EXHIBIT P

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January 10, 2007

Frank P. Arleo, Esq.
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Re: One Stop Financial, Inc., *et al.* and AT&T Corp.
WC Docket No. 06-210

Dear Mr. Arleo:

I enclose a copy of the Reply to Petitioners' Request for Combining Declaratory Rulings and Extension of Time to File Reply Comments filed by AT&T today in connection with the above matter.

Very truly yours,

STEVEN A. MUHLSTOCK

Enclosure

1491143A01011007

In the matter of : Expedited Consideration for Declaratory Rulings On the transfer of traffic only under AT&T Tariff Section 2.1.8., and Related Issues Primary Jurisdiction Referral From the NJ District Court One Stop Financial, Inc. Group Discounts, Inc. Winback & Conserve Program, Inc. 800 Discounts, Inc. Petitioners and AT&T Corp. Respondent	)))))))))))))))))))	Formerly CCB/CPD 96-20 DA-06-2360 WC Docket No. 06-210

REPLY TO PETITIONERS' REQUEST FOR COMBINING DECLARATORY RULINGS AND EXTENSION OF TIME TO FILE REPLY COMMENTS

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INTRODUCTION

Petitioners One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. and Winback & Conserve Program, Inc. have filed a request to combine the Declaratory Ruling Request filed by another of Alfonse Inga's Companies, Tips Marketing Services Corp. ("Tips Marketing") with the Declaratory Ruling Request filed by petitioners. The Commission should flatly reject petitioners' request because there is no overlap between the issue referred by the District Court in petitioners' case and any of the four issues in the Tips Marketing declaratory ruling request. As a result, combining the Tips Marketing request with petitioners' request would not promote economy, and instead would inject issues that are completely irrelevant to the issue that the District Court wishes to have answered on the primary jurisdiction referral.[1]

In addition, the Commission should deny petitioners' motion because it is an impermissible attempt to circumvent the District Court's order on the primary jurisdiction referral. It is obvious that the request by Tips Marketing (which is not a party in the District Court matter) is a ploy by Mr. Inga to have the Commission consider issues that petitioners deliberately chose to litigate by filing a complaint with the District Court in New Jersey. As

[1] The Tips Marketing request raises several substantial threshold issues. One is whether the state and federal "tax inquiries" that supposedly justify Tips Marketing's request are even genuine. Apart from the absence of any evidence indicating there is such an inquiry, only toll telecommunication services that vary with time and distance are taxable by the IRS. *See, e.g., Reese Bros., Inc. v. United States*, 447 F.3d 229 (3d Cir. 2006); *American Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005); *National R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005). The IRS subsequently issued Notice 2006-50, which provides (among other things) that it will no longer collect the excise tax on long distance service. See Ex. 1 (IRS Notice 2006-50, accessed on January 8, 2007 at http://www.irs.gov/pub/irs-drop/n-06-05.pdf). In addition, any claim by the Florida Department of Revenue with regard to the shortfall charges appears foreclosed by the applicable statute of limitations. *See* Fla. Stat. § 95.091 (five year statute of limitations on claims for tax due prior to July 1, 1999). Another serious question is whether Tips Marketing's alleged interest in state or federal tax collections is sufficient to give it standing to seek resolution by the Commission of the issues it has raised in its petition. *See Aradigm Communications, Inc.*, 21 FCC Rcd 3893 (Wireless Tel. Bur. 2006), fn. 30 (recognizing that "the FCC generally follows the principles of Article III standing"); *see also AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 21,750, 21,752-53 (2001) (recognizing that the Commission follows Article III court precedents on standing claims by non-party to adjudicatory proceeding). These are just some issues that would have to be resolved in petitioners' case if the request to combine were granted. AT&T will concentrate in this reply on issues that relate to the petitioners' request to combine proceedings, and will provide full comments on the Tips Marketing request at the appropriate opportunity.

AT&T has previously explained, petitioners affirmatively abandoned any attempt to have the District Court refer these issues, yet Mr. Inga now seeks, through yet another of his entities, to have the Commission decide these same issues. The Commission should deny the request to combine the two proceedings in order to deter such gamesmanship and to promote the integrity of the judicial process.

ARGUMENT

I. There Is No Overlap Between The Issues Raised By Tips Marketing And The CCI-PSE Proposed Transfer Issue In Petitioners' Case.

The District Court's primary jurisdiction referral concerns AT&T's refusal to process a proposed traffic transfer between Combined Companies, Inc. ("CCI") and Public Services Enterprises of Pennsylvania, Inc., ("PSE") in January 1995. As AT&T described in its Comments, the propriety of AT&T's conduct in refusing to process the proposed transfer is the only legitimate issue in petitioners' request. (AT&T Dec. 20, 2006 Comments at 37-41).

In its request, Tips Marketing seeks the following four forms of declaratory relief:

- The FCC must declare that under AT&T Tariff No. 2, shortfall and termination obligations must stay with the Florida customer's (CCI's) CSTPII/RVPP when only traffic is transferred as opposed to transferring traffic with CCI's CSTPII/RVPP discount plan.
- The FCC must declare that AT&T violated its Tariff No. 2, by using an illegal remedy in inflicting shortfall and termination charges to non Florida based CCI's end-users well in excess of the aggregator afforded CSTPII/RVPP discounts.
- The FCC must declare that AT&T, having used an illegal remedy, cannot rely upon shortfall and termination charges due to the illegal remedy.
- The FCC must declare that the responsibility for all the shortfall and termination obligations in 1996 is not the end-users responsibility but the responsibility of AT&T's primary customer --- the Florida based aggregator CCI.

The first of those requests --- whether shortfall and termination obligations must stay with CCI when traffic is transferred without a transfer of the underlying plans --- is the only issue that, on its face, has anything to do with the proposed CCI-PSE transfer. This "issue," however, is completely illusory: there is no dispute that CCI was subject to shortfall and termination obligations, and no need to decide whether they could or should have been assumed by PSE.

It is undisputed that CCI was subject to shortfall and termination obligations for the Tariff No. 2 service because the proposed transfer from CCI to PSE was never actually processed by AT&T. There is no need, therefore, for the Commission to "declare that the traffic transfer did not transfer away the shortfall and termination obligations away from the Florida based CCI" (Tips Marketing Summary at 2): because the traffic transfer never occurred, it is indisputable that CCI's obligation to pay shortfall and termination charges could not have been transferred away. There is simply no live dispute that the shortfall and termination obligations, in fact, stayed with CCI.

Accordingly, there is no reason for the Commission to decide, in connection with Tips Marketing's request, whether AT&T was entitled to refuse to process the proposed traffic transfer under Section 2.1.8 of Tariff No. 2 because PSE refused to assume CCI's obligations to pay shortfall and termination charges. The three other questions Tips Marketing raises all relate to whether AT&T could impose shortfall charges on CCI's non-Florida end-users or whether the shortfall allocation to CCI's master account was permissible. Because these issues all arise from the historical fact that CCI *was* subject to shortfall obligations, it is entirely unnecessary to decide whether AT&T should have processed the CCI-PSE transfer and, if it had done so, whether CCI *would* have remained subject to shortfall obligations.

Indeed, resolving these questions is particularly unnecessary and gratuitous here. Tips Marketing claims that, had AT&T processed the transfer, CCI alone would have been subject to shortfall charges. AT&T's position is that, even if PSE had assumed these obligations and the transfer had gone through, both CCI and PSE would have had these obligations under the tariff's joint and several liability provision. In deciding whether the imposition of shortfall charges on CCI or its end-user customers was proper, therefore, it does not make a whit of difference whether PSE also could or should have shared the obligation to pay such charges.

In short, the proper resolution of these other three questions (which, as discussed below are also non-issues) does not depend in any way on the propriety of AT&T's refusal to process the proposed transfer; rather, the resolution of those issues would involve application of tariff provisions other than Section 2.1.8 of Tariff No. 2, and is thus irrelevant to the issue actually referred by the District Court. There is simply no overlap at all between the issue legitimately raised by petitioners (the propriety of AT&T's refusal to process the CCI-PSE proposed transfer) and the requested relief in the Tips Marketing's Request.

