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FOUNDED 1866

September 30, 2016

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

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

AT&T Corp. (“AT&T”) submits this letter in response to submissions made in the above-captioned docket by One Stop Financial, Inc., Group Discounts, Inc., Winback & Conserve Program, Inc., and 800 Discounts, Inc., (*i.e.*, the Inga companies) (hereinafter “Petitioners”) and 800 Services, Inc. (“800 Services”), as well as the numerous additional emails submitted by Mr. Alfonse Inga, President of the Petitioners.¹

I. INTRODUCTION

In its September 1 comments, AT&T explained why it would be arbitrary, capricious and an abuse of discretion for the Commission to address the new questions posed, much less to resolve any of those issues in favor of Petitioners or 800 Services.² The recent filings by 800 Services and Petitioners only serve to reinforce those points.

For its part, 800 Services does not address the substance of any of the requests for declaratory ruling noticed for comment by the Commission. Instead, its entire September 12, 2016 supplemental reply is devoted to the baseless claim that a 16-year old final judgment that dismissed all of 800 Services’ claims against AT&T should be set aside.³ The Commission has no authority to grant such a request, which must instead be presented to the courts. *See Plaut v. Spendthrift Farms*, 514 U.S. 211, 218 (1995) (review of Article III court decisions cannot be vested in officials of the Executive branch). Unless and until that final judgment is set aside—and 800 Services’ meritless claims of fraud provide no basis for such extraordinary relief—it

¹ *See, e.g.*, Emails to FCC Staff *et al.* from Mr. Inga, dated Sept. 13, 2016 (at 8:48 AM), Sept. 13, 2016 (at 10:12 AM), Sept. 14, 2016 (at 9:28 AM), Sept. 14, 2016 (at 2:22 PM). It should be noted that Petitioners have not filed these emails in the docket of this proceeding..

² *See* “Comments of AT&T,” WC Docket No. 06-210 (dated September 1, 2016) (hereinafter “AT&T’s September 1 Comments” or “AT&T’s Comments”).

³ *See* “800 Services, Inc. September 12, 2016 Supplemental Reply to AT&T’s September 1, 2016 Comments Regarding Petitioners June & July 2016 Declaratory Ruling Requests,” WC Docket No. 06-210 (dated September 12, 2016) (hereinafter “800 Services Reply”).

would be a clear abuse of discretion for the Commission to opine on whether the factual findings and legal conclusions in a long-concluded judicial proceeding were correct. *See* Section II below. Consequently, nothing in 800 Services’ submission provides a basis for the Commission to consider, let alone grant, any of the noticed declaratory ruling requests.

Petitioners’ submissions are similarly lacking in merit. Their September 12, 2016 Reply⁴ is a 112-page hodgepodge that raises numerous issues that were not noticed by the Commission for comment, engages in baseless speculation as to the motivations of the Commission and others, disparages the decision-making of the various federal judges who have previously addressed Petitioners’ claims, and continues Petitioners’ baseless attacks on the integrity of AT&T and its counsel. As explained in greater detail below, Petitioners’ reply fails to present any substantive basis for ruling in Petitioners’ favor on any issues.

A centerpiece of Petitioners’ reply is a blatant misreading of the Commission’s *October 1995 Order*,⁵ which found that AT&T was no longer a dominant carrier. Contrary to Petitioners’ claim, that *Order* did not impose upon AT&T an obligation to make a substantial cause filing with the Commission every time a reseller objected to AT&T’s position regarding the meaning of an existing AT&T tariff. Petitioners cite no authority for this absurd conclusion. The *October 1995 Order* found that AT&T was no longer a dominant carrier and thereby relieved AT&T of certain tariff filing requirements. Yet, Petitioners claim that the *Order* actually imposed a greater burden with respect to tariff disputes than AT&T would have had if it had remained a dominant carrier. Nothing in the *Order* or the Commission’s subsequent jurisprudence supports such a conclusion. Rather, the plain language of paragraph 134 makes clear that all AT&T was required to do was to continue, for a period of one year, to abide by notice requirements similar to the notice requirements that apply to dominant carriers seeking to *amend* the actual terms of an existing tariff. Paragraph 134 had nothing to do with the *enforcement* of AT&T’s existing tariffs or disputes over their meaning. Indeed, the requirement Petitioners purport to derive from this provision would have resulted in total chaos: every dispute AT&T had with any and all resellers over the course of a 12-month period would have resulted in substantial cause filings, which in turn would have wasted Commission resources. Consequently, with respect to Declaratory Ruling Requests I and VII, the Commission should reject Petitioners’ groundless claims that AT&T violated the *October 1995 Order*. *See* Sections III A and G below.

⁴ *See* “Petitioners June & July 2016 Declaratory Ruling Requests Petitioners Reply to AT&T’s September 1, 2016 Comments,” WC Docket No. 06-210 (dated September 12, 2016)(hereinafter “Ptrs. Reply”).

⁵ *In re Motion of AT&T Corp. to Be Reclassified As A Non-Dominant Carrier*, 11 FCC Rcd. 3271 (1995) (“*October 1995 Order*”).

