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VIA ELECTRONIC SUBMISSION

May 27, 2016

Ms. Marlene Dortch  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, D.C. 20554

*Re: Expedited Consideration for Declaratory Rulings On the transfer of traffic only under AT&T Tariff Section 2.1.8., and Related Issues; Primary Jurisdiction Referral From the NJ District Court; One Stop Financial, Inc., Group Discounts, Inc., Winback & Conserve Program, Inc., 800 Discounts, Inc., Petitioners and AT&T Corp., Respondent, WC Docket No. 06-210*

Dear Ms. Dortch:

On May 26, 2016, Frank Simone and I, on behalf of AT&T, met with Stephanie Weiner, Senior Legal Advisor to Chairman Wheeler, and Deena Shetler of the Wireline Competition Bureau. Separately, we met with Rebekah Goodheart, Legal Advisor to Commissioner Clyburn. AT&T urged the Commission to move forward with a declaratory ruling in the above-referenced docket. The discussion was consistent with AT&T's Response to Petitioners' Motion to Temporarily Suspend the Proceeding, filed February 1, 2016.

To ensure a complete record, AT&T hereby submits the attached Letter Order issued on May 18, 2016 in related litigation in the United States District Court for the District of New Jersey.

If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

A handwritten signature in black ink, appearing to read "Christi Shewman", written in a cursive style.

Christi Shewman

cc: Stephanie Weiner  
Rebekah Goodheart  
Deena Shetler

**NOT FOR PUBLICATION**

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

CHAMBERS OF  
**SUSAN D. WIGENTON**  
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE  
50 WALNUT ST.  
NEWARK, NJ 07101  
973-645-5903

May 18, 2016

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*Attorney for AT&T Corp.*

**LETTER ORDER FILED WITH THE CLERK OF THE COURT**

**Re: Combined Companies, Inc. et al. v. AT&T Corp.  
Civil Action No. 2:95-00908-SDW-SCM**

Litigants:

Before this Court is the “Motion to Lift Stay” of Plaintiffs Combined Companies, Inc. (“CCI”), Winback & Conserve Program, Inc., One Stop Financial, Inc., 800 Discounts, Inc., and Group Discounts, Inc. (collectively, “Plaintiffs”). (Dkt. No. 188.) This Court, having reviewed the parties’ submissions and having reached its decision without oral argument pursuant to Federal Rule of Civil Procedure 78, for the reasons discussed below, **DENIES** Plaintiffs’ Motion.

## **BACKGROUND**<sup>1</sup>

This Court writes primarily for the parties and discusses only the facts and procedure relevant to the present Motion. This case arose in 1995, when Plaintiffs proposed a two-step transfer of their Wide Area Telecommunication Service. Plaintiffs proposed that (1) they would transfer their plans (with the associated traffic) to CCI and (2) CCI would transfer all of the revenue-producing phone numbers and virtually all of the traffic associated with those plans, but not the plans themselves or the obligations to pay shortfall and termination liabilities under the plans, to Public Service Enterprises of Pennsylvania, Inc. (“PSE”). AT&T Corp. (“Defendant”) declined to process the proposed transfer because, with respect to the second step, Defendant believed there was a substantial risk that the “traffic only” transfer would result in CCI not having sufficient revenue to meet any shortfall and termination liabilities it incurred.

Plaintiffs initiated this suit on February 24, 1995, to compel Defendant to execute the transfer request. (Dkt. No. 1.) On May 19, 1995, U.S. District Judge Nicholas H. Politan found that the request to transfer traffic from CCI to PSE (the second step) presented tariff construction issues within the primary jurisdiction of the Federal Communications Commission (“FCC”) and referred the issue to the agency. (Dkt. No. 32, Brown Cert. Ex. 6.) Upon reconsideration, on March 5, 1996, Judge Politan issued a preliminary injunction requiring Defendant to transfer the traffic from CCI to PSE pending the FCC’s ruling. (Dkt. No. 54, Brown Cert. Ex. 7.) On appeal, the Third Circuit reversed and held that, because the tariff construction issue had been properly referred to the FCC, it was improper to prejudge the outcome of the referral with a preliminary injunction. (Brown Cert. Ex. 8 (“Third Circuit Opinion”).)

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<sup>1</sup> Unless otherwise noted, all facts are taken from the parties’ submissions.

