income flow would have easily paid for shortfall even if petitioners hadn't already met its fiscal year commitments. Additionally, the CSTPII plans also have several other benefits even while only temporarily having few accounts:

(1) CSTPII's are renewable at the aggregator's discretion most CT's are not, so at CT's end you have a plan to bring traffic back to (exhibit CC at 6.)

(2) Maintains several grandfathered rights (ex. pre-June 17, 1994)

(3) No security deposits; plan's established credit history allows a merger of CSTPII plan into a new CT without posting a $13.5 million deposit.

4) Over $100K per year in free airline tickets.

5) Direct aggregator access to AT&T service.

VI. The DC Circuit By Default Ruled That S&T Obligations Stay with CSTPII Plans

49) The DC Circuit Decision 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 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.

50) There is no option under the tariff to transfer less than 100% of the accounts along with the S&T obligations, and leave the CSTPII plan behind with no obligations left. Of course AT&T can not show any evidence of the non existent option because none exists. Therefore, because there are only two options under AT&T's tariff, the DC Circuit, by default, must agree with petitioners, the FCC and the District Court that S&T obligations stay with the CSTPII plan.

VII. Several AT&T Counsel Also Agree with Petitioners' that S&T Obligations/Liabilities Do Not Transfer

51) **Meade Concession:** In a certification that neither the FCC nor the DC Circuit has seen AT&T counsel Mr. Meade certified to the District Court:

> Under CCI's requested location transfer, CCI would have nominally remained the customer of Record for the CSTP II's. But by transferring revenue-producing accounts, CCI would apparently have rendered itself an assetless shell unable to either fulfill its commitments or to pay its shortfall or termination charges.

52) AT&T's ridiculous rhetoric that CCI would be an assetless shell is false for many reasons, but is no longer an issue due to AT&T's illegal fraudulent use remedy. The only issue critical here is AT&T counsel explaining that the traffic transfer would result in the S&T obligations staying on the Transferors Plan.

53) **Fash Concession:** In a July 7, 1995 letter, that neither the FCC nor the DC Circuit has seen, AT&T counsel Charles Fash wrote to petitioners' counsel regarding a competitor aggregator, Darren B Swain (DBA US Communications), which was attempting to transfer traffic only under 2.1.8 to one of Petitioners' CSTPII plans. Mr. Fash writes in reference to 2.1.8 transfers at Exhibit U:

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

Mr. Fash concedes that S&T obligations stay with the transferor customers' plan, under 2.1.8.

54) **Carpenter Concession:** Neither seen by the FCC nor the DC Circuit were these statements made by AT&T counsel David Carpenter supporting petitioners during Third Circuit Oral Argument:

> 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. (exhibit V. Pg 15 line 9)

55) Mr. Carpenter above is clearly stating that there is distinction as to what gets transferred depending upon whether it is traffic transfer vs. a plan transfer. AT&T's current position (post DC Circuit Decision) is that there is no distinction; AT&T's position currently is that it does not

matter if it is a "traffic only" transfer or a plan transfer, S&T obligations/liabilities must transfer. However AT&T's tariff on 2/23/02, exhibit J shows S&T may, not must transfer. S&T only transfers on plan transfers. See Carpenter again at exhibit V. Pg 15 line 23…

> When you're transferring **all** the traffic, you're transferring the **plan**. That is –and the obligations have to go with it, shortfall and termination liability. (emphasis added)

56) Petitioners did not transfer all the traffic, therefore the plan and its associated S&T obligations do not transfer. Mr. Carpenter then explained what all obligations meant and correctly declared it varied, depending upon what's transferred in these two statements to the DC Circuit:

> Mr. Carpenter: Yes, but what it means to assume **all the obligations.** What obligations **apply** may vary depending on what's transferred. (11/12/04 DC Circuit pg.12 Line 22 Exhibit W)

> 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 pg.12 Line 12 Exhibit W.)

Counsel Carpenter clearly concedes that S&T obligations do not transfer on traffic only transfers. Counsel Carpenter again confirmed petitioners tariff analysis of 2.1.8 as detailed *supra* in para 8.

57) **Fred Whitmere Concession**: Additional evidence neither seen by the FCC nor the DC Circuit is a letter dated February 6th 1995, sent by AT&T to petitioners questioning the traffic transfer. AT&T counsel Fred Whitmere clearly conceding that S&T obligations would stay with the CSTPII plan.

> Mr. Inga's efforts to transfer these end users and leave the plans intact with their commitments, …..AT&T will seek to enforce its rights in the event shortfall and termination charges become due under the tariff and will hold Mr. Inga personally liable for his conduct intended to deprive AT&T of its tariff charges. (See Exhibit X)

58) Mr. Whitmere doesn't assert that under the tariff it doesn't allow traffic to transfer without transferring S&T obligations; just the contrary, he concedes the transaction was in accordance with 2.1.8's proper obligations transfer methodology. He concedes S&T obligations remain with the CSTPII plans. The date of the initial warning letter is 2/6/05 and the TSA's were counter signed 1/13/05; thus it is an undisputed fact that AT&T failed 2.1.8's 15 day statute of

limitations.