The Commission also should rule in AT&T's favor on the other Declaratory Ruling Requests:

- As to Request II, the plain language of AT&T's tariff makes clear that AT&T appropriately allocated and billed shortfall liability to Petitioners' customers. *See* AT&T Tariff No. 2, § 3.1.1.Q; *see also* the August 2000 Decision in 800 Services' matter ("*2000 Politan Decision*") at 7.⁶ Consequently, by definition, AT&T's billing of such amounts in 1996 could not be an illegal remedy. *See* Section III B below.
- As to Request III, Petitioners all but admit that there is no immunity period under AT&T's tariff with respect to shortfall and termination charges incurred in connection with a CSTP II plan, regardless of the start date of the plan. While such liability might have been avoided if the CSTP II Plan holder took certain steps, the obligations were real and there was no automatic immunity. *See* Section III C below.
- As to Request IV, Petitioners sought and obtained a judicial order in May 1995 compelling AT&T to accept the transfer of their plans to CCI, thereby waiving and/or mooted any claim relating to the alleged January 1995 Inga to PSE traffic only transfer. Moreover, even if the claim were not waived and mooted (and it is), AT&T's tariff makes clear that AT&T was under no obligation to process that proposed transfer because PSE had not notified AT&T that it was willing to accept all of Petitioners' obligations under the plans. Because no such notification was provided, the 15 day period on which Petitioners rely was never triggered. Additionally, there are factual disputes regarding whether AT&T in fact objected to this proposed transaction within the 15 day period that further preclude issuance of a declaratory ruling. *See* Section III D below.
- As to Request V, by seeking and obtaining the May 1995 injunction, Petitioners likewise waived any claim that they were entitled to delete locations under their CSTP II Plans, and then to have PSE add those locations to its plan in separate transactions. In addition, there are clear factual disputes as to whether Petitioners ever sought such an alternative transfer, which also preclude issuance of a declaratory ruling. Further, consideration of this issue is barred by principles of res judicata. In vacating the Commission's *2003 Order*,⁷ the D.C. Circuit found that dropping and adding locations in separate transactions would undercut the entire purpose of Section 2.1.8.⁸ *See* Section III E below.

⁶ Letter Op. & Order, *800 Services, Inc. v. AT&T Corp.*, Civ. No. 98-1539 (D.N.J. Aug. 28, 2000), attached as Exhibit B to *Ex Parte* Letter from James F. Bendernagel (Counsel for AT&T) to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-210 (July 1, 2016) ("*AT&T July 1 Ex Parte*").

⁷ Mem. Op. & Order, *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*, 18 FCC Rcd. 21813 (2003) (the "*2003 Order*").

⁸ *AT&T Corp. v. FCC*, 394 F.3d 933, 937-38 (D.C. Cir. 2005).

- As to Request VI, the issue of whether AT&T allegedly “shut-down all traffic only transfers” in June 1995 has nothing to do with whether, pursuant to the terms of Section 2.1.8, a CSTP II plan holder could transfer substantially all of its traffic without the transferee agreeing to assume all of the transferor’s obligations relating to that traffic. Moreover, the question of whether AT&T in fact “shut-down” such transfers in mid-1995 raises fact issues that make this issue inappropriate for resolution by declaratory ruling. *See* Section III F below.

Finally, in assessing whether to even rule on the noticed declaratory ruling requests, the Commission should take into account the following considerations. *First*, the New Jersey District Court, which referred the matter to the Commission and ultimately has responsibility for resolving Petitioners’ claims, has not asked for the Commission’s assistance as to these matters. To the contrary, in 2007, Judge Wigenton denied Petitioners’ motion to expand the referral to encompass certain of these issues.⁹ Further, nothing in Judge Wigenton’s recent rulings denying Petitioners’ 2015 and 2016 motions to lift the stay suggests that she has reconsidered her earlier decision.¹⁰ *Second*, this proceeding has been pending a very long time and the District Court has expressed a clear interest in obtaining the Commission’s views as to the one matter that it did refer, i.e., the interpretation of Section 2.1.8. Accordingly, the Commission should focus its efforts on resolving that issue and not, after 10 years, reverse course and expand the scope of the proceeding. *Third*, the Commission should take note of what has happened since the September 12, 2016 reply date. Apparently emboldened by the Commission’s willingness to solicit comments on their earlier requests for declaratory ruling, Petitioners have submitted more requests that are even less relevant to the matters at issue in the District Court litigation.¹¹

In sum, the Commission should deny the *June 30 and July 11 Petitions* for declaratory rulings, and in no event, should it entertain any additional requests for declaratory ruling.

II. 800 SERVICES’ FILING

In its initial comments, AT&T demonstrated that 800 Services has no possible interest in any of the noticed requests for declaratory ruling because of the res judicata effects of an August 2000 District Court decision, which dismissed all of 800 Services’ affirmative claims and awarded AT&T \$1.8 million in unpaid tariff charges, including approximately \$1.4 million in

⁹ *See* Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. June 20, 2007) (Dkt No. 165). (Attached as Ex. 2 to AT&T September 1 Comments).

¹⁰ *See* Order (Amended), *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 19, 2015) (Dkt. No. 179); Letter Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 18, 2016) (Dkt. No. 210).

¹¹ *See* Letter from Ray Grimes, dated Sept. 15, 2016. Contrary to Petitioners’ apparent assumption (*see* email from Mr. Inga, dated Sept. 15, 2016), the Commission did not notice for comment the declaratory ruling request set forth in Petitioners’ email dated June 23, 2016. In any event, AT&T responded to that request in note 131 of its September 1 Comments.

shortfall charges. *See* AT&T Comments at 19-20. In its Reply, 800 Services does not contest AT&T's showing in this regard.

