ORAL ARGUMENT HELD NOVEMBER 12, 2004

Before the

UNITED STATES COURT OF APPEALS

For The

DISTRICT OF COLUMBIA CIRCUIT

AT&T CORP.,	)	
	)	
vs.	)	
	)	CASE NO. 03-1431
FEDERAL COMMUNICATIONS COMMISSION	)	
	)	

INTERVENORS' MOTION FOR ORDER GRANTING LEAVE
TO MAKE THIS MOTION A PART OF THE RECORD
OR TO FILE A SUPPLEMENTAL BRIEF
TO CLARIFY AND CORRECT THE FACTS OF RECORD

Intervenors, 800 Discounts, Inc., Winback & Conserve Program, Inc., One Stop Financial, Inc., and Group Discounts, Inc. (collectively, the "Inga Companies" or "Intervenors"),[1] by their attorneys, move this Court pursuant to Circuit Rule 27 (a) for an order authorizing the acceptance on the record of this Motion, or the filing of a supplemental brief to further address, the material misstatements, distortions of the plain language of Appellant's Tariff at issue, and material omissions of Appellant's actual business practices relevant to the rights of the Intervenors that were made during Appellant's oral argument. By this Motion, and supplemental brief, Intervenors seek to eliminate the confusion and the unwarranted denigration of the bona fide nature and business legitimacy of the transactions at issue that may have been caused by Appellant's argument. In support of this Motion, Intervenors show the following.

[1] All four companies are wholly owned by Alphonse G. Inga, a New Jersey resident.

1. Intervenors submit that the brief of the Federal Communications Commission ("Appellee") is more than sufficient to sustain its decision before this Court for review. However, Intervenors are concerned that the nature of the transactions that were undertaken 10 years ago in an industry environment that was unique at the time and which no longer exists today, may be misunderstood as a result of the oral argument presented and statements made by Appellant's counsel in response to questions from the Court.[2] Appellant's argument and responses to the Court seek to escape the consequences that ambiguities in a tariff are construed against the carrier by having counsel at oral argument read into the tariff provisions concepts and meanings that are not derived from the plain language of the tariff. In addition, the transcript of the argument reveals numerous instances in which material misstatements and material omissions of Appellant's actual business practices relevant to the rights of the Intervenors were made. Whatever the purposes for the use of this strategy, Intervenors are concerned that it may have created confusion where none should exist and wrongly denigrated the bona fide nature and business legitimacy of the transactions at issue. Of necessity, this Motion will itself contain important clarifications and factual rebuttals to the erroneous assertions made at oral argument. Nonetheless, Intervenors seek leave to submit a supplemental brief to clarify the factual record and correct specific errors that appear in the oral argument transcript should the Court determine that would best serve the ends of justice.

2. This case has several unusual aspects to it. There is the long delay in the Commission's decision-making process and the nature of the transactions on which that decision was rendered. One area that the Court may benefit from further briefing relates to the business

[2] During oral argument, the ambiguities of terminology and the overall complexities of the case were commented upon. *See*, for example, Judge Ginsberg's comments. (Tr. 3, line 19 and 39, line 22.)

practices followed by AT&T in regard to the offering of discounts on its 800 toll free services ten years ago.[3] It was these practices that created the opportunity for the aggregation and resale operations of Intervenors consistent with and as authorized by Commission policies established in 1976.[4] Under the resale policy, Intervenors became the largest aggregator of AT&T's discounted 800 services with a 25% share of this segment of the long distance resale market. Intervenors gained their success by becoming and remaining expert on the terms and conditions contained in AT&T's tariff that governed its discounted 800 service offerings. (J.A. at 471 – 473).

