8.28.18

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**Withdrawal of Petitioners Motion to Find AT&T Violated the FCC ex parte Rules.**

**PETITIONERS RESPONSE TO AT&T’s**

**July 31, 2018 Letter to Correct the FCC RECORD**

**AT&T has filed a response on July 31, 2018 to plaintiff’s motion filed July 11, 2018 but petitioners’ motion was already withdrawn on July 25, 2018 a week prior to AT&T’s July 31, 2018 filing addressing petitioners’ motion as the FCC OGC would not issue a Public Notice as the case ended in 2005 and the FCC 2007 Order and FCC Circulation ended and determined and FCC established 2006 NJFDC Referral was moot.**

Additionally, the recent oral argument statements of Judge Chesler and the recused Judge Wigenton opinions should hold absolutely no weight with the FCC. The evidence presented shows extreme bias and both Judges intentionally **ignored the FCC 2007 Order!**

The FCC should adhere to its 2007 Order that DC Court corrected the FCC on account movement and there is no remand. Just sit back and wait for the next NJFDC Judge to comment on the FCC 2007 Order, as it is all but certain Judge Chesler will recuse his Court. The Third Circuit ethics staff has advised that if Judge Chesler does not willingly recuse his Court a writ of mandamus can be filed with the Third Circuit and the Third Circuit will order his Courts recusal.

Plaintiff’s detailed that Pam Arluk advised that plaintiff’s motion required a public notice and the FCC OGC needed to authorize the Public Notice. Pam Arluk and plaintiffs both understood the 1996 referral was resolved with the correction of the FCC by the DC Court in 2005 and the 2006 referral as per the 2007 Order ---did not expand the scope of the 1996 referral. The FCC Commissioners have already reviewed the 2006 Referral and properly removed it from circulation that lasted from November 2015—January 2017.

The FCC OGC thus would not issue a public notice on plaintiff’s motion. The 1996 referral was resolved in 2005 when the DC Court corrected the FCC on account movement under 2.1.8. -----and the 2006 referral that was removed from FCC circulation because the FCC 2007 Order determined the 2006 referral as per the FCC 2007 Order: “did not expand the scope of the 1996 referral.”

AT&T clearly did violate the Ex parte rules. AT&T’s argument was substantive just with the submission of the NJFDC Wigenton Order asserting all the substantive issues.

Why is AT&T defending a withdrawn motion? AT&T created a revised history of the case filled with subterfuge and missing many critical details. AT&T does this despite never submitting any evidence to show the 3 withdrawn Tr8179 defenses were IMPLICIT to meet the substantial cause test.

While the issue is moot plaintiffs will not allow AT&T to put in the FCC record revised history.

AT&T again misstates the facts of the DC Court Order as a Remand claiming the DC Court reversed the case back to the FCC:

AT&T page 2

In October 2003, the Commission ruled that Section 2.1.8 did not apply to the proposed CCI/PSE transfer and thus did not prohibit it. **The D.C. Circuit reversed that ruling on appeal,** however, and held that Section 2.1.8 did apply to the proposed transfer. *See AT&T Corp. v. FCC*, 394 F.3d 933, 939 (D.C. Cir. 2005).

AT&T counsel ignores the fact that the scope of the 1996 referral was simply account movement—nothing at all regarding obligation allocation. All AT&T defenses (2.2.4, all obligations language, and force a conceded traffic only transfer be deemed a plan transfer to force the revenue and term commitments to transfer were all argued under Tr8179 and withdrawn on June 2, 1995.

Thus, as per the FCC 2003 Order none of the defenses modified the tariff (became part of the tariff) to assert. The Third Circuit referral explicitly indicated AT&T’s Tr8179 defenses were withdrawn.

The DC Court Order page 10 fn 1 and the FCC 2007 Order as petitioners’ previous submissions detailed indicated the DC Court corrected the FCC on the sole issue of whether 2.1.8 allowed traffic only transfers. [[1]](#footnote-1)

The DC Court Legal Director and staff and the FCC OGC and staff have not only stated the DC Court Order was a correction of the FCC but have supplied additional procedural ways (DC Court Docket Entry System and FCC Case Proceedings List) to evidence for NJFDC that DC Court Order did not remand/ reverse the FCC but simply corrected the FCC on the sole issue of whether 2.1.8 allowed accounts to move without the plan (i.e. a traffic only transfer).

AT&T page 3

In February 2016, Petitioners again moved to lift the stay. They claimed that they had advised Commission staff of the District Court’s mandamus suggestion, and that staff had told them to review a January 12, 2007 procedural order entered in this proceeding. Br. Supp. Pls.’ Mot. to Lift Stay, at 5, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Feb. 26, 2016), ECF No. 188. Although that order **simply declined to expand the scope of the referral, Petitioners asserted that the order was a decision that the referral was moot.** *Id.* at 3-8.

The FCC 2007 Order was filed to address whether the June 1996 shortfall infliction issues would be addressed that occurred 18 month after the January 1995 traffic only transfers. The FCC’s Deena Shetler wrote the FCC 2007 Order and said she also took the opportunity to address the Judge Bassler 2006 Referral was moot as it did not expand the scope of the 1996 referral.

The FCC 2007 Order was explicit as to the scope of the 1996 referral and that the DC Court corrected the FCC.

FCC 2007 Order explicitly states the scope of the 1996 referral was whether 2.1.8 applied to **transfers of traffic alone. FCC also states it was corrected…not remanded ( reversed back to FCC)**

“Specifically, the Commission was asked to determine '''whether section 2.1.8 [of AT&T's Tariff FCC No.2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.",6 In its *Order* 011 *Primary Jurisdiction Referral****,* the FCC initially concluded that section 2.1.8 did not apply to transfers oftraffic alone.'** The United States Court of Appeals for the District of Columbia Circuit, however, **found that conclusion to be incorrect.**

FCC 2007 Order then explicitly states Judge Bassler’s June 2006 order does not expand the scope of the 1996 issue previously presented. FCC advised the NJFDC that the answers to the moot 2006 referral have already been briefed.

FCC2007 Order:

As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the **Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to terminate a controversy or remove uncertainty**. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to assist the referring court by resolving issues arising under the Act. That is our goal here. **The district court's June 2006 order does not expand the scope of the issue previously presented.** Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No.2, a matter already **extensively briefed by the parties**."

AT&T page 5:

Moreover, the Commission’s ex parte rules do not require disclosure of statements made by *Commission staff* at an ex parte presentation. The rules expressly recognize that, in permit-but-disclose proceedings, ex parte presentations (*i.e.*, substantive merits communications) can be made either “to *or from* Commission decision-making personnel . . . , provided that *ex parte* presentations *to* Commission decision-making personnel are disclosed pursuant to paragraph (b) of this section.” *Id.* § 1.1206(a) (1st and 3rd emphases added). Thus, the disclosure requirements apply only to ex parte presentations *to* Commission decision-makers by others, not communications *from* the Commission or its staff. AT&T therefore could not have violated these rules by failing to disclose what, if anything, Commission staff said at the ex parte meetings.

The FCC Exparte rules ask to “summarize all data presented and **arguments** made during the oral ex parte presentation that means both sides. An argument indicates the FCC’s staffs position needed to be disclosed as an argument. The ex parte rules also required more than a couple sentences as AT&T’s 3 ex parte notices provided.

Definition of an ar·gu·ment

1.

**An exchange of diverging or opposite views**, typically a heated or angry one.

AT&T’s definition of argument ignores it is an exchange of diverging or opposite views. AT&T only summarized its side of the argument and not the FCC’s staff side.

EX PARTE RULES:

(b) The following disclosure requirements apply to ex parte presentations in permit but disclose proceedings:

1. Oral presentations.  A person who makes an oral ex parte presentation subject to this section shall submit to the Commission’s Secretary a memorandum that lists all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, **and summarizes all data presented and arguments made during the oral ex parte presentation.  [[2]](#footnote-2)** Memoranda must contain a summary of the substance of the ex parte presentation and **not merely a listing of the subjects discussed**.  **[[3]](#footnote-3)** More than a one or two sentence description of the views and arguments presented is generally required.  **[[4]](#footnote-4)**

AT&T page 6

Notwithstanding Petitioners’ fixation on the subject, the question of whether the D.C. Circuit remanded the case to the Commission **is irrelevant.** Judge Bassler concluded that the D.C. Circuit **did *not* expressly remand the case to the Commission,** which is why he *ordered* Petitioners to initiate this proceeding “to resolve the issue of precisely which obligations should have been transferred under § 2.1.8 of Tariff No. 2.” Order Den. Pls.’ Mot. to Lift Stay, at 2, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 31, 2006), ECF No.147. That issue is therefore properly before the Commission, as Judge Wigenton (twice) and Judge Chesler have confirmed. That reality cannot be altered by statements, if any, that Commission staff or personnel in the D.C. Circuit made about whether the D.C. Circuit itself remanded that issue to the Commission.

Judge Bassler simply erred in referring a question that did not expand the scope of the 1996 referral that was limited to account movement after AT&T’s Tr8179 defenses were withdrawn on June 2, 1995. The statements from Judge Wigenton and Judge Chesler are also not relevant as the DC Court Order and FCC 2007 Order concluded the 1996 issue on account movement was corrected by the DC Court. The case is not a remand and there were no open issues to resolve on account movement. The one issue that the FCC needed to interpret on account movement under 2.1.8 was incorrect and corrected by DC Court. No open issues. No remand. By Supreme Court Law the stay must be lifted, and the case goes to damages.