Instead, 800 Services argues that its comments should be included in the Commission's consideration of these petitions because it intends to seek relief from the judgment that dismissed all of its claims 16 years ago. 800 Services then devotes the remainder of its 26-page submission to arguing that it will be able to meet the demanding requirements of Fed. R. Civ. P. 60(b) because AT&T supposedly engaged in a "fraud on the court." 800 Services Reply at 5. That contention is utterly baseless, and the Commission should not devote any resources to resolving any issues concerning 800 Services.

The Commission obviously has no authority or jurisdiction to grant any relief with regard to the 16-year old District Court judgment. Such relief must be sought from the courts.¹² 800 Services suggests that it intends to seek such relief, 800 Services Reply at 2-3, but to date it has not done so and, given the strictures of Rule 11 of the Federal Rules of Civil Procedure, it is doubtful that it will ever do so. AT&T will not lengthen these comments with a refutation of what is merely the latest in an apparently endless series of baseless attacks on the integrity of AT&T and its counsel by Petitioners and their allies. It will respond to these claims if and when 800 Services ever raises them in an appropriate forum.

It is worth noting, however, that, while 800 Services claims that it "only recently discovered" the *October 1995 Order*, 800 Services Reply at 3, 23, it cited the *Order* in comments it submitted in this proceeding nearly a decade ago.¹³ Tellingly, it nowhere claimed in those prior comments that the *Order* required AT&T to make substantial cause showings with respect to any dispute with 800 Services. Similarly, 800 Services states that Larry Shipp, CCI's President, could have testified on 800 Services' behalf, but was "silenced" with a confidentiality settlement. 800 Services Reply at 24. But that claim is also false: Mr. Shipp testified at a discovery deposition in 800 Services' case against AT&T.¹⁴

The fundamental point, of course, is that, unless and until the District Court's final judgment is set aside, it would be improper and a clear abuse of discretion for the Commission to opine on whether the factual findings and legal conclusions in a long-concluded judicial

¹² *See United States v. Foy*, 803 F.3d 128, 134 (3d Cir. 2015) (district court that did not issue order lacked jurisdiction to award relief under Rule 60).

¹³ *See* "800 Services, Inc.'s Comments Regarding Petitioners Request for Reconsideration and Clarification of the January 12, 2007 FCC Order," WC Docket No. 06-210 (Feb. 12, 2007) at 2 (claiming, incorrectly, that the *Order* barred AT&T from inflicting shortfall charges). Earlier this year, 800 Services claimed that it had only recently discovered the *Order*, an assertion AT&T rebutted in its *July 1 Ex Parte*. *See* 800 Services' Request for Declaratory Rulings & Reliance Upon Comments in Case 06-210 (submitted Jun. 7, 2016) at 2; *AT&T July 1 Ex Parte* at 4 (citing 800 Services February 2007 comments). Yet 800 Services blithely persists in advancing this untrue claim.

¹⁴ *See* Certification of John J. Murray, Jr., *800 Services, Inc. v. AT&T Corp.*, Civ. No. 98-1539 (submitted Jan. 28, 2000) (Dkt No. 43) at Ex. N (attaching selected pages of transcript of Larry Shipp deposition taken in 800 Services' case against AT&T).

proceeding were correct. The Commission should therefore decline to address any issues raised by 800 Services.

III. PETITIONERS' FILING

As noted above, Petitioner's reply comments are 112 pages in length and address a number of issues that are irrelevant to the resolution of the seven declaratory ruling requests that the Commission has noticed for comment. Consequently, AT&T does not in this submission attempt to respond to each and every argument made by Petitioners (many of which have been the subject of extensive prior briefing). Further, in the interest of focusing on the most significant points at issue, AT&T will not repeat all of the arguments that it initially made in response to each of the noticed requests for declaratory ruling, nor will it respond to all of Petitioners' claims as to those points. By proceeding in this manner, however, AT&T is not abandoning any of its prior arguments nor conceding its position with respect to any of those matters.

A. Declaratory Ruling Request I.

Did AT&T violate the FCC's Oct 23rd 1995 Order by not allowing its customers to maintain for [a] minimum of 3 years its pre June 17th 1994 terms and conditions by not allowing petitioners to use the discontinuation without liability provision under Tariff No. 2., on its 3 years CSTPII/RVPP (EBO) plan commitment?

In its initial comments, AT&T pointed out that this issue was not appropriate for resolution through a declaratory ruling proceeding because Petitioners had not presented any evidence that they had sought to use the discontinuance without liability option during the period 1995 to 1997, nor had they stated when or how AT&T had refused to permit them to take such steps. AT&T Comments at 21. AT&T also explained that the Commission's *October 1995 Order* did not impose on AT&T an obligation to file with the Commission a substantial cause pleading whenever a customer objected to AT&T's interpretation of an existing tariff provision. To the contrary, as is clear from the language of the *October 1995 Order*, the substantial cause requirement only came into play if AT&T sought to revise its existing tariff in the one year period following the *October 1995 Order's* effective date. *Id.* at 22-23.

