

May 7th, 2007

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Re: WC Docket No. 06-210
CCB/CPD 96-20

**Ex-Parte Comments of 800 Discounts, Inc., One Stop Financial, Inc.,
Winback & Conserve Program, Inc. and Group Discounts, Inc**

**Response to AT&T's Attempt to Cover-Up AT&T's Concessions that the Transferors
Revenue Commitment and Associated Shortfall and Termination Obligations
Do Not Transfer on "Traffic Only" Transfers**

There should be no doubt after reading the following that AT&T inside and outside counsel have "worked in concert" with AT&T's business executives to intentionally engage in the conning of each Court and the FCC that AT&T has been before. Excuse the length of the submission; however this "brief" could be hundreds of pages of additional evidence supporting petitioners.

AT&T's May 1st 2007 submission is simply appalling to anyone who has examined the history of this case. It is an insult to the FCC's intelligence.

AT&T states on page 1 of May 1st 2007 Response:

In petitioners' case, when they read a statement--- by AT&T, the Commission, Judge Politan or the D.C. Circuit--- that statement "means just what they choose it to mean"--- notwithstanding all context, logic and "**evidence to the contrary**". Although **AT&T does not wish to burden the Commission with a detailed refutation of all of the "concessions"** and favorable "rulings" petitioners falsely trumpet in their numerous filings, it submits these comments to address petitioners' key distortions.

Isn't it amazing how AT&T can sit there and state that there is **evidence** to the contrary? The **only evidence** that has been cited in this case shows that plan obligations and their associated shortfall and termination obligations do not transfer on a traffic only transfer. See exhibit Y to petitioners 9/27/06 filing in which it shows "traffic only" transfers with aggregators Ameritel & Tel Save in which plan obligations did not transfer to the transferee. AT&T of course can not produce any evidence because none exists to support its bogus theory.

If AT&T's theory was correct there would be evidence – tons of evidence--- as AT&T has stated—and Judge Bassler and Judge Roberts noted-- that AT&T has done tens of thousands of "traffic only" transfers with no plan obligations transferring. That is why **exhibit J** to petitioners 9/27/06 filing (an AT&T 2/23/02 version of the AT&T section 2.1.8 TSA) states that S&T **may** transfer. Yes it must transfer if you do a plan transfer! AT&T's current bogus tariff analysis that all obligations must transfer on a "traffic only" transfer would dictate that its revised 2.1.8 section in 2002 would have to say "**must**" not "**may**" transfer. Of course **AT&T never addressed this exhibit** because it confirms petitioner's 2.1.8 tariff analysis is absolutely correct.

AT&T also mentions in the above cited excerpt that:

AT&T does not wish to burden the Commission with a **detailed refutation of all of the concessions.**

Please AT&T "spare us" all your disingenuous concern for burdening the Commission and please do refute all AT&T's concessions. AT&T simply can't provide samples of traffic only transfers in which plan obligations transferred because AT&T's theory is nonsense.

AT&T on page 1 of its May 1st 2007 brief **partially quotes** section 2.1.8 to hide a critical part of 2.1.8:

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

AT&T's con is to take the words "all obligations" out of context of 2.1.8. Notice in AT&T's quote how it italicizes "*provided that*" then gives the "good old" dot dot dot (...) routine to take attention away from what Section 2.1.8 stated in full:

Here is 2.1.8:

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

A. The Customer of record (**former Customer requests**) in writing that the company transfer or assign WATS to the **new Customer**.

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

C. The Company acknowledges the transfer or assignment in writing. **The acknowledgement will be made within 15 days of receipt of notification.**

AT&T's ploy is to completely divert attention to Section 2.1.8 paragraph A. Para A:

A. The Customer of record (**former Customer requests**) in writing that the company transfer or assign WATS to the **new Customer**.

Paragraph B is conditioned upon what is transferred between the Customer of Record (CCI) and the new Customer PSE. It is actually very simple. All obligations pertain to only what is transferred. As in many contracts one paragraph is conditioned upon a preceding one.

All the obligations on what is transferred between the former customer and the new customer is transferred. The new customer presents how much traffic (i.e. how many account locations) or the plan that it is accepting from the former customer and assumes the obligations on what it accepts. The DC Circuit stated that it did not see on its face where 2.1.8 allows traffic only transfers because the word “any” were missed. “Any” can be one, some, or many. If 2.1.8 allowed only plan transfers the “any “ would have to be “all” numbers.

When Mr. Meade was speaking about its proposed Transmittal 8179 that was to change section 2.1.8 he certified to the District Court, see (Exhibit N page 4 para 9 to petitioners initial filing.

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

Transmittal 8179 was being proposed as a change to paragraph “C” that would affect the obligations language in paragraph “B.” Tr. 8179 is located at exhibit L in petitioners 9/27/06 filing.

The point here is that in Jan 1995 the one paragraph **B** is conditional upon what is transferred in **A** and this is very common in AT&T’s tariffs. AT&T counsel Mr. Carpenter conceded to the Third Circuit that AT&T lost its Substantive Cause pleading to the FCC regarding interpreting section 2.1.8, as the FCC told AT&T what the section 2.1.8 **tariff already meant.**

Third Circuit Oral Pg 43 exhibit O in petitioners’ 9/27/06 filing.

AT&T’s Counsel David Carpenter:

The FCC asked us to withdraw the complaint because the FCC thought we had done more in the tariff language than codify what the **tariff already meant** because it went beyond prohibiting these sorts of transfers of plans that would affect transfers of

individual locations.

Therefore section 2.1.8 remained status quo—no obligations transferred on a substantial “traffic only” transfer.

As AT&T’s Counsel explained to the DC Circuit exhibit W to petitioners 9/27/06 filing:

Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on *what's* transferred.

Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on *what* service is being transferred.

David Carpenter also stated to the Third Circuit at Oral Argument:

See exhibit V in petitioners 9/27/06 filing Pg 15 line 9:

We point out in our brief that there’s a *distinction* between transfers of entire plans, and transfers of individual end-users locations. That when the “plan” is transferred, "all the obligations" have to go along with it.

See Mr. Carpenter again at exhibit V. in petitioners 9/27/06 filing Pg 15 line 23:

When you’re transferring all the traffic, you’re transferring the plan. That is – and the obligations have to go with it, shortfall and termination liability.

Yes all obligations depends upon what is transferred. If “traffic only” is transferred then all the obligations relating to the account traffic is transferred as was in the case at hand.

As the FCC’s Counsel correctly stated to the DC Circuit during oral argument the accounts do not have commitments:

MR. BOURNE: each individual end user doesn't have a particular level of commitment.

Mr. Bourne is absolutely correct. Only if the plan is transferred do the plan obligations on that plan transfer ---revenue commitment and its associated shortfall and termination obligations.

AT&T's absurd theory would have the **transferee obligated for the bad debt on accounts that were never transferred from the transferor!!!!** Under this absurd theory the transferee would not even have control over what was left behind, as it would be liable for bad debt of accounts it never received!!! ! Imagine that!

AT&T states on page 2:

As a variation, petitioners argue that "S&T obligations are plan obligations not traffic obligations such as indebtedness" Id at 65. Again no such distinction appears in the language of the tariff. Petitioners have created it from wholecloth"

AT&T is wrong. Tariff Section 3.3.1.Q bullet 10 (exhibit D in petitioners 9/27/06 filing) clearly states that **Shortfall and termination obligations are the customers and the customer is defined by CSTPII/RVPP plan ownership, and since the plan is not transferring, neither do the plan obligations transfer.** The plan obligations stay with the Aggregator Customer plan (CCI/Inga). Only if the plan is transferred are the associated plan obligations then transferred.

Furthermore, AT&T's own senior counsel Charles Mr. Fash's letter explained at exhibit H of petitioner's 9/27/06 filing conceded the CSTPII plan structure and its plan commitments (revenue commitments and associated shortfall and termination obligations) remained in tact.

Furthermore, by using the tariff coding symbol system petitioners showed what language changes were clarifications, changes, and new language changes to work backwards to 2.1.8 in Jan 1995. Using the symbols Petitioners and CCI have evidenced for the FCC where section 2.1.8 was expanded, clarified and changed in subsequent 2.1.8 versions in (Nov.1995—May 1996- June 2002).

Petitioners showed that the May 9th 1996 section 2.1.8 (exhibit Reply C in petitioners 1/31/07 filing) also states "all obligations" but **simultaneously shows that the plan commitments remained with the transferor on a traffic only transfer;** and that the transferors remaining plan commitments were subjected to a deposit requirement when transferring substantial "traffic only"--- the transferee was not subjected to any deposit requirement because those obligations do not transfer. This coincides with the AT&T's counsel Mr. Meade's certification:

AT&T Counsel Meade (exhibit N pg.7 para 15 to petitioners 9/27/06 filing) certified:

On October 26th 1995, AT&T Corp. filed Tariff Transmittal No 9229 with the FCC. Transmittal No 9229 addresses the problem implicated in the CCI-PSE transfer--- **the segregation of assets (locations) from liabilities (plan commitments)** --- in the following manner.

Mr. Meade then explains that AT&T addressed the so called problem by instituting deposit requirements. As the May 9th 1996 section 2.1.8 shows the deposit requirements on a large traffic only transfer were of course were required by the transferor--- not the transferee--- because the traffic was being transferred away from the transferors plan commitments which of course remained with the transferors plan. (AT&T counsel Mr. Meade exhibit N pg.7 para 16 of petitioners 9/27/06 filing):

The Deposit for Shortfall Charges included in Transmittal No. 9229 is a “new concept” that meets AT&T's business concern more directly, without addressing the question of intent. Because this is new, it will apply only to newly ordered term plans, and so would not be determinative of the issue presented on the CCI/PSE transfer.

The intent that Mr. Meade was referring to was if the transferor intended to transfer away its accounts and bankrupt the plan that kept its remaining commitment. As the FCC Decision stated on page 5 footnote 44:

We note that the agreement between CCI and PSE expressly provided for the return of accounts to CCI upon request. *See* Exhibit G to Petition

Petitioners intended to take back its traffic to obtain its own contract tariff that it qualified for but AT&T refused. See one sample of a request for a contract at exhibit MM to petitioner's 9/27/06 filing. See here as exhibit A the CCI-PSE contract that the FCC 2003 Decision referenced. This shows there was no intent to defraud AT&T. Additionally AT&T has conceded that the plans were immune from plan liabilities due to being June 17th 1994 grandfathered. The FCC noted this on page 2 of its decision:

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

Additional evidence in which AT&T confirmed that plan obligations do not transfer was also evidenced by the fact that AT&T conceded that under the traffic only transfer joint and several liability was not an issue on plan obligations because it was a traffic only transfer: See exhibit z to petitioners 9/27/06 filing.

AT&T Asserts Deposit Requirements Do Not Pertain to Traffic Only Transfers Due to the Fact that the Transferors' Plans Revenue Commitments Do Not Transfer

AT&T's 1996 brief to the FCC asserted that deposit requirements were only an issue on the PLAN transfer between petitioners and CCI. Deposit requirements are not an issue on the traffic only transfer that was referred by the Third Circuit. The reason is obvious why AT&T asserted deposit requirements are not an issue-----The revenue commitments that the deposit requirements were based on do not transfer on a traffic only transfer.

The FCC 2003 Decision made note of AT&T's concession on page 6 footnote 44.

On a separate point, we note that the deposit provision of AT&T's tariff is not implicated here. In their first and third requests, petitioners seek, *inter alia*, declarations that **AT&T had no basis to require a deposit to effect the movement of traffic without the associated plans.** See Petition at 7-8. AT&T, however, **does not argue** that any deposit was required to effect the movement of **traffic from CCI to PSE** and notes that **the deposit requirement related to the earlier transfer from the Inga Companies to CCI.** See Opposition at 9 n.8.

AT&T asserted that no deposit was required on a "traffic only" transfer because the plan obligations did not transfer on a "traffic only" transfer. The deposit requirements are based upon the revenue commitment and since the revenue commitment did not transfer there was no issue of a deposit on a "traffic only" transfer according to AT&T. See Here Exhibit B

AT&T's position was that deposit requirements were only applicable on a plan transfer (because only then do the revenue commitments and associated S&T obligations transfer) as in the plan transfer from petitioners to CCI.

See exhibit B and notice AT&T added deposit requirements in November of 1995 on a prospective basis to 2.1.8 and of course **placed the deposit requirements on the transferors**

plan because that is of course where the plan obligations stayed on a “traffic only” transfer.

On the bottom of exhibit B it notes that the deposit requirements would not affect plans that were in service prior to Dec 9th, 1995 –the traffic transfer of course was in Jan 1995, so this new prospective tariff change did not affect petitioners. Notice the exhibit B has along the right hand side a line and the letter “C” designating CHANGE—as per the Federal Rules on composition of tariffs. All changes are prospective in nature. (exhibit Q in petitioners 9/27/06 filing explains tariff symbol coding law.)

AT&T’s concession to the FCC that deposit requirements were not applicable on the Jan 1995 “traffic only” transfer is also a clear concession that the plans revenue commitments and associated S&T obligations do not transfer.

Petitioner’s have also shown the FCC tariff evidence (exhibit AA in petitioners 9/27/06 filing): Section 2.1.8 E and explained in detail that the reason why 2.1.8 E does not address the duration in which a transferor remains jointly and severally liable for shortfall and termination obligations on a traffic only transfer is because shortfall and termination obligations do not transfer. See petitioner’s detailed explanation at page 105 chapter XX of its 1/31/07 filing.

AT&T’s attempt to distract the FCC from the entirety of section 2.1.8 by quoting just a small section speaks volumes of AT&T’s attempt to hide the truth.

It all comes down to evidence. If AT&T’s theory was correct it would be able to show the FCC lots of samples of plan obligations transferring on a “traffic only” transfer. Because no evidence exists AT&T has to say things like **“we don’t want to burden the Commission?”**. Read between the lines: FCC we have no evidence and there are no logical cover-ups for our many concessions, so as an excuse we will just tell you that we don’t want to **burden the Commission**.

Tariffs must be explicit by law. If AT&T actually wanted plan obligations to be transferred on a “traffic only” transfer the tariff must explicitly state: On a “traffic only” transfer the transferor must transfer its revenue commitment and the associated shortfall and termination obligations to the transferee.

