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| In the matter of : |) | |
| 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 |) | |
| |) | Formerly CCB/CPD 96-20 |
| One Stop Financial, Inc. |) | |
| Group Discounts, Inc. |) | |
| Winback & Conserve Program, Inc. |) | |
| 800 Discounts, Inc. |) | |
| |) | |
| |) | Petitioners |
| and |) | |
| |) | |
| AT&T Corp. |) | |
| |) | Respondent |

**COMMENTS OF AT&T IN OPPOSITION TO
REQUEST FOR DECLARATORY RULINGS**

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INTRODUCTION

Despite petitioners' complicated and confusing presentation, their petition raises a very simple issue. That issue is whether the word "all" in an AT&T tariff can be interpreted to mean "*only some*," as petitioners implausibly contend, or whether it means "all." The word appeared in § 2.1.8 of AT&T Tariff No. 2, which prescribed when an aggregator of AT&T's WATS could transfer virtually all of its end-user traffic to another aggregator. At the time of the events giving rise to this proceeding, § 2.1.8 provided that:

WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, *provided that . . .* [t]he new Customer notifies [AT&T] in writing that it agrees to assume *all obligations* of the former Customer at the time of the assignment or transfer.

Exh. 1 (attached hereto) (emphases added).¹ To resolve the petition, the Commission must decide whether a proposed transfer of virtually all end-user WATS traffic, without a transfer of "all obligations" of the transferor, complies with § 2.1.8.

Petitioners sued AT&T in federal district court after it refused to process such a transfer in 1995. Following a primary jurisdiction referral, the Commission ruled that § 2.1.8 applied only to transfers of entire WATS plans, and thus did not govern when an aggregator sought to transfer end-user traffic without transferring the plan itself. On appeal, the D.C. Circuit reversed. It held that § 2.1.8 applies to transfers of traffic as well as entire plans. But, because the Commission had not addressed the question, the D.C. Circuit declined to decide in the first instance whether a proposed transfer of traffic in which the transferee declined to accept the

¹ Because petitioners have failed to provide the Commission with many of the relevant documents, including a copy of § 2.1.8 at the time of the proposed transfer, AT&T has attached these materials to this opposition. To avoid confusion, AT&T uses numbers, rather than letters, to designate these attachments.

former customer's obligations to pay "shortfall" and "termination" charges complied with § 2.1.8's requirement that the transferee accept "*all obligations* of the former Customer."

After the D.C. Circuit's decision, petitioners pointedly did not return to the Commission for resolution of the narrow issue the Court had left open. Instead, they sought to re-institute proceedings before the district court, arguing that the D.C. Circuit had ruled in their favor, and that the question it left open was a "red herring." The district court saw through this evasive tactic, and directed petitioners to seek a determination from the Commission whether a transferee's refusal to accept all of a transferor's obligations satisfies § 2.1.8.

Because the answer to that question is obviously "no," petitioners resort to the tortured reasoning, logical fallacies, internal contradictions and *ad hominem* attacks that pervade their submission. They argue, for example, that the Commission has already ruled that the phrase "all obligations" does not include the obligations to pay shortfall and termination charges. But, because it deemed § 2.1.8 wholly inapplicable to traffic transfers, the Commission did not determine—and indeed, could not have determined—what the phrase "all obligations" meant. Flatly contradicting themselves, petitioners elsewhere argue that the Commission did not actually understand § 2.1.8, and thus mistakenly failed to see why the phrase "all obligations" did not include shortfall and termination obligations. Similarly, petitioners self-contradictorily claim that the D.C. Circuit ruled in their favor, but that it, too, did not understand § 2.1.8. And petitioners distort, or simply misinterpret, statements by virtually every AT&T lawyer who has responded to their claims in a vain and transparently improper attempt to override the plain language of the tariff through supposed "concessions."

These and petitioners' assorted other arguments are entirely baseless. The phrase "all obligations" necessarily encompasses the transferor's obligations to pay shortfall and termination

charges. As a result, petitioners' proposal to transfer virtually all of their traffic without transferring these obligations was plainly invalid. Nor is there any merit to their fallback argument that they had "pre-June 1994" plans that were not subject to § 2.1.8's "all obligations" language. The remainder of petitioners' meritless claims—*i.e.*, that AT&T improperly refused to permit petitioners to obtain more favorable contract tariffs, improperly allowed other aggregators to violate § 2.1.8, or improperly sought to collect petitioners' shortfall charges directly from end-users—are indisputably outside the scope of the court's referral.

To assist the Commission in sorting through the maze of petitioners' claims and arguments, AT&T first explains the history of the various proceedings that dictate the scope of the primary jurisdiction referral and the narrow question properly now before the Commission. AT&T then explains why petitioners' various arguments with respect to that question fail. Finally, AT&T explains why the miscellaneous issues petitioners seek to raise are outside the scope of the referral, and need not—indeed, cannot—be addressed by the Commission.

BACKGROUND

At the time of the events that give rise to this dispute, AT&T provided inbound Wide Area Telecommunications Service ("WATS")—*i.e.*, 800 service—under Tariff No. 2, which it filed with the Commission. Under this tariff, AT&T provided discounts to customers who committed to certain traffic volume for a specified period of time. These volume and term commitments were the essential *quid pro quo* for the discounted rates. Accordingly, the tariff provided that if the customer failed to meet its revenue commitments, the customer was obligated to pay "shortfall" charges to make up the difference. Similarly, if the customer discontinued its service plans prematurely, Tariff No. 2 imposed an obligation to pay termination charges.

Petitioners were non-facilities-based aggregator/resellers owned by Alfonse Inga. Petitioners subscribed to AT&T's Customer Specific Term Plan II ("CSTP-II"), one of the volume discount plans offered under Tariff No. 2. As AT&T's customers on nine CSTP-II plans, petitioners were required to satisfy, among other things, the prescribed minimum revenue commitments on each of the CSTP-II plans.

This dispute arose when petitioners proposed a two-step transfer that had the evident purpose of evading the minimum revenue commitments and associated shortfall and terminations liabilities. Under the two-step transfer scheme, petitioners would first transfer all of the plans (with all associated traffic) to Combined Companies, Inc. ("CCI"). CCI would then transfer all of the revenue producing locations and virtually all of the traffic associated with those plans, but not the plans themselves or the plans' associated obligations, to Public Service Enterprises of Pennsylvania, Inc. ("PSE").

AT&T refused to process the two-step transfer. With respect to the second transfer, AT&T believed there was substantial risk that the "traffic only" transfer would result in CCI (which was a new company) not being able to satisfy its obligations under the tariff, because CCI would no longer have the revenue stream (from the traffic) to satisfy its obligations. As AT&T later told the district court, AT&T "refused to permit that transfer precisely because PSE, the 'new' customer in the transfer, did not assume 'all the obligations' of the 'old' customer, CCI," in violation of § 2.1.8 of the tariff, and because the tariff allowed AT&T to deny transfers where fraudulent evasion of charges could otherwise result. *See* Exh. 2, AT&T's March 30, 1995 Post-Hearing Mem. at 7-8 & n. 7.

Petitioners, CCI, and PSE sued AT&T, seeking to compel it to execute the transfer requests. On May 19, 1995, the district court found that the transfer of the plans by petitioners to

CCI satisfied all tariff requirements and ordered AT&T to process the transfer. The court held, however, that the proposed transfer from CCI to PSE presented tariff construction issues that were within the primary jurisdiction of the Commission. It therefore broadly ordered that “the issue of the transfer of [petitioners’ CSTP II] plans and/or their traffic as between [CCI] and [PSE] and its compliance or not with the terms of the governing tariff be referred to the [Commission] for adjudication under the doctrine of primary jurisdiction.” *See* Exh. 3, May 19, 1995 Prelim. Inj. (hereafter the “1995 Referral Order”) at 2.

In response, neither CCI nor petitioners filed any proceedings at the Commission. Instead, in early 1996, petitioners sought reconsideration, arguing that AT&T had not diligently pursued the matter before the Commission.² The court then enjoined AT&T to recognize the proposed transfer of traffic from CCI to PSE pending the Commission’s ruling on the referred matters, on the basis that AT&T had not pursued the issue at the Commission. On appeal, however, the Third Circuit vacated the injunction. Noting that “AT&T objected to the proposal because the [petitioners] did not intend to transfer their potential liability for shortfall and termination charges, which form part of their contracts with AT&T,” *see* Exh. 4, May 31, 1996 Op. at 1, the Third Circuit held that the district court had “correctly referred th[is] question under the doctrine of primary jurisdiction.” *Id.* at 7. The Court held that it was incumbent on petitioners to institute appropriate proceedings at the Commission. *Id.* at 7-8.

In July 1996, petitioners filed a petition with the Commission seeking rulings on several issues, including a finding on whether:

[a]t the time of the attempted transfer . . . in or about January 1995, by CCI to PSE, of the end user traffic under CSTP-II plans held by CCI, neither Section

² Rather than file a petition, petitioners relied on the Commission to adjudicate the tariff interpretation issues in the context of an AT&T filing to revise portions of Tariff No. 2. After AT&T withdrew its proposed revision, petitioners moved to reconsider the May 1995 decision.

2.1.8 of AT&T's Tariff F.C.C. No. 2, nor any other provision of AT&T's Tariff . . . prohibited CCI from transferring the tariff without also transferring the CSTP-II plans with which the traffic was associated.