In their reply comments, the Petitioners do not effectively address or rebut either of these two points. As to the fact issues surrounding their alleged efforts to "restructure" (i.e., discontinue without liability) their CSTP II Plans, Petitioners assert that their plans were restructured "many times," but they do not provide any evidence that any such restructurings took place in the period 1995 to 1997,¹⁵ and they do not offer any explanation as to how AT&T

¹⁵ Petitioners' reference to Exhibit Q (Ptrs. Reply at 48) adds nothing; that transaction took place in 1993. Likewise deficient is Petitioners' assertion that Mr. Shipp certified that the plans were "timely restructured." *Id.* at 50. Not

prevented them from using the discontinuance without liability provisions. Moreover, their assertion that “now is the time to raise these disputed facts,” Ptrs. Reply at 47, demonstrates a profound lack of understanding of the Commission’s rules regarding when it is appropriate to resolve issues pursuant to a declaratory ruling. As the Commission has made clear, declaratory relief is inappropriate where factual issues are undeveloped or disputed. *See* AT&T Comments at 21 n.88.

There is also no merit to Petitioners’ claims regarding the alleged filing requirements imposed by the Commission’s *October 1995 Order*. At no point in their 112-page submission do Petitioners identify any authority supporting their claim that the *October 1995 Order* had the far-reaching impact they ascribe to it—and for good reason: no such authority exists. In agreeing to the requirements set forth in paragraph 134 of that *Order*, AT&T was not agreeing to take on obligations beyond the tariff filing obligations imposed on a dominant carrier. To the contrary, as is clear from the language of that paragraph, AT&T was simply agreeing that, for a one year period, it would continue to make substantial cause showings in connection with any revisions it proposed to make to its existing tariffs. The *October 1995 Order* did not impose any obligations on AT&T with respect to its efforts to enforce existing tariff provisions, much less an extraordinary (and extraordinarily burdensome) requirement that AT&T make (and the Commission address) a substantial cause showing every time a reseller disputed the meaning of an existing tariff term.¹⁶ Not surprisingly, Petitioners cite no instance where the *October 1995 Order* was so construed. Indeed, by requiring that AT&T provide advance notice when AT&T made “any change to an existing term plan,” paragraph 134 of the *Order* made clear that it only applied to formal tariff amendments effectuated through tariff filings.¹⁷ Petitioners previously recognized that obvious meaning of this provision. In a May 2006 letter brief to the District Court that discussed modifications of the language of AT&T’s tariff, Petitioners stated that in the *October 1995 Order*, “AT&T agreed to grandfather existing customers when it introduced a change to its tariff,” and that the *Order* “required AT&T to give notice of the proposed change to customers, who were then given a chance to object.”¹⁸

only is that assertion without citation but is so general as to be meaningless. Petitioners’ claim that the CSTP II plan numbers did not change (*id.* at 49) also does not shed any light on whether Petitioners’ sought to discontinue their plans during the period 1995 to 1997 or whether AT&T somehow interfered with those efforts.

¹⁶ Indeed, the Commission’s discussion in the *October 1995 Order* of the resellers’ concerns with AT&T’s being declared non-dominant makes this clear. *See October 1995 Order* at ¶¶ 129-133. The Commission did not, as Petitioner’s contend, impose any obligation to make a substantial cause filing regarding existing tariff disputes. To the contrary, the Commission’s discussion regarding the substantial cause test clearly related to the showing that would have to be made in connection with a proposed tariff revision. *Id.* at ¶133.

¹⁷ *See also In re Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd. 20730, ¶ 101 n.269 (1996) (characterizing paragraph 134 of the *October 1995 Order* as showing AT&T’s “commit[ment] . . . to comply with an agreement, for twelve months, between AT&T and the Telecommunications Resellers Association regarding *changes to existing term plans.*”) (emphasis added).

¹⁸ Letter from Petitioners’ counsel to Hon. William Bassler, U.S.D.J., *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. May 11, 2006) (Dkt. No. 141) at 7 n.3 & Ex. C (excerpt of *October 1995 Order*).

Finally, any claim that the entire reseller community was somehow unaware of the *October 1995 Order* or somehow overlooked the substantial cause requirement that Petitioners purport to derive from paragraph 134 is absurd. The proceeding leading up to the issuance of that Order was heavily litigated, the reseller community actively participated¹⁹ and the decision itself was highly publicized.²⁰ Further, the provision on which Petitioners' now seek to rely was added to address concerns expressed by the very industry segment, resellers, of which Petitioners are a part. In fact, the very first sentence of paragraph 134 makes that clear. *See* Ptrs. Reply, Exhibit A. Consequently, any claim that the existence of this provision only recently came to light is groundless. *See* notes 13 and 18 *supra* (showing that 800 Services and Petitioners were aware of the *Order* at least as of 2007 and 2006, respectively).

B. Declaratory Ruling Request II.

AT&T under the CSTPII/RVPP Enhanced Billing Option billed petitioner's end-user locations were inflicted shortfall and termination charges on petitioner's end-user locations far in excess of the discounts each end-user location was receiving. Under AT&T's Tariff No 2 within section 3.3.1Q it states for billing purposes AT&T can only remove the discounts. Therefore, would exceeding the location discount constitute an illegal AT&T billing remedy and thus regardless whether the charges were permissible AT&T wouldn't be able to rely upon its charges?

