June 22, 2017

Commission’s Secretary

Marlene H. Dortch

Office of the Secretary

Federal Communications Commission

445 12th Street, SW

Room TW-A325

Washington, DC 20554

Deena Shetler: deena.shetler@fcc.gov

FCC Contractor: fcc@bcpiweb.com

Re: WC Docket No. 06-210

CCB/CPD 96-20

**MOTION**

**The Commission Needs to add 800 Services, Inc as a party under the Declaratory Ruling Requests released within the Public Notice of 8.11.16, Inc.**

**The Commission should consider Combined Companies Inc. (CCI) as an active party under the 8.11.16 Public Notice Declaratory Rulings as it has under the January 2017 FCC determined moot (outside scope) traffic only transfer Referral from Judge Bassler within the 06-210 Case.**

The June and July 2016 Declaratory Ruling Requests included 800 Services, Inc but did not include CCI; however, the Commission issued the Public Notice just under the 4 Inga Companies: (One Stop Financial, Inc., Winback & Conserve Program, Inc. Group Discounts, Inc. 800 Discounts, Inc.)

800 Services, Inc was left off the Public Notice as a party within the Declaratory Ruling requests. Perhaps the FCC did not have evidence at that point to see that EACH OF THE DECLARATORY RULING REQUESTS ALSO AFFECTED 800 Services, Inc.

CCI was also not named as a party in the submission of the June and July Declaratory Ruling Requests and thus CCI should be considered as a party. CCI’s president Larry Shipp has advised the Inga Companies and advised AT&T that its settlement was fraudulently induced.

The Commission should assess the DR Requests under both the Inga Companies traffic only transfers in January 1995 that it participated in which the Inga Companies transferred the Plan to CCI and the set of facts in which the Inga Companies kept the Plans.

1. CCI to PSE

and

1. Inga Companies to PSE

CCI’s president has notified the Inga Companies that it has notified AT&T that it does not consider its July 1997 settlement with AT&T a final resolution of its claims against AT&T. Here as EXHIBIT A is a letter from CCI’s president Larry Shipp to AT&T which confirms CCI’s position that the settlement was fraudulently induced.

The $80 million in shortfall charges which are expected to be found unlawful when the FCC interprets the Declaratory Ruling Requests under the 8.11.16 Public Notice will prove that AT&T had no right to charge such penalties and thus certainly could not use such penalties to induce settlement.

In accordance with NJFDC Judge Hayden in a case between CCI and the 4 Inga Companies a settlement of either Mr Inga or Mr Shipp will not constitute a settlement of the case for all parties. Any settlement of either party will only be a settlement of just the damages to that particular party was to receive for AT&T causing damages.

AT&T has commented in 2016 that the Inga Companies “Lost that Case” with Judge Hayden. That statement as usual is a totally misleading statement by AT&T. That case was to make sure none of the Inga Companies claims were compromised by CCI’s settlement and it enabled Inga Companies to obtain the non-disclosed settlement agreement to see what value AT&T placed upon CCI’s 20% share of the damages. As per the CCI/Inga agreement Inga received 80% and CCI 20%. NJFDC Judge Hayden ruled that CCI’s position and its settlement did not compromise the Inga Companies continued claims. In reference to this proceeding before the FCC if AT&T believes its settlement with CCI compromised the Inga Companies continued claims AT&T actually lost that case and Inga Companies won it. The NJFDC’s position and the DC Circuit Court’s position is the Inga Companies still have continued claims.

If Mr Inga and Mr Shipp settle Mr Okin will continue to expect the FCC to interpret each Declaratory Ruling Request and when AT&T is found to have violated the tariff and the FCC 1995 Order the damages will be assessed on 800 Services, Inc set of facts under its plans.

The only way the Declaratory Rulings will not be interpreted by the FCC is if AT&T settles with all three parties. The Inga Companies have provided several reasons why AT&T’s settlement with CCI cannot settle the Inga Companies claims. One additional reason is the Inga Companies are obviously litigants against AT&T and under the Communications Act legal fees are statutorily defined; thus, there must be a final resolution to determine if AT&T engaged in a tariff violation.

The following emails will outline the fact that each of the Declaratory Ruling Requests within the 8.11.16 FCC Public Notice also effected 800 Services, Inc.

**From:** Brown, Richard H. [mailto:rbrown@daypitney.com]   
**Sent:** Wednesday, June 21, 2017 7:46 PM  
**To:** 'AT&T FRAUD CASE' <hereismybid@optonline.net>; ray@grimes4law.com  
**Subject:** RE: Richard--Please address your false statement to the FCC in 2016

Received.

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Wednesday, June 21, 2017 7:07 PM  
**To:** Brown, Richard H.; [ray@grimes4law.com](mailto:ray@grimes4law.com); Deena Shetler; Pamela Arluk  
**Subject:** RE: Richard--Please address your false statement to the FCC in 2016

THIS EMAIL HAD 3 Attachments which have been uploaded on FCC Server.

Richard

Thank you for confirming receipt of the emails---but why isn’t AT&T providing the evidence of these traffic only transfers in which the obligations transfer?

Why is AT&T EVEN ASSERTING A 2.1.8 Defense when it withdrew it on June 2, 1995!

AT&T’s July 1, 2016 letter to the FCC misrepresented that 800 Services, Inc provided no evidence that it was a pre-June 17th 1994 plan. You knew that was a false statement because you have in your possession exhibit G which is the Network Services Commitment Form and the NEW box was not checked. We are in the process of obtaining exhibit G from National archives as you are refusing to provide it to counsel Ray Grimes.

However, attached is the UPGRADE offer that AT&T account rep Anna Nicoletti sent 800 Services, Inc that you have in your possession as it is in the case file. 800 Services, Inc did an upgrade and was paid on the difference between its existing contract and the new $3 million commitment. If it was a new plan 800 Services, Inc would have received a new RVPP ID and would have been paid a promotional signing bonus on the entire $3 million.

AT&T has known all along it was an upgrade as 800 Services, Inc was paid as upgrade and kept the same RVPP ID. You simply misrepresented to Judge Politan that 800 Services, Inc had NEW SERVICE as of August 1, 1994 when that was an intentional lie.  It was also an intentional lie when AT&T’s July 1, 2016 letter misrepresented that 800 Services, Inc had no evidence that it was a grandfathered pre-June 17th 1994 plan.

Also attached are documents in the 800 Services, Inc case showing that AT&T charged 800 Services, Inc.’s end-users more than the discount afforded each end-user and thus AT&T engaged in an illegal billing remedy.

The case file also points out that 800 Services, Inc tried with Larry Shipp to transfer end-users via 2.1.8 and AT&T acknowledged receipt of the order but simply refused to process the order as Joyce Suek explained AT&T no longer processes “partial TSA’s: it now has to be for the WHOLE PLAN.

That was after the June 2, 1995 withdrawal of Tr8179 in which AT&T claimed it was implicit that it could force a plan transfer when a substantial traffic only transfer was ordered.

AT&T caught wind of 800 Services, Inc. deleting some accounts and then adding them to PSE via 3.3.1 Q bullet 4 and once that was recognized by AT&T----800 Services, Inc was no longer allowed to delete any accounts off its plan. Same scenario with Inga/CCI the next year in 1996.  AT&T wanted to make sure those end-user locations were still on the plans so AT&T could use the illegal billing remedy to whack the end-users falsely blame 800 Services, Inc as AT&T did with CCI/Inga.

How come there are no AT&T comments in the file where AT&T is accusing PSE of not assuming revenue and time commitments on the attempted traffic only transfer? If revenue and time commitment transfer on a traffic only transfer why didn’t AT&T simply process 800 Services, Inc’s 2.1.8 traffic only transfer? Why did AT&T instead choose to use the Joyce Suek TOTAL SHUT DOWN of 2.1.8 to all traffic only transfers remedy?

When AT&T hit the end-users with these huge UNLAWFUL charges there was chaos for months after. In AT&T’s mind there wasn’t enough of an issue to trigger the October 1995 FCC Order GIVEN THE FACT these end-users bills were due November 4th 1995? When the charges laid on the bills for months and people called AT&T and AT&T blamed 800 Services, Inc and offered that if you come off the plan you will put you back direct to AT&T. No controversial issues going on during the 1 year period covered by the October 1995 Order that would necessitate AT&T going to the FCC to meet the substantive case test?

The company with the $269.70 cents bill with a 20% discount of $53.94 BY LAW IF THE CHARGES WERE LEGIT was only supposed to have the $53.94 removed and you hit this end-user location with a 2221.07 charge.  Do you think that an end-user that normally does $269.70 a month would have a LITTLE issue when they open the bill and AT&T wants over $2221.07 or the company will lose its toll-free service which is their customer service and sales line?

You did not feel there was an issue to trigger October 1995 mandate that MAYBE we should see what the FCC says about what we are doing given the fact that our tariff says we can’t do this and AT&T’s 1990 letter to me says AT&T can’t do this and AT&T counsel Mr Friedman advised the FCC in 2003 that the fact that AT&T does the billing does mean the end-user is an AT&T customer. AT&T can’t bill customers that are NOT its customers. That is why AT&T can only remove the discount as the discount is what is being afforded the reseller. The reason the cap is there is because AT&T in effect is taking the discount away for its customer the reseller.

AT&T’s tariff is EXPLICIT:  “For billing purposes, such penalties **shall reduce any discounts** apportioned to the individual locations under the plan.”

Yet AT&T asserted to the FCC in 2016 that AT&T had the right to charge these fees to the end-users---despite what your own counsel Mr Friedman stated in 2003 and what the tariff explicitly dictates.

Mr David R. McAtee and CEO is orchestrating and supervising an intentional fraud---replete with cover-ups and you are just one of several pawns in his intentional fraud on the FCC and NJFDC.

Did you tell your family that you are involved in an intentional fraud with several other AT&T counsels, including AT&T’s General Counsel McAtee and all the comical cover-ups have been blown? Did you tell them that you are incredibly asserting a defense that you already withdrew and the defense is a fraud in any event with no evidence?

**YOU SHOULD NOT ONLY LOSE YOUR LICENSE YOU SHOULD BE LOCKED UP!!!**

Al Inga President

Group Discounts, Inc

**From:** Brown, Richard H. [mailto:rbrown@daypitney.com]   
**Sent:** Tuesday, June 20, 2017 12:21 PM  
**To:** 'AT&T FRAUD CASE' <hereismybid@optonline.net>; ray@grimes4law.com  
**Subject:** RE: Richard--Please address the misrepresentations to the FCC in this letter

Received this email thread.

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Tuesday, June 20, 2017 9:53 AM  
**To:** 'Brown, Richard H.' <[rbrown@daypitney.com](mailto:rbrown@daypitney.com)>; [ray@grimes4law.com](mailto:ray@grimes4law.com); Phillip Okin ([pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)) <[pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)>; 'phillo@giantpackage.com' <[phillo@giantpackage.com](mailto:phillo@giantpackage.com)>; Deena Shetler <[Deena.Shetler@fcc.gov](mailto:Deena.Shetler@fcc.gov)>  
**Subject:** FW: Richard--Please address the misrepresentations to the FCC in this letter

Richard

I received confirmation of the below email with subject: Richard --Please send the Contract.

Please consider this email from counsel Ray Grimes and confirm receipt of the below emails with the following subject lines:

Richard--Please address the misrepresentations to the FCC in this letter

2016 07 01 Letter to STB Docket No. 06-210

Richard -- Your story does not make sense....

Richard --Please send the Contract.

**From:** Brown, Richard H. [<mailto:rbrown@daypitney.com>]   
**Sent:** Monday, June 19, 2017 5:33 PM  
**To:** 'AT&T FRAUD CASE' <[hereismybid@optonline.net](mailto:hereismybid@optonline.net)>; [ray@grimes4law.com](mailto:ray@grimes4law.com)  
**Subject:** RE: Richard --Please send the Contract.

Received.

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Tuesday, June 20, 2017 8:33 AM  
**To:** Phillip Okin ([pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)) <[pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)>; [ray@grimes4law.com](mailto:ray@grimes4law.com)  
**Cc:** 'Brown, Richard H.' <[rbrown@daypitney.com](mailto:rbrown@daypitney.com)>  
**Subject:** FW: Richard--Please address the misrepresentations to the FCC in this letter

Richard Brown

Please consider this email is from Ray Grimes esq who is representing 800 Services, Inc.

I have explained to 800 Services, Inc.’s president Phil Okin and its Counsel Ray Grimes that AT&T counsels misrepresented to the NJFDC and the FCC that 800 Services, Inc had a post June 17th 1994 plan.

Richard you were copied on the July 1, 2016 letter from AT&T counsels James Bendernagel and Joseph Guerra and it was you who handled the NJFDC case between AT&T and 800 Services, Inc.

When the Declaratory Ruling Requests were filed in June 2016 and July 2016 it included 800, Services, Inc. However, when the FCC Public Notice was released on 8.11.16 to comment on the DR requests 800 Services, Inc was left off as a party based upon AT&T’s misrepresentation that 800 Services, Inc was a post June 17th 1994 plan as of August 1, 1994. Even if 800 Services, Inc gives AT&T counsels the benefit of the doubt that you “did not realize” 800 Services, Inc’s July 22, 1994 order was a restructure, and thus kept its pre-June 17th 1994 terms and conditions it has now been brought to AT&T’s attention.

The FCC’s decision to not include 800 Services, Inc within the 06-210 case on each of the DR requests was based upon critical misrepresentations made by AT&T counsels. Since you were personally involved in the NJFDC case it was you who advised your co-counsel to represent 800 Services, Inc’s July 22, 1994 Order was for NEW SERVICE starting in August 1994.

Like the CCI/Inga plans 800 Services Inc. was:

1. Denied a 2.1.8 transfer as as Joyce Suek explained AT&T shut down all traffic only transfers ( “partial TSA’s” ) after AT&T withdrew its 2.1.8 defense on June 2, 1995 and had not yet put into effect Tr9229.
2. Denied having the accounts deleted from its 28% discount plan and added to PSE’s 66% discount plan. In the CCI/Inga case which the alleged shortfall was in June 1996 as opposed to November 1995 for 800 Services, Inc. AT&T already saw that 800 Services, Inc was able to get a few accounts deleted off its plan and added to PSE but when AT&T FRONT END CENTER in MN saw what was going on AT&T denied 800 Services, Inc any additional deletes off its plan. By the time 1996 came around and CCI and the Inga companies tried to delete the end-user accounts AT&T account manager Nancy Williams told me I was not going to be able to delete the accounts and add them to PSE even considering the fact that I retained full Letter of Agency privileges on those end-user accounts and did not need to get a new signature to ADD to PSE’s plan.
3. End-users were assessed charges more than the tariffed remedy of only removing the allocated discount afforded the aggregator.
4. Failed to meet the FCC October 1995 Orders’ condition of AT&T needing to meet the substantial cause test for any issue under 2.1.8 and Discontinuation without Penalty and its Pre June 17, 1994 exemption.
5. Like the Inga Companies to PSE transfer AT&T did not deny 800 Services, Inc within 15 days as per 2.1.8(c).

Each of the DR requests under the 8.11.16 FCC Public Notice were based upon non-disputed facts that also effected 800 Services, Inc.  The NOTES that I made were sent you yesterday were actually emailed to you over a year ago. I also believe the below notes were part of comments that I have already been submitted in this case.

You were well aware before your July 1, 2016 letter to the FCC that 800 Services, Inc’s plan still retained pre-June 17, 1994 terms and conditions due to the July 22, 1994 restructure.

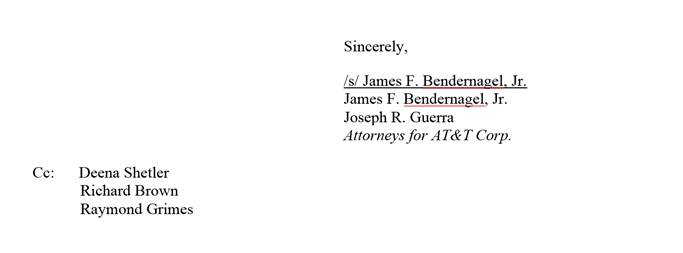
The bottom-line is the July 1, 2016 AT&T submission is based upon a critcal misrepresentation. What would make sense at this point is for AT&T is to correct the injustice to 800 Services, Inc and AT&T advise the FCC that 800 Services, Inc should be added to the 8.11.16 Public Notice within case file 06-210 and the FCC should interpret all DR requests. If AT&T wishes to add additional comments to the 06-210 case file that deal with 800 Services, Inc., AT&T can comment.

If AT&T will not take that action on its own 800 Services, Inc has granted me the ability to submit ethics allegations on its behalf due to the post June 17, 1994 misrepresentations made to the FCC and based upon non-adherence to the FCC October 1995 Order.

We requested that AT&T provide a copy of the July 22, 1994 Network Services Commitment Form and you did not respond that you would do so. Consider the request coming from counsel Ray Grimes.

AT&T has until 5:00pm today to respond to Ray Grimes and copy myself and all statements will be uploaded to the FCC server. If AT&T’s response does not concede that 800 Services, Inc’s July 22, 1994 Order was a proper restructure and retained pre June 17th 1994 terms and conditions and all DR requests under the 8.11.16 Public Notice need to be interpreted for both 800 Services, Inc and the 4 Inga Companies and CCI. CCI’s President Mr Shipp’s position is AT&T fraudulently induced his settlement based upon the charges that will be determined by the FCC should have never been applied in the first place and certainly not using an illegal billing remedy.

These are the 3 AT&T counsels involved in the misrepresentation to the FCC:



Al Inga President

Group Discounts, Inc.