See Exh. B, Commission Mem. Op. and Order (Oct. 17, 2003) ("Commission 2003 Decision") at ¶ 8 (alteration and omissions in original). In March 1997, the Court stayed this matter pending final disposition of any matters before the Commission. See Exh. 5, Mar. 12, 1997 Order.

In its October 17, 2003 decision, the Commission held that AT&T's refusal to process the transfers violated the tariff. The Commission held, first, that "section 2.1.8 of AT&T's Tariff did not address—and therefore did not preclude or otherwise govern—the movement of end-user traffic from one aggregator to another, as CCI and PSE sought to effect." Commission 2003 Decision ¶ 9. Instead, the Commission ruled, § 2.1.8 addressed only "the wholesale transfer of 'WATS,'" which the Commission interpreted to mean the plans themselves. *Id.* CCI, however, "did not seek to transfer the CSTPII/RVPP plans wholesale to PSE," and the Commission concluded "that section 2.1.8 of the tariff did not address or govern the movement of traffic without a plan." *Id.*

The Commission then addressed AT&T's claim that, because the transfers would result in fraudulent evasion of shortfall charges, AT&T was entitled to deny the transfer under the tariff's anti-fraud provisions. The Commission held that the tariff did not permit AT&T to remedy fraud in this manner. *Id.* ¶¶ 10-13. The Commission observed that, even though CCI, "but not PSE, would continue to have been responsible for any shortfall obligations," AT&T's concern that CCI "would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question." *Id.* ¶ 11.³ In stating that PSE would not assume responsibility for shortfall obligations, however, the Commission was simply describing

³ In so ruling, the Commission did not consider tariff language that authorized AT&T to prevent the fraud by refusing to provide PSE the new service that it was requesting through the transfer.

the transfer *as proposed*. Having just ruled (one paragraph earlier) that § 2.1.8 did not apply to this transfer at all, the Commission's statement was manifestly *not* a ruling about what obligations PSE would have been required to assume if § 2.1.8 did apply, as petitioners subsequently argued to the district court (and now argue in their new petition).

On appeal, the D.C. Circuit granted AT&T's petition for review and, in a unanimous opinion by then Circuit Judge, now Chief Justice, Roberts, held that a transfer of traffic without the associated plans was governed by § 2.1.8. Exh. C, *AT&T v. FCC*, No. 03-1431, slip op. at 10 (D.C. Cir. Jan. 14, 2005) ("D.C. Circuit Opinion"). The D.C. Circuit held that "any transfer of WATS required PSE to assume CCI's obligations," *id.* at 7 (emphasis added), stating that it would "eviscerate[]" the purpose of § 2.1.8 to allow PSE to acquire "nearly all services—all the benefits—associated with [the] CSTP plans" and to leave behind "CCI's obligations—the burdens under the plans." *Id.* at 9-10. At the same time, the Court stated that it would "not decide precisely which obligations should have been transferred in this case, as the question was neither addressed by the Commission nor adequately presented to us." *Id.* at 11. Although the Court left the issue open, it stressed the categorical nature of tariff's requirement "that new customers assume 'all obligations of the former customer.'" *Id.* at 11 n.2.⁴

In response to this decision, petitioners did not ask the Commission to address the issue of tariff interpretation that the D.C. Circuit explicitly left open. They did not do so even though the question referred to the Commission—*i.e.*, whether the proposed transfer was in "compliance

⁴ The D.C. Circuit did not reach the Commission's grounds for rejecting AT&T's alternative claims based on the antifraud provisions of the tariff. The Commission did not defend this aspect of its decision on the merits, claiming only that it had not had an opportunity to consider the language of the tariff that authorized AT&T to prevent fraud by refusing to provide PSE the new service that it was requesting through the transfer. In the unlikely event that the Commission does not hold that AT&T's conduct was authorized by § 2.1.8 of the tariff, it can and should address the alternative claims based on the tariff's antifraud provisions.

or not with the terms of the governing tariff,” *see* 1995 Referral Order at 2—plainly cannot be resolved without a determination of whether § 2.1.8’s “all obligations” requirement encompassed CCI’s obligation to pay shortfall or termination charges. Instead, petitioners filed a series of papers in the district court seeking to re-start the proceedings there. In these submissions, petitioners falsely claimed that “the only issue referred to” the Commission was whether § 2.1.8 permits the transfer of traffic without a transfer of the plan itself, that the “D.C. Circuit has conclusively decided that issue in [petitioners’] favor,” and that the Commission’s “2003 opinion compels the conclusion that the entire ‘obligations’ issue”—*i.e.*, the meaning of § 2.1.8’s “all obligations” requirement—“is nothing more than a red herring aimed at further delaying this case.” *See* Exh. 6, Br. in Supp. of Pls.’ Mot. to Lift Stay at 9-10 (emphasis petitioners’). *See also id.* at 12 (“the question of which obligations are assumed on traffic transfers without the plan has already been answered by the FCC and there is no reason to return to the FCC for a ruling on this non-issue”). Through these and other demonstrably inaccurate statements, petitioners sought to avoid returning to the Commission for resolution of the critical question of tariff interpretation that the D.C. Circuit left open.⁵ Ultimately, however, this gambit failed. The district court denied petitioners’ motion to lift the stay and their subsequent motion for reconsideration.

⁵ *See also* Exh. 7, Letter of Mar. 8, 2006 from Frank P. Arleo to Hon. William G. Bassler at 1 (the “sole question” referred to the Commission “has undeniably been found in the Inga Plaintiffs’ favor and all other questions had been resolved by the FCC and D.C. Circuit”); *id.* (“AT&T’s claim that there is a need for additional FCC review of [the “all obligations”] issue is simply incorrect”); Exh. 8, Letter of May 11, 2006 from Frank P. Arleo to Hon. William G. Bassler at 1 (“the narrow question of tariff interpretation posed by the Third Circuit in 1996 has been answered. Specifically, the D.C. Circuit Court of Appeals has clearly confirmed . . . that AT&T Tariff section 2.1.8 permits traffic-only transfers”); *id.* at 1-2 (describing the “issue of interpretation . . . regarding precisely which obligations should have been transferred with the traffic” as a “newly minted defense [that] must fail”).

Petitioners' attempts to mislead the district court into believing that the "all obligations" issue had somehow been resolved in their favor, while entirely improper, was understandable. As AT&T demonstrates in detail below, there is no merit to petitioners' contention that the phrase "all obligations" actually means "only some obligations," and thus excludes from its reach the shortfall and termination obligations that PSE indisputably declined to assume. The transfer petitioners proposed was plainly invalid under § 2.1.8, and the Commission should so hold. Petitioners' claim that their plans were not subject to shortfall obligations and their efforts to expand the issues well beyond those encompassed by the referral, are equally without merit.

ARGUMENT

I. SECTION 2.1.8 REQUIRES A TRANSFEREE TO ACCEPT "ALL OBLIGATIONS" OF THE TRANSFEROR COMPANY, INCLUDING ANY OBLIGATION TO PAY SHORTFALL OR TERMINATION CHARGES, WHEN TRAFFIC UNDER A WATS PLAN IS TRANSFERRED.

The Commission must decide, in the words of the D.C. Circuit, "precisely which obligations should be transferred" where a transferor seeks to transfer traffic under a WATS plan, but not the plan itself. The clear and unequivocal language of § 2.1.8 leaves no doubt as to the proper answer to this question: "*all* obligations," including obligations to pay shortfall or termination charges, had to be transferred. Petitioners' arguments to the contrary do not withstand scrutiny.

A. Section 2.1.8's Requirement That A Transferee Assume "All Obligations" Of The Transferor Necessarily Included Shortfall And Termination Obligations.

It is settled that "[t]ariffs are to be interpreted according to the reasonable construction of their language." *In re Associated Press Request for a Declaratory Ruling*, 72 FCC 2d 760, 764-65 at ¶ 11 (1979) (citing *Commodity News Services, Inc. v. Western Union*, 29 FCC 1208, 1213 at ¶ 2 (1960)). At the time of the proposed transfer, § 2.1.8 stated that "WATS, including any

associated telephone number(s), may be transferred or assigned to a new Customer, *provided that* three conditions were satisfied. For present purposes, the critical condition was set forth in section B, which stated in full:

The new Customer notifies [AT&T] in writing that it agrees to assume *all obligations* of the former Customer at the time of the assignment or transfer. These obligations include (1) all outstanding indebtedness of the service and (2) the unexpired portion of any applicable minimum payment period(s).

AT&T Tariff No. 2, § 2.1.8B.⁶

The phrase "all obligations" inescapably meant that a transferee had to accept each and every obligation of the transferor with respect to the traffic, or service, transferred. The word "all" is a term of all-encompassing inclusiveness. Its principal definitions are "the whole amount or quantity of"; "as much as possible"; and "every member or individual component of."

⁶ Section 2.1.8 stated in full:

Transfer or Assignment – WATS, including any associated telephone number(s), may be transferred or assigned to a new Customer, provided that:

- A. The Customer of record (former Customer) requests in writing that the company transfer or assign WATS to the new Customer.
- B. The new Customer notifies the Company in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment. These obligations include (1) all outstanding indebtedness of the service and (2) the unexpired portion of any applicable minimum payment period(s).
- C. The Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.

The transfer or assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment. These obligations include: (1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s). When a transfer or assignment occurs, a Record Change Only Charge applies (see Record Change Only, Section 3).