In its initial comments, AT&T disputed Petitioners' claim that its July 1996 billing of shortfall to CCI's end-users was an illegal remedy, pointing out that such billing was not only permitted but required by its tariff. AT&T Comments at 25-26. AT&T further noted that Petitioners had previously elected to pursue this issue in the District Court and that it would be arbitrary, capricious and an abuse of discretion for the Commission to now to address this issue given its earlier decisions to refrain from doing so and the fact that the issue is still pending before the District Court, which has not sought the Commission's input. *Id.* at 24-25.

In their reply comments, Petitioners do not deny—nor can they—that AT&T's tariff specifically provides, as Judge Politan expressly noted in his 2000 decision in the 800 Services case, that AT&T had the right to allocate and bill any shortfall and/or termination liability to

¹⁹ Indeed, one of Petitioners' prior lawyers, Charles Helein, submitted comments on behalf of America's Carriers Telecommunications Association ("ACTA") at the time. *See Reply Comments of ACTA*, IB Docket No. 95-118, at 1, 5 (filed Sept. 6, 1995) (noting that ACTA opposes any changes in the nondominant classification of AT&T," which was "under consideration in another proceeding"), 5 (reply comments signed by ACTA General Counsel Charles H. Helein). *See also October 1995 Order* ¶¶ 18, 134 (describing ex parte letters of Telecommunications Resellers Association regarding AT&T's commitments in that proceeding); *id.* at App'x A (listing 42 commenters, including ACTA and Telecommunications Resellers Association).

²⁰ *See, e.g.,* Mark Rockwell, *Gov't Actions To Spur Telco Competition*, COMMUNICATIONSWEEK, Oct. 16, 1995, at 1 ("[T]he FCC removed AT&T's 'dominant carrier' designation, freeing the company from regulatory requirements that have been in place since it was divested in 1982.").

Petitioners' customers.²¹ Instead, they try to add words to the provision, asserting without citation to the language of the tariff, that AT&T "*first*" had to bill the shortfall and/or termination changes to Petitioners, and could allocate charges to end-users only "*after*" doing so. Ptrs. Reply at 58-59 (emphases altered). But the applicable tariff language said no such thing. Nor did it say that "AT&T can *only reduce discounts.*" *Id.* at 57 (emphasis altered). Rather, it stated without any qualification that: "Any penalty for shortfall and/or termination will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan."²² Consequently, AT&T's billing of CCI's customers in accordance with its tariff was not, by definition, an illegal remedy.

Petitioners scoff at the idea that this provision could serve the legitimate purpose of inducing resellers like Petitioners to comply with their obligations. Ptrs. Reply at 60-63. But Petitioners do not deny that the tariff provision had that effect. Instead, they claim that actions AT&T took in accordance with the plain terms of the provision were unlawful because those actions harmed CCI's relationship with its customers. But there is nothing improper about a provision that effectively apprised an aggregator's customers that their provider was not complying with its own payment obligations and thereby enabled those customers to determine whether to take steps to protect their interests. Further, this provision shielded AT&T from claims by such customers that AT&T had somehow failed to disclose this important information to them.

Finally, Petitioners make a number of claims that are either inaccurate or wholly irrelevant to resolution of the specific issue addressed by this request for declaratory ruling. For example, there is absolutely no substance to their claim that Judge Wigenton has requested that the Commission address this issue. Ptrs. Reply at 56. In 2007, she specifically denied Petitioners' request to expand the referral to include this issue.²³ And neither of her two decisions rejecting Petitioners' requests to lift the stay contains the remotest suggestion that she now wants the Commission to address the issue.²⁴ Petitioners' claims regarding AT&T's allegations concerning slamming also miss the mark. *Id.* at 54-55. Not only are they inaccurate, but they are wholly irrelevant to the issue of whether AT&T's billing of shortfall charges constituted an illegal remedy under its tariff.

²¹ See AT&T Tariff No. 2, § 3.1.1.Q; see also *Politan Decision* at 7.

²² AT&T Tariff No. 2, § 3.1.1.Q.

²³ See Order, *Combined Companies, Inc. v. AT&T Corp.*, Civ. No. 95-908 (D.N.J. June 20, 2007) (Dkt No. 165).

²⁴ See Note 10 *supra*.

C. Declaratory Ruling Request III.

For plans that were ordered prior to June 17th 1994 and requested under the discontinuation without liability provision, interpret the duration of the immunity period from being charged pro rata shortfall and termination charges on a CSTPII/RVPP (EBO) plan commitment of 3 years?

As AT&T explained in its September 1 Comments, this request is based on a mistaken premise. Contrary to Petitioners' assertion, CSTP II plans (even pre-June 1994 CSTP plans) were not immune from the imposition of shortfall and termination charges. AT&T Comments at 27-28. To be sure, a CSTP II plan holder could, pursuant to AT&T's tariff, seek to discontinue the plan without liability. But to do so, that holder had to meet certain conditions. If those conditions, which were spelled out in AT&T's tariff, were not met, shortfall and/or termination liability could be and was imposed. *Id.* at 28. Further, to the extent that a CSTP II plan was discontinued without liability, the tariff specified that it would be replaced by a new plan. *Id.* at 28-29 n.112.

