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

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In the matter of	)	
	)	RM No.
Interim Provision of Access	)	
for 900 Transport Services	)	

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TELESERVICES INDUSTRY ASSOCIATION PETITION FOR RULE MAKING

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PETITION FOR RULEMAKING

The Teleservices Industry Association, by its attorney and pursuant to Section 1.401 of the Commission's rules, hereby requests that the Commission initiate a rulemaking proceeding proposing the adoption of rules and policies which, until 900 portability is fully implemented, will require 900 carriers, such as AT&T and MCI, to continue to provide, upon request, tariffed transport services on an information provider's existing 900 numbers, notwithstanding the termination of 900 billing services by the 900 carrier on such 900 numbers. In addition, the Commission should require 900 carriers, upon termination of 900 billing services for a particular 900 number, to provide a referal message service on the same 900 number to any other telephone number.

I.

BACKGROUND

The Teleservices Industry Association ("TIA") is a trade association headquartered in Los Angeles, California, which represents approximately seventy U.S. and international companies engaged in the pay-per-call industry. The pay-per-call industry (also known as the "audiotext" or "900" industry) provides

consumers with a variety of information and entertainment services by telephone on a pay-per-call basis. The charge to make these calls is set by the information provider ("IP") who offers the pay-per-call service.

TIA's October 18, 1994 Petition for Rulemaking on "900 Portability" (CC Docket No. 95-116, RM 8535) is currently pending before the Commission[1].

II.

COMPETITION IN THE MARKET FOR 900 BILLING SERVICES ON EXISTING OPERATING 900 NUMBERS IS VIRTUALLY NONEXISTENT BECAUSE THE LARGEST 900 CARRIER (AT&T) REQUIRES THE INFORMATION PROVIDER TO FORFEIT ITS 900 NUMBER UPON TERMINATION OF 900 BILLING SERVICES.

A. Introduction

TIA's 900 Portability Petition focused primarily on the lack of competition for 900 transport services because of the lack of 900 number portability. This Petition addresses primarily the lack of competition for 900 billing services on existing operating 900 telephone numbers because of the policies and practices of certain 900 companies (primarily AT&T) in "tying" their 900 billing services on existing operating 900 numbers to the IP's right to continue to use its existing 900 numbers. More specifically, once a 900 carrier, such as AT&T, ceases providing billing services for a 900 telephone number (for any reason whatsoever), it thereafter terminates that 900 number, thereby refusing to provide the IP with tariffed transport services on the same 900 number; and even

[1] That Petition describes (p. 1-4) the dynamic and diversified growth of the 900 industry since the late 1980's. This Petition is based upon the September 11, 1994 Comments and the October 11, 1994 Reply Comments filed by David Kahn in support of TIA's 900 Portability Petition.

refuses to provide a referral message to another telephone number!

AT&T's market power over the 900 IP is dramatically magnified because pursuant to Section 7.C. of AT&T's standard 900 Billing Services Agreement ("BSA"), AT&T can terminate its BSA with the IP upon thirty (30) days prior notice, with or without cause. Upon such termination AT&T also terminates the IP's unique 900 numbers; thereby refusing to provide the IP with tariffed transport services on the same 900 numbers; and AT&T even refuses to provide a referral message to another telephone number.

The comments of the various parties to the FCC's telephone number portability rulemaking proceeding demonstrate that for a variety of reasons 900 number portability will take a substantial time period to implement fully; especially because of the time necessary to determine the technology to be used and the allocation of the resulting costs to the various parties. During that time period, the monopoly leveraging anticompetitive practices by AT&T, which controls approximately 70% of the $650 million national 900 market[2], and the resulting anticompetitive evils resulting therefrom should not be permitted to continue to exist.

Because AT&T has an approximate 70% market share of the national U.S. 900 market, this Petition refers to only AT&T's 900 policies and practices, rather than to each and every other 900

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2 Strategic Telemedia, in its July, 1994 Telemedia News and Views newsletter estimated AT&T's 1994 market share would be about 70% of an estimated $650 million dollar national U.S. market. Strategic Telemedia is regularly relied on in the trade for 900 industry statistics. Thus, their estimates were accepted by the overwhelmingly dominant magazine covering the 900 industry, Infotext, in its 1994 Service Bureau Review issue. See also p.20 of Strategic Telemedia's February, 1994 one-hundred thirty page study of the U.S. Market for 900 Services, which estimates AT&T's 1993 market share at 69%.

carrier's policies and practices.

AT&T enforces Sections 8.G. and 9. (or Sections 7.E. and 6. of AT&T's newer version) of AT&T's BSA which provide[3]:

> "8.G. The Premium Billing Arrangement for MultiQuest Dial-It 900 Service provided for in this agreement will automatically terminate if Network Services [i.e., tariffed transport services] are not subscribed to for a period of ninety (90) days...
>
> 9...upon termination of this [billing services] Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

B. AT&T's Illegally Ties Its 900 MultiQuest Billing Services to Its 900 MultiQuest Tariffed Transport Services for the Same 900 Telephone Numbers Pursuant to AT&T's BSA.