Accordingly, there would be no economy or any other benefit obtained by combining Tips Marketing's request with that of petitioners. Instead, a combined proceeding would result in unnecessary delay and complication, especially given various threshold issues, such as whether there is (or even could be) a tax inquiry by the agencies and the standing of Tips Marketing to pursue declaratory relief in this context, as well as the penchant of petitioners and Tips Marketing to burden the Commission and other parties with a plethora of irrelevant and moot arguments. The appropriate course of action is for the Commission to limit petitioners' proceeding to the January 1995 proposed transfer issue and not introduce the entirely unrelated Tips Marketing declaratory ruling request in this proceeding.

II. The Request For Rulings On The June 1996 Shortfall Allocation Issue Also Does Not Justify Combining The Proceedings.

Even if the Commission were to expand the scope of the issued referred by the District Court to include the June 1996 shortfall issues raised by petitioners (see AT&T Dec. 20, 2006 Comments at 37-41), there would still be no reason to combine the proceedings, because the rulings sought by Tips Marketing on the June 1996 shortfall are clearly non-issues utterly unnecessary to the "tax issue," even as described in the Tips Marketing request.

The "tax issue" described by Tips Marketing concerns shortfall charges on CCI's master account allocated in July 1996 and AT&T's settlement agreement with CCI in 1997.[2] According to Tips Marketing, federal and state agencies are seeking to determine whether federal excise tax (in the case of the IRS) or Florida tax should have been charged and collected by AT&T on: (a) the shortfall charges allocated on CCI's master account bill in July 1996; or (b) some portion of the settlement proceeds on AT&T's 1997 settlement with CCI. It should be noted that AT&T is unaware of any such inquiry by either the IRS or Florida Department of Revenue, and that those agencies' respective audits for AT&T are closed. In light of the recent authority that the federal excise tax does not apply to telecommunication services such as shortfall charges, and the IRS decision to no longer collect tax on distance telephone charges (supra at p,2 n.1), the Tips Marketing statement that the IRS has some interest in that transaction is extremely suspect, and probably false. Tips Marketing also has submitted no competent evidence that there is, in fact, any inquiry by the Florida Department of Revenue. Its failure to do so is not surprising, because that agency's interest appears dubious given that Florida's statute of limitations on such a claim appears to have expired years ago.

[2] Tips Marketing states that in July 1996 AT&T removed the shortfall charges that had been allocated on CCI's end user accounts in June 1996, and transferred the charges to CCI's "sole master account." (See Tips Request ¶6).

In all events, based on the description of the "tax issue," the Tips Marketing declaratory relief questions on the June 1996 shortfall allocation are all non-issues. Tips Marketing asks the Commission to decide three shortfall-related issues: (a) AT&T's imposition of shortfall charges on the end-user accounts was "illegal;" (b) AT&T cannot impose shortfall "due to illegal remedy;" and (c) shortfall is the responsibility of CCI, not the end users. (See Tips Request, ¶¶ 18-20). Issues (a) and (c) are both moot because Tips Marketing itself notes that the shortfall charges were removed from the end user accounts and transferred to CCI's master account. The supposed "tax issue" thus concerns AT&T's imposition of shortfall on CCI's master account, not the brief imposition of such charges on end user accounts which were removed a month later.

The request for a ruling on the "legality" of AT&T's allocation of shortfall charges is another fool's errand because Tips Marketing expressly assumes for purposes of its request that the shortfall charges are valid. The only basis Tips Marketing has for seeking a declaratory ruling is its alleged interest in collecting a "bounty" for AT&T's supposed failure to collect proper state and federal taxes on shortfall charges. Even assuming this interest is enough to give Tips Marketing standing to seek such relief -- and AT&T does not concede that it does -- a determination that shortfall charges should never have been imposed in the first place completely undercuts Tips Marketing's right to collect a bounty. Conversely, if Tips Marketing is entitled to a bounty whether or not the imposition of shortfall charges was valid, then there is obviously no reason for the Commission to decide that issue.

In short, allowing the shortfall issues to be introduced into petitioners' proceeding would sow enormous confusion, lead to much more voluminous submissions on various issues that have no commonality with the questions referred by the District Court, and result in a more

protracted and convoluted proceeding. Accordingly, the Commission should deny petitioners' request.

III. Denial Of Petitioners' Request Would Promote The Integrity Of The Judicial Process.

Petitioners spent two years burdening the District Court with various submissions, and then were required to submit all their relief in a single motion. In that motion, they represented expressly that the 1996 shortfall claims were not part of their omnibus motion. Based on the issues as framed by petitioners, the District Court ordered them to return to the Commission to initiate a proceeding on only the June 1995 CCI-PSE proposed transfer issue. (See AT&T Dec. 20, 2006 Comments at 3-9).

The timing of Tips Marketing petition,[3] replete with transparently phony issues on an unsubstantiated "tax inquiry," compels the conclusion that the petition is a sham devised by Mr. Inga in an effort to get what the four Inga Company petitioners would not and did not get from Judge Bassler: a referral on issues related to the June 1996 shortfall claims in the petitioners' Supplemental Complaint. Indeed, petitioners admit such a motivation in their Request (see ¶3), notwithstanding their earlier representations to the District Court, and the Court's decision based on petitioners' positions that the June 1996 shortfall allocation claims were not at issue on the pending motion. The Commission's denial of petitioners' request to combine proceedings will prevent them from profiting from such underhanded conduct and ensure that the integrity of the judicial process is not compromised by such conduct.

[3] It is, of course, no coincidence that Tips Marketing surfaced in November 2006 after the District Court decision. Mr. Inga, recognizing that petitioners were unlikely to prevail in the District Court on an after-the-fact request to expand the referral, is using a strawman (Tips Marketing) in an attempt to bamboozle the Commission to consider issues that the District Court had not referred.

CONCLUSION

For the foregoing reasons, petitioners' request to combine the Tips Marketing Request with their proceeding should be denied.

Respectfully submitted,

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January 10, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of January, 2007, I served the foregoing "Reply to Petitioners' Request For Combining Declaratory Rulings and Extension of Time to File Reply Comments" and attached exhibits by email and first class mail to the following counsel:

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STEVEN A. MUHLSTOCK

EXHIBIT 1

attributable to the credit or refund is taken into account on the date the income is paid or credited in the case of a cash method taxpayer and on the date the return making the request is filed in the case of an accrual method taxpayer.

(g) Requests that do not follow the provisions of this notice. Requests that do not follow the provisions of this notice (whether filed before or after its publication)—

(1) Will not be processed to the extent they relate to the tax paid on nontaxable service that was billed after February 28, 2003; and

(2) Will be processed normally to the extent they relate to the tax paid on nontaxable service that was billed before March 1, 2003.

SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2005-79, 2005-46 I.R.B. 952, is revoked. Rev. Rul. 79-404, 1979-2 C.B. 382, will be revoked in a later revenue ruling.

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Taylor Cortright of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact (202) 622-3130 (not a toll-free call).

Internal Revenue Service
United States Department of the Treasury

Government to Stop Collecting Long-Distance Telephone Tax

IR-2006-82, May 25, 2006

WASHINGTON — The Internal Revenue Service today announced that it will stop collecting the federal excise tax on long-distance telephone service.

The tax on telephone services was first imposed in 1898. The current rate is 3% of the charges billed for these services. The IRS announcement follows decisions in five federal appeals courts holding that the tax does not apply to long-distance service as it is billed today.

Taxpayers will be eligible to file for refunds of all excise tax they have paid on long-distance service billed to them after Feb. 28, 2003. Interest will be paid on these refunds.

Taxpayers will claim this refund on their 2006 tax returns. In order to minimize burden, the IRS expects to announce soon a simplified method that individuals may use.

"So taxpayers won't have to spend time digging through old telephone bills, we're designing a straightforward process that taxpayers may use when they file their tax returns next year," said IRS Commissioner Mark W. Everson. "Claiming a refund will be simple and fair."

The IRS announcement does not affect the federal excise tax on local telephone service, which remains in effect. Likewise, various state and local taxes and fees paid by telephone customers are also unaffected.

