

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 COMBINING DECLARATORY  
RULINGS AND EXTENSION OF TIME TO FILE REPLY COMMENTS**

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## INTRODUCTION

Petitioners One Stop Financial, Inc., Group Discounts, Inc., 800 Discounts, Inc. and Winback & Conserve Program, Inc. have filed a request to combine the Declaratory Ruling Request filed by another of Alfonse Inga's Companies, Tips Marketing Services Corp. ("Tips Marketing") with the Declaratory Ruling Request filed by petitioners. The Commission should flatly reject petitioners' request because there is no overlap between the issue referred by the District Court in petitioners' case and any of the four issues in the Tips Marketing declaratory ruling request. As a result, combining the Tips Marketing request with petitioners' request would not promote economy, and instead would inject issues that are completely irrelevant to the issue that the District Court wishes to have answered on the primary jurisdiction referral.<sup>1</sup>

In addition, the Commission should deny petitioners' motion because it is an impermissible attempt to circumvent the District Court's order on the primary jurisdiction referral. It is obvious that the request by Tips Marketing (which is not a party in the District Court matter) is a ploy by Mr. Inga to have the Commission consider issues that petitioners deliberately chose to litigate by filing a complaint with the District Court in New Jersey. As

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<sup>1</sup> The Tips Marketing request raises several substantial threshold issues. One is whether the state and federal "tax inquiries" that supposedly justify Tips Marketing's request are even genuine. Apart from the absence of any evidence indicating there is such an inquiry, only toll telecommunication services that vary with time and distance are taxable by the IRS. See, e.g., *Reese Bros., Inc. v. United States*, 447 F.3d 229 (3d Cir. 2006); *American Bankers Ins. Group v. United States*, 408 F.3d 1328 (11th Cir. 2005); *National R.R. Passenger Corp. v. United States*, 431 F.3d 374 (D.C. Cir. 2005). The IRS subsequently issued Notice 2006-50, which provides (among other things) that it will no longer collect the excise tax on long distance service. See Ex. 1 (IRS Notice 2006-50, accessed on January 8, 2007 at <http://www.irs.gov/pub/irs-drop/n-06-05.pdf>). In addition, any claim by the Florida Department of Revenue with regard to the shortfall charges appears foreclosed by the applicable statute of limitations. See Fla. Stat. § 95.091 (five year statute of limitations on claims for tax due prior to July 1, 1999). Another serious question is whether Tips Marketing's alleged interest in state or federal tax collections is sufficient to give it standing to seek resolution by the Commission of the issues it has raised in its petition. See *Aradigm Communications, Inc.*, 21 FCC Rcd 3893 (Wireless Tel. Bur. 2006), fn. 30 (recognizing that "the FCC generally follows the principles of Article III standing"); see also *AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 21,750, 21,752-53 (2001) (recognizing that the Commission follows Article III court precedents on standing claims by non-party to adjudicatory proceeding). These are just some issues that would have to be resolved in petitioners' case if the request to combine were granted. AT&T will concentrate in this reply on issues that relate to the petitioners' request to combine proceedings, and will provide full comments on the Tips Marketing request at the appropriate opportunity.

AT&T has previously explained, petitioners affirmatively abandoned any attempt to have the District Court refer these issues, yet Mr. Inga now seeks, through yet another of his entities, to have the Commission decide these same issues. The Commission should deny the request to combine the two proceedings in order to deter such gamesmanship and to promote the integrity of the judicial process.

### **ARGUMENT**

I. There Is No Overlap Between The Issues Raised By Tips Marketing And The CCI-PSE Proposed Transfer Issue In Petitioners' Case.

The District Court's primary jurisdiction referral concerns AT&T's refusal to process a proposed traffic transfer between Combined Companies, Inc. ("CCI") and Public Services Enterprises of Pennsylvania, Inc., ("PSE") in January 1995. As AT&T described in its Comments, the propriety of AT&T's conduct in refusing to process the proposed transfer is the only legitimate issue in petitioners' request. (AT&T Dec. 20, 2006 Comments at 37-41).

