

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)	
)	Formerly CCB/CPD 96-20
Primary Jurisdiction Referral)	DA-06-2360
From the NJ District Court)	WC Docket No. 06-210
)	
One Stop Financial, Inc.)	
Group Discounts, Inc.)	
Winback & Conserve Program, Inc.)	
800 Discounts, Inc.)	
)	
)	Petitioners
and)	
)	
AT&T Corp.)	
)	Respondent

**REPLY TO PETITIONERS' REQUEST FOR EXTENSION
OF TIME TO FILE REPLY COMMENTS**

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January 5, 2007

INTRODUCTION

Petitioners One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc., and Winback & Conserve Program, Inc. have requested a delay of at least one month (until February 16, 2007) to file reply comments in this matter so that they may “seek guidance” from the District Court on whether certain issues in their Request for Declaratory Ruling are within the scope of the District Court’s primary jurisdiction referral. Petitioners contend that either the District Court has broadened the referral to include issues wholly unrelated to the 1995 traffic transfer question, or that there is some ambiguity on the scope of the referral that needs clarification. Both contentions are plainly without merit. The questions the District Court has referred are clear and relate solely to the validity of the proposed 1995 traffic transfer. Accordingly, what petitioners really seek is not a “clarification” of a perfectly clear referral order, but rather an opportunity to persuade a new District Judge who is wholly unfamiliar with the tortured history of this case to grant a new and broader referral than petitioners were able to obtain from the now retired referring judge. The Commission should not countenance this gambit, and instead should deny petitioners’ request for an extension of time.

ARGUMENT

Faced with unambiguous language clearly delineating the scope of the referral, petitioners misquote the District Court, ignore the extensive procedural history (including their own statements), and offer a raft of irrelevant arguments in a misguided attempt to have the Commission decide issues that the District Court did not refer and which are entirely separate from 1995 traffic transfer issue. As detailed more fully in AT&T’s December 20, 2006 Comments (hereinafter “AT&T Comments”) (at 3-9), the original referral in May 1995 was limited to a specific issue concerning the 1995 proposal to transfer traffic from Combined

Companies, Inc. (“CCI”) to Public Services Enterprises of Pennsylvania, Inc. (“PSE”). At the time, the District Court 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.” (AT&T Comments Ex. 3, May 19, 1995 Preliminary Injunction). After the Commission’s October 2003 decision in this matter, and while that decision was still on appeal to the D.C. Circuit, petitioners inundated the District Court with letters and filings seeking various relief, including a primary jurisdiction referral on several questions related to the June 1996 shortfall issue. (AT&T Comments, Ex. 21, proposed Order filed Oct. 8, 2004). In May 2005, the District Court ordered petitioners to file a single motion that included all of the relief they were seeking. (AT&T Comments, Ex. 22, May 5, 2005 Letter Order). Petitioners then filed a May 31, 2005 motion, which focused solely on the 1995 transfer issue and sought to vacate the stay of the litigation proceedings. In that motion, petitioners represented that their claims with regard to the June 1996 shortfall issue “were not directly at issue” and abandoned their request for a primary jurisdiction referral on any issue related to the June 1996 shortfall claims. (AT&T Comments, Ex. 6, Petn. Brief to Vacate Stay at 6).

After extensive briefing and oral argument, the District Court resolved petitioners’ motion in a May 31, 2006 Order and Opinion. It denied their request to vacate the stay of proceedings, and ordered them “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).” (Ex. A to Petitioners’ Sept. 23, 2006 Request for Declaratory Rulings). The Order did not address the June 1996 shortfall issue

or any of petitioners' discrimination claims, as none of those issues was before the court. The May 31, 2006 Order thus confirmed that the referral concerns only the 1995 transfer issue. The reference to "any other issues left open by the D.C. Circuit's Opinion" did not and could not sweep in issues related to petitioners' June 1996 shortfall and discrimination claims because those issues were not the subject of the D.C. Circuit's opinion. Rather, as discussed in AT&T's Comments, the only issue "left open" by that opinion is which obligations should have been transferred for the 1995 CCI-PSE transfer to be in compliance with the tariff and, potentially, AT&T's reliance on the tariff's antifraud provision to prevent the CCI-PSE transfer. (AT&T Comments at 7-8 and Ex. 11 thereto, May 31, 2006 District Court Opinion at 14-15 (discussing issue left open by the D.C. Circuit)).

