Before the
Federal Communications Commission
445 12th Street, SW
Washington DC 20554

In the Matter of:		
Expedited Consideration for Declaratory Rulings	)	
On the transfer of traffic only under AT&T	)	
Tariff Section 2.1.8, and Related Issues.	)	
	)	
Primary Jurisdiction Referral	)	
from the NJ District Court	)	
.	)	CCB/CPD 96-20
	)	DA – 06-2360
	)	WC Docket No. 06-210
One Stop Financial, Inc	)	
Group Discounts, Inc.	)	
Winback & Conserve Program, Inc.	)	
800 Discounts, Inc.	)	
Petitioners	)	
	)	
and	)	
AT&T Corp.	)	
Respondent		

August 23rd, 2007
Commission's Secretary
Marlene H. Dortch

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Petitioners Further Comments

Additional Evidence Of AT&T's Concessions to The FCC in 2003
Prior to AT&T Changing its Position on 2.1.8

Upon further review of the Jan 1995 version of 2.1.8 petitioners provide the following analysis: The record shows that it has always been petitioner's position, and it was AT&T's position prior to the DC Circuit Decision, that AT&T was correctly adhering to its tariff by only transferring the transferors revenue commitment /associated (S&T) obligations on a **plan** transfer; but not on

a "traffic only" transfer. Let's look at AT&T's additional concessions to the FCC prior to the DC Circuits Decision:

Here as Exhibit B

AT&T's April 15th 2003 FCC Reply Comments Page 2-3:

> AT&T had reason to believe that the request to transfer traffic **without the underlying plans** was made with the intent to avoid payment of AT&T's lawful charges.

The only issue was ordering a "traffic only" transfer without the plans transferring. AT&T understood that the tariff did not allow for a "traffic only" transfer in which the transferors plan remained but the revenue commitment and associated S&T obligations transferred. AT&T clearly understood that under 2.1.8 the revenue commitments/S&T obligations stayed with the transferor plan and that of course is why AT&T bogusly asserted that the transferor would be avoiding payment of potential S&T charges. AT&T of course never made the argument that if petitioners had kept its plans and transferred its revenue commitment/S&T obligations AT&T would have effectuated the "traffic only" transfer; because the tariff does not even allow for such a transaction.

Here as Exhibit C is AT&T's April 15th 2003 FCC Reply Comments on Page 4:

> As AT&T's customers-of-record, the Petitioners were responsible for the tariffed shortfall and termination charges. [AT&T **FOOTNOTE 3** HERE] Moreover, as AT&T has already demonstrated, as AT&T's customers-of-record Petitioners were precluded under the governing tariff from transferring their CSTP II ***"Plans"*** to PSE unless PSE agreed to assume all of Petitioner's obligations under those same plans, including tariffed shortfall and termination charges.[AT&T Footnote 4 HERE]
>
> _____
>
> Footnote 3
> **Section 3.3.1.Q of AT&T Tariff F.C.C. No. 2**; *see also*, AT&T Corp. Further Comments, filed April 2, 2003 ("AT&T's 2003 Further Comments") at 7-8.
>
> _____
>
> Footnote 4
> Sections 2.1.8.B of AT&T Tariff F.C.C. No. 2; *see also*, Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling and Joint Motion for Expedited Consideration, filed August 26, 1996 ("AT&T's 1996 Initial Comments") at 10-11.

Notice AT&T is stating transferring their CSTP II ***"Plans"*** not "traffic only". Here AT&T is stating the correct tariff interpretation for 2.1.8 that a **plan** transfer was not allowed unless shortfall and termination obligations transfer—however petitioners did **not** order a plan transfer to PSE it ordered a "traffic only" transfer.

AT&T asserted to the FCC in recent comments that it gave up its misrepresentation that petitioners attempted a plan transfer after the Third Circuit. However petitioners have shown that AT&T kept up this scam in its 1996 comments to the FCC, and as we see here the same attempt to scam the FCC in 2003.

AT&T clearly understood that the only way that the transferors' revenue commitment/S&T obligations transfer to PSE was on a **PLAN transfer** so the AT&T con artists simply misrepresented that a plan transfer was ordered.

Now notice here that AT&T's footnote 3 is regarding the "traffic only" transfer:

> As AT&T's customers-of-record, the Petitioners were responsible for the tariffed shortfall and termination charges

AT&T footnote References: **Section 3.3.1.Q of AT&T Tariff F.C.C. No. 2**

AT&T is conceding that on the "traffic only" transfer at issue the tariffed shortfall and termination charges must stay with the customer (CCI/Inga) which continued to keep its plans. The tariffed shortfall and termination charges that AT&T referenced within 3.3.1.Q are at bullet 10 of this section which is exhibit D to petitioners 9/27/06 filing.

After AT&T comments about what is required by a "traffic only" transfer AT&T brings in its "plan was transferred scam"---as the above AT&T excerpt, after the first sentence, starts out with "Moreover" to give the impression that AT&T is still talking about the "traffic only" transfer.