More information can be found in IRS Notice 2006-50. It will also be published in Internal Revenue Bulletin 2006-25, dated June, 19, 2006.

Related Items:

- IR-2006-137, IRS Announces Standard Amounts for Telephone Tax Refunds
- Telephone Tax Refund Questions and Answers
- Notice 2006-50
- Treasury Department News Release

Part III - Administrative, Procedural, and Miscellaneous

Communications Excise Tax; Toll Telephone Service

Notice 2006-50

SECTION 1. PURPOSE

(a) In general. As further described in this notice, the Internal Revenue Service will follow the holdings of Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005) (ABIG); OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005); Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374 (D.C. Cir. 2005) (Amtrak); Fortis v. United States, 2006 U.S. App. LEXIS 10749 (2d Cir. Apr. 27, 2006); and Reese Bros. v. United States, 2006 U.S. App. LEXIS 11468 (3d Cir. May 9, 2006). These cases hold that a telephonic communication for which there is a toll charge that varies with elapsed transmission time and not distance (time-only service) is not taxable toll telephone service as defined in § 4252(b)(1) of the Internal Revenue Code. As a result, amounts paid for time-only service are not subject to the tax imposed by § 4251. Accordingly, the government will no longer litigate this issue and Notice 2005-79, 2005-46 I.R.B. 952, which states otherwise, is revoked.

(b) Credits and refunds. Taxpayers may be entitled to request credit or refund of the excise taxes paid for the services covered by this notice. This notice provides guidance regarding these requests. In addition, the Commissioner will authorize the scheduling of an overassessment under § 6407

to keep the period of limitations open for these requests. This overassessment will apply to all taxpayers and to all taxes paid for the services covered by this notice beginning with the tax paid on services that were billed to customers after February 28, 2003.

SECTION 2. BACKGROUND

(a) In general--(1) Tax imposed. Section 4251(a)(1) imposes a tax on amounts paid for communications services.

(2) Payment of tax. Section 4251(a)(2) provides that the tax imposed shall be paid by the person paying for the service (taxpayer). Section 4251(b)(2) provides that the applicable percentage is 3 percent of amounts paid for communications services.

(3) Collection of tax. Section 4291 provides that the tax is collected by the person receiving the payment (collector). In most cases, the collector, which is also responsible for paying over the tax to the government, is the telecommunications company that provides the communications services to the taxpayer.

(b) Definitions--(1) Communications services. Section 4251(b)(1) provides that the term communications services means (A) local telephone service; (B) toll telephone service; and (C) teletypewriter exchange service. This notice does not address teletypewriter exchange service.

(2) Local telephone service. Section 4252(a) provides that local telephone service means (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone

or radio telephone stations constituting a part of such local telephone system; and (2) any facility or service provided in connection with such a service. Local telephone service does not include any service that is a toll telephone service as defined in § 4252(b) or a private communications service as defined in § 4252(d). This notice does not address private communications service.

(3) Toll telephone service–(i) Time and distance. Section 4252(b)(1) provides that toll telephone service includes a telephonic quality communication for which there is a toll charge that varies in amount with the distance and elapsed transmission time of each individual communication and for which the charge is paid within the United States.

(ii) Periodic charge for a specified area. Section 4252(b)(2) provides that toll telephone service also includes a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

(c) Rev. Rul. 79-404. Rev. Rul. 79-404, 1979-2 C.B. 382, concludes that a long distance telephone call for which the charge varies with elapsed transmission time but not with distance is toll telephone service described in § 4252(b)(1).

(d) Notice of proposed rulemaking. In a notice of proposed rulemaking (68 FR 15690; April 1, 2003), the Service proposed an amendment to the Facilities and Services Excise Taxes Regulations to provide that toll telephone service described in section 4252(b)(1) may include a communication service for which the charge does not vary with the distance of each individual communication.

(e) Recent litigation. ABIG, OfficeMax, Amtrak, and Reese Bros. hold time-only service is not toll telephone service as defined in § 4252(b)(1). Further, ABIG, OfficeMax, and Reese Bros. hold that the communications service provided was not a service described in § 4252(b)(2) because the end result was not a "periodic charge" based on total elapsed time but rather a monthly bill based on a summation of toll charges for individual communications. (In Amtrak, toll telephone service described in § 4252(b)(2) would have been exempt from tax under the common carrier exception in § 4253(f).) ABIG, OfficeMax, Amtrak, and Reese Bros. also hold that the communications services provided were not local service, notwithstanding the access the services provided to the local telephone system. (Fortis affirms, in a per curiam opinion, a district court decision reaching the same results.)

(f) Notice 2005-79. Notice 2005-79, 2005-46 I.R.B. 952, states that the Service will continue to assess and collect the tax imposed by § 4251 on all taxable communications services, including those similar to the services in ABIG.

SECTION 3. TERMS DEFINED

The following terms are defined solely for purposes of this notice:

(a) Bundled service. Bundled service is local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Bundled service includes, for example, Voice over Internet Protocol service, prepaid telephone cards, and plans that provide both local and long distance service for either a flat monthly fee or a charge that varies with the elapsed transmission time for which the service is used. Telecommunications companies provide bundled service for both landline and wireless (cellular) service.

(b) Local-only service. Local-only service is local telephone service, as defined in § 4252(a), provided under a plan that does not include long distance telephone service or that separately states the charge for local service on its bill to customers. The term also includes services and facilities provided in connection with service described in the preceding sentence even though these services and facilities may also be used with long distance service. See, for example, Rev. Rul. 72-537, 1972-2 C.B. 574 (telephone amplifier); Rev. Rul. 73-171, 1973-1 C.B. 445 (automatic call distributing equipment); and Rev. Rul. 73-269, 1973-1 C.B. 444 (special telephone).

(c) Long distance service. Long distance service is telephonic quality communication with persons whose telephones are outside the local telephone system of the caller.

(d) Nontaxable service. Nontaxable service means bundled service and long distance service.

SECTION 4. EFFECT OF ABIG, OFFICEMAX, AMTRAK, FORTIS, AND REESE BROS.

(a) Tax treatment of communications service after ABIG, OfficeMax, Amtrak, Fortis, and Reese Bros. The Service will follow ABIG, OfficeMax, Amtrak, Fortis, and Reese Bros. Accordingly, taxpayers are no longer required to pay tax under § 4251 for nontaxable service. In addition, collectors or taxpayers may request a refund of tax paid under § 4251 on nontaxable service that was billed to the taxpayers during the period after February 28, 2003, and before August 1, 2006 (the relevant period).

(b) Tax on local-only service. Collectors should continue to collect and pay over the § 4251 tax on amounts paid for local-only service. As noted in section 3(b) of this notice, local-only service includes amounts paid for facilities or services provided in connection with local telephone service. Thus, for example, tax will continue to be imposed on amounts paid by a taxpayer for renting an amplifier phone provided in connection with local telephone service that is subject to tax.

(c) Effect on collectors. Collectors are directed to cease collecting and paying over tax under § 4251 on nontaxable service that is billed after July 31, 2006, and are not required to report to the IRS any refusal by their customers to pay any tax on nontaxable service that is billed after May 25, 2006. Collectors should not pay over to the IRS any tax on nontaxable service that is billed after July 31, 2006. The form will require collectors to certify that for the third quarter of 2006 that the § 4251 tax reported on the Form 720 does not include any tax on

nontaxable service that was billed after July 31, 2006. Consequently, the IRS will deny all taxpayer requests for refund of tax on nontaxable service that was billed after July 31, 2006. All such requests should be directed to the collector. In addition, collectors may repay to taxpayers the tax on nontaxable service that was billed before August 1, 2006, but are not required to repay such tax. Collectors may also request a refund or make an adjustment to their separate accounts, as appropriate, subject to the provisions of § 6415 and section 5(d)(4) of this notice. Collectors must continue to collect and pay over tax under § 4251 on amounts paid for local only service.

SECTION 5. REQUESTS FOR CREDIT OR REFUND

(a) In general--(1) Request must follow this notice. The Commissioner agrees to credit or refund the amounts paid for nontaxable service if the taxpayer requests the credit or refund in the manner prescribed in this Notice.