In its request, Tips Marketing seeks the following four forms of declaratory relief:

- The FCC must declare that under AT&T Tariff No. 2, shortfall and termination obligations must stay with the Florida customer's (CCI's) CSTPII/RVPP when only traffic is transferred as opposed to transferring traffic with CCI's CSTPII/RVPP discount plan.
- The FCC must declare that AT&T violated its Tariff No. 2, by using an illegal remedy in inflicting shortfall and termination charges to non Florida based CCI's end-users well in excess of the aggregator afforded CSTPII/RVPP discounts.
- The FCC must declare that AT&T, having used an illegal remedy, cannot rely upon shortfall and termination charges due to the illegal remedy.
- The FCC must declare that the responsibility for all the shortfall and termination obligations in 1996 is not the end-users responsibility but the responsibility of AT&T's primary customer --- the Florida based aggregator CCI.

The first of those requests --- whether shortfall and termination obligations must stay with CCI when traffic is transferred without a transfer of the underlying plans --- is the only issue that, on its face, has anything to do with the proposed CCI-PSE transfer. This “issue,” however, is completely illusory: there is no dispute that CCI was subject to shortfall and termination obligations, and no need to decide whether they could or should have been assumed by PSE.

It is undisputed that CCI was subject to shortfall and termination obligations for the Tariff No. 2 service because the proposed transfer from CCI to PSE was never actually processed by AT&T. There is no need, therefore, for the Commission to “declare that the traffic transfer did not transfer away the shortfall and termination obligations away from the Florida based CCI” (Tips Marketing Summary at 2): because the traffic transfer never occurred, it is indisputable that CCI’s obligation to pay shortfall and termination charges could not have been transferred away. There is simply no live dispute that the shortfall and termination obligations, in fact, stayed with CCI.

Accordingly, there is no reason for the Commission to decide, in connection with Tips Marketing’s request, whether AT&T was entitled to refuse to process the proposed traffic transfer under Section 2.1.8 of Tariff No. 2 because PSE refused to assume CCI’s obligations to pay shortfall and termination charges. The three other questions Tips Marketing raises all relate to whether AT&T could impose shortfall charges on CCI’s non-Florida end-users or whether the shortfall allocation to CCI’s master account was permissible. Because these issues all arise from the historical fact that CCI *was* subject to shortfall obligations, it is entirely unnecessary to decide whether AT&T should have processed the CCI-PSE transfer and, if it had done so, whether CCI *would* have remained subject to shortfall obligations.

Indeed, resolving these questions is particularly unnecessary and gratuitous here. Tips Marketing claims that, had AT&T processed the transfer, CCI alone would have been subject to shortfall charges. AT&T's position is that, even if PSE had assumed these obligations and the transfer had gone through, both CCI and PSE would have had these obligations under the tariff's joint and several liability provision. In deciding whether the imposition of shortfall charges on CCI or its end-user customers was proper, therefore, it does not make a whit of difference whether PSE also could or should have shared the obligation to pay such charges.

In short, the proper resolution of these other three questions (which, as discussed below are also non-issues) does not depend in any way on the propriety of AT&T's refusal to process the proposed transfer; rather, the resolution of those issues would involve application of tariff provisions other than Section 2.1.8 of Tariff No. 2, and is thus irrelevant to the issue actually referred by the District Court. There is simply no overlap at all between the issue legitimately raised by petitioners (the propriety of AT&T's refusal to process the CCI-PSE proposed transfer) and the requested relief in the Tips Marketing's Request.

Accordingly, there would be no economy or any other benefit obtained by combining Tips Marketing's request with that of petitioners. Instead, a combined proceeding would result in unnecessary delay and complication, especially given various threshold issues, such as whether there is (or even could be) a tax inquiry by the agencies and the standing of Tips Marketing to pursue declaratory relief in this context, as well as the penchant of petitioners and Tips Marketing to burden the Commission and other parties with a plethora of irrelevant and moot arguments. The appropriate course of action is for the Commission to limit petitioners' proceeding to the January 1995 proposed transfer issue and not introduce the entirely unrelated Tips Marketing declaratory ruling request in this proceeding.