Notice that AT&T's footnote 4 now references section 2.1.8 B however what AT&T has explicitly stated in its comment---footnoted at 4----- is that this is how AT&T interpreted 2.1.8 B for a **PLAN** transfer as AT&T states that a **plan** transfer mandated: "including tariffed shortfall and termination charges".

AT&T wasn't stating that "tariffed shortfall and termination charges" would transfer under 2.1.8B on a "traffic only" transfer as AT&T now asserts post DC Circuit. AT&T had just told the FCC in its footnote 3 in the previous sentence that in reference to petitioners "traffic only" transfer the tariff at **3.3.1Q** mandated shortfall and termination obligations must stay with petitioners (transferor) when it stated:

> **As AT&T's customers-of-record, the Petitioners were responsible for the tariffed shortfall and termination charges.**

That is how AT&T properly interpreted 2.1.8 prior to the DC Circuit Decision in that S&T obligations only transfer on plan transfers. It is absolutely reasonable construction of the 2.1.8 tariff to interpret it in this fashion. When the DC Circuit correctly concluded that 2.1.8 allowed both plan transfers as well as traffic only transfers that is when AT&T went into its bogus post DC Circuit reinterpretation of 2.1.8.

Here as Exhibit D is AT&T's April15th 2003 FCC Reply Comments on Page 7:

> AT&T had reason to believe that Petitioners were violating Section 2.2.4 of AT&T's Tariff F.C.C. No. 2 by requesting a **transfer of traffic** without the underlying plans with the intent to **avoid the payment of any of AT&T's tariffed charges,** AT&T's refusal to assent to such a transfer was proper under that tariff.

Notice that AT&T does not assert that petitioners were violating 2.1.8 by transferring "traffic only." AT&T counsels Aryeh S. Friedman, Mark C. Rosenblum and Peter H. Jacoby again concede that petitioners (transferors) were allegedly violating AT&T's fraudulent Use section 2.2.4 because the "tariffed charges" –as AT&T stated earlier (i.e. shortfall and termination") remained with the customer of record (petitioners) on the "traffic only" transfer.

Again notice that AT&T states: "**transfer of traffic without the underlying plans."** If 2.1.8 actually allowed S&T obligations to transfer on a "traffic only" transfer AT&T would have argued: Petitioners are transferring "traffic only" keeping its plans and not transferring their tariffed shortfall and termination obligations. AT&T clearly understood that you can not transfer S&T obligations unless the plan was transferred.

The above AT&T excerpts from its April 15th 2003 FCC comments are from the same AT&T counsel which also conceded in AT&T's April 2nd 2003 FCC comments that petitioners did **not**

remain jointly and severally liable for S&T obligations because S&T obligations do not transfer on a "traffic only" transfer. Thus further confirming their correct interpretation for 2.1.8:
See exhibit Z in petitioners 9/27/06 filing the following:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the *transfer* of such accounts the Petitioners would, **but for** the attempt to bifurcate the traffic from the underlying plans, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. May 19th, 1995 Order at 6, AT&T Tariff **F.C.C. No. 2 Section 2.1.8.**

It would be totally unreasonable tariff construction to allow a transferor to transfer away its primary revenue commitment on a "traffic only" transfer. It would have led to a massive amount of scams against AT&T, as opposed to the transferor having to keep its obligations on a "traffic only" transfer.

AT&T's post DC Circuit position is that on a "traffic only" transfer the transferor must transfer its revenue commitment /and associated shortfall and termination (S&T) obligations and the transferor remains jointly and severally liable for the S&T obligations.

The record shows that it has always been petitioner's position, and it was AT&T's position prior to the DC Circuit Decision, that AT&T was correctly adhering to its tariff by only transferring the transferors revenue commitment /associated (S&T) obligations on a **plan** transfer; but not on a "traffic only" transfer.

AT&T now asserts (post DC Circuit) that its **practices** of transferring "traffic only" without the revenue commitment/and associated (S&T) obligations transferring are of no relevance to the FCC as AT&T (post DC Circuit) bogusly asserts that its practices were not what the tariff mandated.

AT&T clearly understood the correct petitioner's interpretation of 2.1.8 and that is why it indeed practiced that interpretation. This is why the evidence of prior "traffic only" transfers presented (exhibit Y in petitioners 9/27/06 filing) were done as per petitioners 2.1.8 interpretation—

without the revenue commitment /S&T obligations transferring. Despite AT&T claiming to Judge Politan that as of March 1995 AT&T had done thousands of "traffic only" transfers AT&T can not show one in which the revenue commitment /and associated (S&T) obligations transferred:

See within petitioner's FCC filing Date Received/Adopted: 05/22/07 exhibit I

> MR. WHITMER: But there are literally -- my guess is hundreds, if not thousands, of transfers that have happened among aggregators and aggregation plans.

