Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
JOINT PETITION FOR EXPEDITED CONSIDERATION OF THE JOINT PETITION FOR DECLARATORY RULING ON THE ASSIGNMENT OF ACCOUNTS (TRAFFIC) WITHOUT THE ASSOCIATED CSTP II PLANS UNDER AT&T TARIFF F.C.C. NO. 2	)	
	)	
ON REFERRAL BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT	)	
	)	
COMBINED COMPANIES, INC. and WINBACK & CONSERVE PROGRAM, INC. ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. 800 DISCOUNTS, INC.,	)	
	)	
Petitioners,	)	
	)	
and	)	
	)	
AT&T CORP.	)	
	)	
Respondent.	)	
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COMMENTS OF AT&T CORP. IN OPPOSITION TO
JOINT PETITION FOR DECLARATORY RULING AND
JOINT MOTION FOR EXPEDITED CONSIDERATION

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SUMMARY

This Joint Petition for Declaratory Ruling is Petitioners' effort to seek rulings on the issue referred to the Commission by the United States District Court, District of New Jersey. The issue to be resolved by the Commission on this referral is the following:

> Could AT&T refuse Petitioners' request to transfer the traffic but not the Customer Specific Term Plans to which that traffic was associated under AT&T's Tariff F.C.C. No. 2, Section 2.1.8, until AT&T was satisfied that the transfer was not designed to avoid the payment of shortfall and termination charges in violation of the antifraud provisions of the applicable tariff, including AT&T's Tariff F.C.C. No. 2, Section 2.2.4?

Because the Commission must make findings of fact (including on questions of intent and fraud) to resolve this issue, the issue referred to the Commission by the federal district court cannot be resolved in the context of a Petition for Declaratory Ruling; it must be resolved in the context of a complaint proceeding or other adjudication.

Petitioners avoid the fraud issue in their Joint Petition for Declaratory Ruling, both in their recitation of the facts and in their articulation of the rulings the Commission should issue. Those rulings are phrased in terms of whether or not Section 2.1.8 "or any other provision of AT&T's Tariff F.C.C. No. 2" prohibited the transfer. But the referral was broader; the Court's referral was not only to the interpretation of the relevant tariff provisions of AT&T's Tariff F.C.C. No. 2 but to their application to the factual circumstances of this case as well.

Notwithstanding the existence of disputed facts which precludes the declaratory rulings requested in the Joint Petition, the Commission should issue a declaratory ruling on the specific issue identified in its Public Notice; i.e., whether

"pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary." No factual issues surround this question. The express language of the relevant tariff provision, AT&T Tariff F.C.C. No. 2, Section 3.3.1.Q.4, exempting a "CSTP II Plan in effect prior to June 17, 1994," is clear: this section merely relieved customers of pre-June 17, 1994 CSTP II Plans from shortfall charges if they discontinued their pre-June 17, 1994 plan and concurrently entered into a new plan. The "new" plan did not retain any terms or conditions of the old plan, and in particular there is no language in the tariff to support any interpretation that the "new" plan retained the subscription date of the old plan for any purpose whatsoever. To the contrary, any "new" plan subscribed to concurrently with the cancellation of the pre-June 17, 1994 plan is not, by definition, a "CSTP II Plan in effect prior to June 17, 1994." This plain meaning of the tariff was endorsed by the very reseller community to whom (along with all other customers) it was to be applied.

AT&T thus supports the issuance of a Declaratory Ruling that shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.

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In the Matter of JOINT PETITION FOR EXPEDITED CONSIDERATION OF THE JOINT PETITION FOR DECLARATORY RULING ON THE ASSIGNMENT OF ACCOUNTS (TRAFFIC) WITHOUT THE ASSOCIATED CSTP II PLANS UNDER AT&T TARIFF F.C.C. NO. 2 ON REFERRAL BY THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT COMBINED COMPANIES, INC. and WINBACK & CONSERVE PROGRAM, INC. ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. 800 DISCOUNTS, INC., Petitioners, and AT&T CORP. Respondent.	)	
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COMMENTS OF AT&T CORP. IN OPPOSITION TO
JOINT PETITION FOR DECLARATORY RULING AND
JOINT MOTION FOR EXPEDITED CONSIDERATION