AT&T’s position to the DC Court as evidence by AT&T’s briefs to the DC Court and at Oral Argument agreed with petitioners on obligation allocation under 2.1.8. The FCC as per the Administrative Procedures Act only addresses controversies and uncertainties between the parties. There were no controversies and uncertainties between the parties as to the terms and conditions of 2.1.8. The parties agreed that only when the plan transfers do the revenue and term commitment transfer. AT&T asserted defenses it withdrew on June 2, 1995 regarding being able to deem the conceded traffic only transfer should be a plan transfer. As Judge Chesler pointed out **AT&T can’t assert defenses that are not a part of the tariff**, as AT&T did with the new customer security deposits it requested of CCI on the Inga to CCI plan transfer.

Petitioners traffic only transfer imposed no stipulation or condition upon AT&T as per obligation allocation. Petitioners January 1995 Orders simply requested traffic only transfers. The DC Court corrected the FCC and determined 2.1.8 allows traffic only transfers. Therefore, whatever the obligation allocation was the orders were willing to adhere to the tariff, thus any question about obligation allocation is also moot from that standpoint.

Below the DC Court corrects the FCC on the sole reviewable issue of account movement:

DC pg.8: “Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass **transfers of traffic alone.**”

DC pg.10: “As the foregoing discussion indicates, **we find** the Commission’s interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and **not just transfers of entire plans.**

AT&T page 6 FN 3:

Petitioners also claim that AT&T counsel are being “monitored by FCC Ethics [and] State Bar Ethics,” *July 10th* *Submission*, at 28, but AT&T is aware of no active ethics investigations.

AT&T is aware. AT&T has received copies of the FCC Ethics Director Patrick Carney emails to FCC case managers, and State Bar Ethics Counsels. The FCC emails indicated in March 2017 right after the FCC removed the moot Judge Bassler Referral from circulation in January 2017 that the FCC Ethics Director would be “happy to assist” the State Bar Ethics staffs. The FCC Ethics Director explained that the FCC had jurisdiction issues and could not address AT&T’s misrepresentations to the NJFDC.

AT&T page 6 FN 3:

Mr. Inga filed complaints with the NewJersey State Bar and the D.C. Circuit against numerous AT&T lawyers in 2014, but neither initiated proceedings.

Petitioners reply briefs to the NJFDC in June 2018 advised AT&T that it had not filed an ethics complaint with DC Circuit and yet AT&T again states it did. The filings with NJ occurred in 2017 not 2014 and AT&T has already been provided with the NJ State Bar letter of January 2018 stating it is waiting on the FCC Ethics and other State Bars. The FCC Ethics staff did not even receive final ethics brief until December 2017.

AT&T page 6 FN 3:

He also filed claims with Texas Bar Counsel in 2017, which concluded that he had failed to allege “a violation of the Texas Disciplinary Rules of Professional Conduct.” July 13, 2017 Letter from Tx. Bd. of Disciplinary Appeals to A. Inga (attached as Exhibit 21 in the Brown Certification, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 17, 2018), ECF No. 214-1).

Texas counsel Stephanie Pan found that AT&T’s general counsel David R. McAtee did engage in numerous ethics violations, but the ethics violations cited by petitioners were prior to the 4-year statute of limitations requirement. Petitioners appealed Ms. Pan’s 4-year limitation based upon continuing wrong doctrine but were denied. The Texas Bar appeal did not exonerate AT&T general counsel McAtee in any way for his ethical misconduct. This AT&T misrepresentation was also exposed in plaintiff’s June 2018 brief to the NJFDC yet AT&T continues the misrepresentation.

AT&T page 6 FN 3:

And Petitioners’ recent filings indicate that Commission staff have advised Inga that the agency lacks jurisdiction over his claims of alleged fraud before the District Court. *See July* *23rd Submission*, at 3, 13. In fact, Judge Chesler chastised Petitioners for referring to AT&T counsel “as liars, aspeople who have schemed, have engaged in fraud, and similar ad hominem types of attacks” and made clear that, in the future, such attacks “will not be tolerated.” Hr’g Tr. 8:7-8, :17-18 (June 6, 2018) (Ex. A).

Above AT&T is accurate that the FCC Ethics Director stated it did not have jurisdiction over AT&T’s ethical misconduct to the NJFDC. AT&T then misleads that Judge Chesler’s statements about calling AT&T counsel liars were “findings” of his Court that AT&T was not lying. Judge Chesler’s statement was only about plaintiff’s use of the harsh language. Plaintiffs will now refer to AT&T counsels as “big fibbers” as opposed to con artists, liars, etc.

AT&T page 6 FN 3:

Predictably, in their *July 23rd Submission*, Petitioners have turned their personal attacks on Judges and ethics officials, alleging bias byJudge Chesler, other Judges in the District Court of New Jersey, and personnel within the New Jersey and D.C. Bars.

AT&T does not address the specific business deals with Kevin P. Wigenton, and AT&T money paid, hiring done etc. AT&T does not comment on Jackie Chesler be awarded the real estate listing to AT&T $75 million corporate campus. AT&T does not comment on Jackie being presented with “the deal” as opposed to Jackie Chesler soliciting the AT&T listing.

AT&T does not comment on other online comments evidenced by plaintiffs of substantial bias that surround the recused Judge Wigenton, and Judge Chesler.

AT&T also does not comment on business deals with NJ Ethics William Ziff and its relationship with DC Bar Ethics Director Phil Fox. Nor does AT&T comment on DC Bar’s **Washington Lawyer** magazine advertisers claiming if you pay the advertising fees the DC Bar does not initiate ethics.

The fact that AT&T has not commented on its Business Dealings with former AT&T employee Kevin Wigenton and Jackie Chesler etc., substantiates even more the substantial concern of extreme bias of already recused Judge Wigenton and Judge Chesler’s recusal is on the horizon as more information is being gathered.

AT&T page 7

Similarly, Petitioners’ contention that the D.C. Circuit did not “reverse” the Commission’s 2003 decision and instead merely “corrected” it is plainly wrong. First, Petitioners are openly trying to re-litigate a (frivolous) claim that Judge Chesler rejected. At the June 6th hearing, Petitioners’ counsel claimed that “there was never a reversal of the FCC by the D.C. Circuit Court.” Hr’g Tr. 16:14-15 (June 6, 2018) (Ex. A). As noted, Judge Chesler rejected this argument as “patently incorrect” and a total mischaracterization of what the D.C. Circuit did. *Id*. 16:16-18.

It is not plainly wrong. The recused Judge Wigenton and Judge Chesler position that the FCC staff is simply lazy since 2005 in not interpreting the moot 2006 referral is what is plainly wrong.

Judges Wigenton and Judge Chesler purposely ignored the FCC 2003 Order which correctly defined the scope of the 1996 referral. Judges Wigenton and Judge Chesler purposely ignored the 2005 DC Court Order and purposely ignored the FCC 2007 Order stating DC Court corrected the sole issue of account movement that Judge Bassler’s referral did not expand the scope of the 1996 referral and was moot:

“The district court's June 2006 order does not expand the scope of the issue previously presented. Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T's Tariff No.2, a matter already extensively briefed by the parties."

AT&T page 7:

In its appeal of the 2003 Order, AT&T challenged the Commission’s conclusion that **Section 2.1.8 did not apply to the CCI/PSE transfer** as “arbitrary, capricious, and contrary to law.” Br. of Pet’r AT&T Corp., at 17, *AT&T Corp. v. FCC* , No. 03-1431 (D.C. Cir. June 30, 2004) (capitalization altered). **In granting AT&T’s petition for review**, the D.C. Circuit agreed, holding that the Commission had “clearly erred” because its interpretation was “implausible on its face”

AT&T is making plaintiffs point that the DC Court Order was “Petition for Review Granted”---a correction of the FCC on the issue of account movement. Any issues having to do with obligations were off the table when AT&T withdrew Tr8179 on June 2, 1995. The DC Court explicitly advised it corrected the FCC on the account movement issue and obligation issues were not part of the FCC interpretation.

DC Order explicitly states its findings 2.1.8 allows traffic only transfers as Inga did. DC Order explicitly states there were no obligation issues to review. The FCC did not need to address the obligation issues that by May 1995 Court Order were denied and by tariff law “never modified tariff,” never became “part of the tariff,” as all obligation issue were withdrawn 6.2.95.

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

Above the DC Court is explicitly advising that it can’t address obligation issues and that is simply because the FCC only needed to address account movement issue once all the Tr8179 defenses were FCC denied/AT&T withdrawn and never became part of the tariff.

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

Above the DC Court is explicitly advising obligations is “beyond the scope of our opinion” because the FCC only needed to interpret account movement not obligations, once all the Tr8179 defenses were FCC denied/AT&T withdrawn and never became part of the tariff.

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

Above the DC Court is again explicitly advising “We also do not decide precisely which obligations should have been transferred in this case,” because the FCC did not address it---and again that is simply because the FCC only needed to interpret account movement, not obligation allocation once all the Tr8179 defenses were FCC denied/AT&T withdrawn and never became part of the tariff.

The DC Court’s 2005 Order simply corrected the FCC on the sole issue of whether 2.1.8 allowed traffic only transfers. That is the only issue referred and even that was based upon the 1995 non-vacated Order. By the March 1996 Order AT&T’s counsel Meade 11.28.95 certification to Judge Politan and AT&T’s counsels January 1996 Oral argument concession by Frederick Whitmer to Judge Politan both conceded Tr8179 was FCC denied and Tr9229 was prospective and “as a matter of law” it could not prohibit the traffic only transfers and thus the injunction was issued.