As a result, there is no plausible way to read the May 31, 2006 Order as encompassing a referral on the propriety of AT&T's alleged conduct with regard to June 1996 shortfall charges or petitioners' discrimination claims.¹ Recognizing that fact, petitioners selectively quote the May 31 Order, claiming that it represents a "far reaching statement" indicating that Judge Bassler wanted "any other issues left open" resolved. The full text of the May 31, 2006 Order, as well as the procedural history leading up to that order, conclusively refute petitioners' claim about what the District Court put "on the table." Because the referral was clearly and unambiguously limited to the questions on the 1995 proposed CCI-PSE transfer, there is no need to saddle the District Court with a request for clarification.

Petitioners' feigned surprise that there is now a dispute on the scope of the referral is utterly disingenuous. After being ordered to file with the Commission, they sought AT&T's concurrence on the scope of the issues to be submitted for declaratory relief. In a September 19,

¹ In acknowledging that the traffic transfer issue and "shortfall permissibility issue" are "separate and distinct" (Petn. Request for Extension of Time, ¶3), petitioners undercut their contention that there would be some economy in having the Commission decide these two issues together.

2006 email, their counsel suggested that the petition should include the following issues (among others): (a) “whether or not AT&T used an illegal remedy in June of 1996 in the way in which applied S&T [shortfall and termination] penalties to the end-users;” and (b) whether AT&T “engage[ed] in discrimination under 202 of the Act by not providing plaintiffs’ with a contract tariff despite qualifying for it.” Petitioners advised that if any of the additional issues raised in the September 19 email were “viewed by AT&T as disputed facts,” they would return to the District Court and assert that AT&T had reversed its position. (Ex. 1 hereto, Sept. 19, 2006 email).

AT&T replied by pointing out that the two issues identified above (and one other that petitioners’ counsel raised) were plainly outside the scope of the referral and had nothing to do with whether the proposed transfer of traffic between CCI and PSE was “in compliance or not with the terms of the governing tariff.” (Ex. 2 hereto, Sept. 22, 2006 letter at 2). Indeed, AT&T explained at length that petitioners had no conceivable basis for demanding that these issues be resolved at the Commission as part of the primary jurisdiction referral, and that any attempt to move to lift the stay at the District Court on the basis of these claims would be frivolous and sanctionable. (*Id.* at 3). Petitioners did not return to the District Court. Rather, they proceeded to file a petition that contained issues that they have known all along were outside the scope of the referral.

There is also no merit to petitioners’ claim that the District Court’s decision to stay all proceedings somehow suggests that the January 1995 traffic transfer issue and June 1996 shortfall issue should be decided together. As AT&T described in detail in its Comments, there was no such decision by the District Court and no basis to conclude that the District Court

included any June 1996 shortfall or discrimination issue in the referral. (AT&T Comments at 39).²

In a desperate attempt to expand the scope of the referral, petitioners discuss a July 2005 email ostensibly from FCC Counsel Austin Schlick to Mr. Alfonse Inga, petitioners' president. Notably, nothing in Mr. Schlick's email discusses the scope of the referral or advises that the Commission could or would address issues relevant to claims pending in a district court when the district court has not referred those issues under the doctrine of primary jurisdiction. Obviously, neither Mr. Schlick nor anyone else at the Commission has the authority to expand the scope of a district court's referral; such authority would lie exclusively with the district court or the courts sitting over it. As a result, petitioners' reliance on Mr. Schlick's email is entirely misplaced.

The Commission should also ignore petitioners' unsupported statements about the alleged beliefs or desires of the Internal Revenue Service and the Florida Department of Revenue. Neither agency has filed any comments in this proceeding or indicated to AT&T that it has any interest in the referral by the District Court.³ Petitioners obviously do not and cannot speak for either agency, and the Commission should disregard petitioners' innuendo and speculation about those agencies' "views" on this matter.