II. The Request For Rulings On The June 1996 Shortfall Allocation Issue Also Does Not Justify Combining The Proceedings.

Even if the Commission were to expand the scope of the issued referred by the District Court to include the June 1996 shortfall issues raised by petitioners (see AT&T Dec. 20, 2006 Comments at 37-41), there would still be no reason to combine the proceedings, because the rulings sought by Tips Marketing on the June 1996 shortfall are clearly non-issues utterly unnecessary to the “tax issue,” even as described in the Tips Marketing request.

The “tax issue” described by Tips Marketing concerns shortfall charges on CCI’s master account allocated in July 1996 and AT&T’s settlement agreement with CCI in 1997.<sup>2</sup> According to Tips Marketing, federal and state agencies are seeking to determine whether federal excise tax (in the case of the IRS) or Florida tax should have been charged and collected by AT&T on: (a) the shortfall charges allocated on CCI’s master account bill in July 1996; or (b) some portion of the settlement proceeds on AT&T’s 1997 settlement with CCI. It should be noted that AT&T is unaware of any such inquiry by either the IRS or Florida Department of Revenue, and that those agencies’ respective audits for AT&T are closed. In light of the recent authority that the federal excise tax does not apply to telecommunication services such as shortfall charges, and the IRS decision to no longer collect tax on distance telephone charges (supra at p.2 n.1), the Tips Marketing statement that the IRS has some interest in that transaction is extremely suspect, and probably false. Tips Marketing also has submitted no competent evidence that there is, in fact, any inquiry by the Florida Department of Revenue. Its failure to do so is not surprising, because that agency’s interest appears dubious given that Florida’s statute of limitations on such a claim appears to have expired years ago.

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<sup>2</sup> Tips Marketing states that in July 1996 AT&T removed the shortfall charges that had been allocated on CCI’s end user accounts in June 1996, and transferred the charges to CCI’s “sole master account.” (See Tips Request ¶6).

In all events, based on the description of the “tax issue,” the Tips Marketing declaratory relief questions on the June 1996 shortfall allocation are all non-issues. Tips Marketing asks the Commission to decide three shortfall-related issues: (a) AT&T’s imposition of shortfall charges on the end-user accounts was “illegal;” (b) AT&T cannot impose shortfall “due to illegal remedy;” and (c) shortfall is the responsibility of CCI, not the end users. (See Tips Request, ¶¶ 18-20). Issues (a) and (c) are both moot because Tips Marketing itself notes that the shortfall charges were removed from the end user accounts and transferred to CCI’s master account. The supposed “tax issue” thus concerns AT&T’s imposition of shortfall on CCI’s master account, not the brief imposition of such charges on end user accounts which were removed a month later.

The request for a ruling on the “legality” of AT&T’s allocation of shortfall charges is another fool’s errand because Tips Marketing expressly assumes for purposes of its request that the shortfall charges are valid. The only basis Tips Marketing has for seeking a declaratory ruling is its alleged interest in collecting a “bounty” for AT&T’s supposed failure to collect proper state and federal taxes on shortfall charges. Even assuming this interest is enough to give Tips Marketing standing to seek such relief -- and AT&T does not concede that it does -- a determination that shortfall charges should never have been imposed in the first place completely undercuts Tips Marketing’s right to collect a bounty. Conversely, if Tips Marketing is entitled to a bounty whether or not the imposition of shortfall charges was valid, then there is obviously no reason for the Commission to decide that issue.

In short, allowing the shortfall issues to be introduced into petitioners’ proceeding would sow enormous confusion, lead to much more voluminous submissions on various issues that have no commonality with the questions referred by the District Court, and result in a more

protracted and convoluted proceeding. Accordingly, the Commission should deny petitioners' request.

III. Denial Of Petitioners' Request Would Promote The Integrity Of The Judicial Process.

Petitioners spent two years burdening the District Court with various submissions, and then were required to submit all their relief in a single motion. In that motion, they represented expressly that the 1996 shortfall claims were not part of their omnibus motion. Based on the issues as framed by petitioners, the District Court ordered them to return to the Commission to initiate a proceeding on only the June 1995 CCI-PSE proposed transfer issue. (See AT&T Dec. 20, 2006 Comments at 3-9).

