

February 5th 2016
 Commission's Secretary
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 Office of the Secretary
 Federal Communications Commission
 445 12th Street, SW
 Room TW-A325
 Washington, DC 20554
 Deena Shetler: deena.shetler@fcc.gov
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 Re: WC Docket No. 06-210
 CCB/CPD 96-20

Response to AT&T 1.22.16 and 2.1.16 Letters
Further Support of Plaintiffs FCC Motion

AT&T Counsel & FCC Staff

On behalf of Plaintiff's (Group Discounts, Inc., One Stop Financial, Inc., Winback & Conserve, Inc., and 800 Discounts, Inc.) referred herein further referred to as "Plaintiffs," the following responds to AT&T's comments of 1.22.16 and 2.1.16, which was AT&T's response to plaintiffs comments of 1.18.16 and 1.30.16.

AT&T's Conceded Failure to Meet Section 2.1.8's
15 Days Statute of Limitation Precludes AT&T from Raising Any Defense

- 1) Under section 2.1.8 AT&T had only 15 days to raise a defense in writing. AT&T's first correspondence after the Jan 13th 1995 CCI-PSE order was the letter from AT&T counsel Frederick Whitmer on February 6th 1995. The letter addressing the traffic transfer was not only was outside the 15 days but it was only a fraudulent use warning letter, again asserting CCI keeps tariffed plan commitments.
- 2) AT&T knew it had to meet the 15 days so it intentionally fabricated to the DC Circuit that it denied the CCI-PSE transaction on Jan 27th 1995 but of course did not provide evidence. AT&T's fabrication to DC Circuit shows it clearly understood it needed to meet the 15 days.
- 3) Plaintiffs requested many times that AT&T provide the mandated written denial AT&T stated to the DC Circuit it had, but AT&T can't do that because no evidence exists. **AT&T obviously did not first deny the CCI-PSE transfer on Jan 27th 1995 and then 10 days later on February 6th 1995 only issue a fraudulent use warning.**
- 4) All AT&T defenses are precluded 15 days after the Jan 13th 1995 orders were submitted. The 15 day statute of limitations is a clear fact issue not a tariff interpretation issue. AT&T knew it did not deny the traffic transfer on Jan 27th 1995 that it had misrepresented to the DC Circuit and had no evidence when plaintiffs again addresses this to the FCC comments in 2008.

5) AT&T in 2008 bogusly asserted that an AT&T letter that questioned security deposits on the ORIGINAL Dec 16th 1994 Inga to CCI PLAN TRANSFER would serve as the denial of the CCI to PSE traffic only transfer. However the NJFDC May 1995 Decision Page 7 below shows the plan transfer date that AT&T failed to meet was Dec 16th 1994 and therefore AT&T's Jan 23rd 1995 letter certainly was way outside the 15 days.

On December 16, 1994, the Inga companies executed certain TSA's transferring to CCI a number of CSTP II/RVPP plans, namely Plans No.s 1351, 1583, 2430, 2828, 2829, 3124, 3466, 3524, and 3663. In response to AT&T's request, CCI resubmitted these TSA's on December 22, 1994; and on receiving no response to the later submission, CCI again submitted several of the TSA's on December 30, 1994. On that day, December 30, 1994, CCI received written confirmation of two of the submitted TSA's, namely, those for Plans No.s 2829 and 3124. Thereafter, CCI received "welcoming calls" from AT&T. Neither the Inga companies nor CCI received any written notice of non-acceptance by AT&T of their TSA's within fifteen days of December 16, 1994, the date of the original submission of the TSA's. Larry C. Shipp's affidavit states that, on the contrary, AT&T's conduct led CCI to believe it was now the customer of record on all of the transferred Inga companies' plans. For instance, CCI obtained "credits" for

6) AT&T only had 15 days from December 16th 1994 (Dec 31st 1994) to deny the Inga Companies plan transfer to CCI. To buy time AT&T played like they didn't receive the 12.16.94 plan transfer order and CCI submitted the order again on December 22nd 1994 and even that date AT&T failed to meet.

7) The first issue is Judge Politan was misled by AT&T in 1995 that the 15 days clause within 2.1.8 was not a hard statute of limitations date. Later AT&T clarified its tariff that it was a hard 15 days date in which AT&T had to provide in writing the reason for the denial.

8) As the Commission knows when a carrier makes language changes to its tariff it uses symbols along the right column to indicate whether the language modification is an actual change of the tariff or simply clarifying non-explicit language in previous sections, as the case here.

9) Another issue is Judge Politan stated during oral argument that the 15 day clause only relates to issues under 2.1.8; no other tariff sections. His Court stated that typically if tariff sections other than 2.1.8 could be relied upon by AT&T to deny the transfers at issue, those non 2.1.8 tariff sections should explicitly be listed within 2.1.8, but none were! **Therefore the only way AT&T could deny a transaction was if there was non-compliance only with section 2.1.8.**

10) Since the Traffic Transfer case had no controversy or uncertainty under 2.1.8 in 1995, AT&T could not use fraudulent use 2.2.4 even if it met the 15 days to deny the transfer; which it did not. Along those same lines the Commission Rules demand that if the tariff is not explicit it must be determined against the carrier (AT&T).¹

11) In 2008 AT&T knowing that it had clarified its 2.1.8 tariff that the 1995 version of 2.1.8 was a hard 15 days in writing simply lied to the D.C. Circuit that it denied the traffic transfer on Jan 27th 1995 but of course did not had no evidence of a Jan 27th 1995 written denial; so AT&T came up with another misrepresentation to the FCC.

12) AT&T submitted to the FCC a letter from AT&T to PSE dated Jan 23rd 1995 in which PSE was advised that CCI still needed put up a security deposit to obtain the Inga plans---but obviously by Jan 23rd 1995 AT&T had no authority to demand a security deposit under the tariff as 2.1.8

1) did not reference security deposits and

2) the denial was way outside 15 days as the NJFDC Decision states the Inga to CCI plan transfer was ordered December 16th 1994.

13) Furthermore AT&T's Jan 23rd 1995 letter to PSE is absolutely not a timely written rejection of the CCI-PSE traffic transfer. It is a very late Inga to CCI plan denial letter that AT&T tried to pass off to the FCC after AT&T lied to the DC Circuit that it had a Jan 27th 1994 denial that was fabricated. Furthermore AT&T only notified one of the parties and obviously there are multiple parties in the transfer.

¹ FCC 2003 Decision FN65: Pursuant to Rule 61.2, titled "Clear and explicit explanatory statements," as in effect in January 1995, "[i]n order to remove all doubt as to their proper application, all tariff publications must contain clean [sic] and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2 (1994). It is a well settled rule of tariff interpretation that "[t]ariffs are to be interpreted according to the reasonable construction of their language; neither the intent of the framers nor the practice of the carrier controls, for the user cannot be charged with knowledge of such intent or with the carrier's canon of construction." *Associated Press Request for a Declaratory Ruling*, 72 FCC 2d at 764-65, para. 11 (quoting *Commodity News Services, Inc. v. Western Union*, 29 FCC at 1213, para. 2).



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January 23, 1995

Colleen Boothby, Esq.
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Re: Combined Companies and Public
Service Enterprises

Dear Colleen:

This will confirm our conversation Friday regarding the proposed traffic transfer between CCI and PSE. You will recall that my CPNI obligations prevented my discussion of Mr. Inga's plans and CCI. I did inform you, however, that before the CCI-to-PSE transfer could be renewed, CCI must first establish service with AT&T, including satisfying AT&T's credit guidelines. After that point, the CCI-to-PSE transfer, if consistent with tariff obligations, could be effectuated.

I inquired of my clients regarding PSE's statement that AT&T allegedly accepted the Inga-to-CCI TSA's. I am informed that no such acceptance ever occurred.

I trust this memorializes our conversation accurately.

Sincerely yours,

Marie Craig Bloch

14) Therefore Judge Wigenton can and must decide this fact issue against AT&T as no tariff interpretation is necessary as AT&T clarified this was a hard 15 day limit. Full details with additional exhibits at paragraphs 33 through 37: <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

Judge Bassler's Obligations Question Referral is Moot Anyway
As AT&T and the FCC Knows Changes in the Terms and Conditions of Tariffs Are Prospective

15) The FCC case manager Deena Shetler and Randolph Smith advised plaintiffs and AT&T was then provided the FCC email that stated that even if the FCC were to change the terms and conditions of section 2.1.8 it would be 15 days prospective. The FCC staff was asked a simple procedural question and plaintiffs applied the law to the case. Thus even if the FCC were to say the revenue and time commitments must

transfer on the CCI-PSE traffic transfer, it would be grandfathered; Judge Politan also forecasted this on page 16 of his March 1996 Decision.

AT&T 2.1.16 page 7

Finally, petitioners assert that “[t]he FCC staff stated that even if Judge Bassler’s referral was within the scope of the case, it is still a moot issue.” Grimes Letter at 5. Petitioners cite no support for this claim, and AT&T is not aware of any.

<https://transition.fcc.gov/Reports/1934new.pdf>

16) Here is the ultimate support AT&T is asking to cite: The 1934 Communications Act PAGES 38-39.

SEC. 204. [47 U.S.C. 204]

Communications Act of 1934

Change in practice 15 days prospective revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period, as is appropriate.

17) The FCC and AT&T are well aware that all substantive tariff changes are 15 days effective (prospective). As the FCC 1995 Order states AT&T grandfather’s customers when substantive tariff changes are made. Under the 1934 Communications Act any change in the terms and conditions of a tariff is 15 days prospective. As AT&T counsel Meade certified to Judge Politan the reason why CCI did not have to put up security deposits under TR 9229 was that it was a tariff change and thus CCI-PSE transfer was grandfathered.

18) The determination as to whether 2.1.8 would be a change in the terms and conditions is a simple fact based issue. All Judge Wigenton has to recognize is what were the terms and conditions practiced in 1995 as to whether plan commitments were transferred on traffic only transfers. Any change in that would be prospective. In actuality AT&T still does not require plan obligations to transfer on a traffic only transfer. Judge Wigenton just has to have her clerk call AT&T customer service and see AT&T has intentionally misled the NJFDC with its “All Obligations” truncation of the obligations language in 2.1.8.

- A) AT&T has no evidence of any customer transferring plan obligations on a “traffic only” transfer.
- B) The 6 certifications from AT&T customers stating plan obligations don’t transfer on traffic transfers
- C) All the former AT&T counsels certifications and briefs to Judge Politan, the FCC 1996-2003 and the DC Circuit that were switched out who all claim plan obligations don’t transfer on the CCI-PSE transfer. Mr Brown who claimed that it was self-evident under the tariff that on “traffic only” transfers the plan obligations don’t transfer.
- D) Tr. 8179 was filed in an attempt to retroactively change 2.1.8 to force a plan transfer so as to force the plan obligations to transfer

- E) Tr. 9229 is conclusive tariff evidence that plan obligations don't transfer
 F) The FCC reference to Judge Politan Decision:

The District Court noted in this regard that the record contained evidence that AT&T's past practice, "based on [AT&T's] own construction of its tariff language," had been to grant requests such as CCI's and PSE's, and that **AT&T had not "satisfactorily refute[d]" such evidence.** Second District Court op. at 15 & n.6

19) So all Judge Wigenton has to do is simply understand what the status quo was in Jan 1995 and simply apply the Communications Act law that any future FCC change would be 15 days prospective and thus the CCI-PSE transfer is grandfathered.

20) Even if the FCC were to change the terms and conditions and required a "former customers" revenue and time commitment to transfer it would be a prospective change effective 15 days after FCC determination and CCI-PSE transfer would be grandfathered. Obviously the FCC would not do that anyway as the tariff language states that PSE is only responsible to assume "all obligations of the **former** customer" and CCI would not be a former customer since it did not transfer its AT&T plan.

21) As the FCC 2007 Order determined Judge Bassler's obligation allocation question is outside the scope of the Third Circuit fraudulent use referral and thus is moot. However it is also moot because as Judge Politan's March 1996 Decision stated it would be a prospective tariff change and plaintiffs would be grandfathered. More details See para 43-45 <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

AT&T's Sole Defense of Fraudulent Use was Defeated and the FCC and DC Circuit By Law Must Rule Against AT&T Again--- Given the Fact that Fraudulent Use was Not Determined by the DC Circuit.