Petitioners' discussion of CCI, 800 Services, Inc., and other "aggregators" (Petn. Request for Extension of Time ¶9) is also irrelevant to their request. CCI, no longer a party in the District Court matter, recently filed comments that parrot many of the positions taken by petitioners. CCI also stated that the Commission must determine all of the issues in petitioners' declaratory

² In addition to being outside the scope of the referral, the issues raised by petitioners on their various discrimination claims are clearly unsuitable for a declaratory ruling as discussed at length at pages 35-38 of AT&T's Comments.

³ AT&T is also unaware of any investigation by either agency regarding shortfall charges imposed by AT&T in 1996. AT&T notes that audits by those agencies for that period have closed.

ruling request, CCI but presented no argument in support of that view and neglected to discuss what the District Court actually said was the scope of the primary jurisdiction referral. 800 Services, Inc., never a party to the District Court matter, filed comments claiming that the Commission should address all declaratory ruling issues. However, 800 Services also ignored what the District Court actually ordered and offered no reasoned argument in support of its position that the Commission should address all issues raised by petitioners.⁴ Accordingly, there is no significance in the fact that CCI or 800 Services, Inc. agreed with petitioners on this point.⁵ As for the other “aggregators,” none of them filed comments so the Commission should disregard petitioners’ speculation that they want all of petitioners’ issues decided.

Finally, petitioners’ extension request is not only baseless, it is an unfair and prejudicial attempt to return to the District Court and reopen the proceedings to obtain a referral they did not obtain from Judge Bassler. Petitioners have spent nearly two years burdening AT&T and the District Court with a multitude of filings following the D.C. Circuit’s decision, and were eventually directed by Judge Bassler to file a single motion to state all of the relief they sought. They were given ample opportunity to brief and argue that motion to Judge Bassler, who then later denied petitioners’ motion for reconsideration. Now that they have been ordered to return to the Commission, petitioners propose to cause further delay by returning to a new District Judge (Judge Bassler has retired) who is completely unfamiliar with the convoluted

⁴ 800 Services filed a separate suit in the District of New Jersey, alleging a variety of claims concerning its Tariff No. 2 service from AT&T. The District Court dismissed all of 800 Services’ claims on summary judgment and awarded AT&T a \$2.2 million judgment for unpaid tariff charges. The Court of Appeals for the Third Circuit affirmed the District Court judgment in all respects. *800 Services, Inc. v. AT&T Corp.*, 2002 U.S. App. LEXIS 2389, *6 (3d Cir. 2002). 800 Services’ president, Phil Okin, then claimed that his company had ceased operations, and it has not yet paid anything on AT&T’s judgment.

⁵ Indeed, the discussion by CCI and 800 Services, Inc. about shortfall could be “deferred” underscores the unsuitability of deciding any of the June 1996 shortfall issues in a declaratory ruling petition, even if those issues had been within the scope of the referral.

history of this case and raising new issues that they abandoned before Judge Bassler. Granting petitioners' request will unfairly burden AT&T and the new District Judge and cause further delays in the proceeding.

CONCLUSION

For the reasons stated above and in AT&T's Comments (at 35-41), there is no basis for the Commission to consider petitioners' issues on their discrimination claims and "illegal remedy" claim related to June 1996 shortfall. There is also nothing to be gained by extending the reply time to allow Petitioners to return to the District Court to obtain "clarification" on whether those issues are within the scope of the referral. Petitioners filed voluminous papers that extensively briefed the issue at that court and, in doing so, abandoned their request for a primary jurisdiction referral on questions related to the June 1996 shortfall issues. The District Court ruled on the basis of the positions petitioners took before it, and its May 31, 2006 Opinion and Order clearly explains and delineates the issues being referred under the doctrine of primary jurisdiction. Those issues manifestly do not include the shortfall issues. There is, accordingly, no reason to burden the District Court with an "inquiry" on the scope of the referral and no reason to extend the time to file reply comments.