Understanding that all of the evidence is stacked against it, AT&T incredibly now resorts to arguing that it was a wrong practice for AT&T to allow thousands of "traffic only" transfers ----both prior to and after petitioners--- but AT&T got petitioners correct by denying it, but thousands of others wrong!

AT&T (post DC Circuit Decision) seeks to misread Jan 1995's section 2.1.8 and instructs the Commission to ignore its thousands of "practices" as wrong practices. AT&T instructs the Commission to totally ignore the rest of the tariff which conflicts with AT&T's current position, and totally ignore at least 7 of its counsel's dozens of statements that are in disagreement with AT&T's (post DC Circuit) 2.1.8 interpretation.

AT&T relies upon the following within its brief of June 18th 2007 on page 20:

> "It is a well settled rule of tariff interpretation that **'[t]ariffs are to be interpreted according to the *reasonable construction* of their language; neither the intent of the framers nor the *practice* of the carrier controls."** *In re Combined Cos., Inc.,* 18 FCC Rcd 21813, 21821 n. 65 (2003) (quoting *Associated Press Request for a Declaratory Ruling,* 72 FCC 2d 760, 764-65, para. 11 (1979)) (internal quotation marks omitted; alteration in original).

AT&T misreads the law. AT&T asks the Commission to ignore all of its "practices" but can not show how its post DC Circuit position is reasonable construction. AT&T now seeks to take two words (all obligations) out of context within 2.1.8. para "B" and also change and add words to 2.1.8 para "C".

Post DC Circuit AT&T bogusly asserts that on a "traffic only" transfer:

A) the revenue commitment/S&T obligations must transfer

and

B) the transferor remains jointly and severally liable for the revenue commitment/S&T obligations.

The following is one of several arguments made by petitioners to show AT&T's post DC Circuit position was unreasonable tariff construction:

> Petitioners 9/27/06 filing Page 20-21
>
> **IX. AT&T's Theory that S&T Obligations Should Transfer is Commercially Not Feasible**
>
> Scenario I: Transferor "A" with a $50 million S&T obligation sets up a Company "B" with a puny $1,000 a year S&T obligation; that does not even require a deposit. "A" transfers a handful of accounts to "B" and according to AT&T's position "A"'s $50 million in S&T obligations all go to "B". "B" goes then goes out of business and "A" has no more $50 million in S&T obligation, but still has all its traffic to send to an AT&T competitor! In reality the transferor must keep the S&T obligations and are subject to lose their deposit on its $50 million plan.
>
> Scenario II**:** During a year Company A has requests from three Companies "D", "E", and "F", all who have only $1 million plan commitments. "D", "E", and "F" only want $200,000 worth of traffic transferred to them. Under AT&T's bogus theory "D", "E", and "F" would never take in $200,000 in traffic if they had to absorb $50 million in S&T obligations. AT&T claims it has done tens of thousands of traffic only transfers but of course fails to show one shred of evidence that S&T obligations transfer on traffic only transfers. There is no AT&T evidence of its bogus post DC Circuit position that CSTPII plans remain with transferor no obligations.
>
> **X. AT&T's Own Theory That S&T Obligations Transfer on Traffic Transfers Defeats Itself**
>
> Here as exhibit Y are traffic only transfers that were done in 1993 and 1994, transferring "traffic only" from petitioners' to aggregators Ameritel and Tel-Save. If AT&T's bogus position is correct that S&T obligations must also transfer on traffic only transfers that means that after these traffic transfers were completed, all S&T obligations would have already been transferred away from petitioners prior to the Jan 1995 denied traffic transfer with PSE. If AT&T's bogus position is correct then the question of should S&T obligations transfer in Jan 1995 is a moot point; because according to AT&T's bogus position there were no obligations left in Jan 1995 on petitioners' plans to transfer. Conversely the fact that AT&T states that there were S&T obligations that remained on the petitioners' CSTPII plans is still

> yet another concession that S&T obligations/liabilities simply do not transfer on "traffic only" transfers.

Petitioners were pointing out how unreasonable such an interpretation of the construction of 2.1.8 would be under AT&T's bogus post DC Circuit theory. AT&T then responded with its bogus assertion that 2.1.8 mandates that the transferor remains jointly and severally liable for the revenue commitment/S&T obligations on a "traffic only" transfer so it would be reasonable.

