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VIA EMAIL

Raymond A. Grimes, Esq.
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Re: *Combined Companies, Inc., et al. v. AT&T Corp.*
Civil Action No. 95-908 (SDW/SCM)

Dear Mr. Grimes:

On behalf of Defendant AT&T Corp. ("AT&T"), I respond to your January 18, 2016 letter sent on behalf of Plaintiffs Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc. (collectively, "the Inga Companies"). Your letter states that the Inga Companies will move yet again to lift the stay in the District of New Jersey matter even though Judge Wigenton denied such a motion in March 2015, and the Federal Communications Commission ("FCC") has not yet ruled on the issue referred by the District Court to the agency on primary jurisdiction grounds. Your letter offers no new grounds for seeking a stay, and another motion to lift the stay at this juncture would be frivolous.

The proceedings in the District Court case were stayed pending resolution of an issue that Judge Politan referred to the FCC on primary jurisdiction grounds. That referred issue is whether Section 2.1.8 of Tariff No. 2 required AT&T to process requests to transfer virtually all traffic on certain term plans from Combined Companies, Inc. ("CCI") to Public Service Enterprises of Pennsylvania ("PSE"), even though PSE had refused to assume all obligations, including for potential shortfall and termination charges. With that issue still unresolved after an initial FCC ruling and appeal to the D.C. Circuit, Judge Bassler rejected Plaintiffs' motion to lift the stay in 2006. The Inga Companies thereafter filed a petition for Declaratory Ruling at the FCC.

In December 2014, the Inga Companies moved to lift the stay even though the FCC had not yet issued a ruling on the referred issue. They argued, among other things, that the question of what obligations had to be assumed under Section 2.1.8 of Tariff No. 2 was a "red herring" because, in their view, it was clear that a transferee did not have to assume any obligation to pay potential shortfall charges. (See Ptfs. Dec. 15, 2014 Brief at 18-25). After full briefing and oral

argument, Judge Wigenton denied Plaintiffs' motion. She found that given the law of the case, it was appropriate to continue the stay to obtain a ruling from the FCC on the referred issue. (March 18, 2015 Transcript at 30:10-11). Judge Wigenton also suggested that Plaintiffs file a mandamus petition with a D.C. Circuit if they were unhappy that the FCC had not yet decided the referred issue. To our knowledge, Plaintiffs have never filed such a petition.

Your January 18 letter essentially ignores Judge Wigenton's March 2015 ruling and does not explain why Plaintiffs have not filed a mandamus petition.[1] Instead, you raise a series of claims for why Plaintiffs are entitled to file what amounts to a fifth motion to lift the stay. Because many of these claims simply rehash issues that have been the subject of extensive prior briefing, this letter is not a point-by-point rejoinder. Instead, I focus on the principal claims raised by your letter.

Much of your letter is based on the assertion that "AT&T's sole defense in 1995 was under section 2.2.4 which was 'fraudulent use.'" Letter at 1. From this, you appear to argue that an FCC order issued in October 1995 effectively foreclosed any "fraudulent use" claim. You also argue that a January 12, 2007 FCC Order refused to expand the referral beyond AT&T's "sole defense of fraudulent use," and that Judge Wigenton "has never seen" that Order. All of these assertions are demonstrably incorrect.

To begin with, there is no merit to the claim that "fraudulent use" as AT&T's "sole defense." AT&T defended its refusal to process the transfer at issue in this case based not only on its fraudulent use claim, but also because the proposed transfer was invalid under ***section 2.1.8***. *See* AT&T's March 30, 1995 Post-Hearing Br. at 7-8 (AT&T "refused to permit the transfer precisely because PSE, the 'new' customer in the transfer, did not assume '***all*** of the obligations' of the 'old' customer, CCI. *See* AT&T FCC Tariff No. 2, ***§ 2.1.8***") (second emphasis added). Indeed, the Third Circuit clearly recognized that AT&T was defending its refusal to process the CCI-to-PSE transfer on this ground. *See* May 31, 1996 Opinion at 2 ("AT&T objected to the proposal because the plaintiffs did not intend to transfer their potential liability for shortfall and termination charges, which form part of their contracts with AT&T"). Further, the FCC description of the Third Circuit's referral likewise confirms this reality: the "question the Third Circuit referred is '"whether ***section 2.1.8*** [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction."'" FCC October 17, 2003 Order at ¶ 1 (emphasis added). The FCC's 2003 Order also quotes AT&T's filing before the agency, which similarly makes clear that AT&T was raising two defenses, not just a fraudulent use defense. *Id.* ¶ 4 n.26 ("'AT&T objected on the grounds that ***Section 2.1.8*** did not authorize the transfer of a plan unless the transferee, in this case PSE, assumes the original customer's liability ***and that*** the location-only