AT&T’s July 1, 2016 Letter referenced is here as EXHIBIT B

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Monday, June 19, 2017 6:51 PM  
**To:** Phillip Okin ([pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)) <[pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)>; [ray@grimes4law.com](mailto:ray@grimes4law.com); 'Lawrence Coven' <[lcoven@optonline.net](mailto:lcoven@optonline.net)>; 'lgsjr@usa.net' <[lgsjr@usa.net](mailto:lgsjr@usa.net)>  
**Subject:** 2016 07 01 Letter to STB Docket No. 06-210

Richard

AT&T’s attached July 1st 2016 letter to the FCC appears to be a bald face lie. 800 Services, Inc submitted in the NJFDC case the AT&T Network Services Commitment Form which clearly indicates it retained pre-June 17th 1994 Terms and conditions. You acknowledged in your 2016 comments that the 800 Services, Inc plan was pre-June 17th 1994 and would have qualified in 1995 if it submitted a form to restructure.

Here is your comment:

**Similarly, while 800 Services asserts that it owned pre June 1994 CSTP plans, it presents no evidence to support that claim.** More significantly, it fails to disclose that it sued AT&T in 1998 for various claims related to its **post-June 1994 CSTP plans,** and that Judge Politan dismissed all of 800 Services’ claims in 2000 and awarded AT&T a judgment of $1.7 million, of which approximately $1.4 million was for unpaid shortfall charges. *See 800 Services,* *Inc. v. AT&T Corp.* No. 98-1539, (D.N.J Aug. 28, 2000)

Judge Politan was simply scammed by AT&T that 800 Services, Inc did not have a pre-June 17th 1994 plan; otherwise he would have ruled as he did in the CCI/Inga Companies case that the plans were immune.  AT&T in this letter also points out that PSE got hit with shortfall charges and it had a pre-June 17th, 1994 plan. You conveniently forgot to mention that PSE forgot to restructure.

Why would 800 Services, Inc need to show evidence that it had a pre-June 17th, 1994 plan when it was AT&T’s position that it was a pre June 17th 1994 plan and 800 Services, Inc was also entitled to restructure in 1995 but your excuse was it did not restructure; otherwise it would have been able to restructure.

Are you actually going to lie to Judge Wigenton and the FCC and tell them that 800 Services, Inc’s July 1994 Contract is NEW PLAN when NEW PLAN is not checked and there were no chargeback of promotional monies and the same RVPP ID was used?

Al Inga President

Group Discounts, Inc.

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Monday, June 19, 2017 5:59 PM  
**To:** Phillip Okin ([pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)) <[pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)>; [ray@grimes4law.com](mailto:ray@grimes4law.com); 'Lawrence Coven' <[lcoven@optonline.net](mailto:lcoven@optonline.net)>; 'lgsjr@usa.net' <[lgsjr@usa.net](mailto:lgsjr@usa.net)>  
**Subject:** RE: Richard -- Your story does not make sense....

Richard

It has been AT&T’s clear position in FCC comments that AT&T’s interpretation of the June 17th 1994 exemption is that the AT&T customer is entitled to only 1 post June 17th 1994 Restructure even if the customer is within the pre June 17th 1994 terms and conditions are for a 3 year period.

In your 2016 FCC Comments you stated that 800 Services, Inc **would have qualified for a restructure in 1995 but failed to restructure**. In your 2016 FCC comments you even referenced my comment that maybe Judge Politan in 1995 hit 800 Services, Inc with charges because 800 Services, Inc did not restructure in 1995 and CCI and Inga did restructure prior to AT&T hitting my plans with charges in June 1996.

Your position that 800 Services, Inc would have qualified to restructure in 1995 if it sent in the form by your own tariff interpretation means AT&T acknowledged 800 Services, Inc **properly restructured in 1994**. Under AT&T’s own tariff interpretation 800 Services, Inc would not have qualified to restructure in 1995 as that would have been a SECOND post June 17th 1994 restructure. You can’t qualify for a second 1995 restructure if the plan is a POST June 17th 1994 plan in 1994 ( August 1st 1994).

This means you were misrepresenting to the NJFDC that 800 Services, Inc’s plan in 1994 was a POST June 17th 1994 plan----otherwise you would not have conceded 800 Services, Inc **would have qualified** for a restructure in 1995.

So, were you misrepresenting the facts to the NJFDC regarding the 1994 restructure? If you were not misrepresenting the facts to the FCC regarding the 1994 restructure then why did you say 800 Services, Inc would have qualified to restructure AGAIN in 1995 but it did not file when you were not allowing the Inga Companies 2 post June 17th 1994 Restructures and the Inga Companies did in fact file the restructure upgrade?

I am also including Mr Larry Shipp here as he said he still considers CCI a party in the case and has a financial interest in the outcome of this case and as you are aware he has already advised corporate AT&T HQ fraudulently induced CCI into settlement based upon the shortfall and termination charges---which now appear to be saying should have never been assessed upon the CCI/Inga plans based upon AT&T’s 2016 FCC Comments that you would have allowed 800 Services, Inc the second restructure but not CCI and the Inga Companies.  That in and of itself is discrimination under 202 of the Act.

Larry Shipp is also included here because he was the person who tried to send 800 Services, Inc’s 2.1.8 transfer of service in and AT&T acknowledged the order but just did not respond. That was during the time when AT&T totally shut down 2.1.8 after it withdrew Tr8179 and had not yet put Tr9229 in place in November 1995.

I will file these comments on the FCC server and give you a couple of days to respond. If we do not hear from AT&T we will advise Judge Wigenton that AT&T has conceded that it made a material misrepresentation to Judge Politan that 800 Services, Inc actually had a pre-June 17th 1994 plan with just a new start date in 1994.  If that is the case then Judge Politan has already determined in the CCI/Inga case that the plans were immune from shortfall and termination charges as being a pre-June 17th 1994 plans for the life of the plan.

Al Inga President

Group Discounts, Inc.

**From:** AT&T FRAUD CASE [<mailto:hereismybid@optonline.net>]   
**Sent:** Monday, June 19, 2017 3:21 PM  
**To:** 'Brown, Richard H.' <[rbrown@daypitney.com](mailto:rbrown@daypitney.com)>; Phillip Okin ([pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)) <[pokin@giantpackaging.com](mailto:pokin@giantpackaging.com)>; [ray@grimes4law.com](mailto:ray@grimes4law.com); 'Lawrence Coven' <[lcoven@optonline.net](mailto:lcoven@optonline.net)>  
**Subject:** RE: Richard --Please send the Contract.

Please send Ray Grimes, Phil Okin and myself a copy of 800 Services, Inc AT&T Network Services Commitment Form of July 22, 1994. We are also having a copy sent from National Archives because we can’t trust that you will not doctor the contract.

Below is AT&T’s statement of facts—which it misled the NJFDC Court that the 800 Services, Inc plan was a post June 17, 1994 plan.

AT&T just noted other aspects of the contract but the critical section where you indicate whether you are ordering a NEW PLAN or an UPGRADE RESTRUCTURE---AT&T of course did not comment on.

The second screenshot are notes I made when I saw the file a few years ago.

If you look at the notes I made the AT&T Network Services Commitment Form was signed July 22, 1994 and per my notes a restructure was ordered not a new plan. Note this was after the Tr8179 June 2, 1995 withdrawal of Tr8179 ( AT&T’s 2.1.8 defense) and before the November 1995 Tr9229 tariff change that mandated the security deposits against potential shortfall. So during this June 2, 1995 through November 10th 1995 time period AT&T shut down 2.1.8 to all traffic only transfers.

AT&T’s Statement of FACTS is indeed a Statement of MIS-FACTS!!! …Notice the first para sets up the crucial dates and misrepresentation of service starting August 1, 1994 to pull off the fraud on Politan….

Was this a mere oversight by AT&T that 800 Services, Inc contract was erroneously considered by AT&T as a POST June 17th, 1994 plan when it was a restructured its plan on July 22nd 1994 and thus maintained the pre June 17th 1994 Terms and Conditions? Your second sentence states the service was subscribed to after August 1, 1994 but it failed to notify Judge Politan that it maintained its pre-June 17th 1994 status.

Even without the form the fact that 800 Services, Inc kept the same RVPP ID **and did not get charged back the promotional monies** confirms the order had to be an upgrade and not a NEW Plan.

Mr Okin also appears to have a FCC October 1995 violation here as that Order was in place and met the criteria prior to AT&T hitting the plan with shortfall charges.

It also appears as 800 Services, Inc also has an illegal remedy on the BILLING more than the discount amount.

It also appears as 800 Services, Inc also has an illegal remedy on AT&T shut down of 2.1.8 to all traffic only transfers.

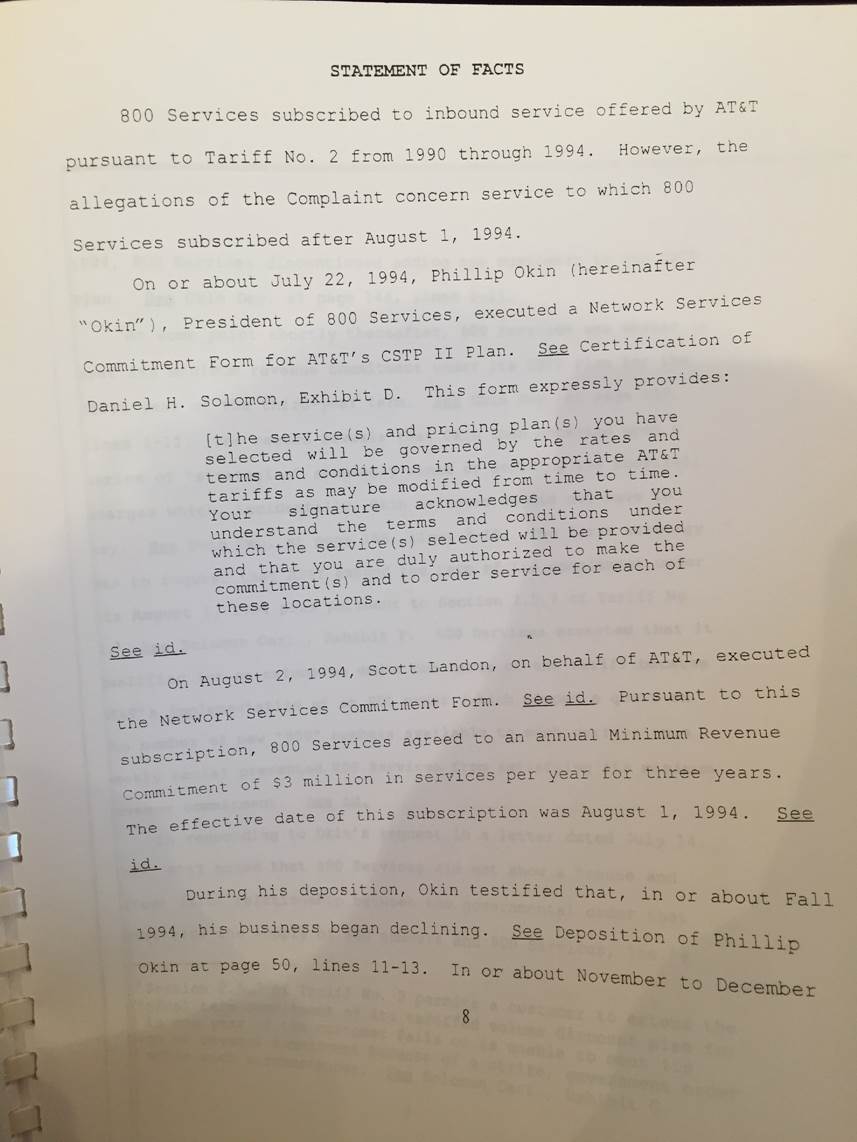
Now the Inga Companies fully understand why AT&T’s Nancy Williams refused to delete the accounts off my plans and move them to PSE. AT&T had already seen 800 Services, Inc. try and delete the accounts off the plan after AT&T refused 800 Services, Inc.’s 2.1.8 traffic transfer that Larry Shipp attempted to PSE. By the time my company tried to delete the accounts AT&T attorneys had already instructed Scott London to not delete the accounts off the plan. The evidence shows that 800 Services, Inc could get a few accounts off and then added to PSE but when AT&T GOT WIND of what 800 Services, Inc was doing it refused to delete any more accounts off 800 Services, Inc’s plan.

AT&T unlawfully put 800 Services, Inc out of business. If AT&T had not misstated the fact that 800 Services, Inc had POST June 17th, 1994 service it would be in the same position as the Inga Companies when it went to restructure in 1995. 800 Services, Inc was well within the 3 year CSTPII/RVPP Commitment and was entitled to restructure again under the pre-June 17th, 1994 TERMS & Conditions.

AT&T either intentionally or unintentionally misled Judge Politan into believing 800 Services, Inc was under post June 17th, 1994 Terms and conditions. I am not buying that you did not see an upgrade was ordered and not new service. The fact that there was no promotional monies chargeback alone and no NEW RVPP ID would have told you that even if you did not see that the “NEW” box was not checked.

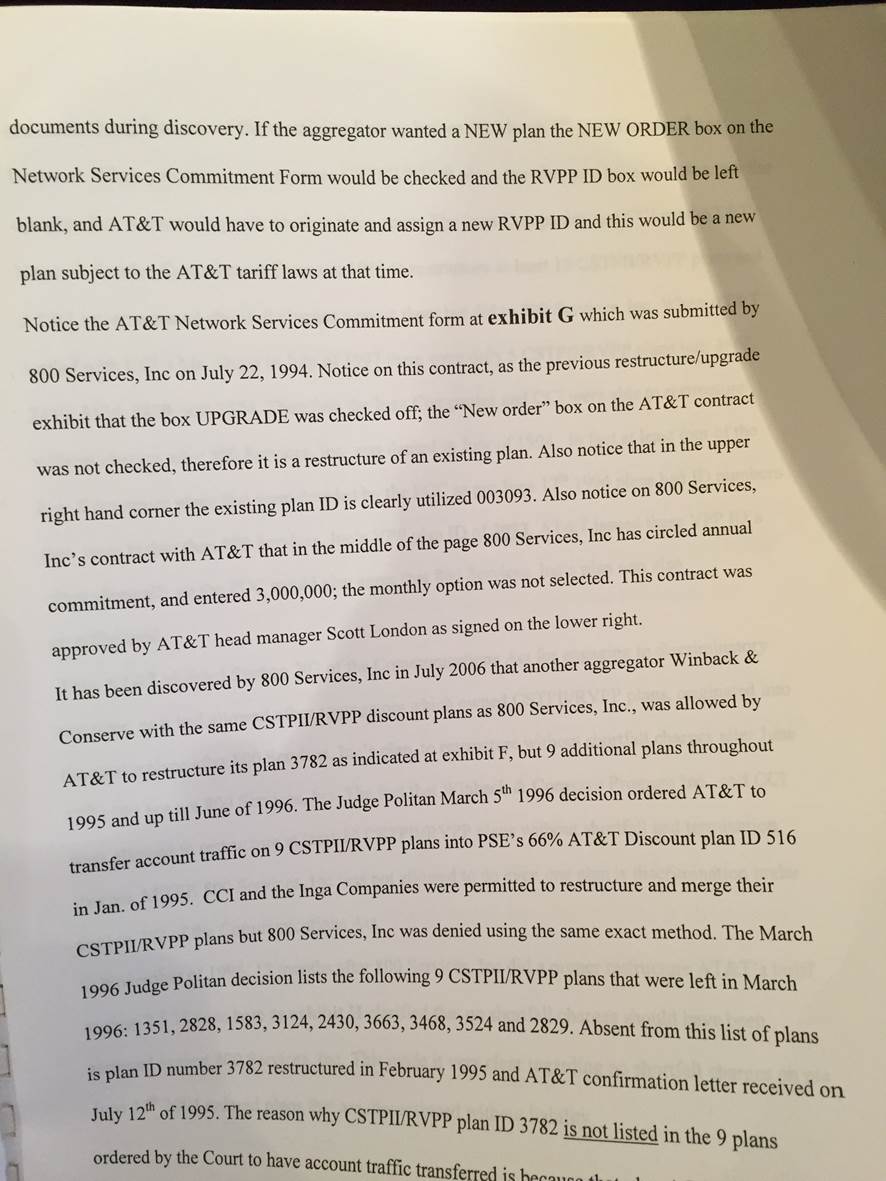
We will have to ask the FCC if 800 Services, Inc can join the Inga case 06-210 DR Requests as it has the same set of DR facts in its case or file a separate DR request. Also the FCC Ethics Staff may be able to move on this 800 Services, Inc case as it is not moot but substantive like the Inga Companies Case.   We will have to inquire.

Please send the Contract.



The following were notes I made on the 800 Services, Inc case.

We are in the process of obtaining the AT&T Network Services, Commitment Form

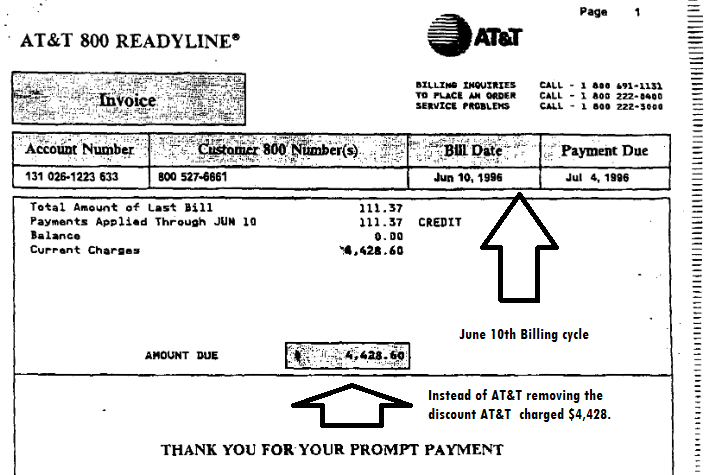


One of the below screenshots shows the change to the Discontinuation Section which satisfies the FCC October 1995 Order in that it presents a change of the terms and conditions and there was an obvious controversy regarding this section.