22) If an appellate court (here D.C. Circuit) has not decided a legal question and the case goes to a lower court (here FCC) for further proceedings, **the legal question, (fraudulent use) not determined by the appellate court (D.C. Circuit) will not be differently determined on a subsequent appeal (Judge Bassler Referral) in the same case where the facts remain the same.** *Allen v. Michigan Bell Tel. Co.*, 232 N.W.2d 302, 303. Additionally an appellate court's determination on a legal issue is binding on both the trial court and FCC **and an appellate court (DC Circuit) on a subsequent appeal** given the same case and substantially the same facts. *Hinds v. McNair*, 413 N.E.2d 586, 607. (So both the FCC and DC Circuit by law must find that AT&T used an illegal remedy on fraudulent use **so the case is moot.** AT&T's fraudulent use position is based upon obligations not transferring and thus is the same as plaintiff's and answers Judge Bassler's 2006 referral.)

FCC 2007 Order Determines Judge Bassler Obligations Referral Does Not Expand the Scope of the Third Circuit Referral on Fraudulent Use --Evidence Discovered that AT&T Intentionally Misled NJFDC Judge Wigenton

23) The FCC issued its Jan 12th 2007 FCC Order to advise the NJFDC that Judge Bassler's 2006 referral on precisely which obligations transfer under 2.1.8 "did not expand the scope" of the Third Circuit referral on AT&T sole defense of fraudulent use 2.2.4.

AT&T's only defense was fraudulent use under 2.2.4. FCC 2003 Pg.10 para 13.

“Because AT&T did not act in accordance with the **“fraudulent use”** provisions of its tariff, which did not explicitly restrict the movement of end-user locations from one tariff plan to another, AT&T cannot rely on them as authority for its refusal to move the traffic from CCI to PSE. AT&T does not rely upon “any other provisions of its tariff” to justify its conduct.”

24) The FCC has not ruled on the Judge Bassler’s 2006 referral simply because Judge Bassler’s obligation allocation question because it did not expand the scope of the Third Circuit referral. The FCC’s Jan 12th 2007 Order states this:

“As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to **terminate a controversy or remove uncertainty**. When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to **assist the referring court** by resolving issues arising under the Act. That is our goal here. The district court’s June 2006 order **does not expand the scope of the issue previously presented. Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T’s Tariff No.2, a matter already extensively briefed by the parties.**” FCC Jan 12th 2007 Order Pg. 2 para 3 Exhibit B in plaintiffs detailed analysis found on FCC server:
<http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

25) The FCC 2007 Order advised the District Court that Judge Bassler’s 2006 referral on which obligations transfer under 2.1.8 **“does not expand the scope of the issue previously presented”** which as the FCC clearly stated in its 2003 Decision was the controversy and uncertainty of the Third Circuit referral on AT&T’s sole defense of “fraudulent use” under section 2.2.4.

26) The FCC’s Jan 12th 2007 Order correctly stated that an FCC Declaratory Ruling was not needed to “terminate a controversy or remove uncertainty” because the 2006 referred question of which obligations transfer was **“ALREADY EXTENSIVELY BRIEFED BY THE PARTIES”** and those comments of both AT&T and plaintiffs that the FCC 2007 Order referenced at FN 13 **all agree that CCI’s revenue and termination obligations do not transfer because its plan does not transfer.**

27) The FCC 2007 Order correctly determined that there was no controversy or uncertainty in 1995 as the parties agreed upon the allocation of obligations from 1995 through the DC Circuit Decision. See the word **RATHER** in the FCC 2007 Order. This rather than that. The FCC is saying: We were resolving the sole controversy and uncertainty of fraudulent use under 2.2.4 in 1995, but now you **rather** have us resolving which obligations transfer in 2006. Something different that the FCC was not asked to do before. The FCC said it was interpreting 2.2.4 fraudulent use and when in 1995 there was no controversy or uncertainty when the parties agreed CCI must keep its revenue and time commitment and now you **rather** have us interpreting which obligations transfer. That is why there has been no FCC Decision.

28) Judge Wigenton will recognize that the FCC would never provide counsels (FN13 of FCC 2007 Order) with “tips” on where they can find the answers to which obligations transfer if that referred question was actually within the scope of the Third Circuit referral. To think that the FCC would actually list the comments on an issue within the scope of the case is absurd. AT&T counsel is aware the FCC simply does not provide

tips to figure out issues that need to be resolved. The very fundamental basis of AT&T's denied fraudulent use defense was that plan obligations do not transfer on traffic only transfers. AT&T was asserting that CCI would not be able to meet its revenue and time commitment and it would result in shortfall charges that AT&T would not be able to collect. AT&T's 1995 fraudulent use defense under 2.2.4 is directly opposite of AT&T's 2006 created "all obligations" defense under 2.1.8.

29) Since the FCC 2007 Order has already determined the 2006 Judge Bassler referral on which obligations transfer did not expand the scope of the Third Circuit Referral, there is no reason to address the merits of the argument. However I will briefly recap evidence Judge Wigenton has not seen to explain why CCI must keep its revenue and time commitment and which explains why AT&T has never produced evidence that revenue and time commitments of CCI's non-transferred plans must transfer—because no evidence exists.²

AT&T's 2.1.16 brief to the FCC page 5

Petitioners' assertion that Judge Wigenton 'has never seen the FCC's January 12, 2007 Order,' Grimes Letter at 5, is patently false. AT&T included a block quote of that Order in its opposition to petitioners' 2014 motion to lift the stay and attached the Order as an exhibit. AT&T Opp. To Mot. To Lift Stay at 11 & Exh. N.

30) Plaintiffs were unaware that the FCC 2007 Order was submitted and honestly did not understand it at the time anyway. The fact that AT&T counsels **did not provide in its 2.1.16 brief to the FCC what AT&T's "block quote"** actually was, prompted plaintiffs to see if AT&T counsel misrepresented to Judge Wigenton what the FCC Order determined. This is the whole relevant para from the 2007 FCC Order where the FCC is saying the Bassler referral did not expand the scope of the original fraudulent use controversy:

"As discussed in the 2003 Order on Primary Jurisdiction Referral, the Commission has broad discretion under the Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to **terminate a controversy or remove uncertainty.** When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission also will seek to **assist the referring court** by resolving issues arising under the Act. That is our goal here. **The district court's June 2006 order does**

² AT&T claimed to Judge Wigenton that it addressed the fact that it had no evidence at the FCC:

"Again, they have also made these contentions to the FCC (see Brown Cert., Ex. O at 73-76 (discussing alleged ambiguity) and 174-178 (**raising alleged other transfers of transfers of service**), and **AT&T has responded to those arguments in that proceeding.**" AT&T Pg. 29

However even the FCC noted AT&T has never provided evidence as the FCC's brief to the DC Circuit stated as they FCC referenced Judge Politan's statement that never provided any evidence:

"The District Court noted in this regard that the record contained evidence that AT&T's past practice, "based on [AT&T's] own construction of its tariff language," had been to grant requests such as CCI's and PSE's, and that **AT&T had not satisfactorily refute[d] such evidence.** Second District Court op. at 15 & n.6"

31) AT&T does not quote the first 2 sentences above and picks up in the middle of the 3rd sentence by leaving out the critical words: **“The district court’s June 2006 order does”** and starts its quote at...

not expand the scope of the issue previously presented. Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T’s Tariff No. 2, a matter already extensively briefed by the parties. Accordingly, we will not extend the reply comment period in this proceeding to await further direction from the district court. We grant a brief extension to the parties to file reply comments, ***which should be informed by this reminder as to the scope of the matter presented here.*** (AT&T added emphasis)

32) AT&T counsel clearly understood what the FCC 2007 Order meant and intentionally misrepresented it to Judge Wigenton. AT&T’s counsels picked up just part of the key passage in the FCC Order and totally twisted it.

Background: Plaintiffs filed a motion because it wanted to know whether the shortfall penalty infliction issues were going to be decided. The FCC 2007 Order determined that Judge Bassler’s referral on which obligations transfer under 2.1.8 did not expand the scope of the original referred fraudulent use issue under 2.2.4. What AT&T did was pick up just a part of the FCC’s 2007 Order and spun it to its interpretation that the FCC is not going to resolve the JUNE 1996 PENALTY INFLICTION BUT WILL ONLY RESOLVE THE JAN 1995 CCI-PSE TRAFFIC TRANSFER QUESTION ON WHICH OBLIGATIONS TRANSFER! AT&T intentionally short quoted a sentence left out of its quote the 2 key prior sentences and spun it to intentionally scam Judge Wigenton.

33) The reason why AT&T’s 2.1.16 Brief to the FCC only said that it provided a “block quote” to Judge Wigenton without actually providing the quote was because it did not want to show the intentional scam it pulled on NJFDC Judge Wigenton. This prompted plaintiffs to go back to the “block quote” and see how AT&T twisted it. AT&T’s cover-up caused plaintiffs to search for the quote and now realize AT&T intentionally misrepresented the 2007 FCC Order.

34) AT&T’s intentional scam on Judge Wigenton also shows that AT&T knew **all along what the FCC 2007 Order actually meant.** Plaintiffs were originally confused by the FCC2007 order and kept briefing for years which obligations transfer under 2.1.8; but it wasn’t even an issue the FCC was going to rule on as the FCC Order determined Judge Bassler’s referral “did not expand the scope” of the original fraudulent use controversy. The reason why AT&T sat back and never responded to many plaintiffs FCC filings on obligations allocation was AT&T knew full well that the obligation referral from Judge Bassler was totally moot and just laughed as plaintiffs provided dozens of reasons why obligations don’t transfer on a totally moot issue. The FCC believed that the FCC 2007 Order was clear and the FCC was not plaintiff’s legal advisor to explain the FCC Order as a Judge would understand the meaning of:

“The district court's June 2006 order does not expand the scope of the issue previously presented.” Rather, we have been asked to interpret the scope of section 2.1.8 of AT&T’s Tariff No. 2, a matter already extensively briefed by the parties.”

35) The FCC believed it was not its position to advise plaintiffs to stop briefing a moot issue. Judge Bassler’s obligations referral was denied by the 2007 FCC Order and AT&T’s sole defense of “fraudulent use” was in essence denied by the FCC. When the DC Circuit did not remand fraudulent use there were no open issues. By LAW OF THE CASE that issue became moot anyway as the FCC and DC Circuit must deny AT&T sole

fraudulent use defense on the same illegal remedy position. So AT&T knew the FCC just wasn't going to rule.

36) AT&T tried to make plaintiffs get a writ of mandamus and even advised Judge Wigenton that AT&T would not oppose plaintiff's writ request to force the FCC to rule. AT&T did not oppose the writ because AT&T believed it would be denied and keep plaintiffs in limbo between a case stayed in the NJFDC and the FCC who was not going to rule on moot NJFDC 2006 referral.

37) AT&T knew exactly what the FCC 2007 Order determined and intentionally misrepresented the 2006 referred obligations issue was to be resolved and not penalty inflictions. AT&T has obviously intentionally misrepresented the FCC2007 Order to Judge Wigenton.

38) Additionally Judge Wigenton never heard the "former customer" tariff analysis and was deceived by AT&T counsel regarding the conclusive TR 9229 tariff analysis as detailed within plaintiffs FCC filing para 87-95 <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>. The FCC should temporarily suspend proceedings to allow plaintiffs to show Judge Wigenton how she was intentionally misled by AT&T's counsels in many instances as detailed in this brief and within: <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

AT&T 1.22.16 letter on pg.1:

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.**

39) PSE did not refuse to assume CCI's revenue and time commitment as that was not even an option under the tariff. The FCC 2007 Order correctly determined there was no controversy or uncertainty between the parties in Jan 1995 as the FCC stated this issue was extensively briefed and pointed to fn13 the parties' comments which all agree that under section 2.1.8., CCI must keep its revenue and time commitment because the plan was not transferring. What was actually referred is stated within the DC Circuit Decision:

DC Circuit pg 5 para 2: The specific question referred to the FCC was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction."

40) The FCC simply needed to evaluate AT&T's sole defense of fraudulent use under 2.2.4. The fundamental basis of AT&T's fraudulent use defense was its position that under 2.1.8, for a "traffic only" transfer, the non-transferred plans revenue and time commitment does not transfer. AT&T did not claim that 2.1.8 was being violated --AT&T relied upon its "Fraudulent Use" section as it claimed to Judge Politan that AT&T "suspected" that CCI would not be able to meet the revenue commitment that under 2.1.8 **does not transfer.**

41) The question Judge Politan wanted the FCC to determine was did AT&T have the right to force plaintiffs to do a plan transfer under 2.1.8 instead of traffic only transfer, due to the substantial quantity of traffic that was transferring without the plan transferring (i.e. AT&T's fraudulent use defense). Judge Politan issued the March 1996 Decision against AT&T because he understood it was a temporary transfer and plaintiffs plans

were pre June 17th 1994 grandfathered—this is also why no security was required when Judge Politan issued the March 1996 Decision.