3. Another aspect is the fact that it was on advice of counsel that Intervenors did not elect to file an Intervenors' brief. This advice was based on the evaluation that Appellant's brief and the points made therein more than adequately demonstrated the validity of the decision under review and unquestionably posited the right to obtain the Court's affirmance. It is only after attending oral argument and reviewing the transcript that Intervenors became concerned over the factual assertions that were made by Appellant's counsel at argument. Intervenors' observation of the oral argument and its review of the transcript raised the potential that while the Court was seeking aid to understand the factual circumstances of the transactions and the industry environment that then existed, it did not obtain that information. On the contrary, Intervenors believe the Court could have been misled and possibly confused by the statements made on behalf of Appellant during oral argument.

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[3] Reference is also made to these practices later in this Motion.

[4] *In the Matter of Regulatory Policies Concerning Resale and Shared Use of Common Carrier Domestic Public Switched Network Services, CC Docket No. 80-54; RM 3453 (Oct. 21, 1980); See also* 62 FCC 2d 588 (1977), *Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, Report and Order;* 60 FCC 3d 261 (1976), *aff'd sub nom. American Telephone and Telegraph Co. v. FCC*, 572 F. 2d 17 (2nd Cir. 1978) cert. denied, 439 U.S. 875 (1978).

4. The issues Intervenors wish to address are the following.

5. The meaning and applicability of Section 2.1.8 of Appellant's tariff will be clarified to show that it may be construed in two ways as AT&T counsel admitted during oral argument and either way supports the FCC's decision and the Intervenors' right to have the transaction completed as tendered to Appellant. The FCC's view of the transaction hinges on section 3.3.1.Q of AT&T's tariff. **It has always been Intervenors position that section 2.1.8 expressly allows for the transaction intended in transferring the accounts to PSE.** Appellant's counsel's assertions about this section are both improper in the context of considering the application of a tariff's provisions and misleading. For example, during oral argument Mr. Carpenter described what 2.1.8 required.

> Mr. Carpenter: "The tariff says you have to assume both the outstanding indebtedness and the un-expired part of the volume commitments." (Tr.11, line 22, emphasis added.)
>
> "Our tariff says you have to assume the obligations for the indebtedness and the un-expired portion of the volume commitments." (Tr.13, line 3, emphasis added.)

These statements misread Section 2.1.8. That section expressly provides that the second obligation to be assumed after indebtedness is the unexpired portion of the "minimum payment periods," which is clearly a time obligation, not a volume obligation. (Emphasis added.) Mr. Carpenter's statements that 2.1.8 required assumption of volume commitments are therefore wrong and irrelevant. By law, tariffs must be clear and unambiguous. Counsel's arguments on appeal cannot read language into a tariff. If section 2.1.8 was intended to incorporate a "volume commitment," it failed to do so. (J.A. at 35).[5]

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[5] 2.1.8 Transfer or Assignment - WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer. 2.1.8.B. The new Customer must notify the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s). (Emphasis added.)

6. Another area of serious confusion created by Appellant counsel's statements during oral argument concerns whether it was permissible to transfer only the accounts under the plans and not the plans' volume obligations. The right under the tariff and AT&T routine business practices at all times **was clearly to allow transfer of only the accounts under plans** and not the plans' volume obligations. The Court will be shown that AT&T actually tariffed a transfer fee of $50 per account to cover the numerous individual account transfers of this exact kind. In addition, it will be shown that AT&T's filing and withdrawal of its Transmittal No. 8179 makes explicit its recognition of the practice of transferring accounts without the transferor plans' volume obligations.

7. That accounts can be and were being moved without the transferor's volume commitment on a regular and numerous basis is demonstrated by AT&T's filing of its Transmittal No. 8179. AT&T's justification for this Transmittal before the Commission was that it wished to make explicit in the tariff what AT&T claimed was already implicit in the tariff. The Commission's tariff expert was willing to allow Transmittal No. 8179 to become effective so long as it complied with law. The law was and is that tariff amendments may only have prospective effect. When AT&T attempted to make Transmittal No. 8179 effective retroactively, it was told it could not do so without being challenged by the Commission. AT&T voluntarily withdrew the Transmittal. (Transmittal No. 8179. J.A. at 101.) In fact, AT&T's in-house counsel that represented AT&T in its filing of Transmittal No. 8179, Mr. Meade, expressly acknowledges that Transmittal No. 8179 was withdrawn because the FCC expressed concern that it would have prohibited a location transfer. (J.A. at 477-478). Statements made by Appellant's counsel during oral argument contradict Appellant's own position that this is not the case.