**AT&T July 31, 2018 page 7**

As Judge Politan explained, AT&T submitted Transmittal 8179 “to make explicit the implicit right that AT&T believe[d] it has under Tariff F.C.C. No. 2 to stop” the CCI/PSE transfer. Opinion, *Combined Companies, Inc. v.* *AT&T Corp.*, at 12, Civ. No. 95-908 (D.N.J. May 19, 1995), ECF No. 32. Contrary toPetitioners’ simplistic view, **the fact that AT&T later withdrew Transmittal 8179 does not mean that AT&T withdrew its underlying Section 2.1.8 defense.** It meant that AT&T could not establish the validity of that defense by means of a clarifying amendment and instead would have to prove its validity based on an analysis of its text and purpose, which AT&T has done in this proceeding.

AT&T quotes from Judge Politan’s 1995 Order **ignoring** his non-vacated May 1995 Order determination that the **outcome of Tr8179 would resolve the issue** based upon AT&T’s March 1995 briefs. AT&T also failed to comment on AT&T’s counsels Meade and Whitmer concessions to Judge Politan that AT&T legally could not prohibit the traffic only transfers leading up to the 1996 injunction.

AT&T claims the fact that it withdrew Tr8179 does not mean that it withdrew its underlying Section 2.1.8 defense. AT&T’s withdrawal of Tr8179 means its defenses never became a part of the tariff to defend. As noted above Judge Chesler also agreed if the defenses are not part of the tariff they can’t be asserted.

AT&T’s position is absurd: “It meant that AT&T could not establish the validity of that defense by means of a clarifying amendment and instead would have to **prove its validity** based on an analysis of its text and purpose, which AT&T has done in this proceeding.”

AT&T had the opportunity to **PROVE ITS VALIDITY** when it filed Tr8179. The proof AT&T failed to provide was AT&T’s could not meet the substantial cause test. AT&T needed prove the February 16, 1995 filed Tr8179 defenses were **IMPLILCIT** in order to prohibit the January 1995 transactions. None of the defenses AT&T conjured up were ever used to prohibit a traffic only transfer and that is why AT&T has never submitted any transactional evidence.

The 3 Tr8179 defenses AT&T did submit all failed to meet substantial cause test. AT&T’s PROPOSED TR8179 LANGUAGE

“If a Customer seeks to transfer, to one or more other Customers, all or **substantially all** of the 800 numbers associated with an existing AT&T 800 Service Term Plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining 800 numbers associated with the term **plan** or Contract Tariff (based on the past 12 months of usage) would **not meet the usage and/or revenue commitment of the volume or term plan** or Contract Tariff, the transfer **will be deemed** a **transfer of the** associated volume or **term plan** or Contract Tariff, the transfer will be **deemed a transfer of the associated volume or term plan** or Contract Tariff to such other Customer(s), and may only be completed in accordance with this Section.

AT&T never provided evidence that the above language was implicit/routine to force a conceded traffic only transfer be **deemed a plan transfer** to force the revenue and term commitment to transfer. That defense takes the same position as plaintiffs that revenue and term commitments don’t transfer unless the plan transfers as Judge Tatel in DC Court understood. [[5]](#footnote-5)

Any FCC Ruling that the FCC should have agreed that at some number of accounts being transferred the plan must be transferred would be a prospective change. There obviously no language within 2.1.8 that would tell an AT&T customer that when it did a traffic only transfer it could only do X number of accounts or X percentage of volume. Thus, even if the DC Court believed the FCC should have considered language to limit the number or percentage of accounts such a change would obviously be prospective given the fact 2.1.8 explicitly states:

FCC 2003 Order page 6 fn 46

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

Section 2.1.8 allows any number of accounts to be transferred. Unfortunately, the FCC did not recognize this language. Additionally, the DC Court did not recognize the any number language as the DC Court got it right that 2.1.8 allows traffic only transfers but did not see that on its face:

DC Court page 7

**The Section on its face does not differentiate** between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS — the telephone service itself.

Given the fact that DC Court itself concedes it could not see any differentiation between a plan transfer and a traffic only transfer this determination means that not only by law wasn’t 2.1.8 explicit **it most certainly wasn’t implicit** that a plan transfer must be done when a certain number of accounts or percentage of accounts were transferred. Thus, any change in 2.1.8 that would allow AT&T to deem a traffic only transfer was a plan transfer would be prospective as DC Court itself saw no differentiation between transfers of entire plans and transfers of traffic and thus AT&T obviously would fail the substantial cause test and any FCC decision would be moot as to the January 1995 transfers.

The best AT&T could hope for ---especially with no transactional evidence to support its TOO MANY accounts were transferred defense is for prospective tariff modification. Even that FCC decision would necessitate additional factors as pointed out by the DC Court that the non-transferred plans were pre-June 17, 1994 grandfathered so as Judge Politan determined the obligations were illusory. Furthermore, the revenue and commitment was already met at the time of the traffic only transfer. AT&T itself stated the term commitment was not a factor as the plans were not being discontinued. All these factors would need to be addressed if the FCC were to decide how much is too much! Of course, in this case you also have the fact that AT&T conceded in 2016 that it availed itself of an unspecified illegal remedy in violation of 203(c) by totally shutting down 2.1.8 to all traffic only transfers--- no matter how much traffic was to be transferred. Thus, it was impossible to transfer less traffic to conform to whatever “AT&T deemed” was implicitly permissible. Then on top of that AT&T has stated that if the plans were transferred to PSE AT&T would have allowed PSE to move the traffic from the 28% to the 66% CT-516 plan---but plaintiffs would be forced to give up its plan which had **huge benefits!** The plans were grandfathered pre-June 17, 1994 plans and because the plans established plaintiffs as customers for years, AT&T could not insist upon new customer security deposits if plaintiffs had given up its plans to PSE and were left with no plans ---i.e. no AT&T customer status—i.e. a former AT&T customer. There were also signing bonuses and the ability to merge the plan with a new Contract Tariff. The plan itself had numerous benefits.

The DC Court’s position on which obligations transfer was beyond the scope of its opinion but noted that plaintiffs transferred all the obligations enumerated within 2.1.8. Even the DC Court saw no evidence of obligations for shortfall and term commitments within 2.1.8. An AT&T customer can’t be expected to transfer obligations not explicitly listed as DC Court understood and decided not to determine which obligations transfer as thankfully it stated that determination was beyond the scope of its opinion. The parties knew which obligations transferred as it did many traffic only transfers previously so it knew the terms and conditions of 2.1.8 and then Tr8179 and Tr9229 further explicitly evidenced revenue and term commitments only transfer when the whole plan transfers as DC Court Judge Tatel understood and agreed with plaintiffs and AT&T.

DC Court:

In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of “traffic.” As this was a threshold determination in the FCC’s order, **we do not reach the remaining issues addressed by the Commission and argued by the parties before us.** We also do not decide precisely which obligations should have been transferred in this case, as this question was neither addressed by the Commission nor adequately presented to us.**2** All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 service without assuming **any** obligations. The petition for review is granted.

**2** At oral argument, AT&T’s counsel repeatedly stated that Tariff No. 2 expressly required PSE to assume the volume commitments that form the heart of AT&T’s concern in this case. *See* Transcript of Oral Argument at 11, 13. In a motion submitted after the argument, however, the Inga companies note that **the only obligations enumerated by Section 2.1.8 are “outstanding indebtedness for the service” and “the unexpired portion of any applicable minimum payment period.”** Intervenors Motion to Clarify and Correct the Facts of the Record at 4. How this enumeration affects the requirement that new customers assume “*all* obligations of the former Customer” (emphasis added) is **beyond the scope of our opinion.**

As the FCC 2007 Order detailed the only issue the FCC need to interpret as per 2.1.8 was account movement—did 2.1.8 allow traffic only to transfer without the plan as all obligation allocation defenses were withdrawn June 2, 1995.

The DC Court corrected the FCC: In sum, the FCC clearly **erred** in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of “traffic.”

The DC Court explicitly stated **“we do not reach the remaining issues addressed by the Commission and argued by the parties before us.”**

Note the DC Court Order FN2 was due to Inga Companies evidence that the only 2 obligations listed within 2.1.8 were transferred. The other two obligations revenue and term commitment the parties agreed do not transfer on a traffic only transfer. The DC Court itself noted AT&T’s 2.2.4 fraudulent use defense **[[6]](#footnote-6)** which takes the position that the terms and conditions of 2.1.8 means the revenue and term commitments do not transfer.

Note the DC Court FN 2 footnote IS PRIOR TO the DC Court statement

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

1. The DC Court just had footnoted that the only two obligations enumerated (bad debt and minimum payment period) were indeed transferred by Inga and accepted by PSE. So obviously plaintiffs did not engage in a traffic only transfer in which there weren’t **ANY OBLIGATIONS** transferred as DC Court understood **all the obligations** listed were indeed transferred.
2. Additionally, when the DC Court refers to **“transfer the benefits”** as in account traffic--- not all **the benefits** transferred in the Inga case. This entire “benefits” issue is not even tariffed language was argued between the parties and the DC Court explicitly noted “we do not reach the remaining issues addressed by the Commission and **argued by the parties** before us.” As noted there are benefits for not transferring a plan. Not only pre-June 17, 1994 grandfathered plan but the ability to avoid new customer security deposits as owning the plan means you are NOT A **former** AT&T customer and remain an AT&T customer.

Below shows the “benefit” concept being argued and thus not within the DC Court reach” and Judge Roberts explicitly stated “ALL THE BENEFITS” were transferred and that is not what happened in this case as the key main billed account benefit did not transfer in agreement with AT&T counsel Fred Whitmer.

MR. BOURNE: The traffic would go to PSE, but CCI's obligations under its plan would not transfer. Neither would the benefits that AT&T owed to CCI under CCI's plan.