The timing of Tips Marketing petition,<sup>3</sup> replete with transparently phony issues on an unsubstantiated "tax inquiry," compels the conclusion that the petition is a sham devised by Mr. Inga in an effort to get what the four Inga Company petitioners would not and did not get from Judge Bassler: a referral on issues related to the June 1996 shortfall claims in the petitioners' Supplemental Complaint. Indeed, petitioners admit such a motivation in their Request (see ¶3), notwithstanding their earlier representations to the District Court, and the Court's decision based on petitioners' positions that the June 1996 shortfall allocation claims were not at issue on the pending motion. The Commission's denial of petitioners' request to combine proceedings will prevent them from profiting from such underhanded conduct and ensure that the integrity of the judicial process is not compromised by such conduct.

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<sup>3</sup> It is, of course, no coincidence that Tips Marketing surfaced in November 2006 after the District Court decision. Mr. Inga, recognizing that petitioners were unlikely to prevail in the District Court on an after-the-fact request to expand the referral, is using a strawman (Tips Marketing) in an attempt to bamboozle the Commission to consider issues that the District Court had not referred.

## CONCLUSION

For the foregoing reasons, petitioners' request to combine the Tips Marketing Request with their proceeding should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 10th day of January, 2007, I served the foregoing "Reply to Petitioners' Request For Combining Declaratory Rulings and Extension of Time to File Reply Comments" and attached exhibits by email and first class mail to the following counsel:

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STEVEN A. MUHLSTOCK

# **EXHIBIT 1**



## Government to Stop Collecting Long-Distance Telephone Tax

IR-2006-82, May 25, 2006

WASHINGTON — The Internal Revenue Service today announced that it will stop collecting the federal excise tax on long-distance telephone service.

The tax on telephone services was first imposed in 1898. The current rate is 3% of the charges billed for these services. The IRS announcement follows decisions in five federal appeals courts holding that the tax does not apply to long-distance service as it is billed today.

Taxpayers will be eligible to file for refunds of all excise tax they have paid on long-distance service billed to them after Feb. 28, 2003. Interest will be paid on these refunds.

Taxpayers will claim this refund on their 2006 tax returns. In order to minimize burden, the IRS expects to announce soon a simplified method that individuals may use.

"So taxpayers won't have to spend time digging through old telephone bills, we're designing a straightforward process that taxpayers may use when they file their tax returns next year," said IRS Commissioner Mark W. Everson. "Claiming a refund will be simple and fair."

The IRS announcement does not affect the federal excise tax on local telephone service, which remains in effect. Likewise, various state and local taxes and fees paid by telephone customers are also unaffected.

More information can be found in IRS Notice 2006-50. It will also be published in Internal Revenue Bulletin 2006-25, dated June, 19, 2006.

### Related Items:

- [IR-2006-137, IRS Announces Standard Amounts for Telephone Tax Refunds](#)
- [Telephone Tax Refund Questions and Answers](#)
- [Notice 2006-50](#)
- [Treasury Department News Release](#)

## Part III - Administrative, Procedural, and Miscellaneous

### Communications Excise Tax; Toll Telephone Service

Notice 2006-50

#### SECTION 1. PURPOSE

(a) In general. As further described in this notice, the Internal Revenue Service will follow the holdings of Am. Bankers Ins. Group v. United States, 408 F.3d 1328 (11th Cir. 2005) (ABIG); OfficeMax, Inc. v. United States, 428 F.3d 583 (6th Cir. 2005); Nat'l R.R. Passenger Corp. v. United States, 431 F.3d 374 (D.C. Cir. 2005) (Amtrak); Fortis v. United States, 2006 U.S. App. LEXIS 10749 (2d Cir. Apr. 27, 2006); and Reese Bros. v. United States, 2006 U.S. App. LEXIS 11468 (3d Cir. May 9, 2006). These cases hold that a telephonic communication for which there is a toll charge that varies with elapsed transmission time and not distance (time-only service) is not taxable toll telephone service as defined in § 4252(b)(1) of the Internal Revenue Code. As a result, amounts paid for time-only service are not subject to the tax imposed by § 4251. Accordingly, the government will no longer litigate this issue and Notice 2005-79, 2005-46 I.R.B. 952, which states otherwise, is revoked.