59) **Friedman Concession:** AT&T correctly quotes its tariff at 3.3.1.Q bullet 10, see Exhibit D, correctly stating that S&T obligations were the responsibilities of Petitioners; and of course petitioners plan was not transferred to PSE. AT&T's non disputed tariffed admission to the FCC:

> As AT&T's customers-of-record, Petitioners were responsible for the tariffed shortfall and termination charges. Section 3.3.1.Q of AT&T FCC No 2 See also AT&T Further Comments filed April 2nd 2003 ("AT&T's Further Comments 2003") at 7-8.

VIII. To Claim Fraudulent Use AT&T Had to Concede that S&T Obligations Do Not Transfer

60) If 2.1.8 actually mandated that S&T obligations transfer on traffic only transfers and the plan remained behind with no obligations then AT&T's position in 1995 would have only been: 2.1.8 does not allow traffic only transfers that don't transfer S&T obligations. The mere fact that AT&T argued Fraudulent Use is a clear concession that S&T obligations do not transfer on traffic only transfers. The District Court also understood AT&T's Fraudulent Use Claim, conceding S&T obligations stay with the plan. Judge Basslers' Decision:

> AT&T also refused the second transfer ("CCI/PSE transfer") on the ground that by transferring the 800 traffic without the plans, CCI was effectively avoiding any shortfall or termination charges. AT&T claimed that without the revenue generated by the traffic under the plans, CCI would have no income and no means of backing the responsibilities it maintained after the CCI/PSE transfer of traffic was executed.

S&T obligations never transferred on traffic only transfers. This is why, despite the fact that AT&T states it has done tens of thousands of traffic only transfers under 2.1.8, AT&T can not produce one single piece of evidence showing that its position was ever done in such a manner. No evidence exists!

IX. AT&T's Theory that S&T Obligations Should Transfer is Commercially Not Feasible

61) Scenario I: Transferor "A" with a $50 million S&T obligation sets up a Company "B" with a puny $1,000 a year S&T obligation; that does not even require a deposit. "A" transfers a handful of accounts to "B" and according to AT&T's position "A"'s $50 million in S&T obligations all

go to "B". "B" goes then goes out of business and "A" has no more $50 million in S&T obligation, but still has all its traffic to send to an AT&T competitor! In reality the transferor must keep the S&T obligations and are subject to lose their deposit on its $50 million plan.

62) Scenario II: During a year Company A has requests from three Companies "D", "E", and "F", all who have only $1 million plan commitments. "D", "E", and "F" only want $200,000 worth of traffic transferred to them. Under AT&T's bogus theory "D", "E", and "F" would never take in $200,000 in traffic if they had to absorb $50 million in S&T obligations. AT&T claims it has done tens of thousands of traffic only transfers but of course fails to show one shred of evidence that S&T obligations transfer on traffic only transfers. There is no AT&T evidence of its bogus post DC Circuit position that CSTPII plans remain with transferor no obligations.

X. AT&T's Own Theory That S&T Obligations Transfer on Traffic Transfers Defeats Itself

63) Here as exhibit Y are traffic only transfers that were done in 1993 and 1994, transferring traffic only from petitioners' to aggregators Ameritel and Tel-Save. If AT&T's bogus position is correct that S&T obligations must also transfer on traffic only transfers that means that after these traffic transfers were completed, all S&T obligations would have already been transferred away from petitioners prior to the Jan 1995 denied traffic transfer with PSE. If AT&T's bogus position is correct then the question of should S&T obligations transfer in Jan 1995 is a moot point; because according to AT&T's bogus position there were no obligations left in Jan 1995 on petitioners' plans to transfer. Conversely the fact that AT&T states that there were S&T obligations that remained on the petitioners' CSTPII plans is still yet another concession that S&T obligations/liabilities simply do not transfer on traffic only transfers.

XI. Joint & Several Liability Provisions Confirms that S&T Obligations Do Not Transfer

64) Here as exhibit Z is a statement AT&T made to the FCC in its public comments in 2003:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the *transfer* of such accounts the Petitioners would, **but for** the

attempt to bifurcate the traffic from the underlying plans, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. May 19th, 1995 Order at 6, AT&T Tariff F.C.C. No. 2 Section 2.1.8.

65) AT&T's interpretation of the tariff is true. If petitioners transferred the plan and not just the traffic, petitioners would indeed remain jointly and severally liable for the transferred S&T obligations; but because 2.1.8 does not require actual S&T obligations to transfer on traffic only transfers; petitioners were not liable for the joint and several S&T obligations, as in a plan transfer; petitioners remained liable for the "actual" S&T obligations that remained on the CSTPII plans. AT&T's reference to "all obligations" here is obviously implying the inclusion of S&T obligations if the plan was transferred. "But for" AT&T's continuously changing positions and its gross misrepresentations this case would have been over a long time ago.

66) Under AT&T's bogus scenario, AT&T asserts that under a traffic only transfer, the actual S&T obligations transfer to the transferee and the transferor would retain only the non-controllable joint and several liability obligations. AT&T's absurd theory is unsupported by evidence and directly conflicts with the tariffs 2.1.8 E's joint and several liability provisions found here at exhibit AA; which clearly indicates that joint and several liability comes into play only on plan transfers; not traffic only transfers. The tariff conclusively shows AT&T is wrong.

