

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

COMBINED COMPANIES, INC.,	:	Civil Action No. 95-908 (WGB)
a Florida corporation,	:	Case 2:95-cv-00908-WGB-MF
	:	
and	:	
	:	
WINBACK & CONSERVE PROGRAM,	:	
INC., ONE STOP FINANCIAL, INC.,	:	
GROUP DISCOUNTS, INC. and 800	:	
DISCOUNTS, INC., New Jersey	:	
corporations,	:	
	:	
Plaintiffs,	:	
v.	:	
	:	
AT&T Corp., a New York corporation.	:	
	:	
Defendant.	:	

REPLY BRIEF IN SUPPORT

**PER 2007 FCC ORDER JUDGE BASSLER’S 2006 REFERRAL IS MOOT AS
IT DID NOT EXPAND THE SCOPE OF THE THIRD CIRCUIT REFERRAL
MISREPRESENTATIONS ON NJFDC JUDGES BASSLER AND WIGENTON
PLAINTIFFS’ MOTION TO LIFT STAY AND SCHEDULE DAMAGES**

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DC Circuit Determined the Judge Bassler Obligation Issue is Beyond Scope

1) DC Circuit Legal Director Martha Tomich advised the DC Circuit would not issue a mandamus of Judge Bassler's "obligations" referral because: 1) It was **not** a remand. 2) The Decision explicitly states "**all obligations of the former Customer is beyond the scope of our opinion**" and was "**not addressed by the Commission**. By Law the DC Circuit can **only review what was referred to and interpreted by the FCC**. The fact that DC Circuit concluded Judge Bassler's 2006 obligations question was beyond the DC Circuit's scope and not reviewable, thus **confirms "obligations" was never before the FCC** ;which is conclusive that **it was never sent to the FCC** and thus is conclusive it was **not a controversy in 1995**. See Exh A. of Inga initial Cert which is the Exparte synopsis provided AT&T of the conference with DC Legal Director and staff.

- "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)." (DC Circuit Decision in Plaintiffs initial brief **EXH O in EXH A pg. 10 fn1**.)
- "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.**" **DC pg. 11 fn2**
- "We also do not decide precisely which obligations should have been transferred in this case, as this question was **neither addressed by the Commission** nor adequately presented to us." **DC Circuit Page 11**

The FCC IS Waiting for This Court to Address the FCC's 2007 Order

The FCC advised plaintiffs that when a case is moot it is still substantive and either the FCC or the District Court must issue an order. ¹

AT&T's Only Bogus & Late Asserted Defense was Fraudulent Use

¹ The case went to circulation 5 months ago but plaintiffs advised the FCC that, with the aid of its new counsel, plaintiffs **now fully understand the case is moot** and that plaintiffs have elected to bring the case back to the NJFDC to address the misrepresentations of the FCC 2007 Order and many other misrepresentations from AT&T. Plaintiffs **apologized** to the FCC for being frustrated in not getting a decision over 10 years but now understand the case is moot and why the FCC did not rule on the case that was not remanded and outside the scope of the original Third Circuit referral. The following plaintiff's FCC filings that are here as **EXHIBITS 1-3 and 5-7** detailed to the FCC with explicit tariff evidence that the case is moot. The NJFDC can issue the order on the January 1995 traffic transfer issue and resolve disputed facts regarding plaintiffs January 1997 Supplemental complaint concerning the June 1996 penalty infliction. The FCC is now waiting for this Court to review the **new evidence** and most importantly the FCC 2007 Order that was manipulated and misrepresented by AT&T.

2) Judge Politan's Confirms AT&T sole 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." (1995 Decision pg. 10 para 2 **Exhibit K** in plaintiff's initial brief.

AT&T's sole defense was fraudulent use under 2.2.4, there was no defense under 2.1.8.²

3) AT&T's sole defense and thus the controversy in 1995 was whether section 2.2.4 fraudulent use could prohibit a permissible 2.1.8 traffic only transfer. The FCC 2003 Decision:

"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." (See plaintiffs initial motion EXH A in EXH A FCC 2003 Order Pg.10 para 13)

4) There was no controversy in 1995 that on **traffic only** transfers the plan commitments don't transfer. Only on **plan transfers** do plan commitments transfer. Thus Judge Bassler's obligation allocation question was determined by the FCC 2007 Order as outside the scope of the case.³

² In 1995 the first issue security deposit was resolved by Judge Politan's May 1995 Order.

³ See NJFDC Judge Politan March 1996 page 17 fn 7 (**Exhibit L** in plaintiff's initial motion)

"Indeed, **AT&T's own counsel** focused the issue by indicating that the tariffed obligations *"involved herein"* are all **tariffed obligations**, for which **"CCI, not PSE"** would be obligated. AT&T's sole defense and thus the controversy in 1995 was whether section 2.2.4 fraudulent use could prohibit a permissible 2.1.8 traffic only transfer.

--During the 11.28.95 hearing AT&T counsel kept asserting its fraudulent use defense and CCI's Mr Shipp kept agreeing that as per section 2.1.8 plan commitments don't transfer. It led to this comment:

AT&T's Whitmer: And one of the obligations of the customer, Winback & Conserve or CCI, that did not go to PSE in the attempted transfer was the obligations for shortfall and termination, correct?

Mr Shipp: That's correct. And we so identified that on the transfer of service document.

The Court: **I know all these facts, Mr Whitmer. I really do. I swear to God.**

Mr Whitmer: I have no further questions. (**Here as Exhibit 5 pg. 4 para 16 letter G exhibit.**)

AT&T Counsel Meade's Certification Combined with Tr8179 & Tr9229 Tells the Story

AT&T understood plaintiffs adhered to 2.1.8 so on 2.16.95 AT&T FCC filed a Substantive Cause Pleading Tr8179. ⁴ AT&T knew plan obligations only transfer if the plan transfers. So AT&T tried to retroactively change 2.1.8 so when substantial locations are transferred it could force the **plan** to transfer **in order to force the plan obligations to transfer**. Tr8179 proposal:

“If a Customer seeks to transfer, to one or more other Customers, all or substantially all of the 800 numbers associated with an existing AT&T 800 Service Term Plan or Contract Tariff, and the anticipated result of such a transfer would be that the usage and/or revenue from the remaining 800 numbers associated with the 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** **EXHIBIT 1 letter K.**

This Tr8179 proposal in and of itself confirms the plan commitments do not transfer.

5) The FCC not only denied Tr8179 to be applied retroactively to change section 2.1.8, but AT&T counsel Meade's certification and the FOIA notes show the FCC did not like it at all. ⁵

AT&T counsel Meade **Exhibit 7 page 5-6 para 11**

“In particular we discussed an **alternative approach** by which AT&T's concern would be met by **requiring a deposit** (either in cash or by letter of credit) in the amount of the **projected shortfall charge** that would apply as a result of the **location transfer**. The FCC was receptive to this approach, but noted that it would represent a **significant change** from the pending filing and that it would be appropriate to make that change as a new transmittal, thereby providing interested parties with a new opportunity to state objections. **The Commission asked that AT&T withdraw Transmittal 8179 and submit the new approach as a new filing.**” ⁶

6) AT&T's Meade certifies to Judge Politan that plan commitments don't transfer:

⁴ Substantive Cause Pleadings allowed AT&T to retroactively change its tariff if it can prove the current tariff language implicitly means what it seeks to make explicit. Tr8179 had no chance. Filed to Delay!

