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**By Law the FCC CASE IS MOOT---Plaintiffs Prevail**

Dear Mr. Brown:

AT&T states the scope of the 2006 Judge Bassler referral is which obligations transfer under 2.1.8

AT&T February 1<sup>st</sup> 2016 Comments to FCC page 6:

“The issue pending before the Commission is the scope of Section 2.1.8, not Section 2.2.4.”

Petitioners' reliance on the Commission's 1995 Order is also misplaced. They claim that this Order undermined AT&T's fraudulent use defense. Grimes Letter at 2-3. This is irrelevant: the issue pending before the Commission is the scope of Section 2.1.8, not Section 2.2.4. Nor does the 1995 Order have any other bearing on this proceeding. In the Order's "grandfathering"

Section 2.1.8 is not within the scope of the Third Circuit Referral. Even if it was it would be considered moot.<sup>1</sup>

Originally AT&T agreed with plaintiffs that CCI must keep its plan obligations (revenue and time commitment as that was the basis of AT&T's sole defense of fraudulent use. AT&T's only defense was fraudulent use under 2.2.4.

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<sup>1</sup> Even if the FCC were to change the terms and conditions under 2.1.8 and decide that revenue and time commitments must transfer on a traffic only transfer, it would be a prospective tariff change and the CCI-PSE traffic only transfer would be grandfathered.

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.”

(Judge Politan’s May 1995 Decision pg. 10 para 2) AT&T’s only defense was fraudulent use:

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.”

Plaintiffs agree that AT&T created in 2006 a controversy regarding which obligations transfer under 2.1.8. Having lost its fraudulent sue defense AT&T abandoned its 2.2.4 Fraudulent Use defense that took the position that CCI keeps the plan commitments to the 2006 created controversy that traffic only transfers without the plan require that CCI must transfer its revenue and time commitment---AT&T’s “all obligations” defense that avoids quoting the words of the **former** customer.

AT&T definitely created a controversy in 2006 regarding which obligations transfer:

### **Judge Bassler Oral Argument**

All about which obligations transfer under 2.1.8.

THE COURT: PAGE 12:

But let's assume you're  
10 correct in your argument and the only thing referred was a  
11 fractionalization issue and the Circuit Court referral to the

12 agency is not as broad as defendants argue.  
13 But assume that's correct. What would prevent me at  
14 this juncture from saying, you know, I don't want to make this  
15 call as to what is encompassed by "**all obligations.**" Look at  
16 that as being an interpretation of the tariff. That matter  
17 refer to the agency.

Oral Argument Pg. 13:

1 THE COURT: I don't find much comfort in that because  
2 **the agency wasn't focused on the term, "all obligations."**

PAGE 14:

15 THE COURT: Tariff uses the phrase, "**all obligations**"?  
16 MR. ARLEO: Right.  
17 THE COURT: So the question then is, what does that  
18 mean?

PAGE 18:

Plaintiff Attorney Arleo:

10 We continue to find evidence that just undercuts any argument that shortfall  
11 terminations are part of this **all obligation language** into  
12 2.1.8.  
13 THE COURT: Why don't we have the agency say that  
14 because if I call it wrong then we got another appeal to the  
15 Third Circuit. Then back to the agency again. Then an appeal  
16 from the agency to the DC Circuit. So, why don't I short  
17 circuit it, just say you go back?

Page 20 :

AT&T counsel Guerra Arguing plan obligations transferring is the controversy:

15 We have been litigating 11 years because they say they  
16 didn't have to transfer that. I, frankly, don't understand.  
17 They say that's a question of fact. It's in every one of their  
18 briefs, including briefs they submitted here. They've done the  
19 things. They have transferred. That's why they're fighting.  
20 **They have no intention of transferring them.**

PAGE 22 AT&T Counsel Guerra regarding discrimination claims:

8 MR. GUERRA: It's a possibility. But I think getting  
9 the answer from the FCC is first.

10 Just as the FCC said, you don't get to this question  
11 until you conclude that 2.1.8. **Required all these obligations**  
12 **to transfer.** Because if it didn't, then AT&T didn't  
13 discriminate with respect to the other parties allegedly allowed  
14 to make transfers without switching the obligations over.  
15 THE COURT: If you waived it to the other ones,  
  
16 assisted on it here --  
17 MR. GUERRA: But already resolved the refusal here was  
18 unlawful based on the language. Tariff, you wouldn't need to  
19 get into discrimination.

Page 23 -24

19 THE COURT: Why does the agency have the more expertise  
20 on making the call as to whether the tariff phraseology, "all  
21 obligations" includes shortfall in termination?  
22 MR. GUERRA: Well, your Honor, first of all the FCC  
23 interprets tariffs all the time. It has an understanding of  
24 what's common practice. It has an understanding that no Court  
25 would have. The Third Circuit has always said **interpreting 2.18**

1 is a job. FCC, they identify generality, important social  
2 policies.