67) Of course 2.1.8 E doesn't address joint and several liability on traffic transfers, because there is no joint and several liability, because the actual S&T obligations stay with the transferors plan! Additionally AT&T can not even assert that it was concerned with any joint and several liability provisions remaining with the CSTPII plans if petitioners did a plan transfer instead of a traffic only transfer.

68) AT&T would have known that transferors' plans were exempt from joint and several liability on plan transfers under 2.1.8 E(c) of the same exhibit AA. Specifically, as per a July 3, 1996 AT&T counsel Mr. Fash letter, here as exhibit BB, petitioners' fiscal year end was April 1st 1995 through March 31st 1996. Therefore, as per 2.1.8E (c), this commitment period was a

"commitment period after the commitment period that includes the Effective Date of the Jan 1995 transfer." It is undisputed tariffed fact that petitioners S&T obligations would have been waived because the effective date of the transfer, Jan. 1995, was within the prior commitment period (April '94 – March 31st '95); not the subsequent commitment period of April 1st '95-March 31st '96. The tariff is conclusive at 2.1.8(E): S&T do not transfer on traffic only transfers.

XII. Discontinuance of AT&T's 800 Customer Specific Term Plan II –With Liability

69) AT&T's tariff confirms S&T obligations are obligations of the AT&T Customer and petitioners of course as a plan owner continued to be a customer after the partial traffic only transfer. See

> Shortfall and/or termination liability are the **responsibility of the Customer**. (i.e. petitioners) (see section 3.3.1.Q bullet 10 here as exhibit D)

70) Now look at exhibit CC which is AT&T's provision for Discontinuance of CSTPII plans. The termination obligation of a customers plan is based upon the revenue commitment of the customers plan; further confirming that shortfall obligations can not be transferred away unless the entire plan is transferred away. Also notice that there is no liability unless **ALL SERVICE** on the customer plan is discontinued from the customers plan. Petitioners were experienced in traffic only transfers and knew exactly what they were doing by leaving accounts on the CSTPII plan so ALL Service was not transferred, thus the S&T obligations remained with petitioners plan as Mr. Fashs' letter explained at exhibit H, the plan structure remained in tact.

XIII. AT&T Concedes that Section 2.1.8 Was Not Explicit

71) Tariffs must be explicit:

> FCC Pg.10 footnote 65 : "Pursuant to Rule 61.2, titled "Clear and explicit explanatory statements, as in effect in Jan. 1995, in order to remove all doubt as to their proper application, all tariff publications must contain clear and **explicit** explanatory statements regarding the rates and regulations." 47 C.F.R. 61.2 (1994).

Also See Orloff v. FCC, 352 F.3d 415, 421 stating that:

"filed tariffs are pointless if the carrier can depart from them at will."

Also See [Title 47 Code of Federal Regulations Sec. 61.54 (j) Federal Composition of Tariffs]:

> Any special rule, regulation, exception or condition affecting a particular item or rate must be specifically referred to in connection with such item or rate.

The FCC's Counsel made this fact known during DC Oral Argument Page 28 Line 10.

> Mr. Bourne: And the Commission's rules require tariff provisions to be clear and explicit, and this Court has declined to enforce tariff provisions against customers in the past when they failed that rule. And the Commission found that that was the case here.

Nothing in the DC Circuit decision changed the fact that 2.1.8 was not explicit. In fact the statement made by the DC Circuit at exhibit C pg. 7 line 1.....

> This section on its face does not differentiate between transfers of entire plans and transfers of traffic, but rather speaks only in terms of WATS--- the telephone service itself.

...simply further substantiated that 2.1.8 was not explicit.

72) Here are just four examples of many regarding AT&T's concession to the NJ District Court that section 2.1.8 was not explicit:

> I) Plaintiffs, relied on the ground that AT&T had filed and withdrawn a tariff transmittal (No. 8179) that did no more than codify the existing requirements of AT&T's tariff (emphasis in original). AT&T June 2005 at p. 8.
>
> II) A subsequent clarification that 'all obligations' [in 2.1.8] include shortfall and termination obligations does not alter the breadth of the earlier version, (March 27, 2006 letter)
>
> III) AT&T explicitly and consistently maintained that the proposed change was a clarification. (AT&T's May 22nd 2006 brief pg 3)
>
> IV) AT&T submitted a proposed revision of section 2.1.8 that "would have" stated explicitly that liability for shortfall and termination charges was encompassed by the phrase "all obligations. (May 22nd 2006 pg. 2)

73) These AT&T statements are obvious concessions that at the time of the denied Jan 1995 traffic transfer AT&T's tariff was not explicit. In addition petitioners can cite statements from each Court and the FCC stating that 2.1.8 was not explicit. Clearly, 2.1.8 contains no such explicit reference to the transferring of S&T obligations on traffic only transfers in Jan 1995.

The undisputed fact here is that AT&T clearly admits 2.1.8 was not explicit in Jan 1995 and by law it must be explicit; therefore AT&T must be found in violation of its tariff, especially at this stage where this case has gone full circle.