AT&T issued October 26th 1995. This change in the terms and conditions triggers the FCC October 1995 Order. The FCC Order mandating meeting substantial cause test was Adopted: October 12,1995 Released: October 23, 1995.

The charges were inflcited on 800 Services, Inc plan in November 1995. Billing cycles for AT&T were primary the 10th and 20th of the month for what was referred to as AT&T Ready Line (Switched Access). Dedicated Access T-1 called AT&T Megacom

See Exhibit NN for sample bill from AT&T. AT&T is misrepresenting it was allowed to do it. <https://ecfsapi.fcc.gov/file/6518610628.pdf>



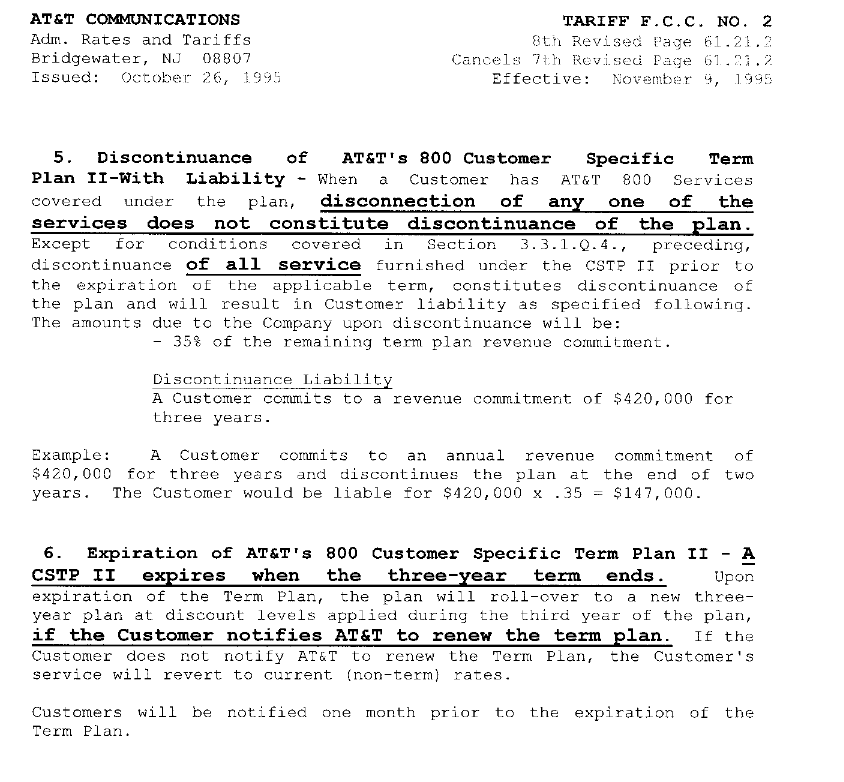
See my initial 2006 brief Exhibit CC

<https://ecfsapi.fcc.gov/file/6518610627.pdf>

Also see exhibit FF for the full tariff change

**Also see GG** which is the Audio tapes that AT&T execujtives had claimed in early 1995 that the June 17th 1994 exemption would contine for the life of the plan.

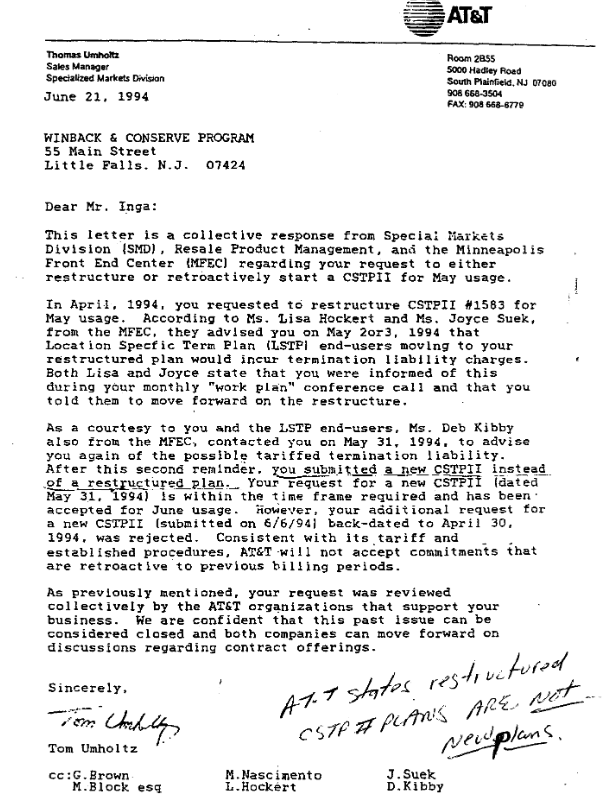
Also see **Exhibit HH** which is the AT&T Revenue at Risk Report and 800 Services, Inc is listed as plan ID 3093. The report date is 7/94 but still can be used to show the plan was pre June 17th 1994. The reason is the RVPP credits is a 2 month lagging credit. So the volume in the report is based upon the May 1994 revenue so the plan was in existence prior to June 17th 1994. AT&T is not questioning whether 800 Services, Inc plan was originally a pre June 17th 1994 plan. AT&T simply changed the interpretation of the terms and conditions that only 1 post pre June 17th 1994 restruture was permissible without pro-rated shortfall charges.



The following is a letter from AT&T stating that a restructured plan is NOT a new plan:

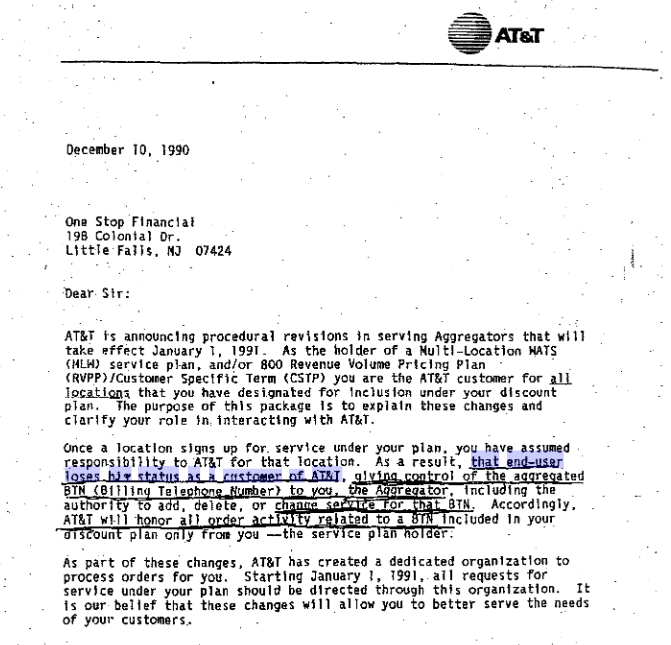
See my initial brief in 2006 Exhibit JJ

<https://ecfsapi.fcc.gov/file/6518610628.pdf>



**See Exhibit : S** <https://ecfsapi.fcc.gov/file/6518610624.pdf>

**Letter from AT&T stating the aggregator is now responsible for billed telephone number and the end-user is no longer an AT&T customer.**



AT&T charged in excess of the discount in the 800 Services, Inc case.

AT&T conceded in 2003 order that the end-user customer is not their customer. If the and user customer is not an AT&T customer then AT&T has no right to charge an end-user that is not its customer.

The reason why AT&T is able to remove the discount off of the end users bill is because they're really not charging the end-user they are in essence removing the discount from the aggregator that is being allocated to the end user.

So simply based upon AT&T concession in 2003 their current counsels are misrepresenting that they can charge end users more than the discount that is being provided ....AT&T simply cannot charge end-user customers that are not its customers.

The FCC 1995 order requires AT&T to know that there is an issue regarding those two sections.

It also requires a change in those two sections. Joseph Fitzpatrick and other AT&T Executives audio tapes show what the terms and conditions of AT&T position was in 1994 and early 1995. AT&T presented no evidence or argument that the June 17th 1994 exemption was over within 1 restructure. There is no such argument by AT&T in the May 1995 decision.

AT&T after it lost and withdrew the TR 8179 SC pleading and AT&T changed the terms and conditions of the duration of the immunity without ever filing anything at the FCC.

The FCC 1995 order requires that AT&T files an SC pleading when it makes a change in the terms and conditions of the two tariff sections cited. Even if AT&T did not file a transmittal change but made the change in the terms and conditions of its own volition without an FCC filing still constitutes a change.

When the October 1995 FCC order came out there was already a controversy existing IN EARLY 1995 regarding the June 17th, 1994 exemption provision duration of immunity. In fact, there were substantial petitions to suspend or reject the pre June 17th 1994 tariff change when it went into effect.

Evidence in Inga case shows Joseph Fitzpatrick had stated on audiotape that the terms and conditions of the pre-June 17th 1994 plans remained immune for the entire life of the plan as long as you kept the same RVPP ID and timely restructured.

AT&T counsels made a change in the terms and conditions of the pre-June 17th 1994 exemption duration without ever going back to the FCC to meet the substantial cause test.

Joseph Fitzpatrick who was the AT&T senior account manager on audio tape stated the plans would remain immune until AT&T counsels changed the terms and conditions without a filing at the FCC. It wasn't only Joseph Fitzpatrick.

The audio tapes which are included in the initial Inga filing back in 2006 also show statements from other AT&T senior managers Thomas Freeburg Lisa Hockert etc in 1995 data plan would remain pre June 17 1994 immune.

AT&T was aware of these controversies in early 1995 and within the May 1995 decision of Judge Politan because under the FCC October 1995 order mandates that AT&T is aware of an issue regarding the discontinuation without penalty section and 2.1.8.

AT&T failed to file a substantial cause pleading to meet the substantial cause test. AT&T also failed to disclose this to 800 Services Inc counsel during discovery. However, whether it was disclosed or not disclosed AT&T still was mandated to go back to the FCC to meet the substantial cause test.

Having failed to meet the FCC October 1995 order AT&T is precluded AT&T from relying upon those shortfall in termination charges.

In retrospect that Detariffing order should have mandated that AT&T send a letter receipt requested to each of the resellers.

**EXHIBIT A**

February 13, 2006



Mr. Edward E. Whitacre, Jr.

Chairman and Chief Executive Officer

AT&T, Inc.

175 E. Houston

San Antonio, TX 78205-2233

# Personal & Confidential

Delivered Via Facsimile and 1st class mail.

**RE: Breech of Contract and Fraud in the Inducement. AT&T needs to replace with real cash the valueless consideration that exceeded $REDACTED provided CCI within the AT&T/CCI July 1st 1997 confidential Release and Settlement Agreement**

Dear Mr. Whitacre:

As a fellow Red Raider (64 – 66), I wish that I was contacting you on a more pleasant subject, especially as I recognize you must be very busy in overseeing the roll-out of the new at&t.

However, I am confident you can address or route this letter to the appropriate party within AT&T such that I might have a prompt response – as it relates to some very complicated ongoing litigation against AT&T, as well as to issues dealing with a certain confidential Release and Settlement Agreement between AT&T and Combined Companies, Inc. (CCI), executed in July 1997.

I have also copied General Counsel, Mr. James D. Ellis, regarding the confidential Release and Settlement Agreement with AT&T, dated July 1st 1997 which you can obtain from AT&T counsel Edward Barrillari in NJ.

By way of background, CCI, is a former aggregator of AT&T tariff services, and was one of the original plaintiffs in a law suit with the four Inga Companies of New Jersey against AT&T filed in 1995. However, even though CCI entered into a settlement with AT&T, the case has continued and AT&T remains a defendant in this 1995 litigation. And it is because that litigation was not settled, that facts have come to light this past January, that indicate **AT&T committed fraud in inducing** CCI to enter into the settlement that it did.

Where do I fit into this? As CCI’s president I signed the agreement on behalf of CCI. My decision to settle CCI’s disputes with AT&T was arrived at under extreme duress. My mother was dying from cancer, and if that wasn’t enough for one son to deal with, AT&T had improperly stopped all payments to CCI due to **AT&T's position that the AT&T discount plans held by CCI were subjected to tariffed shortfall and termination charges**. And though these charges were disputed at the time; CCI was not in the financial (or emotional) position to continue to fight with AT&T

The AT&T/CCI Release and Settlement Agreement required AT&T to pay CCI some cash, which it did. ***However, the majority of the consideration that AT&T provided CCI was that CCI did not have to pay AT&T’s alleged tariff shortfalls and termination charges.***

As well, the AT&T/CCI agreement was to be confidential and contained a non disclosure provision. A provision I took very seriously, and have live by all these years later. However, in January 2006, in researching and preparing a certification that I had been asked to write for The Inga Companies, I discovered that AT&T not only divulged in **public court filings** the existence of the confidential Release and Settlement Agreement but provided material contents of the agreement.

This breech, along with some others that I have become aware of, are clearly evident as I began to reviewed the case file this past January from the FCC and DC Court filings and other communication involving The Inga Companies and their continued claims against AT&T. In another example, I noted that AT&T counsel Richard Brown of Pitney Hardin Kipp & Sczuch sent NJ Federal District Court Judge William Bassler a letter dated January 30, 2004, wherein AT&T openly breeched the AT&T/CCI confidential Release and Settlement Agreement.

While I take the multiple breeches very seriously. There is something else that I discovered that is much more important. So important, in fact, that I believe you should undertake an independent evaluation as to whether the ongoing litigation in New Jersey, as well as the injustice enacted against CCI years ago should continue – or worse escalate.

It’s all there in black and white. CCI was duped. **There should be no doubt that CCI was induced to settle, in reviewing the CCI/AT&T settlement.** Just imagine what CCI was facing. **Huge shortfall charges, with no one at AT&T even seeming to care as they violated their own tariffs almost daily.** In fact, CCI reluctantly began to realize that AT&T had all the cards, and they were the judge and the jury at this time. CCI was left watching helplessly as AT&T did whatever they wanted too, including placing the shortfall charges, in violation of its own tariffs on CCI customer bills initially, before placing them on CCI’s bill. This initial improper action, or as the FCC characterized when addressing other actions by AT&T when the deviated from their own tariffs an” unlawful illegal remedy” by ATT, caused mass hysteria within the CCI customer base. It seemed we were daily trying to explain away this unilateral actions of AT&T to numerous state and federal inquiries including one from the U.S. Postal Service alleging some kind of mail fraud. CCI was literally flooded with complaints and threats of legal action, and quite frankly our desire to fight on was swamped.

I am sure, as a fellow businessman, you can imagine my surprise and anger, as I revisited the events of 1997, and the steps surrounding CCI’s settlement. I couldn’t believe what I was learning, especially as I had put that chapter of my life away. So much so, that aside from some telecommunications consulting with a company who held a marketing agreement with SBC to assist SBC in competing against Birch Communications three years ago, I haven’t even thought about the telecom business in years.

Look, CCI truly believed these charges were inescapable in spite of our protests. My family was scared to death that all we had worked for was about to be lost. **We are talking about enormous charges, and there can be no doubt owing to the magnitude of the charges that they formed the basis for the inducement necessary for us to believe that not paying these charges was considerable compensation provided by AT&T to CCI, because the tariff shortfall and termination charges totaled exceeded $REDACTED**

So imagine now my feelings, as I begin to realize, based on newly discovered information – that CCI’s was buffaloed into accepting “funny money” as consideration for shortfall and termination liability that AT&T improperly enacted or created first against CCI’s customers, and then against CCI. They in effect started a wildfire, and then asked me to settle with them by giving me the a little water to put the fire out – in other words, it is more than likely that AT&T enacted an illegal remedy up CCI, and according to what I now understand as the FCC’s position on such remedies – they would be prevented from relying on it thereafter.

Let me share with you some of those facts that I have only now discovered, that I would respectfully request you should look into.

In January 2006, I found that the FCC on October 17, 2003, ruled that the shortfall and termination charges could not be relied upon by AT&T. The FCC decided that due to the illegal remedy that AT&T used of permanently denying the movement of accounts to a deeper discount plan instead of the proper tariff remedy of temporarily suspending service prevented AT&T from relying on the shortfall and termination charges. This Memorandum Opinion and Order was sent back to the FCC after a judicial review of the FCC decision by the DC Court. However, the DC court, in its opinion by then Circuit Judge Roberts did not find fault with the FCC's position that AT&T engaged in an illegal remedy and can not rely such a remedy as a result.

Additionally I have also just discovered an admission by AT&T’s own counsel Richard Brown that the **shortfall and termination charges, which as mentioned were provided as consideration to CCI**, should never have been inflicted against the CCI discount plans.

Mr. Brown in making his case to the Third Circuit **against another aggregator 800 Services, Inc., inadvertently made a case against AT&T in reference to these shortfall and termination charges as it relates to CCI’s plans.** Mr. Brown acknowledges that CCI's plans would have qualified not to have shortfall and termination charges against them due to having been originated into the marketplace prior to June 17,1994; whereas AT&T claimed that 800 Services Inc.'s AT&T plans were post June 17, 1994 originated and therefore were not immune from such charges.

This AT&T admission also means that the consideration provided by AT&T to CCI of not having to pay for these shortfall and termination charges was totally **valueless consideration!** In now appears then, that AT&T was surely aware that these shortfall and termination charges placed on CCI's customers and then ultimately on CCI’s plans were bogus and therefore not appropriate to the CCI plans, as these plans were all in effect prior to June 17, 1994, date.