(2) Form of request. Taxpayers may request a credit or refund of tax on nontaxable service that was billed after February 28, 2003, and before August 1, 2006, only on their 2006 Federal income tax returns. For this purpose, the 2006 income tax return is the income tax return for calendar year 2006 or for the first taxable year including December 31, 2006. Forms 1040 (series), 1041, 1065, 1120 (series), and 990-T will include a line for requesting the overpayment amount. Persons that are not otherwise required to file a federal income tax return must nevertheless file a return to obtain the credit or refund. Except as provided in section 5(d)(4) of this notice, a request for this credit or refund on any other form (such as a Form 720, 843, or 8849) will not be processed by the

Service. Taxpayers will be permitted to request the safe harbor amount under paragraph (c) of this section only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006.

(3) Guidance on the form. The instructions to the respective federal income tax return forms will provide additional guidance. The forms and instructions will require taxpayers to certify that (1) the taxpayer has not received from the collector a credit or refund of the tax paid on nontaxable service billed during the relevant period and (2) the taxpayer will not ask the collector for a credit or refund of that tax and has withdrawn any such request that was previously submitted. The instructions will also require that taxpayers, except for those individuals using the safe harbor amount, retain records that substantiate the request. These records should include bills from the collector that show the amount of tax charged for nontaxable service for each month during the relevant period and receipts, canceled checks, or other evidence that the amount requested was actually paid.

(b) Period of request. The Commissioner will authorize the scheduling of an overassessment under § 6407 to preserve the period of limitations during which taxpayers may request refunds of the tax on nontaxable service that was billed to customers after February 28, 2003, and before August 1, 2006. Therefore, requests may be made for credits or refunds of tax paid for nontaxable service billed after February 28, 2003 and before August 1, 2006.

(c) Amount of the request--(1) Requests by individual taxpayers--(i) Safe harbor amount. Individual taxpayers may request a safe harbor amount. No

documentation will be required to be submitted or kept to support the safe harbor request. However, taxpayers will be permitted to request the safe harbor amount only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006; have not received a credit or refund of these taxes from the service provider, and either have not requested such a credit or refund from the service provider or have withdrawn any such request. The amount of this safe harbor is still under consideration and will be announced in later guidance.

(ii) Actual amount. Taxpayers that do not request the safe harbor amount may request a credit or refund of the actual amount of tax they paid.

(d) How to file--(1) Requests by individual taxpayers. Individual taxpayers may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006 Form 1040, 1040A, or 1040-EZ, Individual Income Tax Return. Individuals who are not otherwise required to file a federal income tax return must nevertheless file Form 1040EZ-T to request the credit or refund. Individual taxpayers, including Schedule C filers, may request either the safe harbor amount or the actual amount of tax paid for nontaxable service.

(2) Requests by taxpayers other than individual taxpayers. Taxpayers other than individual taxpayers (entities) may request only the actual amount of tax paid on nontaxable service billed during the relevant period. No safe harbor amount is allowed for entities.

(3) Requests by entities--(i) In general. Entities may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006

income tax returns. Any part of the credit or refund attributable to tax payments that were deducted as an ordinary and necessary business expense (including in the determination of unrelated business taxable income) must be included in income for the taxable year in which the refund is received or accrued to the extent that the tax payments reduced the amount of federal income tax (or unrelated business income tax) imposed.

(ii) Partnerships. A partnership, as defined in § 7701(a)(2), may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1065, U.S. Return of Partnership Income. Any amount of the credit or refund included in partnership income and any interest on the credit or refund must be reported on the partnership's return for the taxable year in which received or accrued and must be allocated to its partners on the Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for that taxable year.

(iii) S Corporations. An S Corporation, as defined in § 1361, may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120S, U.S. Income Tax Return for an S Corporation. Any amount of the credit or refund included in S Corporation income and any interest on the credit or refund must be reported on the S Corporation's return for the taxable year in which received or accrued and must be allocated to its shareholders on the Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., for that taxable year.

(iv) Estates and trusts. An estate or a trust, as defined in § 301.7701-4(a) of the Procedure and Administration Regulations, may request a credit or refund

of federal excise taxes paid on nontaxable service only on its 2006 Form 1041, U.S. Income Tax Return for Estates and Trusts. Any amount of the credit or refund included in the estate's or trust's income and any interest on the credit or refund must be reported on the estate's or trust's Form 1041, U.S. Income Tax Return for Estates and Trusts, for the taxable year in which received or accrued. However, for a trust that is treated as owned by the grantor or other person under subpart E (§ 671 and following), part I, subchapter J, chapter 1 of the Internal Revenue Code (grantor trust), the owner of the trust may request a credit or refund of federal excise taxes treated as paid by the owner for nontaxable service only on its applicable 2006 federal tax return.

(V) Tax exempt organizations. An organization that is described in § 501(a) may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 990-T, Exempt Organization Business Income Tax Return. Tax exempt organizations that are not otherwise required to file a federal income tax return must nevertheless file Form 990-T to request the credit or refund. Any amount of the credit or refund included in the organization's unrelated business taxable income must be reported on the organization's Form 990-T, Exempt Organization Business Income Tax Return, for the taxable year in which received or accrued. An organization that is subject to tax on its interest income must also report any interest on the credit or refund on its Form 990-T, Exempt Organization Business Income Tax Return, for the taxable year in which received or accrued.

(vi) Corporations. A corporation, as defined in § 7701(a)(3), that is not described in section 5(d)(3)(iii) of this notice may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120 (series) income tax return (generally, Form 1120, U.S. Corporation Income Tax Return). Any amount of the credit or refund included in the corporation's income and any interest on the credit or refund must be reported on the corporation's income tax return for the taxable year in which received or accrued. Corporations that are not otherwise required to file a federal income tax return must nevertheless file Form 1120 (series) to request the credit or refund

(vii) Other nonfiling entities. Entities that are not otherwise required to file a federal income tax return must file Form 990-T to request the credit or refund.

(4) Requests and adjustments by collectors--(i) Section 6415 conditions to allowance. The conditions to allowance described in § 6415 apply to all requests and adjustments by collectors, as defined by section 2(a)(3) of this notice. Thus, a request by a collector is allowed only if the person that paid over the tax establishes that it has repaid the amount of the tax to the person from whom the tax was collected, or obtains the written consent of such person to the allowance of the credit or refund.

(ii) Requests for regular method collectors--(A) In general. A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts actually collected under § 40.6302(c)-1(a)(2)(i) of the Excise Tax Procedural Regulations (regular method collectors) may request a credit or refund.

(B) Form of the request. Regular method collectors may use Form 720X, Amended Quarterly Federal Excise Tax Return, line 1, IRS No. 22, for credit or refund of amounts collected and repaid to taxpayers.

(iii) Account adjustments for alternative method collectors. A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts considered as collected under § 40.6302(c)-1(a)(2)(ii) (alternative method collectors) may adjust the separate account for the amount of an overpayment. The required adjustment to the separate account is described in § 40.6302(c)-3(b)(2)(ii)(C). The adjustment is reflected on Form 720, Schedule A, line 2, but may not reduce tax liability on Form 720 below zero.

(e) Interest on the credit or refund included in income. If a taxpayer requests a credit or refund of the actual amount of tax paid, interest on the credit or refund of the tax paid for nontaxable service must be included as income on the taxpayer's income tax return for the taxable year in which the interest is received or accrued. Thus, individuals are generally required to report the interest on their 2007 income tax returns.