Nothing herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number.

Webster's Third New International Dictionary 54 (1993). Black's provides the same, broad definition: "'All' means '[e]very member or individual component of.'" *Black's Law Dictionary* 74 (6th ed.1990).

Numerous courts have recognized and applied this plain, broad meaning when construing contracts, regulations, and statutes. As the Ninth Circuit has explained, the word "all" "is clear on its face. We find it impossible to construe the word 'all' to connote anything but its obvious meaning: the whole or entirety of that which it describes." *Oregon Laborers-Employers Trust Funds v. Pacific Fence & Wire Co.*, 959 F.2d 241, at *3 (9th Cir. 1992) (concluding that "there is only one reasonable interpretation of the term 'all on site activities': it means all work done at the construction site"). Thus, under "traditional rules of construction," a promise to indemnify for "all losses," "clearly and unequivocally manifests an intention to absolve . . . from liability for all losses, including those caused by [the indemnitee's] own negligence." *Jackson Terminal Co. v. Railway Express Agency, Inc.*, 296 F.2d 256, 262 (5th Cir. 1961) (emphasis added). The statutory phrase "all other liens on the property" necessarily includes junior as well as senior liens. *In re Kolich*, 328 F.3d 406, 410 (8th Cir. 2003); *In re Smith*, 315 B.R. 636, 641 (Bankr. D. Mass. 2004). The statutory words "all property rights of the parties in joint tenancy" include "not only real but personal property that is owned jointly." *Slaughter v. Slaughter*, 171 F.2d 129, 130 (D.C. Cir. 1949). A contract granting rights subject to "all the debts and obligations of the grantor" includes both obligations "the grantee was aware of," and those it "was ignorant of," because "the words and terms of [such an] agreement are clear, and their meaning is not doubtful." *Silver King Coalition Mines Co. v. Silver King Consol. Mining Co.*, 204 F. 166, 173 (8th Cir. 1913). A regulation exempting an establishment that receives "all of its products" from farms within 10 miles is not satisfied even when 98% of the product comes from such farms,

Addison v. Holly Hill Fruit Prods., Inc., 322 U.S. 607, 610-11 (1944), and a regulation that permits an “all meat” label on hotdogs that are 85% meat is invalid, notwithstanding the discretion normally afforded agencies when they implement a statute they administer, “for the common meaning of the words is *clear and unequivocal*.” *Federation of Homemakers v. Butz*, 466 F.2d 462, 465 (D.C. Cir. 1972) (emphasis added).

The Commission has likewise recognized and applied this broad definition. It has ruled that the phrase “all telecommunications carriers” in 47 U.S.C. § 251(e)(2) “does not exclude any class of carriers.” *In re Numbering Res. Optimization*, 15 F.C.C. Rcd. 7574, 7665 at ¶ 199 (2000). It has therefore interpreted the phrase “to include any provider of telecommunications services.” *In re Telephone Number Portability Third Report & Order* 13 FCC Rcd 11701, 11731 (citing *In re Telephone Number Portability First Report & Order*, 11 FCC Rcd at 8419).

As these authorities make clear, the requirement to accept “all obligations” of a transferor necessarily included the transferor’s obligation to pay any shortfall and/or termination charges associated with the service being transferred.⁷ Petitioners’ contrary interpretation flies in the teeth of the clear and unequivocal meaning of the word “all,” and the wealth of judicial and Commission precedent interpreting that term. As petitioners construe it, the phrase “all obligations” included only the two obligations expressly identified in the second sentence of § 2.1.8B, and excluded other obligations, such as obligations to pay shortfall and termination charges. In other words, petitioners construe the phrase “all obligations” to mean “only some obligations.” But the word “all” “*does not mean ‘some,’ . . . it means what it appears to mean, i.e., every one.*” *Gulf Oil Corp. v. Kruer*, 842 F.2d 331, at *1 (6th Cir. 1988) (first emphasis

⁷ Thus, the fact that § 2.1.8 did not list shortfall and termination obligations does not mean “[y]ou just have to imagine them being there.” Petn. at iv. The word “all” inescapably captured these obligations, and thus left nothing to the imagination.

added); *see also* *Batchelder v. Kawamoto*, 147 F.3d 915, 919 (9th Cir. 1998) (where an agreement provides that “all terms” of the agreement are governed by New York law, “the words ‘all terms’ do not mean ‘some terms’ or ‘all terms except for choice-of-law terms’”); *cf.* *City of Tacoma v. FERC*, 460 F.3d 53, 66 (D.C. Cir. 2006) (“‘[S]ome’ means ‘some’; it does not mean ‘all’”). There is simply no plausible basis for interpreting the phrase “all obligations” to include only some of the transferor’s obligations, and thus to exclude the obligation to pay shortfall and termination charges.

Petitioners claim that AT&T “knew it was limiting itself to just” two obligations by adding the second sentence of § 2.1.8B, which said: “These obligations include (1) all outstanding indebtedness of the service and (2) the unexpired portion of any applicable minimum payment period(s).” Petn. at 8. According to petitioners, if AT&T “did not want to limit itself” to requiring the transfer of only these two enumerated obligations, AT&T should have used the phrase “**including, but not limited to.**” *Id.* (emphasis petitioners’). Petitioners’ understanding of the term “include” is as untenable as its interpretation of the word “all.”

To “include” means “to place, list, or rate as a part or component of a whole or of a larger group, class, or aggregate.” *Webster’s Third New International Dictionary* at 1143. Thus, the second sentence of § 2.1.8B did not limit the sweepingly broad requirement that a transferee accept “all obligations” of the transferor. This sentence simply listed “*part[s]*” or “*component[s]*” of the “*larger group*” of obligations that a transferee had to accept.⁸ By

⁸ The fact that AT&T used “including but not limited to” in another provision cannot change the plain meaning of the word “include” in § 2.1.8. By definition, “including” introduces a subset of a larger whole. The words “but not limited to” cannot override this plain meaning or convert “including” into a term of restriction; instead, they are used for emphasis. Such emphasis makes particular sense in § 2.2.8. By cataloguing different proscribed uses of AT&T marks, the provision risked appearing exhaustive, thus making it prudent to emphasize the non-exhaustive

contrast, petitioners read the sentence as if it said “These obligations include *only*,” or “These obligations are *limited to*,” the two enumerated obligations. This is not an interpretation but a clear and impermissible alteration of the plain language of § 2.1.8.

Beyond their patently mistaken interpretations of the terms “all” and “include,” petitioners purport to make only one other argument from the text of § 2.1.8 itself. Citing the word “any” in the sentence “WATS, including *any* associated telephone number(s), may be transferred or assigned to a new Customer,” petitioners argue as follows: (1) “Any can be one, some, or most, without specification, that can be transferred”; (2) “‘All obligations’ pertain to . . . ‘what is selected for transfer’”; (3) “Under 2.1.8 at ‘B’ ‘the “new” Customer (transferee PSE) notifies [AT&T] what it has accepted (either selected ‘traffic only’ as the case at issue, or the plan with all traffic) and then . . . it is obligated for ‘all the obligations’ **BUT, only on that part of the service which the transferee (PSE) accepts**”; (4) “shortfall and termination obligations are not transferred by petitioners/assumed by PSE, because, shortfall and termination obligations are the Transferor (petitioner) Customer’s plan obligations”; ergo (5) shortfall and termination obligations are “never transferred on traffic only transfers.” Petn. at 4.

As best as AT&T can tell, petitioners appear to claim that when a transferee accepted only the traffic under a plan, and not the plan itself, it had to accept “all obligations” *that are associated with the traffic*, but no others. According to petitioners, this did not include shortfall and termination obligations, because they were “plan obligations,” not obligations related to the traffic. Alternatively, petitioners may be arguing that the transferee was free to decide which obligations it would accept. *See id.* at 5 (the “all obligations language pertains only to what is accepted and reported by the new customer (PSE) to AT&T”).

meaning of the word “including.” The listing of only two obligations in § 2.1.8 ran little if any such risk.

Either way, petitioners' claim founders on the plain language of § 2.1.8. That provision nowhere stated that certain obligations, such as shortfall and termination obligations, transfer only with the plan itself. Rather, it said that the transferee had to assume "all obligations" of the transferor when "WATS, including any associated telephone number(s), [was] transferred or assigned." The D.C. Circuit, in turn, held that "'traffic' is a type of service covered by the tariff." D.C. Circuit Opinion at 10. Thus, when "service covered by the tariff" is transferred, the transferee must assume "all obligations" the transferor has with respect to that service. Because term and revenue commitments under a WATS plan (and the associated charges for failing to meet those commitments) are necessarily "obligations" the transferor has with respect to the covered "service" that is being transferred, those obligations must be assumed by the transferee. Simply put, while customers may have had discretion about what benefits to transfer, § 2.1.8 conditioned the transfer on the transferee's assumption of "all obligations of the former Customer," not merely those obligations the new customer chose to accept and report. The reason the Commission and D.C. Circuit failed to "see on its face where" § 2.1.8 drew the distinctions petitioners attempt to draw, Petn. at 4, is because no such distinctions existed. A transferee had no discretion under § 2.1.8 to decide which obligations it would or would not accept.