Notwithstanding AT&T's knowledge that the FCC "detariffed" AT&T's Dial-It 900 service in part because there supposedly was no "tie-in" between AT&T's billing services and transport services in that case, AT&T "ties" their 900 MultiQuest billing services to AT&T's transport services for the same 900 numbers. More specifically, AT&T's above referenced BSA provisions mean that all AT&T's 900 BSA customers must use AT&T's transport services (i.e., "Utility" or "Network Services"); then if AT&T's 900 billing services are terminated by either party, for any reason whatsoever, AT&T's 900 IP loses its unique 900 numbers. The practical effects are obvious. After operations commence, the AT&T 900 IP cannot elect to use a competitive billing service without losing its 900 telephone numbers, in which it has invested significant monies in promotion, and which are typically the only practical way for the 900 IP's customers to do business with, or to even be able to

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[3] These provisions are enforced by AT&T even though they are legally unenforceable because they are overridden by § 5.4.3. A. of AT&T's Tariff No. 1 (which provides that the 900 number is part of AT&T's 900 tariffed transport service) and by the Federal Communications Act.

contact, the IP ("IP").

Upon termination of AT&T's 900 billing services, pursuant to AT&T's illegal exclusive dealing and tying provisions in AT&T's BSA, AT&T also terminates the IP's unique 900 number(s); and without any referral service. Therefore, when AT&T (or the IP) terminates AT&T's 900 billing services upon thirty days notice pursuant to AT&T's BSA, AT&T thereafter (i) refuses to provide tariffed transport services on the same 900 numbers on which AT&T (or the IP) has terminated billing services, and (ii) refuses to provide a referral service on the same 900 numbers. At that point in time, AT&T will only provide tariffed transport services to an IP on different 900 numbers. Thus, AT&T will only provide 900 utility services (i.e., transport services) to the IP if the IP gives up its single most important asset, its unique 900 telephone numbers; which typically generate virtually all of the IP's total revenue.

In order for AT&T to terminate the IP's 900 telephone numbers, thereby terminating transport services on the IP's existing 900 telephone numbers, AT&T invokes provisions of AT&T's BSA, which are unenforceable as such provisions (i) are not in the applicable AT&T Tariff No. 1 (which is legally controlling over and supersedes any BSA provision), and (ii) constitute illegal tying and exclusive dealing arrangements violative of the Federal Antitrust laws and the Federal Communications Act, as hereinafter set forth.

Thus, under paragraph 8.G. of AT&T's BSA, the 900 IP must use AT&T's Network [tariffed transport or utility] services. If an IP uses AT&T's tariffed 900 transport services, the IP must continue

to use AT&T billing services on those same 900 numbers, or lose its unique 900 numbers. These are telephone numbers in which the IP, typically will have invested substantial sums. Thus, the effects of these provisions in AT&T's BSA are to "tie" AT&T's tariffed 900 transport services to its 900 billing services, and to prevent AT&T's IP's from utilizing 900 billing services of AT&T's competitors in violation of the Antitrust Laws.[4]

AT&T's illegal tying and exclusive dealing provisions in AT&T's BSA deny essential services to the IP. Specifically, after a 900 IP signs an AT&T 900 BSA and agrees to use AT&T's 900 billing services, the 900 IP is tied to AT&T's 900 billing services for life if the IP desires to continue to use the specific 900 number(s) on which it has spent considerable monies advertising, and which constitute the only practical way for the IP's customers to do business with, or to contact, the IP.

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[4]Antitrust laws deal with "competitive realities." United States v. Masonite Corporation. 316 U.S. 265, 280 (1942). The effects of these AT&T tying and exclusive dealing provisions in AT&T's BSA are much like the effects of the lease only system found illegal in United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), affirmed United Shoe Machinery Corp. v. United States 347 U.S. 521, 74 S. Ct. 699, 99 L.Ed. 910 (1954). In that case once a customer entered into a lease with United Shoe Machinery, it was economically prohibitive to deal with a competitor. A tying agreement or condition "need not be expressly embodied in written agreements. Such arrangements may be deduced from a course of conduct." Associated Press v. Taft-Ingalls Corporation, 340 F.2d 753, 765 (6th Cir. 1965) Cert. den. 382 U.S. 820 (1965).

Eastman Kodak Company v. Image Technical Services, Inc., 112 S. Ct. 2072, 119 L.Ed. 2d 265 (1992), is directly on point. In that case, the plaintiff alleged that Kodak illegally tied the sale of Kodak parts to Kodak service. The U.S. Supreme Court held that customers of Kodak for replacement parts of Kodak equipment stated valid claims against Kodak based on Kodak's refusal to sell them such parts. The Supreme Court held that the plaintiffs stated valid claims for violation of both §§ 1 and 2 of Sherman Act. Kodak contended, as AT&T will probably contend, that because there was competition in its primary market [for Kodak Equipment, as for AT&T's 900 billing services] Kodak could not have monopoly power in the parts market. This argument was rejected, 112 S. Ct. 2072-73. The Supreme Court held that it was a question of fact as to whether Kodak monopolized a market in its own products.

