Exhibit A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-5185

COMBINED CO., INC., a Florida Corporation; WINBACK AND CONSERVE PROGRAM, INC; ONE STOP FIN INC., 800 DISCOUNTS, INC., a New Jersey Corporation; and GROUP DISCOUNTS, INC.,

v.

AT&T CORPORATION, a New York Corporation, Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C.No. 95-cv-00908)

Present: Stapleton, Scirica and Weis, Circuit Judges

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel April 30, 1996.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered March 8, 1996, granting a preliminary injunction, be, and the same is hereby reversed and the parties are directed to proceed before the Federal Communications Commission in accordance with the opinion of this Court. Costs taxed against the appellees. All of the above in accordance with the opinion of this Court.

ATTEST:
P. Douglas Sisk
Clerk

Dated: May 31, 1996

NOT FOR PUBLICATION

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No. 96-5185

COMBINED CO., INC., a Florida Corporation; WINBACK AND CONSERVE PROGRAM, INC.; ONE STOP FIN INC., 800 DISCOUNTS, INC., a New Jersey Corporation; and GROUP DISCOUNTS, INC.,

Appellees

v.

AT&T CORPORATION, a New York Corporation,

Appellant

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D.C. No. 95-cv-00908)

Argued April 30, 1996

Before: STAPLETON, SCIRICA, and WEIS, Circuit Judges

Filed MAY 3 1 1996

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OPINION OF THE COURT

WEIS, Circuit Judge.

Plaintiffs are aggregators or re-sellers of defendant AT&T's "800" services. Because they produce a high volume of business, plaintiffs can obtain discounts for their plans from AT&T. In turn, plaintiffs resell the "800" services at a reduced rate to small businesses, the "end users." The litigation before us arises out of the plaintiffs' proposal to transfer their "traffic" to another aggregator, Public Service Enterprises of Pennsylvania, Inc. which enjoys even greater discounts than those available to plaintiffs. AT&T objected to the proposal because plaintiffs did not intend to transfer their potential liability for shortfall and termination charges, which form part of their contracts with AT&T.

The parties agree that the transfer would be governed by AT&T tariff FCC No. 2, § 2.1.8. The district court phrased the issue as "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction," a process the court termed "fractionalization."

On May 19, 1995, the district court directed that the issue be referred to the Federal Communications Commission. In its accompanying letter opinion, the court held that the matter fell within the primary jurisdiction of the FCC because the proper interpretation of the tariff was uniquely within the expertise and experience of the agency. Moreover, the court commented that "the proper application of administrative discretion to that issue will best protect against inconsistencies of outcome." The court was also "persuaded by the fact that this very issue is presently pending determination by the FCC" in tariff transmittal 8179.

Shortly after the May 19, 1995 order, however, AT&T withdrew tariff transmittal 8179, assertedly at the FCC's request. In its place, AT&T filed a second transmittal on October 26, 1995. Although transmittal 8179 was limited to proposed revisions to the transfer or assignment provisions of Tariffs No. 1 and 2, the second transmittal was greatly expanded to include numerous other proposed revisions involving six of AT&T's tariffs.

Plaintiffs then filed a motion in the district court for reconsideration of the May 1995 order on the ground that AT&T had thwarted the FCC's ability to determine the issue by dilatory tactics and by abuse of process counter to the intent of the district court's ruling. In response, AT&T pointed out that plaintiffs had not taken any steps to have the FCC proceed on their claims.

Agreeing with plaintiffs, the district court granted a preliminary injunction directing that until the FCC acted on the issue, AT&T was to grant the plaintiffs' request to transfer traffic without the accompanying liability for shortfall and termination charges. In a letter opinion accompanying the order of March 5, 1996, the court explained that at AT&T's behest, the court had refrained from deciding the fractionalization issue and instead referred it to the FCC. However, as the court saw it, AT&T had obfuscated the issue and thus prejudiced plaintiffs by delaying determination of the question by the FCC. Asserting that it did not intend "to invade the FCC's area of expertise," the court nevertheless stated that it found nothing in tariff No. 2 that prevented fractionalization, and that "a reasonable construction of the Tariff by a lay person would undoubtedly permit" the practice. Rounding out its preliminary injunction analysis, the court concluded that plaintiffs had suffered damage because their "revenue base and customer base have been gravely eroded" and that plaintiffs "had established a strong likelihood

of success on the merits." The court ordered that a mandatory injunction be issued against AT&T.

In MCI Commun. Corp. v. AT&T, 496 F.2d 214, 220 (3d Cir. 1974), we discussed the doctrine of primary jurisdiction. Citing Far East Conference v. United States, 342 U.S. 570, 574 (1952), we summarized that "primary jurisdiction has been developed by courts in order to avoid conflict between the courts and an administrative agency arising from either the court's lack of expertise with the subject matter of the agency's regulation or from contradictory rulings by the agency and the court." See also Nader v. Allegheny Airlines, 426 U.S. 290, 303-04 (1976).