Section 2.1.8 does not mention anything about revenue commitments, shortfall obligations, or termination obligations. When it does list obligations it includes as all obligations only:

(1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum “payment” period(s).

AT&T's counsel Mr. Brown conceded to Judge Bassler that the transferors plan obligations are not listed in that only two obligations listed in 2.1.8. The DC Circuit also made note on page 11 n2 that neither of these obligations were shortfall and termination commitments. As the FCC is aware it must rule in petitioners favor if the tariff is not explicit. See petitioners 1/31/07 filing page 61 under "**IX Section 2.1.8 Was Not Explicit To Say the Least**" for many concessions from AT&T that 2.1.8 was not explicit.

AT&T on page 2 asserts that:

It is precisely because they offer **no credible or plausible** interpretation of the "all obligations" language that petitioners have resorted to arguing that the limitations they seek to engraft onto section 2.1.8 have already been recognized by Judge Politan (even though he asked the Commission to determine what section 2.1.8 means); by the Commission (even though it stated that section 2.1.8 did not apply to the traffic transfer at issue); by the D.C. Circuit (even though it expressly stated that it was not addressing the issue)

It is amazing how AT&T just sits there and makes up statements that are so far from the truth. Petitioners have indeed provided substantial credible tariff evidence, multiple AT&T concessions, and actual "traffic only" transfers which support petitioners position on 2.1.8's "all obligation" language. It is AT&T that has provided no evidence actual traffic only transfers to support its bogus theory.

Judge Politan: Judge Politan's non vacated decision extensively details the obligations allocation under section 2.1.8, due to AT&T's and petitioners explanation to Judge Politan how section 2.1.8 worked.

The FCC: The FCC initially interpreted 2.1.8's obligation language during AT&T's attempt to retroactively enact Tr. 8179. The FCC then extensively interpreted the obligation language of 2.1.8 (agreeing with the non vacated Judge Politan Decision) in the FCC's 2003 decision under the heading 2.1.8.

AT&T's quote of the FCC:

“2.1.8 **did not apply** to the traffic transfer at issue”

is not what the FCC said:

AT&T got it right as to what the FCC actually said in AT&T’s 4/11/07 filing page 3 paragraph 2:

In the portion of its 2003 decision discussing section 2.1.8, the Commission ruled that this provision "did not address--and therefore **did not preclude or otherwise govern—“the movement of the end-users traffic from one aggregator to another”**, as CCI and PSE sought to effect in this case: Commission 2003 Decision, paragraph 9.

The movement of the end-users traffic from one aggregator to another had nothing to do with **which obligations transfer** on the “traffic only” transfer.

The FCC used section 3.3.1.Q bullet 4 (the delete and add analogy) to interpret “how “traffic only” could transfer under the tariff--- but the FCC clearly used section 2.1.8 (see the heading 2.1.8) to interpret and determine **which obligations transfer**.

Section 3.3.1.Q bullet 4 (exhibit D in petitioners 9/27/06 filing) does not even have a bulk traffic transfer obligations language section.

The FCC used 2.1.8 to interpret obligation allocation:

- 1) In the Substantive Cause Pleading, and
- 2) The FCC 2003 Decision.

The FCC then again explained this to the DC Circuit in its brief—see exhibit T to petitioners initial filing.

AT&T Tries to Cover-Up the 11/28/1995 Fred Whitmere Concession

AT&T continues with its “Proposal Defense” to counter its 11/28/1995 Fred Whitmere Concession; a defense that it never presented at the time of the transfer.

In fact AT&T counsel Richard Meade argued to the FCC in AT&T’s Substantive Cause Pleading that petitioners **had followed the proper tariff methodology** but AT&T was mad because it believed that substance (the amount of accounts transferred) should have superseded the “form” (the correct tariff procedure that petitioners used.).

AT&T counsel Richard Meade stated in a February 16, 1995 letter to the FCC's David Nall

AT&T is filing "at this particular time" to prevent a transaction that (at the minimum) elevates form over substance in an effort to avoid payment of shortfall charges.

The FCC ruled against AT&T's substance over form argument. The FCC in 1995 acknowledged that it was the proper tariff methodology that petitioner's followed that the FCC was concerned with. The above quote of Mr. Meade also confirms his understanding that shortfall would stay with the transferors plans as Mr. Meade bogusly asserts the transaction was an attempt to avoid shortfall.

AT&T assets in its May 1st 2007 submission on page 3:

Petitioner's reliance on Judge Politan's March 1996 decision-- which was reversed by the Third Circuit--- suffers from the same defect. Petitioners claim that **Judge Politan was analyzing a transaction" under the tariff," and that "there was no language about a proposed transaction outside the scope of 2.18.** But the lengthy passage petitioners quote from Judge Politan begins by stating that "AT&T has little or no danger of being harmed should the sought for relief be granted" The 'sought-for relief, of course, was an injunction compelling AT&T to process a proposed transfer in which PSE refused to accept all obligations of CCI.

For the FCC's convenience here again is Judge Politan's full quote which is in petitioners exhibit "Reply B" in its 1/31/07 filing. District Courts March 1996 Decision page 17 para 1:

Thirdly, AT&T has little or no danger of being harmed should the sought-for relief be granted. Its economic risk, if any, would arguably be covered by an anticipated excess over commitment under Contract No. 516, **FOOTNOTED HERE**] and/or by its increase in revenue by dint of acquiring plaintiffs' customers as they are siphoned into Contract No. 516 by alternative avenues. Indeed the Court notes that the services provided by AT&T are billed directly to the end user who in turn remits payment directly to AT&T. **The instant injunction does not change that, nor does it increase the risk that the end user shall not pay.** Other interested parties --among them, end users themselves --face no threat of harm should the relief sought be granted

FOOTNOTE FROM ABOVE]

As previously referenced, **AT&T's counsel represented** that AT&T has initiated suit against PSE for shortfalls. **In analyzing the instant motion,** however, and in light of the fact that that suit was for the first time referenced orally at the hearing on this

motion, the Court is not deterred by such litigation. **Indeed, AT&T's own counsel focused the issue by indicating that the tariffed obligations “involved herein” are all tariffed obligations, for which “CCI, not PSE” would be obligated.**

Point I) Judge Politan’s second decision was not reversed on the merits; it was vacated for primary jurisdiction as it had not been passed through the FCC.

Point II) Judge Politan short quotes Judge Politan’s decision and spins it. Judge Politan clearly was relating the transaction as the tariff would dictate it.

Judge Politan states: **The instant injunction does not change that, nor does it increase the risk that the end user shall not pay.**

Judge Politan was not asking AT&T to do anything other than what its tariff mandated.

AND **”Indeed, AT&T's own counsel focused the issue by indicating that the tariffed obligations “involved herein” are all tariffed obligations, for which “CCI, not PSE” would be obligated.**

Judge Politan clearly stated that he was **analyzing the instant motion** and applied AT&T’s **“own counsels” position** on the transaction **“involved herein”**, under the tariff. No more explicit a statement could there be.

There was no language about a so called “proposed” transaction outside the scope of 2.1.8. AT&T’s nonsense about petitioner’s transaction being a “proposal” outside the norm is pure AT&T nonsense.

On its face there is absolutely no doubt what AT&T’s counsel Mr. Whitmer was explaining to the District Court when Mr. Whitmer was discussing plan obligations:

These charges are all **“tariffed” obligations**, for which CCI, **“not PSE”** (which would have the revenue stream to satisfy such charges), **would be obligated.**

Judge Politan clearly understood what AT&T's counsels position was regarding the allocation of obligations **as per the tariff**. Mr. Whitmere clearly associates that traffic only transaction as per what the tariff calls for. He explicitly stated these are all "tariffed" obligations.

Judge Politan clearly understood the traffic only transfers ramifications under the tariff. See the 1996 Politan Decision (Petitioners 1/31/07 filing exhibit Reply B page 19 para 1)

Commitments and shortfalls are little more than **illusory concepts** in the reseller industry—concepts which constantly undergo renegotiation and **restructuring**. The only “tangible” concern at this juncture is the service AT&T provides. The Court is satisfied that such services and their costs are protected. To the extent however that **AT&T's demand for fifteen million dollars' security is premised on the danger of shortfalls**, the Court finds that threat neither pivotal to the instant injunction nor properly substantiated by AT&T.

AT&T premised its request for the \$15 million dollars based upon AT&T's so called likelihood of shortfalls resulting on the transferor's plans—not on AT&T's new bogus position that PSE did not want to accept shortfall and termination obligations.

AT&T requested the \$15 million injunction bond because AT&T acknowledged that under the tariff the plans revenue commitment **stayed with CCI on a traffic only transfer** and AT&T argued that the plans would go into shortfall if the accounts were transferred to PSE.

Judge Politan agreed with AT&T that under the tariff the plan commitments stayed with CCI and did not transfer to PSE---but Judge Politan accurately explained that petitioner's plans could be restructured to **avoid the shortfall charges AT&T based its requested injunction bond**.

AT&T's entire bogus attempt to utilize its fraudulent use provision was based upon its acknowledgement that CCI/Inga would have the revenue commitment on its CSTPII/RVPP plans but most of the traffic would be on PSE's CT-516.

District Court's 1995 **non vacated** Decision found in petitioners exhibit Reply-A in its 1/31/07 filing on page 9 para 2:

Moreover, plaintiffs allege that AT&T has further violated the Act by failing to **“comply with the plain terms of its own tariff”, namely section 2.1.8**, which makes no reference to any deposit requirement and contains no cross-reference to that section of the tariff which allows deposit demands, namely section 2.5.8. Additionally, plaintiffs allege that AT&T's danger of losing on the Inga

companies' commitments **was less after the Inga companies/CCI transfer than before.**

For instance, “plaintiffs point out that under the tariff rule of transfer”: (i) AT&T had security in the fact that it. AT&T, bills the end users directly; (ii) AT&T could pursue CCI for the going-forward non-payments arising from the transferred plans, while having recourse to the Inga' companies for all pre-transfer non-payments; and [iii] that **AT&T could look to CCI and/or the Inga companies for shortfalls in the minimum annual commitment levels under the plans.**

Above Judge Politan confirms that petitioner's traffic only transfer was adhering to the tariff as Judge Politan stated: **“plaintiffs point out that under the tariff rule of transfer”**

This leaves no doubt that Judge Politan was agreeing that petitioners were explicitly following the **tariff's rules of transfer** and not, as AT&T bogusly asserts, *proposing* a transaction outside the tariff rules of transfer. There would be no reason to point out the tariff rule of transfer if petitioners intended to act outside it!

AT&T states in its May 1st 2007 submission on page 3:

The 'sought-for relief, of course, was an injunction compelling AT&T to process a proposed transfer in which PSE refused to accept all obligations of CCI.

AT&T loves to re-write history. The sought after relief was to process a routine “traffic only” transfer separating selected traffic from the plan. It was not an injunction proposing a traffic only transfer in which PSE refused to accept all obligations of CCI.

The referred question that originated with Judge Politan and was subsequently referred to the FCC by the Third Circuit was:

Whether section **2.1.8** [of AT&T's Tariff FCC No. 2] permits an aggregator to transfer traffic under a [tariffed] plan **without transferring the plan itself in the same transaction.**

The focus was on whether 2.1.8 allowed “traffic only” **transfers at all.** As the FCC has seen with the Joyce Suek exhibit I to petitioners 9/27/06 filing AT&T stopped all 2.1.8 “traffic only” transfers.

Furthermore, AT&T's own senior counsel Charles Mr. Fash's letter asserted (exhibit H of petitioner's 9/27/06 filing at pg 1 para 3) that 2.1.8 did not allow "traffic only" transfers. Mr Fash argued for the FCC's delete and add theory:

The **Transfer of Service provision** of the tariff addresses the issue of transfer of service, **not transfer of "traffic"** by moving individual locations from one plan to another. The proper way to move "traffic" (i.e. , a subset of locations on a plan) between plans is to submit service orders to delete the locations from one plan and add the locations to another.

Traffic is of course service and what Mr. Fash was trying to do was stop use of the section 2.1.8's bulk transfer ability. Mr Fash wanted every account to be contacted to delete off one plan and then signed up again on the new plan.

There was no injunction sought on transferring the selected traffic with plan obligations and keeping the plan in tact because no such animal ever existed. AT&T counsel and Petitioners both asserted to Judge Politan that the tariff mandated, and all previous "traffic only" transfers showed no obligations transferred on traffic only transfers----that's why AT&T's fraudulent use claims were raised by AT&T.

The tariff does not mandate that PSE had to accept S&T obligations and therefore PSE ---- which did many "traffic only" transfers---- never was confronted under the tariff with a decision as to whether PSE wanted to accept plan obligations—let alone "refused to accept all obligations of CCI"

PSE's cover letter that was given to AT&T with the "traffic only" transaction explicitly states PSE is doing a **"proper"** submission as it had done many times before allowing many other CSTPII/RVPP 28% aggregators to transfer traffic only to PSE's 66% CT-516 plan. See the paperwork submitted to AT&T which (on page 4 of exhibit F to petitioner's initial filing) PSE states:

Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

PSE did **NOT** tell AT&T, ----as AT&T asserts 12 years later--- that it was proposing a transaction that did not conform to the tariff. The evidence does not lie.

CCI which has submitted a certification to the District Court and also made extensive comments in this proceeding has also stated that there was no request to go outside the 2.1.8 transfer sections normal tariffed allocation of obligations.

Petitioner's also explained to the FCC in its 2003 public comments that the transaction was done **as per the tariff**: DC Circuit Joint Appendix pg. 446 Para 53 here as exhibit C

In fact **the tariff** and AT&T's own form, the **Transfer of Service or Assignment** (TSA) form, made it possible. We did an assignment of end-user accounts **as per the tariff** and what **had been commonly accepted in the marketplace for years.**

AT&T May 1st 2007 page 4 para 1:

As they did in their Reply Comments (at 89-99), petitioners claim that CCI and PSE never proposed "a transaction that did not conform to the tariff" April 18th ExParte at 3. This assertion begs the question of what the tariff required. **There is no dispute that petitioners submitted transfer forms with the words "traffic only" written on them, and that PSE did not agree to assume CCI's shortfall and termination obligations.** Because section 2.1.8 required PSE to assume "all" of CCI "obligations," and because PSE did not do so, the proposed transfer failed to "conform to the tariff." Petitioners ipse dixit assertions to the contrary do not change that fact.