XIV. AT&T Clarification Assertion Is Moot Anyway

74) Whether the language changes made to 2.1.8 in Nov. 1995 (exhibit P) were changes or clarifications is totally irrelevant because even if S&T obligations and liabilities were actually listed within 2.1.8 in Jan 1995 it would not be applicable to a traffic only transfers as AT&T counsel Carpenter agreed. Under 2.1.8 the new Customer assumes all obligations, only on what part of the service it accepts from the transferor, and reports to AT&T. S&T obligations and liabilities must stay with the transferors CSTPII plan which was not being transferred. AT&T claimed to the NJ District Court:

"The expressed language AT&T proposed to add in its November 1995 amendment appears as the final clause of subsection B of 2.1.8, which "clarifies" that "all obligations" includes "**any "applicable" shortfall or termination liability(ies)**".

75) First of all AT&T again admits that it needed to clarify its tariff and add the above clause which was not there in Jan 1995. Secondly, S&T obligations are totally different than actual liabilities. Liabilities only occur when there is actual failure to meet S&T obligations. This clause which covers the transferring of these liabilities was added prospectively to 2.1.8 in November 1995, 11 months after the traffic only transfer and only pertains to plan transfers, not traffic transfers as indicated by 2.1.8(E). Additionally, the actual liabilities as the tariff states must be **applicable** ie. present at the time of a plan transfer. S&T obligations and liabilities are the customers' i.e. (the CSTPII plan holder); these obligations and liabilities do not transfer on traffic only transfers. Even if liabilities transferred on traffic transfers, such liabilities were not currently applicable to petitioners' plans at the time of the transfer anyway. AT&T correctly stated to the FCC in its 2003 public comments:

"shortfall will hit when the **"plans"** are either discontinued or reach their

anniversary date."

76) At the time of the Jan 1995 traffic transfer the plans had already met its fiscal year commitment (exhibit HH) and had months left before the fiscal year end; so shortfall certainly could not have been a rational AT&T excuse not to transfer the selected traffic. Furthermore, these plans were still grandfathered pre June 17th 1994 plans capable of being discontinued (restructured) before fiscal year end to avoid liabilities. Even AT&T's counsel Charles Fash agreed that shortfall was not an issue in Jan 1995, (exhibit BB).

77) Even if the November 1995 prospective changes applied to traffic transfers and were actually clarifications not prospective changes, in petitioners' case termination liabilities were not applicable because petitioners' CSTPII plans were not being terminated. AT&T has already conceded so in its initial 1996 FCC Comments:

> "Termination liability" refers to payment of tariffed charges that **"apply"** if a term plan is discontinued before the expiration of the term. Section 3.3.1.Q 5 of AT&T's Tariff F.C.C. No. 2. Payment of termination charges is not an issue here.

78) The FCC Ruling clearly understood that termination liability is no issue at exhibit B pg.8 fn.56) Therefore, even if this last 2.1.8 clause was deemed a clarification which would have used the tariff symbol "T" and not a change "C" (as indicated by the Federal Composition of Tariffs Law exhibit Q), this last clause had no affect on the Jan 1995 traffic only transfer at issue. The actual S&T contractual obligations/liabilities, (as previously evidenced per 3.3.1.Q bullet 10, exhibit D), must stay with the transferor's plan. Under the tariff, S&T plan obligations/liabilities do not transfer on traffic transfers; they are obligations of the transferor's plan. AT&T's S&T liabilities "clarification" assertion was not applicable to petitioners even if such a clause was included in 2.1.8 in Jan. 1995. However S&T obligations never transferred on traffic only transfers that is why AT&T's transfer provision in 2/23/02 exhibit J shows S&T may transfer not must transfer. S&T must transfer on **plan** transfers. This is why AT&T has absolutely no evidence to support its bogus position. AT&T has simply deceived the FCC and each Court.

XV. FCC Oct 1995 Order -Grandfathers 2.1.8 & Pre 6/17/94 Plans Through Oct 1996. Restructures are Not New Plans Until the Three Year Term Ends

79) Attached as exhibit DD, is the relevant excerpt from an FCC Order Adopted October 12, 1995 and Released October 23, 1995 that addressed AT&T's grandfathering petitioners with respect to Discontinuance With or Without Liability (Pre June 17th 1994 Issue). AT&T and petitioners both agree that CSTPII plans that were issued prior to June 17th 1994 could be discontinued; also referred to as a restructure or upgrade, prior to their fiscal year end to avoid S&T penalties. The FCC's Oct 2003 Declaratory Ruling correctly stated that petitioners' plans were ordered prior to June 17th 1994.pg 2 para 2:

> 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.

FCC Oct 2003 Declaratory Ruling pg 14 n.94 also stated:

> 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.

80) It is not a disputed fact that all plans were pre June 17th 1994 issued. Also here at exhibit EE is an AT&T discontinued, (restructured) upgraded contract, indicating the 3 year option (option B) revenue commitment. Notice: 1) the "upgrade" check box was selected not the "new plan" checkbox, and 2) the upper right corner shows existing RVPP ID used; a new RVPP ID was not being assigned to make it a new plan. What was in dispute? Answer: At what point do the plans lose their grandfathered status? This requires an FCC tariff interpretation. The FCC stated it was a disputed fact regarding whether the plans "may **never** have shortfall charges imposed". Petitioners are no longer asking the FCC to declare that the 3 year commitment plans may never have shortfall imposed. Petitioners ask for relief regarding the following non disputed facts: AT&T denied the traffic transfer in Jan 1995 based upon its position that petitioners' pre June

17th 1994 plans lose its grandfathered status when restructured after June 17th 1994, even if it is only one year into its three year plan commitment.