In the MCI case, the FCC had already taken steps that had a bearing on the issue plaintiffs presented to the district court. We reversed a preliminary injunction granted by the district court. In our opinion, we pointed out that the matter came within the doctrine of primary jurisdiction and the actions of the district court created a potential for inconsistent rulings. We conclude that MCI is controlling in the case at hand.

The district court here relied on language in our opinion in Richman Bros. Records, Inc. v. U.S. Sprint Commun. Co., 953 F.2d 1431, 1448 (3d Cir. 1991), to support its decision to issue a mandatory injunction. In Richman, we noted that if an agency does not undertake proceedings to resolve an issue the court has referred within a reasonable time, the petitioner may seek help from the district court. We do not take issue with the

proposition cited in Richman, but we hold that it does not apply in this litigation at the present stage.

Here, the district court acknowledged that its May 1995 order did not designate the respective responsibility of the two parties to assume the laboring oar in the FCC proceeding. It is our understanding that either party was free to bring the issue to the attention of the agency. After AT&T withdrew its tariff No. 8179 from FCC consideration in the spring of 1995, plaintiffs could have filed a complaint with the FCC to secure a resolution of the issue. Indeed, plaintiffs were free at that point also to request emergency relief from the agency. See United States v. Southwestern Bell Cable Co., 392 U.S. 157, 180 (1968); 47 U.S.C. § 154(i). Instead, plaintiffs chose to engage in a correspondence campaign with AT&T, to which the district court was a party, over a period of months.

Although AT&T's actions may have caused delay in the agency action, plaintiffs had the opportunity to request the FCC to move forward. Instead, the plaintiffs' strategy was to return the issue to the district court rather than have it decided by the FCC. Plaintiffs are sophisticated litigants and, judging from the professional standing of their counsel, were fully aware of the opportunity to press for a decision by the FCC.

We can well understand the district court's feeling that AT&T had engaged in tactics to delay a resolution by the FCC. The record provides adequate basis for such an impression and we do not condone AT&T's maneuverings. In keeping with its

earlier representations to the district court about the desirability of a ruling by the FCC, we would have expected AT&T to promptly ask the agency for a declaratory ruling on the fractionalization issue despite the withdrawal of tariff No. 8179. However, we conclude that other more significant factors counsel against undue reliance on that conduct here.

Having correctly referred the question to the FCC under the doctrine of primary jurisdiction, the district court should have insisted that the parties take the proper steps to proceed expeditiously in that forum. Application of the doctrine rests on considerations of policy in the important communications field and a substantial public interest in securing an agency ruling on the matter in dispute.

The potential for inconsistent rulings is clearly revealed here where the district court concluded that plaintiffs had shown a strong likelihood of success on the merits. That indication of the court's views on the matter is inconsistent with a neutral referral to the FCC, which is appropriate under the circumstances. See Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade, 412 U.S. 800, 821 (1973).

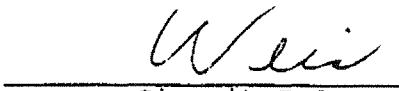
Moreover, as we have noted, the parties did not take any steps to bring the matter promptly to the attention of the FCC and have not provided us with sufficient justification to explain their inaction.

Consequently, we conclude that the issuance of the preliminary injunction in this case was inconsistent with the

proper exercise of discretion of the district court. The order granting the preliminary injunction will be reversed and the parties directed to proceed before the FCC in accordance with this Opinion.

TO THE CLERK:

Please file the foregoing Opinion.



Circuit Judge

Exhibit B

AT&T Corp. ("AT&T") respectfully submits this brief in opposition to the motion of Plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. (collectively, "the Inga Companies") to vacate the stay in this matter.

PRELIMINARY STATEMENT

This Court previously stayed this matter pending final decision of the technical issues of tariff interpretation and federal communications policy that had been referred to the Federal Communications Commission ("FCC") (and to the court of appeals that reviews FCC determinations, the D.C. Circuit). Contrary to the Inga Companies' assertion, these proceedings have not been completed. Although the D.C. Circuit has rejected the primary claim of the Inga Companies and has strongly suggested that their remaining theories are meritless, the D.C. Circuit did not finally resolve these remaining issues, but remanded them to the FCC. In this regard, the Inga Companies are now expressly asking this Court to rule on a series of technical tariff claims that the Inga Companies previously raised before the FCC (and the D.C. Circuit) but that these tribunals have yet to definitively resolve. This is improper, and the motion to vacate the stay should be denied.