More nonsense!!! AT&T again spins what is written on the AT&T Transfer of Service (TSA). AT&T short quotes what is written on the TSA as "Traffic Only" and then totally takes it out of context.

See the cover page and each of the nine AT&T Transfer of Service Forms (TSA's) which are

verbatim section 2.1.8 which show that the only two obligations listed within section 2.1.8 were agreed for transfer by the parties; see exhibit F pgs. 4-13 of petitioners 9/27/06 brief.

For example see the first TSA page 5 of exhibit F which has hand written notes. It states:

Traffic only keep plan in tact. Move all BTN's except
181000018133

BTN's is an acronym for Billed Telephone Numbers. There is nothing contained in any of the AT&T TSA's that state that CCI or PSE was seeking to modify section 2.1.8's obligation language. Nothing in the handwritten notes directs AT&T to change at all what the tariff normally mandates as the proper allocation of obligations.

The instructional notations...

Traffic only keep plan in tact. Move all BTN's except
181000018133

...were put there because the AT&T TSA actually allowed 4 types of transfers, all 4 elaborated on in detail in petitioners 2003 FCC public Comments the *Inga Comments Para 66.JA 450*: Here as exhibit D

AT&T's Transfer or Assignment (TSA) form was used for multiple purposes." Therefore instructional notations to tell AT&T what type transfer was being ordered was mandatory.

As the DC Circuit stated section 2.1.8 -----which is verbatim the AT&T TSA----allowed for transfers of traffic as well as plan transfers. Since the same AT&T TSA form allowed for multiple types of transactions AT&T had to be instructed if a plan transfer or a "traffic only" transfer was being ordered.

The FCC obviously understood that the notations were instructional due to multiple uses of the same AT&T TSA form as it understood "move the location traffic but not the plans---Not transfer traffic and no obligations as AT&T tries to con the FCC today.

FCC Decision: Exhibit B in petitioner's 9/27/06 filing page pg.3

At the bottom of each TSA, **in handwriting**, these parties directed AT&T to move the "Traffic Only" on each plan to PSE. The January 13th cover letter, under which these nine TSA's were forwarded, directs AT&T to "move the locations associated with these plans [but] not in any way to discontinue the plans." (Exhibit H to petition). In this way, CCI and PSE attempted to move to PSE the end-user traffic associated with each of the nine CSTPII/RVPP plans, **but not to move the actual plans themselves.**"

(The referenced Exhibit H in the above FCC quote is the PSE cover letter found at exhibit F page 4 of petitioners 9/27/06 filing.)

The FCC clearly understood that petitioners were instructing AT&T to transfer "Traffic Only and not the plan----- as the TSA's state **Traffic only keep the plan in tact.** AT&T short quotes the hand written notations and then spins it in a pathetic attempt to have one believe that CCI was actually instructing AT&T to transfer **zero obligations**—"Traffic Only!"

It is not conceivable that anyone could read into the hand written notes to transfer traffic only **and zero obligations.** AT&T never made this argument in 1995 at the time of the transfer.

Besides if AT&T really thought that petitioners requested to transfer **"traffic only and no obligations"** it had 15 days to question the transfer as per paragraph C of section 2.1.8. AT&T did not question anything about the transfer within the 15 day statute of limitations at para C of section 2.1.8. Petitioners detail the 15 day statute of limitations extensively on page 145 of petitioners 1/31/07 filing See: Chapter XXX **AT&T Failed the 15 day Statute of Limitations Evaluation Period Within Section 2.1.8**

But even this AT&T cover-up has major holes!!! If AT&T really thought that the mandatory instructional notations meant transfer "traffic only and zero obligations" to PSE then why does AT&T concede that the account obligations (indebtedness and minimum payment period) were transferred?

Here are just a few concessions:

AT&T conceded to the Third Circuit, that (indebtedness and minimum payment period were transferred however AT&T again wanted S&T Obligations also transferred:

See here as exhibit E ---AT&T's Third Circuit Brief, page 33 para 2

AT&T argued:

The District Court's two reasons for its conclusion that AT&T

would suffer "little or no harm" if the injunction issued were both incorrect. First, it reasoned that end users would continue to pay AT&T for the service they took regardless of whether they took service under a CSTP II plan held by CCI or Contract Tariff 516 held by PSE. In fact, AT&T is not merely at risk for non payment of the usage charges themselves, **which are indeed paid by end users directly to AT&T**, but also for plaintiffs' **shortfall and termination charges, which can "only be paid by plaintiffs"** from the revenues they would lose as a result of the transfer. Williams 2d Supp. Cert. ¶ 5 (AA 1261).

The above conceded that indebtedness and minimum payment period were transferred but it also admitted that the S&T charges could **only be paid** by the petitioners because plans remained with petitioners.

AT&T again acknowledged to the District Court that the only two obligations listed within 2.1.8 in Jan 1995 (indebtedness and minimum payment period) were transferred however AT&T also wanted shortfall and termination obligations. May 25th 2006 Oral page 5 line 20

Mr Guerra: We know shortfall and termination were not transferred.

AT&T was not asking for indebtedness and minimum payment period just shortfall and termination which are not listed in section 2.1.8 in Jan 1995. Petitioners agree S&T obligations were not transferred since it was a "traffic only" transfer, not a plan transfer.

CCI's owner Larry G. Shipp certified to Judge Bassler's District Court that indebtedness and minimum payment period were transferred and plan obligations (revenue commitments and their associated shortfall and termination obligations do not get transferred; (Shipp cert at exhibit E of petitioners 9/27/06 filing.)

AT&T's counsel Richard Brown then agreed that there was no dispute as to what gets transferred:

They submit a Certification by CCI's President, Larry G. Shipp, that allegedly "clarifies the nature and type of obligations transferred with the traffic [at issue]." **But there was no dispute on this subject.**

AT&T was correct there are no disputed facts as to what was done. The only two obligations listed in section 2.1.8 were transferred but also AT&T wanted S&T obligations that were not

listed and only come into play on plan transfers. It is a strict tariff interpretation that has already been interpreted by the FCC.

Furthermore, PSE's Vice President Pat Bello, also confirmed that PSE was accepting the account obligations (indebtedness and minimum payment period) under 2.1.8. See Exhibit F pg. 2 para 5 in petitioners 9/27/06 filing:

As AT&T's customer of record under Contract Tariff No. 516, PSE is also directly liable to AT&T for the charges incurred for the outbound and 800 usage of AT&T services by PSE's customers, including the traffic transferred to CCI by Winback which would have been included in the traffic CCI seeks to transfer to PSE."

Additionally, petitioners' FCC reply comments, in 2003, also confirmed its intent to transfer all obligations listed within 2.1.8 at the time of the Jan 1995 traffic only transfer. See exhibit G in petitioners 9/27/06 filing:

The "new customer" assumes all obligations of the former customer at the time of transfer or assignment. These obligations include: (1) all indebtedness for the account numbers specified in the TSA and 2) the unexpired portion of any applicable minimum payment period(s)

Additionally the cover page and each of the nine AT&T Transfer of Service Forms (TSA's) ----- which are verbatim section 2.1.8----- show that the only two obligations listed within 2.1.8 were agreed for transfer by the parties; see exhibit F pgs. 4-13 of petitioners 9/27/06 filing.

Additionally the District Court's non vacated May 1995 Decision which is the established law of the case (see exhibit Reply A in petitioners 1/31/07 filing)

The Inga Companies and CCI **followed the transfer section of the tariff to the letter,** they ought not now be forced to deal with a **unilateral change of the rules by AT&T.**

and

Plaintiffs cannot be held to construe the section governing transfers under the tariff as meaning that which it does not. Words mean what they say. **Rules should not be changed in the middle of the game; and certainly without notice.**

Judge Politan is correct words mean what they say and there is **no where in section 2.1.8 that states that the transferor's revenue commitment and shortfall and termination obligations must transfer**. Tariffs must be explicit or the case by law must be construed against AT&T.

The DC Circuit clearly understood that petitioners transferred all obligations within 2.1.8:

In a motion submitted after the argument however, the Inga Companies note that the **ONLY OBLIGATIONS** enumerated by Section 2.1.8 are outstanding indebtedness for the service and the unexpired portion of any applicable minimum payment period. (DC Circuit pg. 11, n 2 ex. C in petitioners 9/27/06 filing)

Petitioners have much more evidence but I think the FCC should realize by now that there is no doubt that AT&T clearly conceded that the account obligations were transferring with the account traffic. So AT&T “traffic only and zero obligations” transferred defense is right up there with AT&T's other absurd defenses:

Other AT&T Scam Defenses:

1) the 2006 developed: “proposal defense” which mandates that AT&T has evidence but can't show it because it doesn't want to as AT&T states: “burden the FCC” and

2) the infamous 2006 developed: “de minimus transfer section” of the tariff defense---- which doesn't even exist, and

3) the 2005 developed: “joint and several liability defense” where AT&T looked to cover-up for all of AT&T counsels who conceded that plan obligations stayed with CCI ----were “actually referring to joint and several liability obligations staying with CCI—although none of the counsels or business people actually mentioned they were referring to joint and several liability obligations staying with CCI. In fact this defense was being used at the same time that AT&T was asserting there was no joint and several liability upon CCI because the plans were not transferred to PSE (see exhibit Z to petitioner's 9/27/06 filing) AND this defense assumes by definition that the plan obligations actually transferred!!!

How Many Obligations Were Transferred
AT&T's Search for a Defense

Besides the above newly created defenses AT&T has also provided the following positions regarding how many obligations were transferred.

We have the only one obligation was transferred defense that was asserted in June of 2005 to Judge Bassler:

AT&T to the District Court June 13, 2005 Brf. at p. 7-8. Here as exhibit F

First section 2.1.8 requires assumption **of "all obligations"** of the former customer, including (1) outstanding indebtedness and **(2) "the unexpired portions of any minimum terms of service period."** But the Inga Companies asserted that **only the latter obligation must be assumed** and that **the term and volume requirements at issue here** are not matters that had to be assumed, relying on the irrelevant ground that the minimum term for other WATS services under the tariff is one day.

First of all AT&T takes the position that "all obligations" are included in the only two obligations that are listed under the theory that S&T obligations are included in the 2nd one listed which is actually:

(2) the unexpired portion of any applicable **minimum payment period(s).**

However the AT&T master con artists quote of 2.1.8 AT&T intentionally twists the language to:

(2) "the unexpired portions of any **minimum "terms of service" period."**

AT&T recognized that S&T obligations were not contained within 2.1.8 before Judge Bassler in "2005" so Mr AT&T counsel Mr. Brown intentionally misquoted section 2.1.8 to change it from payment period(s) to a contractual service period as if it was a plan obligation.

Notice how AT&T's Mr. Brown also dropped the (s) at the end of period(s) because it wouldn't be an acceptable scam if there were multiple service periods to transfer. Mr. Brown figured that if he was going to lie to the Judge Bassler's District Court Mr. Brown might as well go all the way with his scam.

So AT&T Counsel Brown first completely fabricates 2.1.8's language to make it seem as if S&T obligations are included in the second obligation----then double scams the Judge by bogusly asserting that only one of the **two required obligations** were transferred!!!!

It gets better!!! To further demonstrate the lengths that Mr. Brown will undertake to keep that \$500 an hour coming in, is to note that AT&T was specifically told in its 1995 Show Cause Pleading that S&T obligations **are not included within the minimum payment period**. Mr. Brown has access to these notes that were included in the record.

The FOIA notes indicate on the 23rd page (marked JA 117 in lower right corner) of exhibit K of petitioners 9/27/06 filing:

Moreover, the unexpired portion of any applicable min pay period would “not” seemingly include unexpired portion of any term of service and usage or rev commit but has its own unique meaning and, therefore, the provision about the term plan and commitments **being included as part of the min pay period** is conflicting and **we find in favor of customers in cases of conflicts.**

The Mr. Brown scam continues and gets comical!!! So despite already losing the Substantial Cause Pleading to the FCC in 1995 and being told by the Commission that S&T is not listed within 2.1.8 Mr. Brown then took out of context a statement petitioners made in a post oral brief to the D C Circuit in the year **2005** and said it was AT&T's justification why AT&T didn't transfer the traffic back in **1995!**

After petitioners pointed out AT&T's 1 obligation scam to Judge Bassler AT&T amazingly switched the scam and gave up on its 1 obligation was transferred scam defense and went its no obligations were transferred “traffic only- no obligations ” scam defense!!!

During this proceeding AT&T has changed its scams many times trying to figure out what its best scam is.

The Record Shows AT&T Has Asserted the Following Scams

- 1) There are only two listed and required obligations in 2.1.8 and petitioners transferred only **one** obligation (the above scam to District Court Judge Bassler)
- 2) There are two listed obligations and the second one includes S&T obligations but petitioners

transferred “traffic only and zero obligations were transferred” David Carpenter scam to the DC Circuit page 11 line 18:

they didn't assume any obligations. They didn't assume the obligation even for past indebtedness on the locations, because all they wanted transferred was the **traffic on the plans without the concomitant obligations**, and the tariff says you have to assume **both** the outstanding indebtedness and the unexpired part of the **volume commitments**, and neither of those things were transferred.

(This was AT&T's counsel Carpenter con job on the DC Circuit- Notice how Mr. Carpenter misquotes the 2nd obligation under section 2.1.8. as volume commitments instead of payment period. Mr. Carpenter states that there are only two obligations within 2.1.8. The ones listed on the AT&T Transfer of Service Agreement Form.

Apparently Mr. Brown learned how to misquote the second obligation within 2.1.8 from fellow AT&T counsel Mr. Carpenter; however, Mr. Brown just changed his scam to 1 obligation was assumed under a different scam theory. This is the life of the AT&T defense counsel. The best con artists money can buy!!! Just keep BS'ing the Courts and the FCC and distract them from the fact that AT&T has no evidence to support its bogus theory.