B. Section 2.1.8's Plain Language Is Consistent With Its Purpose.

When interpreting statutes, regulations, tariffs or contracts, the plain meaning of terms can sometimes be ignored if it leads to absurd results. But that interpretive rule has no application here. The categorical and all-inclusive nature of the phrase "all obligations" was entirely consistent with § 2.1.8's purpose. Petitioners' arguments to the contrary are wrong.

Under the tariff, AT&T provided discounts to customers in exchange for their commitment to meet minimum traffic volumes for specified periods of time, or to pay penalties for failing to meet these commitments (shortfall charges for failing to meet the revenue commitment; termination charges for discontinuing service prematurely). As the Commission recognized in its prior decision, and as the D.C. Circuit confirmed, “the ‘purpose’ of Section 2.1.8 ‘was to maintain intact the balance of obligations and benefits between parties under the tariff when one customer stepped into the shoes of another.’” D.C. Circuit Opinion a 10 (quoting Commission 2003 Decision at 7); *see also id.* at 11 (“[t]he whole purpose of the tariff provision in question was to ensure that benefits could not be transferred without concomitant obligations”). And, as the D.C. Circuit held, the Commission’s conclusion that § 2.1.8 did not govern the transfer that petitioners proposed “eviscerates this very purpose” and “would render the transfer provision meaningless,” because it allowed the benefits of the traffic and discounts to be separated from the associated burdens. *Id.* at 10.

Conversely, giving the phrase “all obligations” its natural and all-encompassing meaning serves the fundamental purpose of § 2.1.8. The plain terms of § 2.1.8 ensured that PSE would have enjoyed the benefits of the transferred traffic subject to the same terms under which CCI and petitioners had enjoyed those benefits—*i.e.*, subject to the minimum revenue and term commitments, and the associated penalty obligations that apply if those commitments are not met. Such an interpretation thus “‘maintain[s] intact the balance of obligations and benefits between parties under the tariff when one customer step[s] into the shoes of another.’” *Id.* (quoting Commission 2003 Decision at 7).

Petitioners do not and cannot show otherwise. They argue that the D.C. Circuit failed to appreciate the “substantial benefits” that CCI and petitioners would reap for themselves by virtue

of retaining the plans while transferring the traffic to PSE. Petn. at 16-17. But this is beside the point. As the D.C. Circuit recognized, under the proposed transfer, *PSE* would not have had the same *obligations* as CCI. The balance of obligations and burdens between AT&T and its *new* customer, therefore, would not have been the same as it had been when CCI was AT&T's customer: PSE would have had the benefit of traffic and the resulting revenues, but it would not have been subject to CCI's volume commitment, to shortfall charges for failing to meet that commitment, or to termination charges if it failed to meet CCI's term commitment (assuming PSE was even subject to that commitment⁹).

Unable to show the slightest conflict between the plain meaning of "all obligations" and the purpose of § 2.1.8, petitioners try to manufacture absurdities through hypotheticals bearing no resemblance to the transaction at issue here. They posit a scenario in which Company A, which had a \$50 million shortfall and termination obligation, created Company B, with a \$1,000 shortfall and termination obligation, then transferred to B a handful of accounts. Petn. 20-21. Petitioners then argue that, if B went out of business, AT&T had no recourse against it, yet A "ha[d] no more \$50 million in [shortfall and termination] obligation[s] but still ha[d] all its traffic." *Id.* at 21. The premise underlying this supposed "absurdity," however, is demonstrably mistaken: B's agreement to assume all of A's obligations would not have divested A of those obligations. At the time of the proposed transfer, § 2.1.8 clearly stated that "[t]he transfer or

⁹ Contrary to petitioners' claim, Petn. 5-7, AT&T does dispute that PSE assumed the two obligations listed in § 2.1.8. Petitioners quote statements by AT&T that the shortfall and termination obligations were *not* assumed, but they quote no statements in which AT&T agreed that the other obligations were assumed. In fact, AT&T counsel argued before the D.C. Circuit that PSE "didn't assume any obligations." See Exh. 9. The phrase "traffic only" that petitioners wrote on each transfer form, see Exh. F (Attachments), could not simultaneously operate to assume enumerated obligations, yet exclude unenumerated obligations. In all events, the point is largely irrelevant—PSE indisputably did not agree to assume "all obligations," as § 2.1.8 required.

assignment does not relieve or discharge the former Customer from remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment.” Thus, in the scenario petitioners hypothesize, AT&T still would have had recourse against A.¹⁰ The plain meaning of § 2.1.8’s complementary “all obligations” and “joint and several liability” requirements thus led to an entirely sensible scheme that protected AT&T from traffic transfers that, like the transfer petitioners proposed, might otherwise have been used to defeat the minimum revenue and term commitments.¹¹

Petitioners also claim that it would not have been commercially feasible for A’s \$50 million obligation to transfer to B (or to C, D, E and F, in their second hypothetical), because the transferee(s) had far smaller revenue commitments. But petitioners do not explain why the scenario they posit would have been commercially feasible in the first place. As the very term “aggregator” makes clear, resellers had strong incentives to amass as much traffic as possible, not to disperse traffic by setting up “puny” affiliates and distributing small or minuscule amounts of traffic to them. Indeed, the burdens that the Commission’s anti-“slamming” rules placed on resellers, *see* 47 C.F.R. Part 64 § 1120(e), created additional disincentives to the types of traffic-

¹⁰ For this same reason, there is nothing “self-defeating” about § 2.1.8’s plain language. Petn. at 21. Petitioners claim that, because they had previously transferred traffic to another aggregator, their shortfall and termination obligations had already been transferred away, and thus could not be transferred to, or assumed by, PSE. *Id.* As AT&T has explained, however, those prior transfers did not divest petitioners of their obligations.

¹¹ Petitioners suggest that it would have been “absurd” for the transferor to retain liability for revenue commitments that it could not control. Petn. at 22. The point of the “all obligations” and “joint and several liability” requirements, however, was to protect AT&T. The transferor had complete discretion to choose which, if any, companies it would transfer its traffic or plan to, and thus could protect itself by choosing wisely, with full knowledge of its potential liability, and/or to include additional contractual protections, such as indemnification or a bond, as part of its agreement with the transferee. Rather than bar transfers altogether, the tariff reasonably placed the onus on the customer to determine the best means to afford itself suitable security against potential liability to AT&T arising.

splintering transfers petitioners hypothesize. In contrast to these highly unlikely scenarios, AT&T had very good reason to be concerned that resellers would seek to evade the obligations that were the *quid pro quo* for their discounted plans by transferring traffic but leaving the plans and obligations with asset-less shells. Section 2.1.8's "all obligations" requirement was obviously aimed at this very real problem (as this case itself confirms), not at the remote possibility that aggregators would create small affiliates, then saddle them with large liabilities by doling out tiny percentages of their traffic.

The clear and unequivocal language of § 2.1.8 simply cannot be ignored or rejected based on a showing that in some highly unrealistic scenarios it might have led to anomalous results. Indeed, such an invalid method of "interpretation" is especially improper here. The question referred to the Commission is whether a particular transfer, one entirely unlike petitioners' hypotheticals, "compli[es] or not with the terms of the governing tariff." 1995 Referral Order at 2. As the D.C. Circuit has explained, "even if small scale transfers of traffic were outside the scope of Section 2.1.8, allowing *this* transaction to go through would create an obvious end-run around the unquestioned rule that new Customers had to 'assume all obligations' in transferring WATS *plans*." D.C. Circuit Opinion at 9. Thus, as the D.C. Circuit recognized, to the extent there were ever any possibility that the "all obligations" requirement might be triggered in outlier situations involving valid transfers of small amounts of traffic, the Commission could have addressed those situations by adopting a *de minimis* exception to the requirement, not by ignoring the plain language of § 2.1.8 and allowing its undisputed purpose to be "eviscerate[d]." *Id.* at 10.

C. Other Provisions Of The Tariff Do Not Refute Or Conflict With Section 2.1.8's Plain Meaning.

Petitioners also suggest that other provisions of the tariff demonstrate that a transferee was not required to assume the shortfall and termination obligations of the transferor. Once again, petitioners are mistaken.

They claim, for example, that § 3.3.1.Q bullet 10 “mandates . . . that [shortfall and termination] obligations must stay with the customer plan.” Petn. at 9. But this provision said no such thing. It stated in full that:

Shortfall and/or termination liability are the responsibility of the Customer. Any penalty for shortfall and/or termination liability will be apportioned according to usage and billed to the individual locations designated by the Customer for inclusion under the plan. For billing purposes, such penalties shall reduce any discounts apportioned to the individual locations under the plan.

See Exh. D, § 3.3.1.Q bullet 10. This provision simply made clear that the reseller/aggregator (the “Customer”) was responsible for shortfall and/or termination liability, even though AT&T had the right to collect any sums due directly from the reseller’s customer (the “individual locations under the plan”).¹² The provision nowhere stated, much less mandated, that, if the locations and their associated traffic were transferred to another reseller, that the transferor’s shortfall and termination obligations had to remain with the plan, and could not be assumed by the transferee.