42) The FCC 2007 Order mentioned all the comments of the parties at fn.13 in which AT&T and plaintiffs absolutely agreed that CCI keeps its plans and keep its revenue and time plan commitments. The following are just a few statements AT&T counsel, Judge Politan, and DC Circuit made prior to AT&T changing its defense in 2006 after AT&T lost its sole defense of fraudulent use:

AT&T Counsel Whitmer on 3/21/1995 cross examination of Mr. Inga:

Whitmer: Q: Mr Inga, you know, do you not that if the service, **except for the home account**— or Mr. Yeskoo called it the **“lead account”** ---is transferred to PSE **the shortfall and termination liabilities remain** with Winback & Conserve, **isn't that correct?**

Inga: Yes

AT&T counsel Mr. Carpenter to DC Circuit:

Mr. Carpenter: Now what obligations they are going to end up assuming **will vary depending** on what service is being transferred. (11/12/04 DC Circuit ORAL Argument pg.12 Line 12

AT&T Counsel Carpenter during Third Circuit Oral:

We point out in our brief that there's a **distinction** between transfers of **entire plans**, and transfers of individual end-users locations. That when the **“plan”** is transferred, **“all the obligations”** have to go along with it. (Pg 15 line 9)

AT&T counsel Whitmer 2.6.95 Letter to Mr Inga:

“Mr. Inga’s efforts to transfer these end users and **leave the plans intact with their commitments**, AT&T will seek to enforce its rights **in the event shortfall and termination charges become due under the tariff** and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its **tariff charges.**”

DC Circuit Judge Ginsburg understood CCI keeps its customer plan obligations but understood the plans were 6.17.94 penalty immune and actually finishes the FCC’s counsels’ statement: (Oral Pg. 27 Line 2):

FCC’s MR. BOURNE: Well, CCI still had the obligation to pay its shortfall charges, and there's, there are **other aspects to this** that the **Commission didn't rule on.** I mean, for instance --

JUDGE GINSBURG: Whether they were **grandfathered?**

FCC’s MR. BOURNE: **Right.** So it could well be that there were little or **no shortfall charges.**

The DC Circuit Judge Ginsburg understood the obligations did not transfer on the CCI-PSE transfer.

43) Judge Politan’s May 1995 Decision pg. 10 para 2

On January 13, 1995, PSE and CCI jointly executed and submitted written orders to AT&T to transfer the 800 traffic under the plans CCI had obtained from the Inga companies to the credit

of PSE. Only the traffic was to be transferred, not the plans themselves. In this way, **CCI would maintain control over the plans** while at the same time benefiting from the much larger discounts enjoyed by PSE under KT-516. AT&T refused to accept this second transfer on the ground that CCI was not the customer of record on the plans at issue, and thus could not transfer the traffic under those plans to PSE. **AT&T was further troubled** by the fact that if **only the traffic on the plans and not the plans themselves were transferred to PSE**, the liability for **shortfall and termination charges attendant thereto would then be vested in CCI**: an empty shell in AT&T's view.”

44) Judge Politan clearly understood the revenue and time commitment stayed with CCI. Judge Politan understood 2.1.8 allowed traffic only transfers. His only issue was fraudulent use 2.2.4. Did AT&T have the authority to force a plan transfer when substantial traffic was transferred? This why the FCC 2007 Order denied Judge Bassler's 2006 question on which obligations transfer. There was no controversy or uncertainty in 1995 that CCI must keep its plan commitments. The only controversy/uncertainty was 2.2.4 fraudulent use.

DC CIRCUIT & FCC STATED THE DC CIRCUIT DECISION IS NOT A REMAND

45) FCC head OGC counsel Austin Schlick and John Ingle and the DC Circuit Courts Legal Director Martha Tomich and Laura Chipley have written that the DC Circuit Decision is not a remand. By law the DC Circuit **can only remand** to the FCC an issue that was referred to the FCC to interpret. There simply was no referral to the FCC regarding which obligations transfer under 2.1.8 because there had been no controversy or uncertainty to resolve. If the DC Circuit had confusion as to which obligations transfer it would have remanded the question to the FCC **but it couldn't because that issue was never interpreted by the FCC**—because Judge Politan did not need the obligations allocation question answered. The D.C. Circuit makes this perfectly clear:

D.C. pg. 10 fn1

The Communications Act **precludes us from addressing only those issues which the Commission has been afforded no opportunity to pass.**” 47 U.S.C. Section 405(a). It does not prevent us from considering “whether the **original question** was correctly decided,” MCI v FCC, 10 F3d 842, 845 (D.C. Circ. 1993), or whether the FCC “relied upon faulty logic.” Nat'l Ass'n for Better Broadcasting v. FCC 830 F2d 270, 275 D.C. Cir. 1987). The analysis recounted above speaks to the soundness of the Commission's ruling on **the question initially presented**, and not to any novel legal or factual claims.”

46) The DC Circuit could not remand back to the FCC an issue on which obligations transfer because which obligations transfer **was never referred to the FCC** as there was **no controversy or uncertainty** between the parties that under 2.1.8 CCI must maintain its revenue and time commitment on the non-transferred plan. The original question was whether 2.1.8 allowed traffic only transfers **when considering AT&T sole defense of fraudulent use under 2.2.4.**

47) There was no defense under 2.1.8 as AT&T **tried to retroactively change 2.1.8 via Tr.8179**, because under 2.1.8 there was no way to prevent substantial traffic only transfers. The DC Circuit simply corrected the FCC that section 2.1.8--- as used by plaintiffs CCI-PSE transaction--- did allow direct traffic only transfers. The

FCC had believed that the only way traffic could move is by CCI deleting the accounts and PSE adding the accounts by resigning them. In actuality both ways to move locations w/o the plan are permissible under the tariff: 1) direct transfer under 2.1.8 or delete and add under 3.3.1Q. Under both scenarios the plan obligations do not transfer when the plan does not transfer—but again as the FCC 2007 Order determined this is a moot issue not within the scope of the original AT&T denied defense of fraudulent use. There simply was no obligation allocation controversy or uncertainty by Judge Politan so he did not need to refer a question about which obligations transfer to the FCC. The FCC did not appeal the DC Circuits Decision that 2.1.8 also allowed traffic only transfers and not just deleting and adding accounts. See full details at para 18-20: <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

AT&T's 1.22.16 Letter page 3

The fact that the original referral **included the question whether the proposed CCI-PSE transfer violated section 2.1.8** also completely undermines your argument regarding the significance of the FCC's January 12th 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.

48) The original referral did not include any controversy under 2.1.8. Judge Politan's statement made it clear what the controversy was (fraudulent use 2.2.4.) The FCC 2003 Decision stated the only defense was fraudulent use, not whether the proposed CCI-PSE transfer violated section 2.1.8. AT&T's Richard Meade actually certified to Judge Politan and explicitly advised the FCC in the TR 8179 substantive cause pleading that plaintiffs were **not violating 2.1.8.** The defense was 2.2.4 fraudulent use.

49) It would make absolutely no sense for the FCC in its 2003 Decision to explicitly state that 2.2.4 fraudulent use was AT&T's only defense and thus the controversy/uncertainty that the FCC needed to resolve, then in 2007 totally conflict with itself and issue the FCC 2007 Order stating that obligations allocation under 2.1.8 was within the scope of the original fraudulent use 2.2.4 controversy in 1995.

50) The FCC 2007 Order is clearly saying the Judge Bassler referral on 2.1.8 does not expand the scope of the original 2.2.4 fraudulent use controversy and thus will not be decided. It is common sense that AT&T can't create a new defense under 2.1.8 in **2006** that CCI's plan obligations must transfer on a traffic only transfer when in **1995** AT&T's only defense was under 2.2.4 that CCI must keep its plan obligations and therefore AT&T raised its fraudulent use defense as the reason why it denied the CCI-PSE transfer. Section 2.8 gives AT&T 15 days to raise a defense under 2.1.8 not 11 years.

51) There would be no reason for the FCC to issue the 2007 Order and state the FCC needs to resolve Judge Bassler's referral on which obligations transfer. The only reason the FCC made that statement within its 2007 Order was to advise the NJFDC that Judge Bassler's obligation question under 2.1.8 was not a controversy or uncertainty and is not within the scope of the original referred fraudulent use controversy/uncertainty 2.2.4 issue. The record clearly shows all AT&T's former counsels, including current AT&T counsel Richard Brown, that there was no controversy or uncertainty regarding whether 2.1.8 was being violated. It was the quantity of accounts that were being transferred that caused AT&T to rely upon fraudulent use 2.2.4, to stop the 2.1.8 transfer. If 2.1.8 actually had language in it that could have prevented the transfer AT&T would not

have run to the FCC on February 16th 1995 –after the statute of limitations--and filed Tr8179 and try to overcome the mandated “substantive cause test” and retroactively change 2.1.8.

52) Obviously if plaintiffs were actually violating 2.1.8 that would conversely mean that other AT&T customers were not violating 2.1.8. The mere fact that AT&T can’t produce evidence to show how plaintiffs violated 2.1.8 and other AT&T customers did not violate 2.1.8 screams that violating 2.1.8 was absolutely not the issue.

53) AT&T’s responses do not address plaintiffs 1.18.16 letter regarding the fact that 6 certifications were filed at the FCC from other AT&T customers stating plan obligations do not transfer on traffic only transfers. Additionally AT&T’s own executives all stated plaintiffs did not violate 2.1.8. Everyone including all former AT&T counsels (including Richard Brown to the Third Circuit) all stated that CCI must keep the revenue and time commitment with the non-transferred plan.

54) Obviously AT&T would not have mischaracterized the CCI-PSE transfer as a plan transfer instead of a “traffic only” transfer unless it clearly understood that there was a difference between which obligations get transferred. AT&T clearly understood 2.1.8 was being complied with as a traffic transfer and therefore needed to falsely assert it was a plan transfer and under that false predicate say 2.1.8 was being violated for CCI not transferring the non-transferred plans, plan obligations.

55) After 2006 AT&T took the position that on a traffic only transfer or a plan transfer “all obligations” transfer. Therefore if AT&T had this same “All obligations” position in 1995 AT&T would not have mischaracterized the CCI-PSE traffic transfer as a plan transfer. In 1995 AT&T and plaintiffs agreed that plan commitments only transfer when the plan transfers—no controversy or uncertainty as the FCC 2007 Order determined.

56) The FCC’s 2007 Order states Judge Bassler’s 2006 referral on obligations allocation does not constitute a controversy or uncertainty as it has been “extensively briefed.”

Rather, we have been asked to interpret the scope of section **2.1.8** of AT&T's Tariff No.2, a matter **already extensively briefed by the parties.**"

57) The parties agreed CCI keeps the plan commitments with the non-transferred plan. Due to the duration of the case sitting at the FCC the reality is we now know exactly what the FCC Order stated because of the FCC’s inaction. If the FCC actually believed that Judge Bassler’s 2.1.8 obligation allocation referral was within the scope in Jan 2007 the FCC would have issued a decision by now.

58) The FCC typically responds to the DC Circuit within the first year. The FCC Head Counsel wrote the DC Circuit Decision was not a remand. It is now 11 years since the DC Circuit Decision. This fact alone means the FCC’s 2007 Order position was that Judge Bassler’s 2006 referral on which obligations transfer “did not expand the scope” of the original referral on whether traffic only can transfer under 2.1.8 when considering AT&T’s only denied defense of fraudulent use under 2.2.4—not a violation of 2.1.8. It is conclusive the FCC 2007 Order denied Judge Bassler’s question of which obligations transfer.

AT&T Filings Tr. 8179 and Tr. 9229
Are Conclusive Tariff Evidence that Plan Obligations Don't Transfer

59) AT&T's FCC tariff filings agreed with plaintiffs that CCI must keep its revenue and time commitments on the traffic only transfer. AT&T's counsels created its new "all obligations" defense under 2.1.8 after the DC Circuit Decision. AT&T's position in 1995-2005 before Judge Politan, the Third Circuit, the FCC 1996-2003 and the DC Circuit was CCI's revenue and time commitments do not transfer.

60) Here as Exhibit A is AT&T's TR 8179 tariff filing issued February 16th 1995 and scheduled to be effective March 2nd 1995. This is the FCC filing AT&T did to try and retroactively change 2.1.8 to force the plan to transfer so as to force the plan obligations to transfer. The following is the text:

"If a customer seeks to transfer, to one or more other Customers, all or **substantially all of the locations** associated with an existing Custom Network Services volume or term plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining locations associated with the volume or term plan or Contract Tariff (based on the last 12 months of usage) would **not meet the usage and/or revenue commitment of the volume or term plan** or Contract Tariff, the transfer **will be deemed a transfer of the associated volume or term plan** or Contract Tariff to such other Customer(s), and may only be completed in accordance with this section."