3) There are two obligations listed in 2.1.8 and these **two** were transferred by petitioners but AT&T wanted two more that were not included in 2.1.8: (the S&T Obligations) This was AT&T's position to the FCC in 2003. AT&T figured that it couldn't come back with the S&T obligations being included within 2.1.8's second obligation because the same FCC told AT&T during the Substantive Cause Pleading that this was not the case.

4) Petitioner's transferred the only two required obligations necessary for a traffic only transfer but since petitioners transferred too many accounts from 28% to 66% AT&T is simply going to lie to the Courts that **it was a plan transfer** and not a traffic only transfer and therefore not process the transaction (AT&T counsel Meade's Substance over form position).

All these AT&T fabrications were attempted by AT&T despite the TSA evidence (exhibit F in petitioners 9/27/096 filing is clear as can be that the traffic only transfer was done-----as PSE stated in its cover sheet---in a **PROPER** manner. Furthermore if AT&T believed it was not done properly AT&T had 15 days to question it which AT&T concedes it did not do.

AT&T has conceded that it first asserted its' bogus “Traffic Only-No Obligations” were

transferred defense before the DC Circuit.

Consider:

A) Looking at the AT&T TSA forms there was absolutely no reason to run to the FCC and attempt to retroactively change section 2.1.8 unless you already clearly understood that S&T obligations did not transfer on a traffic only transfer. See all the revisions obtained under the Freedom of Information Act (exhibit K of petitioners 9/27/06 filing) that were proposed by AT&T to the FCC to stop what AT&T understood as permissible. That is why the FOIA notes show that AT&T tried to retroactively enact Tr. 8179.

B) AT&T has repeatedly made the bogus statement that PSE refused to assume the S&T obligations.

Here is one: AT&T's Dec 20th 2006 filing page 34 para 1:

In all events, there can be dispute that, at the time of the proposed transfer, the service CCI sought to transfer was subject to a **revenue commitment, and a potential shortfall obligation, that PSE refused to assume.**

Looking at the AT&T TSA forms and cover sheet submitted by PSE---- in which PSE says it is doing a proper transfer--- what would have ever given AT&T the impression that PSE refused to accept CCI/Inga's **revenue commitment, and a potential shortfall obligation?** There is absolutely nothing in the record which would indicate this!!! AT&T conceded that it did not conjure up the traffic only – no obligations scam until it was before the DC Circuit. Prior to the DC Circuit AT&T conceded that that the only two obligations listed were transferred.

AT&T's SCAM Defenses Conflict

If the parties were actually “proposing a non tariffed transaction” in which CCI/Inga **kept its plan obligations and PSE did not receive any plan obligations---** why in the world would PSE **refuse to assume plan obligations in which the so called proposal mandated that PSE not assume plan obligations!** If you were PSE and you are involved in a “proposal” in which you would receive substantial traffic and the “proposal” required no assumption of plan obligations— what are you refusing!!! This must have been a rookie AT&T con artist who just passed the bar that manufactured this scam.

Remember the reason why AT&T had to conjure up the bogus “PSE refused to assume S&T obligations defense” was because under AT&T’s bogus Joint and Several liability defense it would not make sense!!!

The joint and several liability defense stated that all the AT&T counsel that were referring to the obligations staying with PSE were actually talking about joint and several liability obligations not the primary actual obligations. This **by definition** means that if CCI had joint and several liability obligations then PSE would be assuming the actual primary S&T obligations. However since AT&T can’t possibly let the FCC believe that PSE was actually assuming the primary S&T obligations---that AT&T’s bogus joint and several liability defense would mandate by definition --- AT&T fabricated the little piece that “PSE refused to accept the S&T obligations.” Even AT&T’s scams conflict with one another. That is what happens when you keep fabricating defenses as you roll along.

PSE, CCI and Inga were all co-plaintiffs and announced to Judge Politan how the transaction was to take place according to the tariff in a transaction which all parties had routinely done. The statements to Judge Politan were made a long time after AT&T ran to the FCC upon receiving the TSA’s and cover sheet to stop the transaction by requesting retroactive provisioning of Tr. 8179. (exhibit L in petitioners 9/27/06 filing).

AT&T has conceded that it had no indication in the PSE submitted paperwork that there was any attempt to act outside the tariff as AT&T conceded that it first raised the bogus Traffic Only-No Obligations transferred defense before the DC Circuit 10 years after the fact. AT&T told the Third Circuit that petitioners did transfer the account obligations.

Third Circuit, page 33 para 2 AT&T argued:

In fact, AT&T is not merely at risk for non payment of the usage charges themselves, **which are indeed paid by end users directly to AT&T,** but also for plaintiffs' **shortfall and termination charges, which can only be paid by plaintiffs** from the revenues they would lose as a result of the transfer. Williams 2d Supp. Cert. ¶ 5 (AA 1261).

In addition to the above, AT&T’s position to the FCC in its 2003 public comments was that petitioners transferred the account obligations but AT&T wanted the S&T obligations too. AT&T has conceded that it never argued to Judge Politan that petitioners were not transferring the two obligations indicated within 2.1.8 which was verbatim displayed on the AT&T TSA

form as noted by the DC Circuit on page 11 n2 of exhibit C in petitioners 9/27/06 filing.

Every Court and the FCC has allowed AT&T to simply get away with its nonsense without ever even questioning AT&T to see the **evidence** to support AT&T's deliberate misrepresentations.

**AT&T Again Makes Pathetic Attempt to Cover for its
Counsel Mr. Carpenter Before the DC Circuit.**

AT&T page 4 of its May 1st 2007 filing:

Petitioners also continue to flog statements AT&T counsel David Carpenter made before the D.C. Circuit, and claim that AT&T has offered only "fictitious" and "comical" "cover-ups" for these "concessions." April 18th Ex Parte at 12-13. Once again, however, petitioners **ignore the relevant context in which these statements were made.** Nowhere did he concede that the **phrase "all obligations"** did not include shortfall and termination obligations, or that these latter obligations do not transfer where, as here, virtually all traffic was transferred. **To the contrary, Mr. Carpenter took the position that § 2.1.8's "all obligations" requirement applied even where only 1 percent of an aggregator's traffic was being transferred.**

More AT&T lies: Mr. Carpenter's position before the DC Circuit was that shortfall and termination obligations were included within section 2.1.8's second obligation (unexpired portion of any minimum payment period not as AT&T quotes within the phrase "all obligations:

AT&T May 1st 2007:

Nowhere did he concede that the **phrase "all obligations"** did not include shortfall and termination obligations,

Obviously Mr. Carpenter conceded that the phrase "all obligations" did not include shortfall and termination obligations.

Mr. Carpenter couldn't take the position that S&T obligations are within the phrase "all obligations" when he is took the position that S&T obligations are within minimum payment period. You see Mr. Carpenter's scam is different than Mr. Jacoby's scam and the two counsels just can't get on the same scam page.

Mr. Carpenter misquoted the second obligation which led to petitioners post oral argument brief.

The DC Circuit Decision (exhibit C page 11 n2 of petitioners 9/27/06 filing) shows how he misstated the second obligation of 2.1.8. Additionally before the DC Circuit during oral argument

David Carpenter page 11 line 18:

they didn't assume any obligations. They didn't assume the obligation even for past indebtedness on the locations, because all they wanted transferred was the traffic on the plans without the concomitant obligations, **and the tariff says you have to assume both the outstanding indebtedness and the unexpired part of the volume commitments, and neither of those things were transferred.**

Mr. Carpenter's statements to the D.C. Circuit confirmed that he fully understood the tariff when he was directly asked by Judge Roberts what "all obligations" meant. Mr. Carpenter correctly explained that what "all obligations" meant it varied, depending upon what's transferred not how many accounts are transferred.

AT&T actually wants the FCC to believe that Mr. Carpenter's response to Judge Roberts was actually a response to a different Judge (Judge Ginsburg) minutes earlier--- to a tariff section that Carpenter made up (de minimus transfers)!!!

Here are Carpenter's DC Circuit quotes.

Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.

Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

Mr. Carpenter was not talking about the amount (i.e. how many) of the locations transferred (as if de minimis transfers actually existed or were permissible) -----

Mr. Carpenter was talking about **WHAT SERVICE WAS TRANSFERRED**. As in “traffic only” transfers versus entire plan transfers.

Now turn back the clock 8 years earlier to 1996 and see Mr. Carpenter’s statement to the Third Circuit that obviously was not referring to so called de minimus transfers.

AT&T’s Counsel Mr. Carpenter.(exhibit V in petitioners 9/27/06 filing Pg 15 ln. 9:

We point out in our brief that there’s a **distinction** between transfers of **entire plans**, and transfers of individual end-users locations. That when the **“plan”** is transferred, **"all the obligations"** have to go along with it.

See Mr. Carpenter again at exhibit V. in petitioners 9/27/06 filing Pg 15 line 23:

When you’re transferring **all the traffic**, you’re transferring the **plan**. That is – **and the obligations have to go with it, shortfall and termination liability.**

Mr. Carpenter was clearly referring to **what is transferred---**“ traffic only” vs. the entire plan. There is no distinction being made about AT&T allowing one or two accounts to transfer without S&T obligations transferring. Mr. Carpenter clearly understood how 2.1.8 worked. AT&T’s cover for him is totally pathetic and an insult to the Commissions intelligence.

This whole AT&T de minimus transfer defense is total nonsense anyway---as if the tariff allowed AT&T to **subjectively allow** one account to transfer without obligations transferring –of course the tariff doesn’t mandate that S&T obligations must transfer in the first place.

What if there is a customer with just 5 locations on their CSTPII/RVPP plan and that customer wanted to transfer 1 location AT&T claims it will allow without S&T obligations transferring---and what if that location is the inbound sales center and makes up 90% of the traffic on that transferor customers plan? An AT&T practice to subjectively decide **by number of accounts** as AT&T bogusly claimed would lead to discrimination and would not be permitted in any event.

AT&T attempts to cover for its Counsel Mr. Carpenter but digs its hole even deeper:

AT&T May 1st 2007 page

During oral argument, Mr. Carpenter argued that a customer would violate § 2.1.8 by "moving **all the 800 service** that it receives under

the plan **without assuming any of the liabilities.**" See Exh. 1 attached hereto, p. 8. Judge Ginsburg then asked, "if the customer wanted to transfer or assign 1 percent... of the numbers involved to a different aggregator, that would be, that would not run afoul of the tariff?" *Id.* Mr. Carpenter responded: "That *would* run afoul of the tariff." *Id.* (emphasis added).

AT&T cites the above passage in an attempt to show the FCC that it was Mr. Carpenter's position that it would run afoul of the tariff to do a partial traffic transfer (as petitioners did) and not transfer the transferors' revenue commitments and associated S&T obligations. However AT&T simply does not understand what its counsel is telling Judge Ginsburg regarding what **would run afoul of the tariff.**

Mr. Carpenter states that moving **all** the 800 service that it receives under the plan **without assuming any of the liabilities** would violate § 2.1.8. Petitioners agree with Mr. Carpenter, you obviously can not move all the 800 service and assume **zero liabilities**. You must transfer the indebtedness and the unexpired portion of the minimum payment period as section 2.1.8 indicates and what petitioners did. Additionally petitioners did not transfer **all of the service**; petitioners only transferred part of the service.

AT&T then of course short quotes the above passage because Mr. Carpenter's very next statement was:

But that's not, of course not this case.

Petitioners, agree that you can't transfer traffic without assuming any obligations. The DC Circuit was absolutely correct in stating in its Decision on page 11 exhibit C of petitioners 9/27/06 filing

All we decide is that Section 2.1.8 cannot be read to allow parties to transfer the benefits associated with 800 Service **without assuming any obligations.**

The DC Circuit got it right. Obviously the DC Circuit was not buying Mr. Carpenters position that it was permissible to transfer a couple of accounts (Mr. Carpenter's so called de minimus transfer argument) **without assuming any obligations.**

AT&T again short quotes Mr. Carpenters statement and takes it out of context:

See AT&T's May 1st 2007 brief pg 4-5:

and he **elsewhere** stated that the whole point of § 2.1.8 "was to condition service transfers on the assumption of the very liabilities that weren't transferred here." Exh. 1, p. 39.

AT&T amazingly jumps from page 8 of the oral argument transcript to page 39 of the oral argument transcript but tries to use page 39 to support what AT&T **thinks** Mr. Carpenter said back on page 8!!! He is referring to the petitioner's alleged liability to have shortfall charges collected against its end-users:

Look at **all** of page 39. Mr. Carpenter is talking about AT&T's alleged ability to collect against the end-users who would no longer be on the CCI/Inga plans because these end-users were transferred to PSE. Mr. Carpenter's actual statement on page 39 was:

The only explanation for this, and none was ever offered other than this below, was that they wanted to diminish our ability to evade, **to collect the shortfall charges.**

And the **provisions of the tariff that you were discussing with Mr. Bourne and also the provisions that appear on JA 418 are provisions that give us recourse against the location in the event that the tariff charges aren't paid.** And the one thing that we unequivocally lost, I think the arguments that CCI was somehow better off under this deal are just nonsense, because they had to pay twice for the service, once to PSE, again to AT&T.

But all that aside, we gave up, we lost our bill, **our recourse against the end-user locations as a result of this transfer,** and that's something that our tariff explicitly protected against. The only reason for this tariff was to condition service transfers on the assumption of the very liabilities that weren't transferred here.

Mr. Carpenter is simply recognizing that under the tariff AT&T would not be able to apply shortfall liabilities on CCI/Inga's end-users (since they are on PSE's plan) if CCI/Inga's plans went into shortfall. Mr. Carpenter erroneously believed that AT&T had recourse to bill petitioner's end-users for shortfall.

Mr. Carpenter is **not saying** "under the tariff shortfall and termination obligations transfer on traffic only transfers." He is implying that they should because he erroneously believes AT&T has the right to bill petitioner's end-users.

He's actually acknowledging that under 2.1.8 S&T obligations do not transfer on traffic

only transfers.