Pursuant to the Commission's Public Notice released July 26, 1996 and Section 1.415 of the Commission's Rules, 47 C.F. §1.415, Respondent AT&T Corp. ("AT&T") hereby submits its Comments in Opposition to (1) the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2 ("Joint Petition"); and (2) the Joint Motion for Expedited Consideration of the Joint Petition for Declaratory Ruling ("Joint Motion"), filed by Combined Companies, Inc., ("CCI") and four other companies owned by Alfonse G. Inga, ("Inga"), Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. (the five companies are collectively referred to herein as the "Petitioners").

AT&T opposes the Joint Petition for Declaratory Ruling because the material facts relevant to the requested rulings are disputed. A formal complaint

proceeding is the appropriate vehicle for pursuing these issues, since such proceedings allow for the discovery and development of facts.

Although the existence of disputed facts precludes the declaratory rulings requested in the Joint Petition, the Commission should issue a declaratory ruling on the specific issue identified in its Public Notice; i.e., whether "pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary." As to this issue, which does not require any findings as to disputed facts, the Commission should rule that shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.[1]

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[1] "Shortfall charges" refer to the tariffed charges assessed on customers, upon each anniversary date under a multi-year term plan such as CSTP II Plans, for the amount of revenue commitment to which the customer committed but failed to generate during that plan year. Thus, for example, if a customer commits under a three-year CSTP II Plan to generate $18 million, the customer is liable for $6 million upon the expiration of each year of the three-year term. If, by the end of the first year, the customer generates $5 million in revenue under the CSTP II Plan, the customer is liable for $1 million in shortfall charges for that year. Section 3.3.1.Q.3 of AT&T Tariff F.C.C. No. 2. "Termination liability" refers to payment of tariffed charges that apply if a term plan is discontinued before the expiration of the term. Section 3.3.1.Q.5 of AT&T Tariff F.C.C. No. 2. Payment of termination charges is not at issue here.

STATEMENT OF FACTS

A. Petitioners' Customer Specific Term Plan II Agreements

First Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc., all controlled by Alfonse G. Inga, entered into Customer Specific Term Plan II ("CTSP II") arrangements with AT&T for Wide Area Telephone Service ("WATS" or inbound "800" long distance service), all prior to June 17, 1994. Petitioners discontinued their pre-June 17, 1994 term plans without liability and concurrently subscribed to new term plans after June 17, 1994. It is these new term plans that are at issue in this proceeding.

B. The Transfer Requests

1. First Transfer Request (Four Inga companies to CCI)

The first transfer request, not at issue here, was made by the four Inga companies identified above on or about December 16, 1994. These four companies requested that AT&T permit the transfer of their nine CTSP II agreements to CCI, a new company with no assets. As to this transfer AT&T, consistent with its filed tariffs, initially demanded a security deposit from CCI, a company with no credit history which had just recently been formed. As shown below, this transfer was eventually effected without a deposit.

2. Second Transfer Request (CCI to PSE)

On or about January 13, 1995 CCI made a transfer request to AT&T -- ostensibly under Section 2.1.8 of AT&T's Tariff F.C.C. No. 2 -- that it be allowed to transfer all of the traffic (i.e., all locations subscribed under the CSTP II plans at issue),

but not the plans themselves[2] to Public Service Enterprises of Pennsylvania, Inc. ("PSE"). AT&T objected on the grounds that Section 2.1.8 did not authorize the transfer of a plan unless the transferee, in this case PSE, assumes the original customer's liability and that the location-only transfer violated the "fraudulent use" provisions of Section 2.2.4 of its tariff[3] because the transfer had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall and termination charges. The proposed transfer would have transferred the entire revenue stream to PSE without the corresponding obligations to pay any shortfall and termination charges under the CSTP II Plans. In this regard, Mr. Inga had previously specifically informed AT&T that he intended to leave AT&T with a substantial financial loss and no recourse, by isolating his liabilities in companies with no assets and then having these companies file for protection under the bankruptcy laws.