81) It is not disputed that petitioners' plans were still classified as pre June 17th 1994 at the time of the traffic transfer because the plans were not restructured between June 1994 and the Jan 1995 traffic transfer. It is not a disputed fact in Jan 1995, that the plans could still be restructured during 1995, and in fact were, which resulted in plans with fiscal year end S&T true-up dates in 1996, as per AT&T counsel Fash exhibit BB. AT&T then agreed under FCC Order in Oct 1995 to further grandfather petitioners' plans. Therefore, based upon undisputed tariff facts and tariff language, the FCC should recognize that the plans original commitments would have been completely extinguished by the end of its 3 year commitments which ran into 1997 even without relying upon the newly introduced evidence of the FCC Oct 1995 Order; thus making AT&T's claim of being defrauded of potential S&T charges in Jan 1995 moot. AT&T's position is that a three year commitment, pre June 17th 1994 lost its grandfather status in the first year. AT&T's position is clearly in violation of its tariff as the CSTPII plan is grandfathered and the plan is 3 years. See exhibit FF which are the AT&T tariff discontinuation (restructuring) provisions:

> The Shortfall Charge will not apply in connection with the discontinuance of a CSTPII that was ordered on or prior to June 17th, 1994.

82) It does not state that AT&T will only allow the 1st year of a 3 year CSTPII. It is the whole CSTPII plan, which was 3 years. Even if AT&T interpreted its tariff as: A pre June 17th 1994 plan becomes a post June 17th 1994 plan after one restructure in the first year of the three year plan, AT&T still would have conceded that no traffic would have been needed for 1995.

83) Petitioners were still a CSTII plan when restructuring therefore the CSTPII plan is grandfathered. In fact see page 5 of exhibit FF at (c): "AT&T will provide a credit" on shortfall if the customer does not meet first year shortfall commitment. AT&T's position is also clearly in violation of 201(b) of the Act because it is not just and reasonable. 201(b): Charges, practices,

classifications, and regulations "shall be just and reasonable." AT&T's Fash admits in his July 3rd, 1996 letter that "**shortfall charges could not have been the subject of litigation**" at the time of the Jan 1995 traffic transfer because the plans "did not expire until March 31, 1996" (exhibit BB)

84) The District Court, in its non vacated May 1995 Decision made these relevant statements.

> 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.
>
> 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.

85) Exhibit GG are excerpts of audio tapes (which AT&T and the District Court has a copy) from 13 AT&T managers stating their tariff interpretation was that the plans were forever immune from S&T penalties; however petitioners are only asking the FCC to declare the non disputed fact that the plans were grandfathered for its 3 year commitments; not forever. Also see tariff exhibit CC:

A CSTPII expires when the three year term ends.

86) The CSTPII plan was grandfathered, (exhibit FF) and the CSTPII ended in three years not one. The tariff language is clear as can be and it favors at least 3 years of grandfathering. Also it is an undisputed fact that when the Jan 1995 traffic transfer was attempted petitioners' plans had already met its fiscal year revenue commitments which ended during 1995; See exhibit HH pages 1-3, showing plans were $700,000+ per month over commitment. Therefore, even if the traffic was transferred from petitioners to PSE, the CSTPII plan commitments were already met, even without having to restructure. Also the FCC's ruling pg 7n.51 noted the contract to get the traffic back within 30 days to meet future commitments, see page 4 of exhibit HH. How could AT&T possibly suspected fraud when AT&T held all the cash and the plans commitments were already met. It was a farce not to provide additional discounts. Additionally, AT&T inadvertently

supported petitioners restructuring position in its case vs. competitor aggregator 800 Services, Inc.

AT&T stated:

> After that gambit failed, 800 Services then requested on July 21st, 1995 that AT&T permit 800 Services to "restructure" its CSTPII plan pursuant to Tariff 2. AT&T outlined the terms and conditions specified under tariff No. 2 governing such a request, (A157), and advised 800 Services to notify it if 800 Services wished to proceed. 800 Services never attempted to proceed with this request, (A137), and Okin testified that to his knowledge, 800 Services "did not qualify for a restructuring" of its plan under the terms of the governing tariff.

87) AT&T stressed that 800 Services Inc., did not qualify for a restructuring because AT&T stated within its brief that 800 Services subscribed to new service post June 17th 1994. Conversely, in plaintiffs' case, the FCC has confirmed the undisputed fact hat petitioners' plans were subscribed to prior to June 17th 1994 and "qualified for restructuring" of its grandfathered plans, therefore the plans were immune from S&T charges. AT&T clearly recognized that there would have been a benefit to restructuring if this other aggregator qualified as petitioners did. The fact that the Pre June 17th 1994 tariffed grandfathering provision is 6 months prior to the Jan 1995 denied "traffic only" transfer, confirms that AT&T couldn't have even speculated that petitioners were intending to defraud AT&T. AT&T's claim of fraudulent use was fraudulent abuse its tariff provisions against petitioners.