He argues that AT&T has recourse to collect against the plans end-users (since they are on PSE's plan) and therefore---- under that erroneous logic (which is an entirely different tariff section than 2.1.8) ----petitioners shouldn't have had the right to transfer "traffic only" leaving the S&T obligations remaining with petitioner's.

Despite acknowledging that S&T obligations do not transfer Mr. Carpenter's position that AT&T has the tariffed right to collect shortfall against petitioner's end-users is absolutely wrong. AT&T has already conceded this and the FCC 2003 Decision has also decided this.

AT&T has already made its position very clear that the end-users were not AT&T's.

AT&T's 2003 Further Reply Comments to the FCC page 2: Here as exhibit G

AT&T demonstrated in its Further Comments that under the relevant tariffs Petitioners were AT&T's customers of record and that AT&T did not have any carrier relationship with Petitioners' customers (the "end-users"). Petitioners do not dispute the accuracy of these statements; just to the contrary, they repeatedly concede that they and not AT&T had the exclusive carrier-customer relationship with the end-users. Similarly the Petitioners acknowledge that "**although AT&T also rendered bills** to Winback & Conserves end-users on the behalf of the latter entity, **the billing arrangement** selected by the reseller **did not create any carrier-customer relationship between AT&T and the end-users.**

AT&T's 2003 Further Reply Comments to FCC Page 4: Here as exhibit H

Petitioners also concede that the *liability* for all charges incurred by each location was solely that of the petitioners not the end-users.

AT&T's 2003 Further Reply Comments to FCC page 4: Here as exhibit H.

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

Mr. Carpenter was referencing section 3.3.1Q not section 2.1.8. Obviously Mr. Carpenter either did not understand the 3.3.1Q tariff section which AT&T already conceded was contrary to Mr. Carpenter's DC Circuit statement or he was deliberately misrepresenting the truth to the DC Circuit. AT&T had no right to bill end-users for shortfall charges since they were not AT&T's customers. Of course this comment also answers the question that S&T obligations are the responsibility of the petitioners.

See FCC Oct 17th 2003 Decision page 7 fn. 52.(Exhibit B to petitioner's 9/27/06 filing)

The FCC 2003 Ruling:

As AT&T concedes, the end-users or "locations," were CCI's customers, not AT&T's. See AT&T Further Comments at 6-10 (citing, *inter alia*, *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd at 16075, para. 3; *First District Court Opinion* at 3); see also *MCI Telecommunications Corp v. AT&T*, File No. E-90-28, Order, 7 FCC Rcd 5096, 5100, para. 20 (CCB 1992).

Because these end-users did not choose AT&T as their primary interexchange carrier, AT&T had neither proprietary interest in these individual end-user locations nor an expectation of revenue from them.

See *Hi-Rim Communications, Incorporated v. MCI Telecommunications Corporation*, File No. E-96-14, Memorandum Opinion and Order, 13 FCC Rcd 6551, 6559 para. 13 (CCB 1998).

There is just no way can AT&T cover-up for the many clear AT&T concessions made-to both the Third Circuit and the DC Circuit----- regarding how 2.1.8 worked.

Petitioner's are in no way giving credit to Mr. Carpenter for his accurate account that it "depends upon what is transferred" ("traffic only" or the entire plan) to determine if S&T obligations transfer.

Mr. Carpenter has shown himself to be just as much of a con artist as the rest of the AT&T counsel. The FCC has to understand that Mr. Carpenter was only explaining 2.1.8 in full to counter the FCC's 2003 Decision.

To simultaneously attack petitioners, AT&T conceded for the first time ever—despite 2.1.8's statute of limitations period of 15 days---AT&T introduced its 's bogus ("traffic only- no

obligations were transferred” defense to the DC Circuit. Petitioners were informed that this was AT&T’s master scam before the DC Circuit.

All of AT&T’s filings remind petitioner’s of Humpty Dumpty's famous statement that, "[w]hen I use a word ... it means just what I choose it to mean—neither more nor less." *Alice in Wonderland*.

This is why AT&T has no evidence to support what AT&T *thinks* Mr Carpenter was asserting in AT&T’s feeble attempt to cover-up. No such evidence exists because 2.1.8 does not mandate that traffic only transfers require S&T obligations to transfer.

AT&T Attempts to Cover-up for Injunction Bond Request

AT&T May 1st 2007 page 4 n2.

As AT&T has previously explained, it defies logic and commonsense to argue that AT&T sought a \$15 million bond to protect it from harms caused by the operation of § 2.1.8 itself. Yet, petitioners make precisely this absurd argument. See April 18 Ex Parte at 7 (AT&T sought a bond "because AT&T acknowledged that under the tariff the plans revenue commitments stayed with CCI on a traffic only transfer").

AT&T’s claim why it needed the \$15 million injunction bond was due to its bogus assertion of its fraudulent use provision. AT&T asserted to the Third Circuit that even if Tr 8179 did not go through retroactively but only prospectively there still would be an issue of AT&T’s fraudulent use claim:

AT&T brief in 1996 to Third Circuit Page 12 footnote 5: Here as exhibit I

FCC Tariff Transmittal 8179 would have made explicit that an existing customer could not transfer even "substantially all 800 numbers on an existing plan under circumstances where it would not be able to meet volume or term commitments unless the new customer agreed to assume all of the existing customer's obligations. See Meade 2d Supp. Cert. ¶ 7 (AA 1267). That tariff transmittal would have foreclosed any request for injunctive relief in this case if it had taken effect by its terms, **and would have**

raised issues similar to those presented by plaintiffs' complaint if it had taken effect prospectively.

AT&T wants the FCC to believe that it was illogical for AT&T to have “sought a \$15 million bond to protect it from harms caused by the operation of § 2.1.8 itself”—petitioners agree that it would be illogical to base a request on how 2.1.8 worked. That is why AT&T instead based its injunction bond request upon an entirely different section of the tariff dealing with Fraudulent Use-----due to the amount of accounts that were being transferred. AT&T conceded that there was a remaining issue to warrant AT&T asking for the \$15 million injunction bond despite 2.1.8 being properly adhered to.

AT&T REPLY brief to the Third Circuit 1996: Page 18 para 1:

See Exhibit E in petitioners 4/23/07 filing:

Further, AT&T also demonstrated that even if Section 2.1.8B could “somehow be read” to permit transfers of a plan's traffic without all associated obligations, the proposed transfers would both violate the antifraud provisions of the tariff (because they would evade shortfall or termination liabilities)

AT&T’s position was that it needed the injunction bond of \$15 million because even if 2.1.8B (all obligations paragraph) could “somehow be read” to permit transfers of a plan's traffic without all associated obligations AT&T still had its bogus antifraud provision that AT&T asserted justified the \$15 million bond.

AT&T makes a Feeble Effort To Cover Up AT&T’s “Self-Evident” Concession that S&T Obligations Do Not Transfer On Traffic Only Transfers

AT&T May 1st 2007 Page 5:

Petitioners also point to a statement in AT&T's reply brief in the Third Circuit, where AT&T made this same point. In the passage in question, AT&T stated:

CCI then, incongruously, seeks to defend the District Court by citing "record evidence" that addressed transfers of individual end user locations (not entire plan's liabilities), and showed that the only "obligation" transferred to the "new customer" in that event is the unpaid liability associated with the individual end user location that is transferred.. . But that is self-evident under the tariff.

April 23rd Ex Parte, Exh. D. Contrary to petitioners' claim, AT&T was not "admit[ting]" in this passage that it was "**self-evident** that S&T obligations don't transfer under the tariff." *Id.* at 6. AT&T's quote refers to the transfer of a single "location."

As usual it's just another AT&T bogus cover-up. AT&T short quotes both the front and the back of its passage then takes it totally out of context:

AT&T REPLY brief to the Third Circuit 1996: Page 17 para 2: Attached as exhibit D in petitioners 4/23/07 filing:

AT&T first leaves out of its May 1st 2007 quote the sentence immediately prior to this passage:

CCI notes that a transfer of service can apply either to individual end user locationS or to entire plans. See CCI Br. at 31-32 & n.13.

As the FCC can see in this above sentence, CCI states that locationS (plural) were transferred--- not a single location (singular).

Then AT&T's excerpt explicitly states locationS (plural) were transferred and explicitly states ("not entire plan's liabilities")

citing "record evidence" that addressed transfers of individual end user locationS ("not entire plan's liabilities")

Then after AT&T states:

But that is self-evident under the tariff.

agreeing with CCI's brief stating many locations could be transferred AT&T ends its quote--- failing to address the true intent of the passage. The passage continues with the phrase "by contrast" leaving no doubt to the tie to the paragraphs before it and the ploy AT&T was using to divert attention to CCI's evidence. AT&T then simply mischaracterized the traffic transfer at hand as "**all** the plan's traffic and locations are being transferred," when AT&T knew that the plan's traffic and locations were NOT being transferred.

The passage immediately following AT&T's May 1st 2007 bogus cover-up:

By contrast, when **“all” the plan's traffic and locations are being transferred** to a new customer and when the "plan" would then exist only as an “empty shell”, then the "new customer" would not be assuming "all" the associated "obligations" unless it assumed the **"existing customer's" shortfall and termination commitments.**

Another point must be noted to blow AT&T's cover-up. AT&T couldn't possibly be referring to 1 location (singular) being allowed to transfer with no obligations--- as self-evident **under the tariff.** Section 2.1.8 explicitly shows two obligations that have to be transferred (indebtedness and the unexpired portion of any minimum payment period) Those are truly the only obligations that are self evident **under the tariff.**

AT&T itself on page 29 of its Dec 20th 2006 filing clearly stated that AT&T's whole minimis transfer nonsense **“fell outside the scope of § 2.1.8 altogether.”**

Petitioners also quote statements AT&T's counsel made during oral argument to the D.C. Circuit. Petn. at 18-19. But in the passage they quote, Mr. Carpenter simply recognized that truly de minimis traffic transfers **fell outside the scope of § 2.1.8 altogether.** See Exh. W (AT&T "would not take the position, then, that any shortfall obligation went with the transfer of a single number").

Therefore AT&T couldn't have possibly been speaking about its bogus de minimis transfer exception being **self-evident under the tariff** when AT&T itself stated the bogus de minimis transfer exception **fell outside the scope of § 2.1.8 altogether!!!** “O what a tangled web we weave, when first we practice to deceive” *Sir Walter Scott*

There is simply no way anyone can take AT&T's “self-evident” statement as anything other than a concession that plan obligations under the tariff do not transfer on “traffic only” transfers.

AT&T's Cover-up for Mr. Carpenter is An Inaccurate Account of What Mr. Carpenter Stated and Makes Absolutely No Sense

AT&T May 1st 2007 page 5 para 2:

AT&T's principal argument before the Third Circuit was that, because petitioners were proposing to transfer all but a handful of locations, the transaction was no different from a transfer of the entire plan, and even petitioners admitted that a plan transfer triggered § 2.1.8's "all obligations" requirement. This argument, which is reflected in the statements petitioners' quote from Mr. Carpenter's argument to the Third Circuit, April 18 Ex Parte at 13, is entirely consistent with the argument that § 2.1.8 applies to traffic transfers generally, and it is certainly not a *concession* that § 2.1.8 does not require a transferee to accept "all obligations" in a traffic transfer.

First of all AT&T states that its argument before the **Third Circuit** was that petitioners transaction constituted a plan transfer as if AT&T gave up on that scam. Petitioner's cited multiple statements in its April 23rd 2007 filing showing AT&T's same bogus assertion in AT&T's August 26th 1996 filing to the FCC. See page 10 para 2 (See here as exhibit J)

CCI ostensibly sought to transfer the traffic---but not the "plans" themselves---- to PSE under section 2.1.8 of AT&T's Tariff F.C.C. No. 2. Section 2.1.8B states that a Customer may transfer its WATS service ("in this case" the relevant WATS services are the CSTPII "Plans") to a "new Customer" only if the new customer confirms in writing that it "agrees to assume all obligations of the former Customer at the time of transfer or assignment.

AT&T mischaracterizes petitioner's "traffic only" transfer as a plan transfer as it states: "in this case" the relevant WATS services are the CSTPII Plans."

Obviously in this case it is a traffic only transfer--- not a **PLAN** transfer. AT&T simply intentionally lied by stating that "in this case" the relevant WATS services are the CSTPII

“Plans”.

AT&T did this because there is a distinction between a plan transfer and a “traffic only” transfer due to the obligations that are transferred as its counsel Mr. Carpenter conceded.

AT&T’s cover-up for what it says was its position to only the Third Circuit and for Carpenter’s Third Circuit Assertions makes absolutely no sense! If AT&T’s position is that it does not make a difference whether 1% or 99% of the accounts are transferred --the plan obligations must transfer-- AT&T didn’t need to continually mischaracterize petitioner’s transaction as a plan transfer.

Only because there is a distinction between a plan transfer and a “traffic only” transfer did AT&T make these intentional mischaracterizations. David Carpenter stated to the Third Circuit at Oral Argument:

See exhibit V in petitioners 9/27/06 filing Pg 15 line 9:

We point out in our brief that there’s a distinction between transfers of entire plans, and transfers of individual end-users locations. That when the “plan” is transferred, "all the obligations" have to go along with it.

See Mr. Carpenter again at exhibit V. in petitioners 9/27/06 filing Pg 15 line 23:

When you’re transferring all the traffic, you’re transferring the plan. That is – and the obligations have to go with it, shortfall and termination liability.

AT&T May 1st 2007 page 5 para 2:

This argument, which is reflected in the statements petitioners' quote from Mr. Carpenter's argument to the Third Circuit, April 18 Ex Parte at 13, is entirely consistent with the argument that § 2.1.8 applies to traffic transfers generally, and it is certainly not a *concession* that § 2.1.8 does not require a transferee to accept "all obligations" in a traffic transfer.

Mr Carpenter’s quotes to the Third Circuit are “entirely consistent” with AT&T position that there is no distinction between a traffic only transfer and a plan transfer as far as which obligations transfer? Is AT&T serious!

Mr Carpenter's concessions to the Third Circuit can not be covered-up. Carpenter's game plan in the Third Circuit was to state the correct tariff interpretation but to mischaracterize petitioner's transfer as a plan transfer.