**There is much in the record that strongly shows, that AT&T had no basis to enact any remedy to stop the assignment of accounts in January 1995 (which is the subject of the ongoing suit in which CCI was a co-plaintiff), let alone over power CCI with what AT&T surely knew was an unlawful illegal remedy when they initiated the shortfall against its customers and then CCI as well as other “self help” steps, not within their tariffs, such as withholding money that was due and owing CCI**.

Mr. Whitacre, before I reopen litigation on this against AT&T, I wanted to bring this matter to you and your lawyers personal attention in hopes that through a independent fair minded review by you of the facts, a quick resolution can be obtained without the need for further litigation. In looking this matter over, I think you will find that there is more than sufficient information upon which CCI could pursue such an action. As an example, CCI believes the that if the FCC were asked to rule again on this “shortfall issue”, they would almost certainly conclude as they did before, **and just as AT&T counsel admits, that the shortfall and termination liability compensation offered to CCI as part of its agreement to drop its claims against AT&T** is in essence bogus "monopoly money" – as it was all part of an unlawful illegal remedy.

Surely it cannot be in AT&T's best interests to detail in legal proceedings the intricacies of the CCI/AT&T Release and Settlement Agreement, as the Inga Companies, numerous other aggregators and governmental agencies would no doubt be interested in its contents. Therefore, I am hopeful that you or your representative will contact me before February 17, 2006, to correct the injustice that was enacted against CCI years ago, and immediately replace the "value" of its shortfall and termination charges accounted for within AT&T/CCI Release and Settlement Agreement with **real cash**, and thereby keep this matter settled..

.

Regretfully, If I do not hear from you or your representative by February 17, 2006, I will have no choice but to assume you have no interest in addressing **the compensation attributed to shortfall and termination liability that was paid to CCI** . And if that is your decision, AT&T must face the fact that further litigation with CCI, including the unsettled matters in New Jersey with the Inga Companies, that deal with AT&T’s past conduct could produce damages that realistically could exceed $200 Million dollars. The new at&t doesn’t need this headache, and surely you must realize if a fair resolution, this matter will not go away, if not redressed and corrected. In fact, it will only get bigger as the “cat is now out of the bag”.

Thank you for the courtesy of looking into this matter. I look forward to hearing from you.

I can be reached, if by phone, at 303-423-0728 or 303-947-5083; or if by fax at 303-423-0728..

Respectfully submitted,

Larry G Shipp Jr.

President, Combined Companies, Inc.

/lgsjr

cc: Mr. James D. Ellis, AT&T Senior Vice President and General Counsel

**EXHIBIT B**

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
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July 1, 2016

Marlene H. Dortch

Secretary

Federal Communications Commission

445 12th Street, S.W.

Washington, DC 20554

Re: Written *Ex Parte* Presentation in WC Docket No. 06-210

AT&T Corp. (“AT&T”) submits this letter concerning recent submissions in the above-captioned docket by the Inga Companies and 800 Services, Inc. (“800 Services”), a company now represented by the same counsel as the Inga Companies that recently filed a document entitled “Request for Declaratory Rulings & Reliance on Comments in Case 06-210” (the “800 Services Declaratory Rulings Request”)1.

As the Commission is aware, the Inga Companies have repeatedly sought to expand the scope of the primary jurisdiction referral from the New Jersey District Court by raising a series of extraneous matters, including the issue of whether AT&T properly imposed certain shortfall charges in 1996 (the so-called “shortfall infliction” or “penalty infliction” claim). The Commission has repeatedly rebuffed these efforts—ruling in 2007 that it would not expand the proceedings beyond the issues the District Court referred2; never acting on the Inga Companies’ request for reconsideration of that ruling; and terminating a separate declaratory ruling

1 800 Services, Inc., Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, WC Docket No. 06-210 (June 2, 2016).

2 *See* Order Extending Pleading Cycle, *Combined Companies, Inc. v. AT&T Corp.*, WC Docket No. 06-210 (Jan. 12, 2007)(“January 12, 2007 Order”).

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.





Marlene H. Dortch

July 1, 2016

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proceeding that another Inga company (Tips Marketing) filed with respect to the shortfall infliction claim.3

Nevertheless, the Inga Companies and 800 Services now claim that they have managed to re-inject the shortfall infliction claim into this proceeding. [4](#page2) Specifically, in a “joint comment” dated June 20, 2016, the Inga Companies together with 800 Services assert that because the 800 Services “petition” was submitted “within an existing docket” and AT&T failed to submit a response within 10 days, AT&T is limited to “rely[ing] upon the comments within the 06-210 case pertaining to the penalty infliction issue.” *See* Further Support of 800 Services, Inc. Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210, WC Docket No. 06-210, at 2-3 (June 20, 2016). These claims, like so many others raised by the Inga Companies and 800 Services in the past, are procedurally and substantively baseless.

First, AT&T was under no obligation to respond to 800 Service’s baseless Request for Declaratory Rulings within 10 days of the filing of that Request. Indeed, in an email dated June 8, 2016, Mr. Alphonse Inga himself acknowledged, on behalf of the Inga Companies, that “[t]he FCC has to first address 800 Services, Inc.’s Declaratory Ruling Requests and let the parties know the scheduling of 800 Services, Inc declaratory ruling requests.” *See* Exh. A at 2. More importantly, the FCC’s rules expressly provide that, with respect to “a petition for declaratory

1. *See* Order, *In the Matter of Termination of Certain Proceedings as Dormant*, CG Docket No. 14-97,
2. FCC Rcd 11017, 11068 (Sept. 15, 2014).
3. Inexplicably, the Inga Companies have continued to try to inject the shortfall infliction claim in this proceeding even though they have insisted from time to time, in filings before both the Commission and the District Court, that this proceeding is moot.





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ruling,” the bureau or office to which the petition has been submitted or assigned should “docket such a petition” within an existing or current proceeding where appropriate and “*then* should seek comment on the petition via public notice. Unless otherwise specified by the bureau or office, the filing deadline for responsive pleadings to a *docketed petition* for declaratory ruling will be *30 days from the release date of the public notice*, and the default filing deadline for any replies will be 15 days thereafter.” 47 C.F.R. § 1.2(b) (emphases added). [5](#page3) Here, the Commission has given no notice that it has “docketed” the petition 800 Services filed and has not “release[d]” a “public notice” calling for responsive pleadings. Consequently, AT&T was not required to respond to the 800 Service Request within 10 days of its filing and is under no obligation even now to respond.

Second, 800 Services’ Request for Declaratory Rulings and its proposal that the three requested rulings be added to Docket 06-210 are wholly inappropriate given the history of this proceeding. In the September 2006 petition that initiated this proceeding, the Inga Companies sought to expand the proceeding beyond the matters that had been referred to include the so-called “penalty infliction” issue. 800 Services supported this improper expansion effort in

5 The procedural rule that the Inga Companies and 800 Services cite in support of a 10-day response period is inapposite. That rule states that, “[*e*]*xcept as otherwise provided in this chapter*, pleadings in Commission proceedings shall be filed in accordance with the provision of this section,” 47 C.F.R. §1.45 (emphasis added), and that, “[w]here specific provisions contained in part 1 conflict with this section, *those specific provisions are controlling,*” *id.* Note (emphasis added). Here, another provision of part 1(*i.e.*, § 1.2(b)) is more “specific” (it addresses petitions for declaratory rulings, whereas § 1.45 addresses pleadings generally, and does not mention petitions for declaratory rulings), and § 1.2(b)’s 30-day response period (measured from the release of a public notice) does “conflict with,” and thus takes precedence over, § 1.45’s 10-day response rule.





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comments submitted dated December 29, 2006. *See* Request for Extension of Time to File Reply Comments, 800 Services, Inc., WC Docket No. 06-210 (Dec. 29, 2006). The Commission, however, refused to expand the proceeding to encompass the so-called “penalty infliction” issue. *See* January 12, 2007 Order. The Inga Companies sought reconsideration of that ruling, and were again supported by 800 Services. *See* 800 Services, Inc.’s Comments Regarding Petitioners Request for Reconsideration and Clarification of the January 12, 2007 FCC Order , WC Docket No. 06-210 (Feb. 12, 2007) (“800 Services Feb. 12 Comments”). The Commission has never granted that relief. Thus, 800 Services’ latest Request for Declaratory Rulings in the 06-210 docket is simply a naked and impermissible attempt to override the Commission’s prior ruling and obtain the very relief the Commission has declined to grant.6

Third, substantial questions exist as to the bona fides of 800 Services’ June 2016 Request. 800 Services claims that it “recently discovered the Oct 23rd 1995 Order.” 800 Services Declaratory Rulings Request at 2. But over nine years ago, it cited that very order, claiming that AT&T was “under the Oct. 1995 FCC Order not to inflict shortfall charges,” and that “800 Services is just discovering that AT&T was in contempt of that Oct. 1995 Order.” 800 Services Feb. 12 Comments at 2. Similarly, while 800 Services asserts that it owned pre June 1994 CSTP plans, it presents no evidence to support that claim. More significantly, it fails to disclose that it sued AT&T in 1998 for various claims related to its post-June 1994 CSTP plans, and that Judge

6 Nor is there any merit to the claim that the issues raised by 800 Services have been fully briefed. Precisely because AT&T argued (successfully) that the shortfall infliction was outside the scope of the referral, AT&T did not address the merits of that claim. That is presumably why the Inga Companies and 800 Services now seek to foreclose AT&T from addressing the merits of their claims.





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Politan dismissed all of 800 Services’ claims in 2000 and awarded AT&T a judgment of $1.7 million, of which approximately $1.4 million was for unpaid shortfall charges. *See 800 Services,* *Inc. v. AT&T Corp.* No. 98-1539, (D.N.J Aug. 28, 2000) (attached hereto as Exhibit B). Thatdecision was affirmed by the Third Circuit, *see 800 Services, Inc. v. AT&T Corp.*, 202 U.S. App. LEXIS 2389 (December 7, 2001), and AT&T has not collected anything on the judgment. Given that outcome and the passage of time, 800 Services can have no legitimate interest in any of the three declaratory rulings that it now seeks.

Finally, the fact that Judge Politan found that AT&T was entitled to approximately $1.4 million in shortfall liability relating to a CSTP plan completely belies the Inga Companies’ repeated claims that such liability is illusory, and thus did not have to be assumed in writing by a transferee under § 2.1.8 of AT&T Tariff No. 2. Other cases likewise confirm that shortfall liability was not illusory. In 1999, for example, Judge Loretta Preska confirmed a 1998 arbitration award of $26 million which related to shortfall liability incurred in connection with pre-June 1994 CSTP plans. *See AT&T Corp. v. Pub. Serv. Enterprises of PA, Inc. et al.*, No. 98 Civ. 6133, 199 U.S. Dist. LEXIS 13108 (S.D.N.Y. Aug. 24, 1999) (attached hereto as Exhibit C).

In sum, AT&T objects to the institution of any proceeding in response to 800 Services’ Request for Declaratory Rulings and, to the extent such a proceeding is instituted, to combining that proceeding with the longstanding proceeding in Docket 06-210. Indeed, because the





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Commission indicated in November that an order resolving this proceeding is on circulation,7

such actions would simply add further delay. If the Commission nevertheless decides to move

forward with the Requests, it should establish a schedule pursuant to which each of the three

requested rulings would be subject to full briefing.

Sincerely,

/s/ James F. Bendernagel, Jr. James F. Bendernagel, Jr. Joseph R. Guerra

*Attorneys for AT&T Corp.*

Cc: Deena Shetler

Richard Brown

Raymond Grimes

7 *See* FCC, FCC Items on Circulation, https://transition.fcc.gov/fcc-bin/circ\_items.cgi (last visited June30, 2016).



**EXHIBIT A**

**Brown, Richard H.**

**From:** AL <townnews@optonline.net>

**Sent:** Wednesday, June 08, 2016 4:25 PM

**To:** Phillip Okin; 'Phillip Okin'; ray@grimes4law.com; Deena Shetler; Brown, Richard H.

**Cc:** Ajit.Pai@fcc.gov; Amy.Bender@fcc.gov; ButscheT@dor.state.fl.us;

David.Gossett@fcc.gov; Deanne.Erwin@fcc.gov; Deena.Shetler@fcc.gov;

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thomas.wheeler@fcc.gov; Tom.Wheeler@fcc.gov; townnews@optonline.net;

Zachary.Katz@fcc.gov

**Subject:** RE: Deena & AT&T -- Schedule the 800 Services, Inc., Comments...

Deena & AT&T

Your email yesterday to 800 Services, Inc., the Inga Companies and the Florida Department of Revenue states that the FCC will not advise whether or not the FCC will interpret the penalty infliction issues in the Inga Companies-AT&T case.

Mr. Okin’s company 800 Services, Inc. is **not** a petitioner within the Inga Companies-AT&T 06-210 case at the FCC. Whether or not the FCC will address the penalty infliction issues in the Inga-AT&T case does not address 800 Services. Inc.’s request for a declaratory rulings.

800 Services, Inc. has requested declaratory rulings and made a motion to address these penalty infliction issues within the o6-210 case. There is no law which requires that Declaratory Ruling requests must emanate from a primary jurisdiction referral from a Court. 800 Services, Inc. has requested its Declaratory Rulings comment period be established and combined with and rely upon the comments in the 06-210 case. 800 Services, Inc. requests a determination before the Inga-AT&T

06-210 case is interpreted by the FCC, so that 800 Services, Inc. will be added to the case as an additional petitioner---so if the FCC decides to interpret the penalty infliction issues 800 Services, Inc. is a named petitioner.

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If the FCC can’t refuse 800 Services, Inc.’s declaratory Ruling requests on tariff interpretation issues. The three penalty infliction questions are written in a way that addresses tariff interpretation as opposed to fact finding.

The FCC needs to issue a comments period for 800 Services, Inc. and rely upon 10 years of comments on the penalty infliction issues in the Inga-AT&T case.

Due to client confidentiality laws the Florida Department of Revenue can’t comment and can’t request a Declaratory Ruling.

Judge Wigenton has made it abundantly clear that her Court wants all issues resolved. Judge Bassler’s 2006 referral that ended with “all open issues” also seems to mean that his Court wanted all issues resolved. We do understand that the Jan 12th 2007 FCC Order determined that the Judge Bassler question on which obligations transfer under 2.1.8 did not expand the scope of the original 1996 referral on the sole controversy of fraudulent use under 2.2.4. The remaining issues are only the penalty infliction issues.

We can ask Judge Wigenton to either decide: 1) Judge Politan’s non-referred determination that

the plans were forever immune is the law of the case and an FCC determination is not needed or

2) There needs to be a determination of the penalty infliction issues. If there needs to be a determination of the penalty infliction issues the question then becomes is this a tariff interpretation or a fact based issue. The FCC 2003 Order stated the Inga plans were pre June 17th 1994 but also stated there was a disputed fact as whether the plans would forever be immune. Any disputes under the tariff between AT&T and its customers must by law be determined against AT&T. So it seems that the FCC 2003 Order has already provided Judge Wigenton with the guidance her Court needs to resolve the penalty infliction issues.

We think these penalty infliction issues should be addressed by the NJFDC and so we will file next week a motion to address these issues. Whether or not the traffic could transfer without the plan in Jan 1995 has no impact on a determination as to whether or not AT&T 18 months later in June of 1996 could apply penalties on the Inga Companies plans.

The question today is the FCC’s handling of 800 Services, Inc’s declaratory ruling requests and adding 800 Services, Inc. as a petitioner in the 06 -210 case. The FCC has to first address 800 Services, Inc.’s Declaratory Ruling Requests and let the parties know the scheduling of the 800 Services, Inc declaratory ruling requests or the parties will rely upon the comments already filed. AT&T and the Inga Companies can then decide if it is content with the comments it has already provided that address the issues that determine if the penalty infliction was lawful.

Combine the 800 Services, Inc. DR request case and issue the comments schedule. It would be ridiculous to download all the comments from the 06-210 case and upload the same comments under a different FCC case docket ID.

Thank you

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Al Inga

Group Discounts, Inc.

**From:** Deena Shetler [mailto:Deena.Shetler@fcc.gov] **Sent:** Tuesday, June 07, 2016 9:04 AM

**To:** AL <townnews@optonline.net>; Phillip Okin <pokin@giantpackaging.com>; 'Phillip Okin'<phillo@giantpackage.com>; ButscheT@dor.state.fl.us; taxviolations@dor.state.fl.us; laynede@dor.state.fl.us; DORPTO@dor.state.fl.us; PTODirector@dor.state.fl.us; ray@grimes4law.com

**Subject:** RE: 800 Services, Inc. Declaratory Ruling Request

The receipt confirmation you receive when you make filings, like the one you attach below, is the confirmation that filings have been received in the record by the agency. I cannot comment on what decisions the Commission will or will not make.

Deena

**From:** AL [mailto:townnews@optonline.net] **Sent:** Tuesday, June 07, 2016 8:59 AM

**To:** Deena Shetler <Deena.Shetler@fcc.gov>; Phillip Okin <pokin@giantpackaging.com>; 'Phillip Okin'<phillo@giantpackage.com>; ButscheT@dor.state.fl.us; taxviolations@dor.state.fl.us; laynede@dor.state.fl.us; DORPTO@dor.state.fl.us; PTODirector@dor.state.fl.us; ray@grimes4law.com

**Subject:** FW: 800 Services, Inc. Declaratory Ruling Request

Deena

Please confirm receipt.

