IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 03-1431

AT&T CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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GLOSSARY

AT&T	AT&T Corp.
BTN	Billed Telephone Number
CCI	Combined Companies, Inc.
CSTP II	Customer Specific Term Plan II
CT	Contract Tariff
FCC	Federal Communications Commission
PSE	Public Service Enterprises of Pennsylvania
RVPP	Revenue Volume Pricing Plan
WATS	Wide Area Telecommunications Service

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BRIEF FOR RESPONDENTS

STATEMENT OF JURISDICTION

This Court has jurisdiction to review final orders of the FCC pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

ISSUES PRESENTED FOR REVIEW

Several resellers of AT&T's 800 service filed a petition for declaratory ruling with the FCC asking the Commission to declare that AT&T violated its tariffs when it declined to move traffic from one reseller's 800 service plan to the 800 service plan of another reseller. The Commission ruled in favor of the resellers and against AT&T. *Joint Petition for Declaratory*

Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T's Tariff F.C.C. No. 2, 18 FCC Rcd 21813 (2003) (JA __) ("*Order*").

The issues presented for review are:

(1) Whether many of AT&T's principal challenges to the *Order* are not properly before the Court, because AT&T did not first present them to the FCC as required by 47 U.S.C. § 405(a).

(2) Whether the Commission reasonably interpreted AT&T's pertinent tariffs in concluding that AT&T was without authority under those tariffs to decline the resellers' requests to move traffic between their 800 service plans.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the Addendum to this brief.

COUNTERSTATEMENT

A. Statutory And Regulatory Background

At the time of the events giving rise to this proceeding, telecommunications common carriers generally offered service by filing "schedules" or tariffs showing their services and applicable charges and regulations. 47 U.S.C. § 203(a). Once a tariff becomes effective, the rates and terms in it have the force of law, and a carrier may not depart from those rates and terms. 47 U.S.C. § 203(c); *see also Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003). Under the judicially created "filed rate doctrine," tariffs control the rights and liabilities between carrier and customer. *See AT&T v. Central Office Tel. Co.*, 524 U.S. 214 (1998).

B. Developments Preceding The Primary Jurisdiction Referral

(1) AT&T Tariff F.C.C. No. 2

This petition for review arises out of a dispute between, on the one hand, AT&T, a telecommunications common carrier regulated under Title II of the Communications Act of 1934, as amended ("the Act"), and, on the other hand, a number of companies involved in the aggregation and resale of AT&T's inbound 800 Wide Area Telecommunications Service ("WATS"). *Order*, para. 2 (JA ____).[1] At the time of the events that created the dispute, AT&T was a dominant provider of interstate telecommunications services and, therefore, was required to offer its services under tariffs.

In addition to providing services to end-user customers who buy service for their own use, AT&T offered long distance telecommunications services for resale pursuant to a tariff. *See AT&T v. Winback and Conserve Program*, 42 F.3d 1421, 1423 (3d Cir. 1994). Under a resale arrangement, "[r]esellers, or aggregators, subscribe to AT&T programs which provide large discounts for high-volume purchases of AT&T telecommunications services," and then "sell the services to individual businesses that do not generate sufficient volume to qualify individually for the high-volume discounts." *Id*. *See also Combined Companies, Inc. v. AT&T Corp*, Civil Action No. 95-908 (NHP) (D.N.J.) (May 19, 1995 Letter Op.) ("*First District Court Op.*"), at 3 ("aggregation involves the resale of [] 800 services to small businesses which do not have any direct affiliation with AT&T, and which can secure better [WATS] rates by joining programs or

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[1] The aggregators/resellers who filed the Petition for Declaratory Ruling with the Commission are: Winback & Conserve Program, Inc.; One Stop Financial, Inc.; Group Discounts, Inc.; and 800 Discounts, Inc. ("the Inga Companies"); and Combined Companies, Inc. ("CCI"). *Order*, para. 1 (JA ___). "The Inga Companies were non-facilities-based aggregator/resellers of AT&T's inbound 800 Wide Area Telecommunications Service (WATS)." *Id*. at para. 2 (JA ___).

'plans' run by the aggregators than they could obtain individually") (JA _____). Small businesses that bought WATS service from resellers such as the Inga Companies were customers of the resellers, and were not customers of AT&T.

Sometime before June 17, 1994, the Inga Companies executed AT&T's "Network Services Commitment Form" for WATS under AT&T's Customer Specific Term Plan II ("CSTP II"), a tariffed plan set forth in AT&T's Tariff F.C.C. No. 2. *Order*, para. 2 (JA ___). The Inga Companies committed to aggregate (and buy from AT&T) $54 million worth of 800 services per year under their nine CSTP II plans. This volume of traffic qualified for a discount of 28 percent off AT&T's regular tariffed rates. The 28 percent discount included a "23 percent discount under the CSTP II plan, combined with an additional 5 percent discount available under the tariffed Revenue Volume Pricing Plan ('RVPP')." *Order*, para. 2 (JA ___).

Section 2.1.8 of AT&T's Tariff F.C.C. No. 2 provided for the transfer or assignment of tariff plans.[2] In December 1994, the Inga Companies and CCI executed Transfer of Service

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[2] Section 2.1.8 provides in its entirety:

"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 (see Record Change Only, Section 3). Nothing

Agreement and Notification forms transferring the nine Inga Company CSTP II/RVPP plans to CCI. Although the transfer or assignment provision of its filed tariff did not include a deposit requirement, AT&T initially refused to accept the transfers unless CCI provided a deposit of $13,540,000. Subsequently, however, the transfers of the plans were made without CCI having to furnish a deposit, pursuant to an order entered by the United States District Court for the District of New Jersey in May 1995. *Order*, para. 3 (JA __); *see also First District Court Op.* at 20-21 (JA ___, __).