(b) Credits and refunds. Taxpayers may be entitled to request credit or refund of the excise taxes paid for the services covered by this notice. This notice provides guidance regarding these requests. In addition, the Commissioner will authorize the scheduling of an overassessment under § 6407

to keep the period of limitations open for these requests. This overassessment will apply to all taxpayers and to all taxes paid for the services covered by this notice beginning with the tax paid on services that were billed to customers after February 28, 2003.

## SECTION 2. BACKGROUND

(a) In general--(1) Tax imposed. Section 4251(a)(1) imposes a tax on amounts paid for communications services.

(2) Payment of tax. Section 4251(a)(2) provides that the tax imposed shall be paid by the person paying for the service (taxpayer). Section 4251(b)(2) provides that the applicable percentage is 3 percent of amounts paid for communications services.

(3) Collection of tax. Section 4291 provides that the tax is collected by the person receiving the payment (collector). In most cases, the collector, which is also responsible for paying over the tax to the government, is the telecommunications company that provides the communications services to the taxpayer.

(b) Definitions--(1) Communications services. Section 4251(b)(1) provides that the term communications services means (A) local telephone service; (B) toll telephone service; and (C) teletypewriter exchange service. This notice does not address teletypewriter exchange service.

(2) Local telephone service. Section 4252(a) provides that local telephone service means (1) the access to a local telephone system, and the privilege of telephonic quality communication with substantially all persons having telephone

or radio telephone stations constituting a part of such local telephone system; and (2) any facility or service provided in connection with such a service. Local telephone service does not include any service that is a toll telephone service as defined in § 4252(b) or a private communications service as defined in § 4252(d). This notice does not address private communications service.

(3) Toll telephone service--(i) Time and distance. Section 4252(b)(1) provides that toll telephone service includes a telephonic quality communication for which there is a toll charge that varies in amount with the distance and elapsed transmission time of each individual communication and for which the charge is paid within the United States.

(ii) Periodic charge for a specified area. Section 4252(b)(2) provides that toll telephone service also includes a service which entitles the subscriber, upon payment of a periodic charge (determined as a flat amount or upon the basis of total elapsed transmission time), to the privilege of an unlimited number of telephonic communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area which is outside the local telephone system area in which the station provided with this service is located.

(c) Rev. Rul. 79-404. Rev. Rul. 79-404, 1979-2 C.B. 382, concludes that a long distance telephone call for which the charge varies with elapsed transmission time but not with distance is toll telephone service described in § 4252(b)(1).

(d) Notice of proposed rulemaking. In a notice of proposed rulemaking (68 FR 15690; April 1, 2003), the Service proposed an amendment to the Facilities and Services Excise Taxes Regulations to provide that toll telephone service described in section 4252(b)(1) may include a communication service for which the charge does not vary with the distance of each individual communication.

(e) Recent litigation. ABIG, OfficeMax, Amtrak, and Reese Bros. hold time-only service is not toll telephone service as defined in § 4252(b)(1). Further, ABIG, OfficeMax, and Reese Bros. hold that the communications service provided was not a service described in § 4252(b)(2) because the end result was not a "periodic charge" based on total elapsed time but rather a monthly bill based on a summation of toll charges for individual communications. (In Amtrak, toll telephone service described in § 4252(b)(2) would have been exempt from tax under the common carrier exception in § 4253(f).) ABIG, OfficeMax, Amtrak, and Reese Bros. also hold that the communications services provided were not local service, notwithstanding the access the services provided to the local telephone system. (Fortis affirms, in a per curiam opinion, a district court decision reaching the same results.)

(f) Notice 2005-79. Notice 2005-79, 2005-46 I.R.B. 952, states that the Service will continue to assess and collect the tax imposed by § 4251 on all taxable communications services, including those similar to the services in ABIG.

### SECTION 3. TERMS DEFINED

The following terms are defined solely for purposes of this notice:

(a) Bundled service. Bundled service is local and long distance service provided under a plan that does not separately state the charge for the local telephone service. Bundled service includes, for example, Voice over Internet Protocol service, prepaid telephone cards, and plans that provide both local and long distance service for either a flat monthly fee or a charge that varies with the elapsed transmission time for which the service is used. Telecommunications companies provide bundled service for both landline and wireless (cellular) service.