Petitioners’ reliance on § 2.1.8E is even more misguided. They claim that the phrase “all obligations,” if given its clear and natural meaning, would conflict with § 2.1.8E’s “joint and

¹² This feature of the CSTPII Plan was not confined to reseller customers, but also applied to any entity that subscribed to that plan. For example, in the case of a corporate parent that subscribed to a CSTPII Plan for the use of itself and its subsidiaries, § 3.3.1Q bullet 10 permitted AT&T to proceed against the affiliates even if the parent entity was unable to satisfy its shortfall obligation.

several liability provisions,” which they claim “clearly indicate[] that joint and several liability comes into play only on plan transfers; not traffic transfers.” Petn. at 22. To begin with, § 2.1.8E did not exist when the transfers were proposed. It first took effect November 9, 1995, *see* Exh. AA, long after petitioners had sued AT&T for failing to process their “traffic only” transfers. It therefore cannot control the meaning that § 2.1.8 had before this provision was added.¹³

More fundamentally, this provision flatly refutes petitioners’ claim. The first half of the November 1995 version of § 2.1.8, which petitioners failed to provide, states that “WATS, including any associated telephone numbers, may be transferred.” *See* Exh. 10. This is the same language that the D.C. Circuit held includes transfers of traffic as well as plans. This version of § 2.1.8 then says (1) that the new customer must assume “all obligations,” including “any applicable shortfall or termination liability(ies),” and (2) that the transferor “remains jointly and severally liable for any obligations existing as of the Effective Date of the transfer,” including “any applicable shortfall or termination liability(ies).” Far from “directly conflict[ing]” with the plain meaning of “all obligations,” therefore, the November 1995 version of § 2.1.8 expressly confirms what was clear in the earlier version: that a transferee had to assume all obligations, including shortfall and termination obligations, when traffic was transferred.

Nothing in the provision states that the transferee’s duty to assume all obligations, or the rule of joint and several liability, apply only to plan transfers. Petitioners have attached the second half of § 2.1.8, which sets forth three exceptions to the rule of joint and several liability,

¹³ For these same reasons, it could not have exempted petitioners’ plans from joint and several liabilities, because it did not take effect after until the commitment period that included the effective date of petitioners’ proposed January 1995 transfer. In all events, the issue before the Commission is whether PSE was required to assume “all” of CCI’s obligations, not what obligations would have remained with CCI had the transfer taken effect.

and they have underlined the word “plan” in the first of these exceptions. *See* Exh. AA. But this portion of § 2.1.8E simply states that the first exception is available when, among other things, “the service being transferred or assigned is subject to an AT&T term plan, flex plan or other discount plan with revenue or volume commitments.” *Id.* By its plain terms, therefore, the exception applies whenever *services* (which include traffic) are transferred, not merely when “the *plan* is being transferred.”

In short, the plain meaning of § 2.1.8’s “all obligations” language is perfectly consistent with the language of other tariff provisions.

D. Neither The D.C. Circuit Nor The Commission Has Already Concluded That The Phrase “All Obligations” Does Not Include Shortfall And Termination Obligations.

In what can only be described as a desperate gambit to avoid the plain language of the tariff, petitioners argue at length that the D.C. Circuit and the Commission have already ruled that “all obligations” does not include shortfall and termination obligations. These arguments are utterly baseless.

1. Prior decisions in this proceeding.

Petitioners make the extraordinary and convoluted argument that, because there is “no option under the tariff to transfer less than 100% of the accounts along with the [shortfall and termination] obligations, and leave the CSTPII plan behind with no obligations,” the D.C. Circuit must have agreed “by default” that those two obligations do not transfer when traffic is transferred. *Petn.* at 17. As AT&T has explained, however, petitioners’ “zero-sum” approach to aggregator obligations is flatly mistaken. A transferee’s assumption of shortfall and termination obligations does not “leave the CSTPII plan behind with no obligations,” because the transferor

remains jointly and several liable. Thus, the premise underlying petitioners' tortured reasoning is simply wrong.

More basically, any suggestion that the D.C. Circuit has determined—by default or otherwise—what obligations transfer on a traffic transfer flies in the teeth of the Court's express ruling. The Court stated that “[w]e . . . do *not* decide precisely which obligations should have been transferred in this case.” D.C. Circuit Opinion at 11 (emphasis added). *See also id.* at 11 n.2 (noting that the interpretive import of § 2.1.8's “including” sentence “is beyond the scope of this opinion”). Petitioners' attempt to derive a default interpretation from the Court's ruling is thus entirely improper.

The D.C. Circuit's reason for declining to interpret “all obligations,” moreover, forecloses petitioners' claim that the Commission has already interpreted the phrase. The D.C. Circuit declined to decide the issue because “this question was neither addressed by the Commission nor adequately presented to us.” *Id.* at 11. Petitioners' suggestion that the D.C. Circuit somehow overlooked a Commission ruling on this issue is groundless, as the district court concluded when it denied the motion to lift the stay.

Petitioners quote three passages from the Commission's 2003 Decision that purportedly reflect the determination that shortfall obligations do not transfer. *Petrn.* at 15. In one passage, the Commission summarizes “a letter agreement between CCI and PSE” that explains how these two entities intended to structure the transfer. *See Commission 2003 Decision*, ¶ 9 n.51 (quoted in the *Petrn.* at 15). This summary simply describes what CCI and PSE wanted to do, not what they were legally permitted to do under the tariff. Moreover, the two features of the proposed transfer that petitioners quote from this summary—that CCI would remain responsible for its commitments under the plan and that PSE would assist in moving accounts to enable CCI to

meet those commitments—say nothing whatever about the commitments, or obligations, that PSE had to assume.

Petitioners' other two irrelevant quotes come from paragraphs 10 and 11 of the decision, where the Commission addressed AT&T's fraudulent use argument under § 2.2.4 of the tariff, not the scope of § 2.1.8. In stating that CCI, "but not PSE, would continue to have been responsible any shortfall obligations," *id.* ¶ 11, the Commission was once again simply describing the transfer that CCI and PSE were proposing. Similarly, in observing that termination obligations were not at issue, *id.* ¶ 10 n.56, the Commission was simply noting the fact that termination obligations had not been triggered because the plans at issue had not been terminated. In neither passage did the Commission state what obligations § 2.1.8 required PSE to assume.

Indeed, in these passages the Commission manifestly could not have determined the scope of § 2.1.8's requirements, because in the immediately preceding paragraph it had ruled that § 2.1.8 *did not apply to this transfer at all*. As Judge Bassler recognized, because the Commission "only discussed shortfall and termination charges in the context of the fraudulent use provision," it "did not determine . . . whether PSE was required to assume those commitments under § 2.1.8, because it had already determined that § 2.1.8 did not apply." Exh. 11, May 26, 2006 Op. at 14 n.5. Accordingly, the issue whether the tariff permits a traffic transfer where the transferee assumes "only those obligations assumed by PSE has yet to be answered. By finding that § 2.1.8 did not even apply to the CCI/PSE transfer, the FCC failed to answer that question." *Id.* at 16-17 (footnote omitted).

Because the Commission itself has not determined the scope of § 2.1.8's requirements, such a determination cannot be extracted from the agency's brief to the D.C. Circuit. Under *SEC*

v. *Chenery*, 332 U.S. 194, 196 (1947), only the rationale and grounds set forth in an agency's actual decision are controlling; statements made by the agency's counsel on judicial review of that decision cannot alter, add to or subtract from the rationale set forth in the decision itself. See *AT&T Corp. v. FCC*, 236 F.3d 729, 735 (D.C. Cir. 2001) ("*Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself") (internal quotation marks omitted). Accordingly, the statements petitioners quote from that brief are legally irrelevant.

In all events, those statements are fully consistent with the district court's conclusion that the Commission has yet to rule on the meaning of the phrase "all obligations." Petitioners quote a sentence in which agency counsel stated that,

[i]n arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customer's liability.

Exh. T, FCC Br. at 10 (quoting Commission 2003 Decision ¶ 9). But the reason the Commission "rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customer's liability" was because the FCC concluded that § 2.1.8 "did not address or govern CCI's and PSE's request" at all. See Exh. 12, FCC Br. at 9-10 (quoting Commission 2003 Decision ¶ 9). Indeed, just three pages later, the brief says quite plainly that § 2.1.8 and its assumption of all obligations requirement only "applied to the wholesale transfer of plans, and *did not address . . . the movement of traffic*" only. See *id.* at 13 (emphasis added); see also *id.* at 16 (the Commission "reasonably determined that the transfer provisions of AT&T's pertinent tariff—section 2.1.8 of Tariff F.C.C. No. 2—

'did not address or govern CCI's and PSE's request' to move 800 traffic from CCI to PSE") (quoting Commission 2003 Decision at ¶ 9).

Similarly, petitioners quote a passage in which agency counsel stated that AT&T's arguments to the Commission "incorrectly presume[d] that, apart from the transferee's assumption of liabilities (*which occurs under a transfer of plans, but not a transfer of traffic*), a transfer of traffic and a transfer of plans yields identical benefits and burdens to AT&T and its customers." Petn. at 15 (quoting agency brief at 19-20 (emphasis petitioners')). Once again, however, the reason counsel argued that there was no assumption of *any* obligations (not just shortfall and termination obligations) in a traffic-only transfer was because the Commission had concluded that § 2.1.8 did not apply to such transfers; given that conclusion, the Commission could not have decided which obligations § 2.1.8 required to be assumed in a traffic-only transfer, and its counsel could not have so argued. Nor did agency counsel argue that the Commission had given "meaning" to § 2.1.8 by ruling that it does not require the transfer of shortfall and termination obligations in traffic-only transfers. Petn. at 16. Rather, counsel explained that, even though it did not apply at all to traffic-only transfers, "section 2.1.8 retains meaning under the Commission's reading because the provision still applies to transfers of plans." FCC Br. at 19.