61) AT&T tried to retroactively change 2.1.8 to force the plan to transfer when substantial traffic was transferred. The reason why the plan was forced to transfer was that this was the only way to force the plan obligations (revenue and termination commitments) to transfer. In 1995 AT&T clearly understood that plaintiffs adhered to 2.1.8 and therefore on February 16th 1995 filed Tr. 8179 in an attempt to retroactively change section 2.1.8.

62) Obviously if the language of 2.1.8 had already permitted AT&T to mandate that CCI must transfer and PSE must assume CCI's revenue and time commitment of CCI's non-transferred plan, AT&T would not have attempted to retroactively change 2.1.8 to force a plan transfer. AT&T's actions confirmed what the terms and conditions of 2.1.8 were and confirmed there was nothing already within 2.1.8 that was being violated to deny the CCI-PSE transfer. AT&T had only to rely upon the meritless fraudulent use defense.

63) AT&T was advised by the FCC that it was going to deny Tr8179 if AT&T did not withdraw Tr. 8179 because the FCC said AT&T should not be able to measure the intent of a customer by suspecting fraudulent use so the FCC was not going to force an AT&T customer to transfer its plan just so the revenue and time commitments transfer.

64) AT&T replaced Tr8179 with Tr. 9229 that took a different approach to making sure that AT&T could collect the shortfall charges on non-transferred plans revenue commitment. AT&T counsel Richard Meade certified and conceded to Judge Politan that CCI must keep its revenue and time commitments and AT&T in the future will require security deposits against potential shortfall:

AT&T COUNSEL MEADE:

“On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the **CCI-PSE transfer---** **the segregation of assets (locations) from liabilities (plan commitments)** --- in the following manner. See pg.7 para 15 Meade cert.

AT&T COUNSEL MEADE:

The Deposit for Shortfall Charges included in Transmittal No. 9229 is a “**new concept**” that meets **AT&T's business concern** more directly, without addressing the question of **intent**. Because this is **new**, it **will apply only to newly ordered term plans**, and so would **not be determinative** of the issue presented on the **CCI/PSE transfer**. (Meade certification pg.7 para 16)

65) **Here as Exhibit B** is the tariffed results of AT&T’s Tr9229 filing referenced by AT&T counsel Richard Meade to Judge Politan. To prolong the case AT&T replaced Tr8179 with Tr9229 which addressed substantial traffic transfers with security deposits against potential shortfall that was demanded of the **former customer**.

66) Under Tr. 9229 the former customer of the transferred traffic was mandated to put up security deposits against potential shortfall when substantial traffic was transferred. It is conclusive under AT&T’s Tr. 9229 tariff that AT&T’s customer had to keep its plan commitments as it kept its plan. The FCC understands that AT&T knows its own tariffs and allowed AT&T’s counsels to continue misrepresenting that “all obligations” transfer on a traffic transfer when the tariff is conclusive against AT&T. Even though the obligations issue was determined as moot by the FCC Order it doesn’t give AT&T free reign to intentionally misrepresent what it knows to be reality.

67) There was no need to risk misrepresenting to the FCC that “all obligations transfer” when AT&T knows this issue was determined by the FCC 2007 Order as not within the scope of the Third Circuit referral to begin with. Therefore AT&T refused to upload its 1.22.16 letter.

68) During the March 18th 2015 Oral argument Judge Wigenton asked AT&T counsel Guerra about security deposits because plaintiffs brief included the AT&T tariff filing regarding security deposits on potential shortfall on a substantial traffic transfer. AT&T Counsel Guerra misled Judge Wigenton that the security deposits plaintiffs referenced by plaintiffs had to do with the first **plan transfer** from plaintiffs to CCI.

69) Plaintiffs brief to Judge Wigenton referenced Tr. 9229 and that explicitly deals with substantial traffic only transfers not plan transfers.

The Court Page 10:

THE COURT: Is it accurate, just from my understanding of looking at the history, the security deposit was in lieu of **transferring the obligations**?

MR. GUERRA: Not quite, your Honor.

THE COURT: Okay.

MR. GUERRA: **Because the security deposit fight was over the first leg of the transfer.**

70) Judge Wigenton's question was **on point** keying in on transferring the obligations (the CCI-PSE issue at hand). However Mr Guerra avoided the conclusive Tr. 9229 tariff evidence by bringing up Plaintiffs PLAN TRANSFER to CCI. That was a totally different security deposit issue that AT&T raised after the 15 day statute of limitations. There would have been absolutely no reason for plaintiffs to bring up the dead security deposit issue. AT&T's brief of course does not address Tr9229 nor Mr Guerra's maneuver on Judge Wigenton.

71) The security deposit on potential shortfall that AT&T counsel Meade certified to Judge Politan was the TR 9229 Tariff filing covering security deposits against potential shortfalls presented to Judge Wigenton and is conclusive tariff evidence that plan obligations don't transfer. A more in-depth explanation with multiple exhibits on Mr Guerra's misleading answer to Judge Wigenton's question was uploaded to the FCC server in early November but AT&T never responded: See pages 35-38.

<http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

**PSE IS ONLY OBLIGATED TO ASSUME
ALL OBLIGATIONS OF THE FORMER CUSTOMER**

72) Judge Wigenton has never seen the following evidence which clarifies why AT&T has no evidence. If Judge Bassler saw this evidence he probably would have never sent the FCC 2007 Order denied obligations question to the FCC. PSE did not refuse to accept CCI's revenue and time commitment on the traffic only transfer because section 2.1.8 mandates that CCI must keep its revenue and time commitment because CCI was keeping its plans. PSE under 2.1.8 was only required to only assume "all obligations of the **former** customer." Because CCI was keeping its AT&T plan, CCI obviously was **not a former** AT&T customer and therefore as per 3.3.1Q must keep its revenue and time commitment.

73) The obvious reason why AT&T repeatedly misquoted to Judge Bassler the tariffed words "former customer" as "the transferor" was so Judge Bassler did not pick up on the critical adjective "former" that modifies the noun within the sentence. To deflect attention of the actual words "the new customer must assume all obligations of the former customer" to Judge Bassler AT&T intentionally misquoted the actual words of section 2.1.8 "former customer." The following are just a few of dozens of intentional AT&T counsel misquotes:

- 1) "Thus, the second sentence of § 2.1.8B did not limit the sweepingly broad requirement that a **transferee** accept "all obligations" of the **transferor**."
- 2) the 'new' customer in the transfer, did not assume all the obligations' of the **old** customer, CCI,"
- 3) "whether a proposed transfer of virtually all end-user WATS traffic, without a transfer of "all obligations" of the **transferor**, complies with § 2.1.8."
- 4) "ARGUMENT I. SECTION 2.1.8 REQUIRES A **TRANSFEEE** TO ACCEPT "ALL OBLIGATIONS" OF THE **TRANSFEROR** COMPANY, INCLUDING ANY OBLIGATION TO PAY SHORTFALL OR TERMINATION CHARGES."
- 5) "whether a **transferee's** refusal to accept all of a **transferor's** obligations satisfies § 2.1.8."

74) Despite the fact the traffic only transfers are common transactions this is why AT&T has never been able to show the NJFDC or FCC any evidence of revenue and time commitments transferring on "traffic only"

transfers—because no evidence exists. AT&T simply created this new bogus defense in 2006 as justification for not transferring the traffic in 1995. PSE did not refuse to accept CCI’s revenue and time commitment because that wasn’t even an option under 2.1.8 for a traffic only transfer as the AT&T tariff filings to the FCC conclusively show.

AT&T 2.1.16 Letter at page 8

According to petitioners, “AT&T’s short quote of the full sentence and focus on only the 2 words ‘all obligations’ scam worked on Judge Bassler and thus the moot 2006 Referral was sent to the FCC.” Id at 26. See also Grimes Letter at 7 (referring to “AT&T’s ‘all obligations’ misrepresentation” and its “all obligations’ fraud). To suggest that when a party asks a tribunal **to focus on the relevant portion of a legal document** it is engaging in a “fraud” “scam,” or “misrepresentation” is to strip these words of any recognized meaning.

75) The issue is the “relevant portion of the legal document” is not just two words of a sentence. Adjectives modify nouns and change what PSE is required to assume. The repeated focus on the two words “all obligations” was with the intent to deceive the NJFDC and FCC. As the FCC 2007 Order stated there was no controversy under 2.1.8 in 1995 but AT&T created a controversy in 2006. AT&T did its maneuver on Judge Bassler knowing that its co-counsel had already certified to Judge Bassler that there were no issues under 2.1.8 and by AT&T’s own tariff filings (TR 8179 and Tr. 9229) that plan obligations don’t transfer on traffic only transfers.

76) AT&T’s counsel David Carpenter conceded to Third Circuit and DC Circuit that the words “all obligations” were not the only relevant words.

AT&T Counsel Carpenter during Third Circuit Oral:

We point out in our brief that there’s a **distinction** between transfers of **entire plans**, and transfers of individual end-users locations. That when the **“plan”** is transferred, **“all the obligations”** have to go along with it. (Pg 15 line 9)

AT&T counsel Mr. Carpenter to DC Circuit:

Mr. Carpenter: Now what obligations they are going to end up assuming **will vary depending** on what service is being transferred. (11/12/04 DC Circuit ORAL Argument pg.12 Line 12)

AT&T’s 2.1.8 comments footnote 8:

Petitioners also claim that AT&T “pulled[ed] off the fraud on Judge Bassler” by intentionally misquote[ing]” the language of section 2.1.8. Id. At 25. In the passages petitioners quote---which are taken from AT&T’s opening comments to the Commission ---AT&T did not misquote **but paraphrased the tariff**, using the words “transferee” and “transferor” for the phrases “former customer” and “new customer”—something the Commission itself did in its brief to the D.C. Circuit. See Brief for Respondent, AT&T Corp. v. Federal Communications Commission, No. 03-1431 (filed May 17 2004) at 19-20 n.10

77) The following is the passage with footnote of the FCC’s brief to the DC Circuit in which AT&T’s 2.1.16 comments cites in which the FCC **paraphrased** the words “former customer” as “the transferor.”

More fundamentally, however, AT&T’s argument collapses, because it incorrectly presumes that, apart from the **transferee’s assumption of liabilities (which occurs under a transfer of plans, but not a transfer of traffic)** a transfer of traffic and a transfer of plans yield identical benefits and burdens to AT&T and its customers. That is not the case. Where there is a wholesale transfer of plans pursuant to section 2.1.8 (as in the Inga-to-CCI transactions), the transferee “step[s] into the shoes of [the transferor]” and *replaces* the transferor as the party liable for any *future* purchases of service. Order, para. 9 (JA 7). [FOOTNOTE 10 HERE] **By contrast, when only traffic is moved**, the party reducing its traffic (in this case CCI) "would continue to subscribe to its existing CSTPII plans, and the totality of **the reciprocal obligations between that party and AT&T under those CSTPII plans would remain in effect**, both with respect to service that already had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. Order, para 9 (JA7). Thus, each method of structuring the transaction presents distinct benefits and **obligations** for both AT&T and the customer, and the Commission’s reading **gives meaning to section 2.1.8.** (emphasis added)

Footnote 10

The transferor does remain liable for “outstanding indebtedness” and the “unexpired portion of any applicable minimum payment” obligation existing at the time of the transfer. See Order, n.46 (JA 6) (quoting section 2.1.8)

78) Point One: The FCC’s task was not to interpret which obligations transfer, as there was no controversy regarding which obligations transfer under 2.1.8—AT&T’s only defense was 2.2.4. Even though the FCC was not asked to interpret obligations allocation, AT&T now concedes that the FCC used section 2.1.8 to interpret obligations. The FCC used “transferor” but it also explicitly detailed there is a distinct difference between which obligations transfer while using these words. AT&T’s use of the words was in 2006 to Judge Bassler and the FCC in 2006 prior to the FCC 2007 Order determining the 2006 Judge Bassler referral on obligation allocation was moot. AT&T in 2006 believed that the FCC was going to interpret obligations and AT&T’s post DC Circuit use of the words “the transferor” instead of the “former customer” was asserting “all obligations” transfer no matter whether it’s a “traffic only” or a plan transfer. For AT&T to equate what the FCC said when obligations allocation under 2.1.8 was not a controversial issue, to what AT&T pulled on Judge Bassler and to the FCC after the moot obligations referral is completely different set of circumstances.