AT&T offers within its Dec 20th 2006 filing on page 17-18

> They posit a scenario in which Company A, which had a $50 million shortfall and termination obligation, created Company B, with a $1,000 shortfall and termination obligation, then transferred to B a handful of accounts. Petn. 20-21. Petitioners then argue that, if B went out of business, AT&T had no recourse against it, yet A "ha[d] no more $50 million in [shortfall and termination] obligation[s] but still ha[d] all its traffic." Id. at 21. The premise underlying this supposed "absurdity," however, is demonstrably mistaken: **B's agreement to assume all of A's obligations would not have divested A of those obligations**. At the time of the proposed transfer, § 2.1.8 clearly stated that "[t]he transfer or assignment does not relieve or discharge the former Customer from **remaining jointly and severally liable with the new Customer for any obligations existing at the time of transfer or assignment.**" Thus, in the scenario petitioners hypothesize, AT&T still would have had recourse against A. [AT&T Footnote[10]
> Footnote 10
>
> For this same reason, there is nothing "self-defeating" about § 2.1.8's plain language. Petn. at 21. Petitioners claim that, because they had previously transferred traffic to another aggregator, their shortfall and termination obligations had already been transferred away, and thus could not be transferred to, or assumed by, PSE. Id ***As AT&T has explained*, however, those prior transfers did not divest petitioners of their obligations**.

AT&T Dec 20th page 29:

> Moreover, as AT&T has explained, a valid or permissible traffic transfer under § 2.1.8 would not have extinguished the transferor's liabilities; rather, the **joint and several liability requirement** meant that both the transferor and transferee were responsible for the transferor's obligations.

Despite AT&T claiming "as it has explained" its position to the FCC in 2003—which is after AT&T realized it would need to scam the FCC on which obligations transfer (post DC Circuit)---------AT&T's correct position was that the transferor on a "traffic only" transfer did not remain jointly and severally liable for the revenue commitment/S&T obligations <u>because the revenue commitment/S&T obligations as per 2.1.8 do not transfer:</u>

See petitioner's exhibit Z is a statement AT&T made to the FCC in its public comments in 2003:

> Moreover, as AT&T's customers for all of the locations and all of the traffic generated under the tariffed plans, in terms of the *transfer* of such accounts the Petitioners would, **but for** the attempt to bifurcate the traffic from the underlying plans, **remain jointly and severally liable** with the new customer for all obligations existent at the time of the transfer. May 19th, 1995 Order at 6, AT&T Tariff F.C.C. No. 2 Section 2.1.8.

Let's carefully look at section 2.1.8 **para "C"** in Jan 1995 and see which obligations are subjected to **remaining jointly and severally liable** for the revenue commitment/S&T obligations:

See the FCC's 2003 Decision Exhibit B in petitioners 9/27/06 FCC filing. Look at pg. 6 n.46 which is the Section 2.1.8 in Jan 1995: Here for your convenience:

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

A careful reading of the tariff section 2.1.8(c) shows that only **(1) all outstanding indebtedness for WATS, and (2) the unexpired portion of any applicable minimum payment period(s)**

are subjected to remaining jointly and severally liable with the new customer. The revenue commitment/S&T obligations are not even listed in para C as being subjected to remaining jointly and severally liable.

AT&T's current position is that the revenue commitment/S&T obligations are encompassed within the phrase "all obligations" within 2.1.8 paragraph "B". However if the Commission is only concerned what 2.1.8 actually states then AT&T must concedes that the "remaining jointly and severally liable" provision only applies to 2.1.8 paragraph "C".

Furthermore, there is no such "**all** obligations" statement within 2.1.8 paragraph "C'—"**ALL** obligations is defined in para B. In fact 2.1.8 paragraph "C" states "**ANY**" obligations remaining jointly and severally liable not "**ALL** obligations." **ANY** of course could be one or two obligations but does not mandate "**All** Obligations".

This corresponds to 2.1.8's opening statement:

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

ANY Number(S) (singular or plural) amount of accounts can transfer under 2.1.8 not ("all numbers) of accounts. Likewise **"ANY"** correlates to 2.1.8's first sentence as to what is included within the **ANY** number of accounts transferred as AT&T counsel Mr Carpenter conceded to the DC Circuit.

Even if AT&T asserts that you have to click your heels three times and imagine S&T obligations being listed within paragraph "C" that still would not mean that **all** of those obligations would be subjected to remaining jointly and severally liable. **The "any" obligations would still pertain to only what is transferred (traffic only or plan)** as AT&T counsels: Carpenter, Barillarri, Brown, Whitmer, Jacoby, Rosenblum, Meade and Freidman have all conceded.

According to AT&T (post DC Circuit) 2.1.8 should have been interpreted that the phrase "All Obligations" in paragraph "B"

A) encompassed the additional obligations **not** enumerated (**not** enumerated: revenue commitment/S&T obligations and S&T liabilities)

and

B) the transferor remained jointly and severally liable for the non enumerated revenue commitment/S&T obligations whether a plan transfer was ordered or a "traffic only" transfer was ordered.

That leads to these points:

> There are four obligations-which only the first two were listed as being subjected to the transferring provision within the Jan 2.1.8 version
>
> **(1)** all outstanding indebtedness for the service
> **(2)** the unexpired portion of any applicable minimum payment period(s),
> **(3)** the unexpired portion of any term of service and usage and/or revenue commitment(s),
> **(4)** any applicable shortfall or termination liability(ies)

Point I)

Why enumerate only two of four obligations if you wanted them all transferred? If you wanted all four obligations transferred why not just state "all obligations" and enumerate no obligations and leave it at that. The only reasonable construction a business executive could make is that AT&T is specifically enumerating only the obligations that "all obligations" means. This is especially so when AT&T concedes that its practices were not to transfer the revenue commitment/S&T obligations on a "traffic only" transfer. AT&T thus loses on "non explicity" as it did not list the obligations it wanted transferred.