2. Transmittal 8179 and AT&T's Substantial Cause Pleadings.

Petitioners also claim that the Commission rendered a definitive interpretation of the phrase "all obligations" when the staff considered revisions that AT&T proposed to § 2.1.8 in Transmittal 8179. This claim likewise fails.¹⁴

¹⁴ As a threshold matter, petitioners rely on informal staff actions that do not constitute decisions by the Commission itself. In all events, it is clear that even the staff did not purport to determine the meaning of § 2.1.8's "all obligations" requirement.

In response to the dispute that arose over petitioners' proposed transfer, AT&T proposed, in Transmittal 8179, to add a new paragraph to § 2.1.8C. This new paragraph stated that, where "the anticipated result" of a transfer of all or substantially all traffic would leave the old customer unable to pay the usage and/or revenue commitments that give rise to shortfall and termination obligations, "the transfer will be deemed a transfer of the associated" plans. See Exh. K. AT&T later withdrew this proposal in light of certain concerns expressed by the Commission's staff.

As AT&T lawyer Richard Meade later explained to the district court that made the primary jurisdiction referral, the Commission staff

was concerned that the modified language in Section 2.1.8C would have had a broader effect than was needed to achieve AT&T's specific purpose, which was simply to clarify its existing right to prevent a location transfer intended to avoid payment of charges, and so would constitute a substantive tariff change.

Exh. 13, Meade Certification at 4, ¶ 9. He went on to explain that this provision led to "a number of discussions" to "explore[] alternative tariff language" that would address AT&T's concerns "without requiring a determination as to whether the parties to the transfer intended to avoid payment charges," *id.* at 5, ¶ 10—the determination required by section C's proposed "anticipated result" standard. Mr. Meade's declaration thus made clear that the staff was *not* concerned by the clarification of AT&T's existing right to prevent traffic transfers that were not accompanied by a transfer of shortfall and termination obligations. Rather, the staff was concerned that the new "anticipated result" standard would have a "broader effect" than a mere clarification, and that this broader effect would render the new "anticipated result" standard a substantive change. In the excerpt plaintiffs quote from the oral argument before the Third Circuit, Mr. Carpenter made the same point: referring to the proposed change to section C, he stated that "the FCC thought we had done more in the tariff language than codify [what] the tariff already meant because it went beyond

prohibiting these sorts of transfers of plans that would affect transfers of individual locations.” See Exh. O. Neither of the foregoing statements remotely suggests that AT&T withdrew Transmittal 8179 because the Commission staff had concluded that the phrase “all obligations” did not include a transferor’s shortfall and termination obligations.

Mr. Meade’s statements to the district court concerning Transmittal 9229, Petn. at 13, are equally inapposite. As the very passage petitioners quote makes clear, Mr. Meade simply stated that Transmittal 9229 included a new concept—a deposit requirement for shortfall obligations. His recognition that this deposit requirement was “new” is obviously not a concession that the phrase “all obligations” did not encompass the existing shortfall and termination obligations, let alone evidence that the Commission (or its staff) had somehow reached this implausible conclusion.¹⁵

* * *

In short, there is no merit to petitioners’ claims that the Commission or the D.C. Circuit has already ruled that “all obligations” does not include shortfall and termination obligations.

E. AT&T Has Not Conceded That The Phrase “All Obligations” Does Not Include Shortfall And Termination Obligations.

Petitioners also quote various statements by AT&T and its lawyers in a vain effort to prove that AT&T has repeatedly conceded away the merits of a dispute it has been litigating with petitioners for over a decade. This facially implausible claim is also baseless.

Petitioners cite a series of statements by AT&T lawyers that simply described the transfer petitioners proposed—*i.e.*, one in which CCI would transfer virtually all traffic to PSE, while

¹⁵ Petitioners also cite objections that they, CCI and PSE filed in response to Transmittal 8179. Obviously, these comments are not evidence of a Commission ruling concerning the meaning of the phrase “all obligation.”

CCI alone would retain the obligations.¹⁶ Just like the Commission's similar summaries of this proposal, *see supra* at 24-25, these statements described what CCI and PSE wanted to do, not what they were legally permitted to do under the tariff. Moreover, as AT&T has explained, a valid or permissible traffic transfer under § 2.1.8 would not have extinguished the transferor's liabilities; rather, the joint and several liability requirement meant that *both* the transferor and transferee were responsible for the transferor's obligations. Accordingly, any AT&T statement that a transferor remained liable for such obligations after the transfer was in no sense a "concession" that shortfall and termination obligations did not transfer.¹⁷

Petitioners also quote statements AT&T's counsel made during oral argument to the D.C. Circuit. Petn. at 18-19. But in the passage they quote, Mr. Carpenter simply recognized that truly *de minimis* traffic transfers fell outside the scope of § 2.1.8 altogether. *See* Exh. W (AT&T "would not take the position, then, that any shortfall obligation went with the transfer of a single number"). One page earlier, in a passage petitioners omit, Mr. Carpenter indicated that a single number could have had an outstanding indebtedness that would transfer. *See* Exh. 9. It was only in the limited context of *de minimis* transfers, then, that counsel suggested that the obligations that transferred might "vary depending on what's transferred." *Id.* Nowhere, however, did

¹⁶ *See* Petn. at 18 (Meade "concession" that, under proposed transfer, CCI would have rendered itself an "assetless shell unable to either fulfill its commitments or to pay its shortfall and termination charges") (emphasis omitted); *id.* at 19 (Whitmer "concession" that Mr. Inga sought to transfer traffic "and leave the plans intact with their commitments") (emphasis omitted); *id.* at 20 (Friedman "concession" that, under proposed transfer, petitioners would remain "responsible for the tariffed shortfall and termination charges") (emphasis omitted). *See also id.* at 6 (quoting AT&T's explanation to the Third Circuit that, after transfer, petitioners would be responsible for shortfall and termination charges, "which can only be paid by [petitioners] from revenues they would lose as a result of the transfer") (emphasis omitted).

¹⁷ *See* Petn. at 18 (Fash "concession" that traffic transfer would leave transferor with no assets "to pay tariffed charges associated with the plan").

counsel concede that the phrase “all obligations” did not include shortfall and termination obligations, or that these latter obligations might not transfer when virtually all traffic was transferred. To the contrary, Mr. Carpenter clearly stated that the whole point of § 2.1.8 “was to condition service transfers on the assumption of the very liabilities that weren’t transferred here.” *Id.*¹⁸

Petitioners also assert that AT&T made “a clear concession that [shortfall and termination] obligations do not transfer on traffic only transfers” by arguing that it could decline to process the proposed transfer under the fraudulent use provision. Petn. at 20 (emphasis omitted). But there is nothing logically inconsistent about invoking both § 2.1.8 and § 2.2.4 as bases for declining to process the proposed transfer. That transfer violated § 2.1.8 because PSE refused to assume shortfall and termination obligations, and it violated § 2.2.4 (among other fraud provisions) because CCI, which would remain liable for shortfall and termination obligations under the joint and several liability provision, was shedding the assets it needed to pay those charges. In any case, AT&T was entitled to rely on the fraudulent use provision in the event the Commission concluded that § 2.1.8 did not apply to traffic transfers at all. Such an alternative legal argument is obviously not a “concession” that the principal legal argument is invalid.

Finally, petitioners cite a number of statements in which AT&T described the November 1995 addition of the phrase “shortfall and termination liability(ies)” to § 2.1.8B as a “clarification.” Petn. at 24. Under petitioners’ faulty reasoning, these statements are concessions that, prior to November 1995, the phrase “all obligations” in § 2.1.8 did not include shortfall and termination obligations or, alternatively, could not have been understood to include

¹⁸ Mr. Carpenter made the same point to the Third Circuit as well. See Exh. V.

those obligations. This contention is obviously incorrect. As AT&T has shown, the plain meaning of the word “all” is clear, unequivocal and all-encompassing. AT&T’s addition of the phrase “shortfall and termination liability(ies)” could not possibly demonstrate that, prior to November 1995, the phrase “all obligations” really meant “only some obligations,” or that anyone could reasonably have thought it had such a meaning.

Petitioners’ argument is not only linguistically absurd, it ignores commercial realities. Despite the clear meaning of the phrase “all obligations,” AT&T found itself embroiled in litigation with petitioners. AT&T reasonably sought to foreclose similarly unfounded litigation in the future by, among other things, emphasizing the breadth of § 2.1.8’s assumption of obligations requirement. Under petitioners’ view, however, AT&T could not take this commercially sensible step without forfeiting the plain meaning of the word “all” and its claims in this litigation. This absurd disincentive to commercially responsible conduct is yet another reason, if any more were needed, to reject petitioners’ claim.

II. PETITIONERS’ PLANS WERE NOT IMMUNE TO SHORTFALL AND TERMINATION CHARGES.

Petitioners also claim that, even if “all obligations” includes termination and shortfall obligations, their plans were pre-June 1994 plans and thus exempt from any obligation to pay shortfall or termination charges.¹⁹ Once again, however, the plain language of the tariff refutes petitioners’ claim.

¹⁹ As noted earlier, nothing in the record supports petitioners’ assertion that PSE agreed to assume the two obligations that were listed in § 2.1.8 at the time of the proposed transfer. Thus, even if their plans were immune from shortfall and termination obligations, PSE’s failure to accept in writing the other obligations enumerated in § 2.1.8 rendered the proposed transfer impermissible. The Commission need not address this question, however, because it is clear that petitioners’ plans were not immune from the obligations that PSE indisputably declined to assume.

