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.	)	DA-06-2360
Group Discounts, Inc.	)	WC Docket No. 06-210
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
	)	
Petitioners	)	
and	)	
	)	
AT&T Corp.	)	
Respondent	)	

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

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INTRODUCTION

In accordance with the amended pleading schedule the Commission has established, AT&T submits these comments in reply to the comments submitted by Combined Companies, Inc. (CCI) and 800 Services, Inc.[1] Only CCI's comments address the question that it is properly before the Commission in this proceeding—namely, whether the proposed CCI-PSE traffic transfer complied with the requirements of AT&T Tariff No. 2, particularly the requirement, set forth in § 2.1.8, that the transferee assume "all obligations" of the transferor. CCI's brief discussion of this issue provides absolutely no grounds for concluding that the phrase "all obligations" in § 2.1.8 can be interpreted to mean "only some obligations." The remainder of CCI's comments—and all of 800 Services's comments—ask the Commission to address issues that are the subject of a supplemental complaint that is pending before the New Jersey District Court and that are entirely outside the scope of the issues referred by that Court. Neither CCI nor 800 Services has identified any legitimate basis for the Commission to expand the scope of the referral and wrest these issues from the District Court.

I. CCI'S COMMENTS PROVIDE NO BASIS FOR INTERPRETING THE PHRASE "ALL OBLIGATIONS" IN § 2.1.8 TO MEAN "ONLY SOME OBLIGATIONS."

At the time of the events that give rise to this dispute, § 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.

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[1] Petitioners failed to file comments on December 20, 2006, the date the Commission set for opening comments, thereby depriving AT&T of the opportunity to address by way of reply comments any new or additional arguments petitioners might advance in support of their "interpretation" of the tariff. Should petitioners file reply comments on the current due date or at some later date, AT&T reserves the right to respond to any new arguments petitioners seek to assert.

Exh. 1 to AT&T Comments (emphases added). In its comments, AT&T demonstrated that, by its plain terms, § 2.1.8 requires a transferee to assume "all obligations" of the transferor, including the transferor's obligations to pay shortfall and termination liabilities, when traffic under a WATS plan is transferred. As AT&T explained, this conclusion is dictated by the plain meaning of the sweeping term "all," and this plain meaning is not (and cannot be) altered by § 2.1.8's "including" sentence. AT&T Comments at 9-15. AT&T further demonstrated that § 2.1.8's plain meaning is fully consistent with the provision's obvious purposes, and with the meaning of related tariff provisions (*id.* at 15-22), that neither the Commission nor the D.C. Circuit has (or could have) reached a contrary conclusion (*id.* at 22-28); and that AT&T has never conceded otherwise (*id.* at 28-31). Finally, AT&T demonstrated that the plans at issue in the proposed CCI-PSE traffic transfer were not immune from shortfall obligations (*id.* at 31-34).

CCI's brief discussion of § 2.1.8 does not call into question any of these showings. CCI states that it "agrees with the FCC's Oct. 17th 2003 Declaratory Ruling . . . that shortfall and termination obligations do not transfer unless the entire CSTPII plan(s) are transferred." CCI Comments at 2. But, as AT&T has explained, the Commission made no such ruling. Because the Commission concluded that § 2.1.8 did not apply at all to a transfer of traffic without the transfer of the underlying plan (2003 Commission Decision at ¶ 9), it did not determine—and could not have determined—what obligations § 2.1.8 requires a transferee to assume in such a transfer. Indeed, the D.C. Circuit and Judge Bassler have both squarely held that the Commission did not address the scope of § 2.1.8's "all obligations" requirement. *See* Exh. C, *AT&T v. FCC*, No. 03-1431, slip op. at 11 (declining to decide the meaning of this phrase because it was "neither addressed by the FCC nor adequately presented to us"); Exh. 11, May 26, 2006 Op. at 14 n.5 (finding that the Commission "did not determine . . . whether PSE was

required to assume [shortfall and termination] commitments under § 2.1.8, because it had already determined that § 2.1.8 did not apply"); *id.* at 16-17 (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") (footnote omitted).

Beyond this patent misreading of the Commission's prior decision, CCI argues that the language of § 3.3.1.Q supports its view that a transferee need not assume the transferor's shortfall and termination obligations. This provision states that "[s]hortfall and/or termination liability are the responsibility of the Customer." Exh. D, § 3.3.1.Q bullet 10. CCI notes that, under the proposed transfer, its plans would not have been terminated and it would have remained AT&T's customer even after the traffic transfer. Based on these facts, CCI claims that "the only conclusion . . . is that shortfall and termination obligations must stay with CCI." CCI Comments at 3. This argument, like many advanced by petitioners, reflects a fundamental misunderstanding of § 2.1.8's joint and several liability provisions.