Point II)

In February 1995 (one month after the denied "traffic only" transfer) AT&T's tariff expert Dave Golden proposed adding--- on a prospective basis---- to those obligations already enumerated within 2.1.8., just the 3rd obligation:

> the unexpired portion of any term of service and usage and/or revenue commitment(s),

See within petitioners 9/27/06 filing at exhibit K a page marked JA 100 on the lower right hand corner. This is a proposed prospective revision to Tariff No. 2 that was proposed on 2/9/95 to the FCC's RL Smith by AT&T's Mr Dave Golden:

See at 2.1.8 (B) the revised language proposed that has been highlighted below with bold and underline:

> 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), **the unexpired portion of any term of service and usage and/or revenue commitment(s).**

The prospectively proposed addition of the third obligation was designated by "C" for change—**and added to the list of those obligations enumerated**--- not a clarification within 2.1.8 B of what "All Obligations" means, which would have been designated by the letter "T" as mandated by the Federal Composition of Tariffs Law (at exhibit Q in petitioners 9/27/06 filing).

This shows that this obligation was not "encompassed by the phrase all obligations" as it was added as a "C" for prospective change. A "T" designation would be used:

To signify a change in text but no change in rate or regulation.

So clearly AT&T was changing the regulation and thus the 3rd obligation added to the enumeration list was designated by a "C" and not a "T". If this 3rd obligation was clearly understood as having been encompassed within the phrase "all obligations" under 2.1.8 B the Commission would have allowed AT&T to designate it as a "T" but the Commission clearly understood it was a prospective change within section 2.1.8., and mandated during the time of AT&T's losing its Substantive Cause Pleading to mandate it as a "C" for prospective change.

Additionally noteworthy is the fact that AT&T in prospectively revised 2.18's after Jan 1995 explicitly explained that revenue commitments/S&T obligations did not remain jointly and severally liable on "traffic only" transfers.

Point III)

As the Commission can see in AT&T's February 1995 proposed revision of 2.1.8 only the 3rd obligation was proposed to be prospectively added to the list of enumerated obligations–**but not the fourth obligation**. The point here is even if the business executive totally ignored the list of

explicitly enumerated obligations how is a layman business executive suppose to guess that "All Obligations" as of February 1995 required 3 of 4 obligations to transfer? AT&T itself did not require the fourth obligation in 2.1.8 para B. Additionally if all 4 obligations were actually believed by AT&T (post DC Circuit) to be included within 2.1.8 in Jan 1995 why the blank did AT&T need to wait until November 1995 to add them all in? You would expect AT&T to add them in immediately if AT&T actually believed in Jan 1995 that this is how 2.1.8 should be interpreted.

Point IV)

See petitioners exhibit P within its 9/27/06 filing which is the November 1995 version of 2.1.8. Notice that when AT&T added the fourth enumerated obligation to 2.1.8 it was inserted as an addition to the enumerated list of obligations and also went in as a "C" designation for prospective change not a "T" designation:

To signify a change in text but no change in rate or regulation.

See 2.1.8 November 1995 at exhibit P in petitioners 9/27/06 filing.

> The "new Customer" notifies the Company in writing [USING THE SAME TRANSFER OF SERVICE FORM SIGNED BY THE CURRENT CUSTOMER] that it agrees to assume all obligations of the former Customer as of the Effective Date of the transfer. These obligations include: **FOR EXAMPLE** (1) all outstanding indebtedness for the service and (2) the unexpired portion of any applicable minimum payment period(s), the unexpired portion of any term of service and usage and/or revenue commitment(s), **AND ANY APPLICABLE SHORTFALL OR TERMINATION LIABILITY(IES)**

Therefore the 4th obligation-as was the 3rd obligation—to any business person would have never been interpreted as being included within 2.1.8 in Jan 1995. [1]

Point V) When AT&T prospectively added the 3rd and 4th obligations to the November 1995 version of 2.1.8 if preceded the enumerated list with the words "For Example." However in Jan 1995 AT&T just stated: **"**These obligations include:" which is much more definitive of what AT&T actually wanted in the Jan 1995 2.1.8 version than "For Example:"

The FCC FOIA notes correctly state (exhibit K pg. 23 in 9/27/06 filing) that if AT&T did not want to limit itself it commonly used the phrase: (including, **but not limited to**:) as it does in other tariff sections.