(f) Estimated tax effects. Although the credit or refund allowed to a taxpayer under this notice will be requested on the taxpayer's income tax return, it is not a credit against tax for purposes of §§ 6654 and 6655. Accordingly, the taxpayer may not take the credit or refund into account in determining the amount of the required installments of estimated tax for 2006. In determining the amount of the required installments of estimated tax for 2007, the income

EXHIBIT Q

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., a Florida corporation, AND WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC., 800 DISCOUNTS, INC. and New Jersey corporations, AND PUBLIC SERVICE ENTERPRISES OF PENNSYLVANIA, INC., a Pennsylvania corporation, Plaintiffs, v. AT&T CORP., a New York corporation, Defendant.	CIVIL ACTION NO. 95-908 (NHP)

AT&T'S BRIEF IN OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Page

Statutes and Rules

Other Authorities

INTRODUCTION

AT&T Corp. ("AT&T") submits this brief in opposition to the application of Plaintiffs Combined Companies, Inc. ("CCI"), Winback & Conserve Program, Inc. ("Winback" or "Winback & Conserve"), One Stop Financial, Inc. ("OSF"), Group Discounts, Inc., 800 Discounts, Inc. ("800") and Public Service Enterprises of Pennsylvania, Inc. ("PSE"), (collectively "plaintiffs"), for the entry of an Order to Show Cause With Temporary Restraints.

Plaintiffs' application should be denied because this case turns on the interpretation of an AT&T tariff currently on file at the Federal Communications Commission ("FCC") and the interpretation of statutes specifically entrusted to the FCC for enforcement. This application accordingly implicates matters at the core of the FCC's responsibilities under the Communications Act of 1934 (the "Act"). Indeed, by plaintiffs' own admission, this action involves the construction of AT&T's filed tariffs, the "reasonableness" of AT&T's actions under Sections 201 and 202 of the Act, and the interpretation of the "FCC policies" on which plaintiffs rely. All of these matters are within the primary, if not exclusive jurisdiction of the FCC.

The conclusion that this Court should defer to the FCC is reinforced by the fact that these core questions are concurrently being contested at the FCC in connection with a tariff revision AT&T filed on February 16, 1995. Three of the plaintiffs here have opposed that tariff revision, which addresses issues identical to those raised in this action. Although plaintiffs chose not to tell

the Court either of that FCC proceeding or of their participation in that proceeding, the fact and substance of that proceeding should compel this Court to decline to act on plaintiffs' application by deferring to the FCC's resolution of this identical issue.

What this case is <u>not</u> about is denial of service to any customers. It is undisputed that AT&T has not denied access to Winback's network to any end users. Although the plaintiffs carefully hide this fact from the Court, their end users are denied nothing --- whether or not the plaintiffs succeed on this application. Plaintiffs' complaint thus relates only to AT&T's refusal, for reasons permitted by the tariff, to process transfer of service agreements among the various reseller plaintiffs.

Finally, plaintiffs' request for extraordinary relief seeks not the preservation of the status quo but a dramatic alteration of the status quo. The fact is that plaintiffs' request for AT&T to execute plaintiffs' transfer of service agreements leaves AT&T without any effective remedy in the event that the transferee plaintiffs were to prove unable to fulfill their commitments. Granting plaintiffs' requested relief, thereby irremediably altering the status quo, would likely expose AT&T to substantial and irreversible financial losses. The request should be denied.

STATEMENT OF FACTS

At the heart of this action are the efforts of plaintiff Winback and Conserve and the other Inga Companies to thwart AT&T's ability to secure compliance with the volume and term commitments made by Winback *to* AT&T, pursuant to tariff, in order for Winback to obtain *from* AT&T discounted rates for long distance telecommunications services. To place this case in the proper context, it is helpful to understand (1) the nature of the tariff charges; and (2) the nature of Winback's scheme to put AT&T at financial risk of loss in the collection of tariffed charges.

Due to AT&T's increasing efforts --- often before this Court --- to stop the Inga companies from misrepresenting their relationships to AT&T, Winback is apparently attempting to extricate itself from the "shortfall" and "termination charge" obligations it undertook in subscribing to "CSTP-II" agreements that gave Winback very low telephone usage rates in exchange for very high annual usage commitments, amounting to $54,000,000 annually. In the event usage commitments are not met by customers who promise them to obtain low rates, AT&T's tariffs guard against the discrimination prohibited under 47 U.S.C. §203 by requiring payment of "shortfall" charges on a retrospective basis. Likewise, if the plan is prematurely terminated, prospective termination charges must also be paid. These charges serve the great purpose of the regulatory scheme to prevent preferential treatment to any one subscriber.

Inga commenced his efforts to repudiate the CSTP-II Agreements shortly after the Third Circuit's December 9, 1994 Order established that Winback could be held liable for its sales agents' misrepresentations. In seeking the business arrangement he wanted, Inga often threatened AT&T that he would declare bankruptcy or take other steps intended to leave AT&T with a substantial financial loss for which Inga intended to leave AT&T with no remedy. (Certification of Joseph Fitzpatrick ("Fitzpatrick Cert."), ¶4; Certification of Thomas Umholtz ("Umholtz Cert."), ¶4).[1] What Winback attempted here, which AT&T recognized, was a maneuver that would accomplish the precise result Inga had threatened: leaving AT&T with the prospect of significant financial loss.

Inga first executed a transfer of service agreement of his companies' CSTP-II plans to CCI, the new entity, which in turn would transfer nearly all the locations on those plans (but not the plans themselves) to PSE. As a result, liability for the $54 million volume commitment would have been shifted to CCI, a newly formed company with no assets, and no revenue stream from which to satisfy that commitment. As a practical matter, CCI could have defaulted on its newly undertaken, massive volume commitments with impunity, despite the formal requirements for shortfall charges.

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[1]In support of its Brief in Opposition to Plaintiffs' Motion for a Temporary Restraining Order, AT&T submits the Certifications of Joseph Fitzpatrick, Thomas Umholtz, and Richard R. Meade, and the Affidavit of Frederick L. Whitmer.

AT&T recognized the apparent sham purpose of these transfers and the consequence of permitting this calculated scheme to take effect. Accordingly, AT&T took steps to protect itself against injury. First, AT&T demanded, consistently with its filed tariffs, a security deposit from CCI as a company with no credit history as it had just recently been formed. Second, again consistently with its filed tariffs, AT&T refused to recognize a transfer to PSE without PSE's acceptance of Winback's volume commitments on the plans. AT&T's counsel wrote counsel for Winback, whose traffic PSE was to receive, as follows:

> We have reason to believe that Mr. Inga is attempting to transfer end users from existing plans that have over $50 million on commitments. Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, but without the ability to satisfy those commitments, appears to us to be an attempt to defraud AT&T by obtaining the benefits of a transfer of service and at the same time deprive AT&T of the commitments made to obtain that service. AT&T will not tolerate that conduct.

(Certification of Frederick L. Whitmer, ¶2). Winback did not answer that letter; neither did CCI post the requested security.

On February 16, 1995, AT&T filed with the FCC Tariff Transmittal 8179 to make explicit AT&T's implicit right under tariff to stop Winback's financial maneuvers. (See Certification of Richard R. Meade ("Meade Cert."), ¶3, Exhs. A and B). Several resellers, chief among them the plaintiffs in <u>this</u> action, have opposed AT&T's proposed tariff clarification, raising the same

issue in the FCC as they have brought to this Court: AT&T's right to demand security for volume commitments where all or substantially all traffic is proposed to be moved to another party, leaving the plan behind intact. (See Meade Cert. ¶4).

Notwithstanding the fact that the Commission has the power to grant emergent relief, especially where a controversy is already before the Commission, *see, e.g., Business Wats, Inc. v. AT&T,* 7 F.C.C. Rcd. 7942 (1992), the plaintiffs elected *not* to pursue their request for an extraordinary remedy in the FCC, where the matter was already being contested. Instead, and on an emergent basis, some two months after the issue first arose through Winback's actions, plaintiffs come to this Court seeking mandatory, "temporary" relief in the full equivalent of the final relief they seek.

The long and short of this application is that the relief plaintiffs seek should be denied. That is so because, as we elaborate in the argument below: (1) under the doctrine of primary jurisdiction, this Court should decline to act in order to permit the FCC to act on the identical issue these plaintiffs are already contesting there; (2) plaintiffs are not entitled to relief under 47 U.S.C. §406 because AT&T's actions are entirely consistent with the Act and its tariffs; and (3) plaintiffs have not met the burden for the grant of a temporary restraint.