(b) Local-only service. Local-only service is local telephone service, as defined in § 4252(a), provided under a plan that does not include long distance telephone service or that separately states the charge for local service on its bill to customers. The term also includes services and facilities provided in connection with service described in the preceding sentence even though these services and facilities may also be used with long distance service. See, for example, Rev. Rul. 72-537, 1972-2 C.B. 574 (telephone amplifier); Rev. Rul. 73-171, 1973-1 C.B. 445 (automatic call distributing equipment); and Rev. Rul. 73-269, 1973-1 C.B. 444 (special telephone).

(c) Long distance service. Long distance service is telephonic quality communication with persons whose telephones are outside the local telephone system of the caller.

(d) Nontaxable service. Nontaxable service means bundled service and long distance service.

SECTION 4. EFFECT OF ABIG, OFFICEMAX, AMTRAK, FORTIS, AND REESE BROS.

(a) Tax treatment of communications service after ABIG, OfficeMax, Amtrak, Fortis, and Reese Bros. The Service will follow ABIG, OfficeMax, Amtrak, Fortis, and Reese Bros. Accordingly, taxpayers are no longer required to pay tax under § 4251 for nontaxable service. In addition, collectors or taxpayers may request a refund of tax paid under § 4251 on nontaxable service that was billed to the taxpayers during the period after February 28, 2003, and before August 1, 2006 (the relevant period).

(b) Tax on local-only service. Collectors should continue to collect and pay over the § 4251 tax on amounts paid for local-only service. As noted in section 3(b) of this notice, local-only service includes amounts paid for facilities or services provided in connection with local telephone service. Thus, for example, tax will continue to be imposed on amounts paid by a taxpayer for renting an amplifier phone provided in connection with local telephone service that is subject to tax.

(c) Effect on collectors. Collectors are directed to cease collecting and paying over tax under § 4251 on nontaxable service that is billed after July 31, 2006, and are not required to report to the IRS any refusal by their customers to pay any tax on nontaxable service that is billed after May 25, 2006. Collectors should not pay over to the IRS any tax on nontaxable service that is billed after July 31, 2006. The form will require collectors to certify that for the third quarter of 2006 that the § 4251 tax reported on the Form 720 does not include any tax on

nontaxable service that was billed after July 31, 2006. Consequently, the IRS will deny all taxpayer requests for refund of tax on nontaxable service that was billed after July 31, 2006. All such requests should be directed to the collector. In addition, collectors may repay to taxpayers the tax on nontaxable service that was billed before August 1, 2006, but are not required to repay such tax.

Collectors may also request a refund or make an adjustment to their separate accounts, as appropriate, subject to the provisions of § 6415 and section 5(d)(4) of this notice. Collectors must continue to collect and pay over tax under § 4251 on amounts paid for local only service.

#### SECTION 5. REQUESTS FOR CREDIT OR REFUND

(a) In general--(1) Request must follow this notice. The Commissioner agrees to credit or refund the amounts paid for nontaxable service if the taxpayer requests the credit or refund in the manner prescribed in this Notice.

(2) Form of request. Taxpayers may request a credit or refund of tax on nontaxable service that was billed after February 28, 2003, and before August 1, 2006, only on their 2006 Federal income tax returns. For this purpose, the 2006 income tax return is the income tax return for calendar year 2006 or for the first taxable year including December 31, 2006. Forms 1040 (series), 1041, 1065, 1120 (series), and 990-T will include a line for requesting the overpayment amount. Persons that are not otherwise required to file a federal income tax return must nevertheless file a return to obtain the credit or refund. Except as provided in section 5(d)(4) of this notice, a request for this credit or refund on any other form (such as a Form 720, 843, or 8849) will not be processed by the

Service. Taxpayers will be permitted to request the safe harbor amount under paragraph (c) of this section only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006.