800 Services, Inc. requested via email last Friday that the FCC issue declaratory rulings on penalty infliction type of tariff interpretations. 800 Services, Inc.’s DR request has also been uploaded into the 06-210 file and seeks to rely upon the comments and evidence supplied by AT&T and the Inga companies on these issues.

My counsel Ray Grimes is contacting AT&T counsel Richard Brown to advise AT&T of 800 Services, Inc.’s FCC Declaratory Ruling requests. AT&T can decide if it wishes to supplement its FCC comments on these penalty infliction issues that have already been briefed. Given the fact that AT&T’s recent briefs to Judge Wigenton that the FCC should resolve all these issues we do not see AT&T opposing the FCC interpreting the penalty infliction issues.

Deena we would like the FCC to advise 800 Services, AT&T and the Inga companies if the FCC will resolve the penalty infliction issues relying upon the 06-210 comments. The Inga Companies have also requested these same declaratory rulings and the FCC has stated that it will not advise AT&T or the Inga Companies whether the FCC will issue a ruling on these issues.

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If there is no acknowledgement by the FCC that it will rule on these issues we will advise Judge

Wigenton and request her Court to issue primary jurisdiction referrals on these issues. Based upon Judge Wigenton’s last decision we believe she wants all issues resolved by the FCC.

Thank you

Al Inga

Group Discounts, Inc.



800 Services, Inc.’s president Phil Okin had a declaratory ruling request filed on Friday seeking the FCC to interpret issues having to do with penalty infliction. These penalty infliction issues were also requested by my companies to be resolved and Deena Shetler advised petitioners that the FCC does not advise the parties what the FCC will interpret.

800 Services, Inc. has requested that its declaratory ruling be combined with my companies 06-210 case due to the fact that AT&T and the Inga companies have made substantial comments regarding AT&T’s interpretation of the June 17th 1994 discontinuation w/o liability provision. We have also made substantial comments on the illegal billing remedy and the Oct 23rd 1995 FCC Order which ordered AT&T to maintain the pre June 17th 1994 terms and conditions.

Given the fact that these penalty infliction issues have been substantially briefed due in large part to the open ended referral from Judge Bassler in 2006 my company does not plan on

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making any additional comments. If AT&T would like to add additional comments that is fine and my company will respond.

Given the fact that my company is the petitioner and this may delay the issuance of an FCC ruling the FCC should decide whether there needs to be one FCC order with all issues resolved or separate FCC Orders. It would make the most sense to combine all FCC Rulings into one FCC order.

The DC Circuit and the FCC Counsel during DC Circuit Oral argument in the traffic only transfer case commented that the issue of whether there would be shortfall on the plans in the first place was never interpreted by the FCC. The June 17th 1994 provision is obviously before the Jan 1995 traffic only transfer. AT&T knew it had no merit to raise its sole defense of fraudulent use under 2.2.4 of its tariff---claiming that merely suspecting being defrauded over shortfall charges, gave it the ability to permanently deny the traffic only transfer. AT&T knew in Jan 1995 that its sole defense of fraudulent use had no merit but asserted it anyway.

Also copied here is Thomas Butscher esq. who is counsel for the Florida Department of Revenue and other Florida Department of Revenue staff. There is still an open case in Florida Department of Revenue regarding AT&T’s position to Judge Bassler and the FCC that AT&T was “compensated in a form other than cash” by Florida company CCI, for the $80 million in charges that AT&T inflicted. AT&T was compensated by CCI’s president Larry Shipp in a form other than cash by agreeing in the CCI-AT&T settlement agreement to AT&T in its continued defense against the Inga Companies claims. AT&T conceded in its FCC comments that AT&T was compensated on the $80 million but never paid Florida taxes on the $80 million. Florida law mandates that whether the carrier was paid in cash or some other form of compensation the carrier must pay the taxes. AT&T claimed that although it failed to pay taxes it doesn’t owe the taxes now due to statute of limitations. Florida counsel response to that AT&T position was to point out the Florida law that willful non-paying of taxes and burying the transaction in the AT&T-CCI settlement agreement is an action that has **no** statute of limitation. The issue Florida Department of Revenue still has yet to get determined by the FCC is whether or not the $80 million should have been applied in the first place.

Besides Mr Okin and Florida and my companies there are several other AT&T aggregators that have provided certifications that my company filed with the FCC within the FCC 06-210 case. None of these companies was aware of the FCC Oct 23rd 1995 Order mandating AT&T continue to grandfather the pre June 17th 1994 plans under the discontinuation w/o liability provision. **By law these companies have 2 years from discovery of evidence to bring a** **complaint so they all have already or will soon notify their District Courts that the FCC is interpreting an issue that was recently discovered.**

The Inga companies are filing a reconsideration with the NJFDC asking the Court to CLAIRIFY IN LAYMANS TERMS THE FCC JAN 12th 2007 ORDER. As the FCC has seen

Judge Wigenton incredibly did not even mention this FCC Order in her Court’s recent Decision.

Her Court’s position was that Judge Bassler’s referral was to be interpreted and the FCC

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obviously was stating it “did not expand the scope” of the original 1996 Third Circuit Referral—thus the Judge Bassler issue on which obligations transfer on a 2.1.8 traffic only transfer is moot. We will ask Judge Wigenton to send an order to simply make explicit the Jan 12th 2007 FCC Order. This way Judge Wigenton will understand why the FCC has not ruled on Judge Bassler’s obligation allocation referral for 10 years. The FCC needs to simply clarify that the reason why there was no FCC decision was not Judge Wigenton’s apparent belief that the FCC staff is simply lazy and requires a DC Circuit mandamus and just hasn’t gotten around to it in 10 years ---but the FCC actually **tried to advise the District Court that Judge Bassler’s** **obligation question was moot--**but the FCC Jan 12th2007 Order written by Deena Shetler wasnot understood.

Petitioners have also filed a motion for an FCC bureau level reissuance of the Jan 12th 2007 FCC Order---this time in explicit English.

Petitioners will file next week a motion with the NJFDC requesting that Judge Wigenton issue an order to make the FCC Jan 12th 2007 Order explicit. For Judge Wigenton to not even comment on that FCC Order clearly demonstrates that her Court was also confused by

it. Petitioners spent years commenting on which obligations transfer under 2.1.8 until the FCC 2007 Order was understood that the obligations allocation question of Judge Bassler was not going to be interpreted by the FCC as it was outside the scope of the 1996 referral.

The FCC’s 2007 Order was basically advising AT&T that its new 2.1.8 defense created in Judge Bassler’s Court in 2006 could not be its justification why it denied the traffic only transfer in 1995—common sense!

Thank you for your valuable time!

Al Inga

Group Discount, Inc.

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**EXHIBIT B**

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UNTTED STATES DIS'TRICTCOURT

DISÏßICT OF NEW JERSEY

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DÀCKGROUND

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the duties owed by common carriers are reguLated through

tariffs. Pursuant to S 203, a common carrier such as AT&T, j.s

reguired to file "schedules" with the FCC, commonly refer::ecl l-o

as "tariffsr" "showing all. charges" for its se¡:vjces and "the

classifÍcations, practices, and regulations affecting such

charges." 47 U.S.C. S 203 (a) (West 20OO) . See also MCJ-

Tel.ecommunj cations Corp. v. Graphnet, Inc.\_, B8l F. . Supp. 126, )3?-

(D. N. J. 1.995) . Once the. La:r j.f f.s have been f j led and permj tted by

the FCC to become effective, the common carrier is precJucled by

statute from devj.ating from the terms of its filed tariffs.

Accordjng to the statute: " [no] carrier shal.l . extend to any

person any privileges or facilities in such conununicatSon, or

cmpJoy or enforce any classifications, reguJ.aLj.ons, o¡î practjces affecti¡¡g such charges, except as specified j.n such schedule."

41 U.S.C. S 203(c) (l{est 2000). Thus, pursuant to t.he "filcd

ratc doctrine,/fil.ed tariff doctrine," the filed rates arc bind5ng

on boLh l-he carrier and the public. .gîe Març.çr\_S\_rlppiJ\_ç9.\_.v-

U.{T, B?5 F.2d 434, 436 (4th cj.r. 1989) (cjtatio¡rs omjtted). -.1e\_eì also See Fax Telecommunicaciones, lncr\_]r.\_ð]'&:tj, 138 I'.3ct4'l9,4BB

(2d Cj.r. 1998); MLf fel.econununicatic.;rs Corp=\_v. G¡:aphnet, Inc=,

BBL F. Supp. 126, 1,32 (D.N.J'.1995) . Despire the fact thar

stricL adherence to the filed rate/filed tariff doct¡i.ne oftentjmes produces harsh resuJ-ts, it is the operatjve cloctrj.ne

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to be applj.ed by the courts. see Fax Tel.ecommuni.caciones, lnc-

(2d Cir. 1998).

In 1991-, the FCC adopted ruÌes and regulations authoriz.ing

carriers to establish "contract tariffs" with their cusLomers.

Seq Fax Tel.ecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 4B?. (2d

Cir. 1998) (citing In the Matter of Compel-itjon j.n the Intqrs-t:at-e

.Tnterexchange Marketplace, 6 F. C. C. R. 5880 (199L ) .(here j.nafter

"J@EgEg. .fnterexcbange MarketÞIace" ) ; on recor¡sideration'6

F.C.C.R. ?569 (1991); on further reconsideration, ? t'.C.C.R.2617

(7992), on further reconsideration, 10 F.C.C.R. 4562 (1995)). À

contract tariff contains indÍvidually negotiated and tail.ored

services arrangements ::eached between a coÍlmon carrjer and its

customer. åe-g Tel\_,ecom International- America, I,t:cl. v. AT&T .Èltp-.\_,

67 E. Supp.2d 189, 196 n.4 (S.D.N.Y. 1999); Na:Þip-neL

CommunicatÍons Associatj-on. Inc. v. Arnerican l'el-ephone-¡-

lþl-egrapì--Cg, No. 92 Civ. 1735, 1998 VIL 118174 \*27 n.37

(S.D.N.Y. March 16, 1998). The rules and regulations surrounding contract tariffs were designed to "increase flexibility fo::

customers and promote competition among carriets." Eg¿

1'el\_eçemmuni-çe-qjgfr€-9, 138 F.3d at 482.

In Fax Telecommunicaciones, the United States Court of

Appeals for the Second Circuit expJ-ained the process whereby

contract tariffs become effective. Flrst, " Ia]t least one

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cusLomer must enter into a contract rritt¡ the carr.ier pursuant to the new tariff in order for the èarrier to fiLe the contract tariff." Id. (citing 47 C.F.R. S 61.3(m)). Furthermore, rhe

contract tariff musl- be fil-ed at least fourteen days prior to the effective date of the contract and must include "the terms of Lhe contract, a description of the services to be provided, Lhe price fo:: Lhese services, the minimum volume commitments for each serv.j.ce, any volume discounts, as weLL as other classjficatj.ons, pr:actices, and regulati.ons affecting the contract rate thereby complyJng with the fil-ing requírements of 47 U.S.C. S2O3(a)." lÈ.

(citing .T-Dlelstate-I¡ter.ç:xchanqe Marketplace at EE91 , J.27, 1221 .

Upon expjration of the fourteen days, the contract tarj.ff js effective so long as neither the FCC nor any'memberof the pub)i.c

objecrs. & (ciring 4? c.F.R. ss 61.58 (c) (6), 6I.42 (c) (B) ) .

l'inally, in order not to violate the Act's prohibitj.on agai-trst djsc¡:jmjnatj.on, the carrier must then rnake the contracL Larif f gerreraì.Ìy avajlabl-e to other sj-milar]y situated customcrs. ,1Q!:.

id.. (citj.ng 'lnLe-r-gtate Inl-erexchanqe Markelpl agie.. aL 919191 , 7?'9).

fn Lhis matter, pursuant to Tariff No. 2, ÀT&T offerecl

" j r¡bound" or \ 800il I ong-distarìce telecommunj caLj ons servj ces and

certain discOunt pl.ans for such serçiCes, i.ncludj.ng "Customer

Specific Term Plan 11" (hereinafter "CSTP II1'). ÀT61' s CSI'Pll Plan, as set forth jn Tariff No. 2, provi.ded for discounted rales and associated pronotionaL discounts and credits jn relurn for a

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commitment by the customer t,o satisfy an annual Minimum Revenue

commitment for the term of the "üu".ription. see certi.fication of Daniel H. Solomon, Exhibit C. A customer subscribes to AT&T,s

csrP rr Pl-an by executing a Network servj.ces commitment Form.

Under the tariff, AT&T bill-s the aggregator'sindividual. J.ocations for their portion of the usage under the pì.an

However, lariff No. 2 provides that AT&T's customer of record

(the aggregator in this case) assumes alf fj.nancial

:'esponsi.bS-Jityfor all- of the designated accounts aggregated

under the cust.omer'sCSTP II PIan and that, in the evenL any of these accounts is j.n default of payment'ÀT&T wiLl reduce the plan discount payable to the AT&T customer j.n the amount of t.Ìrat default. See j.d., Tariff No. 2, 53.3.1.Q.

Tariff No. 2 further provides that the customer will j.ncur "shortfall" charges in the event that it does ¡:ot satjsfy its

Mjnjmum lìevenue Commitment and "termination" cha::ges 5f jt

djsconLir)ues service before the complet.ion of the tcr¡n. -$-æ Içt.,-Tariff No. 2 also provides that, in the event any shortfall or

termjnatjon charges are íncurred under a CSTP Il Plan, such

charges shal.l be apportioned among the account-s aggregaLed ul:dcr

Lhe pJ.an according to usage and bil}ed to the j ndj.vj dual

aggregated locations designated by Lhe customer. See id.-

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STÀIIEMENI OF E:ACTS

800 services subscribed to in¡ouna service offered by At,cT pursuant to Tariff No. 2 from 1990 through 1994. However, the arlegations of the complaint concern service to which g00

Services subscribed after August 1, l-g9[.

On or about Ju:--y 22, 1994, PhilJ.ip Okin (herejnafLer "Okin") ¡ Presjdent of 800 Services, executed a Netrrrork Se¡:vjces

Commi'tmentForm fo:: AT&T'sCSTP II Plan. gee Certjficatj.on of

Danie1 H. Solomon, Exhibit D. TIiis form expressly provldes:

ltlhe service(s) and pricing plan(s) you have selected will be governed by the rates and terms and conditions in the appropriate AT&T tariffs as may be modified from time to time.

Your signature acknowledges that you

understand the terms and conclitÍons under

which the service (s) selected will. be provided and that you are duly authorized to make the

commitment(s) and to order service for each of these locations.

åec: i d.

On August 2, 1994, Scott Landon, on behalf of ÀT&T, execut\_ccl

the Network services commitment Form. see .id. Pursuanl t.o t.his subscrjptjon, 800 Services agreed to an annual Mj.nimum lìevenue

commitment of $3 million in services per year for Lh:-ee years.

1'heef f ect j.ve clate of this subscription was August 1 , 1994. gg\_e id.

During his deposjtion, okin testified that, in or abouL l'all

1994, his business began decrÍn5.ng. see trepositÍon of t,hiJJ.j.p okjn at page 50, rines 11-L3. rn or about November to Decemh¡e:r

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1994, 800 Services discontinued adding nev, custon¡ers to its CSTI,

Plan. See okin Dep. ar page 144; finàs 5-L1-

At some point shortly thereafter, 800 Services was unabLe to

meet its mini.mum revenue conmitment under its CSTP PIan for the

first year of the third-year term. see okin Dep. at page 139,

lines l-11. The record reveals that Okin then enrbarked upon a series of "Stral-egies" seemingly aimed at avoiding the shortfall charges which, incidentally, Okin belÍeved he did not have to pay. see okin Dep. .at page. 166, lines 3-10. The first strategy was to reguest that AT&T extend the term of itã comntitment u¡:der its August 1, 1994 plan pursuant to Section 2.5.7 of Tariff No. 2.3 See Solomon Cert., Uxhibit P. 800 Services assertecl that iL guali.fied for an extensio¡¡ under the terms of the tariff because

AT'&1"s inplementati.on of an FCC order (which pJ-aced a guoLa ot't thc number of new " 800" numbers available to each carrie:: on a weekJ.y basis) prevented 800 Services from satisfying jts minjmum

revenue commi.t¡nent . See i d.

ln responding to okin's reguest in a l etter dated July J 4,

1995, A1'6rTnoted that'800 Services did not show a "cause a¡'¡d

af f ect IsjcJ ::elatj.onship between the governntental o¡:cler t.hat constrajns the supply of g00 numbers and 800 Services, )nc.'s

3Sectj.on 2.5.7 of Tarj.ff No. 2 permits a customer to extend the

or:iginal term commitment of Íts tariffed vol,ume discount plan for: up Lo one year if the customer faj Is or is unabfe to meet its

¡sage or revenue commitment because of a strike, government order

o¡: other such circumstances. See Solomon Cert., ExhibiL C-

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failure to meet its ta::iff commitments." See Solomon Cert., Exhibit G. AT&T then requestea É¡OO Servjces to demonstrate that jt already has activated or had fj.rm end-user customer orders to activate all of its cuffently reserved numbers and that it had firm orders for 800 services from end-use¡: customers unde¡: its CSTP TI Plan that could not be satisfied due to the

unavailabiJ-i.ty of new numbers. See id. 800 Services submitt'ed no proof to AT6'Tthat it already had actÍvated all of jts cutrently reserved numbers and had firm orders for additional

service that could not be met due to the i.mplementation of the

FCC quota. $ee Okin Dep. at 93, ì-ine 25; page 94, lines 1-10. l.n fact, Okin testified that no 800 Services order went unfulfitled because of t,he FCC \*800 number" quota. See Okin [rep.

at page 93, lines 7'l-24.