Respectfully submitted,

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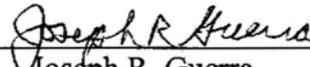
Attorneys for AT&T Corp.

January 5, 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of January 2007, I served the foregoing "Reply to Petitioners' Request For Extension of Time to File Reply Comments" and attached exhibits by email and first class mail to the following counsel:

Frank P. Arleo
Arleo & Donohue, LLC
622 Eagle Rock Avenue
Penn Federal Building
West Orange, NJ 07052



Joseph R. Guerra

Exhibit 1

From: Municipal Email Notices [mailto:ajdmm@optonline.net]
Sent: Tuesday, September 19, 2006 4:13 PM
To: Frank Arleo
Subject: Mr. Jacoby

Mr Jacoby

I understand that you have agreed with Mr. Helein that the traffic transfer issue as stated within Judge Basslers order should proceed by Declaratory Ruling.

Mr. Helein was not involved in the proceedings before Judge Bassler and Mr. Inga only wanted to reconfirm with his business couterpart that the spin that AT&T put on Judge Basslers question was not what the District Court or the DC Circuit asked. As Mr. Inga stated to his business couterpart, AT&T will have the right to argue what it believes the District Court order says on reply to the Inga Companies Declaratory Ruling filing.

Additionally, AT&T represented during oral argument and within letters to the District Court that all the issues that were before the Court were also before the FCC and all were all interpretive issues.

Besides the question regarding which obligations transfer under 2.1.8 on traffic only transfers, the Inga Companies are also seeking Declaratory Rulings on related issues outlined in the attachment. Mr. Helein was not aware at the time that these additional non disputed issues were also going to be addressed at the FCC.

If you recall the FCC Declaratory Ruling in 2003 not only addressed the traffic transfer issue but also addressed the June 1996 infliction of shortfall and termination obligations against the Inga Companies end-users.

If the attached Word Doc outlining the additional issues to obtain a Declaratory Ruling are now viewed by AT&T as disputed facts; then we will advise Judge Wigenton that AT&T has now totally reversed its position and ask to have the stay lifted in regard to facts that AT&T now states are in dispute.

The Inga Companies are close to filing and would like a response by tomorrow.

Frank Arleo

Dear Tom Umholtz

The FCC believes it is a good thing for the parties to address issues to resolve before filing. Therefore I wanted to also advise AT&T before filing the Declaratory Ruling that there are additional undisputed facts that the Inga Companies will also seek to resolve in the way of the Declaratory Ruling process. Please reply by Wed. September 20th 2006 as we are on deadline.

As you are aware the first FCC Declaratory Ruling on 2.1.8 also addressed the shortfall and termination (S&T) penalties that were placed upon the end-users bills by AT&T in June of 1996. The Inga Companies will also seek a Declaratory Ruling on whether or not AT&T used an illegal remedy in June of 1996 in the way in which applied S&T penalties to the end-users.

The FCC has made it clear on what its position is on use of illegal remedies as we have seen in the traffic transfer issue:

The following FCC quotes from its 2003 Ruling:

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)

and to the DC Circuit state its position...

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)

AT&T also committed another illegal remedy in applying its alleged S&T penalties. AT&T's tariff states at 3.3.1.Q bullet 10:

Shortfall and/or termination liability are the responsibility of the Customer. **For billing purposes**, such penalties "**shall reduce any discounts**" apportioned to the individual locations under the plan.

It is an undisputed fact that AT&T's initially applied to all end-users AT&T's alleged S&T penalties, instead of applying them initially to our main account.

Additionally, the tariff only permitted for billing purposes to **reduce the discount**; not apply penalties in amounts far exceeding the removal of discounts. AT&T was not allowed to bill these end-users as the FCC's Ruling stated "these end-users did not choose AT&T as their primary interexchange carrier". Declaratory Ruling pg. 7 n52

For example an end-user with \$66.02 usage was receiving a \$13.21 credit (20%). The tariff remedy if S&T actually existed allows for billing purposes to only reduce the \$13.21 discount.

This end-user was whacked with a \$3,959.03 penalty!