AT&T agrees that, after a traffic transfer, a transferor such as CCI would have remained AT&T's customer and would have remained subject to shortfall and termination obligations. But this does not mean, as CCI appears to believe, that *only* the transferor would have been subject to these obligations, and that § 2.1.8 therefore did not require the transferee to assume these obligations. Section 2.1.8 expressly provided that "[t]he 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 the transfer or assignment." Thus, § 2.1.8 expressly provided that, following a transfer, *both* the transferor and transferee would be subject to "all obligations" that the transferor had at the time of the transfer. The fact that the

transferor retained shortfall and termination obligations, therefore, in no way demonstrates that those same obligations did not have to be, or could not have been, assumed by the transferee.

In fact, the language of § 3.3.1.Q bullet 10 affirmatively refutes CCI's argument. Section 2.1.8 expressly designated the transferee as "the new Customer." Section 3.3.1.Q, in turn, provided that "[s]hortfall and/or termination liability are the responsibility of the Customer." Following a traffic transfer, therefore, a transferee would have been AT&T's "Customer" and thus would have had "responsibility" for shortfall and termination liability. Section 3.3.1.Q simply confirms that a transferee's duty to assume "all obligations" of the transferor necessarily included shortfall and termination liabilities.

Finally, CCI claims that, "if the tariff actually called for shortfall and termination obligations to transfer on traffic only transfers, . . . petitioners would still win," because AT&T allegedly allowed "tens of thousands of other traffic transfers to take place without the shortfall and termination obligations transferring." CCI Comments at 3. As AT&T has explained (*see* Comments at 37), this is not an argument for why the phrase "all obligations" in § 2.1.8 should be interpreted to mean "only some obligations." Rather, it is a claim that AT&T violated § 2.1.8 by permitting traffic transfers in which the transferee failed to assume "all" of the transferor's obligations. The Commission need not address this claim (which involves factual disputes not appropriately resolved in a declaratory ruling proceeding) because it is indisputably beyond the scope of the referral, as are all of the other claims that CCI and 800 Services raise in their comments.

II. THE DISCRIMINATION AND "ILLEGAL REMEDY" ISSUES CCI AND 800 SERVICES SEEK TO RAISE ARE PLAINLY OUTSIDE THE SCOPE OF THE DISTRICT COURT'S REFERRAL.

As AT&T has explained both in its Comments and in its Reply to Petitioners' Request for Extension of Time, the scope of the issue referred to the Commission has been carefully defined by the District Court in two separate orders. That issue is limited to whether the proposed CCI/PSE transfer complied with AT&T's tariff—in particular § 2.1.8's requirement that a transferee agree to accept all obligations of the transferor. In its recent scheduling order, the Commission confirmed that the District Court's June 2006 "does not expand the scope of the issue previously presented," and that the Commission's task is "to interpret the scope of section 2.1.8 of AT&T's Tariff [FCC] No. 2, a matter already extensively briefed by the parties." Order Extending Pleading Cycle ¶ 3 (January 12, 2007). Accordingly, neither the discrimination nor "illegal remedy" claims that CCI and 800 Services discuss in their comments are properly before the Commission and their comments on these issues should therefore be disregarded. These commenters, moreover, have offered no legitimate basis for the Commission to expand the proceeding to address these issues.[2]

[2] Like petitioners, CCI notes that the District Court's most recent order referred "any other issues left open by the D.C. Circuit's Opinion." CCI Comments at 1. Contrary to CCI's mistaken belief, however, this phrase did not and could not sweep in issues related to the "illegal remedy" and discrimination claims because those issues were not the subject of the D.C. Circuit's opinion. Rather, the only issues the D.C. Circuit "left open" were (1) which obligations should have been transferred for the 1995 proposed CCI-PSE transfer to be in compliance with the tariff, and (2) the validity of AT&T's alternative basis for refusing to process the transfer under the tariff's antifraud provisions—a theory the Commission did not address in its brief to the D.C. Circuit based on its claim that it had not had an opportunity to consider the particular 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. *See* AT&T Comments at 7-8 & n.4.

