge Bassler’s question: plan obligations don’t transfer. See TR 9229 Tariff : **EXH X in EXH A** See **EXH A** pg. 35 paras 87-95 for definitive proof. This is why there is no evidence of AT&T’s “all obligations” nonsense. AT&T counsels intentionally misled Judge Bassler and this Court.

**AT&T Has Zero Evidence and Intentionally Misled this Court That It Addressed “No Evidence” at the FCC But AT&T Did Not**

10) Transferring traffic only is an extremely common transaction—mergers, acquisitions, division sell-offs, aggregator transfers, etc. AT&T knew it had **zero evidence** of traffic only transfers in which “all obligations” transfer so AT&T intentionally misled this Court in 2014:

“Again, they have also made these contentions to the FCC (see Brown Cert., Ex. O at 73-76 (discussing alleged ambiguity) and 174-178 (raising alleged other transfers of transfers of service), and **AT&T has responded to those arguments in that proceeding**.” AT&T Pg. 29

No evidence exits! AT&T misled this Court that it addressed the evidence issue at the FCC. AT&T has **not** responded at the FCC. The FCC itself stated to the DC Circuit that AT&T has no evidence as the FCC cited Judge Politan that stated AT&T has no evidence. **EXH R in EX A**

**AT&T Has Abandoned It Former Sole Defense of Fraudulent Use**

11) AT&T’s position is “all obligations” transfer. AT&T’s former fraudulent use defense was CCI must keep its revenue and time commitments because its plan is not transferring. Since AT&T as of 2006 is now asserting that “all obligations” transfer it can’t possibly simultaneously argue that CCI would deprive AT&T of collecting shortfall charges on the revenue commitment that CCI no longer keeps as “all obligations” transfer. AT&T gave up its sole defense before Judge Bassler. AT&T can’t simultaneously assert plan obligations transfer and don’t transfer.

**AT&T Misrepresents PSE Assumed No Obligations During 2015 Oral Argument**

12) Another misrepresentation minted in 2005, that was determined as outside the scope by FCC’s 2007 Order as asserts a 2.1.8 defense. This Court was intentionally misled:

Mr Guerra Page 8 Para 1 of March 2015 oral argument:

But they wrote **"traffic only"** on the forms.And **everybody has understood** that to mean that they weren't in fact assuming the obligations, PSE wasn't.

The Court also addressed this Traffic-Only zero obligations assertion by Mr Guerra Page 9:

THE COURT: So your position, then, Mr. Guerra, is had there been some understanding that all the obligations would transfer as well, then everything would have obviously proceeded and the contracts would have been fine and AT&T would have been on board. It was the notation of **"traffic only"** which was sort of the impediment?

MR. GUERRA: **Yes. And, again, this is the understanding that the DC Circuit had, the FCC had.**

No Court or FCC ever stated zero obligations were being transferred and assumed. The FCC Decision states AT&T’s **only defense** was 2.2.4 fraudulent use. See the actual evidence listed for every Court with extensive quotes **at Exhibit A pg. 38 para 96 to pg. 43 para 108).**

**AT&T Deceives Judge Wigenton and “Revises History” as AT&T Mischaracterizes the**

**CCI-PSE Traffic Only Transfer as a “PLAN” Transfer**

13) AT&T intentionally misled this Court by asserting that it was its assertion in 1995 that all obligations transfer on a traffic only transfer. This is another 2.1.8 defense, which was banned by FCC’s 2007 Order, as it deals with obligation allocation which was never a controversy in 1995. See AT&T’s maneuver to revise history pulled on this Court **EXHIBIT A** pages 44-47.

**THE THIRD CIRCUIT IN 1996 REFERRED A NON CONTROVERSY --- BY 1996 Judge Politan Issued Injunction and Determined there was No Longer A Controversy Due to New Evidence Since May 1995 Decision**

14) The Third Circuit Referral was based upon Judge Politan’s May **1995** Controversy to the FCC; but by March **1996** he determined there was no controversy left as his Court issued the injunction. Here as **EXHIBIT J** are plaintiffs FCC comments of February 15, 2016 substantially detailing the chronological events and misrepresentations and delays by AT&T that caused the Third Circuit to refer a non-controversy. Judge Politan was waiting on the FCC to determine tariff transmittal Tr. 8179 that would resolve the case. Tr. 8179 would mandate for substantial traffic transfers the entire plan would have to be transferred so as to transfer the plan obligations--- as AT&T conceded plan obligations do not transfer on a traffic only transfer. [[2]](#footnote-2) Judge Politan’s first decision was in May of 1995. The FCC advised AT&T that if it did not withdraw Tr8179 the FCC was going to reject it. AT&T withdrew Tr8179 on June 2nd 1995, obviously *after* Judge Politan’s May 1995 Decision. AT&T’s sole defense to deny the CCI-PSE traffic only transfer in 1995 -2003 before the NJFDC and FCC was fraudulent use. By Judge Politan’s March 1996 Decision Judge Politan had reviewed substantial new evidence, and issued an injunction and determined AT&T’s sole defense of fraudulent use for suspecting CCI of potentially defaulting on the revenue commitment was **not an issue** as the plans were Pre June 17th 1994 grandfathered. [[3]](#footnote-3) Judge Politan did not need to refer the pre June 17th 1994 exemption provision to the FCC as he understood the plans were penalty immune. [[4]](#footnote-4) Not only was AT&T’s sole defense of fraudulent use denied by the FCC and reviewed by the DC Circuit but by 1996 Judge Politan determined that AT&T’s fraudulent use defense of suspecting shortfalls on CCI’s plans **had no merit to begin with**. That is the law of the case as Judge Politan did not need to refer the pre June 17th 1994 exemption to the FCC. Judge Politan in May 1995 simply wanted to know if 2.1.8 permitted traffic only transfers or if the tariff did not prohibit traffic only from transferring. March 1996 Judge Politan Decision here asEXH L. See Page 15-16:

The Central issue in this controversy is whether plaintiffs may fractionalize “plans” as contracted between AT&T and its aggregators and as governed by Tariff F.C.C. No 2. Specifically, the question is whether plaintiffs may transfer traffic under a plan without transferring the plan itself in order to obtain more attractive discounts for end users. **The issue of whether Tariff FCC No. 2 permits fractionalization has been referred by this Court to the F.C.C**.