Other cases have held that tying or exclusive agreements violate §§ 1 and 2 of the Sherman Act so long as a "not insubstantial" amount of commerce is involved. Fortner Enter., Inc. v. United States Steel Corp. 429 U.S. 610 (1969); Standard Oil Co. of Cal. v. United States 337 U.S. 293 (1949), Richfield Oil Corp. v. United States, 343 U.S. 922 (1952). See Kodak, supra, at 2079-80.

Thus, if an AT&T 900 IP terminates AT&T's billing services pursuant to AT&T's BSA to use the billing services of a competitor, the IP loses its unique 900 numbers, even though it may have spent large sums in promoting them; and even though the IP's customers have no other practical way of thereafter doing business with, or contacting, the IP. Thus, AT&T becomes the only practical 900 billing services facility after it once signs up a 900 IP, and the 900 IP starts promoting the unique 900 number.[5]

C. In Order to Enforce AT&T's Illegal "Tying" of AT&T's 900 Billing Services to AT&T's 900 Tariffed Transport Services AT&T Relies Upon Tariff And BSA Provisions Which the Commission and the Courts Have Held to Be Unenforceable.

Whenever AT&T's 900 billing services are terminated, by either party, for any reason whatsoever pursuant to AT&T's BSA, AT&T simultaneously terminates the IP's tariffed transport services on the IP's existing 900 telephone numbers pursuant to the BSA, although AT&T's 900 tariffed transport services (including the 900 number itself) are not governed by the BSA; they are governed exclusively by AT&T's Tariff No. 1 and the Federal Communications Act. Section 4 of AT&T's 900 BSA itself states:

"This Agreement does not govern or affect tariffed services."

AT&T's 900 tariffed transport services are regulated by the Federal Communications Act, which obligates AT&T to provide such services (including the 900 telephone numbers) to the IP in a just

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[5]Cf. Eastman Kodak Co v. Image Technical Services, Inc., 112 S.Ct. 2072, 2081-82(1992). Courts have consistently held that contract provisions which constitute illegal "tie-ins" are unenforceable. Courts have refused to permit a party to benefit from contractual rights when the contract is an instrument of restraint of trade. Osborn v. Sinclair Refining Co., 324 F.2d 566 (4th Cir. 1963); Wurzberg Brothers, Inc. v. Head Ski Co., 276 F.Supp. 142 (D.N.J. 1967). Seventh Circuit Court of Appeals in Milsen Company v. Southland Corporation, 454 F.2d. 363, 366-367 (1971): 6th Cir.

and reasonable manner, and on a nondiscriminatory basis (47 U.S.C. Sections 201, 202(a)), notwithstanding any contrary contract provision in AT&T's BSA, such as the last sentence in Section 9 of AT&T's BSA which purportedly requires the IP to give up its most valuable asset upon termination of the BSA, the IP's unique 900 telephone numbers.

More specifically, the last sentence of Section 9 of AT&T's BSA states in relevant part:

> "9...upon termination of this Agreement[6] AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

Thus, upon termination of AT&T's BSA upon thirty days notice, AT&T is willing to continue to provide transport services to the IP, <u>but only if AT&T changes the IP's unique 900 telephone numbers, on which the IP has spent significant amounts of money advertising</u>. AT&T does not, and cannot, contend that AT&T's Tariff No. 1 itself permits AT&T to terminate the IP's 900 telephone numbers, other than for nonpayment of charges.

There is no provision in AT&T's Tariff No. 1 which permits AT&T's "tie-in" practice of terminating transport services for the IP's existing 900 telephone numbers, or the changing (or terminating) of the IP's 900 telephone numbers merely <u>because of the IP's termination, or AT&T's termination, with or without cause, of billing services for the IP's 900 telephone numbers.</u>

AT&T's Tariff No. 1 cannot be modified by AT&T's BSA or usage. Yet, AT&T for more than seven years has regularly and consistently

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[6] Although AT&T's BSA provides that it will terminate the IP's 900 numbers upon "...termination of this <u>Agreement</u>", in fact AT&T terminates an IP's 900 numbers whenever it terminates billing services for those 900 numbers, even though the AT&T 900 BSA for all of the IP's 900 numbers was not terminated.

terminated tariffed transport services on the IP's 900 telephone numbers for a reason not found in AT&T's Tariff No. 1, namely AT&T's termination, with or without cause, of the IP's BSA, or the IP's termination of AT&T's billing services in order to attempt to take advantage of a competitor's lower 900 billing services prices and/or better service.

But the Commission has ruled, in a similar context, that AT&T cannot terminate tariffed transport services even in the event of a breach of a billing services agreement. In the matter of AT&T Dial-It Services and Third Party Billing and Collection Services, 4 F.C.C. Rcd. No. 9, 3429 (1989), the Commission stated:

> "38. ...Further, we instruct AT&T to take adequate steps to ensure that communications services [i.e., tariffed transport services] to callers are not disconnected for failure to pay Premium Billing charges..."