1. The Discrimination Claim. Following the 1995 referral, the Commission expressly declined to reach the discrimination claim CCI seeks to raise. Noting that AT&T disputed that it had processed the proposed CCI-PSE transfer differently than comparable traffic transfers, the Commission stated "that declaratory relief is inappropriate where facts are disputed." 2003 Commission Decision at ¶ 18 n.87. In its recent scheduling order, the Commission confirmed that it had "declined to rule on factual disputes between the parties," because "resolution of such facts was unnecessary on the primary jurisdiction referral, which requested an interpretation of Section 2.1.8," and because petitioners themselves had argued that the district court was "the original forum before which an evidentiary record had been compiled." Order Extending Pleading Cycle ¶ 3 n.12.[3] As the Commission noted, "[t]hese decisions were not disturbed by the Court of Appeals." *Id.*

CCI's comments do not cast the slightest doubt on the Commission's conclusion that the discrimination claim is outside the scope of the referral. AT&T still disputes the factual assertions underlying this discrimination claim. Accordingly, the Commission's conclusion that it would be improper to resolve this factual dispute in a declaratory ruling proceeding remains as valid today as it was four years ago, when the Commission properly declined to address this dispute. Similarly, the Commission's conclusion that resolution of this dispute is unnecessary to resolve the primary jurisdiction referral remains valid. The District Court has requested an

[3] *See* 2003 Commission Decision ¶ 18 n.87 (noting petitioners' argument that "[a]ny factual issues which need to be addressed in order to apply the tariff, after the tariff has been interpreted by the Commission, can be addressed by the District Court") (quoting Petitioners' Reply at i). Moreover, in their petition re-instituting this proceeding, petitioners quote a colloquy between the District Court and AT&T's counsel in which the Court recognized (and AT&T agreed) that the question of discrimination would be presented to the Court, not to the Commission, if AT&T prevailed on the tariff interpretation issue. *See* Petn. at 26.

interpretation of Section 2.1.8, not a determination whether AT&T treated identical proposed traffic transfers differently.

2. The "Illegal Remedy" Claim. The "illegal remedy" claim that petitioners and their supporters seek to inject into this proceeding is likewise completely outside the scope of the referral. This claim has nothing whatever to do with the propriety of the proposed CCI-PSE traffic transfer. In fact, petitioners had not even raised their claim concerning the allegedly impermissible imposition of shortfall charges when the District Court made the referral in May 1995; this claim was instead first asserted two years later, in a Supplemental Complaint filed in 1997. Because, as the Commission has correctly noted, the District Court has not expanded the scope of the original referral, Order Extending Pleading Cycle ¶ 3, these facts make indisputably clear that the "shortfall" issue is outside the scope of issues the District Court referred in May 1995.

The Commission should also understand, however, that petitioners' attempt to raise this issue in this proceeding reflects rank forum-shopping and is a clear affront to the jurisdiction and processes of the District Court. The Commission should refuse to entertain this claim, therefore, for the additional reason that such a refusal will prevent petitioners from profiting from their gamesmanship and from reneging on representations they made to the District Court.

After prevailing before the Commission in October 2003, and while the Commission's decision was still on appeal to the D.C. Circuit, petitioners inundated the District Court with letters and filings seeking, among other things, a primary jurisdiction referral on several questions related to the June 1996 shortfall issue. AT&T Comments, Exh. 21, proposed Order filed Oct. 8, 2004. At this time, petitioners plainly believed that the Commission was a more hospitable forum than the District Court. In response to their numerous letters and submissions,

the District Court ordered petitioners in May 2005 to file a single motion that included all of the relief they were seeking. AT&T Comments, Exh. 22, May 5, 2005 Letter Order.

As a result of the D.C. Circuit's intervening decision reversing the Commission's decision, however, petitioners abruptly changed tactics. Having previously sought to expand the issues referred to the Commission, they now tried to convince the District Court that the Commission and D.C. Circuit had already resolved all issues in their favor, and that they should be allowed to proceed in District Court without returning to the Commission. Accordingly, petitioners filed a May 31, 2005 motion that focused solely on the 1995 transfer issue and sought to vacate the stay of the litigation proceedings. In that motion, they expressly represented that their claims with regard to the June 1996 shortfall issue "were not directly at issue," and they abandoned their request for a primary jurisdiction referral on any issue related to the June 1996 shortfall claims. AT&T Comments, Exh. 6, Petn. Brief to Vacate Stay at 6.

After the District Court denied their request to vacate the stay and ordered them to re-institute proceedings before the Commission, petitioners changed tactics again. Understandably unhappy about the prospect of defending their theory that "all obligations" in § 2.1.8 means "only some obligations," petitioners tried to resurrect their "illegal remedy" claim. They demanded that AT&T agree that this issue could properly be raised before the Commission and threatened to advise the Court that AT&T had misrepresented its positions when opposing the motion to lift the stay if AT&T refused to agree. AT&T pointed out that the "illegal remedy" issue (and two others that petitioners raised) were plainly outside the scope of the referral and had nothing to do with whether the proposed CCI-PSE transfer complied with the tariff, that petitioners had no conceivable basis for demanding that these issues be resolved at the Commission, 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. Exh. 2 to AT&T's Reply to Petitioners' Request for Extension of Time, Sept. 22, 2006 letter at 2-3. Tacitly conceding the untenable nature of their demand, petitioners did not return to the District Court (where they faced the prospect of sanctions). Instead, they improperly filed a petition with the Commission that contained issues that they have known all along were outside the scope of the referral.