15)AT&T counsel Meade conceded when filing Tr8179 that there was nothing within 2.1.8 that could force the plan to transfer so as to force the plan obligations to transfer, when a substantial amount of locations were being transferred. AT&T filed a Substantive Cause Pleading for TR 8179 to see if the FCC would allow it to retroactively apply the change and the FCC denied it. [[5]](#footnote-5)AT&T replaced Tr8179 with Tr9229. **See EXH B in EXH B** is TR 9229 Security Deposit Against potential shortfall. AT&T misrepresented to Judge Politan that Tr9229 would then resolve whether or not the CCI-PSE transfer was to go through. March 1996 Page 4-5 **EXH L**

“For the purposes of the instant determination, it is uncontested that AT&T withdrew Transmittal 8179 on June 2, 1995. As such, the FCC ruling which the Opinion anticipated (**premised on the then-existing facts**) could not issue. However, in August of 1995, AT&T represented to the Court that it had withdrawn Transmittal 8179 at the behest of the FCC, and was in the process of revising the transmittal in preparation for its resubmission. In its August 28, 1995 letter to the Court AT&T stated:

“AT&T has since **revised** the Transmittal language that would clarify existing rights and obligations when a customer desirers to transfer a large portion of traffic of term plans available under Tariff No 2…..AT&T has also planned to include other proposed tariff revisions in this new (and yet unnumbered) Transmittal.”

In response, on November 1, 1995, AT&T denied plaintiff’s allegations stating that no deliberate delay had been orchestrated by AT&T, and that such allegations were now moot since AT&T had filed Transmittal No 9229 on October 26, 1995. Additionally, AT&T contested plaintiffs’ allegation that any tariff transmittal determined by the FCC could only have prospective effect --- contending that the tariffs in question had never permitted fractionalization of plans and service and that **the outcome of the Tariff Transmittal No. 9229 would establish that conclusion without question.**

16) AT&T misled Judge Politan that Tr9229 like Tr8179 was being filed under a Substantive Cause Pleading, so it may have retroactive application to prevent the CCI-PSE transfer. [[6]](#footnote-6) March 1996 Decision continued…page 12

“Richard Meade, a Senior Attorney with defendant AT&T Corp.’ (id. at para 1), “did not understand the Court’s reference of this issue to the FCC to mean that **the Court was relying on Transmittal No. 8179 to resolve the issue**.” Id. At para 12. Such a misunderstanding –by a party’s senior counsel ---gives the Court pause, especially so in light of the revised transmittal filed by AT&T. It appears that, rather than attempting to resolve the fractionalization issue sub judice in an expedited manner, AT&T decided to air all of its concerns at this time with the FCC. **Apparently, somewhere in the morass which is Transmittal No. 9229 can be found the issue of fractionalization**, although this Court is at a loss as to its exact location is a submission which more than half inch thick, and has neither a table of contents nor an index. (See Supplemental Certification of Richard R. Meade, Ex A)”

17) NJFDC Judge Politan March 1996 Decision **EXH L** page 13 line 3 continued….

“Suffice it to say that AT&T misspent over one hundred and forty days (from June 5 to October 26, 1995) ‘fine-tuning’ and ‘clarifying’ its transmittal. The end result of this effort is that **AT&T has obfuscated “the issue” referred by this Court to the FCC** and in so doing has prejudiced plaintiffs and delayed the determination of a concern of vital importance to them as expressed by this Court in the Opinion. The Court finds it incredible that AT&T’s ‘senior counsel’ could not understand the Court’s **focus of concern** from the unambiguous language of the Opinion. In its earlier determination, **the Court pinpointed the pivotal disagreement remaining between the parties to this litigation. The discreet issue then, as now, was whether AT&T must honor the fractionalization of the plans and service attempted by the plaintiffs.** There is no mystery. It appeared at earlier hearings in this matter that AT&T’s litigation counsel clearly understood the **narrow issue** about which the Court was concerned. Indeed it was at AT&T’s behest—**relying on the then-filed Transmittal No 8179**—that the Court refrained from deciding the fractionalization issue and referred it to the FCC. There is little to misunderstand.

Judge Politan did not see within “the morass of Tr9229” (TR9229 **EXH B in EXH B)** that TR9229 tariff conclusively shows traffic only can be transferred and the revenue obligations absolutely do not transfer on a “traffic only” transfer. **[[7]](#footnote-7)** Judge Politan forced Meade in **1996** tocertify whether Tr9229 was a prospective tariff change and if it answered his Courts Fractionalization question.

**Meade Certification Exhibit W in EXH A**

“On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the **CCI-PSE** transfer--- **the segregation of assets (locations) from liabilities (plan commitments) ---** in the following manner. See pg.7 para 15 Meade cert.

**Meade Certification Exhibit W in Exhibit A**

“The Deposit for Shortfall Charges included in **Transmittal No. 9229** is a **“new concept”** that meets AT&T's business concern more directly, without addressing the question of **intent.** Because this is new, it will apply only to newly ordered term plans, and so would **not be determinative** of the issue presented on the **CCI/PSE transfer**. (Meade certification pg.7 para 16)

Meade certification answered Judge Politan’s question: 1) Under 2.1.8 traffic only can transfer w/o plan --- what Judge Politan referred to as “fractionalization.” Judge Bassler’s question: 2) Plan obligations do not transfer on traffic only transfers under 2.1.8. Tr9229 referenced is the “new concept” of Security Deposits Against potential shortfall that was a prospective change.