Thus, even though AT&T does not allege any tariff violation by the IP, upon termination by either party of AT&T's 900 billing services pursuant to AT&T's BSA, AT&T terminates utility (i.e., transport) services on the IP's existing 900 numbers solely because of the termination of billing services pursuant to AT&T's BSA with that IP.

That the carrying of the IP's 900 information services over AT&T's common carrier network (i.e., tariffed transport services) on the IP's particular 900 numbers is a communication service subject to the Act is well settled.

D. The Only Legitimate Reason for AT&T to Terminate Tariffed Transport Services on the IP's Existing 900 Numbers Is Because AT&T Is Not Being Paid for Such Services.

Upon AT&T's termination of billing services for 900 numbers, AT&T does not terminate the IP's tariffed transport services on its

existing 900 telephone numbers because of any alleged non-payment of tariff charges; rather AT&T terminates the IP's tariffed transport services on such 900 numbers ipso facto because AT&T terminates, with or without cause, the BSA or billing services on those 900 numbers; or the IP terminates billing services pursuant to AT&T's BSA to try to take advantage of a competitor's lower 900 billing services prices and/or better service.

Although not in AT&T's tariff, Section 9 of AT&T's BSA provides that while AT&T is providing billing services, AT&T can change 900 numbers when:

> "...such change is necessary to effectively provide Billing Services, including, but not limited to, a change in the Offer(s) or a change in your charges for the Offer(s)."

This may be a reasonable provision in view of AT&T's original (now discontinued) practice of using different telephone prefixes for different billing prices to the caller.

But the last sentence of Section 9 of AT&T's BSA providing for the arbitrary termination of the IP's 900 telephone numbers, thereby terminating transport services to the IP on the IP's existing 900 numbers, upon termination of the IP's BSA can only have an anticompetitive purpose. This purpose does not permit termination of utility (i.e., transport) services to the IP on the IP's existing 900 numbers, as such illegal tying and exclusive dealing provision is unenforceable for the reasons stated herein.

It is anticipated that 900 carriers, such as AT&T, will contend that:

> "Assigning new 900 numbers is different than denying transport services, and there is no provision of the Federal Communications Act nor any other applicable law relating thereto which establishes that the IP is entitled to retain the use of specific 900 numbers."

However, the assignment of new 900 telephone numbers by AT&T is in effect a subscription to "new" telephone services. It is no different than termination of the IP's existing 900 telephone business and the start-up of a new 900 telephone business.

In effect, AT&T may argue that even though AT&T places, without any justification whatsoever, an economically prohibitive penalty on the obtaining of 900 transport services (i.e., termination of the IP's existing 900 numbers), this is not a discontinuation of transport services. In short, AT&T may argue that placing a confiscatory condition on the continuation of AT&T's 900 transport services to the IP does not constitute a discontinuation of such transport services.

First, this ignores the fact that the IP's 900 numbers are part of AT&T's transport services for the IP's numbers pursuant to § 5.4.3.A. of AT&T's Tariff; and there is no provision in the Tariff which permits AT&T's termination of the IP's 900 numbers (or transport services thereon), except for non-payment of tariff charges.

Second, it is difficult to imagine a more flagrant ruse by a common carrier in an attempt to avoid its obligations under the Act to provide transport services to the IP (whose 900 numbers generate virtually all of the IP's revenues, and are the only practical way for its customers to contact the IP) than to in effect say:

> "Yes, we will continue to provide the IP with 900 transport services, but we will arbitrarily change the IP's 900 numbers, thereby exacting an economically prohibitive penalty; since the only way that the IP will be able to generate revenue, or even be able to have its customers contact the IP, is through the IP's 900 numbers -- which will be arbitrarily terminated!"

It is as if an electric utility would say, "Yes, we will continue

to provide you with services, but only at a different address", or only on other conditions which exact such an economically prohibitive penalty as to be equivalent to a denial of services.

Third, since § 5.4.3.A. of AT&T's Tariff explicitly makes the IP's 900 numbers part of AT&T's tariffed transport services, under §§ 201(a) and (b) of the Act AT&T cannot change such numbers unless it is pursuant to a Tariff provision, which is "just and reasonable"; and under § 202(a) of the Act it must also be non-discriminatory.

E. Transport Services for the IP's Particular 900 Telephone Numbers Is a Basic Service Covered by Communications Act.

The FCC has ruled that the provision of 900 transmission (i.e., transport) services, including the assignment of 900 telephone numbers, are basic telephone services subject to the provisions of Title II of the Communications Act. Matter of AT&T 900 Dial-It-Services & Third Party Billing & Collection Services, 4 F.C.C. Rcd. No. 9 (1989). In Dial-It, the FCC held that AT&T Dial-It 900 Information Arrangement service provides sponsor/subscribers with transmission (i.e., transport) services and, thus, properly is characterized as a basic service subject to the Act. Id. at 3434. Thus, the IP's receipt of transmission (i.e., transport) services for its 900 telephone numbers are basic services subject to the provisions of the Communications Act.[7]

F. AT&T's Tariff Provides That the IP's 900 Numbers Are Part of AT&T's 900 Transport Services.

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[7]The FCC segregated the provision of 900 service into two distinct elements. The transport of the message and provision of the telephone number remain subject to traditional common carrier obligations. In contrast, the actual billing and collection of the charges for calls to 900 numbers was de-tariffed by the FCC and left to be governed by private contract only because in that case AT&T did not "tie" them together for the same 900 telephone numbers! See Dial-It at 3434.