C. Procedural History

On February 25, 1995, Petitioners filed suit in the United States District Court for the District of New Jersey under, inter alia, Section 406 of the Communications Act (47 U.S.C. § 406) seeking preliminary injunctive relief. Petitioners characterized the following acts as denials of service in violation of the Act: (1) AT&T's

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2 This process has been identified by the misnomer "fractionalization" in the Joint Petition.

3 And Section 2.8.2 which permits AT&T to "take immediate action to temporarily suspend service" where a customer attempts to "circumvent [AT&T's] ability to charge for its services as specified in Section 2.2.4 (Fraudulent Use)."

refusal of the first transfer request (the four companies to CCI) without a security deposit; and (2) AT&T's refusal of the second transfer request (CCI to PSE) unless PSE assumed all of CCI's obligations under the relevant plans.

The Court ruled on Petitioner's request for preliminary injunctive relief by Order dated May 19, 1995 ("May 19, 1995 Order"). The court granted the preliminary injunction as to the first transfer because CCI had agreed to assume all of the obligations under the relevant CSTP II plans. That transfer has already been effectuated without the filing of a security deposit, and is not at issue in this proceeding.

As to the second transfer, the District Court denied plaintiff's request for relief. The Court held that the issue of whether AT&T's tariff "permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction," as applied to this case, where "AT&T believes these transfers are an effort by the principal of the Inga companies to evade annual commitments to AT&T in such manner as to escape liability for any shortfall and termination charges which might otherwise arise on those plans,"[4] should be referred to the FCC under the doctrine of primary jurisdiction. The referral was thus not only to the "interpretation" of Section 2.1.8, but to its "application" as well.[5] The court did not specify the manner in which plaintiffs were to seek an FCC decision on the issue While the parties, in their briefs, referred to the

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[4] May 19, 1995 Order at 12, n 9

[5] May 19, 1995 Order at 17, n 11

possibility that FCC proceedings on a recently filed proposed revision to AT&T's Tariffs F.C.C. Nos. 1 and 2 (AT&T Transmittal 8179) could relate to the issues raised by Petitioners' complaint, the District Court expressly held that the AT&T Transmittal 8179 proceeding "is of no moment to the instant determination."[6]

In all events, Petitioners did not respond to the May 19, 1995 Order by filing a complaint at the FCC. Instead, on July 27, 1995 Petitioners filed a motion for reconsideration in federal district court based on the FCC's "delay" in issuing a decision on the issue referred to it. Plaintiff's ascribed this delay to AT&T's withdrawal, at the FCC's request, of AT&T Transmittal No. 8179. In an opinion dated March 5, 1996, the District Court reversed its earlier decision and issued a preliminary injunction requiring AT&T to effect the second transfer pending the FCC's future decision on the lawfulness of the transfer. In doing so the District Court did not reverse -- indeed it reaffirmed -- its earlier holding that the dispositive questions underlying the second transfer were within the primary jurisdiction of the FCC.

On appeal, the Third Circuit Court of Appeals vacated the preliminary injunction, noting that "plaintiffs [Petitioners] had the opportunity to request the FCC to move forward. Instead, the plaintiffs' strategy was to return the issue to the district

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[6] May 19, 1995 Order at 17, n.11. AT&T Transmittal No. 8179 would have made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan" under circumstances where it would not be able to meet volume or term commitments unless the new customer agreed to assume all of the existing customer's obligations.

court rather than have it decided by the FCC." Third Circuit decision at 6 (appended as Exhibit A to the Joint Petition). The Third Circuit vacated the preliminary injunctive relief because that was "inconsistent with a neutral referral to the FCC, which is appropriate under the circumstances." Id. at 7. Petitioners then filed this Joint Petition and related Joint Motion for Expedited Consideration.