**In 1996 Judge Politan Rejects AT&T’s Sole Defense of Fraudulent Use on its Merits**

18) AT&T’s 1995 Fraudulent use assertion was **premised** on AT&T suspecting it would be deprived of **shortfall** on CCI’s plans. Judge Politan issued an injunction and stated

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**. March 1996 Politan Decision **EXH L.** (page 19 para 1)

19) AT&T’s demand for a security deposits **premised** on the dangers of shortfalls is a **direct attack on the merits of AT&T’s use of the fraudulent use provision**, as it was **premised** on suspecting shortfalls. By 1996 there was **no** controversy or uncertainty that the FCC needed to resolve for the NJFDC regarding fraudulent use. By 1996 Judge Politan clearly understood CCI’s plans were pre June 17th 1994 grandfathered and thus immune from shortfall charges:

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**. March 1996 Politan Decision **EXH L.** (page 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 NJFDC Decision pg. 11 **EXH K**

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 NJFDC Decision **EXH K** pg. 24

20) The June 17th 1994 shortfall exemption is of course **prior** to the Jan 13th 1995 CCI-PSE transfer so AT&T knew its fraudulent use defense was bogus. AT&T ended up asserting to the FCC a fraudulent use defense that Judge Politan had already clearly determined was totally meritless by 1996 and was already the law of the case. In 1996 the NJFDC Judge Politan had issued an injunction which by definition means his Court had no controversy to terminate or uncertainty to remove. The controversy was simply whether traffic could be transferred without the plan. NJFDC March 1996 Judge Politan Decision Page **EXH L** 16 para 1:

While not seeking to invade the F.C.C’s area of expertise, **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.

21) Judge Politan nor the DC Circuit saw where in the tariff language that section 2.1.8 explicitly allows traffic only transfers but DC Circuit decided that it does anyway. [[8]](#footnote-8) Actually section 2.1.8 does indeed differentiate “on its face” that “**any number”** of accounts can be transferred. Anything less than **ALL NUMBERS** means traffic as opposed to the plan can transfer. See section 2.1.8 as show in the FCC 2003 Order at (Exh A in Exh A pg. 6 fn. 46) opening states:

“Transfer or Assignment – WATS, including **any** associated telephone **number(s),** may be transferred or assigned to a new Customer, provided that:

Plaintiffs later learned that the answer to Judge Politan’s “fractionalization” question was there all along. Judge Politan did not see “**any” “number”** can transfer. If 2.1.8 only allowed plan transfers it would not say “any number(s)—it would only mandate “all numbers.”

Evidence obtained after May 1995 Decision led to March 1996 Decision page **EXH L** 14-15

Applying the criteria for preliminary injunctions to the instant case, the Court finds, that the interim relief requested by plaintiffs at this stage of the litigation is not only warranted, but **is mandated by the evidence proffered.** Firstly, the Court finds that the scales of probability are tipped in favor of plaintiff’s vis-à-vis likelihood of success on the merits. **The onus is on defendant** to convince the FCC that its Tariff No. 2 prohibits the type of transfer attempted by plaintiffs. AT&T was the drafter of the tariff language at issue and, as such, **must withstand the effects of any inadequacies or ambiguities therein**, especially since there remains a vital question whether the FCC’s construction of the Tariff FCC No. 2 shall be accorded retroactive application. **Plaintiff’s submissions suggest that a similar request form some other of AT&T’s carriers has been granted by AT&T based upon its own construction of its Tariff language.**

22) March 1996 Decision page EXH L 15 fn6.

AT&T has authorized a fractionalization of the plan and traffic between other aggregators since the inception of the instant litigation. See H. Curtis Meanor’s Letter and Attachments of December 15, 1995; Letter of December 21, 1995; Certification of Robert Collett; and Meanor Letter of January 29, 1196. **AT&T has submitted neither testimonial nor documentary evidence** to satisfactorily refute that representation. See, e.g., Letter of Frederick L. Whitmer, dated February 7, 1996.

Plaintiffs plans were pre June 17th grandfathered so Judge Politan was not concerned about AT&T’s only denied defense of fraudulent use: being deprived of collecting shortfall on CCI’s plans revenue commitment, as AT&T of course conceded that the revenue commitment had to remain with CCI’s non-transferred plans.[[9]](#footnote-9) Termination commitments were not an issue either.[[10]](#footnote-10) Judge Politan was so certain of the issue based upon the new facts presented since the May 1995 decision that his Court issued an injunction. March 1996 Decision pg11

“(T)he grant of injunctive relief is an extraordinary remedy…which should be granted only in limited circumstances.” …..**Only when the plaintiff produces sufficient evidence to convince the Court that all four factors favor preliminary relief should an injunction issue**.” **Exhibit L pg 11**

NJFDC March 1996 Decision **Exhibit L** page 2:

The events and facts giving rise to this **controversy** are set forth in the Opinion and need not be restated herein. However, **further developments** and certain conduct by the parties **subsequent to the Opinion** mandate that the Court now revisit the case

23) The Third Circuit used the **OLD May 1995 Decision Referral** before Tr8179 was withdrawn by AT&T until June 2nd 1995 and prior to Tr9229. It was as if all the evidence collected between the May 1995 Decision and March 1996 Decision never existed as the case reverted back to arguing AT&T’s sole meritless defense of fraudulent use. The FCC’s AT&T tariff expert R.L Smith’s FOIA notes made February 21 1995 to FCC’s 2003 case manager Judith Nitche confirmed the FCC did have a real problem with this as AT&T had never established the merits of it fraudulent use claim. [[11]](#footnote-11) The OLD Controversy of May 1995 by March 1996 was no longer a non-controversy. [**May 1995 Decisions Exh K & March 1996 Exh L]**

Even DC Circuit Judge Ginsburg understood CCI keeps its customer plans revenue commitment but understood the plans were 6.17.94 grandfathered and thus penalty immune and therefore AT&T’s sole defense of **fraudulent use was meritless.** The FCC explained 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**.