In their reply comments, Petitioners concede that "all plans both pre and post June 17, 1994...are subject to shortfall and termination charges." Ptrs. Reply at 63. They nevertheless try to downplay the significance of that admission by arguing that such charges could be avoided. However, the fact that such obligations could be avoided if certain requirements were met does not mean that those obligations did not exist or that the plans were immune from liability. To the contrary, the CSTP II plan's shortfall and termination obligations were real, as PSE—the reseller to which Petitioners proposed to transfer their traffic—learned.²⁵

There is also no merit to Petitioners' claims as to the significance of Judge Politan's comments in his March 1996 decision. Ptrs. Reply at 64 n.13. That decision was rendered in the context of a preliminary injunction proceeding and, as a consequence, is not legally binding. *See Wybrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d. 543, 548 (3d Cir. 1967) ("[T]he district court's findings in preliminary injunction cases are tentative and inconclusive, and, at best, are nothing more than a tentative judgment of the litigation"). Moreover, the Third Circuit reversed Judge Politan's order granting the preliminary injunction and criticized the district court's decision to express a view on the merits as being inconsistent with its earlier decision that there should be a primary jurisdiction referral.²⁶ In addition, Petitioners' claim that Judge Politan definitively determined that shortfall liabilities are "illusory" is flatly contradicted by Judge Politan's final decision in the 800 Services case, where he awarded shortfall to AT&T.²⁷

²⁵ See AT&T's 7/1/16 Ex Parte Letter, Ex C.

²⁶ See *Combined Companies, Inc. v. AT&T Corp.*, No. 96-5185, slip op. at 7-8 (3d Cir. May 31, 1996).

²⁷ See Letter Op. & Order, *800 Services, Inc. v. AT&T Corp.*, Civ. No. 98-1539 (D.N.J. Aug. 28, 2000) ("2000 Politan Decision"), attached as Exhibit B to *AT&T July 1 Ex Parte*.

Similarly, while Petitioners claim that they “actually did timely restructure [their] pre June 1994 plans in 1996,” Ptrs. Reply at 66, they present no evidence showing that in 1996 either CCI or Petitioners restructured the CSTP II plans at issue. Instead, Petitioners simply point to the fact that the Plans were still in existence in 1997. *Id.* However, the fact that the Plans survived does not mean that shortfall liability was successfully avoided for earlier periods. Indeed, the fact that in 1996 AT&T assessed shortfall charges against these accounts indicates that the opposite is true and, at a very minimum, demonstrates that fact issues exist which make issuance of a declaratory ruling inappropriate.

Finally, Petitioners’ claim that the holder of a pre-June 1994 plan could discontinue the same plan multiple times and still maintain the plan’s status as a pre-June 1994 is simply wrong. As previously noted, this position is at odds with the plain language of the tariff, which states at multiple points that the existing plan will be replaced by a “new” plan. *See* AT&T Comments at 29 n.112. In addition, it produces a nonsensical result: the “discontinued” plan continues to exist. In effect, a provision designed to allow “discontinuance” without liability results in no discontinuance at all.²⁸

D. Declaratory Ruling Request IV.

The Inga Companies plans on January 30, 1995, under tariff section 2.1.8., directly transferred end-user locations without the plan being transferred to Public Service Enterprises (PSE). Did AT&T violate section 2.1.8(c) by not transferring the Inga Companies designated locations due to AT&T’s conceded failure to issue a written denial within 15 days?

In its initial comments, AT&T explained that this request fell outside of the scope of the district court referral, was an improper candidate for resolution through a declaratory ruling and in all events was legally mistaken. AT&T Comments at 29-31. More specifically, AT&T noted that Petitioners effectively abandoned this claim in May 1995 when they choose to seek—and in fact obtained—an injunction compelling AT&T to accept Petitioners’ transfer of their CSTP II plans to CCI, thereby making it impossible for Petitioners to transfer those plans or their associated traffic to PSE. *Id.* at 29-30. AT&T further took issue with Petitioners’ claim that, in February 1995, AT&T was subject to any obligation under its tariff to object to the proposed Inga to PSE traffic only transfers. *Id.* at 31. In addition, AT&T explained that, regardless of whether it had any obligation to object that it did, in fact, make clear its objection to the proposed transfer well within 15 days of January 30, 1995. *Id.* at 30.

In its reply comments, Petitioners do not effectively respond to any of these points. Indeed, it is not apparent that Petitioners even understand the impact of the injunction they

²⁸ The fact that a CSTP II customer with an existing RVPP did not have to subscribe to a new RVPP (*see* Ptrs. Reply at 66) says nothing about whether a discontinued CSTP II plan must be replaced by a new Plan. All it says is that the RVPP and associated number did not need to be changed.

obtained. They repeatedly assert that the Inga to PSE traffic only transfers were initially part of the case in 1995, that those transfers should have been processed first, and that Judge Politan was willing to entertain their claims regarding the Inga to PSE traffic only transfers. Ptrs. Reply at 68-71. But even if true, all of this is irrelevant. By arguing for and securing an order directing AT&T to allow the transfer of their CSTP II plans to CCI and then consummating those transfers, Petitioners abandoned any claims regarding the proposed Inga to PSE traffic only transfers. They elected a different judicial remedy.