Judge Bassler definitely wanted the question of which obligations transfer interpreted by the FCC the issue with that is that it is outside the scope of the Third Circuit referral. I would like to address within Judge Bassler's referral: "as well as any other issues left open"

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case closed.

IT IS FURTHER ORDERED that the Plaintiffs, no later than August 1, 2006, file an appropriate proceeding under Part I of the FCC's rules to initiate an administrative proceeding to resolve the issue of precisely which obligations should have been transferred under § 2.1.8 of Tariff No. 2 as well as any other issues left open by the D.C. Circuit's Opinion in AT&T Corp. v. Federal Communications Commission, 394 F.3d 933 (D.C. Cir. 2005).

/s/ WILLIAM G. BASSLER  
WILLIAM G. BASSLER, U.S.S.D.J.

What is left open that the FCC can decide? Nothing!

The FCC page 11 para 15:

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.”<sup>2</sup> When, as here, a petition for declaratory ruling derives from a primary jurisdiction referral, the Commission will seek, in exercising its discretion, to resolve issues arising under the Act that are necessary to assist the referring court.

Fraudulent use was not a controversy or uncertainty in 1996 under Judge Politan but the FCC ended up with a 1995 controversy. Likewise Fraudulent use was not a controversy or uncertainty in 2006 in Judge Bassler’s Court as it would not have made any sense. **The FCC can’t make the same mistake again by deciding a non-controversy.**

AT&T obviously not arguing to Judge Bassler in 2006 that under 2.2.4 fraudulent use CCI must **keep** its plan commitments (revenue and time commitments) when AT&T was asserting in 2006 that under its all obligations defense that CCI **must transfer** those plan commitments.

AT&T’s February 1<sup>st</sup> 2016 statement that the “scope of the case is 2.1.8 and not 2.2.4” agrees with that Judge Bassler’s referral doesn’t encompass 2.2.4 fraudulent use.

Additionally, both the DC Circuit and FCC have stated the DC Circuit Decision was not a remand. Since the fraudulent use defense was **not remanded** it is considered closed and therefore would not fit into the definition of what an “open issue” is in any event under: “as well as any other issues left open.”

Moreover, if the FCC actually believed Judge Bassler was referring fraudulent use it would be assuming that Judge Bassler was sending in a referral in which AT&T was simultaneously arguing fraudulent use (CCI Keeps plan obligations) and arguing “all obligations” transfer which means CCI must transfer plan obligations. That would make absolutely no sense at all. A defendant can have numerous defenses however they all need to be based upon a fundamental set of facts asserted. In other words AT&T can’t argue that under its tariff that “the former customer” both keeps and transfers its revenue and time commitments.

So what the Judge Bassler referral may have wanted referred are other claims of plaintiffs (discrimination, unreasonable practices and the June 17<sup>th</sup> 1994 exemption, illegal billing, and section 2.5.7 extension of time etc.) But the FCC 2003 Decision states at fn. 87 and 94 that these claims must be handled by the District Court.

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<sup>2</sup> 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; *see also* 47 U.S.C. §§ 154(i), (j); *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C.Cir.), *cert denied*, 414 U.S. 914 (1973).

Maybe Judge Bassler did not notice that these other plaintiff claims needed to be handled by the District Court and just added to the end of his Court's obligation question the catch all phrase: "as well as any other issues left open."

Plaintiffs would like Judge Wigenton to clarify what the District Court referral encompasses as it would allow both parties to properly address the issues. If AT&T agrees that there are no open issues included within the nebulous phrase "as well as any other issues left open" then plaintiffs will request Judge Wigenton to update the referral to be definitive as to what claims are before the FCC.

Can you explain at this point what AT&T believes are the other open issues that the FCC needs to decide as plaintiffs don't see that there are any issues open? The 2007 FCC Order determined that Judge Bassler's referral on which obligations transfer is not within the scope of the case and that is why the FCC has not ruled—the case is moot.

AT&T believed that due to this sentence there were open issues DC Circuit on page 11 fn2

"How this enumeration affects the requirement that new customer assume "*all* obligations of the former Customer" (emphasis added) is **beyond the scope of our opinion.**"

The DC Circuit decision states that this obligation allocation is "**beyond the scope of our opinion**" because DC was limited to reviewing **only what was referred to and interpreted by the FCC.** Therefore since it was not within DC's scope to review it, then certainly it was not within DC's scope to address it or remand it.

This definitively means the obligation allocation issue was not within the initial scope of the case that the FCC had to rule on. That is the point of the FCC Jan 12<sup>th</sup> 2007 Order.

Since the Commission was not afforded the opportunity from the District Court referral to interpret obligations the DC Circuit is **precluded from addressing this issue** and thus can't remand it as it was never before the FCC as stated within DC Circuit Decision 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."

The DC Circuit could only address the original 2.2.4 issue and whether 2.1.8 allows traffic only to transfer. Where it states on page 11 last line: "The petition for review is granted." That simply means that only what was referred to the FCC 2.2.4 and can traffic only transfer without the plan was reviewed by the DC Circuit.