24) The FCC’s 2003 Decision did understood there was no fraudulent use intent as it noted the plans were pre June 17th Ordered and the traffic could be returned within 30 days to meet commitments without having to restructure the plans. [[12]](#footnote-12) The FCC went ahead and issued a decision to deny fraudulent use. FCC 2003 Decision **EXH A in A** 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.

So not only did Judge Politan by 1996 determine AT&T’s fraudulent use defense was meritless the FCC denied AT&T’s fraudulent use even **assuming** it had merit.

25) The DC Circuit had the opportunity to address the fraudulent use issue that the FCC decided against AT&T. The D.C. Circuit did not find fault with the FCC’s decision to deny AT&T’s sole defense of Fraudulent Use. DC Circuit Judge Ginsburg recognized during oral argument that the AT&T used an illegal remedy and could not rely upon fraudulent use and this is the Law of the Case. [[13]](#footnote-13) Judge Politan’s March 1996 Decision made it perfectly clear Page 16 para 1:

“the Court finds **nothing** in the Tariff F.C.C. No. 2 which prevents fractionalization.”

26) **“Nothing”** obviously includes denouncing AT&T’s sole defense of 2.2.4 fraudulent use. By 1996 the law of this case was AT&T’s defense of Fraudulent Use was meritless to begin with.

**The FCC 2003 Decision States that the District Court Must Resolve Disputed Fact Regarding the Duration of the June 17th 1994 Grandfathering Exemption**

FCC 2003 Decision pg. 14 fn 94

Finally, we refuse the parties’ request that we declare whether “pre-June 17, 1994 CSTP II plans, **as are involved here**, **may never have shortfall charges** imposed, as long as the plans are restructured prior to each one-year anniversary.” *See* Joint Motion for Expedited Consideration at 2; Opposition at 14-15; Reply at 25. Declaratory relief on this issue – which also was not referred to us by the district court – is inappropriate because whether CCI’s plans were pre- or post-June 17, 1994 plans is a disputed fact. *Compare id*. *with* Opposition at 14 n.13*.* **EXH A in A**

The plans were ordered prior to June 17th 1994. FCC Decision EXH A in EXH A pg. 2 para 2:

“**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.”

27) The dispute is how long could the plans be restructured without shortfall charges. See **here EXH F** as several AT&T managers stated the plans would always be immune**.** However at minimum AT&T’s tariff states the plans would be grandfathered and be restructured for 3 years as that is when the 3 year commitment ends—not one year into the commitment as AT&T asserts. [[14]](#footnote-14) **Here as Exhibit G** the tariff states:

**“A CSTPII expires when the “three-year” term ends.”**

AT&T can’t change its tariff terms and conditions only one year into a three year commitment as it asserts. Therefore the Pre June 17th 1994 plans at minimum could continually be restructured without shortfall through May of 1997 and have a new 3 year commitment through May of 2000. AT&T unlawfully applied the charges in June of 1996. Judge Politan’s March 1996 Decision determined that AT&T’s fraudulent use position was “premised on the danger of shortfalls” was “neither pivotal to the instant injunction nor properly substantiated by AT&T.” March 1996 Politan Decision (page 19 para 1). The FCC Decision states that if need be the NJFDC needs to address the June 17th 1994 issue. It also determines Plaintiffs Jan 1997 Supplemental Complaint concerning the unlawful infliction of charges in June of 1996. The penalties were applied in June 1996 but the tariff in August 1996 was **still exempting** pre June 17th 1994 plans. **EXH E in EXH A.** Also see **here as EXH E** a contract in which the “Upgrade” box was checked instead of the “New” box which means the plans maintain pre June 17th 1994 grandfather status. Also note the word restructure was written on the contract. Restructured plans retain the same terms and conditions and grandfathered status. Also **Here as EXH H** is Section 2.5.7 EXTENSION OF TERM COMMITMENTS and a letter to AT&T which also was invoked and not denied by AT&T to avoid the June 1996 charges—but AT&T violated this tariff provision as well.

**The FCC’s 1995 Order Directed at AT&T’s Pervasive Violations of Section 2.1.8 and the Pre June 17th 1994 Shortfall and Termination Charges Immunity Provision**

28) Plaintiffs filed comments on February 5, 2016 and cited an FCC Order of Oct 23, 1995. The relevant section of the FCC Oct 23, 1995 Order is paras 133-137 and is **EXH C in EXH B.** The FCC 1995 Order explicitly states that it **“transcends the scope of this proceeding”** and covered tariff No. 2. This 1995 FCC Order forces AT&T to commit to grandfather Pre June 17 1994 plans as a condition for obtaining the benefit of being reclassified as a non-dominant carrier.

FCC 1995 Order para 134

“As a general practice, **AT&T grandfathers both existing customers and subscribed customers** (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, **2**, 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and **it commits to continue that process**.”

FCC 1995 Order at 136 & 137 AT&T is ordered by FCC to comply with grandfathering.

“We believe that the commitments proffered by AT&T in its October 5, 1995 Ex Parte Letter contribute to addressing the tariff-related concerns raised by the commenters in this proceeding, and we therefore **order AT&T to comply with these voluntary commitments**.

137. “We also note that some of the tariff-related issues raised by commenting parties **transcends the scope of this proceeding.”**

29) AT&T was ordered to grandfather the pre June 17th 1994 plans on Oct 23, 1995. Judge Politan’s injunction was March of 1996. AT&T ran to the Third Circuit in 1996 and argued “primary jurisdiction.” Obviously the FCC Oct 23, 1995 Order had already determined AT&T’s sole defense of fraudulent use was meritless by NJFDC March 1996 Decision. The FCC Oct 23 1995 Order had in effect handed AT&T its “primary jurisdiction” decision.