Needless to say this led to incredibly irate end-users. It's one thing losing a \$13 discount as per the tariff; it's another issue applying almost \$4 grand! AT&T's illegal remedy ruined all of our goodwill. AT&T used this illegal remedy and then came to the end-users rescue by destroying us.

Issue II: Section 2.1.8's Statute of Limitations requirement of 15 days.

It is also an undisputed fact that AT&T was well beyond the 15 day statute of limitations period as the non vacated 1st Judge Politan Decision indicated. Therefore the issue of AT&T demanding that S&T obligations also transfer on a traffic only transfer may be moot. Given the fact that it has already been resolved that 2.1.8 allows traffic only transfers AT&T's S&T obligations

demands would be moot if the FCC agrees with Judge Politan that AT&T did not meet the 2.1.8. Statute of Limitations requirement of 15 days.

Issue III: Pre June 17th 1994 plans grandfathered till end of three year term.

The FCC Oct 2003 Declaratory Ruling pg 14 n.94 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 ...is inappropriate because whether CCI's plans were pre- or post-June 17, 1994 plans is a **disputed fact**.

We will seek a Declaratory Ruling on undisputed facts in reference to pre June 17th 1994 plans:

It is an undisputed fact that the plans were all subscribed to prior to June 17th 1994:

The FCC's Oct 2003 Declaratory Ruling correctly stated that plaintiffs' 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.

The FCC stated that what is disputed is whether the pre June 17th 1994 plans may **never** have shortfall imposed; however our new Declaratory Ruling will seek a Declaratory Ruling on grandfathering just the remainder of the 3 year commitments. We will not ask for a forever grandfathered declaration as that was in dispute.

AT&T's tariff states:

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

The tariff then states:

A CSTPII expires when the three year term ends.

It is an undisputed fact that we restructured prior to fiscal year end. AT&T's interpretation was that a pre June 17th 1994 plans become a post plan when restructured prior to the end of the very 1st year of a three year CSTPII contract. The FCC will simply be asked to interpret whether the non disputed pre June 17th 1994 plans would be grandfathered through just its remaining 3 year commitment; not forever as what was in dispute.

Issue IV: Section 2.1.8 was Not Explicit

We also will seek a Declaratory Ruling on whether section 2.1.8 was explicit at the time of the Jan 1995 traffic only transfer; which as AT&T is aware is a requirement of its tariffs.

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.

DC Oral Argument Page 28 Line 10. FCC's Counsel 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.

Here are just four examples of many regarding AT&T's concession to the NJ District Court:

1) 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)

There are many more AT&T statements of this same ilk.

The FCC will be asked to issue a Declaratory Ruling based upon AT&T’s own admission, plus comments made by each Court as well as the FCC regarding section 2.1.8’s failure to be explicit.

Issue V) Section 2.5.7 Circumstances Beyond the Customers Control

If a restructure is determined as a new plan, then finding AT&T violated 2.5.7 by not waiving S&T obligations under 2.5.7., Circumstances Beyond the Customers Control. AT&T simultaneously interpreted restructures as both a new plan and a “not new” Plan.

AT&T stated restructures were new to make the pre June 17th 1994 plans post plans but also stated that the restructured pre June 17th 1994 plans were “not new” so as to prevent the acquisition of AT&T customers who were under Location Specific Term Plans. (LSTP’s).

Issue VI) Discrimination Issue

By engaging in discrimination under 202 of the Act by not providing plaintiffs’ with a contract tariff despite qualifying for it. AT&T’s position to the third Circuit was that AT&T had the right to discriminate as to who gets a contract tariff. The FCC will be asked to issue a Declaratory Ruling on whether AT&T violated section 202 of the Communications Act.

Tom these are all non disputed facts that need FCC interpretation. In fact AT&T during the May 25th 2006 oral argument stated to Judge Bassler

“all the issues are non disputed facts which need FCC interpretation”.

Additionally AT&T stated within its briefs to the District Court:

Plaintiffs made the same arguments to the FCC that they are now raising in this Court. Their prior submissions to the agency confirm that the issues they ask this Court to decide are all encompassed within this Court's primary jurisdictional referral.