Third Circuit Oral Pg 43 exhibit O in petitioners' 9/27/06 filing. AT&T's Counsel David Carpenter:

The FCC asked us to withdraw the complaint because the FCC thought we had done more in the tariff language than codify what the tariff already meant because it went beyond prohibiting these sorts of transfers of plans that would affect transfers of individual locations.

Additionally, AT&T's assertion that Mr. Carpenter's assertions were "entirely consistent" with AT&T's theory that petitioners did a plan transfer due to AT&T's assertion that :

but a handful of locations, the transaction was no different from a transfer of the entire plan

However Mr. Carpenter dispelled that consistency by explicitly stating it depends upon what is transferred (traffic or plan) not the amount of traffic.

Mr. Carpenter: Yes, but what it means to assume all the obligations. What obligations apply may vary depending on what's transferred.

Mr. Carpenter: Now what obligations they are going to end up assuming will vary depending on what service is being transferred.

Of course if AT&T's theory was correct AT&T would have evidence but because AT&T's theory is bogus there is no evidence.

AT&T Again Confuses the FCC's Position on How the Account Traffic Could Transfer Versus Which Obligations Transfer on a Traffic Only Transfer

AT&T May 1st 2007 page 6:

See AT&T Corp. v. FCC, 394 F.3d 933, 937 (D.C. Cir. 2005)
"AT&T did not concede the inapplicability of Section 2.1.8 **to transfers of traffic only**¹. Indeed, had AT&T been willing to make such a concession, it presumably would not have contested the meaning of this provision before the Commission. Accordingly, the FCC's reliance on AT&T's comment is plainly misplaced."

The above passage relates to whether or not section 2.1.8 allows for transfers of "traffic only." AT&T's position before the FCC in 1996 was **NOT** that all obligations must be transferred on a "traffic only" transfer AT&T argued that we did a plan transfer due to the amount of accounts that were transferred—and that is the reason why S&T obligations should transfer.

The DC Circuits Decision on page 8 was derived from the following AT&T 1996 FCC passage in which the DC Circuit deduced that 2.1.8 allowed traffic only transfers.

AT&T's **1996** brief to the FCC page 10 here as exhibit J

CCI ostensibly sought to transfer the traffic---but not the "plans" themselves---- to PSE under section 2.1.8 of AT&T's Tariff F.C.C. No. 2. Section 2.1.8B states that a Customer may transfer its WATS service (**"in this case" the relevant WATS services are the CSTPII "Plans"**) to a "new Customer" only if the new customer confirms in writing that it "agrees to assume all obligations of the former Customer at the time of transfer or assignment."

Notice how AT&T starts out with:

CCI "**ostensibly sought**" to transfer the traffic---but not the "plans" themselves- to PSE under section 2.1.8 of AT&T's Tariff

¹ The DC Circuit obviously understood that "traffic only" meant "traffic only" not the plan; not AT&T's 2005 creation of short quoting the TSA and changing the context to "Traffic Only" no obligations.

AT&T is using the phrase: “ostensibly sought” because it is asserting that petitioners “tried to or seemingly” did a “traffic only” transfer but in AT&T’s belief, petitioners did a plan transfer due to the amount of account traffic transferred.

AT&T clearly understood that there was---as its counsel Mr. Carpenter stated ---a distinction between is a plan transfer and a traffic only transfer---- as to which obligations get transferred. This is why AT&T then follows with:

Section 2.1.8B states that a Customer may transfer its WATS service (“in this case” the relevant WATS services are the CSTPII “Plans”) to a “new Customer” only if the new customer confirms in writing that it “agrees to assume all obligations” of the former Customer at the time of transfer or assignment.

AT&T mischaracterizes petitioners transfer as a plan transfer --(“in this case” the relevant WATS services are the CSTPII “Plans”) ----then states that all the obligations would transfer on a PLAN transfer.

Therefore when AT&T quotes the D C Circuit regarding AT&T would have “presumably” interpreted the meaning of 2.1.8....

AT&T’s May 1st quote of the DC Circuit:

Indeed, had AT&T been willing to make such a concession, it presumably would not have contested the meaning of this provision before the Commission. Accordingly, the FCC's reliance on AT&T's comment is plainly misplaced

AT&T already gave away its interpretation of which obligations would transfer by intentionally needing to mischaracterize the transfer as a plan transfer----- so only then could AT&T ask for the transferors plan obligations to transfer. Additionally AT&T gave away what 2.1.8 meant as far as obligations allocation when it filed Tr. 8179 to change the status quo. AT&T asked for the plan to be transferred not the plan obligations on a substantial “traffic only” transfer. See exhibit

L of petitioners 9/27/06 filing.

The Only Thing AT&T has Maintained is Inconsistency

AT&T asserts on page 6 of its May 1st 2007 filing:

At bottom, there are two central facts that no amount of bluster and name-calling by petitioners can obscure: 1) AT&T has **consistently maintained** that § 2.1.8 governs the very traffic transfer at issue here; and 2) AT&T has **consistently argued** that that transfer violates §2.1.8 because PSE did not agree to accept "all obligations" of CCI.

Let's look at each of these 2 points AT&T cites as its "consistent positions".

1) Only petitioner's have maintained that "§ 2.1.8 governs the very traffic transfer at issue here"-
---AT&T's position was not maintained as the record shows:

AT&T's own senior counsel Charles Mr. Fash's letter asserted (exhibit H of petitioner's 9/27/06 filing at pg 1 para 3) that 2.1.8 did not allow "traffic only" transfers. Mr Fash argued for the FCC's delete and add theory as per tariff section 3.3.1.Q bullet 4

The **Transfer of Service provision** of the tariff addresses the issue of transfer of service, **not transfer of "traffic"** by moving individual locations from one plan to another. The proper way to move "traffic" (i.e. , a subset of locations on a plan) between plans is to submit service orders to **delete the locations from one plan and add the locations to another.**

AT&T Counsel Mr. Fash misrepresented that service was somehow different than traffic just so the aggregator would not use 2.1.8. to move its traffic in bulk.

However the DC Circuit Decision correctly stated at exhibit C pg. 10, para. 2 of petitioners 9/27 filing --- that traffic is service:

In absence of any contrary evidence we find that "traffic" is a type of service covered by the tariff.

Example Two that shows AT&T did not maintain that “§ 2.1.8 allows traffic only transfers---- and the “the traffic transfer at issue here.”

See exhibit I of petitioners 9/27/06 filing a fax to petitioner’s from its senior account provisioning manager who stated that she was given directions by AT&T’s legal department --- **AT&T senior manager Joyce Suek:**

Al --Per our Conversation, 6/19; an original TSA is now required for transfer activity. Additionally **we “no longer” process “partial TSA’s”, the TSA must be for the whole plan.**
Joyce Suek”

“Partial TSA’s” meant traffic only transfers using the Transfer of Service Agreement (TSA). AT&T’s position, as AT&T’s Joyce Suek stated was that the only way to transfer traffic under 2.1.8 was to transfer the entire plan. This same erroneous AT&T logic in Jan 1995 was harshly criticized by the DC Circuit.

Now let’s look at what else AT&T states it has **consistently argued:**

2) AT&T has **consistently argued** that that transfer violates §2.1.8 because PSE did not agree to accept "all obligations" of CCI.

As we have seen counsel Fash stated the transfer did not apply to 2.1.8 at all. Additionally the record evidence shows that AT&T counsel Mr. Brown agreed with the certification submitted by CCI’s owner Mr Shipp in which Mr. Shipp clearly specified that plan obligations do not transfer on the transfer at issue. See exhibit E to petitioner’s 9/27/06 filing.

Mr. Brown asserted:

They submit a Certification by CCI’s President, Larry G. Shipp, that allegedly "clarifies the nature and type of obligations transferred with the traffic [at issue]." **But there was no dispute on this subject.**

Petitioners have also evidenced AT&T’s counsel Mr. Meade state that the correct 2.1.8 methodology was used in his bogus “substance over form” assertion due to the amount of account traffic transferred. Why in the world would PSE “**not agree to accept** "all obligations" of CCI” when under AT&T’s newly created “proposal defense”--- CCI/Inga’s plan obligations

were not even proposed to be assumed by PSE!!!

The FCC must also note that even if AT&T did consistently argue that PSE did not assume plan obligations of CCI/Inga there is zero record evidence of PSE making any modification to the routine 2.1.8 order—as PSE explicitly stated it was doing a **proper** transfer.

The FCC should see on page 4 of Exhibit F to petitioners initial 9/27/06 filing in which PSE states:

Please find a **properly executed** AT&T transfer of Service Agreement (TSA) to move all of the end-user locations, except the 181 account number and the 131 lead number into PSE's CT516. (CSTP/RVPP Plan ID #003690)

No amount of diversionary AT&T rhetoric can change the fact, -----as AT&T has conceded----- that section 2.1.8 in Jan 1995 does not state that revenue commitments and their associated shortfall and termination obligations are to be transferred.

Tariffs must be explicit and AT&T therefore loses as per the law. Additionally AT&T did not act within section 2.1.8's statute of limitation period of 15 days.

AT&T May 1st 2007 page 6 footnote 4.

It is equally preposterous to argue that, in its October 2003 decision, the Commission "utilized section 2.1.8 to interpret precisely which obligations are transferred." April 18th Ex Parte at 14. The Commission expressly stated that § 2.1.8 "did not *address*— and therefore did not preclude *or otherwise govern*—**the movement of end-user traffic.**" See Request for Declaratory Ruling, Exh. B, Commission 2003 Decision at f] 9 (emphases added). Petitioners claim this not a statement that § 2.1.8 does not address or otherwise govern "the OBLIGATIONS ALLOCATION ANALYSIS." April 18th Ex Parte at 15. This is utter nonsense. **By saying that the provision does not apply at all, the Commission was plainly disclaiming any determination about what obligations have to be assumed when § 2.1.8 does apply.**

The FCC 2003 decision as the above quote states only stated that 2.1.8 did not apply to the movement of traffic. As the FCC stated:

"did not *address*— and therefore did not preclude *or otherwise govern*—**the movement of end-user traffic.**"

The FCC believed the traffic could be moved in bulk using the delete and add provision (section 3.3.1.bullet 4.---but it used section 2.1.8 to interpret which obligations transferred.

AT&T above states:

By saying that **the provision does not apply at all**, the Commission was plainly disclaiming any determination about what obligations have to be assumed when § 2.1.8 does apply.

AT&T again misleads as **no where** in the FCC Decision does it say regarding 2.1.8 that

the provision does not apply at all

AT&T did not and can not refute -the FCC's extensive obligations analysis was in fact **under the heading 2.1.8**. Additionally, it was shown by petitioners—and also not refuted by AT&T--- that the FCC agreed with the non vacated District Court Judge Politan Decision which utilized section 2.1.8 to interpret allocation of obligations. See FCC Decision exhibit B in petitioners 9/27/06 filing at page 7 line 10

FCC Decision Under Heading 2.1.8

CCI and PSE retained the benefits and obligations of their respective agreements with AT&T. We note in this regard that both the forms submitted to AT&T and the agreement between CCI and PSE stated that CCI would continue to subscribe to its existing CSTP II plans. [FCC FOOTNOTE 49 HERE] Thus, **CCI still would have to meet its tariffed commitments**, without the use of the traffic moved to PSE, and **AT&T also would remain obligated to CCI under the terms of Tariff No. 2.** [FCC FOOTNOTE 50 HERE] The moved traffic would be used to meet PSE's CT 516 volume commitments and, once moved, would no longer be associated with CCI's CSTP II. If the traffic were moved away from CCI under Tariff 2, to PSE under Contract Tariff 516, AT&T would get less money for the same traffic – the traffic would be discounted 66 percent

instead of 28 percent. [FCC FOOTNOTE 51 HERE]

FOOTNOTE 49:

See Exhibits G and H to Petition.

FOOTNOTE 50:

CCI and PSE did agree that the traffic could be returned to CCI upon 30 days written notice from CCI that **AT&T required CCI to meet its commitments.** *See* Exhibit G to Petition. Accordingly, at least theoretically, the traffic might have been returned to CCI at some point to **enable it to meet any CSTP II obligations.** *Cf.* Reply at 10 (arguing CCI would receive more net income, and thus have more money available to pay any charges, after the traffic was moved to PSE). We do not speculate whether the traffic ever would have been moved back or whether it or some other development would have satisfied **CCI's CSTP II commitments** because AT&T did not move the traffic from CCI to PSE.

FOOTNOTE 51:

See First District Court Opinion at 5. Exhibit G to the Petition, a letter agreement between CCI and PSE dated January 16, 1995, explains that, once the traffic was moved: (1) CCI's end-users (formerly the Inga Companies' end-users) would "**be billed by AT&T at the prevailing AT&T Tariff 2 CSTP rates, less twenty three percent (23%) Customer Specific Term Plan (CSTP) discount, and 5.5% Revenue Volume Pricing Plan (RVPP) discount**"; (2) CCI would get 80 percent "earned credit" for this traffic **from PSE**; (3) **CCI would continue to be responsible to AT&T for any commitment associated with the CSTP II Plans (which would not be discontinued)**; and (4) PSE would assist in moving accounts back to CCI upon written notice from CCI that AT&T required **CCI to meet its commitments.** *See* Exhibit G to the Petition. Thus, the traffic would be discounted 66 percent instead of 28 percent and the end-users would receive a discount off AT&T's standard tariffed rates greater than the portion of the 28 percent they had received when their traffic was associated with the CSTP II plan. *See First District Court Opinion at 3-5.* The discount differential would be apportioned between CCI and PSE according to their letter agreement. *See also* n.**Error! Bookmark not defined.**, *infra*.

The above section 2.1.8 tariff analysis under the 2.1.8 heading references and agrees with the non vacated First District Court Decision **and both utilized section 2.1.8 to interpret the obligations allocation. This complete tariff interpretation by the FCC was done under 2.1.8 and had absolutely nothing to do about the fraudulent use provision.** The above FCC section

2.1.8 tariff analysis shows that “once the traffic was moved” to PSE the end-users transferred would get PSE’s 28% (CSTP 23% plus 5% RVPP) discount pool which obviously means it absorbs the bad debt. This obviously confirms that just the account obligations transfer, because in fact only accounts did transfer!