There is not a shred of support in the record, therefore, for 800 Services' baseless argument that *AT&T* stated to the Court that the "illegal remedy" claim was an "interpretive issue[] that the FCC must decide." *Id.* at 4. Because petitioners abandoned their request for a referral of that issue (as well as any other issue related to the June 1996 shortfall claims) when they filed their motion to lift the stay, AT&T had no reason to address the issue at all, and did not do so. When petitioners tried to resurrect the "illegal remedy" issue after their motion to lift the stay was denied, AT&T argued that this issue was outside the scope of the referral. Moreover, 800 Services' belief that the District Court wants the Commission to decide this issue (800 Services' Comments at 1) is utterly irrelevant. The Commission resolves issues on a primary jurisdiction referral based on the scope of the referral itself, not a commenter's speculation about what the court wants. The "illegal remedy" was not referred because petitioners did not ask to have the issue referred. Similarly, the fact that the language of the tariff provisions relevant to the "illegal remedy" claims is undisputed (*id.* at 2) does not alter the fact that the District Court did not refer this issue to the Commission.

Like 800 Services, CCI also falsely accuses AT&T of altering its position. Indeed, CCI goes so far as to suggest that, as a result of AT&T's alleged change of position regarding the permissibility of imposing shortfall charges, the Commission should rule that AT&T fraudulently induced CCI to enter into the settlement agreement that resolved the lawsuit CCI

brought over the imposition of these very charges. CCI Comments at 6-7. This alleged "inconsistency," however, is entirely a product of CCI's willful misunderstanding of AT&T's arguments.

AT&T has not suggested that the Commission has already addressed the "illegal remedy" claim, or that AT&T's imposition of shortfall charges against CCI "may not have been permissible." *Id.* at 7. To the contrary, AT&T's imposition of shortfall charges is entirely consistent with its arguments that the proposed CCI-PSE traffic transfer was invalid. In its comments, AT&T explained that, even if the plans that petitioners transferred to CCI had not been "restructured" prior to the proposed January 1995 transfer, those plans were not completely immunity from shortfall charges; rather, they remained subject to revenue commitments that, if not met or avoided through a "restructuring," could result in shortfall charges. *See* AT&T Comments at 31-34. Accordingly, AT&T argued that, as the recipient of the plans from petitioners as part of their two-step transfer scheme, CCI was subject to shortfall obligations, and that PSE's failure to agree in writing that it would assume this obligation rendered the proposed traffic transfer from CCI to PSE invalid under § 2.1.8. *Id.*

There is not the slightest inconsistency between that position and AT&T's imposition of shortfall charges on CCI. Because the proposed CCI-PSE transfer was not processed, CCI remained subject to shortfall obligations.[4] As a result, its subsequent failure to meet the underlying revenue commitments entitled AT&T to assess shortfall charges. There is thus no conceivable basis for expanding the scope of the referral due to any supposed change in AT&T's

[4] As AT&T has explained, under § 2.1.8's joint and several liability provision, CCI would have remained subject to these shortfall obligations even if PSE had agreed to assume those obligations. *See* AT&T Comments at 18 & nn. 10-11; *id.* at 29.

positions. Nor is there any basis to assist CCI in its baseless efforts to escape a settlement agreement it entered into over a decade ago.

* * *

To put the matter as directly and simply as possible, petitioners' effort to expand the scope of the referral is the latest in a series of blatantly improper forum-shopping gambits and a direct affront to the jurisdiction and processes of the District Court. Petitioners abandoned their request for a referral of the "illegal remedy" claim when they believed a return to the Commission would doom their challenge to AT&T's refusal to process the CCI-PSE traffic transfer. When their efforts to avoid a Commission decision on that issue failed, they declined to ask the Court to expand the scope of the referral, knowing that, in light of their past representations, any such effort would not only fail but would expose them to the risk of sanctions. Instead, they are attempting to use the Commission to obtain what they could have sought, but calculatingly declined to seek, from the District Court. And, as part of this improper effort, petitioners have enlisted the aid of two entities that wish to regain what they surrendered or lost in litigation against AT&T.[5] Because the Commission plainly should not countenance, let alone facilitate, such rank gamesmanship, it should refuse to entertain the "illegal remedy" and discrimination claims that petitioners and their supporters seek to inject into this proceeding.

[5] 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.

Respectfully submitted,

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January 31, 2007

CERTIFICATE OF SERVICE

I hereby certify that, on this 31st day of January, 2007, I served the foregoing "Reply Comments of AT&T Corp. in Opposition to Request for Declaratory Rulings" by first class mail to the following:

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