AT&T is required under its Tariff No. 1 to provide 900 tariffed transport services to the IP, including the IP's particular 900 telephone numbers. The IP's 900 numbers are part of AT&T's tariffed transport services. The IP's 900 telephone numbers are provided through the Tariff, not AT&T's BSA. In fact, AT&T's Tariff No. 1 explicitly includes a 900 number as part of AT&T's 900 tariffed transport service. More specifically, § 5.4.3.A. of AT&T's Tariff No. 1 states:

> "The monthly charges for AT&T MultiQuest Service apply per Service Arrangement. The Service Arrangement is a combination of network hardware and software programming which provides the capability for calls to a Customer's 900 number to be routed to a Customer-designated AT&T Central Office. Each Service Arrangement <u>includes one 900 number</u> and one Routing Capability." (Emphasis added.)

Therefore, since the IP is entitled to 900 transport services, and since the IP's 900 numbers are part of those tariffed transport services, it necessarily follows that pursuant to the Tariff the IP is entitled to 900 transport services, <u>including the IP's 900 numbers</u>, upon termination of AT&T's billing services on those 900 numbers; notwithstanding any contrary provision in Section 9 of AT&T's BSA.

Thus, the IP's actual 900 telephone numbers are part and parcel of AT&T's common carrier communication (i.e., transport) service because <u>the IP's 900 telephone numbers are assigned through the Tariff, not the BSA</u>. AT&T's MultiQuest 900 Tariff No. 1 has other provisions dealing with 900 telephone number changes, such as (i) "once a 900 number has been disconnected by the Customer, it will be unavailable for use for six months, unless waived by the previous Customer" (Section 5.4.1), and (ii) the nonrecurring charge for changing a 900 telephone number is $175 (Section 5.4.3).

But, there is no provision in AT&T's Tariff No. 1 which permits AT&T to change an IP's 900 telephone number simply because the IP terminates, or AT&T terminates, without cause, billing services for such 900 numbers.

G. All Acts by AT&T, As a Common Carrier, Must Be Just and Reasonable, Regardless of Any Contrary AT&T BSA or AT&T Tariff Provision.

The language of § 5.4.2.E. of AT&T's Tariff No. 1 that a customer has no "....interest or proprietary right to any...900 telephone number...." does not mitigate the Federal Communications Act's requirement that AT&T, as a common carrier, must act in a "just and reasonable" manner pursuant to 4 U.S.C. Section 201(b).[8]

Indeed, when challenged, the FCC has held that the burden of proof is upon the carrier to justify restrictions in a tariff as being just and reasonable under Section 201. Tariffs are not presumed to be in compliance with the Act simply because they are filed and effective. The FCC does not review and approve all tariffs in advance. Rather, the FCC authorizes the carriers to file tariffs which are subject to review for lawfulness in the event of a challenge by a subscriber to the service.[9]

Thus, simply because AT&T's MultiQuest 900 tariff No. 1 declares that the IP allegedly has no proprietary interest in a 900 number does not ipso facto result in AT&T's Tariff No. 1 complying with the Federal Communications Act, and certainly is not a basis

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[8] The U.S. Supreme Court long ago held, "the Act requires the filed tariffs to be `just and reasonable' and declares that otherwise they are unlawful." Ambassador v. United States, 325 U.S. 317, 323 (1945).

[9] See In the Matter of Regulatory Policies Concerning Resale & Shared Use of Common Carrier Services & Facilities, 60 F.C.C. 2d 261 at paragraph 5 (1976), aff'd sub nom. AT&T v. F.C.C., 572 F.2d 17 (2d Cir. 1977), cert. denied, 439 U.S. 875 (1978).

upon which to terminate the IP's particular 900 numbers for an unjust and unreasonable cause. AT&T's termination of the IP's existing 900 telephone numbers simply because the IP terminates, or AT&T terminates, without cause, billing services pursuant to AT&T's BSA constitutes an unjust and unreasonable practice under the Act.[10] Certainly, AT&T's Tariff does not permit AT&T to terminate the IP's 900 transport services on the IP's 900 numbers based on the fact that the IP terminated, or AT&T terminated, without cause, billing services for the same 900 telephone numbers -- nor, it is submitted could it under Section 201(b) of the act.

H. AT&T's Termination of an IP's Unique 900 Telephone Numbers Merely Because AT&T's 900 Billing Services Are Terminated Is Not "Just and Reasonable" As Required by Section 201(b) of the Federal Communications Act, and Other Applicable Law.