(3) Guidance on the form. The instructions to the respective federal income tax return forms will provide additional guidance. The forms and instructions will require taxpayers to certify that (1) the taxpayer has not received from the collector a credit or refund of the tax paid on nontaxable service billed during the relevant period and (2) the taxpayer will not ask the collector for a credit or refund of that tax and has withdrawn any such request that was previously submitted. The instructions will also require that taxpayers, except for those individuals using the safe harbor amount, retain records that substantiate the request. These records should include bills from the collector that show the amount of tax charged for nontaxable service for each month during the relevant period and receipts, canceled checks, or other evidence that the amount requested was actually paid.

(b) Period of request. The Commissioner will authorize the scheduling of an overassessment under § 6407 to preserve the period of limitations during which taxpayers may request refunds of the tax on nontaxable service that was billed to customers after February 28, 2003, and before August 1, 2006.

Therefore, requests may be made for credits or refunds of tax paid for nontaxable service billed after February 28, 2003 and before August 1, 2006.

(c) Amount of the request--(1) Requests by individual taxpayers--(i) Safe harbor amount. Individual taxpayers may request a safe harbor amount. No

documentation will be required to be submitted or kept to support the safe harbor request. However, taxpayers will be permitted to request the safe harbor amount only if they have paid all taxes billed by their service provider after February 28, 2003, and before August 1, 2006; have not received a credit or refund of these taxes from the service provider, and either have not requested such a credit or refund from the service provider or have withdrawn any such request. The amount of this safe harbor is still under consideration and will be announced in later guidance.

(ii) Actual amount. Taxpayers that do not request the safe harbor amount may request a credit or refund of the actual amount of tax they paid.

(d) How to file--(1) Requests by individual taxpayers. Individual taxpayers may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006 Form 1040, 1040A, or 1040-EZ, Individual Income Tax Return. Individuals who are not otherwise required to file a federal income tax return must nevertheless file Form 1040EZ-T to request the credit or refund. Individual taxpayers, including Schedule C filers, may request either the safe harbor amount or the actual amount of tax paid for nontaxable service.

(2) Requests by taxpayers other than individual taxpayers. Taxpayers other than individual taxpayers (entities) may request only the actual amount of tax paid on nontaxable service billed during the relevant period. No safe harbor amount is allowed for entities.

(3) Requests by entities--(i) In general. Entities may request a credit or refund of federal excise taxes paid on nontaxable service only on their 2006

income tax returns. Any part of the credit or refund attributable to tax payments that were deducted as an ordinary and necessary business expense (including in the determination of unrelated business taxable income) must be included in income for the taxable year in which the refund is received or accrued to the extent that the tax payments reduced the amount of federal income tax (or unrelated business income tax) imposed.

(ii) Partnerships. A partnership, as defined in § 7701(a)(2), may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1065, U.S. Return of Partnership Income. Any amount of the credit or refund included in partnership income and any interest on the credit or refund must be reported on the partnership's return for the taxable year in which received or accrued and must be allocated to its partners on the Schedule K-1, Partner's Share of Income, Credits, Deductions, etc., for that taxable year.

(iii) S Corporations. An S Corporation, as defined in § 1361, may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120S, U.S. Income Tax Return for an S Corporation. Any amount of the credit or refund included in S Corporation income and any interest on the credit or refund must be reported on the S Corporation's return for the taxable year in which received or accrued and must be allocated to its shareholders on the Schedule K-1, Shareholder's Share of Income, Credits, Deductions, etc., for that taxable year.

(iv) Estates and trusts. An estate or a trust, as defined in § 301.7701-4(a) of the Procedure and Administration Regulations, may request a credit or refund

of federal excise taxes paid on nontaxable service only on its 2006 Form 1041, U.S. Income Tax Return for Estates and Trusts. Any amount of the credit or refund included in the estate's or trust's income and any interest on the credit or refund must be reported on the estate's or trust's Form 1041, U.S. Income Tax Return for Estates and Trusts, for the taxable year in which received or accrued. However, for a trust that is treated as owned by the grantor or other person under subpart E (§ 671 and following), part I, subchapter J, chapter 1 of the Internal Revenue Code (grantor trust), the owner of the trust may request a credit or refund of federal excise taxes treated as paid by the owner for nontaxable service only on its applicable 2006 federal tax return.