79) Point Two) AT&T is now conceding that the FCC actually utilized the obligations language of section 2.1.8 to interpret which obligations transfer. AT&T advised Judges Bassler and Wigenton that AT&T didn’t use section 2.18 to interpret obligations allocation.If the FCC was required to interpret which obligations transferred under 2.1.8 it would agree that “words mean what they say.” The FCC said this also when it quoted Judge Politan. FCC 2003 pg. 10 fn 65

To quote the district court, “**Words mean what they say.** Rules should not be changed in the middle of the game; and certainly not without notice.” *First District Court Opinion* at 21.

80) AT&T knows full well the dozens of misquotes were not convenient paraphrasing. Was it too difficult to quote the actual words “former customer” that it necessitated the paraphrasing to “the transferor” and the “Old Plan?” Absolutely not. It was intentional deception. AT&T clarified in later versions of section 2.1.8 and explicitly advised what the meaning of “former Customer” was. PSE is only responsible for assuming “all obligations of the former customer” not the Transferor or OLD PLAN. CCI is not a “former AT&T Customer when it doesn’t transfer its plan. That is the critical difference as AT&T’s counsel explained to the D.C. Circuit.

AT&T 2.1.16 Letter at page 8

According to petitioners, “AT&T’s short quote of the full sentence and focus on only the 2 words ‘all obligations’ scam worked on Judge Bassler and thus the moot 2006 Referral was sent to the FCC.” Id at 26. See also Grimes Letter at 7 (referring to “AT&T’s ‘all obligations’ misrepresentation” and its “all obligations’ fraud). To suggest that when a party asks a tribunal **to focus on the relevant portion of a legal document** it is engaging in a “fraud” “scam,” or “misrepresentation” is to strip these words of any recognized meaning.

81) The issue is the “relevant portion of the legal document” is not just two words of a sentence. Adjectives modify nouns and change what PSE is required to assume. The repeated focus on the two words “all obligations” was with the intent to deceive the NJFDC and FCC. AT&T’s counsel David Carpenter conceded the words “all obligations” were not the only relevant words.

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AT&T counsel Mr. Carpenter to DC Circuit:

Mr. Carpenter: Now what obligations they are going to end up assuming **will vary depending** on what service is being transferred. (11/12/04 DC Circuit ORAL Argument pg.12 Line 12)

The FCC’s 1995 Order Directed at AT&T’s Pervasive Violations of Section 2.1.8 and the Pre June 17th 1994 Shortfall and Termination Charges Immunity Provision

The FCC 1995 Order para 133-137: is here as Exhibit C

FULL ORDER: https://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1995/fcc95427.txt

FCC 1995 Order para 134

As a general practice, **AT&T grandfathers both existing customers and subscribed customers** (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, 2, 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and **it commits to continue that process**.

As the FCC and Judge Politan stated Plaintiffs plans were Pre June 17th 1994 grandfathered and the FCC Order covers tariff No 2. which is the tariff at issue.

82) FCC 1995 Order para 134 Continued

In exceptional cases, however, grandfathering may not be appropriate either because: (1) a change is necessitated by typographical errors, a service inadvertently priced below costs, rate changes where no individual rates (post-discount) are increased, or other comparable circumstances, or (2) the change is necessary to bring clarity to a non- rate term or condition, where it is necessary to treat all customers alike (such as a change to the provisions for how orders are processed, but not including changes to the body of Contract Tariffs, Tariff 12 Options or Tariff 15 CPPs). In such circumstances, AT&T commits for a twelve-month period to **offer its customers the following additional protections** not required of non-dominant carriers: - where AT&T **makes any change to an existing term plan**, AT&T will afford the affected customers 5 days meaningful advance notice of the tariff filing to give the customer the opportunity to object; provided, **however, that for changes to discontinuance with or without liability**, deposits and advance payments, **or transfer or assignment of service, AT&T will file on 14-days' notice.** (AT&T would have the unaffected right to change underlying tariff rates -- such as a general change to SDN rates -- unless the term plan protected the customer from such changes.) Where the affected customer(s) agrees to the revision, AT&T will note that agreement in its transmittal letter and file the change on 1 day's notice. **Where the affected customer objects to the change, AT&T will file the change with the Commission on 6 days' notice. With respect to the 14 or 6 days notice filings, the substantial cause test will be applicable to the same extent as it is today.**

The 1995 FCC Order explicitly covers “discontinuance with or without liability” (aka restructuring) and transfer or assignment of service (which is section 2.1.8). Whether or not a plan gets hit with shortfall and termination charges depends upon whether the plan was ordered on or prior to June 17th 1994. (SEE EXHIBIT D)

83) The above passage mandates that the substantial cause test is applicable when the customer objects to the change—which is obviously the case with plaintiffs. This means as long as plaintiffs owned these plans they would be grandfathered and penalty immune.

AT&T's 1.22.16 letter states:

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.

The FCC 1995 Order explicitly addresses that AT&T was being criticized by resellers for not adhering to the Pre June 17th 1994 Discontinuance w/o liability provision and the section 2.1.8. It explicitly states it covers criticisms within the FCC's 1995 reclassification case “**and elsewhere.**”

FCC 1995 Order at 134:

134. Finally, we note that AT&T has voluntarily committed to implement certain measures that are designed to address criticisms of

its business practices that resellers have raised in this proceeding **and elsewhere**. AT&T represents that the following reflects an agreement with the Telecommunications Resellers Association, and AT&T has committed to comply with this agreement.

84) The “and elsewhere” reference is obviously regarding plaintiff’s case on these same issues. The FCC had knowledge of plaintiff’s case due to AT&T’s Tr8179 filing at the FCC on February 16th 1995. The same Charles Hunter counsel that represented the Telecom Resellers Association was involved in petitions to reject Tr.8179 in plaintiff’s case.

FCC 1995 Order at 136 & 137 AT&T is ordered by FCC to comply with grandfathering.

We believe that the commitments proffered by AT&T in its October 5, 1995 Ex Parte Letter contribute to addressing the tariff-related concerns raised by the commenters in this proceeding, and we therefore **order AT&T to comply with these voluntary commitments**.

137. We also note that some of the tariff-related issues raised by commenting parties transcend the scope of this proceeding.

85) Since the comments in the FCC 1995 issue that were raised covered both the Discontinuance w/o liability provision and transfer of service the FCC 1995 Order explicitly states that its 1995 order **“transcends the scope of this proceeding.”** This 1995 FCC Order forces AT&T to commit to grandfather Pre June 17 1994 plans as a condition for obtaining the benefit of being reclassified as a non-dominant carrier.

The fact that AT&T’s commitment to grandfather the plans is within the FCC’s reclassification Order does not in any way diminish the FCC Order’s impact on plaintiff’s case as the FCC1995 order stated.

86) The FCC’s 2003 Decision pg. 2 para 2 clearly stated the plans were pre June 17th 1994:

“Prior to June 17, 1994, the Inga Companies completed and signed AT&T’s “Network Services Commitment Form” for WATS under AT&T’s Customer Specific Term Plan II (CSTP II), a tariffed plan, which offered volume discounts off AT&T’s regular tariffed rates.”

AT&T’s 1.22.16 Letter speaking about the 1995 FCC Order:

It 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 liability issues between AT&T and the Inga Companies.

87) The fact that the plans were pre June 17th 1994 immune from shortfall absolutely defeats AT&T at the very merits of its fraudulent use assertion. The controversial issue before the FCC was 2.2.4 “Fraudulent Use.” AT&T claimed it could rely upon 2.2.4 fraudulent to deny the Jan 1995 traffic transfer. AT&T’s

fraudulent use assertion was that AT&T suspected that CCI would not be able to meet the revenue commitment on the non-transferred plan and be deprived of collecting shortfall charges.

88) The June 17th 1994 discontinuation w/o liability provision, also known as restructuring, obviously was already in the tariff prior to AT&T's Jan 1995 reliance upon fraudulent use. AT&T could not possibly suspect that CCI would be deprived of collecting shortfall at the time of the traffic transfer in Jan 1995 when the plans—as Judge Politan—clearly understood could be discontinued w/o liability and restructured due to being pre June 17th 1994 grandfathered.

89) Judge Politan clearly understood that the parties agreed that CCI must keep its revenue and time commitment but he noted the plans were immune from these charges as they were pre June 17th 1994 Grandfathered and thus immune from the shortfall and termination charges.

90) Not only was AT&T's sole defense of fraudulent use denied by the FCC due to the illegal remedy AT&T used; The FCC 1995 Order is clear evidence that AT&T's 2.2.4 fraudulent use defense was also meritless to begin with. Judge Politan understood the plans were ordered prior to June 17th 1994 and were thus penalty immune---and that is why he denied the security deposit when he ordered the traffic to be transferred the NJFDC March 1996 Decision.

91) These Judge Politan comments leave no doubt that this Pre June 17th 1994 issue not referred to the FCC is the law of the case:

A) Judge Politan: “Suffice it to say that, with regard to pre-June, 1994 plans, methods exist for defraying or erasing liability on one plan by transferring or subsuming outstanding commitments into new and better plans pursuant to AT&T's own tariff.”
District Court Joint Appendix pg. 66

B) Judge Politan: “Commitments and shortfalls are little more than illusionary concepts in the reseller industry—concepts which constantly undergo renegotiation and restructuring. The only “tangible” concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T. March 1996 Politan Decision (page 19 para 1)

C) Judge Politan: “In answer to the court's questions at the hearing in this matter, Mr. Inga set forth certain methods for restructuring or refinancing by which resellers can and do escape termination and also shortfall charges through renegotiating their plans with AT&T.”

92) It is absurd for AT&T's 1.22.16 letter to state that AT&T not adhering to the June 17th 1994 discontinuation w/o liability provision has nothing to do with AT&T sole defense of fraudulent use. Obviously AT&T's suspecting fraudulent use in Jan 1995 was meritless—even if it met the 15 days statute of limitation—that it did not. Judge Politan stated that AT&T's demands based upon the premise of CCI's shortfalls was not substantiated by AT&T.

AT&T 1.22.16 Letter conceded:

AT&T agreed generally to “grandfather” existing customers if AT&T made changes to term plans under various tariffs, and also that for certain changes, AT&T would provide certain notice, depending on whether the affected customers objected to the proposed changes.

93) Yes AT&T “agreed to grandfather existing customers when it made changes to term plans.” In addition AT&T agreed that it would have to adhere to the substantive cause test. So any changes in the tariff would be grandfathered. Plaintiff’s plans were pre June 17th 1994 ordered as Judge Politan and the FCC stated so it absolutely affects the merits of AT&T raising a fraudulent use defense. AT&T can’t reasonably suspect shortfall when the plans can be discontinued w/o liability due to being grandfathered pre June 17th 1994 plans. AT&T was required under the 1995 FCC Order to continue grandfathering the plans.

94) At **exhibit D** we see June 17th 1994 plans are exempt under the discontinuation with or without liability of a CSTPII tariff provision. The FCC 1995 Order committed AT&T to the substantial cause test and to continue grandfathering the pre June 17th 1994 plans.

95) Judge Politan’s second Decision was in March of 1996 that ordered the traffic transferred from the former customer CCI to the new Customer PSE. AT&T appealed that decision and maintained its sole defense of “fraudulent use” claiming it suspected it would be deprived of the collection of CCI’s plans shortfall charges. To assert that fraudulent use defense AT&T conceded the revenue commitment must stay with CCI.

96) AT&T appealed Judge Politan’s **March 1996** Decision based upon AT&T’s **primary jurisdiction argument**. It is now discovered that the primary jurisdiction argument appeal was done despite already being under FCC Order as of **October 1995**. Obviously Judge Politan never saw the October 1995 FCC Order, nor did the Third Circuit or FCC in **1996**. The FCC 2003 Decision would not have stated that June 17th 1994 issue was a disputed fact if it had considered the 1995 FCC Order.

97) AT&T already had its FCC primary jurisdiction resolution in 1995 via Tr. 8179 and Tr. 9229 and the FCC Order of 1995. Additionally Exhibit D is effective 8.29.96 and **still** it is exempting pre June 17th 1994 plans. The FCC 1995 Order committed AT&T to grandfather the plans as long as the reseller owned the plans. If a pre June 17th 1994 plan becomes a post June 17th 1994 plan prior to the 8.29.96 AT&T filing the tariff would have to indicate that. It is conclusive the 1995 Order defeats AT&T’s fraudulent use defense and the June 1996 penalty infliction. AT&T settled with co-plaintiffs CCI in July 1997 and it now it is conclusive that AT&T knew that the \$80 million in charges were not permissible under FCC Order in 1995. No wonder AT&T paid CCI what it claims was “substantial cash” and never pursued the \$80 million in charges as AT&T claimed it was compensated for the charges in a form other than cash. AT&T used the \$80 million in charges against CCI as leverage when in reality AT&T had no right to use that leverage.

98) AT&T 1.22.16 letter at footnote 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 para 20 n.94).