**AT&T’s Illegal Billing Remedy—A Fact Based Issue—The NJFDC Must Decide**

30) *Assume* the plans were not pre June 17th 1994 grandfathered as of June 1996 and the Oct 1995 FCC Order was never written. If AT&T had the right to inflict the $80 million in shortfall and termination charges, under Subsection 203(c), it must follow the proper tariff remedy. **Here as Exh I** see AT&T charged plaintiffs end users customers the $80 million so customers that would normally get a $66.02 bill received a bill for $4,428 and AT&T blamed the aggregator. The remedy if the charges were permissible was to only remove the $13.21 discount. Simple fact based issue that needs no FCC tariff interpretation:

“For billing purposes, such penalties **shall reduce any discounts** apportioned to the individual locations under the plan.” **EXH S in EXH A**

31) The FCC 2003 Decision page 13 para 19 explains the consequences of using an illegal remedy.[[15]](#footnote-15) The FCC used this law when denying AT&T’s fraudulent use provision. AT&T “permanently denied” the CCI-PSE transfer instead of the tariffed remedy of only “temporarily suspending service” and therefore the fraudulent use defense was denied. Same concept: when AT&T infuriated plaintiff’s end user customers by inflicted the charges against the end users, instead of the tariffed remedy of only charging the aggregator, AT&T used an illegal remedy. Since AT&T availed itself of an illegal billing remedy, by law it can’t rely upon the charges. This is a simple fact based issue. Plaintiffs February 5, 2016 letter to AT&T on pages 30-32 **here as EXH B,** details the illegal billing issue with tariff exhibits. If the NJFDC simply decides, as Judge Politan did that the plans were pre June 17th 1994 then Court doesn’t need to address the fact based issue of the illegal billing remedy. No tariff interpretation is needed—it’s clear cut.

**FCC Case is Moot as Any AT&T Defense Is Barred Due to 2.1.8 Statute of Limitations**

32) The case is over on statute of limitations to raise any defenses under section 2.1.8. This is a simple fact based issue which does not require tariff interpretation. It decides all issues including Judge Bassler’s question of which obligations transfer and AT&T’s sole defense of fraudulent use that was denied by the FCC. AT&T intentionally misled Judge Politan that the 15 days were not a statute of limitations date. Then clarified its tariff that the 1995 version was a 15 days hard limit to raise any defenses. By 2005 AT&T needed to misrepresent to the DC Circuit it met the 15 days by denying the transfer on Jan 27th 1995 but as usual did not provide evidence. AT&T in 2008 changed its story again and advised the FCC that a different dated letter of Jan 23, 1995 was the CCI-PSE denial—but that letter was a very late Inga to CCI plan transfer denial ---not a CCI-PSE traffic only denial. Plaintiffs February 8th 2016 details AT&T’s misrepresentations. The statute of limitations violation means AT&T should not have ever been able to raise this defense in the first place in 1995. See Plaintiffs detailed 15 days February 8th 2016 comments **here as Exhibit C pgs. 1-10.**

**As AT&T’s Own 2006 Created “ALL OBLIGATIONS” Defense Would Mean Judge Bassler’s Referral is Also Moot**

33) Plaintiffs did many traffic only transfers away from plan previously to the denied Jan 1995 transfer. Under AT&T’s “all obligations” theory that “all obligations” transfer, that would mean there were no obligations left to transfer in Jan 1995. **Here at Exhibit D** are samples of June 14, 1993 and Sept 28, 1994 transfers that would have transferred away all the obligations. Under AT&T’s post 2006 assertion there was no obligations to transfer by the Jan 1995 CCI-PSE transfer. The fact that there were obligations left on the plans means AT&T’s “all obligations” 2006 creation was bogus-----and that is why AT&T has zero evidence. AT&T intentionally misled this Court.

**The FCC States Plaintiff’s Discrimination Claims Must be Handled By the NJFDC**

34) Judge Bassler confirmed the legitimacy of plaintiff’s discrimination claims as AT&T allowed other customers under 2.1.8 to do transfer traffic without the plan.

Judge Bassler’s Court: What the FCC is saying there, there's a question of **unlawful discrimination**. They've already decided the question of interpretation, but the plaintiffs put another issue in front of them. They said to the extent we're supposed to transfer all these obligations under 2.1.8. **AT&T has allowed thousands of other transfers** to go through where **they didn't require that**. That's a form of discrimination under Section 203. (Oral Pg. 20 line 22)

EXHIBITS G thru L in EXH A are other AT&T customers that under 2.1.8 that transferred traffic only and customer plan obligations did not transfer. AT&T allowed others the same exact 2.1.8 traffic only transfers and a future FCC case is moot. The FCC in 2003 states this Court should resolve discrimination:

For example, petitioners claim that AT&T engaged in unlawful **discrimination** in violation of section 202 because its consistent practice was to permit aggregators to transfer locations without plans…….Assuming that further inquiry is appropriate, efficiency favors their **resolution in the district court** where the evidentiary record already has been developed. FCC Decision page 13 FN 87EXH A in EX A

**The FCC Case Is Also Moot Due to Changes in the Terms and Conditions of Tariffs are 15 Days Prospective and Previous Transactions Are Grandfathered**

35) The FCC 2007 Order eliminated 2.1.8 issues but ***even if*** a future FCC Decision was issued on 2.1.8 it would be is moot. AT&T can’t change 2.1.8 retroactively for all AT&T customers as noted by the FCC 2003 Decision. The FCC confirmed future tariff changes are moot. **EXH A in EXH A**

FCC 2003 Decision: Page 11 fn 73:a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, *i.e.*, modifies the tariff, within a certain number of days from the transmittal filing date. *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b).

FCC Page 11 para 14: Whether a Tariff Revision May Have Retroactive Effect: “AT&T does not address the retroactive application of tariff revisions. We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter.”