Plaintiffs filed a petition with the FCC on July 15, 1996, arguing, *inter alia*, that AT&T Tariff No. 2 § 2.1.8 (“Section 2.1.8”) did not allow Defendant to refuse to process the proposed CCI/PSE transfer. (Brown Cert. Ex. 9.) On October 17, 2003, the FCC held that Section 2.1.8 did not apply to the “traffic-only” transfer from CCI to PSE and thus did not prohibit that transfer. (Brown Cert. Ex. 4.) On appeal, the D.C. Circuit held that Section 2.1.8 did apply to traffic transfers. *AT&T Corp. v. F.C.C.*, 394 F.3d 933 (2005). After the D.C. Circuit’s decision, Plaintiffs filed a motion in this District to lift the stay, arguing, *inter alia*, that the FCC had resolved the issue in their favor. (Dkt. No. 125, Brown Cert. Ex. 13.) On June 1, 2006, U.S. District Judge William Bassler refused to lift the stay and ruled that, in light of the D.C. Circuit’s decision, the FCC had yet to determine whether PSE had to assume shortfall and termination obligations under Section 2.1.8. *Combined Cos., Inc. v. AT&T Corp.*, No. 95-908, 2006 WL 1540917 (D.N.J. June 1, 2006) (Dkt. No. 146, Brown Cert. Ex. 15).

On December 15, 2014, Plaintiffs asked this Court to lift the stay, claiming that the relevant issue had already been answered by the FCC, and that the referral was moot because an FCC ruling on Section 2.1.8 would have prospective effect only. (Dkt. No. 166, Brown Cert. Ex. 26.) This Court, reasoning that Judge Bassler had properly concluded that the referred question had not yet been resolved by the FCC and that nothing had changed to call into question his prior ruling, denied Plaintiffs’ Motion. Transcript of Oral Argument at 30, *Combined Cos., Inc. v. AT&T Corp.*, No. 95-908 (March 18, 2015) (Brown Cert. Ex. 1). This Court also noted that it was “not convinced” by Plaintiffs’ mootness argument, and “strongly suggest[ed]” that Plaintiffs file a mandamus petition to compel the FCC to rule on the referred tariff issue. (*Id.* at 29, 31.)

To date, Plaintiffs have not sought mandamus. However, on November 2, 2015, the FCC posted notice on its website that Plaintiffs’ petition has been circulated and is “pending action by

the full Commission.”<sup>2</sup> Plaintiffs filed their current Motion on February 26, 2016. (Dkt. No. 188.) Defendant filed its Opposition on March 21, 2016, (Dkt. No. 191), and Plaintiffs filed their Reply on April 12, 2016, (Dkt. No. 209).

## **DISCUSSION**

As this Court stated on the record last year in response to Plaintiffs’ previous Motion to Lift Stay; and as Judges Politan and Bassler, as well as the Third Circuit, previously held; the tariff construction question was properly referred to the FCC under the doctrine of primary jurisdiction. The reasons for which the referral was proper in 1995, 2006, and 2015—policy determinations in the important communications field, a substantial public interest in securing an agency ruling on the matter in dispute, and the need to avoid potentially inconsistent rulings—are still relevant today. (*See* Brown Cert. Ex. 1 at 28-29 (quoting Third Circuit Opinion at 7). Since this Court denied Plaintiffs’ previous Motion to Lift Stay last year, neither new developments nor new arguments have arisen which would justify a different outcome at this time. In fact, the only significant development since this Court’s March 2015 decision, the FCC’s announcement of pending action regarding this matter, weighs heavily in favor of denying Plaintiffs’ Motion. Indeed, the only factor that weighs in favor of granting Plaintiffs’ Motion—the inordinate amount of time that has transpired since this suit began—was addressed in 2015 when this Court “strongly suggest[ed]” that Plaintiffs seek mandamus to compel a ruling from the FCC (a suggestion which Plaintiffs did not follow). (*See id.* at 28, 30-31.) Therefore, Plaintiffs’ Motion to Lift Stay is **DENIED.**

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<sup>2</sup> *See* FCC, *Items on Circulation*, [https://transition.fcc.gov/fcc-bin/circ\\_items.cgi](https://transition.fcc.gov/fcc-bin/circ_items.cgi) (last updated May 17, 2016) (noting that the “Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2 et al.” is a “Commission level item[] that ha[s] been circulated and [is] pending action by the full Commission”).

**CONCLUSION**

For the reasons set forth above,

**IT IS** on this 18<sup>th</sup> day of May, 2016,

**ORDERED** that Plaintiffs' Motion to Lift Stay is **DENIED**.

**SO ORDERED.**

*s/ Susan D. Wigenton*  
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**SUSAN D. WIGENTON**  
**UNITED STATES DISTRICT JUDGE**

Orig: Clerk  
cc: Parties  
Steven C. Mannion, U.S.M.J.