Plaintiffs' arguments to the agency confirm that the interpretive significance, if any, of AT&T's proposed revisions to 2.1.8 is a matter that can and should be submitted to the FCC.

If AT&T believes any of the foregoing issues plus the issue of which obligations transfer are in dispute we will then go back to the District Court and advise new Judge Wigenton that AT&T has now reversed its position that these are now disputed facts – not interpretive issues; this way the District Court can then lift the stay to further address the facts that AT&T disputes. As always please confirm that you have sent to your counsel.

Al Inga Pres.

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

Exhibit 2

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September 22, 2006

Via Email & Regular Mail

Frank P. Arleo, Esq.
Arleo & Donohue, LLC
622 Eagle Rock Avenue
West Orange, NJ 07052

Re: Combined Companies, Inc., et al. v. AT&T Corp.
Civil Action No. 95-908 (WGB)

Dear Frank:

On behalf of AT&T Corp., I am responding to a September 20, 2006 email ostensibly from you to Peter Jacoby, an AT&T Senior Counsel, and the letter from Alfonse Inga to Tom Umholtz at AT&T, which was attached to the email to Mr. Jacoby.

That correspondence states that if the "additional *issues*" identified there are "now viewed by AT&T as disputed *facts*; then [you] will advise Judge Wigenton that AT&T has now totally reversed its position and ask to have the stay lifted in regard to *facts* that AT&T now states are in dispute." AT&T has not "reversed its position" about the *issues* that are to be submitted to the FCC. To avoid further confusion, I identify what those issues are below. But AT&T is under no obligation to agree that certain *facts* are undisputed, and it did not argue to the District Court that the stay should remain in place because any "facts" were undisputed. Your clients have no basis, therefore, for seeking (for a third time) to have the stay lifted, and any attempt to do so would be frivolous.

The issue that was referred to the FCC, and that remains undecided, was whether the proposed transfer of the relevant service "plans and/or their traffic" was in "compliance or not with the terms of the governing tariff." May 19, 1995 Preliminary Injunction, at 2. The D.C. Circuit concluded that § 2.1.8 of the AT&T's Tariff No. 2 governed the proposed transfers. Because this provision states that a transferee company must agree in writing "to assume *all* obligations of the former Customer at the time of transfer" (emphasis supplied), the FCC must decide whether the proposed transfer was in "compliance or not" with this requirement, given that the transferee did not agree to assume in writing any obligations for shortfall or termination charges.

PITNEY HARDIN LLP

Frank Arleo, Esq.
September 22, 2006
Page 2

In the proceedings before the District Court over whether the stay should be lifted, your clients raised a welter of arguments for why the phrase "all obligations" did not include any obligation for shortfall and termination charges. These included arguments that: (1) the obligations that must be assumed are not "all obligations of the former Customer" but only the "outstanding indebtedness" and "unexpired portion of any applicable minimum payment period," (2) the term and volume commitments that can give rise to shortfall/termination liabilities are not unexpired portions of minimum payment periods, (3) shortfall and termination obligations do not apply to the plans at issue because they are "pre-June 1994" plans, (4) AT&T's withdrawal of Tariff Transmittal 8179 somehow supports plaintiffs' interpretation of § 2.1.8, (5) FCC staff notes somehow show that the FCC rejected AT&T's claim that Tariff Transmittal 8179 was a mere codification or clarification of the "all obligations" language in § 2.1.8, (6) the symbols AT&T employed in Tariff Transmittal 8179 somehow refute that same claim, (7) AT&T's tariff was not sufficiently clear or explicit and any ambiguity must be resolved against it, (8) § 3.3.1.Q of AT&T's tariff and its \$50 per location fee for transfers somehow establishes that customers can transfer all traffic under plans without associated volume commitments, and (9) other transfers that occurred in the past support plaintiffs' interpretation. AT&T agrees that your clients are free to raise any and all of these *arguments* before the FCC in support of their theory that the phrase "all obligations of the former Customer" does not include shortfall and termination obligations. Most of these arguments depend on the meaning of public documents, and thus do not raise factual disputes at all.