JUDGE ROBERTS: What benefits are those?

MR. BOURNE: Well, the plan has a whole set of reciprocal obligations. There are volume commitments. There --

JUDGE ROBERTS: I'm looking for a benefit.

MR. BOURNE: Well --

JUDGE ROBERTS: It seems to me that the benefit is that you provide the service, and the rest of it is burden, obligations, volume requirements, and so on. And so your argument, it seems to me, collapses **if all the benefits** are being transferred but the burdens are not.

MR. BOURNE: Well, the obligation of AT&T is to provide the service to --

JUDGE ROBERTS: Right.

MR. BOURNE: -- to the customer at the specified prices, the specified package of services that are contained within the plan. And PSE did not receive the rights that CCI had under the CSTP II plan, when the traffic, or would not have when the traffic was transferred. And the Commission viewed the transfer provision to apply when the transferee steps entirely into the shoes of the transferor, which couldn't happen when AT&T doesn't owe the obligations of the CSTP II plan to PSE.

Now, granted, it, in cases where the transferee has a plan that perhaps is considered better than the transferor ‑-

JUDGE GINSBURG: Such as 5.1.6.

MR. BOURNE: -- such as 5.1.6, the transferee would not want to assume the obligations associated with the transferor. But in other circumstances you can see, can imagine the transferor, the transferee viewing, getting the entire plan **as a benefit**, so.

Above the FCC Counsel Bourne correctly stated that there are benefits associated with the plan. In any event there was argument over benefits and NOT ALL BENEFITS transferred.

AT&T account management advised plaintiffs that as long as the home lead account (benefit) did not transfer the plan which was a huge grandfathered benefit and thus the parties agreed the revenue and time commitment did not transfer.

See AT&T counsel Fred Whitmer arguing AT&T’s fraudulent use defense noting that not all the DC Court referred “the benefits” did not all transfer. The traffic only transfer intentionally left the MAIN BILLED/ HOME/ LEAD ACCOUNT the main benefit) on the non-transferred plan as it was understood the revenue and time commitments stay with the non-transferred plan. AT&T Counsel Fred Whitmer made sure NJFDC Judge Politan understand this point when AT&T was asserting its fraudulent use defense: AT&T’s Whitmer 3/21/1995 cross examination of Mr. Inga:

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

Inga: **Yes**

1. Any FCC decision that put a “limit” on the number of or percentage of accounts that could transfer when 2.1.8 explicitly stated “any number” of accounts can transfer would be a prospective change.
2. Although it was outside the DC Court Review the position the DC Court position is taking is if ALL ACCOUNTS transferred (100%) and if 2 obligations listed ( bad debt and minimum payment period) were not being transferred then it would appear to violate 2.1.8. Inga agrees with DC Court that if a party tried to transfer **all accounts** and there were no benefits left and did not transfer any of the obligations it would violate 2.1.8. However, the non-disputed facts are Inga did not transfer all accounts as AT&T counsel noted, and the remaining plan had pre June 17, 1994 grandfathered status as FCC and DC Court understood,**[[7]](#footnote-7)** and did not need to meet new customer security deposits and the FCC understood there were benefits with the plan.
3. Obviously there is no EXPLICIT language within 2.1.8 that refers a certain percentage of traffic that could be transferred—let alone so called **implicit** language. An FCC change would need to assess many other factors (was the plan a pre June 17, 1994 plan, were the revenue commitments already met, could the reseller simply buy traffic at some point, could the plan be merged with another plan that had substantial overage revenue commitment, and many other factors. Obviously if AT&T “too many accounts transferred defense proposed and then withdrawn under Tr8179) had evidence AT&T would have presented it. So obviously AT&T’s withdrawn argument was not implicit or explicit to meet the substantial cause test and thus any change by law would be prospective and thus AT&T’s withdrawn too many accounts transferred defense as the FCC 2007 Order noted was outside the scope of the 1996 referral and is moot.
4. Furthermore, in *this* case if the “too many accounts were transferred” defense were actually within the 1996 referral scope –it was not----but if it was it would also be denied as AT&T conceded it used an unspecified remedy in violation of 203(c). AT&T conceded it totally shut down 2.1.8 to all traffic only transfers no matter how many accounts were going to be transferred. There was no way to transfer less accounts and there was no way to know per 2.1.8 how many less needed to be transferred---as 2.1.8 allowed “any number” of WATS accounts to transfer without the plan. If DC Court did not make the error by not seeing 2.1.8 did allow “on its face” traffic only transfers, and **any number** of accounts could transfer it would have understood this non-reviewable, moot issue.

DC Court page 7

**The Section on its face does not differentiate** between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS — the telephone service itself.

Judge John Roberts screwed up a non-reviewable issue. Failing to see in 2.1.8 the words ANY NUMBER caused him confusion but it didn’t matter. Judge Roberts did get the only issue that was reviewable per 2.1.8 correct:

In sum, the FCC clearly **erred**[[8]](#footnote-8) in ruling that Section 2.1.8 of AT&T Tariff FCC No. 2 does not apply to a transfer of “traffic.”

It is a non-disputed fact that the order forms show plaintiffs imposed **no condition or stipulation** upon AT&T as to which obligations transfer as all it did was simply ask for a traffic only transfer. Thus, it can’t possibly be held in violation of any 2.1.8 “obligation allocation” either explicit or implicit within 2.1.8. as plaintiffs were willing to do what was needed to get the 66% instead of 28%. So even if the tariff forced plaintiffs to transfer the plan that was loaded with benefits to PSE it would have done so and AT&T claimed it would provide the 66%---thus an FCC decision is also moot as AT&T would pay damages at 66% instead of 28% on $54.6 million in billing.

AT&T also included in its Tr8179 Substantial Cause Pleading the use of section 2.2.4 Fraudulent use to prohibit a traffic only transfer. AT&T not only could not meet the substantial cause test to prove that defense was implicit by providing evidence as that AT&T defense was unlawful under the tariff. Any rate or regulation that conditioned one tariff section must be referred to. Section 2.1.8 nor section 3.3.1Q bullet 4 were conditioned upon needing to meet fraudulent use under 2.2.4.

FCC 2003 Order page 10 FN 67:

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

The above 2.2.4 AT&T defense also takes the same position as plaintiffs that revenue and term commitments do not transfer on a traffic only transfer. That was the fundamental tariffed basis of AT&T’s 2.2.4 defense. AT&T claimed that because the revenue and term commitments do not transfer on a traffic only transfer AT&T was going to be denied collecting shortfall charges on the non-transferred plans as that plan needed to keep its tariffed revenue and term commitment. So there was no controversy or uncertainty between the parties as to which obligations transfer on a traffic only vs plan transfer.

AT&T reply brief to DC Circuit Court pg 9 explicitly detailed 2.2.8 allows traffic only transfers without the liabilities:

“Section 2.1.8 “addresses” the transfer of end-user traffic ***without*** the associated liabilities.” (no emphasis added)

AT&T explicitly advised DC: “all the obligations” vary depending on what is transferred:

Mr. Carpenter: Yes, but what it means to assume **all the obligations.** What obligations **apply** may vary **depending on what's transferred**. (11/12/04 DC Circuit pg.12 Line 22 )

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

AT&T's 1995 br. page 5 confirms obligations don’t transfer:

These charges are all **tariff obligations**, for which **CCI**, **not PSE** (which would have the revenue stream to satisfy such charges, would be obligated.

NJFDC March 1996 pg 17 fn 7 cites AT&T’s brief, answering Judge Bassler’s moot referral:

“Indeed, **AT&T's own counsel** focused the issue by indicating that the **tariffed** obligations “involved herein” are all tariffed obligations, for which **“CCI, not PSE”** would be obligated.

AT&T’s 3rd defense under Tr8179 was opposite the first two. AT&T claimed that the phrase “all obligations” meant all obligations transfer on a traffic only transfer ---which was opposite of the first 2 bogus defenses in which AT&T asserted the revenue and term commitments do not transfer. Of course, its not all obligations of the TRANFEROR—it is all obligations of the **FORMER** CUSTOMER. This defense also failed the Substantial Cause test as it was an intention big fib and of course never had any evidence submitted to meet substantial cause test to show the FCC that it was IMPLICT/ROUTINE.

So when AT&T asserts it has the right to assert non-tariffed defenses not only is that absurd but EVEN IF AT&T was able to: “instead would have to **prove its validity”** ----Can’t prove it’s validity as the substantial cause standard to achieve retroactive application of changes in tariff language can’t be met by AT&T.

AT&T counsel David Carpenter conceded to the Third Circuit during Oral argument on Pg. 43 that the FCC Rejected Tr8179 because none of the defenses under Tr8179 were implicit and the tariff could codify what 2.1.8 allegedly already meant despite AT&T providing zero evidence.

Carpenter stated:

“We thought the issue would be decided. The FCC asked us to withdraw the complaint because the FCC thought we had done **more in the tariff language than codify what the tariff already meant.**

Anyone reading 2.1.8 would never understand that revenue and term commitments had to be transferred on a traffic only transfer as these obligations -----as stated by the DC Court were not even enumerated within 2.1.8 ----yet alone mandated to be transferred. Also, there obviously was no language within 2.1.8 nor evidence submitted by AT&T that would have any AT&T customer believe that AT&T under 2.1.8 AT&T could force a conceded traffic only transfer be deemed a plan transfer at some number of accounts transferred based upon AT&T’s sole determination. Where in 2.1.8 does it say all this? Tariffs must by law be explicit or ruled against the maker (AT&T). **2.1.8 is not even explicit let alone implicit**. The FCC was absolutely correct that none of AT&T’s 3 Tr8179 defenses were not even tariffed, let alone implicit!!! Absolutely Tr8179 defenses did more than codify what the tariff already meant. AT&T’s 3 proposed Tr 8179 defenses would substantially change the tariff and thus must be prospective

The Third Circuit referral explicitly stated Tr8179 defenses were withdrawn and was based upon Judge Politan’s non-vacated May 1995 Order that determined the outcome of Tr8179 would determine the issue. AT&T counsels then concede to Judge Politan AT&T can’t “as a matter of law” prohibit the traffic only transfers. AT&T’s position in 1995 and 1996 was not if the FCC denies Tr8179 and AT&T withdraws it AT&T still gets to assert a defense that is not part of the tariff.