By making that election, moreover, Petitioners were no longer in a position to transfer their plans (or traffic on the plans) directly to PSE, as CCI became the plan owner. Consequently, any ruling by either the District Court or the Commission on this issue would be pointless; the claim was waived and mooted by Petitioners' election to transfer the plans to CCI. Indeed, this point is confirmed by the fact that no issue pertaining to the proposed Inga to PSE traffic only transfer was presented by Petitioners to the Commission in their "1996 Petition for Declaratory Ruling." *See* Note 4 to AT&T's September 1 Comments (identifying the issues that were presented, which all related to the proposed CCI to PSE transfer). The issue, and any claim relating to it, was out of the case by then, and remains so today.²⁹

Although the issue is completely irrelevant, there is also no merit to Petitioner's argument regarding AT&T's alleged obligation to object to the proposed Inga to PSE traffic only transfer within 15 days of January 30, 2015. As AT&T has previously explained, under Section 2.1.8 of its tariff, the 15-day notice period did not begin until the "new" customer notified AT&T in writing that it was agreeing to assume all obligations of the "former" customer. *See* "Reply Comments of AT&T," WC Docket No. 06-210 (dated September 12, 2016) at 3. Because PSE never notified AT&T in writing that it was willing to assume Petitioners' obligations for shortfall and/or early termination liability in connection with the January 31, 1995 proposed "direct" traffic only transfer to PSE, AT&T had no obligation to process that request or acknowledge it within 15 days.

There is also no merit to Petitioners' equally irrelevant claim that AT&T failed to object to the proposed Inga to PSE traffic only transfer within 15 days. At best, Petitioners' assertion that the February 6, 1995 letter from AT&T's counsel (Fred Whitmer) was not a denial but rather a mere "warning" raises a fact issue that precludes the issuance of a declaratory ruling on the Inga to PSE traffic only transfer (if the issue were even in the case). Further, the distinction that Petitioners seek to draw is not credible. In his letter, Mr. Whitmer made clear that AT&T objected to any transaction that sought to separate the plan obligations and liabilities from the traffic, which is exactly what the purported Inga to PSE traffic only transfer would have done. Consequently, it is nonsensical to contend that AT&T was not "rejecting" the proposed Inga to PSE traffic only transfer.

²⁹ AT&T has not argued that Petitioners waived *all* of their claims, as Petitioners erroneously assert. *See* Ptrs. Rep. at 3-12.

E. Declaratory Ruling Request V.

In January 1995 did AT&T's Tariff No 2 Section 3.3.1Q4 allow petitioners to move the designated end-user locations by deleting the locations from Petitioners' plans and adding those locations to PSE's plan and thus would it result in plaintiff's ability to keep its plans and its revenue and time commitments associated with the non-transferred plans?

This request suffers from the same fatal defects as Petitioners' request concerning the Inga to PSE traffic only transfers. Petitioners assert that they attempted to delete and add some of the traffic in separate transactions, pointing to "evidence," *i.e.*, a letter from an AT&T attorney in mid-1995 relating to a separate transaction and an undocumented conversation with an AT&T employee. Ptrs. Reply at 83-85. But that claim only serves to highlight the unresolved factual issues underlying this improper claim for a declaratory ruling.³⁰ Further, even if these factual claims were undisputed, and even if Judge Politan expressed an interest in this issue at the outset of the proceedings, the claim was both waived and rendered moot by Petitioners' election to seek and obtain an injunction compelling AT&T to recognize the transfer of Petitioners' plans to CCI. As a result of that election, the issue dropped out of the case, which is why Petitioners' 1996 Petition for Declaratory Ruling did not raise this issue with the Commission. *See* AT&T's Comments at 3 n.4.

Moreover, as AT&T explained, this claim is squarely foreclosed by the D.C. Circuit's reasoning. While the D.C. Circuit did not directly rule on Petitioners' delete and add *claim* (because Petitioners had long before abandoned it), it did find that deleting and adding substantially all of the locations in separate transactions would undercut the very purpose of Section 2.1.8. It is that determination by the D.C. Circuit that bars further consideration of this issue in this proceeding, and Petitioners have not—because they cannot—show otherwise.³¹

Finally, Petitioners' claim that the transfer of the traffic pursuant to Section 2.1.8 is no different than a transfer accomplished by deleting and adding locations in separate transactions (Ptrs. Reply Comments at 86) is simply false. As AT&T explained in connection with its appeal of the Commission's 2003 Order, there are significant differences.³² In contrast to a transfer under Section 2.1.8, there is a risk that the existing end users might lose their 800 numbers and it would almost certainly take longer to complete the transfers. Further, the party adding locations

³⁰ *See* AT&T Comments at 21 n.88.

³¹ *Burlington Res. Inc. v. FERC*, 513 F.3d 242, 246 (D.C. Cir. 2008) ("Northern suggests that we revisit our holding in *Burlington I*, portraying our construction as dictum But if Northern (which intervened in *Burlington I*) thought that any of our essential reasoning was in error, it should have petitioned for reconsideration, which it did not. *Burlington I*'s construction has thus become law of the case, which Northern cannot challenge here."); *U.S. Office of Pers. Mgmt. v. FLRA*, 905 F.2d 430, 434 (D.C. Cir. 1990) ("This laudable and self-imposed restriction is grounded upon the sound public policy that litigation must come to an end.") (citation omitted).