ARGUMENT

I. THE COMMISSION MAY NOT ISSUE THE REQUESTED DECLARATORY RULINGS BECAUSE MATERIAL ISSUES OF FACT EXIST AS TO EACH REQUESTED RULING

The primary jurisdiction referral was not on the narrow issues identified in the four requested rulings set out in Joint Petition for Declaratory Rulings:[7] whether or not Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, "or any other provision of AT&T's Tariff

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[7] The four requested rulings are: (1) "At the time of the attempted transfer . . . neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff F.C.C. No. 2" prohibited the transfer of the traffic without the transfer of the underlying plans or to require a deposit; (2) "Under standard tariffing law, principles, policies, and as required by the plain language of Section 203 of the Act, AT&T had no legal basis and could not have effectively tariffed any changes or additions to Section 2.1.8 or any other provisions of AT&T's Tariff F.C.C. No. 2, subsequent to January 1995, which could have substantially affected CCI's rights to assign the traffic under its CTSP II plans to PSE in January, 1995;" (3) "Since neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff F.C.C. No. 2" prohibited the transfer of the traffic without the transfer of the underlying plans, AT&T had no legal basis for doing so; and (4) "Refusal to accept such transfer" was in violation of Sections 201, 202 and 203 of the Act and Rule 61.54(j) of the Commission's Rules.

F.C.C. No. 2" prohibited the transfer of the traffic without the transfer of the underlying plans. As phrased by the District Court the referral was not only to the interpretation of Section 2.1.8 of AT&T's Tariff F.C.C. No. 2 (or any other provision of AT&T's Tariff F.C.C. No. 2) but to its "application" to the factual circumstances of this case: whether AT&T could refuse to authorize the transfer, under those sections of the tariff including Section 2.2.4, until AT&T was satisfied that the transfer was not designed to avoid shortfall payments in a scheme designed to defraud AT&T.[8]

Thus a ruling on the issues raised by the Joint Petition turns on resolving a critical issue of fact: whether AT&T could refuse the transfer under Section 2.1.8 of AT&T's Tariff F.C.C. No. 2 or "any other provision of AT&T's Tariff F.C.C. No. 2," because the purpose and effect of the transfer were to avoid the payment, in whole or in part, of tariffed shortfall and termination charges in violation of the antifraud provisions of Section 2.2.4 of AT&T's Tariff F.C.C. No. 2. Declaratory relief is inappropriate where, as here, material facts are disputed. Such fact-based disputes must be resolved through the Commission's complaint procedures so that the parties, through discovery, can have an opportunity to develop the factual record to resolve this dispute.

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[8] Requested Ruling numbers 1 and 3 also requested a ruling on the deposit requirement, which related to an earlier transfer between the four Inga companies and CCI. The District Court ruled on the deposit issue; this was not part of the primary jurisdiction referral.

A. The Commission Cannot Grant Declaratory Relief Where There Is A Material Issue Of Fact In Dispute

Declaratory relief under Section 1.2 of the Commission's Rules, 47 C.F.R. § 1.2, cannot be granted by the Commission "where, as in the present case, all relevant facts are not clearly developed and essentially undisputed." In the Matter of Cascade Utilities, 8 FCC Rcd 781, 782 (1993) citing to Aeronautical Radio, Inc., 5 FCC Rcd 2516 (Com. Car. Bur. 1990) and American Network, Inc., 4 FCC Rcd 550, 551 (Com. Car. Bur. 1989). Instead, fact-based disputes must be resolved through a complaint proceeding where the parties "through discovery, would have an opportunity to develop the factual record to resolve this dispute" Aeronautical Radio, Inc., supra, 5 FCC Rcd at 2518.

B. A Material Issue of Fact Exists As To Whether AT&T Had Reasonable Grounds For Believing That The Purpose And Effect Of The Transfer Were To Defraud AT&T

CCI ostensibly sought to transfer the traffic -- but not the plans themselves -- to PSE under Section 2.1.8 of AT&T's Tariff F.C.C. No. 2. Section 2.1.8.B states that a customer may transfer its WATS service (in this case the relevant WATS services are the CSTP II Plans) to a "new Customer" only if the new customer confirms in writing that it "agrees to assume all obligations of the former Customer at the time of transfer or assignment." This provision, by its terms, allows a transfer of CCI's service to PSE only if PSE agreed to assume all obligations under

those same plans. Yet CCI explicitly amended the transfer of services form to read "Traffic Only."[9] By expressly declaring that it did not intend to effectuate a transfer of all obligations under the plans to PSE, and by PSE expressly noting in its transmittal letter that "[t]his order is solely to move the locations associated with these plans and not intended to in any way discontinue the plans"[10] thereby declining to assume all obligations of the former Customer at the time of transfer, the proposed transfer, on its face, violated the terms of Section 2.1.8.