The obligations allocation under 2.1.8 had already been stated by AT&T as customer plan obligations don't transfer in order to assert its 2.2.4 fraudulent use defense under 2.2.4. The DC Circuit did not review obligations allocation as it was not referred to the FCC and therefore not reviewed and therefore can't remand what the FCC was not afforded the opportunity to address and thus no remand.

The FCC also agrees that the DC Circuit was not a remand.

The FCC in its 2007 Order determined the Judge Bassler obligation allocation referral 2.1.8 was not within the scope of the original case 2.2.4 and thus the FCC banned all of AT&T's 2.1.8 defenses. The DC Circuit Decision itself stated that the obligations allocation issue was "beyond the scope of our opinion" confirming the issue was not within the original scope of the FCC case and effectively supporting the FCC's Jan 12<sup>th</sup> 2007 Order that determined Judge Bassler referral on obligations allocation under 2.1.8 did not expand the scope of the Third Circuit referral.

There are no issues left open that are controversial issues within the scope of the Third Circuit referral. All remaining claims (discrimination, unreasonable practices and the June 17<sup>th</sup> 1994 exemption, illegal billing remedy, Section 2.5.7 Extension of Term Commitment etc.) are all fact based issues the FCC has advised the District Court to handle.

**Fraudulent Use is a Disputed Fact and was not Appropriate  
to be Resolved within a Declaratory Ruling Forum**

The FCC 2003 Decision noted that even assuming AT&T had reason to suspect fraudulent use the FCC determined AT&T used an illegal remedy and thus AT&T lost its sole defense of fraudulent use. It is a disputed fact as to whether or not AT&T's reliance upon fraudulent use had merit to begin with. This is a fact disputed fact issue that should have been handled by the NJFDC.

The FCC's AT&T regulatory manager for AT&T's tariff's R.L Smith noted that Fraudulent use section 2.2.4 did not apply at all to Transfer of Service 2.1.8.

R.L SMITH:

Finally the provisions noted by AT&T here **do not seemingly restrict TorA** ( Transfer or Assignment) per se but the new regs do, nor does it address TorA explicitly.

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No issue with location commitments. The locations will all pay their bills to AT&T and PSE will be responsible for bad debt if the locations do not pay their bills to AT&T. AT&T is 100% bad debt free.

R.L Smith:

“Do we need to save AT&T from commitments per se? **Why not just loss of pay for charges.** If the moved locations are still with AT&T, they may well generate enough money to keep AT&T almost whole and **not cause the need for this intrusive method of protection.**”

Mr Smith also noted that AT&T should not have been allowed to automatically assume there was fraudulent use as this was a judgment call that is not appropriate within a declaratory ruling forum.

See the FCC’s AT&T tariff expert R.L Smith’s notes that were made February 21 1995 to FCC’s case manager Judith Nitche. See Para B. Joint Appendix (JA) page 116. R.L Smith commenting on AT&T’s fraudulent Use claim:

Two things to keep in mind about this one. First it indicates intent to and that is a judgment call which would have to be decided in a complaint case if the matter came up.

Further down in the same para NAILED IT....

‘it does not even take intent into account but assumes it is there’

So it is a disputed fact whether AT&T had merits in raising a fraudulent use defense in the first place. The FCC 2003 Order stated that the June 17<sup>th</sup> 1994 exemption provision was a disputed fact and that has to be handled by the NJFDC. If the NJFDC simply finds that Judge Politan’s March 1996 Decision is the Law of the Case that the plans were pre June 17<sup>th</sup> 1994 immune that certainly would mean that the Jan 13<sup>th</sup> 1995 CCI-PSE transfer—which is after the June 17<sup>th</sup> 1994 exemption—would mandate that there was no merit to fraudulent use in the first place.

Even if Judge Wigenton did not agree that the plans were pre June 17<sup>th</sup> 1994 immune the fact is the plans had already met their revenue commitments in Jan 1995 and the traffic could be taken back within 30 days so obviously there was no reason to suspect fraudulent use in the first place.

The fraudulent use defense has already been denied but was clearly a disputed fact that the FCC simply should have first asked the NJFDC to rule on ---especially when the NJFDC March Decision clearly stated AT&T's assertions premised on shortfalls was not substantiated.

The FCC proceedings are clearly moot at this point as there are no open controversies that are within the scope of the Third Circuit referral that have non-disputed facts. The cart was before the horse in this case. The fraudulent use defense was denied but the FCC should not have even wasted it time until the NJFDC first determined whether the fraudulent use defense had merit to begin with.

FCC 2003 pg 13 fn 87

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. ....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.

The FCC has already denied the fraudulent use defense and the DC Circuit did not find fault or remand it but it was a meritless defense to begin with.

Very truly yours,

Raymond A. Grimes, Esquire

Cc: Client

Cc: FCC