In or about July 21, L995, 800 Servjces then attempted to

'.¡:estructure" its CSTP II Plan. By leLter datc'clJuly 25, I995' ÀTeT responded to 800 Services'sreguest to ::estructl¡rc jts CSI'P

II Plan and outl.ined the terms and condj.tions specifiecì under

Tarjff No. 2 that srere applicabJe to this regt¡esL. Sce Solomon

Cert., Exhjbit I. Speci.ficaJly, ATçT advj.sed 800 Servjces that

under the tariff, if 800 Services restructured its exj.sLing CSI'I'

II Plan, 800 Services wouLd remaj.n 1Íable under the tarj.ff for

any shortf aII charges accrued j.n the f j rst year of J.ts plan and, jn the event that 800 Se::vices faj.led to satisfy jts Minimu¡n

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Annual commitment for the first year of the existi\_ng plan, it would also be reguired to repay tnu pro\*otionar credits paict to

800 services under the plan. see id. AT&T advised 800 servjces

to notify it if 800 Services wished to proceed with this requesL.

See j.d. 800 Services never attempted to proceed with this

reguest. .see okin Dep. at page 94, Iines ?-10. In fact, Okj.n testified that 800 services did not qualify for a restl:ucLur5.ng of its plan under the terms of the governing tariff' See Okjn

Dep. at page 1.34, l.ines ?-11.

g00 services next contemplated moving cerlain business

traffic from its Tariff No. 2 service to cT 516. Notwithstarrdi'nçt

800 Servi.ces'sallegations in its Comp]aínt, 800 Services has admítted in discovery that it did not qualify to subscribe di¡:ectly to CT 516 and that 800 Services never actua)'Iysubmitted an order to ÀT&T for servj.ce to Cl'516 or under any oLher

contract tariff or to transfer service from Tariff No. 2 tc> cT 516. þ Okin DeP. at Pages 101-105

Final-ly, in or around JuJ.y 28, 1995, 800 Services sub¡nitted orders to ATc.T to delete all its end-user locations from its CSI'P lI Plan. see okin Dep. at page 104. ÀL the tj.me that 800

Se::vices asked to delete all. j.ts customers from its pì-an'800

Se::vj.ces had no arrangements to transition those cu.stomers to any

other 800 Services'splan or to any other telecommunj.catjon-s

serv.ice for inbound 800 service. see okin Dep., at page 157,

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Iines 74-22; page 158, Iines 22-25; page 159, line 1.

On or about ApriJ- l, 1996, ATcT renderea a bill to g00 services in the amount of $382,651.05 arlegedry due and owing for usage charges for inbound telecommunications services provided to

800 Services by AT&T pursuant to Tariff No. Z. Þ Cerlificatjon of Naris Sotillo-Sayers, $6. In or about May 1 , !996, AT6T rendered a bilL to 800 Services in the amount of 91,399,998.68

refl.ecting the amount alleged1y due and owing for shortfall and terminatjon charges because of 800 Services'salleged failure to

ful-fitL the Minímum Revenue Commitment under jts CSTP II p]an.

See id., S1?. AT6.T contends that 800 Services never paid any money to A16rT in satisfaction of the aforementj.oned biLl-s and

that said amounts remain due and owing

on April 6t 1998, 800 Services filed a complaint in Lhe

unj.ted states DisLrict court for the District of New Jersey conta j.ning twelve counts.

on June 30, 1.998, AT&1'filed an Answer and counterclaint.

DISCUSSION

' I. Standard of Review

The standard governing a sunmal'yjudgment motion is set forth in Lred. R. Civ. P. 56 (c) , whi ch provides, in pertinent

part, that:

tt]hejudgmentsoughtsha].lberenderedforthwithif the ptãaAingsl depositions, ansr,rers to interrogatories, and

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| admissions on file, together with | | the affidavits, if |  |  |
| -q;nuin" | | any, |  |
| show thar there is no | iôruï J"- to uny ¡naterial | | |  |
| fact and that the noviíg party is | | u'titfed to a judgment | |  |
| as a matter of law |  |  |  |  |
| FED. R. crv. p- 56(c) (r{est 2oo0). | n tact is materiar if | | it might |  |

affect the outcome of the suit under the governing substantive f aw. g9 Ande::son v. Líbertv Lobbv, Inc. , 4?? U. S. Z4?., 2S5

(1986).

Proceduralì-y, the movant has the initial h¡urden of

j-dentifying evidence that it bel-ieves shows an absence of gcnuinc:

issues of material fact. See Celotex Corp. v. Catfe-tt, 477 U.S. 3L?, 324 (1986). Ilùhen the movant wilL bear the burden of proof at trial, the movant'sburden can be discharg,.,O O, showjng that

there is an absence of evidence to sppport the non-movant'scase. see j-ç!, at 325. If tt¡e movant establishes the absence of a genuine issue of material fact, the burden shifts to the non-

movant to do more than "simply show that there is some

metaphysÍcal doubt as to material f acts. " Maf-sushi-!-a-E-l-re.-

Tndrrq Co- v- 7.eni th Redi o corÞ., 475 U.S. 5'14,586 (1986)

In this matter, there are no genuj.t:e jssues of ma1.er:ial f ac:t.

and therefore, sunmary judgment is approprjate.

II. Co¡rmunications Act

Counts Eleven and Twelve of 800 Services'sComp.laint

purport to allege claj.ms arising under SS 201 , 202, and ?-03 o{-

the Communications Act.

The limitations period governing such claims is found j.n

Section 415 (b) of the Act hrhich provides, in pertinent part:

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"[aJ1] compJ-aints against carriers for the recovery of damages

not based on overcharges sharl É riråa with the commission within tvro years from the ti¡ne the cause of action accrues, and

not after, subject to subsection (d)a of this section." 41

U.S.C. 5415(b) (Vfest 2000). This section applies equal)y Lo complaints brought in a court of Ìaw in additj.on to those cl aims filed with the FCC. See Pavlak v. Cnurct¡, 721 F.2d 7425, 14?'6'?'1

(grh cir. L984); Sard v. Northern ohio TeÌ. co., 381 F.2d 16 (6'u

Cir. 196?)

800 Servj.ces filed the subject Complaint on April 6, 1998 essentially alleging that AT6IT engaged in various viol'ationsof

the common law and the communications Act during a period of tj.me beginnÍng in September 1990 and ending no Jater than July 1995'

The servj.ce upon which plaÍnti.ff bases its Complaint commerìced o¡: August 2, 7.gg4, see Complaint, 9[6, and the latest a]]eged misdeed

a sect-jon 415 (d) , which Provides:

If on or before expiration of the period of limitation in subsection (b) or (c) of this section a carrier begins action under

subsection (a) of this section for recovery of lawful charges ín respect of the same service, or, without beginning action, col'lectscharges

in respect of that service, said perÍod of limitation shall be extended to incl'udeninety days f rom the time such actiorr j-s begun or such charges are coll-ected by the carrier.

4-t U.S.C. S415(d) (West 2000).

lncidentalty, there is no dispute that, based on the facts of this case, this provision does not apply.

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by ÀT&T occurred no 1ater than July 1995 when 800. Services reguested that its accounts be aèreteà, g conplaint, Í16, and claims that it later reguested transfer to CT 516, g\* Complaint,

1,21. Based on plaintiff 'sallegationsr the most recent vj.oLatjon occurred no l-ater than July 1995'which is more than two yeat:s

prior to the filing of the Complaint.

In response, 800 Services contends that iLs cl.aims brougirL pursuant to the Communications Act are not time-barred by the applicabJ.e two-year statute of 1í¡nitatj.on-s by virtue of tt¡e

"continuing wrong" doctrine

The "continuing wrongl'doctrjne applies j.n situatjons where there is evidence of continuing affi¡:native wrongful conduct.

See !87 Corporate Center Associates v. Townshirr of Brjdqewater, 101 F.3d 320, 32A (3d Cir. 1996) (citing ll@.

Unjted Bhd. of Çarpenters and,Joiners of Àm., g2'7F.zct 1283, 7296

(3d Cir. 1991) (emphasis added)). B0O Services has failed Lo

aJ.Jcae any facLs o:: establish th¡:ough discovery any evjdence Lhat

¡\T&T'salleged wrongfuì conduct giving rj.se to the Communicatjo¡rs

Act clajms continued beyond the limitations per5.od. 800 Services

merely contends that because A1'&T'tcontinuesto be unjusLly

enriched at plaintiff's expense," the continuing wrong doctrine

should apply. Às stated above, however, the continuing wrong

doctrine applies to an affirmative act by the aÌleged wrongdoer

and continuing to be "unjustÌy enriched" does not qualify as an

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affirmative act. Instead, if one becomes "unjusLly enriched" it js, tnost likely, the reeult of an affirmative wrongful act.

Because there is no evÍdence in the record of an affirmative act of wrongdoíng by AT&T beyond Jul-y 1995, 800 Services'sclaj.ms jn

COITNIIS ELt\fEN À¡ID gtfEL\¡E of the Complaint for violation of the

Communications Act are DISMISSED WITII PREitttDICE inasmuch as they

are time-barred.

TIt. SJ'anderand LibeI

CounÈs Five and Six o.f 800 Services'sCompJ.aint purport. t-o

aIIege claims of slander and Iibel.

|  |  |
| --- | --- |
| N.J.S.À. S2A: : 14-3 Provides: |  |
| Every acÈion at law for libel- or | slander shall |
| be commenced within 1 year | next afte¡- |
| publÍcatj.on of the alleged libeJ | or slander. |

N.J. Sr¡r. A¡¡H. S2A:14-3 (West 2000) .

The latest point in time within which it j-s alleged that

ATcT ¡nade slanderous or l"ibelous statements js July 1995. Às

noted above, plaj.ntíff filed the subject Complaint o¡r Àpri.l 6,

1998, wel. l over one year after the slanderous arrd I ibelous

staternents allegedly were made by representatjvc:s of ÀT&1'.

Theref ore, COUNÎS FI\¡E ÀlID SIX of 'the Conrplaint are DISMISSED

}¡IEH PREiIITDICE inasmuch as they are time-barred.

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fV. Unjust EnrieÌ¡nent

Count Four of 800 Services, ð Co^pf.int purports to allege a cl.aim of unjust enrichment. 800 Services contends that AT&T became unjustly enriched at its expense when Al'eTutilized 800

Services'sproprietary customer lists to derive profits without

apporti-onÍng the profits. 800 Servj.ces also alLeges that Al'&T

wrongfully collected revenue from end-user customers wj.thot¡L gjving 800 Services its share of the profits.

To state a claim for unjust enrichment, a plaintiff musL

show "both that defendant received a benefit and that retention

of that benefit without repal¡ment wouLd be unjust." VRG Co::n. v.\_

GKN ReaLt.ylorp\*, 135 N.J. 539, 554 (1994) (cj.ting Þglates

Corunerc.faf-ÇgrB=-v. Wai.i.ia, 2l-1. N.J. Super. 231., 243 (N.J. Super.

Ct. App. Div. 1986),'Russell-Stanlev Corp. v. Pl.ant Indus., l-E-:\_r

250 N. J. Super. 478, 509-510 (N.J. Super. CL. Ch. Div. 1991 ) ) . /\

pJaj.ntiff must show "that it expected remuneration from the

defendant at the time j.t performed or conferrecl a ber¡efjt on

defendant and that the faiLure of the remuneration enri.checi

defendant beyond its contractual. rights." \¡nç\_!orU, 135 N.J. at

55s.

The deposition testimony submitted by cour¡sel for 800

Services does not support its all-egation that ¡\TeT used proprietary information beJ.onging to 800 servj.ces. euite sj.rnpJy, there is no first-party testimony that AT&T app::opriated 900

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Services customers. For example, Okinrs testimony reeks with statements amounting to nothing åore than mere conjecture. A

thorough review of Okin'stestimony reveals that he simply made

assumPt.ions about AT&T's actions when his business traffic began

to decline. In fact, Okin admits that none of the customers who l.eft 800 Services ever advised him that they left as a resuLt of

being contacted by AT&T

Additionally, conÈrary to what 800 Services would have thj.s

Court believe, nothing in Chris Mehlenbacher or Susan Rinaldj's

(employees of 800 Services) deposition testirony provS.des a

factual- basis for 800 Services'sconclusion that AT&1'vlas

utilizing its proprietary infor¡nation. In fact, when questjoned

about what he knew about a cl-aim Lhat AT&T was misusing

plaintiff's proprietary information, Mr. MehLenbacher testjfied that: "[i]t was just, let's call it a general buzz in the aggregator j.ndustry that they felt that thej.:: accounts welîe bej ng targeted specifically. r don'thave a specifj.c conversatjon LhaL

took p1ace." See Deposition of Chris Mehlenbacher at page 89, l.ines L-5. l'inally, À1 fnga,s (another aggregator) testimony js

based on what info¡:mation he was given by Okin and other

aggregators in the industry. see Deposition of Ar rnga at page

32, lines 7-14¡ page 1.12-11.3. SC.C also Okin Dep. at page 244, l-ines 12-24.

800 services arso aì-Ieges that AT&r'wrongfurJ-y collected

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revenue from end-user customers wÍthout giving 8O0 Servjces its

share of the profits. However, gOO slr\*rices offers no evidence

to support this aJ.Jegation. Therefore, COUNB FOIR of the

Complaint is DISMISSED WITB PRE,IIIDICE.

v Intentional Interference with Prospective Econonic Àdvantage and Intentional Interf€rence with Contractual

Relations

Counts Seven and Eigirt of 800 Services'sComplai.nt purport

to allege cl.aims of intentional interference with prospectjve economic advantage and intentional jnterference wj.th contraclual

rel-ations.

"An action for tortious interference wjth prospective busj.ness relation protects the right rto pursue one'sbusiness,

calling or occupation free from undue jnfl-uence or molestaticúr.,"

PrjnL.inq Mart-Morrjstown v. Sharp El.ectronj\_cs\_\_Cgæ:, 1l6 N.J.

739, 750 (1989). "What is açtionable is \[L]he luring ahray, by devious, improper:, and unrighteous means, of the customer of

¿¡nother. '" id .-

"The separate cause of acLion for the jlrLentional

interferer¡ce with a prospective contractual or economj.c ¡:elationship has long been recognized as clistj.¡¡ct from the Lort. of jnterference with the performance of a contracl-,,, -Ld. (citatjons omi.tted). Pursuant to New Jer:sey Law, the elements of

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a claim for tortÍous interference wiÈh contract are: \* (1) a

plaintiff's existing or reasonabiu "\*p."tation of economic

advantage or benefit; (2'ta defendant, s knowledge of the

pJ.aintiff'sexpectancy by the defendant; (3) wrongful and intentional interference with that expectancy by the defendant;

(4) a reasonable probabiJ-ity that the plaintiff woul,d have

¡:ecejved the anticipated economic advantage absent such j.nterference; and (5) damages resulting from the defendant, s j.nterference." @-fantic ¡¡etwork SVCS .,...\_\_g! al ., 928 F. Supp. l-354, 1369 (D.N.J. 1996) (citarions omjrred).

Cl-early, the Li.nchpin of the analysis is the ..wrongfulness,, c¡f

the acl-ions.'

800 Services contends that AT&T wrongfuJll'soLicited 800

Servjces'scustomers, thereby causing 800 Services,s business to

decline. Specifical.ly, 800 Services contends that AT&1'call.ecl

800 services'scustomers, offered l-ower rates than those offer:ed

by 800 Servj.ces, and toLd these customers that it woulcl remove

any.short,falL charges assessed to them if they woutd swjtch to

À1'e1'800.. Services afso contends that ATel'tortiously int.crf e¡:ed wit.h iLs busi.ness when AT6,T refused to alrow 800 services to restruct-ure its plan.5

sBOO Services proffers many allegations to support its tortious i.nl-erference claims. ltowever, many of these allegations shourd have been asserted pursuant t,o the Communications Act. Since the

court has a).ready determined that any claims brought pursuant to the communications Act are time-barred, the court wirr not

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As aforernentioned, there is no reriable, first\_party testimony in the record that efc,i'wrongfu1J-y solicited 800

Services'scustomers. Even assuming that ÀT&T contacted 800

Services'scustomers and advised those customers that A1'&T

disconnected 800 Services, that a customer could comp.Lete calls

on the AT&T network at AT&T'sstandard rates, that a customer may

also cl¡oose any ìong-distance carrier, and that a customer may

want to consider direct service with AT&T as an alternative to no

service at al-l (si.nce Okin testified that there $ras no alternative plan in place post-deletion), such conduct does not sLrike this Court as "wrongful" conduct on the part of ÀT&1'.

l'hj.sis because these st,atements allegedly occurred after 800

Services began defaulting on its payment obligations and, ultimatelyr pJ.aced these customers in the posit.ion of havjng no

800 service plan at all.

Further, 800 Services'sallegation that A1'&TwrongfulJy

refused its request to restructure is beljecl by the tesljmony 5f its President. The record reveaLs that ÀT'eT::esponded to 800

services'sreguest to restructure its csrp rI plan and outlj.ned

the te::ms and condjtions specified under Tarjf f No. 2 that v¡ere

applicable to this reguest. åee Solomon Cert., Exhibj.t I. specifically, ATcT advised 800 services that under t-he tariff, jf

address these al-legations.