> Mr. Carpenter: "So of course when a single number is transferred, single location is transferred, you know, this provision [2.1.8] applies…" (Tr.11, line 13.) And again, in

> explaining to Judge Robert's 2.1.8 's phrase "assuming all obligations," AT&T counsel admits locations can be transferred without the transferors volume obligation. (Tr. at 12, lines 1-18)
>
> Mr. Carpenter: "Yes, but what it means to assume all the obligations. What obligations apply may vary **depending on what's transferred**. In some cases the **only obligation** that may be transferred is going to be the outstanding indebtedness." (Tr.12, lines 22-25 and 13, line 1) (Emphasis added.)

8. Another serious misstatement was made that Appellant was at risk of being unprotected in the event of nonpayment for services. **For example, the intended transferee of Intervenors accounts, PSE, in fact assumed the obligation for past indebtedness and the un-expired portion of any applicable minimum payment periods.**

9. Mr. Carpenter made numerous statements during oral argument that PSE did not assume any of the obligations. Mr. Carpenter: "They didn't assume the obligation even for past indebtedness on the locations, because all they wanted transferred was the traffic on the plans without the concomitant obligations, and the tariff says you have to assume both the outstanding indebtedness and the unexpired part of the volume commitments, and neither of those things were transferred." (Tr.11, line 19.) This statement is incorrect because the TSA form shows that the two obligations to be assumed – indebtedness and unexpired time period were assumed by PSE. Appellant's argument is based on the notations on the AT&T transfer form and ignores the fact that the TSA form as signed results in the assumption of all obligations. The notations made on the TSA actually states "Traffic only move all BTN's except 181-000-0142-457, 131-134 0230-254 CSTP/Keep Plan # 3663 Intact. (J.A.at 175. Similar notations on other TSAs may be found at J.A. at 176 through 183). Appellant modified the actual notations to read "Traffic only…" then argued that the aggregator only wanted to move traffic and wasn't assuming the obligations. Appellant seeks to persuade the Court that these notations meant that the aggregator intended to separate the indebtedness on the accounts from the traffic revenue on the accounts.

The tariff doesn't offer the customer the option of separating the traffic revenue from potential indebtedness on the same account. What the notations mean is that Appellant was being asked to move all the traffic except for 2 accounts and leave the existing CSTP plans intact.

10. The supplemental brief will show that notations were necessitated due to the fact that this one TSA form is used by AT&T for multiple purposes because under section 2.1.8 different types of transactions were allowed using the same form.

11. The tariff is explicit that the indebtedness must go with the traffic for the accounts that were to be assigned to PSE. Indeed, whether the transactions were processed under the FCC's theory that locations were deleted and added under section 3.3.1.Q or the theory that the accounts were assigned under 2.1.8, the indebtedness follows the accounts.

12. The second requirement under 2.1.8 is for the time period, **and this was met**. The minimum time period is defined as one day, (J.A. at 187. *See*, AT&T's Tariff section 2.5.5 (1995)).

13. In addition, no mention was made of the fact that the Revenue Volume Pricing Plan (RVPP) credits applicable to PSE's plan would be used to cover any indebtedness created for PSE locations for which PSE may have become obligated for under the tariff. AT&T counsel argued in a manner that would create the erroneous impression that the RVPP credits had to come from the transferors' plans. (J.A. at 172).