88) Additional evidence that demonstrates AT&T's "real" position that its S&T charges were bogus was AT&T's position to the IRS and Florida Revenue Department, that its shortfall charges imposed in June 1996 were bogus. If the shortfall charges were legitimate AT&T, as an entrusted taxing agent would have been obligated to charge, collect and remit the 3.5% federal excise taxes and Florida 7% sales taxes on the end-users toll free bills in June of 1996. Florida law is absolutely clear at 212.05 (2) (a):

> Gross receipts from telecommunication services include the gross receipts for all telecommunication services of whatever nature.

89) If AT&T truly believed that the shortfall charges were actually legitimate in this case it wouldn't have failed to pay the (10.5%) federal and state taxes on the $131 million its manager Carl Williams certified to the District Court was due AT&T in June of 1996. AT&T can not take a position to one Federal/State Agency (IRS& Florida) and the exact opposite position to another federal agency, the FCC. AT&T already took the position that the shortfall and termination charges were bogus thus no excise and sales taxes should be applied.

90) More evidence showing AT&T "real" position that its S&T obligations were bogus was AT&T's settlement with CCI (one of the original 5 plaintiffs'). Despite AT&T being under non disclosure with CCI, AT&T announced that its settlement included a cash payment plus the waiver of all the S&T charges. CCI 's president Mr. Shipp also stated that the AT&T-CCI settlement agreement included a provision for CCI's president Mr. Shipp to cooperate with AT&T to help AT&T defend itself against the remaining 4 petitioners. If AT&T actually believed that its actions were in accordance with its tariffs why in the world would AT&T ever waive all these "so called" legitimate S&T charges plus pay CCI to boot? AT&T described CCI as an asset less shell; hardly a threat. Anyone can see that AT&T knew it was guilty as could be.

XVI. AT&T's Position that CSTPII Plans Were "Not New" So As to Prohibit LSTP Enrollments, Also Confirms Restructures Are Not New Plans - The Section 2.5.7 Issue

91) Section 2.5.7 Waives S&T Obligations "Due To Circumstances Beyond the Customers Control", see exhibit II. AT&T denied petitioners traffic transfer based upon its tariff interpretation that a restructured CSTPII plan became **"new"** post June 17th 1994 plans only one year into its 3 year commitment. However, AT&T simultaneously declared that a restructured CSTPII plan was **"not new"** and prohibited petitioners from enrolling into its CSTPII, without penalty, AT&T direct customers which were on their own (Location Specific Term Plan –LSTP). See page 1 of exhibit JJ which allows for the end-user a LSTP penalty waiver if the CSTPII is a new plan.

Discontinuance of the former term plan (LSTP) and initiation of the new plan must be done concurrently.

92) See page 2 of exhibit JJ stating that the restructured plans were not new so AT&T could prevent penalty free access to its customers. See pg 3 of exhibit JJ showing AT&T tariff pages showing when you have a new CSTPII you need a new RVPP; and option B CSTPII plans are 3 year commitments as were petitioners'; and customers with existing RVPP do not have to subscribe to a new RVPP--- so they stay pre June 17th 1994 grandfathered, but can not enroll AT&T LSTPII customers without penalty. AT&T and the District Court have these audio taped statements of 3 AT&T managers:

Mr. Freeberg: I am saying that the corporation is stating the tariff indicates that a restructure is not a new plan, that it is continuous.
Lisa Hockert: Restructure is not a new plan period. I take my direction from Rich Kurth directly.[2]
Maria Nasciemento: And it's saying that you have to have a new CSTP plan to bring in the LSTP's to. You don't have a new one. Restructured plans are one thing. New plans is another.

93) See exhibit KK, is the undisputed fact that 2.5.7 was requested due to AT&T's conflicting interpretation that restructures were simultaneously new (to become post June 17th 1994 plans) but also not new (to prevent end-users on LSTP's to enroll penalty free on petitioners CSTPII, to force petitioners into shortfall.) Basically AT&T wanted its cake the icing and eat it too, all by itself. The FCC needs to declare AT&T's simultaneously interpreting a restructured plan as both being a new and a "not new" plan was a Circumstance Beyond petitioners' control. If the FCC interprets a restructure as an existing old plan, petitioners avoid S&T under pre June 17th 1994 discontinuance provisions. If the FCC interprets restructures as new plans then S&T obligations are waived as per 2.5.7. It only makes sense that a restructure is not considered a new plan.

XVII. The Undisputed Increase in Sales Margin Applied to the Tremendous Increase in Traffic on CT-516 Coupled with the Automatic Decrease in CSTPII Commitment, Would Easily Have Paid for CSTPII Shortfall

[2] Richard Kurth was the head of a department at corporate HQ in which AT&T referred to as its "Product House," which was in charge of development of AT&T's tariffs.

94) Even if the CSTP II plans 1) hadn't already made its commitment, 2) weren't pre June 17th 1994 grandfathered 3) S&T waived per 2.5.7., or 4) waived per the FCC Oct 1995 Order, consider the undisputed fact that petitioners succeeded in being the largest aggregator owning 25% market share out of 100 toll free aggregators, exhibit HH. Petitioners achieved this with a total discount of 28%.There was only enough compensation to have one level of sales people and petitioners' could reasonably only interact with 50 direct sales contractors. CT-516, with a 66% discount, would have enabled at least a 3 time increase of sales contractors with even more money left over for corporate. CT516 would have enabled 50 sales directors who each supervised 50 managers, who each supervised 50 sales representatives, i.e. (12,500 sales contractors'). The 2,500 time increase in sales people would have led to an enormous addition in traffic added. Additionally, the CSTPII plans commitment when restructuring decreased each year by 33% even if there was no traffic on the CSTPII plan; remember time, not usage, retired AT&T commitments on pre June 17th 1994 restructured CSTPII's. The Traffic would have increased while the commitment would have automatically decreased. This combination, as an additional option, enabled the CT-516 income to more than pay the CSTPII shortfall. Allowing AT&T to use its fraudulent use provisions to speculate as to what the future may have held on legitimate business transactions is absurd. The traffic only transfer was not fraudulent.