⁵ It allowed AT&T to **subjectively discriminate** when it could force a plan transfer **in order to force the plan commitments** to transfer. As the March 1996 Politan Decision shows, when AT&T replaced Tr8179 with Tr9229 Judge Politan was livid. He made AT&T counsel Meade certify where in Tr9229 it addresses plaintiffs traffic only transfers. See Plaintiff's initial motion page 12 para 15 through page 15 para 17 covering Judge Politan's comments on the “AT&T delay” and the “Tr9229 morass.”

⁶ AT&T counsel Carpenter conceded to Third Circuit (Oral Pg. 43) the FCC Rejected Tr8179:

AT&T counsel Carpenter: We thought the issue would be decided. The FCC asked us to withdraw the complaint because **the FCC thought we had done more in the tariff language than codify what the tariff already meant**

“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)** **Exh 7 pg.7 para 15:**

7) Plan commitments don't transfer on traffic only transfers. On a “traffic only” transfer the revenue to PSE (assets locations) are segregated from liabilities CCI's plan commitments.

However in plaintiff's case the plans were pre June 17, 1994 and immune from liabilities.

AT&T's “Tr9229 security deposits” was AT&T's new concept to address substantial transfers.⁷

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.** **Exh 7 pg.7 para 16**

8) There was **never a controversy** in 1995 that section 2.1.8 allowed traffic only transfers and the plan commitments stay with the non-transferred plan.⁸ AT&T deceived Judge Bassler and then tried the scam on the FCC in 2006 and has continued the intentional fraud on this Court.⁹

⁷ Tr.8179 would allow AT&T to subjectively decide to force a plan to transfer to force the plan commitments to transfer. The FCC advised AT&T that the 2.2.4 provision did not condition 2.1.8 so AT&T **prospectively** changed 2.1.8 and with Tr9229 required security deposits on the former customer because **the revenue commitment does not transfer.**

⁸ 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 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 reply brief to DC Circuit pg 9:

“Section 2.1.8 “addresses” the transfer of end-user traffic **without** the associated liabilities.”

---DC Circuit Judges Tatel and Ginsburg both understood “all obligations” don't transfer unless the **whole plan** is transferred: D.C. Oral Argument Page 10

JUDGE GINSBURG: Well, you said “all obligations”.

JUDGE TATEL: Well, that's **only if the whole plan is transferred.**

---AT&T Counsel asserted to Judge Politan as March 8th 1995 there were thousands of traffic only transfers among aggregators and AT&T can't produce one in which the plan commitments transfer:

“But there are literally - - my guess is hundreds, if not thousands, of transfers that have happened **among aggregators** and aggregations plans.” NJFDC Oral Argument pg. 53 See here as **Exhibit 1 letter R**

The DC Circuit, The FCC 2003 & 2007 Decisions and the District Court Decisions Agree

9) AT&T, plaintiffs and Judge Politan **all clearly understood** that under section 2.1.8 for traffic only transfers there is **never the transfer** of the plan commitments. Only on **plan transfers** do the plan commitments transfer. The DC Circuit **by law could not address** obligation allocation because the FCC **did not interpret it** because **Judge Politan did not refer it.** Decisions Agree.

10) The FCC 2007 Order is consistent with its own 2003 Decision, DC Circuit Decision and the District Court Decisions. There was never a controversy in 1995 concerning obligation allocation. The FCC 2007 Order correctly determined Judge Bassler's referral on 2.1.8 "does not expand the scope of the original referral." Judge Bassler sent an FCC referral on obligations allocation that as the DC Decision explicitly stated was beyond the scope of the case because it was not before the FCC as the Judge Politan never referred it. ¹⁰

11) AT&T 3.21.16 Reply Brief page 10:

Plaintiffs claimed that FCC staff had "confirmed" Plaintiffs' realization that the case was moot. *Id.* at 1. But in emails, the FCC staff person explained that she had merely provided background information on **how agency rules worked**, and that she was "**not answering a question specific to the facts of your case**"

⁹ The fraud was created for Judge Bassler and the FCC 2007 Order determined it was outside scope of the Third Circuit Referral. Even on merits plaintiffs win: See plaintiff's initial motion **Exhibit A there are 6 certifications EXHIBITS G thru L** confirming obligations do not transfer. As per tariff **Exhibit 7** plan commitments don't transfer. **Here At Exh 1 para Exh M** is a 1993 tariff page showing a \$50 charge per location transferred under 2.1.8 or \$50 if the entire plan was transferred. **Here At Exh 1 Exh N** is a promo that waived the \$50 charge on the first 500 accounts transferred. The FCC itself stated that AT&T has **no evidence** as the FCC cited Judge Politan that stated AT&T has no evidence. (**Plaintiff's initial motion EXH R in EX A**) AT&T lost its sole defense of fraudulent use under 2.2.4 due to the illegal remedy it used and **created a new controversy in 2006** as to which obligations transfer under 2.1.8 on traffic only transfers in Judge Bassler's Court, which FCC 2007 Order said was outside scope of the case.

¹⁰ The fundamental basis of AT&T's sole defense of fraudulent use took the position that under the tariff **plan commitments do not transfer** on a traffic only transfer and plaintiffs agreed that plan commitments don't transfer on traffic only transfers. The FCC's 2007 Order conceded that it was corrected by the DC Circuit. So the DC Circuit, FCC, AT&T, and plaintiffs all now agree that 2.1.8 permitted the movement of traffic only, as well as plan transfers –the original 1995 Judge Politan question. AT&T defense in 1995 was 2.2.4 fraudulent use. AT&T's interpretation of the FCC 2007 Order would make absolutely no sense for the FCC 2007 Order to say the scope of the case is "obligations" when the FCC in 2003 stated the controversy was 2.2.4 and the DC Circuit explicitly stated the FCC did not interpret obligations allocation because it was not referred to it and Judge Politan Decision shows no obligation issue. Plaintiff's initial motion **page 5 para 4 thru para 8** covers AT&T's manipulation of the FCC 2007 Order in depth.

12) Deena Shelter's email regarding prospective tariff changes was not related to the **facts of this case** because the obligations question under 2.1.8 is **not within the scope of this case.**¹¹

AT&T stated that this Court disagreed that the law on prospective tariff filings did not mean the issue was moot. However this Court was not referring to whether prospective tariff changes meant the transfer was **moot**. The statement this Court made regarding mootness was whether or not aggregators existed anymore. See the deceptive maneuver AT&T counsel pulled here:

That's Not What Judge Wigenton's Court Determined as Moot

AT&T 3.21.16 Reply Brief page 11:

“The Court specifically noted that it was “not convinced” by Plaintiffs’ **mootness** argument.”

13) AT&T's 3.21.16 Reply Brief page 14:

Last year, this Court rejected Plaintiffs' claim that Judge Bassler's referral was moot because an FCC interpretation of § 2.1.8 would have **prospective effect only**.