14. In addition, it can be shown that AT&T was in no danger of suffering unremunerated shortfalls because none applied, a finding that was made by the United States District Court for New Jersey before the case was referred to the FCC by the Third Circuit and which appears therefore to be the law of the case. **All of the plans in question were Pre-June 17, 1994 plans.** By express tariff provisions, such plans were grandfathered as to shortfall

obligations, *i.e.*, shortfall did not apply to such plans. It can be further shown that AT&T's position that the plans were subject to shortfall penalties is without merit by its assertion that the "shortfall will hit when the plans are either discontinued or reach their anniversary date." (J.A. at 547). But when a plan is upgraded (restructured) it is not discontinued! A plan that is restructured does not reach its fiscal year anniversary date. The whole point with grandfathered plans is that these plans do not have monthly pro-rata shortfall commitments only annual commitments. So if the plan is restructured in the 11th month, it never gets to the fiscal year end anniversary date! The aggregator has its volume commitment waived but must extend its time obligation to AT&T.

15. **The United States District Court for New Jersey after extensive testimony has ruled that the subject plans were immune from shortfall because of this grandfathering provision.** (J.A. at 66.) **The FCC's Declaratory Ruling makes note of the fact these plans were ordered prior to June 17, 1994.** (J.A. at 2). The FCC was not asked to and therefore was restricted from making any ruling on the effect of the plans' pre-June 17th 1994 date; however the FCC was sure to note that these were pre-June 17th 1994 plans. These plans qualified under the FCC's substantive rule change criterion.

16. It can also be shown that there are indeed at least 5 substantial benefits attached to CSTP II Plans without the accounts and that the financial status of CCI was absolutely no threat to AT&T's receiving full payment for its services. A supplemental brief will allow a demonstration of substantial benefits that the CSTP plans retained even without their associated accounts that were to be assigned to PSE's CSTP/RVPP plan. Oral argument also brought up the issue of whether AT&T had more exposure because CCI was a small company with very little assets. A supplemental brief will show on the record that AT&T had ample recourse against

significant assets not only of CCI, but the four Inga Companies as well, the latter being the largest aggregator operation in the United States at the time.

17. During argument it was represented that account movement was not a routine practice.

> Judge Roberts: Well, let me ask you, then, have you never before allowed anyone to transfer as much as one number without assuming any obligations? I thought the record was pretty clear that that has been done.
>
> Mr. Carpenter: There were allegations made that we did that. We disputed that. The FCC did not reach that issue. (Tr. 9, line 4).

18. Judge Roberts' observation about what the record shows is correct. Mr. Carpenter's response to that observation is contrary to what AT&T's practice was and what it did because of that practice. AT&T's tariff contains a $50 fee that applies when locations are moved without the transferors' CSTP plans, or their shortfall commitments. AT&T actually justified this $50 fee to the Commission on the grounds that these type of transactions were so numerous and routine that the charge had to be levied (J.A. at 495). Indeed, AT&T also tariffed a promotion called "promo 183" that waived the $50 fee per account moved for the first 500 accounts per plan. (J.A. at 213 - 224). The aggregators had 9 plans so they were entitled to 4,500 free account transfers before they would have to pay for the balance. (J.A. at 174). AT&T's actual practice therefore was not properly described when Appellant's counsel stated that AT&T would allow only one or two plans to be moved under 2.1.8.

19. It is also contradicted by the attempts of AT&T to revise its tariff under Transmittal No. 8179 discussed at page 4, *supra*. (*See* J.A. 101, *et seq*.) The record also shows additional evidence of account assignments. (*See* Robert Collett Certification at J.A. at 204 and others at J.A. at 225 and 484-488).