If AT&T believed it could still assert non-tariffed defenses it would not have unlawfully ordered the total shut down of 2.1.8 in June of 1995 to all traffic only transfers as stated by its counsel Charges Fash and processing manager Joyce Suek. As soon as all its Tr8179 defenses were FCC denied and withdrawn those defenses could not be asserted.

AT&T counsel Meade 11.28.95 certification to the NJFDC made it clear that AT&T would no longer assert its Tr8179 defenses.

Meade Certifies to NJFDC November 28 1995.

AT&T certifies it is giving up on Tr8179 defenses and developed **ALTERNATIVE** TARIFF LANGUAGE. Not AT&T will continue to assert withdrawn defenses as AT&T now claims.

MEADE CERTIFIES:

“I and others at AT&T had a number of discussions with the FCC concerning Transmittal No. 8179. In the course of those discussions we explored **alternative tariff language** that would address more directly the problem **(the separation of assets and liabilities)** that give rise to the initial filing without requiring a determination as to whether the parties to the transfer **intended** to avoid payment of charges.”

In particular we discussed **an alternative approach** by which AT&T's concern would be met by requiring a **deposit** (either in cash or by letter of credit) in the amount of the projected shortfall charge that would apply as a result of the location transfer. The FCC was receptive to this approach, **but noted that it would represent a significant change** from the pending filing and that it would be appropriate to make that change as a new transmittal, thereby providing interested parties with a new opportunity to state objections. The Commission asked that AT&T withdraw Transmittal 8179 and submit the **new approach** as a new filing.

The FOIA notes show **Tr8179 was denied by late February 1995 as AT&T was already making Tr9229 security deposit tariff revisions to be effective March 2, 1995 but refused to withdrawn** T8719 until June 2 1995 to delay the legal process.

AT&T counsel Meade certifies that while they were talking Tr8179 he was discussing the “alternative approach” the FCC’s Randolph Smith suggested: Tr9229 (security deposits against potential shortfall). Meade conceded that Tr9229 was not a Substantial Cause IMPLICIT Argument and the FOIA notes show Tr9229 security deposit language prior to Tr8179 being withdrawn.

Meade 11.28.95 certification continued to confirm Tr9229 was new and not already implicit with 2.1.8 and confirm that the plan liabilities do not transfer on a TRAFFIC ONLY transfer:

**“Over the summer**, AT&T discussed the **contemplated across- the- board tariff filing** with representatives of a reseller trade group, the Telecommunications Reseller Association ("TRA") which includes resellers that will be affected by and interested in this package. Revisions were made in response to the reseller input. The **contemplated changes** were discussed further with the FCC in August and September, and **further revisions made**. All of these revisions were circulated among the many affected product management groups within AT&T for approval. The time between the **withdrawal of Transmittal No. 8179 in June** and the filing of transmittal No. 9229 in October was a result of AT&T's desire to solicit and respond to input from resellers and the FCC, and the need to obtain approval from the many different product management groups affected by **the changes.**

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

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

Without addressing the question of intent to avoid shortfall as Tr8719 defenses would enable AT&T to do. AT&T clearly advised the NJFDC that AT&T was abandoning Tr8179 defenses in favor of the Tr9229 security deposits.

As plaintiffs have detailed the Tr8179 and Tr9229 defenses could **not co-exist** as Tr8179 enables AT&T to decide how much traffic it could be transferred---whereas Tr9229 the former customer of the traffic could transfer as much traffic as it wanted as long it posted security deposits against potential shortfall. Clearly AT&T was forced to abandon Tr8179 defenses in order to prospectively tariff Tr9229 security deposits.

AT&T counsel Whitmer in January 1996 made it clear AT&T

AT&T’s Whitmer: **“If** the Commission permits AT&T to go forward with this tariff submission, **as I think they will**, that in and of itself means that the practices that are set forth in the expanded---in the expanded submission are reasonable practices or lawful practices, as the Commission has worked with them and has permitted them to go into effect. That means, your Honor—I think by analogy perhaps more so than-- **than absolutely as a matter of law**---but I think the Court can take from that reaction of the Communication Commission to the new submission that AT&T was appropriate ---was acting appropriately under the Communications Act when it refused to recognize the fractionalized transfer.”

Page 20 Line 1

Whitmer: **It is pending, as I understand**

The Court: Pending. I have 324 cases pending here., Some are ripe and will be determined very promptly, like the jury trial I’m doing today. Others may not be reached for another year and half or two years. Where does this end? I recognize you have been tabbed as the expert in this area. We’ll get to you. (Remark addressed to Inga Counsel Charles Helein)

Whitmer: The answer to your question **I don’t think can be given with the kind of precision that you want.**

Wait to you read the rest of Freddie Whitmer’s scam job on Politan. Later in the oral argument after continued pressure from Politan…

(PAGE 28 -29) Line 25 **---(Below Whitmer is referring to the MEADE November 28, 1995 certification. Remember this January 23, 1996!**

WHITMER: **If you look at paragraph 15**

THE COURT” Paragraph 15?

Whitmer: You can look at everything obviously

THE COURT: You say look at paragraph 15. “On October 26, 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the CCI-PSE transfer---the segregation of assets (locations) from liabilities  (plan commitments) ---in the following manner…LONG PARAGRAPH HERE ……That’s it?

WHITMER: **Yes sir** ….

Freddie Whitmer finally gave up the **“TR 9229 is PENDING**” fraud.  Whitmer finally Whitmer pointed NJFDC Judge Politan to para 15 of the November 28, 1995 Meade certification. Whitmer **confirmed his knowledge that TR9229 is already in effect** on a prospective basis MONTHS EARLIER.

Politan later states that he had already circled that paragraph. Politan knew Freddie was scamming him and Politan was screwing around with Freddie Whitmer to see if Freddie would finally tell the truth and stop scamming his Court.

AT&T ‘s November 1, 1995 letter to Politan made no reference to AT&T still being able to assert Tr8179 defenses and claimed the outcome of Tr9229 (security deposits) would resolve the issue.

NJFDC Judge Politan March 1996 Decision Page 4-5

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

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

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

AT&T’s counsel on November 1, 1995 asserted that the “**the outcome of the Tariff Transmittal No. 9229 would establish that conclusion without question**,” but knew back in March 1995 that Tr8179 was dead and that the FCC advised Tr9229 would be prospective.

When AT&T wrote its November 1, 1995 letter to NJFDC Judge Politan it knew that it had just PROSPECTIVELY filed Tr9229 a week earlier on October 26, 1995 and knew it was prospective, yet AT&T was still scamming Judge Politan on November 1, 1995. AT&T continued the scam on NJFDC Judge Politan at Oral Argument on January 23, 1996 but by that time Judge Politan had understood AT&T played him for a fool for many months and issued the injunction.

AT&T’s 11.1.95 letter concedes the remaining hope is Tr9229 (security deposits against potential shortfall). AT&T conceded the 3 other defenses under Tr8179 were all denied by the FCC and thus AT&T withdrew TR8179.

After AT&T loses all defenses under Tr8179 and Tr9229 is conclusive that revenue and time commitments do not transfer on a traffic only transfer as AT&T adds security deposits against potential shortfall and Tr9229 is prospective only……. AT&T went from in March 1995 asserting the outcome of the Tariff Transmittal No. TR8179 would resolve the issue to November 1st 1995 “the outcome of the Tariff Transmittal No. TR9229 would establish that conclusion without question” to today AT&T has the right to assert defenses that were bogus, no-tariffed and which it certified to NJFDC that it abandoned and as a matter of law could not defend.

The only reason AT&T is going so far in this flagrant violation of Rule 11b for insisting upon a defense that is no longer tenable and without any evidentiary support is AT&T appears to have bought Judge Wigenton and now Judge Chesler.

Judges Wigenton and Chesler ignored the glaring fact that AT&T never submitted any transactional evidence. Even if the FCC and DC Court found that AT&T’s defenses were reasonable they could only go into effect prospectively. AT&T also does not address the fact that Judge Politan determined AT&T’s defenses had no merit as the plans were all pre-June 17, 1994 as the DC Court Judge Ginsburg and FCC counsel understood. [[9]](#footnote-9)

Judge Chesler Oral pg 23-24

25 **All these other things that were brought up by AT&T,**

1 such as **security,** those were all addressed because Judge

2 Politan ruled on that in -- **those were not part of the**

3 **tariff.**

Just as the security deposits requested by AT&T on CCI were not a part of the tariff neither were AT&T’s Tr8179 defenses. Judge Politan also ruled in the non-vacated May 1995 Order that the outcome of Tr8179 would resolve the case and AT&T conceded this in its March 1995 briefs to Judge Politan.

Just as new customer security deposits requested by AT&T on CCI were not a part of the tariff neither were AT&T’s Tr8179 defenses nor were Tr9229 deposits for shortfall and thus Tr9229 went into effect prospectively.