Moreover, the fact that AT&T offers the IP new 900 telephone numbers does not make AT&T's act of terminating the IP's existing 900 telephone numbers, when the IP terminates, or when AT&T terminates, billing services just and reasonable.[11] This tactic by AT&T simply is a ruse to avoid its common carrier transport obligations! The FCC should not permit AT&T to terminate communications (i.e., transport) services to the IP's particular 900 numbers for reasons that are not "just and reasonable." To

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[10] In fact, even if AT&T's reason for terminating the IP's transport services on the IP's existing 900 numbers was the content of the IP's messages, the Federal Communications Act prohibits such termination. National Assn of Broadcasters, 740 F.2d at 1203.

[11] This argument is bolstered further by AT&T's refusal to provide referral messages on the IP's existing unique 900 telephone numbers after they are terminated by AT&T or the IP. A referral message advises callers that the number has been changed and provides the new number. Without a referral message, callers to all of the IP's AT&T 900 telephone numbers that are terminated would hear a message stating that the numbers are no longer in service. Callers would thereby conclude that the IP is simply no longer in business, or is unable to provide 900 services.

permit such conduct is to make a mockery of the Federal Communications Act's legislative mandate that AT&T provide 900 transport services (including the 900 numbers themselves) to the IP on a "just and reasonable" basis.

In the past, common carriers have attempted to obtain the right to change telephone numbers by including in a tariff the right to change numbers and a statement that subscribers have no property rights to the telephone numbers assigned. However, the Commission has struck down such tariff provisions holding:

> "We find this provision so broad and vague that it would accord the telco unrestricted discretion to change its customers' number assignments. Customers may have significant financial interests in the stability of these assignments.... We also find that the [provision] that customers have no "property rights" in these number assignments is gratuitous[12] [and] must be deleted." Matter of Investigation of Access & Divestiture Related Tariffs, 97 F.C.C.2d 1082 (1984).[13]

Further, the Commission has said that any tariff limitations that would restrict such rights must be justified by the carrier. In reviewing such tariff language, the Commission has set forth the following standard:

> "It is clear, however, that the prohibitions restrict subscribers' use of their communication service, and that carriers must justify the restrictions as just and reasonable under Section 201(b) of the Communications Act, and the case law based thereon. Also, the restrictions and exceptions thereto are discriminatory, and thereby unlawful if it is

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[12]In fact, the tariff language at issue may indeed be "gratuitous." AT&T does not own telephone numbers. The numbers are assigned to AT&T by Bell Communications Research (known as "Bellcore"), for all telephone numbers in the United States. In the Matter of Provision of Access for 800 Service, 8 F.C.C. Rcd. 1423 at paragraph 19 (1993); In the matter of Competition in the Interstate Interexchange Marketplace, 5 F.C.C. Rcd. 2627 at n.120. Thus, the tariff language may have been inserted to protect AT&T from claims by subscribers as a result of changes made by Bellcore, and not for the purpose of permitting AT&T arbitrarily to revoke telephone numbers, and thereby engage in unjust, unreasonable or discriminatory conduct in violation of the Act.

[13]In that same case, the FCC noted its policy that "customers may use a common carrier's services or facilities as they choose as long as the use (1) is lawful, (2) will not harm the network, and (3) is not otherwise publicly detrimental." (Emphasis added.)

determined that the discrimination is unjust and unreasonable under Section 202(a) of the Act. The burden of proof of establishing the justness and reasonableness of the restrictions and discrimination associated therewith is squarely on the carriers in whose tariff the restriction exceptions are found." Resale & Shared Use, 60 F.C.C.2d 261 at paragraph 4.

Notwithstanding AT&T's knowledge of these FCC decisions, AT&T included both in its Tariff No. 1, and in its BSA, provisions which AT&T knew were anticompetitive and unenforceable; namely § 5.4.2.E. stating that a customer has no "...interest or proprietary right to any....900 telephone number", and the last sentence of § 9 of AT&T's BSA which provides:

> "9...upon termination of this Agreement AT&T will assign you a different telephone number(s) if you elect to continue Network Services. [i.e., transport services]."

AT&T's changing of the IP's 900 telephone numbers merely because of the termination of billing services for those 900 numbers clearly violates the Federal Communications Act and FCC precedent. The IP has an interest in the 900 numbers assigned to it, which may not be terminated except in very limited circumstances; which are not present simply because AT&T's billing services for those 900 numbers are terminated. In short, AT&T has no "just and reasonable" basis whatsoever for the termination of the IP's 900 numbers, thereby terminating transport services on the IP's existing 900 numbers, merely because either party terminates billing services for those 900 numbers pursuant to AT&T's BSA.