36) So ***even if*** in the future the FCC were to change the terms and conditions of 2.1.8 and force all AT&T customers to transfer the customer plan obligations on traffic only transfers it would be 15 days prospective and the CCI-PSE transaction is grandfathered. Explicit 1934 Communications Act law mandates prospective tariff changes:

Any other tariff filed pursuant to section 204(a)(3) of the Communications Act, including those that propose a rate increase or **“any change in terms and conditions”, shall be filed on 15 days' notice.**

Thus the CCI-PSE transaction is grandfathered as Judge Politan’s 1996 injunction predicted.

**PSE is Only Responsible for Assuming All Obligations of the “FORMER” Customer**

37) **New evidence** that if Judge Bassler had this he would have understood why the DC Circuit was confused about obligations. This shows AT&T intentionally misled Judge Bassler and this Court. The day after plaintiffs FCC filed the “former customer” tariff analysis at the FCC, Mr. Brown asked how much plaintiff’s wanted in settlement. Under 2.1.8., PSE is **only obligated** to assume “all obligations of the **former** customer.” On a traffic only transfer CCI does **not** become a **former** AT&T customer of its plan as CCI keeps its AT&T plan. As an AT&T customer (not a **former** AT&T customer) CCI must retain and meet its customer plan obligations. 38) Simple---The **former** customer is only a **former** customer on the service (traffic or plan) that it transfers. Since PSE is only obligated to assume all obligations of the “**former** customer;” CCI is not a **former** customer of its plan, CCI must maintain its revenue and time commitments and shortfall and termination liability. Likewise the former customer CCI is **not** a former customer of the end-user accounts that it kept. So the new Customer (PSE) would not be obligated to pay bad debt on accounts that it does not get transferred to it—which of course makes perfect sense. **[[16]](#footnote-16)** **Plan Transfer Difference:** When the Inga Companies transferred its **entire plans** to CCI, the Inga Companies became **former** AT&T customers of its whole plan! Therefore CCI absolutely did have to assume the Inga Companies **plans** revenue and time commitments and shortfall and termination liability.Three months after plaintiffs filed with the FCC the former customer tariff analysis AT&T responded with a pathetic “backwards interpretation.” AT&T actually asserted the **former** AT&T customer, that by definition has **no service**, is defined as the Customer. Obviously the Customer is defined as a former customer on what service ( traffic or plan) that is transferred and the new customer must assume all obligations **on the service transferred**. **See EXH Q in EXH A** English Professor Clara Roth explains the obligations language of 2.1.8.

**AT&T Lost Its Sole Defense of Fraudulent Use so it Created a New “All Obligations” Defense on Judge Bassler and Misquoted 2.1.8 to Deflect Attention from Key Words**

39) AT&T intentionally misquoted section 2.1.8 to cover-up the words “former customer” to distract Judge Bassler from the key adjective “former” which modifies the noun and what PSE must assume. Just a few from dozens of misquotes.

1) “Thus, the second sentence of § 2.1.8B did not limit the sweepingly broad requirement that a **transferee** accept "all obligations" of the **transferor**.”

2) the `new' customer in the transfer, did not assume all the obligations' of the **`old'** customer, CCI," 3) “whether a proposed transfer of virtually all end-user WATS traffic, without a transfer of "all obligations" of the **transferor,** complies with § 2.1.8.” 4) “ARGUMENT I. SECTION 2.1.8 REQUIRES A **TRANSFEREE** TO ACCEPT "ALL OBLIGATIONS" OF THE **TRANSFEROR** COMPANY, INCLUDING ANY OBLIGATION TO PAY SHORTFALL OR TERMINATION CHARGES.” 5) “whether a **transferee's** refusal to accept all of a **transferor's** obligations satisfies § 2.1.8.”

AT&T misquotes #’s 1), 4) and 5) also changed “new customer” to “transferee’s” to **balance it out** with “transferors” to evade detection. Number 3) AT&T doesn’t quote “new customer assumes” it conveniently just picks up sentence from “ALL OBLIGATIONS OF THE **TRANSFEROR** COMPANY” as it changes “former customer” to **transferor company**. AT&T’s counsels intentionally deceived the NJFDC and the FCC. AT&T lost its sole fraudulent use defense under 2.2.4 which asserted CCI must keep its revenue and time commitments to the new defense “all obligations” that asserted without evidence that revenue and time commitments must transfers under 2.1.8.**[[17]](#footnote-17)** Full details of AT&T Counsels “all obligations” hoax on Judge Bassler is at **Exhibit A** page 24 para 57 through page 30 para 75. Of course this is why AT&T had zero evidence to support its “all obligations” theory asserted on this Court. AT&T comically told the FCC that its misquotes of the tariff language was just “paraphrasing.” It was much too difficult to quote “former customer” so AT&T had to say “the transferor.” Yes intentional Cover-Up.

**AT&T Violates 2.1.8 by Completely Shutting it Down—Even if AT&T had a Valid Fraudulent Use Defense There was No Way to Comply by Transferring Less Traffic**

40) AT&T’s Joyce Suek recently advised plaintiffs that AT&T counsel ordered the violation of AT&T’s 2.1.8 tariff to stop quick and easy direct 2.1.8 transfers to prevent discounts of 66% instead of 28%. The DC Circuit correctly determined that 2.1.8 did allow traffic only transfers.

The DC Circuit Decision **EXH O in EXH A** 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 **EXH O in EXH A** 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.

AT&T order processing manager Ms. Joyce Suek’s in June 1995 uses of the term “Partial TSA’s” means “traffic only” transfers under 2.1.8 **T**ransfer **S**ervice **A**greement (TSA).

Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally **we “no longer” process partial TSA’s, the TSA must be for the whole plan.** **EXHIBIT U in EXH A**

41) “No longer” obviously means AT&T was allowing 2.1.8 transfers but stopped. There are two points that need to be addressed due to shutting down 2.1.8: **A)** Even if Judge Bassler’s referral question on which obligations transfer was considered it would be **moot,** because AT&T totally shut down 2.1.8 traffic only transfers, no matter which obligations were being transferred. **B)** The fact that AT&T shut down 2.1.8 for traffic only transfers also attacks AT&T’s sole defense of fraudulent use. Under fraudulent use, section 2.2.4, AT&T claimed it has the right to suspect CCI would not be able to meet its revenue commitment once substantial traffic was transferred to PSE. Since AT&T shut down 2.1.8 to all traffic only transfers there was **no way to transfer less traffic** as AT&T subjectively and self-servingly claimed too much traffic was being transferred. Even if the FCC and DC Circuit had determined that AT&T had the right to rely upon 2.2.4 fraudulent use due to too much traffic being transferred, AT&T would still be in violation as it used an **illegal remedy** as there was no way to comply by transferring less traffic. Given the fact that AT&T used an illegal remedy by stopping all traffic only transfers is additional evidence to prove the Judge Bassler referral on which obligations transfer is a **moot issue** as it didn’t matter which obligations transfer –AT&T was not allowing use of 2.1.8 at all for traffic only transfers.

**Moot Fact Based Issues That Require No FCC Interpretation**

**42) (A)** All AT&T defenses are barred by 15 days statute and limitations within 2.1.8C

**(B)** FCC 2007 Order eliminated all AT&T’s 2.1.8 Defenses. Judge Bassler’s referral moot.

(C) Fraudulent Use: 1) Judge Politan determined by March 1996 that there were no controversies remaining and that included fraudulent use. 2) Fraudulent Use was not overturned by DC Circuit and both FCC and DC Circuit by law of the case are bound to same decision. 3) By AT&T stating in 2006 that “all obligations” transfer it is attacking and thus abandoning the fraudulent use claims. 4) Also fraudulent use defense is also meritless due to 6.17.94 immunity provision and the FCC October 23, 1995 Order. 5) AT&T shut down all traffic only transfers under 2.1.8 no matter which obligations were being transferred and there was no way to comply with fraudulent use by transferring less traffic. 6) Even if AT&T won a fraudulent use defense it would only have forced **plans** to transfer to PSE. AT&T advised Judge Politan it would still **allow 66% discount** if PSE had the plans. 7) The facts show plaintiffs had already met their revenue commitment and the FCC decision noted that contractual arrangements were made by plaintiffs to get the traffic back within 30 days to meet commitments so there was no merit to raise a fraudulent use defense. 8) Previous Traffic Only Transfers: If AT&T’s “all obligations” assertion was correct it is self-defeating as there would not have been any obligations to transfer in Jan 1995 and AT&T can’t claim fraudulent use as there were no obligations left for CCI to default on.

**(D)** Prospective: ***Even if*** the FCC were to rule on 2.1.8 and agreed with AT&T “all obligations” assertion the CCI-PSE transfer would be grandfathered as any change would be 15 days prospective and thus moot case.

**(E)** Discrimination: AT&T allowed other 2.1.8 traffic only transfers and plan commitments didn’t transfer. AT&T’s Ms. Suek in June 1995 stated that it no longer allowed traffic only transfers which obviously means AT&T did allow them in Jan 1995 but didn’t allow plaintiffs. Therefore it is discrimination under the 1934 Communications Act.

**(F)** Tariff Not Explicit: By law if the tariff is not explicit it must be ruled against AT&T.

**(G)** The FCC 2003 Decision directs the NJFDC to resolve the 6.17.94 issue; however this Court should determine the Law of the Case is the plans were found by Judge Politan to be grandfathered and that is why he did not need to refer this issue.

**(H)** The FCC 2003 Decision is directing the District Court to resolve Unreasonable Practices.

**(I)** The Court must address the Illegal Billing Remedy by Applying Charges Against End-Users.

**(J)** DC Decision absolutely didn’t find fault with the FCC’s Decision to deny AT&T’s fraudulent use defense as its confusion was about which obligations transfer. But the FCC 2007 Order correctly determined that was not a controversy in 1995 and thus determined Judge Bassler’s referral was moot. The DC Circuit Legal Director Martha Tomich and FCC OGC Austin Schlick said the DC Decision was **not a remand**. **EXH AA in EXH A.** The DC Circuit Decision decided traffic only can transfer which is the only narrow question Judge Politan wanted to know as his Court’s 1996 Decision explicitly states there are no controversies.

**CONCLUSION**

If AT&T was telling the truth all it would have to do is show this Court a few samples of evidence of its “all obligations” theory—it can’t as no evidence exits. It was all an intentional hoax on Judge Bassler and this Court. The FCC with its 2007 Order shows it knew better. The June 17th 1994 immunity exemption is prior to the Jan 1995 CCI-PSE transfer. The FCC took 7 years (1996-2003) and revived a 1995 fraudulent use defense that Judge Politan by 1996 determined was totally meritless. Furthermore, the FCC Oct 1995 Order determined AT&T already had its primary jurisdiction but AT&T ran to the Third Circuit in 1996. Even if the FCC and DC Circuit had ruled for AT&T on fraudulent use, AT&T still loses as the fact based issue is AT&T used an illegal remedy by totally stopping all traffic only transfers under 2.1.8 so plaintiffs couldn’t comply. The 15 days statute of limitation and prospective tariff filings also make this case moot. Plaintiffs prevail on traffic transfer issue and the 1997 Supplemental Complaint on the June 1996 penalty infliction. Judge Politan did not refer the June 17th 1994 exemption provision because after two days of testimony his Court determined the plans were June 17th 1994 grandfathered. This should be considered the Law of the Case and damages scheduled for both the Jan 1995 CCI-PSE traffic transfer and the June 1996 penalty infliction.