The FCC correctly interpreted that CCI’ plans revenue commitments with their associated shortfall and termination obligations must stay with the transferring plan holder CCI. The FCC’s decision (under the heading 2.1.8---not the fraudulent use heading), clearly interpreted that the plans revenue commitments **do not transfer!**

Look at this next FCC decision excerpt which does fall under the Fraudulent Use Heading **but here is the key---it references the use of tariff section 2.1.8.**

FCC 2003 Decision Page 8 para 11 Under Fraudulent Use Section:

Based upon our review of AT&T’s tariff, we conclude that, even assuming that AT&T reasonably suspected a violation of the “fraudulent use” provisions of its tariff – which we do not decide – those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. If AT&T had moved the traffic from CCI to PSE, then all of the traffic that CCI had used to meet its CSTP II/RVPP commitments would be associated with PSE’s CT 516. **Further, CCI (as well as the Inga companies) [FOOTNOTE 62] but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans.** Once all of its traffic was moved to PSE, CCI might have needed to amass new traffic in order to meet its commitments under its CSTP II plans. **AT&T’s apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.**

FOOTNOTE 62:

See First District Court Opinion at 9.

The FCC under the Fraudulent use section was simply correctly making the point to AT&T that its fraudulent use claim was a farce because under **section 2.1.8’s** joint and several liability provision **CCI AS WELL AS THE INGA COMPANIES** would be obligated for the actual shortfall. AT&T was claiming that CCI was an asset less shell and therefore was attempting to enact its Fraudulent Use provisions; however the FCC was simply stating that AT&T also had

the Inga Companies to pursue for shortfall. This is why the FCC correctly chose to further explain 2.1.8's obligations allocation under Fraudulent Use. It makes perfect sense.

Furthermore look at the sentence:

Further, CCI (as well as the Inga companies) [**FOOTNOTE 62**] but not PSE, would continue to have been responsible for any shortfall obligations under the CSTP II/RVPP plans.

See what it the footnote references:

FOOTNOTE 62:
See First District Court Opinion at 9.

The FCC was in agreement with Judge Politan's non vacated Decision which interpreted the obligations allocation **under 2.1.8's obligations language.** The fact that the FCC added further 2.1.8 obligations analysis under the fraudulent use heading is appropriate to those who understand the joint and several liability provision of 2.1.8.

The FCC under the Fraudulent Use heading was simply reiterating what it had already interpreted under the heading 2.1.8 within the FCC decision. The FCC Decision was simply making the point that revenue commitments/S&T obligations **do not transfer on traffic only transfers** but AT&T still could pursue both CCI and the Inga Companies. By AT&T making a claim for fraudulent use because it "believed" that it was going to be deprived of shortfall on CCI's plans, AT&T was also simultaneously confirming, as was the FCC, that it understood that S&T obligations do not transfer on traffic only transfers.

The FCC Decision obviously was confirming that S&T obligations stay with CCI, and the fact that part of its 2.1.8 obligations allocation analysis was under the heading interpreting AT&T's bogus Fraudulent Use claim but referencing and agreeing with Judge Politan's 2.1.8 analysis is perfectly understandable, and in no way diminishes its correct interpretation.

In fact it actually enforces the FCC decision regarding the allocation of obligations because it confirms that the FCC fully understood that for AT&T to make a fraudulent use claim it also had to acknowledge that the S&T obligations did not transfer on traffic only transfers. If the tariff did not allow traffic only transfers in which the S&T obligations stayed with the transferor, AT&T would not have instituted its bogus fraudulent use claim; **AT&T would have simply argued that its tariff does not permit S&T obligations to remain with the transferors**

plan on a traffic only transfer.

Therefore the FCC has obviously already interpreted under section 2.1.8 which obligations transfer.

Consider that there is no obligation transfer language within AT&T's fraudulent use provisions.

Although the FCC used 3.3.1.Q bullet 4 to determine the method in which account traffic could be transferred—the FCC used the obligations language within section 2.1.8 to interpret and determine which obligations transfer. Moreover, section 3.3.1 Q bullet 4 also does not contain any obligations transfer language. The FCC had to use section 2.1.8, as it is the only obligations transfer language in the tariff.

When the DC Circuit answered Judge Politan's referral on "whether or not traffic only could transfer" the case was over due to the obligations language issue having already been decided by both the non vacated District Court, then not changed by the FCC, and not changed nor remanded back to the FCC by the by the DC Circuit.

AT&T's assertion on page 6 footnote 4 that "**the provision does not apply at all**" is even more ridiculous when the you consider the FCC explicitly stated to the DC Circuit that it used 2.1.8 to interpret and determine which obligations transfer. AT&T's master con is to take what the FCC said in relation to **account movement** and apply it to obligations allocation.

The FCC in fact explained to the DC Circuit that if it wasn't for the obligations section of 2.1.8 that section wouldn't have any meaning as it related to traffic-only transfers.

See exhibit T of petitioner's 9/27/06 filing which is page 19 and 20 of the FCC's brief to the DC Circuit explaining its 2003 Decision:

More fundamentally, however, AT&T's argument collapses, because it incorrectly presumes that, apart from the transferee's assumption of liabilities (which occurs under a transfer of plans, but not a transfer of traffic), a transfer of traffic and a transfer of plans yields identical benefits and burdens to AT&T and its customers. That is not the case. Where there is a wholesale transfer of plans pursuant to section 2.1.8 (as in the Inga-to-CCI transactions), the transferee" steps[s] into the shoes of [the transferor]" and *replaces* the transferor as the party liable for any *future* purchases of service. Order, para 9 (JA7) **FOOTNOTE 10**

By contrast, when only traffic is moved, the party reducing its traffic (in this case CCI) “would continue to subscribe to its existing CSTPII plans.” And the totality of the reciprocal obligations between that party and AT&T under those CSTPII plans would remain in effect, both with respect to service that had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. Order, para. 9 (JA7). Thus, each method of structuring the transaction presents **distinct benefits and obligations** for both AT&T and the customer, and the Commission's reading **gives meaning to section 2.1.8**.

FOOTNOTE 10

The transferor does remain liable for “outstanding indebtedness” and the “unexpired portion of any applicable minimum payment” obligation existing at the time of the transfer. *See Order*. n.46 (JA6) (quoting section 2.1.8).

The FCC specifically states that it interpreted 2.1.8 in rejecting AT&T's position that S&T obligations transfer: Here again at exhibit T in petitioners 9/27/06 brief is an excerpt from page 10 of the FCC's brief to the DC Circuit Court.

In arriving at the conclusion that section 2.1.8 of Tariff No. 2 did not prohibit the requests made by CCI and PSE to transfer traffic, the Commission rejected AT&T's contention that section 2.1.8 did not permit the transfer of traffic without a plan unless the transferee assumed the original customers liability. *Id.* at para. 9 (JA 6-8) The Commission stressed, however, that even with the transfer of traffic, CCI still would have to meet its tariffed commitments.

And, once again, the FCC confirms that S&T obligations remain with petitioners' plans. Here again within petitioner's 9/27/06 exhibit T is the FCC's correct position on page 11 of its brief to the DC Circuit.

The commission concluded that CCI's obligations remained under the CSTPII and RVPP plans, and that "AT&T's apparent speculation that CCI would fail to meet these commitments and would be judgment-proof did not justify its refusal to transfer the traffic in question.

So as the FCC explained although it used section 3.3.1.bullet 4 (delete and add accounts paragraph) to interpret the MOVEMENT OF ACCOUNTS it used section 2.1.8 to interpret the OBLIGATIONS ALLOCATION. No harm done.

Additionally, the fact that the FCC made an error in using section 3.3.1.bullet 4 to interpret how “traffic only” could move in bulk **does not in any way affect the FCC’s correct 2.1.8 obligations allocation analysis.**

The FCC simply took the same position as Judge Politan’s non vacated District Court Decision, which used section 2.1.8’s obligations language to interpret and determine which obligations transfer on traffic only transfers.

Petitioner’s provided in its 4/23/07 filing several excerpts from AT&T Counsel Mr. Meade’s Substantial Cause Pleading of 2/16/1995. AT&T’s May 1st 2007 filing of course did not respond to the Meade evidence which destroys AT&T’s “proposal defense.” AT&T’s “proposal defense” asserts that what petitioner’s “proposed” was a transaction outside section 2.1.8 and not actually what section 2.1.8 mandated---which according to AT&T was the transfer of plan obligations on a “traffic only” transfer.

Mr. Nall explained that the tariff revisions—which AT&T tried to retroactively enact to cover petitioners transfer--- were to cover all customers (plural). Obviously, AT&T was seeking to make a change to its tariff to prevent substantial traffic transfers – but it recognized its tariff allowed it for not only petitioners but all AT&T customers (plural). Petitioners traffic only request was no different than what any other AT&T customer had routinely done under section 2.1.8.

Dear Mr. Nall

AT&T submits this letter to demonstrate that there is substantial cause for applying the tariff changes set forth in Transmittal 8179 to AT&T customerS receiving services under existing term plans and Contract Tariffs. The Transmittal adds a paragraph to the existing sections of Tariff F.C.C. Nos. 1 and 2 governing Transfer or Assignment of service to clarify that transfer of all or substantially all of the locations or 800 numbers associated with a Tariff 1 or 2 term plan (or Contract Tariff) to another customer is deemed a **transfer of the term plan** (or Contract Tariff) itself, **if the anticipated result of the transfer otherwise would be a significant commitment shortfall.**

AT&T was not only trying to change the tariff for only petitioners so called “proposed” “traffic only” transfer but AT&T wanted it closed for all customers because AT&T recognized the traffic only transfer was permissible. All customers would be affected, because that is the way the tariff worked.

Notice that AT&T’s proposed revision to 2.1.8 was to have the **plan transferred** not the plan obligations transferred when there was a substantial “traffic only” transfer. There was no option under the tariff to transfer plan obligations on a “traffic only” transfer.

Mr. Meade

The Transmittal Clarifies Existing Tariff Terms

As a clarification of existing tariff provisions rather than a substantive change, the proposed tariff provision should be applied to existing term plan and Contract Tariff customers without any special showing.

AT&T tried to retroactively change the tariff --- for the entire industry [all customers (plural)] --- because AT&T understood that petitioner’s traffic only transfer was permissible under the tariff.

Mr Meade further notes that the petitioner’s traffic only transfer:

would leave the **continuing obligation** to pay shortfall (or termination) charges

The phrase **continuing obligation** should be noted here. AT&T’s other new defense for some of its counsel is that the counsels were all referring to “joint and several liability obligations” remaining with CCI’s plan on a traffic only transfer, as AT&T asserted the actual obligations transfer to PSE. However Mr. Meade correctly states that the shortfall and termination charge obligations stay with CCI.

The FCC was not buying AT&T’s Substantial Cause pleading! The FCC clearly understood that AT&T was not addressing a so called “proposal” outside section 2.1.8----AT&T was addressing a proposed traffic only transfer that complied with 2.q.8 explicitly and AT&T wanted to therefore change 2.1.8 for the industry.

See exhibit K page 22 para 1 (marked JA 116 on lower right hand corner.) FOIA Notes from the

FCC's AT&T expert R.L. Smith:

AT&T Substantial Cause Showing:

This raises the question of why two tariffs and various term plans **that affect far more than this one reseller**, need to be changed if the problem only involves one isolated reseller, who of course, is mad at AT&T. This is especially true in that AT&T itself argues that the revisions are mainly just a clarification of existing provisions.

The FCC's R.L. Smith recognized immediately that what AT&T was doing was trying to change its tariff to stop the entire industry from doing permissible substantial traffic only transfers. AT&T's nonsense that petitioner's were attempting a "proposed" transfer outside the tariff would not have caused AT&T to change the tariff for the industry.

The Petitions to Reject or Suspend AT&T's attempt to retroactively change 2.1.8 (exhibit R to petitioners 9/27/06 filing) make clear the following points:

- I) there was no option to only transfer plan obligations on a "traffic only" transfer and that is why there is no evidence of such a transaction.
- II) The Telecom Resellers Association whose counsel was Charlie Hunter makes it clear that petitioners "proposal" was in accordance with 2.1.8 and this was the view of the TRA. It was not a so called "proposed" transaction outside the scope of 2.1.8.
- III) Plan obligations stay with the plan on a traffic only transfer.

Charles Helein Petition to Reject or Suspend Tr. 8179 page

:

AT&T seeks to unilaterally impose on its existing Term Plan and Contract Tariff **customers** additional liability neither agreed to or negotiated with the customer; nor for which AT&T has offered any justification. AT&T's unilateral Increase of the liability of its Term Plan and Contract Tariff customers violates established FCC precedent which requires a showing of "substantial cause" to change the terms of long term tariffed services.

Helein Pages 4-5

7. The obligations of a former customer upon transfer of a Term Plan was limited to unpaid charges accruing prior to transfer and a continuing obligation to meet the minimum commitments made over the unexpired portion of the term plan or contract tariff.

AT&T's changes would now make the "new" customer responsible for the full run of the contract liability for the former customer's commitment even if the "new" customer's existing commitments to AT&T already exceed both the new customer's existing commitment and the former customer's commitment being transferred.

8. **The Commission has ruled that carriers are entitled only to the balance of payments over the unexpired portion of the minimum service period or the carrier's un-recovered out-of-pocket costs, whichever is lesser. Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145. Phase I, 97 FCC 2d, 1082, 1173 (1984). [FOOTNOTE 4]**

In the cited decision, the Commission found that while it was reasonable for a carrier "to take steps to mitigate any losses due to discontinuance ... where the minimum service period is greater than one month ..." the formula to apply is defined as follows -

The charges for discontinuance ... must... provide ... in instances where the minimum period is greater than one month, ... [for] the lesser of the Telco's non-recoverable costs for the discontinued service or the minimum period charges.

Helein FOOTNOTE 4:

See also DIAL INFO, Inc. v. AT&T. 61 R.R 2d 242, at 244-45, n. 6(1986). It is clear from this decision that the rulings made by the Commission in regard to the access and Divestiture related tariffs apply with equal force to AT&T.