See sample here:

> AT&T Tariff Section 2.2.8. Use of AT&T Marks – Unless otherwise allowed pursuant to Section 2.2.5, preceding, when WATS is resold, neither the Customer nor any other reseller or intermediary in the sales chain between the Customer and an end user may make any use**, including, but not limited to** use in advertising, promotional materials, Internet…"

AT&T pulls out of 2.1.8 the phrase "all obligations" and takes it totally out of context. AT&T is misleading what 2.1.8 says by putting the cart before the horse.

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[1] As the FCC 2003 Decision indicated S&T obligations are different than vs. present S&T bad debt liability. The difference between obligation 3 and obligation 4:
The **"unexpired portion of any term of service and usage and/or revenue commitment(s)**" is simply the balance of the transferor's remaining revenue commitment—this revenue obligation transfers only on a **plan** transfer as per 3.3.1.Q bullet 10 and section 5–not a "traffic only" transfer.
The "**any applicable shortfall or termination liability(ies)"**are shortfall and/or termination commitments/obligations that have **come due.** They become actual liabilities instead of the plans revenue obligation because the AT&T customer of record did not meet its revenue commitment. These S&T liabilities were prospectively added to section 2.1 8 after November 1995. Even if these S&T liabilities were listed within 2.1.8 in Jan 1995 this obligation was not applicable anyway as there were no S&T liabilities they were—as per 2.1.8-- **present at the time of transfer.**

Section 2.1.8 **DOES NOT SAY: "includes: all obligations,"** as AT&T wants everyone to believe. Section 2.1.8 says:

> [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**:] then explicitly lists the only two obligations.

AT&T simply reverses the order ("all obligations include" to "includes all obligations" to totally mislead the FCC.

Point VI)

AT&T in Jan 1995 recognized that the reasonable construction of its tariff would dictate to its customers that the revenue commitment/S&T obligations were not encompassed within 2.1.8B nor were they subjected to the remaining jointly and severally liable provision in 2.1.8 C and thus simply prospectively added these 2 additional obligations within 2.1.8B after the petitioners denied "traffic only" transfer.

However even after AT&T's analysis of 2.1.8 in November 1995 when AT&T prospectively changed ("C") its tariff ----AT&T's practice continued to not transfer the revenue commitment/S&T obligations on "traffic only" transfers and only subject the transferor to the remaining jointly and severally liable provision on a plan transfer not on a "traffic only" transfer. That's why AT&T has no evidence to support its bogus (DC Circuit) theory.

The obvious reason AT&T ran to the FCC in an attempt to retroactively enact Tr. 8179 (exhibit L in 9/27/06 filing) was that AT&T understood in Jan 1995 that the revenue commitment/ S&T obligations do not transfer on "traffic only" transfers. AT&T claimed it was merely clarifying 2.1.8 but Mr Meade and Mr Carpenter both conceded that the FCC said it would be a substantive tariff change. The FCC's 2003 decision was clear that no substantive changes after January 1995 would affect plaintiffs' transaction. See FCC Decision Page 11 para 14 exhibit B to petitioner's initial filing:

> We also do not understand AT&T to argue that **any revisions to its tariff that became effective after January 1995** govern resolution of this matter.

Point VII)

AT&T continued to use the same "All Obligations" language in revised 2.1.8 versions after Jan 1995. Therefore this would lead business executives and the FCC to believe that AT&T in Jan 1995 simply was defining in Jan 1995 at 2.1.8 B what "all obligations" encompassed by its **enumerated list.** However even after all four obligations were enumerated within 2.1.8 in November 1995 and later the revenue commitment/S&T obligations still never transferred on "traffic only" transfers. The May 1996 version of 2.1.8 exhibited within petitioners 1/31/07 filing details that the revenue commitment/S&T obligation stays with the transferor on a "traffic only" transfer. AT&T comically suggested that AT&T changed its tariff in June 2002 to allow "traffic only" transfers to keep its revenue commitment/S&T obligations.

Point VIII)

AT&T asserted to Judge Bassler on page 12 of its June 26th 2006 brief regarding its November 1995 2.1.8 language amendment:

> The expressed language AT&T proposed to add in its November 1995 amendment appears as the final clause of subsection B of 2.1.8, which **clarifies** that "all obligations" includes "any applicable shortfall or termination liability(ies).

First of all the language amendment any applicable shortfall or termination liability(ies), went in as a CHANGE designated by "C" not a clarification designated by "T'. Secondly this obligation would not pertain to petitioners--- as per 2.1.8---there were no S&T liabilities present at the time of transfer. AT&T itself conceded this to the FCC in its 2003 comments:

> shortfall will hit when the plans are either discontinued or reach their anniversary date

Yes "shortfall **will** hit when the plans are either discontinued[2] or reach their anniversary date" but even if this obligation was included within 2.1.8 in Jan 1995 it had to be ---as per 2.1.8--- present at the time of the "traffic only" transfer.

Thirdly, AT&T with this assertion conceded to Judge Bassler that the 3rd obligation: **unexpired portion of any term of service and usage and/or revenue commitment(s)"** which also prospectively went into 2.1.8 as a change ("C") –was not a clarification of what AT&T now alleges needed to be guessed as being included in Jan 1995.