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[1] Rather than file such a petition, on January 20, 2016, the Inga Companies inexplicably filed a "motion" with the FCC to suspend the proceedings. The apparent basis for such a motion is Plaintiffs' view that the District Court stay should be lifted without a decision on the referred issue. As discussed herein, that view has been repeatedly rejected by the District Court.

transfer violated the "fraudulent use" provisions of Section 2.2.4'") (emphasis added). Accordingly, there is no basis for your repeated assertion that AT&T's "sole defense" was a claim of fraudulent use under section 2.2.4.[2]

The fact that the original referral included the question whether the proposed CCI-to-PSE transfer violated section 2.1.8 also completely undermines your argument regarding the significance of the FCC's January 12, 2007 Order. Because the referral included that issue, the FCC's statement in its 2007 Order that it would not expand the scope of the referral cannot possibly be read to limit the issue before it to the question of fraudulent use. In fact, in the very next sentence, the FCC explained that the issue it had been asked to resolve was "the scope of section 2.1.8." January 12, 2007 Order ¶ 3.[3] Thus, the agency did not "den[y]," but instead affirmatively recognized, "Judge Bassler's referral regarding which obligations transfer." Letter at 8. In refusing to expand the referral, the FCC was simply making clear that it would not address the host of extraneous issues that Plaintiffs sought to inject, both in the referral proceeding and in a second proceeding initiated by another of Mr. Inga's companies, Tips Marketing. Your claim that "Judge Wigenton has never seen the FCC's January 12, 2007 Order," also is false. AT&T included a block quote of the order on page 11 of its opposition to Plaintiffs' (last) motion to lift the stay and attached the order as an exhibit to that submission.

Your letter also argues that an October 23, 1995 FCC Order supports Plaintiffs' argument that AT&T does not have a viable fraudulent use defense because there was no possibility that the plans would be subject to shortfall charges. As an initial matter, that argument is irrelevant: the question before the FCC is whether the proposed CCI-to-PSE transfer was valid under section 2.1.8. It is also frivolous. The October 23, 1995 Order was issued as part of the FCC's decision to reclassify AT&T as a non-dominant carrier in certain markets; it was not issued in connection with this case. It thus has nothing to do with the issue referred on primary jurisdiction grounds by the District Court in this case, and has no impact on any of the liability issues between AT&T and the Inga Companies. Contrary to your contention, the October 1995 Order does not affect whether the CSTP plans at issue in this case could be subject to potential shortfall charges. The portion of the Order cited by you (¶ 34) merely reflects that in October 1995, AT&T agreed generally to "grandfather" existing customers if AT&T made certain changes to term plans under various tariffs, and also that for certain changes, AT&T would

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[2] It is also worth noting that Plaintiffs raised this same claim in connection with their last motion to lift the stay. Pls. Feb. 17, 2015 Rep. Br. at 4 ("[t]he sole defense raised by AT&T to justify denying the transfer was that plaintiffs violated the fraudulent use provision of Section 2.2.4"). There is no basis for raising this groundless contention a second time.

[3] Your letter also appears to argue that Judge Bassler referred this issue to the FCC because he mistakenly believed that the D.C. Circuit had remanded the issue to the agency. Judge Bassler's, 2006 order makes clear, however, that he believed that the D.C. Circuit "did not expressly remand the case back to the FCC," *id.* at 12, but that the parties had to return to the agency for resolution of issues under section 2.1.8 that had not been resolved, *id.* at 13-18.

provide certain notice, depending on whether the affected customers objected to the proposed changes. Nothing in that Order suggests that AT&T was required to "grandfather" pre-June 1994 plans, or that such plans were "immune" from shortfall or termination liability.[4]

Your letter concludes by arguing that the stay should be lifted because "liability is clearly established," and all that remain are "fact issues." Judge Wigenton has already squarely rejected those arguments. If Plaintiffs move at this juncture to lift the stay, AT&T reserves its rights to seek sanctions under Rule 11 and 28 U.S.C. §1927, and any other appropriate relief.

Very truly yours,

Richard H. Brown

RHB/
cc: Joseph R. Guerra, Esq. (via email)

[4] AT&T disputes that there has been adjudication of whether the plans are pre or post-June 17, 1994. The FCC's October 17, 2003 Order did not resolve the dispute, labeling it a fact issue. (See October 17, 2003 Order at ¶20 n.94).