There was no disputed fact that the plans were ordered prior to June 17th 1994 and thus grandfathered from shortfall and termination charges as they could be discontinued w/o liability. What was the disputed fact was

how many restructures w/o liability a three year CSTP plan can have. AT&T is quoting a 2003 FCC Decision which did not take into consideration the 1995 FCC Order that resolved the disputed fact.

99) FCC Decision FN 94:

Finally, we refuse the parties' request that we declare whether "pre-June 17, 1994 CSTP II plans, **as are involved here**, may never have shortfall charges imposed, as long as the plans are restructured prior to each one-year anniversary." See Joint Motion for Expedited Consideration at 2; Opposition at 14-15; Reply at 25. Declaratory relief on this issue – **which also was not referred to us by the district court** – is inappropriate because whether CCI's plans were pre- or post-June 17, 1994 plans is a disputed fact. Compare *id.* with Opposition at 14 n.13.

The FCC 1995 Order which the FCC was not presented with and thus did not consider, resolves the disputed fact of how long the plans were grandfathered for. It Orders AT&T to continue the grandfathering of the plans. Furthermore it states that even in exceptional cases AT&T was to extend the grandfathering for an additional year from the October 23, 1995 FCC Order.

100) Therefore it is an undisputed fact that AT&T unlawfully inflicted shortfall and termination charges on the CSTP plans on June 10th 1996. So at the very minimum the plans could be discontinued w/o liability, aka restructured, up to October 23 1996. Therefore when considering the 1995 FCC Order there is **no longer a disputed fact to be resolved** when taking the FCC 1995 Order into consideration.

101) The FCC 1995 Order defeats AT&T's sole defense of fraudulent use **on its merits** for suspecting shortfall charge on Pre June 17th 1994 grandfathered plans. Additionally plaintiffs filed a supplemental complaint on Jan 3rd 1997 after AT&T unlawfully inflicted the plans with the shortfall and termination charges on June 10th 1996. The FCC Oct 1995 Order which transcended that case is conclusive it was unlawful to apply shortfall and termination charges in June 1996.

102) There is no longer is a disputed fact regarding the Pre June 17 1994 provision now that the FCC 1995 Order has been discovered. In any event if there are any disputed facts they must be handled by the NJFDC as the FCC 2003 Decision at fn. 87 and fn. 94 states. AT&T is very concerned that Plaintiffs want to go back to NJFDC to show new evidence. So the AT&T counsels came up with the following misrepresentation to make it seem as if the NJFDC has already seen the FCC 1995 Order.

AT&T's February 1st 2016 brief: page 6

"As AT&T has explained, those pre October 1995 terms did not enjoy "immunity" from shortfall obligations. AT&T 2006 Comments at 31-34 **[Fn 5 HERE]**

Then your eyes go down to the footnote but you are still thinking the brief is referring to the Oct 1995 FCC Order. Footnote 5:

Petitioners also assert that Judge Bassler never saw the **1995 Order**. Grimes Letter at 8. In fact, petitioners' prior counsel cited **that Order** and attached it as an exhibit to a letter to Judge Bassler in which he argued that the stay should be lifted. See Exh. D."

103) Here is AT&T's Exh D.

Exh D. As you also recall the prospective tariff changes made to the AT&T Transfer of Service Agreement section 2.1.8 started in **November of 1995** and addressed issues that the Inga Companies case vs. AT&T related to.

104) What this exhibit to Judge Bassler actually referenced was a **tariff change** in section 2.1.8 in **November 1995**. Not the October 23rd 1995 FCC Order. To pull of the con that the FCC Oct 1995 Order had already been seen by Judge Bassler, AT&T's paragraph first focuses on the Oct FCC Order and then changes subjects and drops the second half of the para **into a footnote 5** and only says "Judge Bassler never saw the **1995 Order**."

105) Notice how AT&T leaves the month off and calls it an **Order**. What is actually in the exhibit was a **NOVEMBER 1995 TARIFF CHANGE** and not the FCC October 1995 Order. This is no mistake. AT&T's counsels fabricated that the exhibit was an ORDER and intentionally left off the month because he wanted the FCC to think AT&T was talking about the Oct 23rd 1995 FCC ORDER—when in fact the exhibit was about a November 1995 tariff change.

106) This is a very well calculated attempt to mislead the FCC. The fact is the plans did enjoy immunity as the tariff indicates here at plaintiffs Exhibit D—not to be confused with AT&T's exhibit D referenced above. The exhibit AT&T counsel cites in a brief to Judge Bassler is not Judge Bassler already seeing the Oct 23 1995 FCC Order.

107) Even if the FCC mandated that AT&T's fraudulent use defense forced plaintiffs to transfer the plan to PSE, AT&T asserted to Judge Politan that Plaintiffs would still get the 66% discount. This because AT&T conceded it would allow PSE to move the locations from the 28% CSTPII to the 66% Contact Tariff 516. However plaintiffs wanted to keep its grandfathered plans. Therefore the fraudulent use defense is also moot in that respect.

Mischaracterization of the CCI to PSE Traffic Transfer Does Not Constitute a Defense

108) The very reason AT&T in 1995 mischaracterized the CCI-PSE transfer as a plan transfer and not a "traffic only" transfer was AT&T clearly understood that the non-transferred plans revenue and termination commitment only transfers under a **plan transfer**—not a traffic only transfer. During the March 18th 2015 oral argument before Judge Wigenton AT&T read from a small snippet of its argument in 1995 in which it claimed in 1995 PSE must assume all obligations of CCI. What AT&T actually did there was first mischaracterize the CCI-PSE transaction as a plan transfer and **under that false plan transfer predicate** correctly stated that under a **plan transfer**—not a traffic only transfer---the revenue and time commitment must transfer.

109) Current AT&T counsel Richard Brown on 4.25.96 **mischaracterized** to Third Circuit that the CCI-PSE transfer was a **plan** transfer and under that false predicate argued PSE must assume revenue/shortfall and time/termination commitments. Richard Brown said it was **self-evident** for traffic only transfers that obligations **don't transfer**:

“CCI Notes that a transfer of service can apply either to individual end user locations or to entire plans. See CCI Br. At 31-32 & n13. CCI then, incongruously, seeks to defend the District Court by citing “record evidence” that addressed transfers **individual end user locations (not entire plan liabilities), and showed that the only “obligation” transferred to the “new customer” in that event is the unpaid liability associated with the individual end user location** that is transferred. **But that is self-evident under the tariff.** By contrast, when *all* the plan’s traffic and locations are being transferred to a new customer and the “plan” would then exist only as an **empty shell**, then the “new customer” would not be assuming “all” the associated “obligations” unless it assumed the “existing customer’s” shortfall and termination commitments.”

110) Another mischaracterization that it was a **plan** transfer and not a “traffic only” transfer: AT&T FCC 2003 Reply J. Appendix 533:

AT&T states it is referring to the traffic only transfer to PSE but says it’s a plan transfer:

“Petitioners were precluded under the governing tariff from transferring their CSTP II **plans to PSE** unless PSE agreed to assume all of the Petitioner's obligations under those same **plans, including tariffed shortfall and termination charges.**” (**No emphasis added on italics.**)

111) In order to recreate history AT&T misled Judge Wigenton that AT&T’s position in 1995 was that it was asserting that under a traffic only transfer PSE must assume the non-transferred plans revenue and time commitments. AT&T counsel Joseph Guerra’s oral argument presentation was read from a carefully prepared statement and tried to revise history by stating it was AT&T’s position in 1995 that CCI must transfer the plan commitments. Mr Guerra was making that statement when AT&T was mischaracterizing the CCI-PSE transaction as a plan transfer, not a traffic only transfer. Mr Guerra also used the mischaracterization maneuver on Judge Wigenton when he attributed an AT&T statement on which obligations transfer on a **plan transfer** that was quoted within the DC Circuit Decision.

AT&T’s 1.22.16 letter also uses the mischaracterization to falsely assert there were **two defenses**. AT&T letter at pg. 2-3 quotes the FCC 2003 Decision and then falsely interprets it based on a **plan transfer**:

“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 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.”

112) See where I have emphasized “**transfer of a plan**” whereas AT&T of course only emphasized the words “*and that,*” to make it appear as if AT&T had two defenses! The fact that FCC was saying AT&T objected on the grounds that section 2.1.8 did not authorize the **transfer of a plan** unless PSE assumes the original’s customer’s liability on a **plan transfer**, is absolutely correct under the tariff. The parties have always agreed that on a **plan transfer**, the plans revenue and time commitments absolutely do transfer with the **transferred plan**—as they did when the Inga companies transferred its plans to CCI.

113) The first item is not a controversy. AT&T should object if a customer refused to transfer the plan obligations if the transaction was a plan transfer. AT&T was again mischaracterizing the CCI-PSE transaction as a PLAN transfer and under that false predicate was saying PSE would have to assume CCI's plan obligations. Mischaracterizing reality does not constitute a defense. The parties agree plan transfers required the plan commitments to transfer as they did when the Inga Companies transferred its plan to CCI. The second item after "and that" was AT&T's only denied meritless defense.

114) As the FCC 2007 Order determined the parties agreed from 1995 till after the DC Circuit Decision that the revenue and time commitments do not transfer when traffic only transfers. AT&T's letter is referring to the FCC statement in which the FCC is quoting AT&T saying all obligations transfer on a plan transfer. However this CCI-PSE transaction is not about the transfer of a plan. It is about a traffic only transfer. Simply mischaracterizing the CCI-PSE transfer as a plan transfer was not a defense when the case is about "traffic only," non-plan transfers. The second sentence referencing fraudulent use 2.2.4 on the traffic only location transfer was indeed AT&T's sole denied defense. From 1995 up until after the DC Circuit when AT&T lost its fraudulent use defense, AT&T had always maintained under its fraudulent use defense that on a traffic only transfer CCI's plan commitments do not transfer.

115) AT&T was obviously not before Judge Politan asserting that under its tariff CCI revenue and time commitments don't transfer (fraudulent use defense) and simultaneously asserting that under its tariff CCI's revenue and time commitments must transfer (AT&T's post DC Circuit defense). Let's assume that AT&T was asserting in 1995 that under 2.1.8 CCI must transfer all its obligations. Obviously if CCI has no obligations left then why did AT&T claim that it suspected of being deprived of collecting shortfall on CCI's shortfall commitment (i.e. fraudulent use defense 2.2.4), since these commitments were all transferred away years earlier?

116) The fundamental basis of the two defenses is diametrically opposed. The fact is AT&T created its "all obligations" defense, w/o evidence, before Judge Bassler in 2006, when AT&T lost its sole defense of fraudulent use. AT&T's letter emphasizing the words "*and that*" is simply more subterfuge and actually makes plaintiff's point for why the FCC 2007 Order determined that there was no controversy or uncertainty as to which obligations transfer under 2.1.8.

117) Plaintiffs did many traffic only transfers away from its plan previously to the denied Jan 1995 transfer. If AT&T applied its "all obligations" transfer assertion in 1995, that would mean plaintiffs transferred away all the obligations prior to 1995 and there were no obligations left to transfer in Jan 1995. So how can AT&T have claimed in Jan 1995 that plaintiffs were supposed to also transfer customer plan obligations, when under AT&T's assertion there were no obligations left to transfer.

118) AT&T's "all obligations" defense created in 2006 is self-defeating. If the obligations were still left on the CCI's plans after prior to the CCI-PSE traffic only transfer that means AT&T's theory that all obligations transfer is wrong. If AT&T's "all obligations" theory is correct and all obligations did transfer then why was AT&T asserting fraudulent use that it would be denied of shortfall on obligations that had already been transferred away? How can AT&T assert that CCI had to transfer all obligations if there were no obligations left to transfer since they were all transferred away prior to Jan 1995? Most importantly why can't AT&T show the Judge just a few dozen samples of evidence to support its "all obligations" theory. The Tr8179 and Tr. 9229 tariff filings are conclusive that AT&T knows plan obligations don't transfer but the FCC has allowed AT&T to continue with its fabrications when the FCC is well aware AT&T knows better. AT&T 2.1.16 Letter at page AT&T page 3 AT&T attempted to argue that on March 30th 1995 it was asserting that under a traffic only transfer the plan obligations must transfer.