Tr8179 proposed the new customer had to assume the **entire PLAN** and the revenue and term commitments at AT&T’s subjective whim. Per FCC FOIA notes the FCC in February 1995 suggested security deposits against potential shortfall as a non-subjective solution. Tr9229 was mathematical formula. The former customer of the traffic would post security deposits against potential shortfall **on the remaining revenue commitment** because under 2.1.8 revenue commitments do not transfer on a traffic only transfer—only on plan transfers! Simple: Under TR9229 the security deposit compared the **tariffed remaining revenue commitment** to the **actual revenue remaining** on the plan, after accounts were transferred. Tr8179 and its replacement solution **Tr9229** **explicitly answered the moot question**—**revenue and term commitments only transfer when the PLAN TRANSFERS—not on traffic only transfers!**

Because security deposits were not a part of tariff 2.1.8 it went into effect prospectively. It did however again answer Judge Bassler’s moot question as to which obligations transfer on a traffic only transfer. TR9229….

**B.**  **Deposit For Shortfall Charges -**The Company will require a deposit from a Customer that meets each of the elements specified in 1. through 3., following, to be held as a guarantee for the payment of any charge that may be incurred as a result of a **failure to meet revenue or volume commitments** or monitoring conditions **(Shortfall Charge)** under an AT&T Pricing Plan (a term plan, flex plan, or other discount plan with **revenue or volume commitments** offered under this Tariff, or a Contract Tariff under which WATS is provided). **(C)**The Customer has requested that AT&T **remove specified locations** or telephone numbers from the Pricing Plan, and the total annualized charges or usage from the locations or telephone numbers **that would remain under the** Pricing Plan are less than 50% (during the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), **of any currently applicable commitment under** **the Pricing Plan.**

There was no controversy or uncertainty between the parties as to which obligations transfer on a traffic only transfer vs plan transfer and Tr9229 tariff further confirmed the parties position.

**AT&T July 31, 2018 page 8:**

Indeed, Petitioners’ contrary claim is refuted by Judge Politan’s actions. Displeased by AT&T’s withdrawal of the transmittal, he decided to grant “interim relief *pending the FCC’s* *resolution of th[e] issue*” he had previously referred, and he entered an injunction in March 1996based on a prediction about how he expected *the Commission* would interpret the tariff. Letter Opinion, at 7, 15-16, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. Mar. 5, 1996), ECF No. 54 (emphasis added). That course of conduct makes no sense if, as Petitioners now claim, AT&T’s withdrawal of Transmittal 8179 in 1995 effectively withdrew its Section 2.1.8 defense. If that had been the case, Judge Politan would have simply rescinded his prior order referring the Section 2.1.8 issue, as the issue would have been entirely moot.

The only issue Judge Politan was concerned about was whether 2.1.8 allowed traffic only transfers. Judge Politan did not care about AT&T’s assertions that AT&T was going to be deprived of collecting shortfalls on the non-transferred plans. Judge Politan made a judgement call that these Tr8179 defenses had no merit.

The non-vacated 1995 Decision understood obligations don’t transfer but plans were immune:

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

Judge Politan: “In answer to the court’s questions at the hearing in this matter, **Mr. Inga** set forth certain methods for restructuring or refinancing by which resellers can and do **escape termination and also shortfall charges** through renegotiating their plans with AT&T.” **May 1995 pg. 2**

All 3 AT&T FCC denied defenses were as Judge Politan put it: “premised on the danger of shortfalls.” AT&T **never substantiated** the merit to raise its FCC denied defenses anyway.

Judge Politan: “**Commitments and shortfalls** are little more than **illusionary concepts** in the reseller industry—concepts which constantly undergo renegotiation and restructuring. Theonly “tangible” concern at this juncture is the service AT&T provides. **The Court is satisfied** that such services and their costs are protected. To the extent however that AT&T’s demand for fifteen million dollars’ security **is premised on the danger of shortfalls,** the Court finds that threat neither pivotal to the instant injunction **nor properly substantiated by AT&T**. March 1996 pg.19 para 1)

Judge Politan: “The Court finds **nothing** in the Tariff F.C.C. No. 2 which prevents fractionalization, and contemplates a like finding by the F.C.C. Cleary, therefore, plaintiffs have established a strong likelihood of success on the merits. **March 1996 Pg. 16 para 1.**

When the FCC denied all 3 AT&T’s defenses under Tr8179 and AT&T withdrew it on June 2, 1995 there were no obligation allocation defenses left as Tr9229 (security deposits against potential shortfall) was only prospective. The only question Judge Politan had was very simply did 2.1.8 allow traffic only transfers.

Oral Argument November 15th 1995:

The Court: **I have a simple question.** Whether you can split the thing in two pieces. **That is all the question I had.** I mean, you know.

Mr La Fiura: I understand

**AT&T’s Tr8179 obligation defenses were of no concern to Judge Politan.** The NJFDC 1995/1996 fact-based “judgement call” was AT&T **didn’t have merit** to speculate on the dangers of shortfall on the non-transferred plans revenue commitment.

NJFDC found no merit, so FCC needed to falsely presume AT&T had merit to raise its defenses!

FCC FOIA NOTES:

“Two things to keep in mind about this one. First **it indicates intent to** and that is a **judgment call** which would have to be decided in a complaint case if the matter came up. What AT&T seems to propose in **new provisions** might well go beyond this situation in that **‘it does not even take intent into account but assumes it is there.** Mr Smith FCC FOIA Notes February1995.

FCC 2003 Order pg 8 para 11 stated FCC “assumed” merit as it doesn’t decide judgement calls:

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

FCC/DC doesn’t decide merit. NJFDC decided it: “danger of shortfalls not substantiated!” “the Court finds nothing,” the Court is satisfied,” “do escape termination and also shortfall charges.”

DC Oral Pg. 27 Line 2 understood customer plan obligations don’t transfer and understood why Judge Poloitan determined AT&T’s Tr8179 defenses had no merit.

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

FCC 2003 Order pg. 2 para 1 stated the plans were pre-June 17 1994 ordered and thus immune:

**“Prior to June 17, 1994,** the Inga Companies completed and signed AT&T’s “Network Services Commitment Form” for WATS under AT&T’s Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T’s regular tariffed rates.”

**AT&T July 31, 2018 PAGE 8**

The Commission likewise did not rule that withdrawal of Transmittal 8179 withdrew AT&T’s Section 2.1.8 defense. To the contrary, the Commission recognized that the defense was before it and it rejected that defense, albeit on the mistaken view that Section 2.1.8 did not apply to the proposed CCI/PSE transfer at all.

More AT&T subterfuge. The FCC 2003 Order only needed to address section 2.2.4 fraudulent use as to tariff section 3.3.1Q bullet 4 (delete accounts from 28% plan and Add to 66% plan) not per 2.1.8. Section 2.2.4 Fraudulent use was argued under Tr8179 and the FCC noted in its 2003 Order that Tr8179 was withdrawn on June 2, 1995. The FCC did not need to interpret 2.2.4 in reference to the section 2.1.8 traffic only transfer, as the FCC only had to address 2.1.8 in regard to whether it allowed traffic only transfers.

AT&T misrepresents that because the FCC 2003 Order denied 2.2.4 it was addressing a Tr8179 defense. It was addressing 2.2.4 as Tr8179 only addressed the 2.1.8 transaction not the 3.3.1Q Bullet 4 option of moving accounts without the plan. The FCC was very explicit in 2003 as to the fact that it was only addressing account movement under 2.1.8. FCC 2003 Order page 11 addressing AT&T’s Tr8179 Defenses withdrawn on June 2, 1995:

“After AT&T refused to permit petitioners to move the traffic, it filed Transmittal 8179 with the Commission in February 1995, which sought to amend Tariff No. 2.  The district court’s May 1995 primary jurisdiction referral to the Commission was based, **in part,** upon AT&T’s contention that the Commission’s consideration of Transmittal No. 8179 would clarify whether CCI was entitled, under the tariff, to **move the traffic without the plans to PSE. (FCC FN 73)** According to the record, however, **AT&T ultimately withdrew Transmittal 8179 on June 2, 1995.[[10]](#footnote-10)[**2]  **Thus, Transmittal 8179 never became effective.”**

The FCC 2003 Order notes the referral on 2.1.8 was based IN PART upon Tr8179. The part the FCC needed to interpret after AT&T’s 3 Tr8179 defenses were withdrawn was only account movement.

**FCC 2003 Order FN 73:***“See First District Court Opinion* at 12, 16-17; *Second District Court Opinion* at 3-4, 13; *see also* Petition at 14-16 & n.7 (**quoting AT&T’s Brief filed in 1995** with the district court **(“Transmittal 8179 … make[s] explicit AT&T’s implicit rights under the tariff.  Accordingly, the proceeding in the FCC will resolve that issue ….”).**  The district court found that *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031 (10th Cir. 1993), was persuasive authority on one of the factors relevant to the primary jurisdiction referral:  whether a decision by the court prior to an Commission response to a petition pending before that agency might result in conflicting decisions.  *See First District Court Opinion* at 14 n.10; *see also* Petition at 14-15 n.7 (quoting AT&T’s Brief filed in 1995 with the district court).  A tariff transmittal, however, is a different kind of administrative filing than the petition for declaratory ruling, *see Mical*, 1 F.3d at 1037, that was at issue in the *Mical* case.  As we discuss in Section III.C, below, a tariff transmittal is **a carrier-initiated document** which, if not withdrawn or deferred by the carrier, or suspended or rejected by the Commission, becomes effective, *i.e.*, modifies the tariff, within a certain number of days from the transmittal filing date.  *See* 47 U.S.C. § 203(a), (b); 47 C.F.R. § 61.58(a), (b).  Until the transmittal becomes “effective” **it is not part of the tariff.**  In the interim, the carrier has the power to defer the effective date of a particular transmittal, file an amended version of it, or, as AT&T did in this matter, **withdraw it.”**

**AT&T took the chance of initiating Tr8179 at the FCC and lost.** The only issue the FCC in 2003 was obligated to interpret as to 2.1.8 was simply whether accounts could move without the plan.