If as alleged by DII, AT&T is in fact routinely demanding a pre-service deposit from all its Dial-It 900 customers despite the express limitations of its revised tariff. AT&T might be in violation of our decision in Investigation of Access and Divestiture Related Tariffs, supra. [Citing to 97 FCC 2d 1082, 1143 (1984) cited in paragraph 5 of the Bureau's decision in this case] (At a.6 of 61 R.R 2d 245, emphasis added.)

AT&T's attempt to recover from the "new" customer the same commitments of the "former" customer does not comply with the formula established by the Commission for discontinuance charges.

AT&T asserted that the Tr.8179's revisions were just **clarifications** and Tr 8179's revisions to section 2.1.8 were already in operation that a plan must transfer when a substantial "traffic only" transaction was ordered. That of course was nonsense. Mr. Helein evidenced that there was no way that AT&T's proposed revision for 2.1.8., was already implicit and already being carried out that way in the market --as if that were the case AT&T would have been clearly violating the law.

See at exhibit R in petitioners 9/27/06 filing which is Charlie Hunter's Petition to Reject Transmittal 8179 who was the counsel for both the Telecom Resellers Association (TRA) and CCI. Page 2

CCI endorses the Petition to Reject the Petition to **Reject "filed on this date by the Telecommunications Resellers Association"** ("TRA") **and agrees with TRA** that AT&T has failed to make the "substantial cause" showing necessary to justify the material adverse changes that Transmittal 8179 tariff revisions would effect in a massive number of existing long-term service arrangements, including those held by CCI. CCI further endorses **TRA's argument** that the Transmittal No. 8179 tariff revisions are unlawful in that they would unjustly hinder the ability of customer to "port" "800" numbers and locations among interexchange carriers and improperly interfere with the flexible conduct of customers' businesses, complicating in particular corporate acquisitions. Finally, CCI wholeheartedly subscribes to **TRA's view** that the Transmittal No. 8179 tariff revisions run counter to longstanding Commission policies favoring unlimited resale and sharing of common carrier services.

Mr. Hunter represented many resellers and this shows that all of the resellers had been doing the same transaction under 2.1.8 as CCI, and therefore AT&T's newly created "proposal defense" that CCI was somehow acting outside 2.1.8 is a farce.

Charlie Hunter page 9-10

And AT&T's **lame contention that its current requirement that the transferee of a term plan must "agree to assume all obligations of the former Customer"** could be read expansively to require the transferee of individual "800" numbers or locations to **assume full term plan obligations is disingenuous and almost laughable. Not only has AT&T never interpreted its tariff in this manner,** but if this were a legitimate reading of current tariff requirements, the transfer to another IXC of a single "800" which had been associated with a term plan would trigger the assumption by that carrier of all term and volume commitments associated with the term plan. **Obviously, this is a painfully absurd result that was neither intended nor can be read into the current tariff language.**

AT&T's "substantial cause" showing in support of its proposed

Transmittal No. 8179 tariff revisions can be charitably described as, Half-hearted at best. Essentially, AT&T argues that its proposed changes are necessary to protect it from CCI. Even if true---**which they are not**---the allegations AT&T has directed against CCI **cannot justify imposition of a material change in the long-term service arrangements of hundreds of thousands, perhaps millions, of other customers.**

Mr. Hunter explicitly states AT&T has **never interpreted its tariff in this manner** and it affects **hundreds of thousands, perhaps millions, of other customers. AT&T's proposal defense is as the TRA and CCI petition noted: "laughable."**

Page 10:

As TRA has pointed out, the Commission has long recognized that the ability to "port" numbers and locations to other carriers is a prerequisite to a competitive telecommunications environment.

Again it was the entire reseller industry which attacked AT&T's effort to change the tariff to have plan obligations transferred on a "traffic only" transfer. Of course in 1995 AT&T was only mandating that the plan must transfer on a substantial traffic only transfer as the tariff never allowed plan obligations to transfer on a "traffic only" transfer.

Page 13 para 1:

AT&T should not be permitted to chip away at those elements of a resale carrier's business which are critical to its continued success. One of these elements is the ability to flexibly move traffic to meet commitments **and realize higher margins, either individually or in conjunction with other resellers.** Such movement of traffic are not undertaken with fraudulent intent; they are normal and accepted aspect of the provision of interexchange service.

Page 13 para 2:

Certainly, there is no better proof that the Transmittal No. 8179 tariff provisions **are targeted at the resale community** than the fact that the entire focus of AT&T's purported "substantial cause" showing is directed against CCI.

Again Mr Hunter explicitly states that Tr. 8179 was targeted at the resale community. There was nothing different about what petitioners "proposed" than what it had always done under 2.1.8--- see exhibit Y in petitioner's 9/27/06 filing.

AT&T's Revenue at Risk Report (exhibit HH in petitioners 9/27/06 filing) showed that petitioners were the largest aggregator in the country controlling 25% of the aggregator toll free market. The AT&T Revenue at Risk Report also shows that the great majority of aggregators were under their revenue commitment but petitioners had already met its fiscal year commitment at the time of the traffic only transfer as CCI's filing evidenced.

By moving substantially all of its account traffic from 28% to 66% ---petitioners simply drew the focus of AT&T; however nothing that petitioners did was anything different than what it did in the past and what other aggregators and AT&T customers had correctly done under 2.1.8.

Other aggregators moved substantially all of their account traffic without the plan obligations transferring but due to the fact that they were smaller aggregators AT&T processed their transactions. There was no cap as to the amount of accounts that could be transferred in 2.1.8. Furthermore at exhibit S to petitioners 9/27/06 filing there was no cap as to how many locations could be moved. There was a fee of \$50 per location moved on a traffic only transfer or a one time fee for moving the entire plan. If AT&T's bogus theory was correct that all "traffic only" transfers had to transfer all plan obligations then-----Why would an aggregator not just transfer its entire plan under AT&T's bogus theory the plan obligations are to transfer anyway and thus pay one \$50 fee instead of \$50 per location moved? If you moved 1,000 locations you would pay \$50,000 under the tariff--versus \$50. None of the peripheral AT&T tariff sections support AT&T's bogus theory for 2.1.8—and that is why it is just theory because no evidence exists because as Charlie Hunter stated "**AT&T never interpreted its tariff in this manner.**"

PSE's Petition to Reject Transmittal 8179- Colleen Boothby

Page 1:

The transmittal substantially changes the terms and conditions of **virtually all of AT&T's long- term offerings** but AT&T fails to demonstrate substantial cause for the change, as required by the RCA Americom Decisions

Page 3:

The transmittal adds language to the Transfer or Assignment provisions in Tariffs 1 and 2 (which also apply by cross-reference to AT&T's Contract Tariffs) **that severely limits the circumstances in which resellers could shift traffic among long-term offerings.** The new language would allow customers to transfer locations out of a long-term offering only if the locations remaining in the offering generated sufficient usage in the previous year to satisfy the offering's minimums. If they did not, **the customer may only transfer the whole plan to another customer,** even if the customer could add new locations or increase traffic from the remaining locations to satisfy its minimum commitment

Again Ms Boothby explains that **the customer may only transfer the whole plan to another customer.** There was no option to transfer plan obligations, as 2.1.8 mandates that all obligations pertain to what is transferred (traffic or the plan).

Page 5 footnote 3

Because this discussion is invalid to the lawfulness of Tr. No 8179, PSE will not address it other than to note that the interpretations advanced in the Meade letter are so untenable (i.e. interpreting the

deposit requirement provision to mean that a customer transmitting traffic may need to deposit a condition of processing the transfer; **interpreting the transfer section to require customers to whom locations are transferred to assume plan obligations**) are fully consistent with the unreasonable lengths to which AT&T is apparently willing to go to impede resale.

PSE was noting that AT&T Tr. 8179 attempt to change its tariff was an attack on resale in general. Not a “proposal” that just petitioners did.

Page 6-7

AT&T hardly needs to disrupt every contract tariff it has filed (and it has filed more than two thousand of them) and all of its term plans, when its rights as a creditor are already well protected.

Second, AT&T claims in its substantial cause showing that customers have no legitimate expectation that they can transfer traffic and not plans. In fact, AT&T itself has created that expectation by routinely processing such transfers.

Moreover, such transfers, and the expectation that they will continue, serve quite legitimate and pro-competitive business purposes. Here are just a few examples of the circumstances under which customers would quite legitimately want to transfer **locations and not plans**, each of which would be frustrated by the changes in Tr. No. 8179:

A customer transfers substantially all of the locations in a plan to another reseller (**who then qualifies for a new contract tariff** with better rates for those locations, for example) and **simultaneously transfers into the plan replacement traffic** that exceeds its commitment levels.

CCI was negotiating with AT&T for a new CT that AT&T was delaying thus forcing the traffic only transfer.

A customer transfers locations as above and has excess traffic in other plans that can be moved in if the remaining locations don't generate sufficient traffic.

Petitioners had already met its fiscal year commitment at the time of the traffic only transfer by over \$2 million.

A customer transfers locations as above and adds new replacement locations over a two or three month period with sufficient traffic to meet the plan's minimums.

This was also an option to petitioners.

A customer transfers locations as above and knows that the traffic at the remaining locations will increase because the end user at those locations previously was settling traffic between suppliers and now picks the reseller as its sole supplier going forward,

A customer transfers locations as above and exercises its rights under AT&T's tariffed **discontinuance provisions to terminate the plan without liability, extinguishing any traffic commitment.**

AT&T concedes that Petitioner's had available at the very minimum 18 months remaining to its pre June 17th 1994 grandfather provision that would give it immunity to plan discontinuance.

None of these cases would be exempted from the Draconian effect of Tr. No. 8179 because the revisions proposed therein sweep together legitimate traffic transfers and transfers for a fraudulent purpose. **But there is nothing inherently sinister, and more important, there is nothing unusual about transfers of substantially all locations in a plan. AT&T has received and processed many such transfer requests in the past.**

Yes PSE assumed many "traffic only" transfers under 2.1.8 to PSE prior to the transaction at issue and no plan or plan obligations were transferred.

Page 9

AT&T claims that the purpose of the filing is to prevent a particular transaction in which a reseller is attempting to insulate its assets from AT&T's legitimate claims for payment under tariff by selling its service to a third party and leaving itself with little or no remaining assets. **But, as described in Section 111.1, above, the revisions in Tr. No. 8179 would address not only this single case but all substantial transfers of locations from all plans regardless of the reseller's status or purpose. By sweeping so broadly, Tr. No. 8179 would have an anti competitive effect on the inter exchange marketplace** by discouraging resale and denying access to AT&T's newest discounted offerings. Moreover, access is denied not only to resellers but to their end users as well who would be denied access to newer discounts.

Again AT&T was seeking to stop the entire industry from doing the same permissible transaction as petitioners.

Page 10:

Rather than give customers the annual period they bargained for, the new provision would **strip the customer of its plan** whenever the customer seeks to transfer substantially as of its locations, even if it is transferring into the plan sufficient traffic to meet its commitment. If that customer is in month two or three, "substantially all" of its locations may not yet be a large number of customer accounts.

Thus, customers with seasonal traffic spikes or those whose traffic is starting off at low levels but is growing rapidly—neither of whom would have trouble meeting their minimums after a year—**would have to give up their plan** if they tried to re-align their service mix by transferring some locations out and transferring others in. By thus gutting the minimum annual period that is central to the rationale for long-term offerings, Tr. No. 8179 introduces provisions that are unreasonable on their face and the Bureau should reject it.

Consider the following by AT&T counsel Fred Whitmer in AT&T's **March 30th 1995** brief to Judge Politan prior to the District Courts First May 1995 Decision. Here as exhibit K page 11.

Page 11

The public interest, moreover, is served by denying the plaintiff's motion and referring this matter to the FCC on the grounds of primary jurisdiction. **With the core issue regarding plaintiff's second "proposed" transfer already before the FCC in the form of transmittal No. 8179**

AT&T has bogusly asserted that Mr. Whitmer's November 28th 1995 statement in reference to plan obligations

These charges are all **"tariffed" obligations**, for which CCI, **"not PSE"** (which would have the revenue stream to satisfy such charges), **would be obligated.**

...was not actually how the tariff works but it was what petitioners were so called "proposing" to do.

However as can be seen in Mr. Whitmer's March 30th 1995 statement what was "proposed" was being addressed in the form of TR. 8179. Of course the second proposed transfer he references is the CCI/Inga to PSE "traffic only" transfer--- the first was Petitioners PLAN transfer to CCI.

As the FCC is aware with Tr. 8179 ATA&T attempted to change 2.1.8 to mandate a plan transfer must take place when a substantial "traffic only" transfer was ordered. **This was an industry change.**

The fact that Mr. Whitmer conceded in March 1995 that petitioners traffic only transfer (the core issue) was before the FCC in the form of the **industry wide tariff 8179 change** is definitive that Whitmer recognized that the "traffic only" transfer that petitioners did was no different than what all other aggregators were doing and what Tr. 8179 was attempting to stop.

Therefore AT&T's cover-up for Mr. Whitmer's November 1995 concession (its "proposal defense") is obviously a bogus defense.

Seeking Summary Judgment

AT&T asserts on page 7 of its May 1st 2007 filing:

Yet, since making these declarations of "victory," petitioners have inquired whether the Commission will temporarily suspend these proceedings so that they can **seek summary judgment** from the district court. *See* Email from Mr. Al Inga to Ms. Deena Shetler (April 26, 2007). If the issue is so clear, why run from the Commission now and begin anew in court?

The reason is simple-- Why would petitioners want to wait for what is obvious to the District Court? Petitioners started its case in the District Court and that is where damages will be awarded. There seems to be no reason to wait for the FCC to rule when the District Court can see the FCC has already interpreted 2.1.8 as far as obligations were concerned 3 times:

- 1) The 1995 Substantial Cause Pleading of AT&T,
- 2) The 2003 FCC Decision
- 3) The FCC's position to the DC Circuit.

Additionally due to the many AT&T concessions which AT&T provided no cover-up for; or completely new bogus cover-ups outside the section 2.1.8's 15 day rule---this "traffic only" transfer issue should be decided in petitioners favor immediately after 12 years of AT&T scams.

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

/s/ Al Inga
Al Inga President