119) AT&T 2.1.16 statement:

There is no merit to petitioners' claim that AT&T's sole defense" was "fraudulent use." AT&T AT&T explained in its response to the Grimes Letter, AT&T defended its refusal to process the proposed CCI-to-PSE transfer based not only on its fraudulent use claim, but also because the proposed transfer was invalid under section 2.1.8. See EXH B AT&T's March 30, 1995 Post-Hearing Br. At 7-8 (**AT&T refused to permit that transfer precisely because PSE, the "new" customer in the transfer, did not assume "all the obligations" of the "old customer, CCI.**)

120) What AT&T argued on March 30th 1995 was the transaction was not a traffic only transfer but a plan transfer and under that false predicate made the above "all the obligations" statement. But what AT&T did not quote in its 2.1.16 letter is the full passage in which it definitively stated that on a traffic only transfer the plans revenue commitment does not transfer. The following precedes AT&T's March 30th statement Exh B page 7-8

That volatility exposes AT&T to increased financial risk and has caused AT&T to be more prudent in seeking security deposits. AT&T has that right under the tariff. Indeed, plaintiffs did not immediately contest AT&T's demand for security. Instead they carried out a plan they had conceived in October, to "park" traffic with PSE, by attempting a transfer of traffic, but not the plans, to PSE. That proposed two-step transfer **increased the likelihood that the plans would incur shortfall and termination liabilities by divorcing the revenue that satisfies the commitments from the plans in which those commitments were made.....**

AT&T's 2.1.16 only quote of March 30th 1995 passage: **AT&T refused to permit that transfer precisely because PSE, the "new" customer in the transfer, did not assume "all the obligations" of the "old customer, CCI.**

Continuation of March 30th 1995 quote.....

See AT&T FCC Tariff No. 2, Section 2.1.8 (emphasis supplied.) Plaintiff's' effort to make the clear tariff language, "all the obligations", mean something less than "all" is pure sophistry. Plaintiffs want to enforce the language of the tariff as they wish it to be read, not as it in fact reads.

Above it was clear that AT&T's position in 1995 was that plan obligations don't transfer on traffic transfers. Post DC Circuit AT&T would like to have the language of the tariff as they wish it to be read, and not as it in fact reads.

121) AT&T's 2.1.16 brief at page 3:

As AT&T has explained, a traffic transfer would not have divested a transferor such as CCI of obligations existing at the time of the transfer. Comments of AT&T in Opposition to Request for Declaratory Rulings (Dec 20 2006) ("AT&T 2006 Comments") at 17-18 (discussing Section 2.1.8's joint and several liability" provision). Thus, CCI had obligations PSE was obligated to assume. FN 3

122) On a traffic only transfer the joint and several liability provision relates only to the traffic selected for transfer. There is no joint and several liability as to the former customer's plan commitments (revenue and time commitments) because the plan is not transferring. Yes at the time of the transfer CCI would be responsible for the two obligations outlined on the face of 2.1.8 in 1995 on the locations that were selected for transfer, not on the locations that were not transferred. This has no impact on CCI keeping its plan commitments as CCI is not a "former customer" of its plan.

**FCC Decision States that Discrimination
and Unreasonable Practices—Must be Resolved by the NJFDC**

123) My 1.18.16 letter was also not responded to regarding the fact that there are disputed fact claims the FCC states the Judge Wigenton must handle:

FCC Footnote 87

For example, petitioners claim that AT&T engaged in unlawful discrimination in violation of section 202 because its consistent practice was to permit aggregators to transfer locations without plans. *See* Petition at 23, 25. Petitioners also argue that AT&T engaged in an unreasonable practice in violation of section 201 because, when it refused to effect the transfer of locations, it enforced an unwritten rule. *See* Petition at 22-23. Petitioners filed voluminous documents with the Commission, many of which also were filed with the district court, which petitioners claim support their theory of the case. AT&T has not attempted to rebut these individual claims, asserting, instead, that the facts regarding these claims are **disputed** and arguing that declaratory relief is not appropriate when all relevant facts are not clearly developed before the Commission and essentially undisputed. *See Cascade Utilities, Inc., American Telephone and Telegraph Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 8 FCC Rcd 781, 782 para. 11 (CCB 1993) (cited in Opposition at 10 (additional citations omitted)). **As noted above, we agree that declaratory relief is inappropriate when the facts are disputed.**

Accordingly, we deny all requests not specifically granted. In accordance with the discretion allowed us in a declaratory proceeding, moreover, we see no need to attempt to resolve the disputed issues through a formal complaint proceeding before the Commission, as AT&T proposes. Given our conclusion that AT&T violated section 203 of the Act, it is unclear what additional fact-finding on these issues is necessary. Assuming that further inquiry is appropriate, efficiency favors their resolution in the district court where the evidentiary record already has been developed. That is consistent with petitioners' original choice of forum for this dispute, with petitioner's objective in this proceeding, see Reply at i ("Any factual issues which need to be addressed in order to apply the tariff, after the tariff is interpreted by the Commission, can be addressed by the District Court, which has already compiled an extensive factual record in this case"), 14, and with the court's primary jurisdiction referral. The district court proceeding is still pending and the parties have presented evidence in that forum, *inter alia*, in the course of a two-day hearing.

**AT&T Loses Supplemental Complaint Due to Illegal Billing of End-Users
AT&T Cannot Rely Upon the Charges it Inflicted in June 1996 Even if the Charges Were Lawful**

124) The FCC 2003 decision correctly noted that the plans were ordered pre June 17th 1994. The plans original commitments would have been completely extinguished by the end of its 3 year commitments which ran into 1997; however AT&T inflicted the charges in June 1996.

125) It's not only the fact that AT&T unlawfully inflicted the \$80 million in charges—AT&T used an illegal remedy and prepared for the illegal billing to maximize the damages. Under the tariff if the \$80 million in charges was actually warranted AT&T was obligated to charge only its aggregator—but to maximize damages AT&T applied the \$80 million in charges to all the aggregators' end-users.

126) Samples have been provided the FCC and AT&T that show businesses who expected a \$60 phone bill received a \$4,428 phone bill! Obviously petitioners business was destroyed when AT&T did this as end-user customers went ballistic! There was a billing dispute leading up to the placing of these charges. Petitioners simply advised AT&T that the charges should not be placed at all but AT&T claimed that they were permissible in being applied.

127) AT&T concedes there was a dispute as AT&T stated:

(You should know, however, that CCI disputes these charges.)

Petitioners end-users went ballistic and AT&T blamed the aggregator and then AT&T removed the charges and the end-users went back to AT&T but without the aggregator extra discounts—a well-planned scheme. AT&T intentionally violated the clear cut tariff law in order to put petitioners out of business. AT&T's remedy if shortfall is actually appropriate under the tariff:

- The Customer will assume all financial responsibility for all designated accounts in the plan and will be liable for all charges incurred by each location under the plan.

Above the AT&T's **Customer** is the "the aggregator" and the aggregator Customer of AT&T is the only one that is financially responsible for the charges, not the aggregators end-users—who are not AT&T's customers.

The tariff further details:

Shortfall and/or termination liability are the responsibility of the Customer. Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.

128) If warranted shortfall and termination charges are the responsibility of the AT&T customer the aggregator plaintiff's---not plaintiff's end-users. The ONLY remedy that AT&T's tariff avails AT&T is to simply remove the discount on the end-users bill if the aggregator does not initially pay AT&T. So in other words an end-user bill received an aggregator 20% credit of \$13.21 on end-users \$66.02 gross usage. The \$13.21 credit is the 20% discount provided by being under the aggregators CSTPII/RVPP plan. The AT&T remedy is ONLY that the **\$13.21 be removed**. That's it!

The tariff does not permit AT&T to apply shortfall and termination true-up charges in EXCESS of the \$13.21 credit provided by AT&T's customer the petitioners. *If* the charges were appropriate AT&T as the above excerpt from the tariff indicates:

“For billing purposes, such penalties **shall reduce any discounts** apportioned to the individual locations under the plan.”

129) AT&T’s remedy ---if warranted ---was to simply remove the \$13.21 cents---not intentionally infuriate the end-users by sending that end-user that averages \$66.02 a bill for \$4,428! Remember this is pre internet development and thus the toll free service line was the end-users customer service and sales line and if the business lost that number for non-payment to AT&T the business would suffer severe damages. So businesses quickly dropped the aggregator as AT&T promised it would remove the shortfall and termination charges. AT&T advised these end-users that if you say you were slammed we will remove you!

130) Obviously AT&T is aware that it was an intentional violation of the tariff. AT&T used an **illegal remedy** in order to put petitioners out of business. It was a planned attack to inflict massive charges to infuriate petitioner’s end-users, and then rescue the end-users back to AT&T with higher rates. AT&T of course does not comment at the FCC on its illegal billing remedy—after all what is AT&T possibly going to say—the law is clear as could be.

131) The FCC in 2003 Decision decided that AT&T used an **illegal remedy** in applying its “fraudulent use” argument as AT&T “permanently denied” the transaction instead of the tariffed remedy of “temporarily suspending” service. The FCC 2003 Decision decided that when an illegal remedy is used that provision can no longer be relied upon. The Court of Appeals for DC Circuit did not find fault with the FCC position on treating illegal remedies. Likewise when AT&T used an **illegal remedy** in applying the \$80 million in charges the law clearly dictates AT&T violated its tariff by illegally applying its shortfall and termination charges to the end users.

132) The illegal billing resolves plaintiffs Jan 3rd 1997 filed Supplemental Complaint and is a clear fact issue that needs no tariff interpretation and therefore the NJFDC can easily handle this. Therefore the FCC should temporarily suspend the FCC proceedings to also address this issue. So threatening my firm with sanctions before even seeing my brief to Judge Wigenton is uncalled for when the FCC itself states that there are several disputed facts that must be handled by the NJFDC.

SUMMARY

Substantial new evidence was discovered with AT&T’s latest comments of 2.1.16. The FCC Bureau cannot send the case to circulation w/o including this evidence. This brief clearly shows that there has been substantial critical evidence that the NJFDC Judge Wigenton has not seen or was intentionally misrepresented to the NJFDC. The FCC should temporarily suspend releasing a decision and consider sanctions. Plaintiffs ask the FCC to consider this filing and all filings within the case. Many of the exhibits are on the FCC server here: <http://apps.fcc.gov/ecfs/comment/view?id=60001310889>

Respectfully Submitted,
Group Discounts, Inc.
/s/ Al Inga
Al Inga President

EXHIBIT A (TR 8179 Proposal)

AT&T COMMUNICATIONS
 Adm. Rates and Tariffs
 Bridgewater, NJ 08807
 Issued: February 16, 1995

TARIFF F.C.C. NO. 1
 3rd Revised Page 150.1
 Cancels 2nd Revised Page 150.1
 Effective: March 2, 1995

6.2.6. Transfer or Assignment (continued)

If a Customer seeks to transfer, to one or more other Customers, all or substantially all of the locations associated with an existing Custom Network Service volume or term plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining locations associated with the volume or term plan or Contract Tariff (based on the past 12 months of usage) would not meet the usage and/or revenue commitment of the volume or term plan or Contract Tariff, the transfer will be deemed a transfer of the associated volume or term plan or Contract Tariff to such other Customer(s), and may only be completed in accordance with this section. If the transfer of service is to a group of two or more other Customers, the new Customer for the volume or term plan or Contract Tariff will be that group. Each Customer in the group will be jointly and severally liable for all of the obligations associated with the transferred service and volume or term plan or Contract Tariff.

6.2.7. Multi-Location Calling Plan (MLCP) - Certain Custom Network Services are available as part of the MLCP. The terms and conditions of the MLCP are described in Section 6.9. following.

Exhibit B**Tr 9229 As Certified As the Way AT&T Handled Large Traffic Transfers by AT&T Counsel Meade**

AT&T COMMUNICATIONS
 Adm. Rates and Tariffs
 Bridgewater, NJ 08807
 Issued: July 15, 1997

TARIFF F.C.C. NO. 2
 12th Revised Page 28
 Cancels 11th Revised Page 28
 Effective: July 16, 1997

2.5. Payments and Charges (continued)*2 Different TYPES*

1 **2.5.8. Deposits** - The following deposit provisions are applicable to WATS. A deposit does not relieve the Customer of the responsibility for the prompt payment of bills on presentation. When a deposit is required, AT&T will provide a written notification of the amount of the deposit and an explanation of the reason(s) for the deposit requirement. When a deposit is required in connection with an order for new service or an AT&T Pricing Plan, the Customer shall pay the deposit within the period specified by the Company, which shall be a minimum of ten (10) days after the date of the deposit notification, except as provided in Section 2.5.10, following, in connection with a Contract Tariff order. AT&T may defer installation activity while a deposit demand is pending. When a deposit is required in connection with existing service, the deposit shall be paid within 30 days after the date of the deposit notification. If the Customer refuses to pay a deposit required under this Section, AT&T may refuse to provide new service, or restrict or deny existing service for which the deposit is required. If as a result of a Customer's refusal to pay such a deposit, the existing service is ultimately disconnected, the Customer shall be liable for all applicable termination charges. In lieu of a cash deposit, the Company will accept as a deposit or as a portion of the deposit amount, irrevocable and commercially sound Bank Letters of Credit, Surety Bonds, pledges of assets as security under the Uniform Commercial Code or similar statutes, or Guarantees, or any combination of cash and these instruments.