XVIII. AT&T Discriminates As to Which Customers Receive Contract Tariffs

95) Despite petitioners having the highest industry usage, see exhibit HH, AT&T refused to provide petitioners with a contract tariff and forced petitioners to transfer the traffic or continue to lose its customer base. Here as exhibit LL is a certification from AT&T's Mr. Higginson that AT&T gave deeply discounted contract tariffs to many aggregators, including PSE and Tel Save. Mr. Higginson did not explain that these two aggregators had to take legal action to get their CT 516 which was only a $4 million per year commitment, when petitioners were over $90 million per year at it peak late 1993-early 1994. The toll free traffic was $54.16 million, certified by

AT&T's Carl Williams, at the time of the Jan 1995 traffic only transfer. Here at exhibit MM are three of many letters from petitioners asking for a contract tariff, but AT&T refused each request. AT&T also refused petitioners' requests for CT's that were within 90 day public offerings. AT&T's brief to the Third Circuit stated that it was allowed to discriminate.

XIX. AT&T Fails 15 Day Statute of Limitation Requirement of 2.1.8

96) The non vacated District Courts first decision shows the undisputed facts that AT&T was in violation of 2.1.8's 15 day statute of limitation requirement; a fact AT&T has never and can not dispute; see section 2.1.8(c); exhibit B page 6 n46. The District Court stated in regards to properly completing the AT&T TSA form:

> The Inga Companies and CCI followed the transfer section of the tariff to the letter, they ought not now be forced to deal with a unilateral change of the rules by AT&T.
>
> Plaintiffs can not be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. Rules should not be changed in the middle of the game; and certainly not without notice.

97) It is undisputed: Petitioners' followed the AT&T transfer form to the letter and the DC Circuit correctly decided that 2.1.8 allows traffic only transfers. The AT&T Jan 1995 TSA 's, exhibit F pgs 4-13, do not state anything regarding whether to transfer S&T obligations or not. It was labeled as a traffic only transfer as opposed to a plan transfer, and AT&T had always (prior to Jan. 1995) transferred traffic only without transferring the plan and its associated S&T obligations. AT&T was simply responsible for acting in accordance with its tariff. The "non issue" regarding whether S&T obligations transfer (while favoring petitioners position anyway), is a moot issue due to AT&T's failure to adhere to 2.1.8's statute of limitation requirement. If the FCC did not recognize 2.1.8's statute of limitations requirement it would open the FCC doors to untold cases that fell to such a provision. It would turn established law completely on its head.

XX. AT&T Uses Illegal Remedy in June 1996 in its Application of Alleged S&T Penalties

98) The following FCC quotes from its 2003 Ruling and to the DC Circuit state its position:

> We also conclude that AT&T did not avail itself of the remedy specified in its tariff for suspected fraud and thus can not rely upon the fraud sections of its tariff to justify its refusal to move the traffic. (FCC Declaratory Ruling pg 14 para 21)

> In essence, the Commission ruled that AT&T had invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services. *See AT&T v. Central Office Telephone Co., 524 U.S. at 222-24.* As this Court (DC Court) recently noted, "filed tariffs are pointless if the carrier can depart from them at will. Orloff, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine the regulatory scheme" and give AT&T the power to control the economic fates of its customers here, the resellers. The Commission's holding on this issue thus is both consistent with the law and reasonable. (FCC brief to DC Circuit pg. 25 para 2)

99) AT&T not only committed the illegal remedy outlined within its 2003 decision; AT&T also committed an illegal remedy in applying its alleged S&T penalties. The tariff states"

> Shortfall and/or termination liability are the responsibility of the Customer. (AT&T's tariff section 3.3.1.Q bullet 10 here as exhibit D)

> "For billing purposes", such penalties "shall reduce any discounts" apportioned to the individual locations under the plan. (section 3.3.1.Q bullet 10)

AT&T's violated its tariff by initially applying to all petitioners' end-users its alleged S&T penalties, instead of applying them initially to petitioners'. Additionally, the tariff only permitted for billing purposes to reduce the discount; not apply penalties in amounts far exceeding the removal of the discounts. AT&T was not allowed to bill these end-users as the FCC's Ruling (pg. 7 n52) stated "these end-users did not choose AT&T as their primary interexchange carrier".

100) Exhibit NN shows end-user with $66.02 usage receiving petitioners' $13.21 credit (20% discount). The tariff allows for billing purposes to reduce the $13.21 discount. The end-user was absolutely whacked with a $3,959.03 penalty! Needless to say this led to incredibly irate end-users who 1) called the AT&T number on the bill 2) AT&T then blamed petitioners, 3) AT&T took petitioners end-users back to AT&T at higher rates.4) Petitioners business was in effect immediately destroyed despite the issue of whether these charges were even legit was pending. It's one thing losing a $13 discount as per the tariff; it's another issue applying almost $4 grand!