(v) Tax exempt organizations. An organization that is described in § 501(a) may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 990-T, Exempt Organization Business Income Tax Return. Tax exempt organizations that are not otherwise required to file a federal income tax return must nevertheless file Form 990-T to request the credit or refund. Any amount of the credit or refund included in the organization's unrelated business taxable income must be reported on the organization's Form 990-T, Exempt Organization Business Income Tax Return, for the taxable year in which received or accrued. An organization that is subject to tax on its interest income must also report any interest on the credit or refund on its Form 990-T, Exempt Organization Business Income Tax Return, for the taxable year in which received or accrued.

(vi) Corporations. A corporation, as defined in § 7701(a)(3), that is not described in section 5(d)(3)(iii) of this notice may request a credit or refund of federal excise taxes paid on nontaxable service only on its 2006 Form 1120 (series) income tax return (generally, Form 1120, U.S. Corporation Income Tax Return). Any amount of the credit or refund included in the corporation's income and any interest on the credit or refund must be reported on the corporation's income tax return for the taxable year in which received or accrued.

Corporations that are not otherwise required to file a federal income tax return must nevertheless file Form 1120 (series) to request the credit or refund

(vii) Other nonfiling entities. Entities that are not otherwise required to file a federal income tax return must file Form 990-T to request the credit or refund.

(4) Requests and adjustments by collectors--(i) Section 6415 conditions to allowance. The conditions to allowance described in § 6415 apply to all requests and adjustments by collectors, as defined by section 2(a)(3) of this notice. Thus, a request by a collector is allowed only if the person that paid over the tax establishes that it has repaid the amount of the tax to the person from whom the tax was collected, or obtains the written consent of such person to the allowance of the credit or refund.

(ii) Requests for regular method collectors--(A) In general. A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts actually collected under § 40.6302(c)-1(a)(2)(i) of the Excise Tax Procedural Regulations (regular method collectors) may request a credit or refund.

(B) Form of the request. Regular method collectors may use Form 720X, Amended Quarterly Federal Excise Tax Return, line 1, IRS No. 22, for credit or refund of amounts collected and repaid to taxpayers.

(iii) Account adjustments for alternative method collectors. A person that collected the tax imposed by § 4251 on nontaxable service and paid it over to the government based on amounts considered as collected under § 40.6302(c)-1(a)(2)(ii) (alternative method collectors) may adjust the separate account for the amount of an overpayment. The required adjustment to the separate account is described in § 40.6302(c)-3(b)(2)(ii)(C). The adjustment is reflected on Form 720, Schedule A, line 2, but may not reduce tax liability on Form 720 below zero.

(e) Interest on the credit or refund included in income. If a taxpayer requests a credit or refund of the actual amount of tax paid, interest on the credit or refund of the tax paid for nontaxable service must be included as income on the taxpayer's income tax return for the taxable year in which the interest is received or accrued. Thus, individuals are generally required to report the interest on their 2007 income tax returns.

(f) Estimated tax effects. Although the credit or refund allowed to a taxpayer under this notice will be requested on the taxpayer's income tax return, it is not a credit against tax for purposes of §§ 6654 and 6655. Accordingly, the taxpayer may not take the credit or refund into account in determining the amount of the required installments of estimated tax for 2006. In determining the amount of the required installments of estimated tax for 2007, the income

attributable to the credit or refund is taken into account on the date the income is paid or credited in the case of a cash method taxpayer and on the date the return making the request is filed in the case of an accrual method taxpayer.

(g) Requests that do not follow the provisions of this notice. Requests that do not follow the provisions of this notice (whether filed before or after its publication)--

(1) Will not be processed to the extent they relate to the tax paid on nontaxable service that was billed after February 28, 2003; and

(2) Will be processed normally to the extent they relate to the tax paid on nontaxable service that was billed before March 1, 2003.

#### SECTION 6. EFFECT ON OTHER DOCUMENTS

Notice 2005-79, 2005-46 I.R.B. 952, is revoked. Rev. Rul. 79-404, 1979-2 C.B. 382, will be revoked in a later revenue ruling.

#### SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Taylor Cortright of the Office of the Associate Chief Counsel (Passthroughs and Special Industries). For further information regarding this notice, contact (202) 622-3130 (not a toll-free call).