**Only ACCOUNT MOVEMENT Under 2.1.8 of the tariff was the issue per 2.1.8 not obligation issues:**

FCC Order pg14 ¶ 21: “We conclude that **section 2.1.8** of AT&T’s Tariff did not address and therefore did not preclude or otherwise govern **the movement** of end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case.”

The FCC did not have to interpret any of the 3 Tr8179 defenses as per the 2.1.8. traffic only transfer as those defenses per 2.1.8 were withdrawn.

The FCC 2007 Order also made is explicit that the scope of the 1996 referral was account movement… transfers of traffic alone…. Not any of the denied and withdrawn Tr8179 per 2.1.8 needed to be addressed as they were all withdrawn…

FCC 2007 Order….

“Specifically, the Commission was asked to determine '''whether **section 2.1.8** [of AT&T's Tariff FCC No.2] permits an aggregator to **transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction**.",6 In its *Order* 011 *Primary Jurisdiction Referral****,* the FCC initially concluded that** **section 2.1.8 did not apply to transfers oftraffic alone.'** The United States Court of Appeals for the District of Columbia Circuit, however, **found that conclusion to be incorrect.**

The evidence is overwhelming the Commission reviewed the Third Circuit Referral which also stressed AT&T withdrawal Transmittal 8179 and thus the scope of the 1996 referral was simply as the FCC 2003 and 2007 Orders stated ---whether section 2.1.8 applied to transfers of traffic alone.

FCC 2007 Order then explicitly states Judge Bassler’s June 2006 order does not expand the scope of the 1996 issue previously presented. FCC advised the NJFDC that the answers to the moot 2006 referral have already been briefed.

FCC2007 Order:

As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the **Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to terminate a controversy or remove uncertainty**. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to assist the referring court by resolving issues arising under the Act. That is our goal here. **The district court's June 2006 order does not expand the scope of the issue previously presented.** Rather, we have been asked to interpret the scope of **section 2.1.8** of AT&T's Tariff No.2, a matter already **extensively briefed by the parties**."

AT&T’s position is that the DC Court Order (page 10 fn1) that explicitly states it corrected the FCC and obligations were beyond the scope of its opinion and the FCC 2007 Order that it was corrected on the sole issue are all wrong. The DC Legal Director and all staff and FCC OGC and all staff all assert the DC Court Order was Petition for Review Granted correction of the FCC.

Yet AT&T incredibly claims the DC Court Order is a remand (reversed back to the FCC in 2005) and for 13 years the FCC staff are all lazy in refusing to interpret the moot 2006 Judge Bassler referral that “did not expand the scope of the 1996 referral.”

**AT&T July 31, 2018 Page 8:**

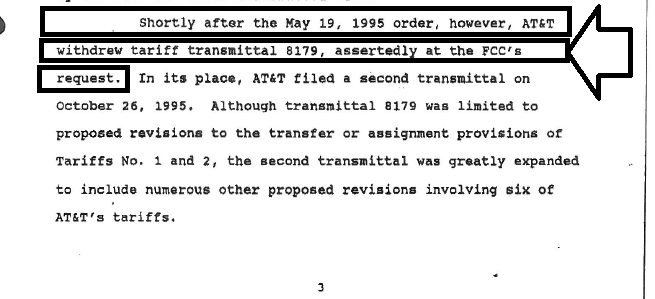
Nor did the D.C. Circuit conclude that the meaning of Section 2.1.8’s “all obligations” language was beyond the scope of the court’s opinion “because the FCC only needed to interpret account movement not obligations, once all the Tr8179 defenses were FCC denied/AT&T withdrawn.” *July 10th Submission*, at 7. As Judge Chesler pointed out, the D.C. Circuit declined to address the meaning of this language because the Commission’s conclusion that Section 2.1.8 did not apply to the proposed CCI/PSE transfer made the resolution of that issue “irrelevant.”

D.C. Circuit declined to address which obligations transfer on a traffic only vs plan transfer because as it stated the only reviewable issue was account movement. DC Circuit did not review **what was not before it** per section 2.1.8. AT&T’s 3 Tr8179 defenses did not need to be reviewed.

DC only needed to review what was referred by the Third Circuit and interpreted by the FCC and only that by law is DC reviewable—which was simply as the FCC 2007 Order states is whether **section 2.1.8 applied to transfers oftraffic alone.**

The Third Circuit explicitly stated Tr8179 was withdrawn and thus none of the 3 defenses per section 2.1.8 needed to be interpreted by the FCC. Third Circuit May 31, 1996 Referralstates on page 3 that AT&T’s FCC Tr8179 pleading, which AT&T conceded encompassed all 3 defenses was withdrawn:

“Shortly after the May 19, 1995 Order, however, AT&T withdrew tariff transmittal 8179, assertedly at the FCC's request.”



As Judge Chesler pointed out pg 23-24 defenses must be a **part of the tariff** to assert:

25 **All these other things that were brought up by AT&T,**

1 such as **security,** those were all addressed because Judge

2 Politan ruled on that in -- **those were not part of the**

3 **tariff.**

Just as the security deposits requested by AT&T on CCI as a new AT&T customer were **not a part of the tariff** neither were AT&T’s Tr8179 defenses per section 2.1.8.

Judge Politan ruled in the non-vacated May 1995 Order that the outcome of Tr8179 would resolve these AT&T defenses. AT&T conceded this in its March 1995 briefs to Judge Politan and so did Meade in November 1995 and Whitmer in January 1996. AT&T cannot violate the non-vacated May 1995 NJFDC Order and assert defenses that the NJFDC determined could not be asserted.

**AT&T July 31, 2018 Pages 8-9:**

In sum, the issue referred by the District Court regarding the meaning of **Section 2.1.8** still needs to be addressed and resolved by the Commission. Accordingly, the Commission should focus its attention on resolving that issue and disregard Petitioners’ continuing efforts to avoid resolution of that issue.

The DC Court Order was as the FCC 2007 Order states ---simply a Petition for Review Granted ---a correction of the FCC on the sole issue referred by the Third Circuit of whether 2.1.8 allowed transfers of traffic alone.

1. By COURT ORDER: AT&T cannot violate the non-vacated May 1995 Court Order that vacated the Tr8179 defenses.
2. BY COMMUNICATIONS ACT: As FCC 2003 Order states …AT&T cannot assert defenses that were withdrawn and thus never modified the tariff ---never became part of the tariff.
3. Even if obligations were asked to be FCC interpreted by the NJFDC in 2006 that issue still does not meet FCC APA standards. The FCC as per the APA can only address controversies and uncertainties that the parties do not agree as per the terms and conditions of 2.1.8. The evidence clearly shows AT&T and Plaintiff’s interpretation per 2.1.8 was exactly the same: Revenue and term commitments only transfer when the plan transfers.
4. AT&T can’t meet the Substantive Cause Pleading IMPLICIT requirement per its 2.1.8 defenses in any event to achieve retroactive application of its February 1995 FCC filing to apply it to the January 1995 traffic only transfer. The FCC has already properly determined in February 1995 that 2.1.8 contained no language of any of the 3 AT&T Tr8179 defenses----nor did AT&T submit any transactional evidence to the FCC to prove its 3 Tr8179 defenses were within the terms and conditions of 2.1.8 were implicit.
5. It is obvious AT&T abandoned Tr8179 defenses on June 2, 1995, as at that same time AT&T took the incredible step of totally shutting down 2.1.8 to all traffic only transfers. AT&T’s Joyce Suek advised in June 1995 that AT&T NO LONGER will do partial Transfer of Service (TSAs) that it must be for the whole plan. AT&T would not have intentionally violated its tariff if it believed it could still assert non-tariffed defenses that had no evidentiary support.
6. Tr8179 and Tr9229 terms and conditions can’t coexist so Tr8179 had to be abandoned.
7. Plaintiff’s simply asked for a traffic only transfer. Plaintiffs orders **did not impose any condition or stipulation** upon AT&T as per obligations or altering 2.1.8’s terms and conditions in any way. Plaintiffs simply asked for a traffic only transfer under section 2.1.8 and AT&T was thus simply mandated as per 2.1.8 (c) to deny in writing the order within 15 days or process it. Thus, the Judge Bassler 2006 referral is also moot in that respect.
8. When the DC Court determined 2.1.8 allowed traffic only transfers it **de facto** resolved the moot obligation allocation question that the parties agreed upon. AT&T and Plaintiffs position was there is no option within 2.1.8 that gives the customer the option of transferring revenue and term commitments on a traffic only transfer. As per AT&T’s fraudulent use defense the revenue and term commitments must stay with the non-transferred plans no matter how much traffic is transferred. Thus, when DC Court determined 2.1.8 allowed traffic only transfers it de facto resolved the obligation allocation answer even though DC Court chose not to review which obligations transfer.
9. DC Court Legal Director Martha Tomich advised plaintiffs that the only issue the DC Court resolved was the only one it could and that was whether accounts can move without the plan under 2.1.8. All other issues regarding obligations were not DC Court reviewable. Tomich advised plaintiffs that if AT&T had an issue with the DC Court Order it was incumbent upon AT&T to have appealed. The DC Court Order is not a remand.