³² *AT&T Corp. v. FCC*, 394 F.3d at 937-38.

to its plan would be required to establish that each of the end user customers had consented to the transfer so as to avoid concerns as to slamming. Accordingly, this is yet another reason why the Commission should not address this issue at this point in the proceeding.

F. Declaratory Ruling Request VI.

Did AT&T's complete shutdown of section 2.1.8 to all traffic only transfers, of any quantities of locations transferred, to prevent all traffic only, non-plan transfers, constitute an illegal remedy or any other violation of section 2.1.8?

As AT&T explained in its September 1 Comments, this issue falls outside the scope of the district court referral which focuses on whether, under the plain language of Section 2.1.8, Petitioners could transfer substantially all of their traffic without the transferee (PSE) agreeing to assume all of Petitioners' obligations related to that traffic. AT&T Comments at 34-35. Further, even if this issue were relevant, there are clear factual issues that preclude resolution of this issue by declaratory ruling. *Id.* at 33-34.

In their reply comments, Petitioners do not rebut either of these points. Contrary to Petitioners' apparent belief, the mere fact that Petitioners make a factual assertion, or present evidence that allegedly supports that factual assertion, does not mean that there are no factual disputes. Nor does the making of such allegations or the presentation of such evidence mean that an issue is ripe for resolution by declaratory ruling. Indeed, if that were the case, all disputes would be appropriate for declaratory ruling so long as one of the parties made a factual claim and presented some evidence in support of it. Because there are clear factual issues regarding how AT&T responded to requested traffic-only transfers after January 1995, this issue is not appropriate for resolution by declaratory ruling.

Petitioners also have not overcome AT&T's showing that this issue has no relevance to Petitioners' claim that Section 2.1.8 somehow permitted the transfer of substantially all traffic without PSE agreeing to assume all of CCI's obligations related to that traffic. Even if AT&T had refused to process "all traffic-only transfers" beginning in mid-1995, that would not support Petitioners' position that AT&T acted unlawfully in refusing to process the CCI-to-PSE traffic only transfers in January 1995. *See* AT&T Comments at 34-35. Accordingly, the Commission should refrain from addressing this issue.

G. Declaratory Ruling Request VII.

Under the FCC's October 1995 Order AT&T was ordered to file with the Commission, within 6 days a **substantial** cause pleading to meet the **substantial** cause test when AT&T customers objected to the following 2 tariff sections: **1) Transfer or Assignment of Service and 2) Discontinuation With or Without Liability.** Does AT&T's failure to

comply with the FCC 1995 Order to timely file and meet the **substantial** cause test preclude it from raising any defenses under these tariff sections?

As explained above, the *October 1995 Order* has nothing to do with AT&T's efforts to enforce the terms of its existing tariffs and Petitioners' claims to the contrary rest on a blatant misreading of this *Order*. See Response to Declaratory Request I *supra*. Consequently, Petitioners' rampant speculation throughout their reply submission as to what might have happened if AT&T had made substantial cause filings relating to all of the various disputes identified by Petitioners in their reply comments is pointless. No such obligation existed.³³ There is, likewise, no merit to Petitioners' claim that the *October 1995 Order* has some relevance to the January 1995 transfer requests because the CCI to PSE transfer was "pending" as of October 1995 (Ptrs. Rep. at 107-08). The tariff provision existing in January 1995, not any subsequent modifications by AT&T to that provision, governs the parties' respective duties and obligations regarding the January 1995 transfer requests.

Finally, because AT&T was under no obligation to make substantial cause filings in response to disputes over the meaning of its tariffs, there is no merit to Petitioners' claim that AT&T waived any of its defenses to customer claims relating to disputes regarding an existing tariff provision—a point driven home by the fact that Petitioners do not cite a single case in support of their position.³⁴

³³ Contrary to Petitioners' claim, the October 1995 Order did not impose any obligation on AT&T to make any filing within 6 days, or for that matter 14 days, of a customer's objection to AT&T's interpretation of an existing tariff provision. Rather, the *Order* simply identified the notice periods that would apply if AT&T sought to amend an existing tariff provision. In the case of a change to tariff section relating the transfer or assignment of service or discontinuation with or without liability, AT&T would have to wait 14 days for the change to become effective, regardless whether it had previously provided its customers with pre-filing notice of the change and regardless of whether the customer had objected to the proposed change. The six day period cited by Petitioners only related to changes to other types of provisions where pre-filing notice had been provided and an objection to the proposed change had been made.

³⁴ Waiver requires proof of an "an intentional relinquishment or abandonment of a known right or privilege." *United States v. Robinson*, 459 F.2d 1164, 1168 (D.C. Cir. 1972) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); see also *Mawakana v. Bd. of Trustees of Univ. of D.C.*, 113 F. Supp. 3d 340, 354 (D.D.C. 2015) ("A waiver is '[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage,' and it requires a showing that the party alleged to have waived the right 'had both knowledge of the existing right and the intention of forgoing it.'" (quoting BLACK'S LAW DICTIONARY (10th ed. 2014)); *Butler v. White*, 67 F. Supp. 3d 59, 66 n.1 (D.D.C. 2014) ("Defendant cannot knowingly give up a defense it does not know it has.").

IV. CONCLUSION

For the foregoing reasons and the reasons set forth in AT&T's September 1 Comments and its September 12 Reply Comments, the Commission should deny the *June 30 and July 11 Petitions* for declaratory rulings.

Sincerely,

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