Some of these arguments, however, are based on assertions that AT&T has always disputed. Your client is free to raise these arguments before the FCC and AT&T will respond accordingly. But AT&T will not agree that assertions underlying the arguments are undisputed, and it did not argue that the stay should remain in place because such assertions were undisputed. To the contrary, AT&T advised the District Court, for example, that "whether these plans are pre- or post-June 17, 1994 plans is disputed. (See FCC Opinion ¶ 19 n.93)." AT&T Brief Opposing Motion to Lift Stay at 15 n.4; *see also id.* at 18 (noting the "(baseless) allegation that these were pre-June 1994 plans that are exempt from shortfall liabilities"); FCC Opinion at ¶ 18 n.87 (noting AT&T's argument that the facts regarding earlier transfers "are disputed").

In addition, several of the issues raised in Mr. Inga's letter are plainly outside the scope of the referral. The letter raises the issues of (1) whether AT&T used an illegal remedy by placing shortfall and termination charges on end-user bills, (2) whether it should have waived shortfall and termination obligations under § 2.5.7, and (3) whether it engaged in discrimination by not providing plaintiffs with new contract tariffs. None of these issues has anything to do with whether the "transfer of the . . . plans and/or their traffic as between Combined Companies, Inc. and Public Services Enterprises of Pennsylvania, Inc. [were in] compliance or not with the terms of the governing tariff." May 19, 1995 Preliminary Injunction, at 2.

PITNEY HARDIN LLP

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September 22, 2006
Page 3

In fact, plaintiffs admitted this with respect to the "illegal remedy" claim. In their motion, which you filed, plaintiffs stated that AT&T's allegedly "illegal" imposition of penalties against end-users "led to the filing in March of 1997 of a Supplemental Complaint in the District Court," and that "[t]hose claims are currently stayed *but are not directly at issue in this motion,*" Motion at 6 (emphasis added). Indeed, since the referral to the FCC had occurred *two years before the Supplemental Complaint was filed*, this claim could not possibly have been included in the referral. Similarly, plaintiffs' claim that AT&T engaged in unreasonable discrimination under the Communications Act by not entering into new contract tariffs with them likewise could not have been within the scope of the referral, since this claim, too, was included in the Supplemental Complaint filed two years *after* the referral. See Supp. Compl. ¶ 111. Finally, in none of the many submissions that plaintiffs filed on their motion to lift the stay did they argue that any of these three issues warranted the lifting of the stay, and AT&T therefore never addressed these arguments, let alone told the District Court that these were matters for the FCC to decide pursuant to the earlier primary jurisdiction referral.

In short, your clients have no conceivable basis for demanding that these three issues be resolved at the FCC as part of the primary jurisdiction referral, and any attempt to move to lift the stay on the basis of these claims would be frivolous and sanctionable. Your clients can raise the many other issues I have identified above in the proceedings before the agency. But AT&T is under no obligation to agree to any of the assertions underlying those claims or with the legally erroneous characterizations of those claims, and any attempt to re-litigate the propriety of the stay based on AT&T's refusal to agree to such assertions or characterizations would likewise be frivolous and sanctionable.

Finally, because you represent the plaintiff companies, I insist that all further correspondence between plaintiffs and AT&T occur on a direct counsel-to-counsel basis. I further insist that Mr. Inga, who is not a lawyer and cannot represent the plaintiffs in this case, not correspond with Thomas Umholtz (Mr. Inga's sole point of contact at AT&T under the District Court order) about this matter. Adherence by you and Mr. Inga to these procedures will assure that proper legal and ethical practices are followed, as well as eliminate potential confusion about plaintiffs' legal positions. As expressly permitted by Judge Bassler's December 8, 2003 Order, AT&T will not respond to future communications regarding this litigation or the FCC proceeding received from Mr. Inga.

Very truly yours,



RICHARD H. BROWN

RHB/jms

cc: Peter H. Jacoby, Esq.
Joseph R. Guerra, Esq.