**Per Supreme Court Law The Stay Should be Lifted—and Proceed to Damages**

The Supreme Court has a two-part test for identifying a final agency action.  "First, the action must mark the consummation of the agency's decision-making process -- it must not be of a merely tentative or interlocutory nature.  And second, the action must be one by which 'rights or obligations have been determined' or from which ‘Legal consequences flow.'" Bennett v. Spear, 520 U.S. 154, 177-78, 117 S.Ct. 1154, 137 L.Ed. 2d 281 (1997) (citations omitted).  See also, Abbott Labs., 387 U.S. at 148-49, 87 S.Ct. 1507 (observing that the "problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration").  The FCC consummated its action referred by Third Circuit. That final agency action was ripe for review under the Administrative Procedure Act (APA) 5. U.S.C. s. 704, See Top Choice Distribs., Inc. v. United States Postal Serv., 138 F.3d 463, 466 (2d Cir. 1998).  The DC Circuit agreed with plaintiffs that § 2.1.8 also allows traffic only transfers—not just the FCC’s (delete and add method), but that still makes it a **final action**. The FCC’s 1.12.07 Order accepted DC’s determination that 2.1.8 also allowed traffic only to transfers. **The proceeding was over**.  By law it can only have been continued if:

(1) DC issued a **remand. The DC Court staff has explicitly advised that the DC Court Docket Entry system indicates the case was a FCC correction –not a remand. The FCC staff has advised that its case proceedings list must state it is a remand if it is a remand. It is not a remand (reverse back to FCC)** DC Legal Director Tomich stated and FCC GC Schlick emailed plaintiffs that DC Decision was **no remand.**

1. the FCC voluntarily addressed it; or
2. a party filed for a clarification.

**None of these things happened.** DC simply determined 2.1.8 traffic only transfers are permissible. All AT&T 2.1.8 defenses were under Tr8179 and FCC denied/AT&T withdrawn on June 2, 1995 under Tr8179. Per Supreme Court Law the stay must be lifted by the NJFDC.

A recusal will be sent to Judge Chesler after additional feedback from investigators. More than sufficient evidence has already been collected and AT&T is not defending its business deals with NJFDC Judges families and the many comments of extreme bias. AT&T is not commenting on State Bar Ethics business deals and relationships with NJ Office of Attorney Ethics and DC Bar Counsel.

The lack of AT&T defending these business deals and elaborating how Jackie Chesler was given the AT&T multimillion dollar commission to list AT&T’s property makes the Judge Chesler recusal motion even more conclusive.

The next NJFDC Judge hopefully will address the 2007 FCC Order as both Judge Wigenton and Judge Chesler ignored it.

The FCC 2003 Order explicitly stated the account movement is the scope of the 1996 referral and the FCC 2007 Order is explicit as to the scope was account movement under 2.1.8 and that DC Court corrected the FCC. No remand.

The FCC 2007 Order is explicit that the scope of the 1996 referral was simply did 2.1.8 allow traffic only transfers. There was never a controversy between the parties regarding the terms and conditions of section 2.1.8 regarding which obligations transfer. AT&T agreed with Inga Companies to the DC Court that 2.1.8 allowed traffic only transfers and the revenue and term commitments do not transfer unless the plan transfers. Tr8179 filing recognized 2.1.8 allowed traffic only transfers. AT&T’s Tr8179 FCC denied defense was simply based upon “how many accounts could transfer.” Section 2.1.8 allowed any number of accounts to transfer.

Judge Bassler’s referral on precisely which obligations transfer was not a controversy or uncertainty to meet APA standards. Judge Bassler’s “any other open issues” referral is also moot as once the DC Court corrected the FCC on the sole issue of whether 2.1.8 allowed traffic only transfers all issued were resolved and thus there weren’t any other “open issues.” Once AT&T withdrew its 3 defenses these were no longer tariffed defenses to assert. AT&T would need to meet the Substantive Cause Test to prove its defenses were implicit. With no transactional evidence of ever submitted of denying a traffic only transfer based upon (a) too much traffic was transferred (b) 2.2.4 fraudulent use –suspecting shortfall on the non-transferred plan (c) the “all obligations” language in 2.1.8 in which AT&T intentionally changed the word” “former” to misled the FCC--------none of these AT&T defenses could possibly meet the arduous substantive cause test. That is why AT&T’s counsels conceded the defenses did more than codify and as a matter of law it can’t prohibit plaintiffs’ transfers.

Understanding it could not rely upon its 3 bogus defenses AT&T went ahead and advised the Minnesota AT&T order processing center in June 1995 to deny all traffic only transfers—no matter how many accounts were being proposed to transfer. AT&T of course did this unspecified remedy in violation of 203(c) in June 1995 as soon as it withdrew Tr8179 in June 1995.

The FCC 2007 Order correctly determined Judge Bassler 2006 referral “did not expand the scope of the 1996 referral” which was resolved with the DC Correction of the FCC.

There is nothing for the FCC to decide about the 1996 referral. The case is over, and plaintiffs really won the case in 1995 when the FCC denied AT&T’s 3 defenses and AT&T withdrew them and conceded the FCC did more than codify what the tariff meant.

Plaintiffs will be addressing the fact that the recused Judge Wigenton and soon to be recused Judge Chesler intentionally ignored the FCC 2007 Order as they knew the case was over and plaintiffs won the case.

It appears AT&T’s business deals with these Judges has caused their Courts **not to address explicit FCC 2007 Order language** and make-believe AT&T still has defenses that were withdrawn and make believe AT&T has evidence and make believe AT&T never conceded to Judge Politan that it can’t rely upon any of its Tr8179 defenses.

These Judges completely ignored the fact that Judge Politan already determined AT&T’s defenses had no merit.

These Judges ignored the fact that AT&T lied to the DC Court that it met 2.1.8 (c) requirement, to deny in writing within 15 days the January 13, 1995 CCI to PSE and the January 13, 1995 Inga to PSE traffic only transfer. AT&T claimed it denied the transfer without submitting evidence to the DC Court as AT&T had no evidence of denying either of the transfers.

We expect the next NJFDC Judge will read the explicit FCC 2007 Order and will understand the only issue referred in 1996 was account movement and it was decided in plaintiffs favor and proceed to damages.

Al Inga President

Group Discounts, Inc.

1. DC Order: 10 FN 1, it states DC corrected FCC, not remanded:

   “The FCC contends that this entire line of argument — challenging the Commission’s interpretation as rendering Section 2.1.8 meaningless — is not properly before us, as AT&T did not first present it to the Commission in a petition for reconsideration. FCC Br. at 15 & 19. We disagree. The Communications Act precludes us from addressing only those issues upon which the Commission “has been afforded no opportunity to pass.” 47 U.S.C. § 405(a). **It does not prevent us from considering “whether the original question was correctly decided,”** MCI v. FCC, 10 F.3d 842, 845 (D.C. Cir. 1993), **or whether the FCC “relied on faulty logic**.” Nat’l Ass’n for Better Broadcasting v. FCC, 830 F.2d 270, 275 (D.C. Cir. 1987). The analysis recounted above speaks to the soundness of the Commission’s ruling on the question initially presented, and not to any novel legal or factual claims.” [↑](#footnote-ref-1)
2. AT&T’s summary does not come close to what ex parte requirements mandate. AT&T simply provided its position that Judge Basslers 2006 referral had merit to be FCC interpreted and never summarized what the FCC’s staffs position was on why the 2006 referral did not expand the scope of the 1996 referral on account movement. [↑](#footnote-ref-2)
3. AT&T did what the FCC Rules explicitly state it could not do----it could not merely list subjects discussed. [↑](#footnote-ref-3)
4. AT&T provided no view of the “argument.” It provided its side only not the FCC staffs position. [↑](#footnote-ref-4)
5. D.C. Oral Argument Page 10

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

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

   AT&T in 1995 stated the commitments don’t transfer unless the **whole plan** transfers:

   When a customer **transfers the whole plan** under which it receives service, the transferee receives all of the transferor's individual accounts *and* also assumes obligations for usage as well as liability for existing or potential shortfall and termination charges on that plan. **EXH B pgs. 5-6**  [↑](#footnote-ref-5)
6. DC COURT PAGE 4-5 understood the revenue commitment does not transfer on a traffic only transfer and AT&T thus suspected shortfall penalties would occur for failure to meet the revenue commitment:

   In addition, AT&T argued that the proposed transfer violated the tariff’s “fraudulent use” provisions, as CCI almost certainly would fall short of **its volume commitments** once the traffic was moved to PSE’s account, and AT&T had reason to believe that CCI would not have sufficient assets to pay the resulting penalties. [↑](#footnote-ref-6)
7. DC Oral Pg. 27 Line 2 understood obligations do not transfer and the plan maintained the benefit of being grandfathered from shortfall and termination obligations:

   FCC Counsel MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on**. I mean, for instance **DC JUDGE GINSBURG**: **Whether they were grandfathered?**  FCC MR. BOURNE: **Right.** So, it could well be that there were little or **no shortfall charges**. [↑](#footnote-ref-7)
8. The FCC **erred** and the DC Court corrected the FCC. 1996 referral was resolved in favor of plaintiffs. No remand. No reverse back to FCC. The only reviewable issue sent to the FCC by the Third Circuit was interpreted by the FCC and the DC Court corrected the FCC. Simple. [↑](#footnote-ref-8)
9. DC Oral Pg. 27 Line 2:

   FCC Counsel MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this that the Commission didn't rule on**. I mean, for instance **DC JUDGE GINSBURG**: **Whether they were grandfathered?**  FCC MR. BOURNE: **Right.** So, it could well be that there were little or **no shortfall charges**. [↑](#footnote-ref-9)
10. [2]  *Second District Court Opinion* at 4. [↑](#footnote-ref-10)