ARGUMENT

I. **THE COURT SHOULD DENY THE REQUEST FOR A TEMPORARY RESTRAINING ORDER BECAUSE THIS ACTION MUST BE DISMISSED UNDER THE DOCTRINE OF PRIMARY JURISDICTION BECAUSE THE PRECISE ISSUE RAISED BY PLAINTIFFS IS UNDER CONSIDERATION BY THE FCC IN A PROCEEDING INVOLVING THESE SAME PARTIES.**

The precise question now at issue in plaintiffs' application for a temporary restraining order is already before the FCC, with CCI, Winback & Conserve and PSE (among others) actively contesting the validity of AT&T's actions. (See Meade Cert. ¶¶4-7). This circumstance compels denial of plaintiffs' application for extraordinary, temporary relief on this record.

"Primary jurisdiction" is a doctrine that reflects the judiciary's concern with maintaining the proper relationship between the courts and administrative agencies on matters that Congress has placed within the special competence of a particular agency. *United States v. Western Pac. R.R.*, 352 U.S. 51, 63 (1956). As described by the Court in *Far East Conference v. U.S.*, 342 U.S. 570, 574-75 (1952):

> The Court has developed a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the

> limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Although there is no fixed test for invoking primary jurisdiction, courts have focused on two factors in determining whether to refer a matter to an administrative agency[2]: (1) whether the issue lies peculiarly within the agency's discretion or requires the exercise of agency expertise; and (2) whether there exists a danger of inconsistent rulings. *See Western Pacific*, 352 U.S. at 64; *National Communications Ass'n, Inc. v. American Telephone and Telegraph Co.*, Dkt. 94-7352 (2d Cir. January 30, 1995); *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1039 (10th Cir. 1993); *Richman Bros. Records, Inc. v. U.S. Sprint Communications Co.*, 953 F.2d 1431, 1435 n.3 (3d Cir. 1991), *cert. denied*, 120 L. Ed. 2d 921 (1992). Both of these factors support denying plaintiffs' application pending resolution by the FCC of the core issue presented here.

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[2]Although sometimes described as "referral," the procedure as contemplated by the Supreme Court is that a District Court will rely on one of the adversaries to request a determination from the agency. *Reiter v. Cooper*, 122 L. Ed. 2d 604, 617, n. 3 (1993). In this case, the adversaries are *already* before the agency, requesting a determination of the central issue here.

A. Because Plaintiffs' Claims Concern The Scope of AT&T's Duties Under the Tariff and The Communications Act, The FCC Is The Proper Forum For This Matter.

It is well-established that issues of tariff interpretation and application and whether a given practice is "unreasonable" under the Communications Act must be decided in the first instance by the applicable administrative agency. *Allnet Communication Service v. National Exchange Carrier Ass'n*, 965 F.2d 1118, 1121 (D.C. Cir. 1992); *In re Long Distance Litigation*, 831 F.2d 627, 631 (6th Cir. 1987). The rationale for invoking primary jurisdiction here is that Section 201 and plaintiffs' charges deal with reasonableness, which is a determination that Congress has placed squarely in the hands of the FCC. *In re Long Distance Litigation*, 831 F.2d at 631.

Plaintiffs' claims here all require this Court to determine whether certain alleged acts (i.e. AT&T's request for a deposit for CCI and its refusal to acquiesce in the transfer of accounts to PSE) are "unjust" or "unreasonable" under Sections 201(a) and (b) or violate AT&T's tariffs. These issues are at the very heart of the responsibilities entrusted by Congress to the FCC, for they both require the expert and specialized knowledge of the FCC, *Western Pacific*, 352 U.S. at 63, and require "the exercise of administrative direction." *Far East Conference*, 342 U.S. at 574. Those issues should, moreover, be resolved once the FCC takes action in its pending proceeding regarding Transmittal

8179. Any determination of reasonableness of AT&T's action thus belongs in the FCC, not this Court.

Plaintiffs' second claim, that AT&T's failure to permit the transfer of service to CCI unless it posted a security deposit violated Sections 201(a), (b) and 203, also requires interpretation of tariff provisions and their application to the facts in this case. Determining reasonableness of AT&T's acts requires examination of not only sections Tariff No. 2 §§ 2.1.2(A), 2.1.8 (A-C), 2.5.8(A) (which even plaintiffs have acknowledged must be construed)[3] but also the general prohibitions against fraudulent schemes to avoid payment of tariffed charges (Tariff F.C.C. No. 1, §2.2.4.B.2. and Tariff F.C.C. No. 2, §2.2.4.A.2) and AT&T's right to restrict or suspend a customer's right to transfer service (Tariff F.C.C. No. 1, §2.9.2; *see* Tariff F.C.C. No. 2, §2.8.2). The FCC, not this Court, is clearly the proper body to harmonize these tariff provisions in light of its policy expertise and the congressional intendment to apply consistent requirements to the nation's telecommunication common carriers. *See Vortex Communications, Inc. v. American Telephone and Telegraph Co.*, 828 F. Supp. 19, 21 (S.D.N.Y. 1993) (FCC is responsible for tariff interpretations requiring involving technical and policy considerations).

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[3]AT&T, of course, disputes plaintiffs' conclusory argument about the facility of interpreting and applying the tariff provisions. Plaintiffs, moreover, ignore other tariff provisions whose underlying rationales must be considered in interpreting and applying the provisions concerning the transfer of service. The FCC is surely better situated to deal with all these questions.

B. The FCC Is Currently Considering Precisely The Same Issues In A Case Involving Precisely These Parties. This Directly Raises The Danger of Inconsistent Adjudication.

Although plaintiffs have chosen not to inform the Court of these relevant proceedings in the FCC, there is now already pending before the FCC the identical issue raised in plaintiffs application. That fact strongly favors this Court's deference to FCC's adjudication. As one Court has put it, the "advisability of invoking primary jurisdiction is greatest when the issue is already before the agency." *Mississippi Power & Light Co. v. United Gas Pipe Line*, 532 F.2d 412, 420 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094 (1977); *see MCI Communications Corp. v. American Tel. and Tel. Co.*, 496 F.2d 214, 223-24 (3d Cir. 1974).

Now before the FCC is a proceeding that deals squarely with issues at the heart of the plaintiffs' application and in which the plaintiffs have had the opportunity to present, and have presented, their views in lengthy petitions. (See Meade Cert., ¶¶4-7). That proceeding initiated on February 16, 1995, when AT&T filed Transmittal 8179 to clarify AT&T's and subscribers' existing obligations concerning transfer of service under AT&T FCC Tariff Nos. 1 and 2. Under those tariffs, a customer is liable, *inter alia,* for 1) usage charges, 2) so-called shortfall charges, and 3) termination charges. When a customer transfers the whole plan under which it receives service, the transferee receives all of the transferor's individual accounts *and* also assumes obligations for

usage as well as liability for existing or potential shortfall and termination charges on that plan. The tariff clearly contemplates that the responsibility for shortfall and termination penalties reside with the customer that is receiving the revenue from that service. What AT&T seeks with Transmittal 8179 is clarification of these already-existing obligations.

Several companies, including CCI, PSE and Winback & Conserve, have filed Petitions to Reject Or Suspend and Investigate AT&T's Transmittal 8179. (Meade Cert., ¶¶4-7). Plaintiffs accordingly cannot complain that they have not had a reasonable opportunity to seek an administrative ruling on this matter. *See Reiter v. Cooper*, 122 L. Ed. 2d 604, 617-18, n. 3 (1993); *see also American Telephone and Telegraph v. MCI Communications Corp.*, 837 F. Supp. 13, 17 (D.D.C. 1993) (primary jurisdiction appropriate in situation when the parties are able to participate in an ongoing FCC proceeding). They have already been heard; they should await the FCC's decision, not provoke this Court to act on an emergent basis while the FCC considers the identical issue.

The resolution of these issues will, in addition, affect any subscribers to AT&T Tariff F.C.C. Nos. 1 and 2 and those who hold contract tariffs that seek to transfer a substantial amount of traffic. Therefore, the danger of inconsistency between the FCC proceeding and this action is manifest. (*See* Meade Cert. ¶6, Ex. D (Petition to Reject of Combined Companies, Inc.) at 1.)