Section 3.3.1.Q.4 allowed for the discontinuance of a CTSP II plan without liability if two requirements were met. First, the customer had to replace its “existing” plan with a “new” plan that had a total revenue commitment equal to or exceeding the sum of the remaining commitment of the plan that was being “cancelled.” *See* Exh. 14. Second, if the customer did not satisfy the prorated annual commitment of the plan being terminated, the customer had to pay a prorated shortfall charge. *Id.* As to this requirement, however, § 3.3.1.Q.4 provided an exception, known as the “grandfather clause”: “CSTP II Plans in effect on or prior to June 17, 1994” were not subject to such shortfall charges. *Id.*

At various points, petitioners appear to argue that, even after they “restructured” their plans, they remained “pre-June, 1994” plans and thus were necessarily exempt from the imposition of prorated shortfall charges. *See, e.g.,* Petn. at 28 (“[p]etitioners were still a CST[P] II plan when restructuring therefore the CSTP II plan is grandfathered”). By its plain terms, however, the tariff did not create a class of CSTP II plans that could be “restructured” again and again without ever being subject to shortfall obligations. Rather, the grandfather clause provided a one-time exemption from prorated shortfall charges when a pre-June 17, 1994 plan was “cancelled,” and replaced with a “new” plan. Such new plans, however, did not qualify for the exemption from prorated shortfall charges. The grandfather clause did not retain any terms or conditions of the discontinued plan, and there is nothing in the language of the tariff to support the theory that a “new” plan retained the subscription date of the old plan for any purpose. To the contrary, the “new” plan subscribed to concurrently with the cancellation of the pre-June 17, 1994 plans was, by definition, *not* a “CSTP II Plan in effect prior to June 17, 1994.” Thus, once petitioners replaced their pre-June 17, 1994 plans, their new plans were fully subject to the prorated shortfall obligations set forth in the tariff.

Alternatively, petitioners appear to argue that, as of January 1995, their plans had not yet been restructured, and thus were still pre-June 1994 plans that were immune from shortfall charges at the time the transfer was proposed. Petn. at 28. The problem with this argument is that it conflates (1) the ability to avoid prorated shortfall charges with (2) a complete immunity from all shortfall charges under all circumstances. Section 3.3.1.Q.4 plainly did not provide a complete and immutable immunity from shortfall charges. Instead, as petitioners themselves acknowledge, this provision allowed a pre-June 1994 plan to avoid prorated shortfall charges if certain conditions were satisfied before the plan expired. *Id.* at 27 (“plans that were issued prior to June 17th 1994 *could be* discontinued . . . prior to their fiscal year end to avoid [shortfall] penalties”) (emphasis added); *id.* at 30 (petitioners’ plans were “*qualified* for restructuring”) (emphasis altered; internal quotation marks omitted). At the time of the proposed transfer, therefore, CCI’s “unrestructured” pre-June 1994 plans were still *subject* to revenue commitments (*i.e.*, “obligations”) that if not met (or otherwise avoided) could result in shortfall charges. PSE was thus required to assume that obligation in writing at the time of the transfer—something it pointedly refused to do.

Indeed, petitioners’ claim that shortfall charges on a pre-June 1994 plan could easily be avoided through restructuring, and their related disputed factual assertion that CCI’s plans had already met their revenue commitments prior to the transfer and thus faced no threat of shortfall charges, raise an obvious question: if the risk of actually incurring shortfall charges were really slim to none, why did PSE so adamantly refuse to accept the obligation? If petitioners had truly believed the assurances they now provide to the Commission, they could have simply amended their transfer forms so that PSE accepted all of CCI’s obligations, including its minimum revenue commitments and associated shortfall penalties. Their failure to do so—and their

willingness to litigate the issue for over a decade—makes clear that there were economic risks associated with the obligations that PSE was unwilling to assume.

In all events, there can be dispute that, at the time of the proposed transfer, the service CCI sought to transfer was subject to a revenue commitment, and a potential shortfall obligation, that PSE refused to assume. As a consequence, the proposed transfer did not comply with § 2.1.8, and AT&T was entitled to refuse to process it.

III. AT&T DID NOT “WAIVE” ITS RIGHT TO REFUSE TO PROCESS THE INVALID TRANSFER BY FAILING TO SATISFY SECTION 2.1.8’s “STATUTE OF LIMITATIONS.”

Finally, petitioners half-heartedly argue that AT&T “fail[ed] to adhere to 2.1.8’s statute of limitation[s] requirement,” and that this failure, or “violation,” moots the question of whether shortfall and termination obligations must be assumed in a transfer of virtually all end-user traffic. Petn. at 34. This claim rests on a clear mis-reading of section C of § 2.1.8.

Section C sets forth the last of the tariff’s three conditions on transfers of “WATS.” This third condition stated:

[t]he Company acknowledges the transfer or assignment in writing. The acknowledgement will be made within 15 days of receipt of notification.

AT&T Tariff No. 2, § 2.1.8C. By its plain terms, this provision placed a limited third condition on the rights of resellers to transfer service. It manifestly did not condition AT&T’s right to refuse to process transfers that failed to comply with § 2.1.8’s *other* requirements.

Petitioners purport to derive such a restriction on AT&T’s rights from the second sentence, which stated that AT&T’s written acknowledgement would be made in 15 days. But this sentence simply placed a commercially reasonable time limit on AT&T’s ability to delay implementation of a *valid* transfer. If AT&T failed to provide the written notice in 15 days, this third requirement (AT&T’s written acknowledgment) would cease to exist. Thus, after 15 days,

AT&T could not rely on its own failure to acknowledge the transfer in writing as a grounds for denying the transfer. The expiration of the 15-day period, however, had no effect on the other two conditions. If either of those conditions were not satisfied, AT&T was not obligated to process the transfer.

In order to have had the extraordinary meaning petitioners ascribe to it, the second sentence 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.” The second sentence of section C, however, plainly said no such thing. Accordingly, AT&T remained entitled to refuse to process petitioners’ proposed transfer because it did not satisfy § 2.1.8’s second condition.

IV. THE COMMISSION SHOULD DECLINE TO ADDRESS THE OTHER ISSUES PETITIONERS SEEK TO RAISE.

The Commission should decline to address the remaining issues that petitioners seek to raise. These issues are entirely outside the scope of the referral and inappropriate for resolution in a declaratory ruling in any event.

A. The Commission Should Decline To Address Petitioners’ Discrimination Claims.

There are several reasons for the Commission to decline to adjudicate the “issues” of whether AT&T discriminated against petitioners by supposedly refusing to provide them with certain contract tariffs, *see* Petn., Point XVIII, or by allegedly permitting other aggregators to transfer traffic without an assumption of shortfall and termination obligations. *Id.*, Point XXI. First, these issues are clearly beyond the scope of the referral, which, as noted above, concerns whether AT&T’s refusal to permit the transfer from CCI to PSE was in compliance with the terms of the governing tariff. Although the Commission has broad discretion under the

Administrative Procedure Act and Commission rules to decide whether a declaratory ruling is necessary to terminate a controversy or remove uncertainty, it should decline to decide issues that are not necessary to assist the referring court. *See* Commission 2003 Decision at ¶ 15 n.72 (citing 5 U.S.C. § 554(e); 47 C.F.R. § 1.2; 47 U.S.C. §§ 154(i), (j); and *Yale Broadcasting Co. v. FCC*, 478 F.2d 594, 602 (D.C. Cir. 1973)). Petitioners' discrimination claims are clearly such issues.

The district court's May 1995 referral does not relate to petitioners' claim that AT&T violated Section 203 of the Communication Act concerning contract tariffs, which was first asserted almost two years after the referral, in petitioners' March 1997 Supplemental Complaint. *See* Exh. 15, ¶ 111 (§ 6).²⁰ Nothing in the Third Circuit opinion or the district court's May 31, 2006 Opinion and Order expanded the referral to include the Supplemental Complaint's discrimination claim on contract tariffs.²¹ The reason for that is plain. The question of whether AT&T somehow discriminated against petitioners regarding access to contract tariffs bears no relevance to the propriety of AT&T's conduct concerning the CCI-PSE transfer request. The facts and legal analysis for those two claims are distinct. Thus, there can be no plausible argument that consideration of this issue by the Commission would somehow assist the district court in resolving the referred issue. Indeed, as discussed more fully below, petitioners repeatedly represented to the district court that the claims on the Supplemental Complaint were separate and distinct from the account movement issue that was the subject of the AT&T's

²⁰ Petitioners are correct that the district court stayed this matter after permitting the filing of the Supplemental Complaint and AT&T's responsive pleading. However, their contention that the Magistrate Judge did so because he treated the issues in the Supplemental Complaint as "related" is wrong. Magistrate Judge Hedges simply reaffirmed that the earlier stay remained in effect; he did not make a finding or even discuss any question of "relatedness." *See* Exhs. 5 & 16.

²¹ The May 2006 order simply permitted petitioners to pursue any issues left open by the D.C. Circuit's decision, which addressed only the Commission's interpretation of § 2.1.8.

petition for review at the D.C. Circuit. *See* Exh. 17 (Letter of July 9, 2004 from Alfonse Inga to Hon. William G. Bassler).