How 2.1.8 Was Actually Interpreted In Jan 1995 By AT&T and Petitioners

Obviously the revenue commitment/S&T obligations were not listed anywhere within 2.1.8 in Jan 1995. However, petitioners understood by AT&T's practices, AT&T's business executives 2.1.8's explicitly enumerated obligations subjected to transfer and AT&T tariff No 2's other sections that supported petitioner's 2.1.8's tariff interpretation that the revenue commitments/S&T obligations do not transfer on "traffic only" transfers. There were no tariff sections within AT&T's tariff No. 2 to support AT&T's 2.1.8 bogus tariff interpretation that revenue commitments/S&T obligations transferred on "traffic only" transfers. Tariff section 3.3.1.Q bullet 10

> Shortfall and/or termination liability are the **responsibility of the Customer**. (i.e. petitioners) (see section 3.3.1.Q bullet 10 exhibit D in 9/27/06 petitioner filing)

Also see exhibit CC in petitioners 9/27/06 filing which is AT&T's Tariff No 2 Section 5 Discontinuance of CSTPII plans. Notice the termination charge is

[2] If the plans are discontinued under a pre June 17th 1994 issued plan as in petitioner's case there would be no shortfall. Additionally if the plans reached their anniversary date but met their commitment there also would be no S&T liabilities either.

"-35% of the **remaining** term plan **revenue commitment**"

The termination obligation is a customer (petitioner) commitment and is based upon the plan that stays with the customer and the termination charge is calculated upon the **revenue commitment** of the customer's plan that also remains, as the FCC 2003 Decision explains. This further confirms that shortfall and termination obligations can not be transferred away unless the entire plan is transferred away.

Notice under tariff section 5 that there is no liability unless **ALL SERVICE** on the customers plan is discontinued from the customers plan. Petitioners were experienced in "traffic only" transfers and knew exactly what it was doing by leaving the lead/home account on the CSTPII/RVPP plan so **ALL Service** was not transferred, thus the **revenue commitment**/S&T obligations remained with petitioners (transferors) plans.

As Mr. Fashs' letter explained at exhibit H in petitioners 9/27/06 filing,

> With respect to the requested transfer, it is my understanding that Mr Swain informed Ms DeMills that his intention was to move all but two locations from the plan in question to another reseller, thus leaving the **plan structure technically in place** in the name of Darren B Swain

Yes the **plan structure** stays in place and so must the revenue commitment.

Mr. Fash at Exhibit H in petitioners 9/27/06 filing then writes in reference to this transfer:

> It appears to AT&T at this juncture that transfer of all but two of the locations as requested by Mr. Swain would render not only the plan, but Darren B. Swain, Inc., an empty shell devoid of assets with which to pay **tariffed charges "associated with the plan"**.

During oral argument AT&T's counsel Mr. Whitmer specifically references the "home account" AKA "lead account" that helps to inform AT&T that a "traffic only" order is being ordered as opposed to a plan transfer:

See FCC filing Date Received/Adopted: 05/22/07 at exhibit D:

> Whitmer: Mr. Inga, you know, do you not, that if the service, except for the **home account**—or Mr. Yeskoo called it the **"lead account"**—is transferred to PSE, **the shortfall and termination liabilities remain** with Winback & Conserve, isn't that correct?

The business jargon was "home or lead account" but in terms of the Tariff No. 2 this account was referred to as the **Main Billed Account.**

Here as **exhibit A** is AT&T tariff No2 section 2.9. DEFINITIONS.

See the Definition for Main Billed Account:

> **Main Billed Account - an account associated with a Customer's service to which WATS charges are billed.**

See exhibit F in petitioners 9/27/06 filing and observe all of the AT&T Transfer of Service Agreements (TSA) for each plan transferring "traffic only". The TSA are all verbatim section 2.1.8. Notice that on each TSA petitioners instructed AT&T to keep the "181……" Main Billed account AKA home/lead account on each of the CSTPII/RVPP plans.

AT&T's tariff No 2 shows absolutely no tariff sections to support AT&T's bogus interpretation for 2.1.8 that revenue commitments/S&T obligations transfer on "traffic only" transfers—just the contrary.

Moreover AT&T's tariff No 2 shows absolutely no tariff sections to support AT&T's bogus interpretation for 2.1.8 that on a "traffic only" transfer, revenue commitments/S&T obligations are subjected to 2.1.8's remaining jointly and severally obligated provision - just the contrary.

ATT's 2.1.8 Interpretation is so Absurd that
if the Revenue Commitment/S&T Obligations Were Actually Transferred
In Petitioners Previous 1993 and 1994 "Traffic Only" Transfers
AT&T Automatically Losses the June 1996 Shortfall Issue

Petitioners have evidenced at exhibit Y in petitioners 9/27/06 filing that it participated in previous "traffic only" transfers to the one denied by AT&T in Jan. 1995, doing nothing different than it did with the Jan 1995 denied "traffic only" transfer. Under AT&T's bogus 2.1.8 interpretation after petitioners transferred away "traffic only" petitioners were left with "joint and several liability" for the S&T obligations after these 1993 and 1994 "traffic only" transfers.