1. Obviously Judge Politan wouldn’t have had before his Court AT&T **simultaneously** asserting (revenue and time commitments) **don’t transfer** (under AT&T’s original 2.2.4 fraudulent use defense) and **must transfer** (under AT&T’s “all obligations” defense created before Judge Bassler in 2006). Additionally AT&T obviously couldn’t have been simultaneously asserting to Judge Politan that PSE was violating 2.1.8 by refusing to assume customer plan obligations when AT&T in 1995 was actually asserting under its 2.2.4 fraudulent use defense that PSE **was not obligated** to assume customer plan obligations as **those obligations are CCI’s.**  [↑](#footnote-ref-1)
2. “Specifically, the Commission was asked to determine ''whether section 2.1.8 [of AT&T's Tariff FCC No.2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring **the plan** itself in the same transaction." Ex Jan 12th 2007 Order **(EXB in EXH A Pg. 2 Para 2)** [↑](#footnote-ref-2)
3. FCC Exh A in Exh A pg. 2 para 2: “**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.” [↑](#footnote-ref-3)
4. District Court: “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**. March 1996 Politan Decision (page 19 para 1) **EXH L**

   [↑](#footnote-ref-4)
5. Substantive Cause Pleading means AT&T pleads that it has the right to retroactively change the tariff as AT&T asserts it is already implicit what the tariff means and AT&T seeks to modify the tariff language retroactively to make it explicit. AT&T’s pleading was in hope the FCC would retroactively apply it to cover the CCI-PSE traffic only transfer. If the FCC believes it is not implicit and it would actually be a change in the terms and conditions the proposed language change goes into effect on a prospective basis. [↑](#footnote-ref-5)
6. Even if Judge Bassler’s referral was within the scope of the case and the FCC were to decide in the future that “all obligations” transfer it would be prospective only and thus this is also why Judge Basslers referral is moot:

   FCC 2003 Decision (Exh A in Exh A Page 11 fn 73): a tariff transmittal is a carrier-initiated document which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, *i.e.*, modifies the tariff, within a certain number of days from the transmittal filing date. *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b).

   FCC Page 11 para 14: Whether a Tariff Revision May Have Retroactive Effect: “AT&T does not address the retroactive application of tariff revisions. We also do not understand AT&T to argue that any revisions to its tariff that became effective after January 1995 govern the resolution of this matter.” [↑](#footnote-ref-6)
7. When traffic only (end-user locations) were transferred without the plan being transferred to the new AT&T customer the calculation to determine the amount of security deposits simply compares the **non-transferred remaining revenue commitment** to the revenue (phone usage) generated from the end-user locations that did not get transferred away. This conclusively evidences that the revenue commitment does not transfer on a traffic only transfer. [↑](#footnote-ref-7)
8. Despite the DC Circuit not understanding that 2.1.8 actually does “on its face” expressly allow traffic only transfers the DC Circuit confirmed the only question Judge Politan had: Does the tariff allowing traffic only transfers:

   DC Circuit Page 7:The Section **on its face** does not differentiate between transfers of entire plans and transfers of traffic

   D.C. 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.

   D.C. Circuit Decision stated on pg.10: First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans. [↑](#footnote-ref-8)
9. FCC Pg.10 para 13. “Because AT&T did not act in accordance with the **“fraudulent use”** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. **AT&T does not rely upon “any other provisions of its tariff” to justify its conduct.”** [↑](#footnote-ref-9)
10. The termination commitment also stayed with CCI but AT&T conceded to the FCC that the termination commitment was not an issue as CCI was not going to terminate its plans.

    FCC 2003 Decision**(Exh A in Exh A page 8 fn 56)** AT&T is conceding termination obligation does not transfer: Opposition at 5. Although AT&T also argues that the move also avoided the payment of tariffed *termination* charges, *id.*, it separately states that termination liability (payment of charges that apply if a term plan is discontinued before the end of the term) is **not at issue here**. Opposition at 3 n.1. That is consistent with the facts of this matter; petitioners never terminated their plans. Accordingly, termination charges are not at issue in this matter.” [↑](#footnote-ref-10)
11. 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”**  [↑](#footnote-ref-11)
12. FCC’s 2003 Decision pg. 2 para 2: “**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.”

    See FCC page 7 fn. 50: CCI and PSE did agree that the traffic could be **returned to CCI upon 30 days written notice from CCI that AT&T required CCI to meet its commitments.**  [↑](#footnote-ref-12)
13. If an appellate court (here D.C. Circuit) has not decided a legal question and the case goes to a lower court (here FCC) for further proceedings**, the legal question, (fraudulent use) not determined by the appellate court (D.C. Circuit ) will not be differently determined on a subsequent appeal (Judge Bassler Referral) in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303. Additionally an appellate court’s determination on a legal issue is binding on both the trial court and FCC **and an appellate court ( DC Circuit) on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607. (So both the FCC and DC Circuit by law must find that AT&T used an illegal remedy on fraudulent use so the case is moot. AT&T’s fraudulent use position is based upon obligations not transferring and thus is the same as plaintiff’s and answers Judge Bassler’s 2006 referral.) [↑](#footnote-ref-13)
14. The term restructure was the industry used term for the tariff language of “discontinued with or without liability.” Whether or not there would be shortfall charges depended upon if the plans were pre June 17th 1994 grandfathered. [↑](#footnote-ref-14)
15. “Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are “specified” in the tariff and makes it unlawful for a carrier to deviate, in the rendition of tariffed services, from the charges, regulations, and practices set out in its filed tariff. We agree that, **when AT&T availed itself of a remedy not “specified” under its tariff, it violated section 203 of the Act.** As discussed in Section C above, pursuant to section 203, a carrier’s tariff controls the rights and obligations of the carrier, which, as a matter of law, is required to abide by the tariffed terms and is precluded from acting outside it.” [↑](#footnote-ref-15)
16. Under AT&T’s incredible “all obligations” theory asserted with zero evidence---the new customer would be responsible for paying bad debt on accounts that weren’t even transferred to it! [↑](#footnote-ref-16)
17. Mr. Brown to Third Circuit 1996 said it was **self-evident** customer plan obligations **don’t transfer** then in 2006 before Judge Bassler that these obligations **must transfer**. [↑](#footnote-ref-17)