What this Court **actually stated** had nothing to do with mootness due to prospective changes:

The Court: So I'm not convinced that the argument -- that this issue is **moot** because **aggregators don't exist any further**. See Judge Wigenton Oral Argument page 15.

14) AT&T misled regarding the mootness issue. Even **if** Judge Bassler's referral was within the scope of the case it is moot due to prospective changes----not due to aggregator's non-existence.

No AT&T You Do Not Have Two Defenses

AT&T misleads by asserting there were 2 controversies: AT&T 3.21.16 Reply Brief page 16-17:

¹¹ Plaintiffs point was **even if** Judge Bassler's obligation question was within the scope of the case **it would be moot**. Future FCC initiated tariff changes are 15 days prospective and plaintiffs grandfathered. See Communications Act law for this case within FCC 2003 decision within plaintiffs initial brief **Pg. 26 para 35-36**. Therefore the Judge Bassler referral is moot as to plaintiffs even if it was considered.

Moreover, AT&T argued **to the FCC** that the proposed CCI/PSE transfer “**was (i) not authorized under the transfer provisions of AT&T’s tariff (Section 2.1.8);** and (ii) a violation of the antifraud provisions of the tariff (Section 2.2.4).”

15) AT&T’s first so called defense (i) bolded---was AT&T mischaracterizing the CCI-PSE transfer as a **plan** transfer as AT&T understood plan commitments only transfer under plan transfers. Also note AT&T states it pulled this scam on the FCC but it was not a controversy before Judge Politan.¹²

No AT&T --If the Tariff is Not Explicit by Law It Is Ruled Against AT&T

AT&T 3.21.16 Reply Brief page 21 fn. 16 Asserts:

“For subsection C to be a “statute of limitations,” it would have had to state that, “notwithstanding the foregoing requirements, AT&T shall process all transfers of WATS unless it objects in writing within 15 days of receipt of notification of a transfer.”

16) Total Nonsense! For 2.1.8 Subsection C **not** to be a statute of limitations date it would have to explicitly state it is not a statute of limitations period.¹³ As Judge Politan’s March 1996 decision stated “the **onus** is on AT&T.” Retroactive language changes in 1996 to 2.1.8

confirmed the Jan 1995 version of 2.1.8 was indeed a 15 day statute of limitation in writing.¹⁴

¹² That’s why AT&T filed Tr8179 to force the plan to transfer. AT&T asserted as a plan transfer it required all obligations to transfer and thus under that false plan transfer predicate it violated 2.1.8. Plaintiffs agreed with AT&T on plan transfers the plan commitments must transfer. The FCC deals with controversies. The first defense was not a 1995 controversy --it’s an AT&T scam. AT&T in 1995 was not simultaneously asserting on traffic only transfers, plan commitments **do transfer** (AT&T’s 2006 created all obligations defense) and its 1995 sole 2.2.4 defense plan commitments **don’t transfer**. **Exh 1 pg. 2 para 4--7** details with AT&T cited tariff evidence that Customer of Record plan commitments as per 3.3.1.Q don’t transfer on a traffic transfers---only plan transfers.

¹³ 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). **FCC 2003 pg.10 fn 65. Plaintiffs Initial Br. In EXH A see EXH A**

¹⁴ AT&T counsel lied to the DC Circuit in 2004 that it denied the CCI-PSE transfer on Jan 27th 1995 to meet the Jan 28th deadline. AT&T’s actions confirm that it understood it needed to meet the 15 days. AT&T’s Jan 23rd 1995 letter was a very late denial-- due to AT&T failed demand for a CCI security deposit on the Dec 16th 1994 Inga to CCI plan transfer; not a denial of the Jan 13th 1995 CCI-PSE traffic

The Inga-PSE Traffic Only Transfer Wasn't Denied—The Court Must Order the Transfer

17) The Inga to CCI plan transfer was held up due to AT&T's request for CCI's posting of a security deposit. So a traffic only transfer was ordered from **the 4 Inga Companies directly to PSE** on Jan 31st 1995. **A)** AT&T could not request security deposit, **B)** AT&T acknowledged the Inga-PSE traffic only transfer. **C)** and AT&T did **not** deny it within 15 days. **D)** The Inga to PSE traffic only transfers was also determined by Judge Politan **as part of the case complaint**. **E)** A clear fact issue that needs no FCC interpretation. **Here as Exh 6 Exhs A-F 1995 NJFDC Judge Politan Hearings** with overwhelming evidence. By law this Court must find for plaintiffs.

AT&T Tried These Same Revisionist History Scams at the FCC

18) AT&T 3.21.16 Reply Brief page 23: "In March 1995, AT&T expressly stated that it "refused to permit the [CCI/PSE] transfer precisely because PSE, the 'new' customer in the transfer did not assume 'all of the obligations' of the **'old'** customer, CCI."

Obligation allocation is outside the scope; however plaintiffs will explain the AT&T scam here.¹⁵

If This Were True AT&T Would Have A Ton of Evidence—Language Flip

19) AT&T 3.21.16 Reply Brief page 26:

Contrary to Plaintiffs' assertion, § 2.1.8 does not define the "former customer" based only "on the service (traffic or plan) that it transfers." Id. at 27. It defines **"former Customer"** as **"[t]he Customer of record."**

DC Circuit and FCC 2007 Order determined outside scope. Details of AT&T's scam here.¹⁶

only transfer. **See plaintiffs initialbrief page 24 para 32 with substantial evidence and exhibits.**

¹⁵ AT&T tried this scam in February at FCC. **See Exh 8 page 29 para 119** AT&T in 1995 **full quote** states "**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**" Also notice AT&T's 1995 cover-up--**using** the phrase "**old customer**" instead of actual tariff language "**former customer.**" CCI obviously is not a former AT&T Customer since its plan didn't transfer. See initial brief on pg 26. Also see **Exhibit 7** AT&T Counsel Meade certification and Tr9229 security deposits against potential shortfall is conclusive tariff evidence that plan obligations don't transfer on traffic only transfers that answers Judge Bassler's referral in any event. During last year's Oral argument 3.18.15 AT&T counsel Mr. Guerra avoided this conclusive tariff evidence. See plaintiffs initial brief Exhibit A page 8 para 9.

¹⁶ AT&T simply flipped the language of 2.1.8. See section 2.1.8 initial brief **Exh A in Exh A pg 6 fn 46:**

Because AT&T Had No 2.1.8 Defense in 1995

20) AT&T 3.21.16 Reply Brief page 27:

Much of Plaintiffs' brief is devoted to a discussion of Judge Politan's March 1996 decision. See Pls. Br. at 10-20. That decision, however, did not adjudicate AT&T's § 2.1.8 defense.

AT&T had no 2.1.8 defense. The DC Circuit did not review it because the FCC did not interpret it because Judge Politan did not refer it. Judge Politan's 1996 Decision denied 2.2.4 Fraudulent use on its merits as the plans were pre June 17th 1994 grandfathered. This is the Law of the Case.