Indeed, even the plaintiffs' own submissions in this case establish that the issues they raise must be decided by the FCC in the first instance. *See* Joint Brief in Support of Plaintiffs' Motion for Temporary Restraining Order and Mandatory Preliminary Injunction (filed Feb. 24, 1995). The plaintiffs' brief overflows with references to "FCC policy," (*see, e.g., id.* at 18, 24), descriptions of FCC orders or regulations assertedly governing this dispute (*see, e.g., id.* at 18-19, 23-24, 26-27, 29-30, 36) descriptions and interpretations of disputed terms in FCC tariffs (*see, e.g. id.* at 19-21, 23-24, 27-28), and statements that its or AT&T's actions were "reasonable" under Section 201 of the Communications Act (*see, e.g., id.* at 20-25, 29, 32, 35).

C. Plaintiffs' Brief Argument On The Primary Jurisdiction Issue Is Inapposite.

Plaintiffs' only recognition of the FCC's involvement in these matters is contained in a terse footnote briefly citing two decisions. Plaintiffs do not even attempt to refute that their application seeks decision of matters entrusted to the FCC or that the application directly raises the danger of inconsistent adjudications. *See Western Pacific*, 352 U.S. at 64. And both decisions plaintiffs cite on this issue are readily distinguishable.

In *National Communications Ass'n v. American Tel. & Tel. Co.*, No. 94-7352, slip op. (2d Cir. Jan 30, 1995)("NCA"), the decision on which the plaintiffs place primary reliance, there was *no* dispute about the construction of the tariff at issue. Rather,

in *NCA* the Court found that the only dispute was about the underlying facts to which the tariff applied, *i.e.*, "whether NCA had timely paid its bills." *Id.* at 7. The court described that inquiry as "a rather simple factual question" that was well "within the district court's experience." *Id.* *See also id.* at 10 ("this case does not require interpretation" of AT&T's tariff). Here, of course, the plaintiffs and AT&T disagree not only about the facts (arguably a matter within the conventional experience of judges) but also about the interpretation of the applicable tariff (a matter indisputably at the core of the FCC's discretion and expertise).

Second, in *NCA*, unlike this matter, there was no action pending at the FCC considering precisely the same issue. Therefore, the court stated that the case "present[ed] a unique and narrow factual dispute that pose[d] *no risk of inconsistent interpretations*." *Id.* at 10 (emphasis added). In this case, by contrast, the FCC is already considering precisely the same questions plaintiffs raise here in a proceeding involving precisely the same parties, posing a substantial risk of inconsistent judgments.

The other decision plaintiffs cite, *Bruss Co. v. Allnet Communications Servs., Inc.*, 606 F. Supp. 401 (N.D. Il. 1985), actually undermines plaintiffs' argument. There the court stated that "a dispute as to whether a carrier's rates or practices are reasonable has uniformly been deemed to be within the primary

jurisdiction of the appropriate regulating agency." *Id.* at 408. The court refused to refer the case to the FCC only because the dispute there essentially involved a "mere question of fact" and not an "exercise of administrative discretion." *Id.* at 409 (quoting *Pennsylvania R.R. v. Puritan Coal Mining Co.*, 237 U.S. 121, 131-32 (1915)).

II. AT&T HAS NOT VIOLATED ANY PROVISION OF THE ACT BECAUSE IT HAS NOT UNREASONABLY DENIED PLAINTIFFS "SERVICE." THIS COURT SHOULD ACCORDINGLY DECLINE TO ACT UNDER § 406.

Plaintiffs' argument that this Court may issue an order under Section 406 both misreads §406 and mischaracterizes the facts of this case. Neither plaintiffs nor any end user of Winback, of CCI, of PSE or of any other plaintiff has been denied "service." All continue to have access to the 800 service Winback provides. AT&T has thus done nothing to interfere with the plaintiffs' ability to receive "service." All AT&T has done is to take steps to prevent manipulation of those end users to lay AT&T open to the risk of financial loss through Winback's or CCI's default of the substantial $54 million volume commitments Winback made to AT&T. Put simply, the dispute here is not about AT&T denying anyone *service*; it is about AT&T denying permission to plaintiffs to shift duties and liabilities owed AT&T away from responsible parties to entities unable to meet those commitments.

Section 201(a) of the FCA requires a carrier to furnish communication service upon "reasonable request." 47 U.S.C. §

201(a). AT&T satisfied that duty by agreeing to permit transfer of the CSTP-II plans upon the giving of tariffed security by CCI. CCI was a newly formed corporation without any payment history or established financial record, and without either substantial assets or a willingness to pay a security deposit. It is simply not reasonable to expect a company, as CCI, with no assets, to assume a liability to deliver on a $54 million service commitment while at the same time acting as a mere conduit to PSE for the transfer of the end users whose income stream could satisfy that commitment. AT&T protected itself from financial loss and safeguarded the public interest in preventing discrimination by demanding adequate financial security as contemplated by, and permitted in, the tariff. Nothing plaintiffs have said diminishes the reasonableness of AT&T's demand for security.

The language of AT&T's Tariff itself makes clear that AT&T has not violated Section 201. AT&T's Tariff No. 2 states that "a deposit to be held as a guarantee for the payment of charges" may be required of either a Customer which has a proven history of late payments to the Company "*or whose financial responsibility is not a matter of record.*" AT&T Tariff No. 2, § 2.5.8(A) (emphasis supplied). CCI, the proposed transferee of Winback's CSTP-II plans, was a newly formed corporation, without an established credit history or history of regular payment. Plaintiffs argue that although CCI is a "new" corporation in a "technical sense" --- and a literal sense as well --- the fact that CCI was established as the parent corporation of two other corporations, Global and

National, should forgive this "technicality." That argument ignores the fact that a parent corporation may be insulated from the liability of its subsidiary, and therefore the ability of a creditor to look to a *parent* corporation for payment of the *subsidiary's* debts may be quite limited. *See, e.g., Local 397, Int'l Union of Elec. v. Midwest Fasteners, Inc.*, 779 F. Supp. 788, 792 (D.N.J. 1992); *See also* 18 C.J.S. Corporations § 1 *et seq.*

If a parent corporation is free of its subsidiaries' financial obligations, *a fortiori* the subsidiaries are not answerable for the obligation of their parent. Nothing in plaintiffs' brief suggests otherwise. Yet plaintiffs would have AT&T rely on non-existent obligations and the absence of security to provide service while remaining at risk for tariffed shortfall charges. To state plaintiffs' argument is to understand its rejection.

The FCC policy regarding deposits cited by plaintiffs is simply inapposite here. That policy provides that a carrier, such as AT&T, may demand deposits from an entity that does not have an established credit history, except that an interexchange carrier which is a *successor* to a company which has established credit and has no history of late payments may be exempt from the deposit requirement. *See In re Investigation of Access and Divestiture Related Tariffs*, CC Docket No. 83-1145, Phase I, *Memorandum, Opinion and Order*, 97 F.C.C.2d 1082 (1984).

The short answer is that CCI is no successor to anyone. The terms "successor" or "successor in interest," when used in reference to corporations, generally mean an entity which "has become invested with rights and assumed the burdens of the first corporation" and "which is thereafter responsible for prior liens . . . all debts, liabilities and duties" of the corporation. *See, e.g., In re New York S. & W. R. Co.*, 109 F.2d 988, 994 (3d Cir. 1940); *In re The Stanley Hotel, Inc.*, 13 B.R. 926, 933 (Bankr. Colo. 1981). Plaintiffs do not and cannot explain how CCI, a newly formed corporation that acts as the parent of Global and National, can be either the successor or successor in interest to either Global or National. Both Global and National remain viable corporations. The relationship between CCI and Global and National is, we are told, one of parent-subsidiary; it is *not* successor-predecessor. Plaintiffs' reliance on the FCC policy is thus wholly misplaced.