A. Deposit for Recurring Charges - The Company will require a deposit from a Customer (1) who has a proven history of late payments to AT&T or (2) whose financial responsibility is not a matter of record (determined in accordance with 1., following). AT&T will hold the deposit as security for the payment of charges. The amount of this deposit will not three times the sum of the estimated average monthly usage charges and/or the monthly service charges.

1. To determine the financial responsibility of a Customer and/or the specific amount of any deposit required, AT&T will rely upon commercially reasonable factors to assess and manage the risk of non-payment. These factors may include, but are not limited to, payment history for telecommunications service, the number of years in business, history of service with AT&T, bankruptcy history, current account treatment status, financial statement analysis, and commercial credit bureau rating.

2 **B. Deposit For Shortfall Charges** - The Company will require a deposit from a Customer that meets each of the elements specified in 1. through 3., following, to be held as a guarantee for the payment of any charge that may be incurred as a result of a failure to meet revenue or volume commitments or monitoring conditions (Shortfall Charge) under an AT&T Pricing Plan (a term plan, flex plan, or other discount plan with revenue or volume commitments offered under this Tariff, or a Contract Tariff under which WATS is provided). The amount of this deposit will not exceed the estimated Shortfall Charge, to be determined in accordance with the applicable tariff provisions under which such Shortfall Charges would be assessed, based on the total annualized charges or usage calculated as specified in the applicable category under 2., following. A deposit will not be required under this Section if the amount of the estimated Shortfall Charge is less than \$300,000. A deposit will be required when each of the three following requirements is met:

1. The Customer has subscribed to a Pricing Plan that includes a revenue or volume commitment based on charges or usage over a period of one year or longer.

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2.5.6.B. Deposit for Shortfall Charges - (Continued)

2. The Customer is in one of the following categories (a) through (c). For purposes of these determinations, if any commitment under the Pricing Plan is based on charges or usage over a period of longer than one year, the commitment will be treated as an annual commitment equal to the amount of the commitment, divided by the number of months in the commitment period, multiplied by twelve.

(a) AT&T has accepted the Customer's order for service under the Pricing Plan and the Customer has identified at least one location or telephone number to be served under the Pricing Plan, but the total annualized charges or usage from all such identified locations and telephone numbers are less than 50% of the annual commitments applicable during the first year of the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed usage or (ii) the average monthly billed usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available.

(b) The Customer has been taking service under the Pricing Plan for at least six full billing months, and the total annualized charges or usage under the Pricing Plan are less than 85% of any currently applicable annual commitment under the Pricing Plan. Such total annualized charges or usage will be twelve times the greater of (i) the past month's billed charges or usage or (ii) the average monthly billed charges or usage during the preceding twelve months, or if billed usage information is not available for the preceding twelve months, then during the number of preceding months for which such billed usage information is available.

(c) The Customer has requested that AT&T remove specified locations or telephone numbers from the Pricing Plan, and the total annualized charges or usage from the locations or telephone numbers that would remain under the Pricing Plan are less than 50% (during the first six full billing months of the term of the Pricing Plan), or 85% (after the sixth full billing month of the term of the Pricing Plan), of any currently applicable commitment under the Pricing Plan. Such total annualized charges or usage will be determined using the same methodology as specified in (b), preceding.

3. The Customer's net assets (based on a review of an audited financial statement, if available, and other information available to AT&T) are less than three times the amount of its total commitments to AT&T under tariffed service arrangements, or the Customer's financial responsibility is not a matter of record (determined in accordance with A.1., preceding).

C. Interest on a Cash Deposit - Interest will be paid to a Customer for the period that a cash deposit is held by AT&T.

Plaintiffs note: Obligations remain on the former customers plan as end-user locations are removed. AT&T covered itself whether accounts were either transferred away via 2.1.8 or deleted from plan via 3.3.1.Q. This was the (Tr.9229) outcome of the AT&T Counsel Meade certification to Judge Politan as to what AT&T was going to do in the future for large traffic only transfers. Make the former customer that had to keep the customer plan commitments post deposits against shortfall. This did not affect plaintiff's CCI-PSE transfer because as normal it was a tariff change that of course was prospective.

Certain material on this page formerly appeared on Page 28.
Certain material previously found on this page can now be found on Page 28.1.1.
* Issued on not less than one day's notice under authority of Special Permission No. 96-0469.

The FCC 1995 Order---EXHIBIT C

Relevant Excerpts of the FCC 1995 Order and its Effect on Plaintiffs Case

133. Certain commenters raise issues implicating the "substantial cause" test. The "substantial cause" test holds that tariff revisions altering material terms and conditions of along-term service tariff will be considered reasonable only if the carrier can make a showing of substantial cause for the revisions. In response to concerns of IBM and API that AT&T be required to justify any changes to contract-based tariffs, we note that we recently affirmed the applicability of the "substantial cause" test to tariff revisions that alter material terms and conditions of a long-term contract, and we clarified that this test applies to any unilateral tariff modification by non-dominant as well as dominant carriers. Accordingly, if AT&T files a modification to a contract-based tariff, we will take into account that the original tariff terms were the product of negotiation and mutual agreement, and we will consider on a case-by-case basis, in light of all the relevant circumstances, whether a substantial cause showing has been made. We will apply the substantial cause test in this way in any post-effective tariff investigation, pursuant to Section 205, and in complaint proceedings. We also will consider, on a case-by-case basis, whether to allow customers to terminate contracts without liability.

134. Finally, we note that AT&T has voluntarily committed to implement certain measures that are designed to address criticisms of its business practices that resellers have raised in this proceeding and elsewhere. AT&T represents that the following reflects an agreement with the Telecommunications Resellers Association, and AT&T has committed to comply with this agreement:

As a general practice, **AT&T grandfathers both existing customers and subscribed customers** (i.e., customers who have submitted a signed order for service) when it introduces a change to a term plan (including Contract Tariffs, term plans under Tariffs 1, 2, 9, and 11, Tariff 12 Options and Tariff 15 CPPs), and **it commits to continue that process**. In exceptional cases, however, grandfathering may not be appropriate either because: (1) a change is necessitated by typographical errors, a service inadvertently priced below costs, rate changes where no individual rates (post-discount) are increased, or other comparable circumstances, or (2) the change is necessary to bring clarity to a non-rate term or condition, where it is necessary to treat all customers alike (such as a change to the provisions for how orders are processed, but not including changes to the body of Contract Tariffs, Tariff 12 Options or Tariff 15 CPPs). In such circumstances, AT&T commits for a twelve-month period to **offer its customers the following additional protections** not required of non-dominant carriers: - where AT&T makes any change to an existing term plan, AT&T will afford the affected customers 5 days meaningful advance notice of the tariff filing to give the customer the opportunity to object; provided, **however, that for changes to discontinuance with or without liability, deposits and advance payments, or transfer or assignment of service, AT&T will file on 14-days' notice.** (AT&T would have the unaffected right to change underlying tariff rates -- such as a general change to SDN rates -- unless the term plan protected the customer from such changes.) Where the affected customer(s) agrees to the revision, AT&T will note that agreement in its transmittal letter and file the change on 1 day's notice. **Where the affected customer objects to the change, AT&T will file the change with the Commission on 6 days' notice. With respect to the 14 or 6 days notice filings, the substantial cause test will be applicable to the same extent as it is today.**

135. AT&T has also voluntarily committed to report to the Common Carrier Bureau and to the Telecommunications Resellers Association Executive Board, on a quarterly basis, its performance in processing reseller orders. This commitment is for a term of one year.

In addition, for at least twelve months, AT&T will provide a single point of contact to receive reseller complaints not resolved through the first point of contact, the AT&T account manager. Finally, AT&T represents that it has agreed with the Telecommunications Resellers Association to establish alternative dispute resolution procedures:

AT&T is willing to establish a quick, efficient, commercially-oriented process for resolving disputes with its reseller customers. AT&T is willing to enter into mutually agreeable private party arbitration agreements with these parties. AT&T is also willing to develop with the Telecommunications Resellers Association Executive Board a model two-way Arbitration Agreement. AT&T would be willing to enter into such an agreement with any of its reseller customers for resolution of commercial disputes between the reseller and AT&T under the following guidelines:

a) The Arbitration Agreement would be based on the United States Arbitration Act and the Commercial Arbitration Rules of the American Arbitration Association.

- b) The Arbitration Agreement would bind each party to arbitration as the exclusive remedy for any covered claims that arise in the period covered by the agreement. The covered period initially would be twelve months, but the reseller will be permitted to end the covered period earlier by providing at least 30 days prior written notice.
- c) Covered claims would include all claims between the parties relating to tariffed services, the carrier-customer relationship between the parties, or competitive practices, except claims that tariff provision or practice is unlawful under the Communications Act would not be covered claims. Covered claims would include, for example, claims that AT&T has misapplied or misinterpreted its tariffs, that the customer has failed to comply with its tariff obligations, or that either party has engaged in unlawful competitive practices such as misrepresentation or disparagement.
- d) The Arbitration Agreement would provide for a 90 day arbitration process, unless the parties agree to a longer period.

136. MCI argues that AT&T's commitment in its September 21, 1995 letter to grandfather, at its discretion, existing customers adversely affected by unilateral contract changes (permitting them to receive AT&T performance on the same terms and conditions as the original contract), or allowing them to terminate their agreements with AT&T without liability if they pay under utilization charges, is "patently anti-consumer." We note, however, that AT&T's October 5, 1995 Ex Parte Letter clearly addresses the concerns raised by MCI. We believe that the commitments proffered by AT&T in its October 5, 1995 Ex Parte Letter contribute to addressing the tariff-related concerns raised by the commenters in this proceeding, and we therefore order AT&T to comply with these voluntary commitments.

137. We also note that some of the tariff-related issues raised by commenting parties transcend the scope of this proceeding. For example, questions concerning the application of the filed rate doctrine to contract tariffs may arise with respect to carriers other than AT&T. We intend to examine these and other questions in the context of our review of our regulatory scheme governing the interstate, domestic, interexchange industry.

EXHIBIT D

1. **CSTP II Exception** - A Customer of a CSTP II that was either ordered on or prior to August 29, 1996, or in service on or prior to September 1, 1996, may discontinue without liability that Old Plan in conjunction with an order for a New Plan, subject to the conditions specified in (a), following, in lieu of the conditions specified in Sections 2.5.18.D. and E., preceding. The Customer also must satisfy the conditions specified in Sections 2.5.18.A. through C., preceding, except as otherwise provided in (b) and (c), following.

Effective date of material filed under Transmittal No. 9229 is advanced to August 29, 1996 under authority of Special Permission No. 96-0677. Certain material previously found on this page can now be found on Page 34.9.1.

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Issued: August 28, 1996

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Effective: August 29, 1996

** All material on this page is reissued except as otherwise noted. **

2.5.18.F.1. **CSTP II Exception - (continued)**

(a) The total revenue commitment over the full term of the New Plan must be greater than or equal to the remaining annual revenue commitment of the Old Plan. The remaining annual revenue commitment of the Old Plan is the Annual Revenue Commitment divided by 12 times the number of full months remaining in the term of the Old Plan. If the New Plan is a Contract Tariff, only the 800 Service revenue commitments under the Contract Tariff are used to calculate the total revenue commitment of the New Plan. If more than one plan is being discontinued, the total revenue commitment over the full term of the New Plan must be equal to or greater than the sum of the remaining monthly revenue commitments (the monthly revenue commitment times the number of monthly remaining) and/or annual revenue commitments (the annual revenue commitment divided by 12, times the number of full months remaining) of the plans being discontinued.

(b) Section 2.5.18.C. does not apply to a CSTP II that was in effect or on order on or prior to June 17, 1994.

(c) If the Customer has paid a Shortfall Charge pursuant to Section 2.5.18.C. in conjunction with its discontinuance of a CSTP II and replacement of the CSTP II with a New Plan, and if, at the end of the first year of the term of the New Plan, the Customer has incurred charges in excess of the New Plan minimum revenue commitment for that year, AT&T will provide a "credit" to the Customer for the amount by which such incurred charges under the New Plan exceeded such

**Notice the phrase at (c) above "discontinuance of a CSTPII"
This is the tariff term for what is referred to as a restructure. Note above at (b) pre June 17th 1994 plans are grandfathered. This ties in the term "discontinuance" used in the FCC1995 Order with the pre June 17 1994 grandfathering.**