A) 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. **EXH L**, pg 19 para 1

B) 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." May 1995 Decision pg. 11 **EXH K**

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." May 1995 **EXH K** pg. 24

21) March 1996 Judge Politan Decision **Exhibit L** in plaintiff's initial motion Page 16 para 1:

The Court finds **nothing** in the Tariff F.C.C. No. 2 which prevents fractionalization, and contemplates a like finding by the F.C.C. Clearly, therefore, plaintiffs have established a strong likelihood of success on the merits.

A. The Customer of record (**former** Customer) requests in writing that the Company transfer or assign WATS to the new Customer.

The Customer of record **with service** is being defined as a **former** Customer for the **WATS transferred-** not the reverse as AT&T asserts. You obviously can't start out as a former AT&T customer, with **no AT&T service**, to then be defined as a customer. **Former** customer by definition means you had no AT&T service to begin with. **See plaintiff's initial brief pg. 26 para 37.** Obviously if AT&T was telling the truth it would have evidence of traffic only transfers in which plan commitments transferred. Under AT&T's 2006 minted "all obligations" intentional scam on Judge Bassler there wouldn't be the Meade Certification **Exhibit 7** with exhibits of the Tr. 9229 security deposit tariff page **showing the plan obligations don't transfer.** **Exhibit 7 Meade Certification with tariff evidence** is **conclusive Tr9229 tariff proof** that answers Judge Politan's question that YES 2.1.8 does allow "fractionalization" (i.e. traffic only transfers) and answers Judge Bassler's 2006 question as it defeats AT&T 2006 created "all obligations" defense, because plan commitments do **NOT** transfer on traffic only transfers.

Nothing includes section 2.2.4. Fraudulent use. The FCC stated the June 17th 1994 issue was not referred. That is because after substantial testimony Judge Politan understood the plans were pre June 17th 1994 exempt. So did AT&T and that is why AT&T paid CCI substantial cash and did not pursue the \$80 million in penalties it unlawfully inflicted. AT&T's sole defense of fraudulent use was premised on the danger of suspecting shortfalls and was denied on its merits:

“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) **(Exhibit L in plaintiff's initial motion)**

22) NJFDC Judge Politan stated in his March 5th 1996 Order at 18-20 that the parties could:

“revisit the issue of security at any time in the future upon the filing of appropriate papers supported by credible documentary or testimonial evidence (emphasis added).” **(Exhibit L in plaintiff's initial motion)**

23) AT&T has never provided any credible tariff evidence that the plans were not pre June 17th 1994 immune, it just asserted it was a disputed fact so the FCC could not rule. **All disputed facts** (Unreasonable practices, discrimination and duration of the June 17th 1994 shortfall/termination exemption provision) must be resolved by the NJFDC. The stay must be lifted and all disputed fact issues resolved. The mere fact that the FCC is confirming that these are **disputed facts** means that the tariff is **not explicit** and thus by law if must be determined in plaintiffs favor—see supra “Pursuant to Rule 61.2, titled “Clear and explicit explanatory statements.” AT&T should have never suspected shortfall in Jan 1995 and never inflicted shortfall in June 1996. ¹⁷

¹⁷ FCC 2003 Decision in plaintiffs initial brief in **EXH A see Exh A** see pg. 13 FN 87:

“For example, petitioners claim that AT&T engaged in unlawful **discrimination** in violation of section 202....Petitioners also argue that AT&T engaged in an **unreasonable practice** in violation of section 201.. Assuming that further inquiry is appropriate, efficiency **favours their resolution in the district court** where the evidentiary record already has been developed.

FCC 2003 Decision in plaintiffs initial brief **EXH A in EX A** pg. 14 FN 94:

We also decline to address issues concerning AT&T's shortfall charges in this declaratory proceeding..... With respect to petitioners' argument that AT&T's CSTP II shortfall charges set forth in Tariff No. 2 are facially unreasonable, we find this issue – **which was not referred to us by the**

The Final Decision On Fraudulent Use is the NJFDC's Not the FCC

24) AT&T's sole defense was fraudulent use. The FCC only interprets the tariff it does not make judgment calls. The FCC 2003 Decision **Exh A in EX A** in plaintiff's initial brief page 8

Based upon our review of AT&T's tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE.

FCC July 2, 2004 Brief to DC Circuit pg. 13-14: **Here in Exh 1 Exh D**

"The Commission also reasonably concluded that, even if the requested movement of traffic between CCI and PSE would violate the "fraudulent use" provisions of AT&T's tariff (**a question the agency found it unnecessary to decide**), AT&T's refusal to move traffic from CCI to PSE was not authorized under the tariff's "temporary suspen[sion of] service" remedy upon which AT&T relied below. That ruling was more than justified, particularly given the requirement of 47 CFR 61.2 that tariff provisions be "**clear and explicit**" and this Court's holding that the FCC may decline to enforce tariff provisions against customers for failure to comply with that provision, Global NAPS, Inc 247 F.3d at 258."

25) The FCC had to first falsely assume: A) that 2.2.4 could prevent a permissible 2.1.8 transfer and B) falsely assume AT&T had merit to raise a fraudulent use defense (Judge Politan already denied). The FCC decided AT&T used an illegal remedy and denied fraudulent use. Only the NJFDC can decide fact based judgment calls as to whether AT&T had merit in the first place to assert fraudulent use. Even if the FCC and DC Circuit determined AT&T could use 2.2.4 to deny a permissible 2.1.8 transfer a NJFDC judgment decision on fraudulent use **trumps** the FCC and DC Circuit.¹⁸ AT&T itself on August 26, 1996 advised the FCC it can't decide any issues:

"THE COMMISSION MAY **NOT** ISSUE THE REQUESTED DECLARATORY RULINGS BECAUSE MATERIAL ISSUES OF FACT EXIST AS TO EACH REQUESTED RULINGS The four requested rulings are: (1) "At the time of the attempted transfer... neither Section 2.1.8 of AT&T's Tariff F.C.C. No. 2, **nor any other provision of AT&T's Tariff F.C.C. No. 2**" prohibited the

district court – to be irrelevant to our conclusion that AT&T violated its tariff. 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." ...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.

¹⁸ The FCC in 2003 fn. 87 & fn 94 states the NJFDC must decide the 6.17.94 immunity or declare it is the law of the case as by 1996 Judge Politan determined AT&T had no merit to assert fraudulent use i.e. suspecting shortfalls. **See Exhibit 1 pg.13 para 30** Detailing 20 judgment based reasons A through T why AT&T's fraudulent use defense was not valid to prevent a 2.1.8 transfer.

transfer of the traffic without the transfer of the underlying plans or to require a deposit.
See exhibit 5 pg. 8 paras 28-32

Plaintiffs Were Also Denied Traffic Only Transfer Under 3.3.1Q4

26) In 1996 the above first declaratory ruling was acted upon by the FCC in 2003. Plaintiffs filed Exhibit 2 to remind AT&T that plaintiffs were not only covered under 2.1.8 but also covered for 3.3.1Q4. in Exhibit 2 see Exhibit A. AT&T agrees that no plan commitments transfer under 3.3.1Q4. Besides 2.1.8 the FCC saw that 3.3.1.Q4 also allowed plaintiffs to delete end user business locations and PSE to add the locations. In fact AT&T's own Counsel Charles Fash stated that this account movement method was permissible and plan commitments don't transfer.¹⁹ The DC Circuit decided the FCC erred by not recognizing 2.1.8 allowed traffic only transfers,²⁰ but this does not mean that traffic only can't also move by deleting and adding accounts. See Exh 5 pg. 5 para 20 -23 letter to AT&T & FCC with exhibits evidences that Judge Politan didn't care which section of the tariff allows transfers. Judge Politan looked at 2.1.8 and did not see in the 2.1.8 language "any number" of locations can transfer. Judge Politan only wanted to know does Tariff No 2 allow traffic only transfers. Exh 5 see Exh H pg 1

¹⁹ AT&T Counsel Fash on July 7th 1995 Here as EXHIBIT 9 stated the way to move accounts was delete and add as the FCC 2003 stated.