Obviously the illegal remedy ruined all goodwill. AT&T not only did this in June 1996 but then did the same thing in March 1997 to other CSTPII plans because it worked so well.

XXI. AT&T Discriminated As To Which Aggregators it Allowed Traffic Only Transfers

101) District Court Judge Bassler during oral argument recognized that thousands of traffic only transfers were done like petitioners both before and after the Jan 1995 denied traffic only transfer. Judge Bassler explains that even if AT&T won on the 2.1.8 issue it was apparent that AT&T discriminated against petitioners and AT&T counsel MR. Guerra agreed: Page 20 line 22

> The Court: What the FCC is saying there, there's a question of unlawful discrimination. They've already decided the question of interpretation, but the plaintiffs put another issue in front of them. They said to the extent we're supposed to transfer all these obligations under 2.1.8. AT&T has allowed thousands of other transfers to go through where they didn't require that. That's a form of discrimination under Section 203.
> MR. GUERRA: The FCC says, we're not going to resolve discrimination claims here because A: We don't need to; B, it's inefficient because termination is a fact question and you can litigate those fact questions.
> THE COURT: Let's assume it goes back to the agency and it agrees with your position. Still going to have this issue of discrimination in this Court. Right?
> MR. GUERRA: You would, your Honor. I believe you would.

102) S&T obligations were never mandated to be transferred on traffic only transfers as AT&T's Transfer form dated 2/23/02 (7 years after the denied Jan 1995 traffic only transfer) still did not mandate S&T obligations must transfer. It said may transfer. S&T obligations only transfer when there was a plan transfer; see exhibit J.

XXII Relief Sought - The FCC Is Requested to Issue Separate but Consolidated Declaratory Rulings That AT&T Violated its Tariff and Hence the Communications Act:

1) By not transferring the traffic specified in Jan. 1995 under section 2.1.8.

2) Due to section 2.1.8 not having explicit provisions.

3-A) By violating 201(b) for its unjust and unreasonable interpretation of its discontinuation (restructure) provision on pre 6/17/94 plans, asserting the pre become post 6/17/94 when restructured prior to the 1st yr of a 3 yr. term. **3-B)** And/Or for violation of 203 that indicates the CSTPII plan is at least grandfathered for three years after the June 17th 1994 substantive change.

4) By not adhering to the 15 day statute of limitations requirement of 2.1.8. Once 2.1.8 was determined as allowing traffic only or plan transfers the question of which obligations is moot.

5) By not adhering to section 3.3.1.Q bullet 10 by using an illegal remedy: A) Initially applying the charges to the end-users instead of its customer the aggregator and B) inflicting shortfall charges upon end-user locations in excess of the end-users discounts.

6) The FCC should declare that S&T obligations should have been waived under 2.5.7. (Circumstance Beyond Customers Control) because of AT&T's interpretation that a discontinuance (restructure) was simultaneously both a new plan and not a new plan.

7) By engaging in discrimination under 202 of the Act by not providing petitioners' with a contract tariff despite qualifying for it and also refusing all 90 day public offerings.

8) As noted by the District Court by engaging in discrimination under 202 of the Act for allowing thousands of other AT&T customers to transfer traffic only, both prior to and well after the Jan 1995 denied traffic transfer, but not allowing petitioners.

9) By violating 201(b) for unjust and unreasonable use of its fraudulent use provisions when the record indicates that the fiscal year commitments were met, and the traffic could be taken back.

10) Discrimination- On same transaction taking the position with co-petitioner (CCI) that the S&T charges were **bogus** and therefore needing to pay CCI, while asserting petitioners S&T charges were **legit.**

11) The FCC should again declare that AT&T used an illegal fraudulent use remedy by permanently denying the traffic only transfer instead of temporarily suspending service and therefore AT&T can not rely upon such charges even if the were found legitimate.

12) For violating 201(b) for unjust and unreasonable position that its S&T charges were legitimate for petitioners but simultaneously taking the position to the IRS and Florida Revenue Department that the S&T charges were totally bogus.

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September 23rd 2006

Respectfully Submitted,

One Stop Financial, Inc
Group Discounts, Inc
Winback & Conserve Program, Inc
800 Discounts, Inc.

By: _____
Frank Arleo
Its' Attorney

Exhibit A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

COMBINED COMPANIES, INC., and WINBACK & CONSERVE PROGRAM, INC., ONE STOP FINANCIAL, INC., GROUP DISCOUNTS, INC. and 800 DISCOUNTS, INC., Plaintiffs, v. AT&T CORP., Defendant.	Civ. No. 95-908 (WGB) **ORDER**

This matter having come before the Court on the motion of Plaintiffs, Winback & Conserve Program, Inc., One Stop Financial, Inc., Group Discounts, Inc. and 800 Discounts, Inc., to lift the stay; and

The Court having considered the submissions of the parties and oral argument; and

For the reasons set forth in the Opinion issued this day; and

For good cause shown;

It is on this 31st day of May 2006 ORDERED that Plaintiffs' motion to lift the stay is **DENIED.**

IT IS FURTHER ORDERED that the Clerk of the Court keep this

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.