Petitioners' claims of discriminatory traffic-only transfers is likewise beyond the scope of the referral. The question referred was whether the proposed transfer of traffic between CCI and PSE was in "compliance or not with the terms of the governing tariff." 1995 Referral Order at 2. The answer to that question turns entirely on the proper interpretation of the governing tariff. And, as AT&T has shown, the proposed transfer was plainly invalid under § 2.1.8.

Even if, as petitioners claim, AT&T had permitted other "traffic only" transfers, that would not alter the plain language of § 2.1.8 and thereby make the transfer petitioners proposed permissible. Instead, it would give rise to a separate discrimination claim—*i.e.*, that AT&T discriminated against petitioners by enforcing the tariff as to them, while permitting others to evade its requirements. The district court did not refer this issue to the Commission or seek its assistance in resolving it. Indeed, as the colloquy between the Court and AT&T's counsel makes clear, the Court recognized (and AT&T agreed) that this issue would be presented to the *Court*, not to the Commission, if AT&T prevailed on the tariff interpretation question. *See* Petn. at 26.

Second, these discrimination claims are unsuitable for a declaratory ruling because resolving them necessarily involves disputed issues of fact. Declaratory relief under the Commission's Rules, 47 C.F.R. § 1.2, cannot be granted "where, as in the present case, all relevant facts are not clearly developed and essentially undisputed." *In re Cascade Utilities*, 8 FCC Rcd 781, 782 (1993) (citing *In re Aeronautical Radio, Inc.*, 5 FCC Rcd 2516, 2518-19 (Com. Car. Bur. 1990) and *In re American Network, Inc.*, 4 FCC Rcd 550, 551 (Com. Car. Bur. 1989)). Any fact-based disputes at the Commission must be resolved through the complaint procedures that enable the parties, through discovery, to develop the facts to resolve the dispute.

In re Aeronautical Radio, Inc., 5 FCC Rcd at 2518. Adjudicating petitioners' contract tariff and traffic-only transfer discrimination claims would require deciding myriad factual issues (which have not been developed at the district court), such as the course of dealing between petitioners and AT&T, the existence of other customers that were similarly-situated to petitioners, and the course of dealing between AT&T and the customers that petitioners claim were "favored." The existence of those disputed issues of fact makes this issue unsuitable for a declaratory ruling.²²

In fact, in their prior submissions to the Commission, petitioners argued that "[a]ny factual issues which need to be addressed in order to apply the tariff, after the tariff is interpreted by the Commission, can be addressed by the District Court." See Commission 2003 Decision at ¶ 18 n.87 (quoting Petitioners' Reply at i). And the Commission itself "agree[d] that declaratory relief is inappropriate when the facts are disputed." *Id.* Accordingly, the Commission should reject the petitioners' request for a declaratory ruling on the discrimination claims petitioners seek to raise now.

B. The Commission Should Decline To Address Petitioners' Illegal Remedy Claim.

Yet another issue utterly unrelated to the one referred by the district court is whether AT&T used an "illegal remedy" in June 1996 in its "Application of Alleged S&T Penalties." See Petn., Point XX. Petitioners' contention that the district court somehow determined that this issue was not "separate" from the January 1995 transfer issue, *id.* at 3, is demonstrably false.

²² Under the forum election provision of the Communications Act (47 U.S.C. § 207), petitioners' decision to seek relief in the district court on these claims precludes them from filing a Complaint in the Commission. See, e.g., *Stiles v. GTE Sw. Inc.*, 128 F.3d 904, 907 (5th Cir. 1997) ("the language of the statute is unambiguous: A complainant can file a complaint either with the FCC or in federal district court, but *not* in both") (emphasis added); *Premier Network Servs., Inc. v. SBC Communications, Inc.* 440 F.3d 683, 688 (5th Cir. 2006) ("once an election is made by either filing a complaint with the FCC or filing a complaint in federal court, a party may not thereafter file a complaint on the same issues in the alternative forum, regardless of the status of the complaint").

Petitioners' claim that the Commission's 2003 Decision "encompassed the June 1996 penalty infliction" issue, *id.* at iv, is a transparent misreading of that decision, which expressly declined to address the issue. Commission 2003 Decision at ¶ 20 n.94. Because it is clearly outside the scope of the issue referred by the district court, the Commission should not address the June 1996 shortfall issue.

Petitioners suggest that the district court's "decision" not to "separate" the January 1995 traffic issue from the June 1996 shortfall issue tacitly shows that these issues should be decided together. Petn. at 2-3. Unfortunately for petitioners, there was never any such decision by the district court and no basis for concluding that it is of the view that the June 1996 shortfall issue is included in the referral. The relevant procedural history is as follows. In July 2004, Alfonse Inga, attempting to act *pro se* on behalf of petitioners, submitted letters asking the district court to either consider the June 1996 shortfall issue at a "court hearing" or to order a primary jurisdiction referral on three questions related to the June 1996 shortfall issue. In his letter, Mr. Inga stated that the issues in the Supplemental Complaint, including the June 1996 shortfall claims, were "separate and distinct" from the "account movement issue." *See* Exh. 17. In September 2004, the court refused to consider Mr. Inga's request, finding that he could not appear on behalf of corporate entities. Exh. 18 (Sept. 1, 2004 Letter Order from Judge Bassler). Thereafter, petitioners retained counsel, who renewed informally the request by Mr. Inga to vacate the district court's stay (in part) and for primary jurisdictional referral. Exh. 19 (Sept. 23, 2004 letter from Janet Coven to Judge Bassler). In denying that request, Judge Bassler made no finding of relatedness, and noted that petitioners would have to file a formal motion to restore the matter to the active docket. Exh. 20 (Oct. 8, 2004 Letter Order from Judge Bassler).

In October 2004, petitioners made such a motion, seeking to vacate the stay (in part) and a “primary jurisdiction referral order” for three declaratory rulings having to do with the June 1996 shortfall issue: (a) the appropriateness of applying shortfall charges; (b) an issue they called “disputed bill remedy;” and (c) whether AT&T waived shortfall “penalties.” Exh. 21 (Proposed order filed Oct. 8, 2004). After AT&T filed its response, petitioners filed a series of supplemental papers, prompting the district court to ask the parties to submit briefs consolidating all of the reasons why the stay should (or should not) be lifted. Exh. 22 (May 5, 2005 Letter Order from Judge Bassler). In their May 31, 2005 motion detailing all of the reasons to vacate the stay, petitioners said nothing about a primary jurisdiction referral on the June 1996 shortfall claims, thereby abandoning their earlier request for the district court to make a primary jurisdiction referral on the June 1996 shortfall issue. In fact, they represented to Judge Bassler that “[t]hose claims also are currently stayed but are not directly at issue in this motion.” (Pet’rs’ May 31, 2005 Br. at 6). In denying their motion and ordering petitioners to initiate an administrative proceeding with the Commission, therefore, the district court did not consider the June 1996 shortfall claim, for that issue was not even before the court. Thus, the district court made no decision not “to separate” the June 1996 shortfall claim, and there is no basis to conclude that the district court ever concluded that issues on the June 1996 shortfall charge claim should be decided along with the referred issue.

The Commission should also reject petitioner’s statement that the Commission 2003 Decision “encompassed the June 1996 penalty infliction.” Petn. at iv. That is a blatant misreading of the Decision. The Commission expressly declined to address any issues concerning AT&T’s shortfall charges in that declaratory proceeding, including the propriety of

the imposition of shortfall charges on CCI's end-users, which it deemed to be "a moot issue." Commission 2003 Decision at ¶ 20, n.94.

As discussed above with respect to other issues first raised in the Supplemental Complaint, the request for a Declaratory Ruling on whether AT&T's used an "illegal remedy" by placing shortfall charges on certain end-user bills is unrelated to the issue referred by the district court. Deciding whether the December 1994/January 1995 proposed transfer from CCI to PSE was in "compliance or not with the terms of the governing tariff" is not assisted by delving into the propriety of AT&T's alleged conduct on a distinct legal issue based on a different set of facts occurring some 18 months later. That proposition cannot be legitimately disputed. Petitioners' conclusory statement that the issues are related is directly contradicted by their repeated representations to the district court that the June 1996 shortfall issue was separate from the referred question. That the district court continued the stay in its entirety reflects a sensible application of the law set forth in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 223-24 (1966) (instructing district court "to stay the action pending the *final outcome* of the . . . proceedings" under the regulatory statute) (emphasis added), not that the June 1996 shortfall issue is either related to the January 1995 transfer issue or somehow within the scope of the primary jurisdiction referral.²³ Accordingly, the Commission should decline to consider petitioners' request for a declaratory ruling on whether AT&T's conduct with regard to application of shortfall charges constituted an "illegal remedy."

²³ Furthermore, given that there has been no discovery in the district court on the claims in the Supplemental Complaint, it is premature to conclude that there are no fact issues with regard to the June 1996 shortfall allocation issue. That is another reason to decline to consider this issue on a request for a declaratory ruling. For the reasons stated above, petitioners would not be permitted to seek relief through the complaint process, as they have already sought relief from the district court based on same allegations.

Respectfully submitted,

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December 20, 2006

CERTIFICATE OF SERVICE

I hereby certify that, on this 20th day of December, 2006, I served the foregoing
“Comments of AT&T Corp. in Opposition to Request for Declaratory Rulings” and attached
exhibits by email and first class mail to the following counsel:

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