"The proper way to move traffic (i.e. a subset of locations on a plan) between plans is to submit service orders to delete the locations from one plan and add the locations to another."

AT&T Counsel Fash confirms that if the accounts move via 3.3.1Q4 from Mr. Swains CSTPII/ RVPP Plan the commitments stay with the plan:

"It appears at his juncture that transfer of all but two of the locations as requested by Mr. Swain would render not only the plan, but Darren B. Swian, Inc. an empty shell devoid of assets with which to pay tariffed charges associated with the plan.

²⁰ The DC Circuit Decision Plaintiffs Initial Brief In EXH A see EXH O stated on pg.8:

"Absent such reliance, the commission provides us with little reason why the plain language of Section 2.1.8 fails to encompass transfers of traffic alone."

and the DC Circuit Decision Plaintiffs Initial Brief in EXH A see EXH O stated on pg.10:

"As the foregoing discussion indicates, we find the Commission's interpretation implausible on its face. First, the plain language of Section 2.1.8 encompasses all transfers of WATS, and not just transfers of entire plans."

"In sum, the FCC clearly erred in ruling that Section 2.1.8 of AT&T Tariff FCC No.2 does not apply to a transfer of "traffic." DC Circuit Decision pg 11. Plaintiffs Initial Brief in EXH A see EXH O"

The Court: Where does it say this? How do you get to this?

Mr Shipp: How do I get to that?

The Court: Where does it say that in any document or any tariff? **Apart from 2.1.8?**

27) Oral Argument November 15th 1995: **Here as Exh 5 Ex H page 2**

The Court: **I have a simple question.** Whether you can split the thing in two pieces. **That is all the question I had.** I mean, you know.

Mr La Fiura: I understand

How the accounts got from CCI or Inga to PSE was irrelevant as long as AT&T was protected for its costs, which occurs for 2.1.8 direct transfer or delete and add under 3.3.1Q-4. Under both account movement methods the plan commitments don't transfer and PSE is responsible for bad debt on locations moved and plaintiffs responsible for bad debt on locations not transferred.²¹

AT&T Agrees It Violated the October 23, 1995 FCC Order

28) AT&T reply brief page 30:

D. The Significance of the FCC's 1995 Order..... In refusing to process the proposed CCI-to-PSE transfer, AT&T was not *changing* the plans; it was simply **enforcing them in accordance with the plain language of their pre-October 1995 terms.**

Correct, AT&T had to enforce the plans in accordance with their **pre Oct 1995 terms.** The FCC confirmed the plans were pre June 17, 1994 and thus AT&T violated the FCC Oct 1995 Order:

"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."

Initial brief EXH A in EXH A FCC 2003 pg. 2 para 2:

A simple fact issue and AT&T conceded it was ordered to continue the pre Oct 1995 terms.

²¹ March 1996 Judge Politan Decision See Page 15-16:

The Central issue in this controversy is whether plaintiffs may fractionalize "plans" as contracted between AT&T and its aggregators and as governed by Tariff F.C.C. No 2. Specifically, the question is **whether plaintiffs may transfer traffic under a plan without transferring the plan itself** in order to obtain more attractive discounts for end users. The issue of **whether Tariff FCC No. 2** permits fractionalization has been referred by this Court to the F.C.C.

Plaintiff's complaint covers traffic only transfers via 2.1.8 and 3.3.1Q-4 and also covers both the CCI to PSE and Inga to PSE traffic only transfers. AT&T counsel Fash explicitly stated that 3.3.1Q4 permitted traffic transfers and **Mr Fash concedes no plan commitments transfer under 3.3.1Q4.** So this Court can also decide in favor of plaintiffs under 3.3.1.Q 4. **Initial brief Exh S in Exh A**

AT&T Also Violated the June 17, 1994 Exemption Provision

29) When AT&T applied shortfall in June 1996 it violated the FCC 1995 Order. AT&T also violated the tariff. See [Exh 3 pg 2 A-P](#) “ITEM II TARIFF EVIDENCE” confirms immunity into **2004**. The FCC (fn 87 fn 94) states the NJFDC must handle disputes. AT&T Loses all Disputes.

AT&T Manipulated the FCC 2007 Order and Hid the Block Quote from the FCC

30) AT&T reply brief page 31:

“AT&T did not “intentionally misrepresent[]” the meaning of the *2007 FCC Order* to this Court.”

AT&T counsels knew exactly what the DC & FCC 2007 Order determined. ²²

When the Cover-Up Was Blown AT&T Called the Next Day to Settle

31) AT&T’s 3.21.16 brief page 31

AT&T paraphrased § 2.1.8, using the words “transferee” and “transferor” for the phrases “former customer” and “new customer.” Plaintiffs absurdly describe this as an “intentional Cover-Up.” *Id.* at 29 (emphasis omitted). But the FCC itself used this terminology in its brief to the D.C. Circuit

The actual word “**former**” customer was **too long** that it needed constant **paraphrasing!?** ²³

AT&T Stated PSE Must Assume the Plan Commitments if it was a Plan Transfer

32) AT&T’s 3.21.16 brief page 32

Similarly, AT&T counsel did not mislead this Court, *Pls. Br.* at 10, by demonstrating that, well before 2006, AT&T objected to the proposed CCI/PSE “traffic only”

²² Experienced AT&T counsels know when the DC Circuit confirmed that it can only review what the FCC interpreted and states that obligations issues were beyond the scope of the case. If the FCC did not interpret it---it means it was not referred to the FCC. If AT&T actually believed its interpretation it wouldn’t have intentionally omitted the first two sentences of the key FCC 2007 paragraph and pulled half of the third sentence and **never showed the FCC** the block quote it manipulated to this Court. [See here Exh 8 paras 29-37](#) of FCC comments detailing AT&T’s intentional manipulation.

²³ The FCC wasn’t asked to interpret obligations. The FCC didn’t reverse its position as AT&T has done. AT&T Counsel Guerra at Judge Bassler Oral argument: “the language is **all obligations.**” AT&T 3.21.16 page 31fn 24:

“Plaintiffs did not advance their “former customer” theory until **after** AT&T submitted the comments that Plaintiffs now quote.”

Obviously in Judge Bassler’s Court the “former” language was not recognized. The day after the **former customer** analysis was filed at the FCC, AT&T counsel Mr. Brown called asking how much money plaintiffs wanted as AT&T knew the cover-up was blown. **See initial br. Exh. A paras 57-67 for details.**

transfer on the grounds that PSE had failed to agree in writing to assume all of CCI's obligations, including the obligations to pay shortfall and termination charges.