As explained more fully below, the threshold issue in this case is whether AT&T violated its tariffs when it refused to grant the earlier request of Combined Companies Inc. ("CCI") to transfer to Public Service Enterprises of Pennsylvania ("PSE") all the revenue generating "traffic" on certain long distance calling plans *without* also transferring the volume commitments that would give rise to "shortfall" or "termination" liabilities if the traffic volumes were not maintained. Judge Politan previously held that this issue is within the primary jurisdiction of the FCC, and the Third Circuit held that the FCC has primary jurisdiction over all related issues as well. Proceedings here were then stayed pending a final decision on these issues.

Exhibit C

AT&T initial brief to DC Circuit

5. As noted above, on May 19, 1995, the District Court ordered AT&T to accept the first transfer of the nine CSTP II plans in their entirety from the Inga Companies to CCI, and that transfer was accepted and is not at issue in this case. *Id.* at ¶¶ 3, 5; *First District Court Opinion.* The District Court did not rule on the lawfulness of the second proposed transfer of the service (without the liabilities) from CCI to PSE, holding that the tariff interpretation issues required to determine whether that transfer was lawful under the tariff were within the primary jurisdiction of the FCC. *Id.*[9]

On July 15, 1996, CCI and the Inga Companies filed a petition for declaratory ruling with the FCC. *Declaratory Ruling* ¶ 7; Petition for Declaratory Ruling (JA ____). AT&T filed comments in opposition to the petition on August 26, 1996, and the petitioners filed reply comments on September 23, 1996. *Declaratory Ruling* ¶ 7. In addition, in response to a request from the FCC staff for further comments on two issues, additional comments were filed by the parties on April 2, 2003, and April 15, 2003. *Id.*

5. The FCC's Declaratory Ruling. The FCC released its *Declaratory Ruling* on October 17, 2003. The FCC first addressed the question of whether the "Transfer or Assignment" provision in Section 2.1.8 of AT&T's tariff permitted a reseller/aggregator to transfer "the traffic" under a CSTP II plan to a new customer without also transferring the associated obligations to the new customer. The FCC agreed that Section 2.1.8 governed the

[9] When no party brought those primary jurisdiction issues to the FCC, CCI and the Inga Companies moved in the District Court for reconsideration, and the court on March 5, 1996, entered a preliminary injunction directing AT&T to recognize the proposed partial transfer from CCI to PSE pending a determination by the FCC on the tariff interpretation issues. *See Declaratory Ruling* ¶ 6; Letter Order, *Combined Companies, Inc. v. AT&T Corp.*, Civil Action No. 95-908 (D.N.J. filed March 5, 1996) ("*Second District Court Opinion*"), Exhibit F to Petition for Declaratory Ruling (JA____). However, on May 31, 1996, that injunction was vacated by the Court of Appeals for the Third Circuit as inconsistent with the primary jurisdiction referral, and the parties were again ordered to submit the tariff interpretation issues to the FCC. *Declaratory Ruling* ¶ 6; *Combined Companies, Inc. v. AT&T Corp.*, Case No. 96-5185 (3d Cir. May 31, 1996) ("*Third Circuit Opinion*"), Exhibit A to Petition for Declaratory Ruling (JA____).

Exhibit D

AT&T DC Circuit Reply Brief

> 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.' 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' 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." *Id.* (footnotes omitted).

This paragraph makes the precise point that AT&T raised in its petitioner's brief.

The FCC's Brief seeks to muddle matters further by also accusing AT&T of making a "brand new argument" on appeal. In particular, the FCC asserts that AT&T is now for the first time making the "textual claim" that the phase "including the associated telephone numbers" is "controlling." FCC Br. 18. This is doubly wrong.

First, it would be irrelevant even if AT&T were now arguing that this language in the tariff were dispositive. This language is in the tariff; it was quoted by AT&T below, and the FCC plainly had the opportunity to consider this language in the context of rejecting ***AT&T's claim*** that Section 2.1.8 "addresses" the transfer of end-user traffic ***without*** the associated liabilities.[3] AT&T is entitled to make claims on appeal that merely "ask whether the original question was decided correctly by the agency." *Time Warner*, 144 F.3d at 80.

Second, AT&T has never contended that the "including . . ." clause is itself "controlling." Rather, AT&T agrees with the FCC insofar as it suggests that this language merely confirms that

[3] Indeed, the law is clear that the legal rights of a carrier and its customers must be measured exclusively by the terms of the carrier's filed tariff and the terms of the filed tariff cannot be disregarded by the agency under any circumstances. *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126-27 (1990) ("[t]he legal rights of shipper as against carrier . . . are measured by the published tariff," and "[d]eviation from [the tariff] is not permitted upon any pretext"), quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922), and *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *AT&T v. Central Office Telephone Co.*, 524 U.S. 214, 221-23 (1998).