20. The actual facts also contradict Appellant's argument about AT&T's ability to collect shortfall from the locations. In argument, it was stated that AT&T had the right to collect shortfall from the locations, i.e., the end user customers. This is contrary to fact and law as the end-user customers were not customers of AT&T, but of the aggregator companies. Under law and tariff, AT&T had no right to collect shortfall penalties from end-users. AT&T's rights to collect shortfall applied to the aggregators, except in this case it did not even apply to them because of the grandfathering of pre-June 17, 1994 plans. Were it not for this grandfathering, AT&T must first seek payment from the aggregator. If the aggregator could not pay the shortfall AT&T's tariff only would have allowed the discounts that were going to the end-users to be removed and the plan dismantled. Appellant's argument was intended to make the Court believe that the account assignment transactions would not allow AT&T to collect potential shortfall obligations. AT&T had no recourse to collect its alleged shortfall from the aggregators' locations no matter what plan the accounts were on.[6]

21. The transactions that were thwarted by AT&T were legitimate transactions based on the long-standing policy of resale that merely requires carriers that offer discounts to their largest customers to make those same discounts available through resale. Intervenors and CCI contracted to improve the discount level that they could offer to smaller 800 users whose individual volumes of usage did not qualify for such discounts. By moving the accounts as allowed, if not in fact authorized, by AT&T's tariff, all that happened is that a larger number of 800 end users would obtain a larger share of discounts for which otherwise they could not individually qualify. And CCI and Intervenors obtained a greater margin on their commitments

[6] *See* 3.3.1.Q, J.A. at 418 providing that shortfall and/or termination liability are the responsibility of the customer. For billing purposes AT&T can only remove discounts. AT&T cannot charge shortfall to end-users.

to AT&T for the volume of 800 traffic that did qualify for the greater discounts being offered. This in turn made CCI and Intervenors more competitive in the aggregation marketplace.

22. Circuit Rule 27 (a) authorizes an application for an order or other relief to be made by motion that states with particularity the grounds for the motion, the relief sought and the legal argument necessary to support it. It is submitted that the foregoing satisfies each of these requirements. In addition, under the Federal Rules of Appellate Procedure (Fed. R. Civ. P. 24(b)), the Court exercises discretion when it determines whether or not to allow permissive intervention. Among other factors, the Court will consider whether representations made by the original parties are adequate to assist the court in making its decision. *Securities and Exchange Commission v. Bear Stearns*, 2003 U.S. Dist. LEXIS 14611 (S.D.N.Y. 2003). In *Bear Stearns*, e the court found the Intervenors would not contribute to the court's understanding of the issues and that the public was well represented by the Securities and Exchange Commission ("SEC"), The Commission in this case, but for the liberties taken by Appellant in oral argument, has well represented the interests of the public based on the law and the facts that were before the Commission for its decision. The Commission could not however address the facts surrounding the business of aggregation and Appellant's business practices as presented to the Court by Appellant for the first time or in such a distorted manner. This Motion and the proffered supplemental brief does and will provide the Court with important facts necessary to its review, facts that have not been presented in the proper context heretofore. *See also*, Atlantic Refining Co. v. Standard Oil Co., 304 F.2d 287 (D.C. Cir. 1962).

23. Equitable considerations also support this motion. Appellant's violations of the Communications Act have been determined by the expert agency charged by Congress to administer the Communications Act. Importantly, these determinations were made after a delay

of nearly 8 years. It is an axiom of American jurisprudence that justice delayed is justice denied. Justice for Intervenors has been excessively delayed and not because of the Court's observation that the complexity of the issues required such an extraordinary time frame. But rather because AT&T's violations were compounded by the destruction of the Intervenors' business and financial resources which in turn prevented the more rigorous pursuit of action by Intervenors to compel action by the Commission. The destruction of Intervenors business prevented pursuit of that remedy as well.

24. Further delay is not warranted and no further delay should occur based on the record before this Court that demonstrates the validity of the Commission's decision here on review. Intervenors believe the Commission's decision is clear and correct and that the Court, if not misled by Appellant's circuitous and evasive responses and the liberties taken with the plain language of the tariff, will so find. Intervenors therefore request that the Court issue an order making this Motion part of the record, or an order granting leave to file a supplemental brief to address the factual issues discussed herein and for such other and/or further relief as the Court determines.

Respectfully submitted,
Intervenors, 800 Discounts, Inc., Winback & Conserve Program, Inc., One Stop Financial, Inc., and Group Discounts, Inc.

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