Furthermore, Section 2.2.4 of the same tariff prohibits customers from taking actions that constitute "[t]he fraudulent use of, or the intended or attempted fraudulent use of, WATS," and defines "fraudulent use to include:

> Using or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by:
>
> . . .
>
> 2. Using fraudulent means or devices, tricks, schemes . . . whether directed at the Company or others. . . ."[11]

In the proceedings in the District Court, AT&T proffered evidence clearly demonstrating the reasonableness of its belief that the transfer of the traffic but not the underlying plans was with the intent to avoid the payment of AT&T's tariffed shortfall and termination charges. As described in affidavits submitted by AT&T, the person

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9 Exhibit H to the Joint Petition.

10 Id.

11 Tariff F.C.C. No. 2, Section 2.8.2 also permits AT&T to suspend the customer's right to transfer service as part of such a scheme to defraud.

who owned and controlled Petitioners, Mr. Alfonse Inga, had repeatedly threatened to AT&T employees that he would isolate his companies' liabilities under the CSTP II plans in companies with no assets, have these shell companies file for bankruptcy, and thus leave AT&T with no recourse.[12] The proposed transfer to PSE, by separating the traffic which produced the revenue stream from the obligation to pay shortfall or termination charges, would have accomplished precisely what Inga had threatened. Under the terms of CCI's requested transfer, CCI would have remained the customer of record for the CSTP II Plans; but by transferring its revenue-producing accounts, CCI could render itself an assetless shell, unable to either fulfill its revenue commitments to AT&T or pay its shortfall or termination charges.

Petitioners assert in their Petition that this transfer of traffic (but not the CSTP II Plans) was part of CCI's "business plan" to provide its end users with lower rates pending completion of negotiations with AT&T for a contract tariff similar to Contract Tariff 516 subscribed to by PSE (to which the customer accounts were to be

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[12] Certifications of Joseph Fitzpatrick, ¶ 4 and Thomas Umholtz, ¶ 4 appended to AT&T's Brief in Opposition to Plaintiffs Motion for Temporary Restraining Order, Combined Companies Inc v AT&T Civ No 95-908 (NHP) (March 7, 1995) ("On many occasions, Mr. Inga had threatened that if he did not get his way with AT&T, or that AT&T did not submit to his demands or the demands of his companies, he would do everything he could to leave AT&T with a large commitment on which AT&T could not collect. Mr. Inga had also indicated that to accomplish this end, he would be willing to shut his companies down, and file for bankruptcy if that is what it took.")

transferred). Joint Petition at 11-12. However, this explanation does not stand up to scrutiny for two reasons.

First, the purpose articulated by Petitioners did not require the transfer of the traffic without the plans; it could have been accomplished merely by an agreement with PSE which could have been entered into even with a transfer of the underlying plans. There is thus no explanation for Petitioners' failure to transfer to PSE the entire plan (including the shortfall and termination obligations) other than the illicit desire to separate the plans' traffic from their liabilities and thereby to evade the shortfall or termination payments for which the Petitioners would otherwise be liable. The separation of the plans' assets (revenue stream) from their liabilities (volume commitments) could simply have no other purpose.

Second, Petitioners themselves could have ordered service under Contract Tariff 516 or any of a number of plans offering deeper discounts than their own CTSP II Plans. Petitioners did not avail themselves of these options because, under the terms of the tariff, had they directly subscribed to these different plans and moved their end users to them, Petitioners would have still incurred shortfall charges under their existing CSTP II Plans -- the very liability which they sought to circumvent here.

Precisely because the proposed CCI-to-PSE transaction was artificially structured to enable Petitioners to evade shortfall or termination liabilities, and because Inga had indicated this was his intent, it was reasonable for AT&T to conclude that the transfer of the traffic but not the plans to PSE was in furtherance of a scheme to

defraud. As a result, AT&T reasonably concluded that CCI's proposed transfer was (i) not authorized under the transfer provisions of AT&T's tariff (Section 2.1.8); and (ii) a violation of the antifraud provisions of the tariff (Section 2.2.4).