In addition, several courts have recognized that the mere statement in a tariff[14] that a customer has no proprietary right in

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[14]Nor is the fact that AT&T's BSA also states that the IP has no ownership or other interest in the assigned 900 numbers controlling. AT&T may not by contract alter the rights defined by the tariff. American Broadcasting Companies, Inc. v. FCC, 643 F.2d 818, 819, 823-24 (D.C. Cir. 1980); Maislin Industries U.S. v. Primary Steel, Inc., __ U.S. __, 110 S.Ct. 2759, 2766 (1990) (although a case arising under

a telephone number can not serve as a basis for a phone company to circumvent its obligations under applicable law. Such a tariff provision has been consistently interpreted by courts to prevent telephone companies from engaging in such conduct, whose sole effect is to harm the subscriber. More specifically, courts have held that a tariff provision (virtually identical to AT&T's MultiQuest 900 Tariff) stating that a user has no ownership right in a telephone number, could not be construed to authorize a telephone company to exercise arbitrary dominion over the telephone number so as to cause harm and injury to another.[15]

Thus, the statement in AT&T's 900 tariff (and/or BSA) that the IP has no proprietary interest in its unique 900 numbers is not a basis to permit AT&T to act in violation of the Communications Act and terminate an IP's unique telephone nuumbers just because either

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the Interstate Commerce Act, the FCC has considered it appropriate to refer to precedent of the Interstate Commerce Commission. 60 F.C.C.2d 261.) Further, an unfiled or unpublished contractual alteration of a tariff is violative of the Act itself. 643 F.2d at 826. See *also*, Maislin, 110 S.Ct at 2769 (adherence to unfiled rates undermines basic structure of the law).

[15]For example, in Shehi v. Southwestern Bell Tel. Co., 382 F.2d 627, (10th Cir. 1967), the U.S. Court of Appeals for the Tenth Circuit reasoned that if it were to follow the telephone company's interpretation of the tariff concerning reservation of property rights to the telephone numbers, tariff provisions, such as the transfer of service between subscribers, would be rendered meaningless, and changes in subscriber's numbers could be made at the slightest whim of the company, regardless of the consequences to subscribers. See also, Price v. South Cent. Bell, 313 So.2d 184 (Ala. 1975).

In the area of bankruptcy law, the Fifth Circuit in In re Fountainbleau Hotel Corp., 508 Fed. 2d. 1056 (5th Cir. 1975) reh. den. 512 F.2d 1406 stated:

> "Two other circuits have held that the right to use a telephone number does not constitute possession of that number. See In re Best Re-manufacturing Co., 9 Cir. 1971, 453 F.2d 848; Slenderella Systems of Berkeley, Inc. v. Pacific Telephone and Telegraph Co., 2 Cir., 1960, 286 F.2d 488. Both of these cases are extremely brief discussions of the issue, however, and we believe that they should not be followed. They rely heavily on the fact that, as in this case, the telephone company tariffs recited that a subscriber acquires no property rights in a telephone number when he is permitted the use of it. A tariff, however, drafted by the company and certain to be self-serving, cannot determine the meaning of the term "property" in the federal bankruptcy statute. The telephone numbers are a valuable asset, just like the hotel's building or furniture. The purpose of summary jurisdiction is to give the bankruptcy court a quick means of preserving the wherewithal for maintaining the debtor's business. Protecting use of the telephone numbers by the debtor clearly falls within that responsibility." (Emphasis added.)

party terminates AT&T's 900 billing services.

I. The IP Has a Very Significant Interest in Its Unique 900 Telephone Numbers.

The FCC and the courts have recognized the substantial interest of a subscriber to telephone service and its assigned telephone number.[16] For 900 IP's, their particular 900 numbers are typically the single most important asset they possess, and typically generate virtually all of the IP's 900 income.

The reason the IP's 900 telephone numbers generate such revenues is because of the significant investment of past advertising expenditures and associated good will over many years in the past. When the IP's 900 telephone numbers are converted or terminated by AT&T, upon AT&T's termination of the IP's BSA, without cause, and AT&T thereby refuses to provide the IP with tariffed transport services on such 900 telephone numbers, the IP suffers irreparable injury because the IP's 900 business will probably be destroyed since the IP's 900 callers will have no practical way to contact the IP, but instead will call a competitor's 900 telephone number. As a result, the IP's 900 business will most probably not be in existence.

Upon AT&T's termination on thirty days notice, without cause, of the IP's BSA, AT&T terminates (pursuant to the last sentence of Section 9. of the IP's BSA) transport services on the IP's unique 900 telephone numbers, which typically generate virtually all of

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[16]The FCC has ordered that carriers such as AT&T must allow a customer to take its area code 800 numbers with it if it changes long-distance companies. See In the Matter of Provision of Access for 800 Service, 6 F.C.C. Re 5421 (1991). The order became effective May 1, 1993. In the Matter of Provision of Access for 800 Service, 7 F.C.C. Rcd. 8616 (1992). In the 1992 Order, the FCC acknowledged the "significant benefits that number portability can bring to consumers, through heightened 800 service competition and increased choices...." 6 F.C.C. Rcd. 5421 at paragraph 20.

the IP's 900 revenue. Unless the 900 IP has essential tariffed transport services on its existing 900 telephone numbers, the IP's 900 business will most probably be destroyed.