33) Obligations are outside scope. Plaintiffs have evidenced every statement AT&T made prior to Judge Bassler's Court was made as AT&T stated the traffic transfer was as a plan transfer.²⁴

AT&T Creates Multiple "Traffic Only" Defenses AFTER the NJFDC Referral

34) AT&T's 3.21.16 brief page 33:

"Counsel's point was that PSE had not agreed to accept "all" of the obligations, not that it was assuming "zero" obligations. And this Court understood AT&T's position:

THE COURT: So your position, then, Mr. Guerra, is had there been some understanding that all the obligations would transfer as well, then everything would have obviously proceeded and the contracts would have been fine and AT&T would have been on board. It was the notation of "**traffic only**" which was sort of the impediment?

MR. GUERRA: Yes. And, again, this is the understanding that the DC Circuit had, the FCC had. Id. at 18 (emphasis added). Moreover, both the **D.C. Circuit and FCC** did understand that, under the proposed transaction, PSE would not assume all of CCI's obligations."

Obligations issue outside scope. Here is how AT&T is intentionally deceiving this Court.²⁵

This Court was On Point With Its Security Deposit Question and AT&T Evaded It

²⁴ AT&T never argued to Judge Politan that plan commitments transfer because AT&T was at that time asserting the plan commitments don't transfer to assert fraudulent use. AT&T misrepresented the transfer as a plan transfer to FCC because it knew plan commitments don't transfer. See:

"There, AT&T noted in passing that "**in this case** the relevant WATS services are **the CSTP II Plans.**"...[Section 2.1.8], by its terms, allows a transfer of CCI's service to PSE only if PSE agreed to assume all obligations under those **plans.** (**DC Circuit page 7-8**)

In this case it is a **Traffic Only** transfer. Plaintiffs agreed with AT&T in 1995 that plan commitments transfer on **plan** transfers. No controversy. Not referred by Judge Politan. DC & FCC stated outside scope of case. **See initial brief Exh A paras 109-118** details scam pulled on this Court.

²⁵ The key is what Judge Politan understood and referred. The FCC did not interpret obligations and understood traffic only meant traffic only not the plan. The FCC understood **traffic only** not the plan. FCC 2003 Decision FCC Decision: pg.3:

"At the bottom of each TSA, in handwriting, these parties directed AT&T to move the "Traffic Only" **on each plan** to PSE. The January 13th cover letter, under which these nine TSAs were forwarded, directs AT&T to "**move the locations associated with these plans** [but] not in any way to discontinue **the plans.**" In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, but **not to move the actual plans themselves.**" The FCC 2003 Order agreed with Judge Politan ---CCI must keep plan commitments. Judge Politan and the FCC knew Traffic Only has nothing to do with modifying obligations. The TSA handles both plan and traffic only transfers. AT&T was informed that the order was "**traffic only.**" **ONLY AFTER** Judge Politan's Court did AT&T short quote and spin "Traffic Only" and assert to the FCC the CCI-PSE was a **plan transfer** and since the forms said "Traffic Only" not a plan transfer AT&T asserted it violated **plan transfer** rules. AT&T counsel attempted to mislead the DC Circuit with his own "Traffic Only No Obligations" interpretation. See **here as Exhibit 10 para 9** plaintiffs post DC Circuit Oral argument brief to correct AT&T counsel. Read **all of Exh 10** for several more AT&T scams in DC.

35) AT&T's 3.21.16 brief page 34

Plaintiffs nevertheless base their contrary assumption on the fact that the Court was asking "about transferring obligations in reference to the CCI-PSE transfer." Pls. Br. at 8. But Transmittal 9229 would have had prospective effect only, **and so would not have governed the CCI/PSE transfer at all.**

Obligation issue outside scope. This cover-up is incredible nonsense.²⁶

This Court Should Consider Sanctions for Violation of Rule 11B Evidentiary Support

36) AT&T's 3.21.16 brief page 35:

AT&T asserted that it had "responded to" Plaintiffs' "contentions" before the FCC concerning "**other transfers of service.**" This statement is true. AT&T responded by explaining that this **discrimination claim** had not been referred and involved questions of fact that could not be resolved in a declaratory ruling proceeding.

Evidence is evidence, regardless what law is being applied. If AT&T was referring to **discrimination** it would make **even less sense** to withhold evidence from this Court.²⁷

²⁶ Mr Guerra knew this Court didn't care about the Inga to CCI plan transfer security deposit issue resolved by the first May 1995 Decision. The fact that Tr9229 security deposits against potential shortfall on traffic only transfers (**Exhibit 7**) would be prospective and not govern the CCI-PSE transfer is **evading the point.** The point is Meade certification with the Tr9229 tariff evidence is conclusive that plan commitments don't transfer. Plaintiffs started in 1990. From 1990 to 1995 Traffic only transfers were done w/o transferring plan obligations. AT&T's denies plaintiffs in Jan 1995. AT&T's Joyce Suek in June 1995 says traffic only transfers had been allowed, but **no longer**, but AT&T never changed tariff [**Initial brief pg 29 para 40**]. Mr Brown now says that as of the Tr9229 filing (Oct 1995) AT&T allowed traffic only transfers w/o the plan obligations transferring and Tr.9229 did not govern plaintiffs so it did not require security deposit. Then why didn't AT&T at that point simply process the transfer! All these ridiculous intentional cover-ups are conflicting with the facts. Obvious intentional fraud on this Court.

²⁷ Here is AT&T's 2014 Pg. 29 statement to this Court:

"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's statement is simply referring to **other transfers of service.** If it was referring to discrimination it would be even more nonsensical, as discrimination must be addressed **by this Court.** Therefore why would AT&T **reserve evidence** for the FCC concerning discrimination and not address discrimination evidence for this Court? None of this AT&T cover-up makes any sense. The fact is that AT&T's counsel Whitmer told Judge Politan in 1995 supra that AT&T had done thousands of traffic transfers and of course AT&T can't provide evidence of plan commitments transferring on traffic only transfers --as none exists. The "all obligations" defense was an intentional fraud that started with Judge Bassler **and continues and is a flagrant insult to this Court's intelligence.** The DC Circuit & FCC 2007 Order understood "obligations" was not within the scope of the 1995 referral and by 1996 Judge Politan recognized and got fed up with AT&T's fraudulent use scam as his Court clearly understood the plans were pre June 17th 1994 immune.

All Disputed Fact Judgment Calls Trump Any FCC or DC Circuit Ruling

37) AT&T's 3.21.16 brief page 36:

The Court should reject Plaintiffs' suggestion to lift the stay to address these fact-based claims before resolution of the issues referred to the FCC. Resolution of the referred issues could significantly affect the ultimate scope and resolution of this case.