It is thus abundantly clear that disputed material issues of fact concerning Petitioners' intent to defraud AT&T are at the heart of all four legal issues which CCI is asking the Commission to resolve, and thus preclude a declaratory ruling. A complaint proceeding would provide Petitioners and AT&T, through discovery, an opportunity to develop these facts and thereby provide the Commission with a complete evidentiary record upon which it can resolve the issues raised by CCI. Accordingly, the Commission should not -- indeed cannot -- issue the four Declaratory Rulings identified in the Joint Petition on the basis of the record as its currently stands.

II. DECLARATORY RELIEF IS APPROPRIATE FOR THE "PRE-JUNE 17, 1994 PLAN SHORTFALL EXEMPTION" ISSUE

Despite the existence of material facts in dispute which render the issues identified in the Joint Petition inappropriate for declaratory ruling, Petitioners have identified an issue which is currently ripe for a declaratory ruling; i.e., whether "pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary."[13]

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[13] Petition for Declaratory Ruling at 12, n.3; Motion for Expedited Consideration at 2. AT&T does not concede that CCI's current term plans, subscribed to after June 17, 1994 (when CCI simultaneously discontinued plans initiated prior to

(footnote continued on next page)

No factual issues surround this question; it is clear from the express language of the relevant tariff, AT&T Tariff F.C.C. No. 2, Section 3.3.1.Q.4, that prorated shortfall charges do apply when a subscriber seeks to discontinue CSTP II plans entered into after June 17, 1994, including CSTP II plans that happen to have replaced pre-June 17, 1994 CSTP II plans that were discontinued without liability. AT&T thus supports the issuance of a Declaratory Ruling on this issue.

Petitioners assert that the transfers opposed by AT&T could not in all events evade shortfall charges because there is no possibility of such charges: "subsequent tariff changes notwithstanding, pre-June 17, 1994 CSTP II plans, as are involved here, may never have shortfall charges imposed, as long as the plans are restructured prior to each one year anniversary."[14] Petitioners' assertion is incorrect both under the plain meaning of the relevant tariff provision as well as the underlying intent of that tariff provision.

(footnote continued from previous page)

that date) are "pre-June 17, 1994 plans," and reserves its right to rebut that characterization in this or any other proceeding.

[14] Petition for Declaratory Ruling at 12, n.3; Motion for Expedited Consideration at 2. Petitioners also claim that "the shortfall charges now tariffed by AT&T are unreasonable" in violation of 47 U.S.C. § 201; that "such charges bear no relation whatsoever to AT&T's legitimate cost recover needs losses [sic] when commitments are not met; violate standard contractual law requiring mitigation and constitute an unconscionable windfall for AT&T." These claims have no place in a declaratory ruling proceeding because a tariff, once effective, is presumed lawful and can be challenged only in a complaint proceeding. Arizona Grocery v. Atchinson, T. & S.F.R. Co., 284 U.S. 370, 384 (1932).

The relevant tariff provisions[15] make it clear that shortfall charges may be imposed where, as here, CSTP II Plans that were entered into upon the concurrent discontinuance of a CSTP II Plan that was subscribed to prior to June 17, 1994 are discontinued or reach an anniversary date. Section 3.3.1.Q.4 of AT&T Tariff F.C.C. No. 2 allows for the discontinuance of a CTSP II plan without termination liability if two requirements are met. First, the Customer must (among other options not relevant here) replace its "existing" CSTP II plan with a "new" CSTP II Plan with a total revenue commitment at least equal to or exceeding the sum of the remaining revenue commitment of the plan "being cancelled." The second requirement is that the customer must pay a prorated shortfall charge. As to this second requirement (which is the only liability at issue in the instant Joint Petition and Joint Motion), there is one exception: "CSTP II Plans in effect on or prior to June 17, 1994" are not subject to such shortfall charges.[16]

The plain meaning of the tariff thus makes clear that a plan is exempt from shortfall charges only when it is "cancelled," at which time both the obligations of the customer (e.g., revenue commitments and shortfall penalties) and the obligations of

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15 The tariffs provisions cited herein are appended as Exhibit A.