Assume AT&T's Bogus Interpretation is Correct

Petitioner's plans when transferred to CCI therefore only had joint and several liability responsibility remaining on them having transferred away the primary responsibility in 1993 and 1994. Petitioners and CCI restructured i.e. (Discontinue Without Liability tariff section 2.5.18 exhibit FF in petitioners 9/7/06 filing) the CSTPII/RVPP plans throughout 1995 and Jan 1996, thus creating new commitment periods. Therefore as per 2.1.8E(c) (exhibit AA in petitioners 9/27/06 filing) petitioners were exempt from S&T charges when AT&T hit the plans in June 1996 with S&T liability.

As per AT&T counsel Fash letter of July 3, 1996 (exhibit BB in petitioners 9/27/06 filing), plaintiffs' fiscal year end was April 1st 1995 through March 31st 1996. As per 2.1.8E (c), this commitment period was a "commitment period after the commitment period that includes the Effective Date of the transfer." Specifically: The effective date of the transfer was Jan. 1995 which of course was within the prior April 1994 – March 31st 1995 commitment period.
If AT&T was actually interpreting 2.1.8 to mean that the transferor did not have to keep its primary S&T obligations but transferred the primary S&T obligations away and remained only

with the joint and several liability S&T obligations ----then the S&T charges placed upon petitioners in June of 1996 violated the tariff under AT&T's own faulty (post DC Circuit) interpretation.

Under AT&T's (post DC Circuit) bogus interpretation for 2.1.8 that the primary obligations transfer and plans only have remaining the joint and several liability obligation left for S&T charges this would result in the following: An aggregator with a $54 million revenue commitment could transfer away a couple of accounts to a shell company, then restructure AKA (Discontinuation Without Liability exhibit FF 9/27/06 filing -tariff section 2.5.18) its $54 million plan and have no obligations left. Totally Absurd!!! This is what happens when you conjure up total nonsense interpretations---the nonsense conflicts with not only 2.1.8 but all other tariff sections.

If this is the (post DC Circuit) bogus tariff interpretation that AT&T is now sticking to for 2.1.8 then this is yet another way to determine that AT&T violated its tariff in June 1996 by inflicting S&T liabilities.

Petitioners also have shown that the plans were immune from shortfall and termination liability due to:

A) were pre June 17th 1994 grandfathered and thus immune from S&T charges in June 1996 and

B) AT&T used an illegal shortfall application illegal remedy in June 1996 and thus can not rely upon the S&T charges even they were permissible.

Obviously section 2.1.8 could never have been interpreted to allow the transferor plan to allegedly get rid of the primary revenue commitment by transferring a few accounts, restructure away the alleged "remaining joint and several liability", and quickly walk away from its $54 commitment. In reality the transferor plan as per 2.1.8, 3.3.1.Q bullet 10 and section 5 had to meet its primary obligations and could not get rid of them and be subjected to losing its deposit requirement if the revenue commitment was not met.

Conclusion-The Obligations Issue Is Actually A Moot Issue
Petitioners Automatically Win Anyway

The evidence presented by petitioners has simply been overwhelming. The FCC has an absolute lay-up in petitioners favor regarding which obligations transferred as the FCC's 2003 Decision was right on the money in regards to the obligations allocation under 2.1.8.

However petitioners again stress that at the time of the "traffic only" transfer petitioners were silent as to whether or not revenue commitments/S&T obligations transfer. Petitioners simply filled out the AT&T TSA provided by TA&T to it and expected AT&T to do what it always had. AT&T was simply instructed to process--- as the cover letter (exhibit F in the 9/27/06 filing) stated--- a "**proper** order" in compliance to whatever 2.1.8 obligations mandated.

The FCC decision can decide the obligations issue but the quickest and easiest way to quickly resolve the case is to appropriately decide that section 2.1.8 was "not explicit" and thus in violation of the Communications Act and decide for petitioners; if any tariff section deserved to be labeled not explicit it was 2.1.8.

The FCC can and should quickly decide that that "obligations issue" is moot due to section 2.1.8(c)'s statute of limitation provision of 15 days. As the FCC's 2003 decision agreed with Judge Politan: "Words mean what they say"—15 days is the law under 2.1.8--and thus the "traffic only" transfer therefore should have been processed.

The FCC can also quickly decide that the obligations issue is moot due to the fact that petitioners did not request that AT&T do anything other than what 2.1.8 "properly" required. Petitioners simply wanted a "traffic only" transfer and that has been determined as being allowed under 2.1.8.

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

By:___/s/ Al Inga_____
Al Inga
Its' President