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800 Services restructured its existing csrp rr p)an, 900 services woufd remain liabre under the taiirr ior any shortfall charges

accrued in the first year of its plan and, in the event that goo Services faited to satisfy its Minimum Ànnual CommiLment for the fírst year of the existing pran, it would arso be required Lo repay the promotional credits paid to 800 services under the pJ-an. see id. AT&T advised 800 services to notify it if Bo0

ServÍces wished to proceed v¡ith this request. See id. BO0

Services never attempted t.o proceed with this request. See Oki.n

Dep. at page 94, lines 7-10. In fact, Okin testified that 800 Services did not qualify for a restructuring of its plan under

the terms of the governing tariff. See Okin Dep. at page 134'

l.ines ?-L1. Therefore, COIINIIS SE\IEN and EIGHT of the Complaint

are DISMISSED }fIfg PRE,IÌIDICE.

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| VI. Unfair Competition/Trade Libel | | | |  |  |  |
|  | Count Njne of 800 Servjces'sComplaint purports to alJege | | | | |  |
| cla'jmsof unfair competition/trade Iibel. | | | |  |  |  |
|  | I'In order to | | prove the tort of trade libel, | a plaintiff | must |  |
| establish | | "the publicatJ.on, or coÍìmunicationto a 1-hird person, | | | |  |
| :t | fafse | statements concerning the plaintiff, | | hj.s property, | or |  |
|  |  |  |  |  |  |
| his business." | | | Iederat Deposit In | , 2? F.3d | |  |

850, B?1 (3d Cir. 1994 ) (cit.ing Hqnry v. Vaccaro Const.-Co. v.

A. J. DePace, Inc. , 13? N..J. Super . sLZ (Law Dj.v. 19?5) ) .

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800 services argues that AT&T tord g00 services, s customers that 900 services was "not responsiurå in their business matters-" see 900 services'ssuppremental Brief at. page 11. To support this proposition, 800 Services reries on the testimony of susan Rinaldi' one of its employees. contrary to 800 services,s characterization of that testimony, Susan Rj.nal.di testifjed that in connection with a discussion of why AT&T allocated shortfall

charges. to end-user locations, an employee of AT&T, named

"Vanessa" said: "vùe told the customers because 800 Services

didn't meet their requirement that they're being charged back a

penalty." See Deposition of Susan RÍnaldÍ at ¡rage 145, l.ines l-

12. As pointed out by counsel for AT&T, the "r:eguirement" referenced therein is the Minimum Annua1 Commitment in the tari.ff which, if not met, gives rise to the impositior¡ of shortfall. charges. 800 Servj.ces does not dispute that it d.i.d not meet the Minimum Annual Commitment and, accordingly, shortfall charges loay

i ssue

In conclusion, 800 Services has not offered any admissible evi.dence which demonstrates that AT&T made false statements

concerning 800 Services, its property o¡: busj.ness. Therefor:e,

cotNT NI¡IE of the complaint is DISMISSED ]IITH PRET.ÍUDICE.

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t¡If. åltÎ's Counterclai¡

AT&T has filed a countercr.aim seeking judgment for unpaid usage charges in the amount of $392,6s1.05 and shortfall. charges i.n the amount of $1,399,998.68 plus pre-judgment interest.

As discussed i.n greater detair above, the fired tariff controls the parties' rights and liabilities as a matter of l.aw. In thj.s matter, Tariff No. 2 provides that Lhe payment of Ínvoices is due upon presentation. See Certificatio¡: of Daniel H. Solomon, Exhibit C, Tariff llo. 2 S 2.5.3. Pursuant to Tariff No. 2, 800 Services, as a subscriber to AT&T set.ríc." pursuant tc) the ta::iff , is obtigated to pay all usage charges accrued fo:: services rendered. Additionally, 800 Services is responsible for shortfall and termination charges in the event that 800 Services faj.ls to satisfy the ninimum u sage connitmenLs. 800 Servjces has not submitted paymen rf any of these charges. The prevaiJJng l.aw entitl-es AT&1 'tojudgment for these charges.

AT&1'has submj.tted a Certifjcation by Noris Sotjl.lo-Saye::s

dated December 10, 1999 which certÍfies that tÌ:ese are the:

amounts due and owing to AT&T as a l:esu1t of servj.ces pr:ovj ded to

8OO Servj ces under the CSTP II Plan. lrlthough 8OO Servj.ces has

contested that it must pay these charges, it does not challengc

the amounts as set forth in the Certification.

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| ,t' | cLoIËú |  |
| UNITED STATES DISTRICT COURT | |  |  |
| FOR THE DISTRICT OF NEI¡ü JERSâUB 2 I 200Û | | |  |  |
|  | Af |  |  |  |
| 8OO SERVICES, INC., | CIVIL ACTION NO. | 98-1s3 9 |  |  |
| Pl-aintif f , | HON. NICHOLAS H. | Þolrr¡¡r |  |  |
| v. | FTNÀJL ORDER |  |  |  |

AT&T CORP.,

Defendant.

THfS lfATfER.having come before the Court on the motj-on

by defendant ATeT Corporation for sunmary Judgment with respeci

to the rernaining counts of plaintiff 800 Services'sComplai-nt;

and the Court havÍng heard oral .argument on February 29, 2000 and

l\pril 77, 2000; and upon careful consideration of all memoranda

submitted in connection with said motioni and for the reasons set

forth more particularly j.n the Letter Opinion which accompanies

this Order,'and good cause havi¡g been shown,

rr rs on this ã/ 4y of August, 2ooo,

ERED that the motion by defendant I\T&T Corporation

for summary judgment is GRjI¡NTED and the remaining counts of

pla5.ntif f 's Complaint are hereby DXSMISSED WIEH pRE,XUDICE; and j.t

is further

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ORDERED that ÀT&T Corporation is entitled to judgment

on its counterclaim in the amount of 91,182,649.60 plus pre-judgment interest; and it is further

ORDERED that rhis case is CLOSED.

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ATToRNEYs FoR D'ôfendant

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| 8OO SERVTCES, TNC., | Hon. Nichol-as H. Politan, U.S.D.J. |  |
| Plaintiff, | Civll l\ction No. 98-1539 |  |
| v. |  |
| ATET CORP., | FINÀL JUDGMENT |  |
| Defendant. |  |  |

WHEREAS the Court entered a Fi.nal Order i.n thi s acLi on

on August 28, 2000 directing the entry of a final judgment j.n

favor of defendant ATaT corp. on its claim against pJ.aintiff 800

Services, Inc. in the amount of g1,782,649:..60, plus prejudgrment

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I{I{EREAS ttre prejudgrment interest (caLculated pursuant to

28 U.S.C. 51961) from .Iune L, 1996 through .August 28, 2OOO eguals

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$IHEREÀS this Judgment being submitted by counsel for

ATcT Corp. for entry;

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ORDERED that a final judganent be and the same j.s hereby

entered in favor of defendant AT&T Corp. and against pl.aintiff BOO

Services, Inc. in the sum of ç2,2311434.60.

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**EXHIBIT C**

Page 1



2 of 4 DOCUMENTS

**AT&T CORP., Plaintiff, -against- PUBLIC SERVICE ENTERPRISES OF PENN-SYLVANIA, INC.; PAB GROUP, INC.; AND ENTERPRISE TELCOM SER-VICES, INC., Defendants.**

**98 Civ. 6133 (LAP)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF**

**NEW YORK**

***1999 U.S. Dist. LEXIS 13108***

**August 24, 1999, Decided**

**August 26, 1999, Filed**

**DISPOSITION: [\*1]** AT&T's petition to confirmarbitration award granted in its entirety and cross-petition denied in its entirety. AT&T's motion for sanctions de-nied in its entirety.

**COUNSEL:** For AT&T CORP., plaintiff: Elizabeth M.Sacksteder, Sidley & Austin, New York, NY.

For PUBLIC SERVICE ENTERPRISES OF PENN-SYLVANIA, INC., PAB GROUP, INC., ENTERPRISE TELCOM SERVICES, INC., defendants: Richard C. Yeskoo, Fabricant & Yeskoo, New York, NY.

For PUBLIC SERVICE ENTERPRISES OF PENN-SYLVANIA, INC., counter-claimant: Richard C. Yeskoo, Fabricant & Yeskoo, New York, NY.

For AT&T CORP., counter-defendant: Elizabeth M. Sacksteder, Sidley & Austin, New York, NY.

**JUDGES:** LORETTA A. PRESKA, United States Dis-trict Judge.

**OPINION BY:** LORETTA A. PRESKA

**OPINION**

*MEMORANDUM AND ORDER*

LORETTA A. PRESKA, United States District

Judge:

Plaintiff AT&T Corp. ("AT&T") was awarded twenty-six million dollars against defendant Public Ser-vice Enterprises of Pennsylvania, Inc. ("**PSE**") at the conclusion of a month-long arbitration proceeding. AT&T now moves to confirm the arbitration award, and defendant **PSE** cross- moves to vacate the award. De-fendants PAB Group, Inc. ("PAB") and Enterprise Tel-com Services, Inc. ("ETS") separately **[\*2]** respond to AT&T's petition to confirm the arbitration award. For the reasons that follow, AT&T's petition to confirm the arbi-tration award is granted in its entirety, and the cross-petition denied in its entirety. 1

1 The following submissions have been con-sidered in resolving this motion: Notice of Plain-tiff AT&T Corp.'s Petition to Confirm Arbitration Award dated September 28, 1998, with annexed Affidavit of William Nissen ("Nissen Aff.") and Proposed Order; Memorandum of Law in Sup-port of Plaintiff AT&T Corp.'s Petition to Con-firm Arbitration Award dated September 28, 1998; Notice of Petition and Petition to Vacate Arbitration Award dated October 30, 1998; **PSE's** Combined Memorandum in Support of Pe-tition to Vacate Arbitration Award and in Oppo-sition to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998 ("**PSE** Mem."); Affirmation of John E. Andrews in Support of **PSE's** Combined Memorandum in Support of Pe-tition to Vacate Arbitration Award and in Oppo-sition to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998 ("Andrews Aff.");

Page 2

1999 U.S. Dist. LEXIS 13108, \*

Memorandum of Defendants PAB Group, Inc. and Enterprise Telcom Services, Inc. in Response to AT&T's Petition to Confirm Arbitration Award dated October 30, 1998; AT&T Corp.'s Reply to the Memorandum of Defendants PAB Group, Inc. and Enterprise Telcom Services, Inc. in Re-sponse to AT&T's Petition to Confirm Arbitration Award dated November 23, 1998; AT&T Corp.'s Combined Reply in Support of its Petition to Confirm Arbitration Award and in Opposition to **PSE's** Petition to Vacate Award dated November23, 1998; Affidavit of Aryeh Friedman dated November 19, 1998; Affidavit of William J. Nis-sen in Support of AT&T Corp.'s Combined Reply in Support of its Petition to Confirm Arbitration Award and in Opposition to **PSE's** Petition to Vacate Award dated November 23, 1998 ("Nis-sen Reply Aff."); **PSE's** Reply Memorandum in Support of Petition to Vacate Arbitration Award dated December 21, 1998; Reply Affirmation of John E. Andrews in Support of **PSE's** Memoran-dum in Support of Petition to Vacate Arbitration Award dated December 21, 1998.

**[\*3] BACKGROUND**

This action originated in a series of disputes includ-ing but not limited to three federal court actions and seven administrative proceedings before the Federal Communication Commission ("FCC"). (Nissen Aff. P 3). For purposes of this petition, I will briefly discuss the underlying claims.

AT&T is a common carrier regulated by the Federal Communications Commission ("FCC") under the Com-munications Act of 1934 ("the Act"). *47 U.S.C. § 151,* *et seq.* **PSE**is a reseller of long distance services whichpurchases bulk long distance service from carriers such as AT&T. In the early 1990's, AT&T developed an in-bound service called the customer specific term plans ("CSTP II plans") for the provision of telecommunica-tions services by AT&T to customers such as **PSE.** The CSTP II plans provided significant discounts and other promotional credits to customers willing to commit to purchase a minimum dollar value of inbound 800 service over a stated term. (Nissen Reply Aff., Ex. D, testimony of Kurth at 3500-03; Testimony of Carpenter at 2696:4 -25 attached at Andrews Aff.). Governed by an AT&T **tariff** , if the customer failed to meet its purchase commitment in **[\*4]** any year during the life of the plan, it was required to pay AT&T the difference, otherwise referred to as the **shortfall**, between the volume to which it had committed and the amount it had actually taken. (*See* Nissen Reply Aff., Ex. H, AT&T 313, § 3.3.1.Q.3). The provision at issue, entitled "Penalty for **Shortfalls**," provided that:

the Customer must meet the net annual revenue commitment after the discounts are applied. If a Customer does not meet the annual revenue commitment in any one year, after discounts are applied, the Customer must pay the difference be-tween the Customer's actual billed reve - nue and the annual revenue commitment.

( Andrews Aff., Ex. C, AT&T 313 P 3.3.1.Q.3). **PSE** claims that AT&T's subsequent actions caused CSTP II plans to become non-competitive and, thus, **PSE** fell into **shortfall. (PSE** Mem. at 3). **PSE** further claims that thetotal **shortfall** penalties of $ 91,289,789 bore no relation to any actual damage to AT&T as a consequence of **PSE's** failure to satisfy contractual commitments. (*Id.*at4).

In late July 1996, the parties agreed to resolve their various claims against each other in an arbitration pro-ceeding **[\*5]** presided over by a jointly-selected panel of three former federal judges. (Nissen Aff., Ex. A; An-drews Aff., Ex. A). 2 The parties executed an Arbitration Agreement (the "Agreement") which provided, *inter alia*, that all proceedings were stayed, that the arbitration would be governed by the Federal Arbitration Act ("FAA") and that the arbitrators would "determine the rights and obligations of the Parties according to the Communications Act of 1934, 47 U.S.C. P [151], *et seq.*, applicable federal and state **tariffs**, and such other feder-al and state law as the Tribunal finds would apply in the United States District Court for the Southern District." (Nissen Aff., Ex. A, P 11.3; Andrews Aff., Ex. A, P 11.3).

2 The judges included Sherman G. Finesilver, formerly Judge of the United States District Court for the District of Colorado, George C. Pratt, formerly Judge of the United States District Court for the Eastern District of New York and the United States Court of Appeals for the Second Circuit, and Thomas Masterson, formerly Judge of the United States District Court for the Eastern District of Pennsylvania. (Nissen Aff. P 7). I note that Judge Finesilver replaced Kenneth Conboy, formerly Judge of the Southern District of New York, because **PSE** elected to accept Judge Conboy's offer to withdraw upon discovering that his firm was representing telecommunications clients in proceedings adverse to AT&T. ( *Id.* P 8).

**[\*6]** The evidentiary hearing commenced on May4, 1998 and lasted through June 3, 1998. (Nissen Aff. P

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1999 U.S. Dist. LEXIS 13108, \*

21). The parties agreed, and the Agreement provided that "the Award shall be made . . . without findings as to facts, issues or conclusions of law, and shall be without a statement of the reasoning on which the award rests." (Nissen Aff., Ex. A, P 6.1; Andrews Aff., Ex. A., P 6.1). The Agreement further provided that "if the Tribunal finds that each party is liable to the other for damages, the Award shall grant net damages to the Party that is liable for the lesser amount, which party shall be the Prevailing Party." (*Id.*). AT&T submitted damage claims to the arbitrators totaling $ 94,103,493, and **PSE** asserted claims ranging from $ 72 million to $ 127 million. (AT&T 901, **PSE** 1006-1008, **PSE** 1221 attached at An-drews Aff.). On August 14, 1998, after the panel heard oral argument on post-hearing briefs, the arbitrators awarded AT&T twenty- six million dollars against **PSE.** (Nissen Aff. P 27, Ex. D). Under the Agreement, an award of less than thirty million dollars was final and binding on the parties. ( *Id.* P 29). The arbitrators did not award AT&T any recovery against ETS **[\*7]** or PAB.

**DISCUSSION**

I. *Standard of Law*

The standard for avoiding summary confirmation of an arbitration award is very high, and the burden of proof is on the party moving to vacate the award. *Willemijn*

*Houdstermaatschappij v. Standard Microsystems Corp., 103 F.3d 9, 12 (2d Cir. 1997)*. It is well-settled in thisCircuit that "'arbitration awards are subject to very lim-ited review in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Id.* (quoting

*Folkways Music Publishers v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993))*. Thus, because of the severe limitation ofa court's function in confirming or vacating an arbitration award, a district court must find that the arbitrators acted "in manifest disregard of the law" to vacate an arbitration award. *Id.* (citing *Wilko v. Swan, 346 U.S. 427, 436-37,* *74 S. Ct. 182, 187-88, 98 L. Ed. 168 (1953))*. A findingof manifest disregard requires

something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. Manifest **[\*8]** disregard of the law may be found . . . if the arbitrator un-derstood and correctly stated the law but proceeded to ignore it.

*Id.* (internal citations omitted).