Further, unlike 800 numbers, until 900 telephone numbers are portable, they cannot be transferred from AT&T to another 900 billing company. Thus, the IP remains totally dependent upon AT&T for provision of transmission (i.e., transport) services for its unique 900 telephone numbers. AT&T's termination of the IP's unique 900 telephone numbers significantly and adversely affects the IP's entire substantial past investment of very significant monies in advertising to generate demand for these particular 900 telephone numbers. This deprives the IP of very substantial revenues from the residual response to such advertising for many years in the future.

Pursuant to AT&T's illegal exclusive dealing and tying provisions of their BSA (i.e., Sections 8.G. and 9.) AT&T terminates tariffed transport services on the same 900 numbers when AT&T terminates billing and collection services for those 900 telephone numbers. In other words, upon AT&T's termination, without cause, on thirty days notice of the IP's BSA AT&T will only provide utility services (i.e., tariffed transport services) to the IP for the IP's unique 900 telephone numbers if the 900 IP gives up its single most important asset, its unique 900 telephone numbers!

The IP's unique 900 telephone numbers generate significant revenues because of substantial past advertising expenditures and associated good will. When the IP's 900 telephone numbers are terminated by AT&T, or when AT&T thereby refuses to provide tariffed transport services for such 900 numbers, the IP's 900

business will most probably be destroyed because the IP's 900 callers will have no practical way to immediately contact the IP, but instead will simply call a competitor's 900 telephone number.

The IP's specific 900 telephone numbers, and the tariffed transport services therefore, are critical and essential to the IP's 900 business. More specifically, the loss to the IP of tariffed transport services for the IP's specific 900 numbers results in a loss of the IP's unique property, its customer list, because (1) the IP's 900 numbers are the only means for the IP's customers of those numbers to do business with the IP, and (ii) there is no practical economic way for such customers to contact the 900 IP, a significant number of whom are repeat customers, other than through a referral message on each of the IP's 900 numbers. In order to leave such a referral message, the IP needs to have tariffed transport services on the IP's 900 numbers.

Otherwise, the IP's customers will call one or more of the IP's 900 telephone numbers, only to find that there is no information being provided, and no forwarding number given. Customers may try one or more of the IP's other 900 telephone numbers, only to find that no information is being provided for each, and no forwarding number given. Customers will, therefore, come to believe that the 900 IP is out of business, which as a result it most probably will be! Those 900 IP customers will switch to a competitor of the IP, and will be lost.

III.

THE FCC IN ORDERING 800 NUMBER PORTABILITY CONCLUDED THAT UNTIL 800 NUMBER PORTABILITY WAS AVAILABLE, FUTURE BUNDLING BY AN 800 CARRIER OF ANY SERVICE USING OLD "800 NUMBERS" WAS AN UNLAWFUL PRACTICE UNDER SECTION 201(b) OF THE COMMUNICATIONS ACT.

In In the Matter of Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, the FCC stated:

> "We conclude, first, that until 800 number portability is available, future bundling by AT&T of any service with 800 or inbound service using "old" 800 numbers (800 numbers that were in use by the customer on the day prior to the release of this order) is an unlawful practice under section 201(b) of the Communications Act." FCC Rcd. No. 9, p.2677

The Commission's rationale was that:

> "Because of concerns that bundling of 800 services by AT&T could lead to anticompetitive leveraging, thereby harming competition for other services, we prohibited AT&T from including 800 or inbound services in contract-based tariffs or Tariff 12 integrated services packages until 800 numbers become portable." 7 Commission Rcd. No. 9, p. 2678.

More specifically, the Comission concluded:

> "We have found that leveraging is a significant risk with respect to "captive" 800 service customers -- customers that are unable to change their 800 number without incurring substantial costs." 7 FCC Rcd. No. 9, p.2680.

The Commission emphasized the significance of a subscriber's 800 number being changed when it stated:

> "Thus, in addressing the prospective costs a customer would incur if it changed its 800 number, AT&T ignores what may be the most significant costs involved for some customers -- forfeiting the value of their old 800 numbers, including any value inherent in the number itself, as well as any other goodwill associated with the number." 6 FCC Rcd. No. 21, p.5904.

IV.

AT&T'S MONOPOLY LEVERAGING OF ITS 900 TELEPHONE NUMBERS IS SIGNIFICANTLY MORE RESTRICTIVE THAN IT WAS FOR AT&T'S 800 NUMBERS; AND A 900 NUMBER IS MORE CRITICAL TO ITS SUBSCRIBER THAN AN 800 NUMBER BECAUSE THE 900 NUMBER IS TYPICALLY THE ONLY WAY FOR THE 900 SUBSCRIBER'S CUSTOMERS TO DO BUSINESS WITH, OR TO EVEN BE ABLE TO CONTACT, THE 900 SUBSCRIBER.

AT&T currently has in excess of 70% of the national 900 telephone market and engages in even more anticompetitive "tying" practices with its 900 numbers than AT&T did with reference to its 800 numbers.