Nonsense no reasons provided. AT&T's sole fraudulent use defense was fact based.²⁸

AT&T Fails to Quote Which Provision Authorizes Penalties on Our Customers

38) AT&T's 3.21.16 brief page 36:

Plaintiffs characterize as AT&T's "Illegal Billing Remedy," they quote a particular sentence from Tariff No. 2 and assert that the "[s]imple fact based issue . . . needs no FCC tariff interpretation." Pls. Br. at 23. However, Plaintiffs fail to quote the **actual tariff provision upon which AT&T relied**

Even if AT&T was permitted under a different tariff section to charge shortfall penalties, it's **totally irrelevant** as AT&T is required as the FCC Decision points out AT&T must adhere to its tariff and use the **proper remedy**; otherwise it is **can't rely upon the charges**.²⁹

²⁸ AT&T itself asserted to the FCC in 1996 that the fraudulent use issue is a **disputed facts judgment call** not a tariff interpretation. The FCC stated the NJFDC has to handle the 6.17.94 immunity that is **prior to** the Jan 1995 traffic only transfer. This Court must conclude Judge Politan's 1996 determination that the plans were immune and AT&T had **no merit** to suspect being deprived of shortfall is the law of the case. Judge Politan made this call w/o the knowledge of the Oct 23, 1995 FCC Order. Even the DC Circuit believed the cart was before the horse as Judge Ginsburg understood CCI keeps its customer plan obligations but understood the plans were 6.17.94 grandfathered and penalty immune and completed the FCC's counsels' question (Pg. 27 Line 2):

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?**

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

²⁹ "For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan." **Initial brief EXH S in EXH A**

The **FCC has already supplied the applicable law on illegal remedies** when AT&T used an illegal remedy of permanently denying the traffic only transfer instead of the tariffed remedy of temporarily suspending service. **See FCC page 13 para 19**: "Subsection 203(c) forbids a carrier from employing or enforcing any classifications, regulations, or practices affecting its charges unless they are "specified" in the tariff and We agree that, when **AT&T availed itself of a remedy not "specified" under its tariff, it**

There is No Doubt the Inga Companies Have Claims

39) AT&T's 3.21.16 brief page 36

“whether AT&T's settlement with CCI precludes Plaintiffs from even pursuing this claim.”

Point 1) AT&T's settlement with CCI explicitly concedes the continued claims of the Inga Companies as AT&T sought CCI's cooperation in helping AT&T defend itself. See “cash redacted” AT&T/CCI settlement in the public domain. Initial filing in Exh. A see Exh. BB.

Cooperation:

CUSTOMER agrees to reasonably **cooperate to the fullest extent** with AT&T in connection with **AT&T's ongoing efforts to resolve its disputes with Winback and Conserve**, including the New Jersey Action, the F.C.C. Action...However, CCI shall not be required to produce any documents that were created for the purpose of communication between CCI and its attorneys **and Winback and Conserve, AI Inga**, and their attorneys in the absence of a duly issued subpoena.

Point 2) AT&T is well aware that NJFDC Judge Hayden has ruled that the Inga Companies claims against AT&T were **not at all** compromised by the AT&T/CCI settlement.

Point 3) Judge Politan explicitly stated the **Inga to PSE** traffic only transfer **is included in the claims of the complaint** not just CCI-PSE transfer. First Judge Politan addresses the first scenario of the Inga to CCI plan transfer and CCI to PSE traffic only transfer. Then Judge Politan addresses the second scenario of the direct traffic only transfer between Inga and PSE. In

Exhibit 6 there is a 3 page exhibit F. The second page of exhibit F on line 6 states:

Judge Politan: That was the first scenario, factually that you went through. The **second scenario** was CCI, as assignee or agent for **Winback, parked all the service with PSE, retained the plan commitment**, so to speak, and said: Approve that. Those are the **two sets of facts** that have occurred. No one has alleged in this case that you went to AT&T

violated section 203 of the Act. ...Thus, when AT&T availed itself of a remedy not “specified” in its tariff, that action violated subsection 203(c)

and said: Extend the window on the 516 contract to Winback so they could subscribe to it. So it's not in the case.³⁰

Point 4) The FCC in 2003 knew co-plaintiff CCI settled with AT&T in 1997 but still went ahead as the FCC understood Inga Companies still had valid claims and standing in the case.

Judge Bassler Did State Plaintiffs Have Discrimination Claims and AT&T Agreed

40) AT&T's 3.21.16 brief page 38

Plaintiffs claim that Judge Bassler "**confirmed the legitimacy of**" their discrimination claim. Pls. Br. at 25. In fact, the quote Plaintiffs provide is not from Judge Bassler, but from AT&T's counsel

Inserted wrong quote. The actual quote plaintiffs wanted this Court to see is **here at Exh. 12 pg 21 line 9** that confirms the legitimacy of the discrimination claims as Judge Bassler states:

9 THE COURT: Let's assume it goes back to the agency and
10 **it agrees with your position.** Still going to have this issue of
11 **discrimination in this Court. Right?**
12 MR. GUERRA: **You would, your Honor. I believe you**
13 **would.**
14 THE COURT: So we would then –

AT&T lost its sole defense of fraudulent use at the FCC and Judge Politan by 1996 determined merely suspecting fraudulent use had no merit to begin with, but **even if** AT&T had prevailed on those issues, AT&T still loses on the fact based issue of discrimination.³¹

³⁰ Judge Politan only included the CCI to PSE and Inga to PSE traffic only transfers in the complaint and not the denial of a deeper discount plan for plaintiffs. Note Judge Politan understood plan commitments don't transfer "retained the plan commitment."

AT&T constantly denied the Inga companies its own contract tariff even though the Inga companies qualified as AT&T own Revenue Reports show plaintiffs were AT&T's reseller. **Here as Exh 11 pgs. 3-6 "Legitimate Business Plan- No Fraudulent Scheme"** shows evidence of legitimate business plan and why plaintiffs were forced to transfer traffic because **AT&T refused to provide the discounts plaintiffs were entitled to.**

³¹ Judge Bassler erroneously believed obligations allocation was within the scope of the case but both DC Circuit & FCC said it was not. His Court believed **even if** AT&T won the obligations argument that AT&T still discriminated by allowing others to do 2.1.8 traffic only transfers w/o the plan commitments transferring. Thus Judge Bassler stated that this is **still discrimination** and AT&T counsel agreed. AT&T

CONCLUSION

The fact issues are very straight forward clear facts. The following violations are clear:

The January 1995 Traffic Only Transfers Complaint-- VIOLATIONS

- 1) **STATUTE OF LIMITATIONS:** Simply rule on the very clear fact that AT&T conceded the **Inga Companies traffic only transfer directly to PSE** was not denied within the 15 days statute of limitation at 2.1.8C, and all AT&T defenses are precluded. Transfer issue resolved.
- 2) **DISCRIMINATION:** As Judge Bassler noted AT&T clearly discriminated against the 4 Inga Companies. The record is overwhelming other AT&T customers transferred traffic only w/o plan commitments transferring but AT&T denied the Inga Companies (AT&T Counsel Whitmer's concession of thousands of transfers between aggregators; Zero AT&T evidence; Plaintiffs evidence of previous transfers; Meade Certification with Tr8179 & Tr9229, Joyce Suek "we no longer do it" which means AT&T had been doing it for others, and the 6 certifications from other AT&T customers much more). AT&T's conceded the FCC denied Tr8179 due to AT&T subjectively discriminating intent based on quantity of accounts transferred.
- 3) **OUTSIDE SCOPE/DECIDE ON THE MERITS/TARIFF CHANGES PROSPECTIVE:** Any tariff change by the FCC would be prospective and plaintiffs Inga to PSE traffic only transfer would be grandfathered so an FCC decision is moot. AT&T simply violated 203 by not transferring the Inga to PSE traffic only transfer based upon the fact that AT&T's sole defense of fraudulent use under 2.2.4 has already been **denied by the FCC due to illegal remedy** and denied by Judge Politan **on its merits**. His Court's March 1996 Decision clearly determined that this fact based defense of "fraudulent use" had no merit due to the fact that the plans were pre June 17th 1994 immune and this is the Law of the Case. Plaintiffs showed 20 fact based reasons (**Exhibit 1 pg 13 para 30**) why AT&T sole defense of fraudulent use defense should be denied. Judge Politan's 1996 Decision was

counsel Whitmer conceded (supra) AT&T as of March 1995 had done thousands of traffic transfers between aggregators. Plaintiffs initial brief evidenced AT&T order processing manager Joyce Suek who stated in June 1995 that AT&T **no longer** allowed traffic only transfers which obviously means AT&T did allow them in Jan 1995 but didn't allow plaintiffs (**see initial brief in Exh. A Exh. U**) Furthermore, AT&T **can't claim that it can discriminate** between its customers regarding how much traffic plaintiffs transferred versus others. The FCC already denied that same exact argument. AT&T's Tr8179 filing argued it had the right to **subjectively discriminate** at what point AT&T can force its customer to transfer its plans in order to force plan commitments to transfer. That is why the FCC denied Tr8179 due to AT&T subjectively measuring intent. This led to Tr8179 being replaced by Tr9229 security deposits against shortfall which was not discriminatory.

not overturned on error. It was on primary jurisdiction grounds and the one 1995 question that he had as to whether any part of the tariff 2.1.8 or 3.3.1Q4 allowed “fractionalization” was no longer a controversy by 1996. The DC Circuit determined and AT&T has always agreed with plaintiffs that 2.1.8 allows traffic only transfers.

4) **Estopped**: AT&T is legally estopped for having changed its position from the plan commitments do not transfer (fraudulent use defense (1995-2005) to AT&T Judge Bassler forward scam (2006-present) that all obligations must transfer under 2.1.8 on a traffic only transfer. AT&T’s position in 1995 was that 2.1.8 allowed traffic only transfers and that the revenue and time commitments do not transfer. AT&T is judicially estopped from taking a contrary position. See *Sholly v. Amar*, 450 F.2d 74, 77 (9th Cir. 1971) (“a party is estopped to contradict a position he advocated in a prior judicial proceeding or prior pleadings”); *Eads-Hide and Wool Company v. Merrill*, 252 F.2d 80, 85 (10th Cir. 1958) (same).

5) **The Illegal Remedy Shut Down 2.1.8 and 3.3.1Q4**: As Joyce Suek and Charles Fash stated AT&T unlawfully totally shut down both 2.1.8 and 3.3.1.Q4 account transfer sections without making a change to its tariffs; thus AT&T used an illegal remedy and automatically loses.

Plaintiffs Supplemental Complaint Due to June 1996 Penalty Infliction—VIOLATIONS

5) **JUNE 1996 PENALTY INFLICTION**: Plaintiff’s January 3, 1997 Supplemental Complaint regarding the June 1996 penalty infliction is resolved due to any one of these fact based issues:

A) **June 17, 1994 immunity Exemption**: Judge Politan already determined and the FCC further stated the plans were pre June 17th 1994 ordered. The FCC said there is are disputed facts; however that means by law the decision must favor plaintiffs.

B) **The Oct 23, 1995 FCC Order**: Explicitly stated it transcends that order to plaintiff’s case and AT&T agrees it was ordered to maintain the pre Oct 1995 grandfathered terms and violated this.

C) **The Illegal Billing Remedy**: As this Court has seen AT&T offered zero defenses to this violation. The penalties were unlawful but even if they were lawful AT&T used an illegal remedy and by law it can’t rely upon the penalties.

D) **Unreasonable Practices: FCC 2003 FN 94**:

“With respect to petitioners’ argument that AT&T’s CSTP II shortfall charges set forth in Tariff No. 2 are **facially unreasonable**, we find this issue – which was not referred to us by the district court – to be irrelevant to our conclusion that AT&T violated its tariff.”

AT&T's shortfall is based upon the discount provided but PSE's discount of 66% is for only a \$4.8 million commitment and plaintiffs were doing over \$50 million. Thus charging shortfall is facially unreasonable under the 1934 Communications Act. Additionally AT&T claims it was already compensated by co-plaintiffs CCI for the \$80 million in charges due to CCI's President Mr Shipp's cooperation in defending AT&T against Inga Companies.

Under the Communications Act it is would be facially unreasonable and illegal for AT&T to be compensated twice for same charges. AT&T's sole defense of fraudulent use was denied. AT&T and plaintiffs agree 2.1.8 and 3.3.1Q4 allow traffic only transfers. The obligations issue under 2.1.8 as the DC Circuit and FCC 2007 Order show is outside the scope of the case. AT&T agrees with plaintiffs that 3.3.1Q4 allows traffic only transfers and the plan commitments don't transfer.

Plaintiffs ask this Court that it issues orders in reference to both the Inga to PSE traffic only transfer of Jan 31st 1995 and the CCI to PSE traffic only transfer of Jan 13th 1995. The January 31, 1995 Inga to PSE traffic only transfer would have actually taken place first because of the initial security deposit requested of CCI on the plan transfer that did not get resolved until May 1995 decision. AT&T concedes that it did not deny the Inga to PSE traffic only transfer within 15 days and on that alone AT&T loses. The only original defense of fraudulent use is ultimately as judgment call. Judge Politan's 1996 decision clearly determined AT&T's sole defense had no merit. It must also be pointed out that the referral from Judge Bassler on its face made no sense to the FCC. The FCC resolves controversies. AT&T created its new position before Judge Bassler that the plan commitments **must transfer** on a traffic only transfer. The second part of Judge Bassler's referral asked to address "**other open issues.**" The only open issue in 1995 was fraudulent use, which AT&T took the position that plan commitments **do not transfer.** Obviously AT&T was not **simultaneously** asserting to Judge Bassler in 2006 that plan obligations **do and don't transfer.** AT&T created the referral order for Judge Bassler to sign in which AT&T counsels believed would sneak in another attempt to argue fraudulent use. A defendant can have many defenses but all defenses need to be based upon the same assertion. The Judge Bassler referral to the FCC looked like AT&T was simultaneously arguing the plan commitments do and don't transfer—which made no sense. Judge Wigenton, the evidence is overwhelming AT&T counsels intentionally deceived this Court. Obligations allocation is outside the scope. If AT&T was telling the truth it would obviously have evidence to support its position. AT&T never addressed the 6 certifications of other AT&T customers at page 5 para 2 in plaintiff's initial motion. **In EXH A see Exh's G thru L.** Please consider not needing oral argument. Please simply sign plaintiffs Order and schedule further adjudication of the fact based issues that the FCC stated this Court must resolve.