Arbitrators are not required to provide an explana-tion for their decision. *United Steelworkers of America*

*v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598, 80 S. Ct. 1358, 1361-62, 4 L. Ed. 2d 1424 (1960)*. Here, theparties agreed that no explanation was to be provided to the parties, and none was. While the lack of an explana-tion makes the evaluation of the conduct and conclusions of an arbitration panel more difficult, it does not change the standard of law I must apply. *See Willemijn Houd-stermaatschappij, 103 F.3d at 12*. Thus, "a reviewingcourt can only infer from the facts of the case whether 'the arbitrator[s] appreciated the existence of a clearly governing legal principle but decided to ignore or pay no attention to it.'" *Id.* (quoting *Merrill Lynch, Pierce, Fen-*

*ner & Smith v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986))*. The Court of Appeals warns the reviewing courtto "proceed with caution," (*id. at 13*), because if there is "even a barely colorable **[\*9]** justification for the out-come reached," confirmation of the award is required. *Id.*

(quoting *Matter of Andros Compania Maritima, S.A. of*

*Kissavos, 579 F.2d 691, 704 (2d Cir. 1978))*. This ap-plies even if the grounds for the arbitrators' decision are "based on an error of fact or an error of law." *Id.*

II. *Public Policy Exception*

There is a "narrow exception to the deferential ap-proach that generally characterizes judicial review of arbitration awards." *International Brotherhood of Elec-*

*trical Workers, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 715 (2d Cir. 1998)* (hereinafter"*IBEW*") . A court may refuse to confirm an arbitration award if such award is contrary to "'some explicit public policy' that is 'well defined and dominant.'" *Id.* (quoting

*W.R. Grace & Co. v. Local Union 759 et al., 461 U.S. 757, 766, 103 S. Ct. 2177, 2183-84, 76 L. Ed. 2d 298 (1983))*; *see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 42-43, 108 S. Ct. 364, 98 L. Ed.*

*2d 286 (1987)*; *Newsday Inc. v. Long Island Typograph-ical Union, 915 F.2d 840, 844 (2d Cir. 1990)*. While "itis **[\*10]** far from clear . . . where to draw the line in determining whether the public policy allegedly violated is important enough to require . . . vacating an award," courts agree that the line must be drawn somewhere. Thus, this exception is very narrow and is usually, alt-hough not exclusively, applied by courts where an award threatens public health and safety. *DiRussa v. Dean Wit-*

*ter Reynolds Inc., 121 F.3d 818, 825 (2d Cir. 1997)*

(holding that an arbitrator's erroneous interpretation of federal statutory law does not violate public policy), *cert.*

*denied*, *522 U.S. 1049, 118 S. Ct. 695, 139 L. Ed. 2d 639 (1998)*; *Newsday, 915 F.2d at 845* (affirming vacating anaward which, if enforced, would violate public policy against sexual harassment in the workplace); *Local 1,*

*Amal. Lithographers of America v. Stearns & Beale, Inc., 812 F.2d 763, 773 (2d Cir. 1987)* (reversing confirma-tion of arbitration award which sought to bind nonunion workers to a collective bargaining agreement to which

Page 4

1999 U.S. Dist. LEXIS 13108, \*

they were not a party); *Exxon Corp. v. Esso Workers'* *Union, Inc., 118 F.3d 841, 852 (1st Cir. 1997)* (reversingconfirmation of **[\*11]** award reinstating employee who had failed drug test as being contrary to public policy against performing safety-sensitive jobs while under in-fluence of drugs); *Union Pac. R.R. v. United Transp.* *Union, 3 F.3d 255 (8th Cir. 1993)* (vacating arbitrationaward because result was reinstatement of railroad worker to safety-sensitive position) . In drawing this line, the Court of Appeals has held that a "result-oriented ap-proach" should "govern a federal court's review of an arbitration award on public policy grounds." *IBEW*, 143 F.3d at 717, 718 (holding that the reinstatement of an employee who altered his urine sample for a drug test did not necessarily violate the "strong public policy in favor of promoting a safe, drug-free working environment in the nuclear power industry").

A. *Application of the Public Policy Exception*

**PSE's** opposition to summary confirmation of thearbitration award and petition to vacate the award re-volves around one issue: whether AT&T's Penalty for **Shortfalls** is violative of public policy and, thus, requiresvacatur of the award. AT&T argues, *inter alia*, that **PSE** agreed to arbitrate and is now precluded from attempting **[\*12]** to litigate the validity of the **shortfall** charges.Indeed, **PSE** specifically put forth in its post-hearing brief to the Panel that the provision was an unenforceable penalty. (*See* Nissen Reply Aff., Ex. U at 54-56). Thus, AT&T asserts that the arbitrators had a full opportunity to take **PSE's** position into account when formulating their award and, since awards are "subject to very limited review," I should not even entertain **PSE's** challenge. *See*

*Folkways Music Publishers, 989 F.2d at 111*.

Although review of the arbitration award is limited, it is broader than AT&T's interpretation. Judicial econ-omy favors allowing the arbitration to proceed first and then subsequently addressing any public policy concerns thereafter, only if they should arise. "A court cannot . . .

bypass the arbitration process simply because a public policy issue may arise." *National Railroad Passenger*

*Corp. v. Consolidated Rail Corp., 282 U.S. App. D.C. 132, 892 F.2d 1066, 1071 (D.C. Cir. 1990)*. Followingthis approach, if the arbitration came out a certain way, the "court would presumably never have had to address the public policy issue at all." *892 F.2d at 1072*. The reviewing **[\*13]** process is limited, however, to some extent. While the Court of Appeals has held that "find-ings as to questions of law, i.e., public policy questions, are subject to *de novo* review by a district court, an arbi-trator's factual findings clearly are not." *IBEW*, 143 F.3d at 725. Accordingly, **PSE** is not precluded by the doc-trines of waiver or estoppel from asserting that AT&T's Penalty for **Shortfalls** violates public policy. *Id. at 715*.

B. *Filed* ***Tariff*** *Doctrine*

**PSE** argues that the Penalty for **Shortfalls** violateswhat it characterizes as the strong historical public policy against contractual penalties for breach of contract. *See*

*Priebe v. United States, 332 U.S. 407, 68 S. Ct. 123, 92 L. Ed. 32 (1947)*. "The law is clear that contractual termsproviding for the payment of a sum disproportionate to the amount of actual damages exact a penalty and are unenforceable." *Leasing Service Corp. v. Justice, 673*

*F.2d 70, 73 (2d Cir. 1982)*; *John T. Brady & Co. v. Form-Eze Systems, Inc., 623 F.2d 261, 263* (2d Cir.),

*cert. denied*, *449 U.S. 1062, 66 L. Ed. 2d 605, 101 S. Ct. 786 (1980)* (holding**[\*14]**that unlawful penalty clausesare unenforceable). Thus, **PSE** argues that if AT&T's Penalty for **Shortfalls** is disproportionate to any reason-ably conceivable damage to AT&T then "public policy deems AT&T's **tariff** provision void as a matter of law." (**PSE** Mem. at 10).

**PSE's** own language proves the undisputed fact thatthe provision at issue is *not* a contractual provision, but rather, a **tariff** provision. Accordingly, the filed rate doc-trine (or the filed **tariff** doctrine) is applicable. "[A] **tar-iff**, required by law to be filed, is not a mere contract. Itis the law." *Carter v. AT&T, 365 F.2d 486, 496 (5th Cir.*

*1966)*, *cert. denied*, *385 U.S. 1008 (1967)*; *see also Marcus v. AT&T, 138 F.3d 46, 56 (2d Cir. 1997)* ("fed-eral **tariffs** are the law, not mere contracts"); *AT&T v.*

*City of New York, 83 F.3d 549, 552 (2d Cir. 1996)*

("these federal **tariffs** have the force of law and are not simply contractual"). The Supreme Court has acknowl-edged the rigidity of this doctrine but "despite the harsh effects of the filed rate doctrine, [has] consistently ad-

hered to it." *Maislin Industries v. Primary Steel, 497 U.S.* *116, 128, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990)*.**[\*15]**

The Supreme Court noted, however, "an important cave-at: The filed rate is not enforceable if the [regulating agency] finds the rate to be unreasonable." *Id.* Accord-ingly, under the filed **tariff** doctrine, courts must give effect to a **tariff** provision unless it has been found to violate the Act. Although the Communications Act does not expressly provide that the FCC has the general power to reject **tariff** filings summarily, courts have inferred this under section 201 of the Act. *See, e.g., Capital Net-*

*work System v. Federal Communications Commission,*

*307 U.S. App. D.C. 334, 28 F.3d 201, 204 (D.C. Cir. 1994)*. I note that**PSE**is correct to the extent that "theCommission equates **tariff** filings with contract offers." *Id.* Accordingly, "contract law provides the analyticalframework by which *the Commission* assesses a **tariff's** 'justness' and 'reasonableness,'" not the district court. *Id.*

(emphasis added); *see also Delta Traffic Service v.*

*Georgia-Pacific Corp., 936 F.2d 64, 66 (2d Cir. 1991)*.In *Maislin Industries v. Primary Steel*, the regulating

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agency did not determine that the **tariff** rates were un-reasonable, and, on that basis, the Supreme **[\*16]** Court held that the rates were presumed reasonable. *497 U.S.* *at 129, fn 10*. Accordingly, because neither party hasbrought to this Court's attention a ruling by the FCC de-claring the filed **tariff** unreasonable, I presume, for pur-poses of this decision, that the **tariff** is reasonable and has the force of law.

C. *Other Grounds for Refusal to Vacate Award*

Even if I did not make this presumption, **PSE** has not met its burden in meeting the public policy excep-tion. I note that a court can only refuse to confirm an arbitration award if such award is contrary to "'some ex-plicit public policy' that is 'well defined and dominant.'"

*IBEW*, (quoting *W.R. Grace & Co., 461 U.S. at 766*).Although courts have not exclusively limited this excep-tion to cases involving public health or safety, it has rarely been used in a case like the one at bar, which will result only in the payment of money damages from one private party to another. *See, e.g., DiRussa, 121 F.3d at* *825* (stating that the public policy exception had beenapplied to prevent conduct that "is particularly harmful to society and egregious in nature, such as when the con-duct required by **[\*17]** the award would jeopardize pub-lic health and safety"); *Newsday, 915 F.2d at 845*; *Local*

*1, Amal. Lithographers of America, 812 F.2d at 773*;

*Exxon, 118 F.3d at 852* . Thus, even addressing the meritsof the public policy at issue, it does not fall within the type of public policy that courts have deemed dominant enough to overturn an arbitration award under the high standard applicable. And in any event, any public policy against enforcing a penalty provision is insufficient to overcome the strong public policy in favor of arbitration.

*See In the Matter of Arbitration between Associated General Contractors and Savin Brothers, Inc., 45 A.D.2d 136, 142, 356 N.Y.S.2d 374 (3d Dept. 1974)*, *aff'd*, *36*

*N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975)*

(holding that although the award constituted a penalty, the public policy favoring arbitration outweighed the public policy against penalties); *Sweeney v. Morganroth,* *451 F. Supp. 367, 370 (S.D.N.Y. 1978)* (confirming thearbitration award "even assuming that the award is a penalty . . . where, as here, the contract expressly pro-vides the arbitrator **[\*18]** with power to grant the award").

III. *Manifest Disregard of the Law*

In addition, **PSE** asserts that the arbitrators exceeded their powers under the Agreement and acted in manifest disregard of the law. **PSE** has failed to uphold its burden of establishing that the arbitrators understood and cor-rectly stated a well-defined, explicit, and clearly applica-ble law but proceeded to ignore it. *Willemijn, 103 F.3d*

*at 12*. In *Multi Communication Media Inc. v. AT&T Corp., 1997 U.S. Dist. LEXIS 5166*, No. 96 Civ. 2679,1997 WL 188938 (S.D.N.Y. April 18, 1997), a case with a similar "penalty" **tariff** provision at issue, the court did not find the penalty to be unreasonable but denied sum-mary judgement because the district judge determined that under the filed rate doctrine the **tariff** provision *may* require application regardless of New York law. *Id. at* *\*14* (emphasis added). Here, the parties agreed that thearbitration panel did not have to make "findings as to facts, issues or conclusions of law" and should make its determination "without a statement of the reasoning on which the award rests." Thus, the very fact that the court in *Multi Communication Media* opined that the **[\*19]** filed rate doctrine *may* trump New York law shows, at a minimum, at least one "barely colorable justification for the outcome reached" in the present matter. *Matter of*

*Andros Compania Maritima, S.A. of Kissavos, 579 F.2d at 704*.3Accordingly, I find that the arbitrators did notexceed their authority by acting in manifest disregard of the law and I decline to vacate this award on those grounds.

3 Thus, I need not address AT&T's other hy-pothetical explanations for the arbitration panel's award.

IV. *PAB and ETS's Response to AT&T Petition*

There is no dispute that the arbitrators awarded AT&T no recovery on its claims against PAB and ETS. AT&T merely objects to the request of PAB and ETS that the award be confirmed only as to them and without specifically asking that the award be confirmed as to **PSE.** I find AT&T's objection frivolous, and, in light ofthe findings above, the award is confirmed in its entirety.

V. *Immediate Registration*

AT&T claims that **PSE's** assets in New **[\*20]** York are insufficient to pay the judgment and, thus, requests permission to register the judgment against **PSE** imme-diately in other federal districts pursuant to *28 U.S.C. §* *1963*. *Section 1963* requires a showing of "good cause"to register judgments of district courts in other districts. Good cause is demonstrated where a judgment debtor lacks assets in the district rendering the judgment but holds assets in another district. *See Woodward & Dick-*

*erson v. Kahn, 1993 U.S. Dist. LEXIS 4188, 89* Civ. 6733(PKL), 1993 WL 106129 (S.D.N.Y.) (citing *Chicago*

*Downs Ass'n v. Chase, 944 F.2d 366, 372 (7th Cir. 1991))*; *Associated Business Tel. Sys. Corp. v. Greater*

*Capital Corp., 128 F.R.D. 63, 68 (D.N.J. 1989)*. AT&Tclaims that **PSE** does not have sufficient assets in the State of New York to pay the amount of the judgment sought and, to the extent **PSE** has assets that they are

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located in the Commonwealth of Pennsylvania and/or other jurisdictions. (Nissen Aff. P 30). AT&T need not show exact evidence of assets, but, under *§ 1963*, I may grant registration upon a "lessor showing." *Associated* *Business, 128 F.R.D. at 68* (quoting the Commentary

**[\*21]** to 1988 Revision,*28 U.S.C. § 1963*). According-ly, in the absence of any objections or contrary evidence by **PSE,** I accept as true the sworn affidavit of AT&T's attorney William J. Nissen and grant AT&T's request.

VI. *AT&T's Motion for Sanctions*

AT&T also moves for sanctions under *Fed. R. Civ.* *P. 11* against**PSE,**ETS and PAB for (1)**PSE's**allegedlymeritless counterclaim, and (2) ETS and PAB's allegedly baseless request that the arbitration award only be con-firmed as it relates to their liability to AT&T.

In deciding whether to impose sanctions, a court bears a serious responsibility because sanctions run counter to the American rule that each party should bear its own legal expenses. *See Schlaifer Nance & Co., Inc.*

*v. Estate of Warhol, 7 F. Supp. 2d 364, 372 (S.D.N.Y. 1998)*. Despite the district court's discretion to do so, theCourt of Appeals has stated consistently that sanctions should not be imposed lightly. *See Knipe v. Skinner, 19* *F.3d 72, 78 (2d Cir. 1994)*. The Court of Appeals re-quires "clear evidence that the challenged actions are entirely without color and are taken for reasons of har-assment or delay or for other improper purposes, **[\*22]** and a high degree of specificity in the factual findings."

*Oliveri v. Thompson, 803 F.2d 1265, 1272 (2d Cir. 1986)* (internal quotation marks and citations omitted),

*cert. denied*, *480 U.S. 918, 107 S. Ct. 1373, 94 L. Ed. 2d 689 (1987)*. I note, in particular, that it is common forlitigants who lose in arbitrations to be motivated to move for vacatur by a desire to forestall complying with an arbitration award. *See, e.g., In the Matter of the Arbitra-*

*tion Between U.S. Offshore, Inc. and Seabulk Offshore, Ltd., 753 F. Supp. 86, 92 (S.D.N.Y. 1990)*. Nonetheless, Ido not find those circumstances are present here.

First, I find that AT&T's objection to the response by ETS and PAB is frivolous. ETS and PAB are under no obligation to ask for confirmation of the award as to **PSE.** Accordingly, because it is undisputed that ETS and

PAB do not oppose confirmation of the award, AT&T's motion for sanctions is denied as to these parties. Sec-ond, while I find that **PSE's** opposition to AT&T's peti-tion borders on violating the above standard, I do not find that it crosses the line. *See, e.g., International*

*Telepassport Corp. v. USFI, Inc., 89 F.3d 82, 86 (2d Cir. 1996)* **[\*23]**(affirming denial of sanctions based onpetition to vacate award where argument was "barely non-frivolous"); *W.K. Webster & Co. v. American Pres-*

*ident Lines, Ltd., 32 F.3d 665, 670 (2d Cir. 1994)* (va-cating district court's award of sanctions on petition to vacate arbitration award because "colorable claims" and "plausible arguments" were made); *Productos Mercan-*

*tiles E Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 47 (2d Cir. 1994)* (affirming denial of sanctions de-spite showing of "poor judgment" and "sloppy legal work"). As stated above, "it is far from clear . . . where to draw the line" when determining the applicability of the public policy exception. *DiRussa, 121 F.3d at 825*. It is also clear that "'the question of public policy is ultimate-ly one for resolution by the courts.'" *IBEW*, 143 F.3d at 715 (quoting *W.R. Grace, 461 U.S. at 766*). Thus, I do not find that **PSE's** opposition to the arbitration was "en-tirely without color" even though **PSE** did not prevail. Accordingly, AT&T's motion for sanctions is denied in its entirety.

**CONCLUSION**

For the reasons stated above, the arbitration **[\*24]** award of twenty-six million dollars is confirmed in its entirety, **PSE's** cross-petition is denied in its entirety and AT&T's motion for sanctions is denied in its entirety. Accordingly, the parties are to comply with section 2.6(a) of the Agreement and file within five business days of the date hereof joint motions to dismiss with prejudice the pending proceedings. AT&T shall submit a proposed judgment on five days notice.

SO ORDERED.

Dated: New York, New York August 24, 1999

LORETTA A. PRESKA, U.S.D.J.