16 The explicit exemption for pre-June 17, 1994 CSTP II Plans was permitted under a tariff revision accomplished by Special Application No. 1871, filed June 14, 1994, revising the then-pending AT&T Transmittal No. 6508, filed February 17, 1994. It is referred to herein as the "Grandfather Clause."

the carrier (e.g., particular discount levels) cease to be effective. The tariff also makes clear that a "new" plan must replace the old plan, with new terms and conditions to which both the customer and the carrier are bound. Accordingly, the Grandfather Clause merely relieved customers of pre-June 17, 1994 CSTP II Plans from the second "requirement" of shortfall charges when they discontinued their pre-June 17, 1994 plan and concurrently entered into a new plan; it did not retain any terms or conditions of the old plan, and in particular there is no language in the tariff to support any interpretation that the "new" plan retained the subscription date of the old plan for any purpose whatsoever. To the contrary, any "new" plan subscribed to concurrently with the cancellation of the pre-June 17, 1994 plan is not, by definition, a "CSTP II Plan in effect prior to June 17, 1994."

This construction of the plain meaning of the tariff is supported by the intent expressed by the affected parties when the Grandfather Clause took effect. The resellers themselves, who intervened in AT&T's tariff proceeding clarifying the application of shortfall charges as a condition of discontinuance without liability, argued for a grandfather clause that would exempt plans entered into before the effective date of AT&T's clarifications: "AT&T must, at a minimum . . . insert . . . a provision that limits the application of the new language to plans (not customers) executed after the effective date of the transmittal."[17] (emphasis added). Thus, they conceded that

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[17] PSE's Petition to Reject or Suspend and Investigate, In the Matter of AT&T Tariff F.C.C. No. 2, Transmittal No. 6508, filed Feb. 25, 1994, at 4-5; see also, GE

(footnote continued on next page)

shortfall charges could be imposed on those same customers for "those plans entered into after the effective date of the transmittal establishing the change" (emphasis in the original).[18] Another reseller argued for a "'Fresh Look' opportunity to terminate their CSTP II plan commitments without liability before the fundamental terms of those commitments are changed out from under them."[19] Consistent with these proposals, AT&T revised its pending tariff to include the Grandfather Clause[20] and the Commission allowed the tariff clarifications to take effect.[21] As there is no dispute that "new" plans are "entered into" after June 17, 1994, the Commission has ample basis to rule that only CSTP II Plans that were subscribed to prior to June 17, 1994 may be discontinued without shortfall liability, and not the "new" plans that were concurrently entered into after June 17, 1994 to replace those plans.

(footnote continued from previous page)

Capital Communications Services Corporation's Petition to Reject or Suspend and Investigate, In the Matter of AT&T Tariff F.C.C. No. 2, Transmittal No. 6508, filed Feb. 25, 1994, at 4-5. The petitions cited herein are attached as Exhibits B (PSE), C (GECCS) and D (Furst Group).

18 Id.

19 The Furst Group, Petition to Reject or Suspend and Investigate, In the Matter of AT&T Tariff F.C.C. No. 2, Transmittal No. 6508, filed Feb. 25, 1994, at 5.

20 Reply of American Telephone and Telegraph Company, In the Matter of AT&T Tariff F.C.C. No. 2, Transmittal No. 6508 filed Feb. 28, 1994, at 2.

21 Order, In the Matter of AT&T Tariff F.C.C. No. 2, Transmittal No. 6508, released June 17, 1994.

In light of the plain meaning of the tariff, which was endorsed by the very reseller community to whom (along with all other customers) it was to be applied, the Commission should rule that shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.

CONCLUSION

For the reasons set forth above, Petitioners' request for the four Declaratory Rulings set out in the Joint Petition should be denied, with instructions that Petitioners, if they wish to proceed, must do so through by formal complaint. The Commission should further issue a Declaratory Ruling that under AT&T Tariff F.C.C. No. 2, Section 3.3.1.Q.4, shortfall charges may be imposed where, as here, post-June 17, 1994 CSTP II replacement plans are discontinued or reach an anniversary date.

Respectfully submitted,

AT&T Corp.

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