Plaintiffs' argument that AT&T has violated Section 203 is even further off the mark. Section 203 provides that each carrier must file tariffs with the FCC showing all charges and rates for interstate communications and must abide by the terms of those tariffs. 47 U.S.C. §203. It is undisputed that AT&T has done just that. As even Plaintiffs observe, the right of a carrier to demand a deposit from a person requesting service who has no established record of financial responsibility is expressly contained in a filed tariff. *See* AT&T Tariff No. 2, §2.5.8. AT&T was and remains ready to process the TSAs submitted by Winback and

CCI *upon receipt of the security deposit* required under the tariff. That deposit has not been made. Plaintiffs' effort to manufacture a §203 violation here thus fails to pass logical muster.

What Winback, CCI and PSE seek is not to receive *service* under the Act and various tariffs; that they already have. Rather, plaintiffs seek permission to transfer CSTP-II plans from Winback to CCI, an entity incapable of satisfying the $54 million volume commitment without retaining the traffic from the end users that CCI intended simultaneously to transfer to PSE. The net result of these actions would have been to award PSE substantial traffic, deprive AT&T of the benefit of Winback's volume commitment, and leave the entity in breach of that volume commitment, CCI, incapable of satisfying the shortfall charges required by the tariff. No other explanation answers satisfactorily the question why so elaborate a series of transactions were plotted if the goal were truly to give PSE the end users' traffic. There is simply no economic rationale for CCI to participate in the transaction or for CCI to hold onto a handful of accounts, except to serve as a strawman to achieve Inga's purpose.

Winback now complains that a mandamus should issue to require AT&T to "discontinue" service under §406. The anomaly of Winback's argument stems from the illegitimate purpose of its efforts. Section 406 was intended to prevent either (1) discrimination in charges or (2) denial of service for illegitimate

reasons. 47 U.S.C. § 406. But AT&T has not denied *any* end user service.

To be sure, AT&T has an obligation to provide service. But that obligation is not absolute. Rather, the Act and AT&T's tariffs require AT&T to provide service *only* if reasonable financial requirements are met. As AT&T has pointed out to the Commission, AT&T's conditions to the transfers Winback wants to carry out simply seek to prevent Winback from divorcing liability for volume commitments from the benefit of discounted rates.

The fact that Winback would, if successful, rid itself of shortfall liability, devolve that liability to CCI, an entity incapable of satisfying that obligation, and thereby expose AT&T to genuine financial loss when the commitment is not met is reason enough to deny plaintiffs relief. But the antidiscrimination prohibitions of the Act (*see* 47 U.S.C. 201(b)) may even require denial of plaintiffs' application. If Winback succeeds, it will have obtained CSTP-II plans containing discounts without adhering to volume commitments required of all other customers. Winback will thereby have obtained a discriminatorily favorable rate for its service, contrary to the central purpose of the Federal Communications Act. That result is avoided only by denying plaintiffs relief.

III. PLAINTIFFS ARE NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER UNDER TRADITIONAL TESTS.

Plaintiffs cannot remotely meet the requirements for issuing a preliminary injunction. In order to obtain the preliminary injunctive relief that they seek, plaintiffs must demonstrate: 1) a likelihood of success on the merits; 2) danger that the applicant will suffer irreparable harm; 3) that the balance of equities favors the applicant; and 4) that the public interest would be served by order. *Opticians Ass'n of America v. Independent Opticians of America,* 920 F.2d 187 (3d Cir. 1990).

Plaintiffs do not satisfy these requirements. For reasons argued earlier, plaintiffs have not shown a likelihood of success on the merits of their Federal Communications Act claims because AT&T has not denied service to anyone, much less unreasonably so. AT&T's deposit demand of CCI was, in light of CCI's unestablished financial record, both reasonable and just. Sections 201(a) and (b) have accordingly not been violated. Section 203, which requires that a carrier file and abide by filed tariffs, has also not been violated by AT&T. The fact is that AT&T has complied with the language of the tariff 2.5.8(A) by demanding a deposit of an entity with no established record of financial responsibility. By not paying the deposit and subsequently filing this action to avoid having to pay the deposit, it is Winback and CCI that have not complied with the tariff's language.

Nor have Plaintiffs suffered irreparable harm because of AT&T's denial of their desire to have Winback's Plan transferred. Plaintiffs argue that the "continued maintenance and growth" of Winback's business, the "long term success" of CCI's business, and future revenues to PSE are now in jeopardy, and that this is enough to establish *irreparable* harm. That is incorrect. It is well-established that "[m]ere injuries, however substantial in terms of money, time, and energy necessarily expanded ... are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *United States v. Jefferson County,* 720 F.2d 1511, 1520 (11th Cir. 1983), *reh'g denied by Bennett v. Arrington*, 724 F.2d 978 (11th Cir. 1984); *see also Canal Auth. of Fla. v. Callaway,* 489 F.2d 567, 573 (5th Cir. 1974) ("only those injuries that cannot be redressed by the application of a judicial remedy after a hearing on the merits can properly justify a preliminary injunction"). This case is about which of the Inga companies will be ultimately responsible for obligations to AT&T. Plaintiffs cannot explain how the allocation of those obligations among companies will cause any of them "irreparable" harm. Plaintiffs have thus failed to show the second element necessary for a temporary restraining order, especially where the desired relief is mandatory.

Nor can plaintiffs seriously argue that the balance of hardships favor them. If forced to permit the transfer of Winback's Plan to CCI as well as the subsequent transfer to PSE,

AT&T faces the likelihood of being left with a substantial uncollectible shortfall and termination charges if and when Winback and CCI, having neither assets nor a customer base producing a revenue stream, default on their obligations. The "hardships" facing Winback, CCI, and PSE, moreover, are non-existent: if PSE took an assignment of the Plans from Winback and Conserve, thereby accepting shortfall and termination liability, AT&T would effect the transfer. If CCI posted the requested security, AT&T would effect the transfer. Neither of these is a "hardship" equating to irreparable harm.

The public interest too favors AT&T. That is so because the public's interest here is not merely that resale promotes competitive markets. The "purpose of the [Communications Act of 1934] is to protect the public interest rather than to provide a forum for the settlement of private disputes." *United Tel. Co. of Carolinas, Inc. v. F.C.C.*, 559 F.2d 720, 723 (D.C. Cir. 1977). *See also Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 14 (1942) ("purpose of the [Communications] Act was to protect the public interest in communications"). The "great purpose" of the Communications Act is to prevent unjust discrimination in rates. *See Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907) (construing antecedent of the Communications Act). If Winback and Conserve obtains discounted rates in exchange for volume commitments and then default on those commitments after transferring its locations to another, Winback will have, in effect, deliberately secured a discriminatory rate on a false

promise. Thus, AT&T alone is not injured by Winback's scheme; the public interest suffers as a result of the discrimination in favor of Winback as against those subscribers who paid higher rates as a result of their fulfilled, but lower service commitments.

Finally, the last reason to deny plaintiffs the relief they seek is the fact that their "temporary," mandatory relief is identical to the final relief they seek; *i.e.*, a dramatic alteration, not preservation of the status quo. It has long been the law that a temporary restraining order is extraordinary relief designed to preserve the status quo during litigation. *See, e.g.*, *Granny Goose Foods, Inc. v. International Bhd. of Teamsters*, 415 U.S. 423 (1974); *Warner Bros. Inc. v. Dae Rim Trading, Inc.*, 877 F.2d 1120 (2d Cir. 1989); *Willheim v. Investors Diversified Services*, 303 F.2d 276 (2d Cir. 1962). What the Plaintiffs seek here, however, is irretrievably to *alter* the status quo. A mandatory preliminary injunction, which plaintiffs seek, should only be granted at the preliminary stage of the proceedings in "rare instances" where facts and law are clearly in favor of moving party, especially if the grant of the temporary injunction would "in effect give plaintiff the relief which he seeks in the main case." *Miami Beach Fed. Sav. & Loan v. Callader*, 256 F.2d 410 (5th Cir. 1958); *Bricklayers, Masons, et al. v. Lueder Const. Co.*, 346 F. Supp. 558, 561 (D. Neb. 1972). Plaintiffs have not met that standard here. Plaintiffs' request for a temporary restraining order therefore should be denied.

CONCLUSION

For all the foregoing reasons, Defendant AT&T Corp. requests that the Court deny plaintiffs' application for a temporary restraining order.

Respectfully submitted,

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