(2) AT&T Contract Tariff 516

Under a separate tariff, Contract Tariff 516, AT&T sold inbound and outbound services to a reseller entity known as Public Service Enterprises Pennsylvania, Inc. ("PSE"), which was not related to either the Inga Companies or CCI.[3] (The district court noted that "PSE's business involves the resale of outbound services as well as [WATS], and a combination of both." *First District Court Op.* at 4 (JA ___).) PSE enjoyed a more favorable discount under Contract Tariff 516 than the discount that was available to CCI under the CSTP II/RVPP plans: "With an annual commitment of $4 million, which included 15 million minutes of 800 services per year, the CT

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herein or elsewhere in this tariff shall give any Customer, assignee, or transferee any interest or proprietary right in any 800 Service telephone number."

AT&T Tariff F.C.C. No.2, 14th rev. p. 20 (effective April 21, 1994) (JA _____).

[3] Starting in 1991, the Commission adopted rules and regulations for the use of "contract tariffs," which permit a carrier to negotiate tariffs individually with customers so long as the carrier then makes the negotiated deals available to other similarly situated customers. *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880, 5901-03 (paras. 117-132) (1991). Contract tariffs "were designed to increase flexibility for customers and to promote competition among carriers." *Fax Telecommunicacaiones, Inc. v. AT&T*, 138 F.3d 479, 482 (2d. Cir. 1998).

516 discount available to PSE was 66 percent off AT&T's regular tariffed rates." *Order*, para. 4 (JA ___). Accordingly, CCI sought to take advantage of the CT 516 discount.

CCI and PSE jointly executed and submitted to AT&T nine transfer-of-service forms corresponding to each of CCI's nine plans. At the bottom of each transfer form, in handwriting, they requested that AT&T move the "traffic only" on each plan to PSE. On January 13, 1995, CCI and PSE forwarded the nine transfer forms to AT&T and requested that AT&T "move the locations associated with these plans [but] not ... in any way to discontinue the plans." *Order*, para. 4 (quoting Exhibit H to the Petition for Declaratory Ruling (JA ___)). Under the proposed transaction, CCI would maintain its relationship with its end user customers, but would serve them by reselling AT&T 800 service obtained indirectly from PSE (as a reseller of AT&T service), rather than directly from AT&T. The district court noted that "[i]n this way, CCI would maintain control over the plans while at the same time benefiting from the much larger discounts enjoyed by PSE under [CT-516]." *First District Court Op.* at 10 (JA ___). CCI also would remain liable to AT&T for any shortfall in volume commitments under its plans. *Id.* As it had with respect to the Inga-to-CCI transactions, AT&T balked. It declined to move the traffic from CCI to PSE, *Order*, para. 4 (JA ___), and litigation ensued.

C. Litigation In The District Court And The Third Circuit

In February 1995, the Inga Companies and CCI sued AT&T in the United States District Court for the District of New Jersey, alleging violations of the Communications Act in connection with AT&T's refusals to (1) accept the transfer from the Inga Companies to CCI; and (2) to move traffic from CCI to PSE. *Order*, para. 5; *see generally First District Court Op.* (JA

___, __).[4] With respect to the Inga-to-CCI transaction, the district court on May 19, 1995, ordered AT&T to accept the transfer on the basis of a finding that AT&T's tariff provided no basis for conditioning the transfer on the payment of a deposit. *Order*, para. 5 (JA ___); *First District Court Op.* at 1, 20-21 (JA ___, __). With respect to the CCI-to-PSE transaction, the district court referred to the FCC the issue of whether CCI could move its traffic to PSE under the terms of AT&T's Tariff F.C.C. No. 2. *Order*, para. 5; *First District Court Op.* at 15 ("[A]s to the CCI/PSE transfer, the issue hinges on whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction . . . . [This issue] should be determined by the FCC.") (JA ___, __).

Despite the district court's order, neither the plaintiffs in the court action nor AT&T brought the primary jurisdiction question to the Commission. *Order*, para. 6 (JA ___). Instead the plaintiffs returned to the district court, seeking a preliminary injunction to compel AT&T to transfer the traffic from CCI to PSE. On March 5, 1996, the district court entered an order requiring AT&T to "recognize the transfer" and to provide service at the CT 516 rates. *Order*, para. 6 (quoting *Combined Companies, Inc. v. AT&T Corp*, Civil Action No. 95-908 (NHP) (D.N.J.), filed March 5, 1996, at 1 ("*Preliminary Injunctio*n")) (JA __). In so doing, the district court provided its own tentative conclusion as to how AT&T's Tariff F.C.C. No. 2 should be interpreted – stating that the tariff permitted the transfer of traffic from CCI to PSE. *Order*, para.

[4] PSE originally was a plaintiff in this action, but was dismissed from the case without prejudice after the complaint was filed. *First District Court Op*. at 2 n.1 (JA ____).

6 (JA ___); *see also Combined Companies, Inc. v. AT&T Corp*, Civil Action No. 95-908 (NHP) (D.N.J.), filed March 5, 1996, at 16 ("*Second District Court Op.*") (JA ___).[5]

AT&T appealed the district court's order to the Third Circuit, which, on May 31, 1996, vacated the lower court's March 5 decision as inconsistent with the district court's primary jurisdiction referral, and ordered the parties to bring the referred issue to the Commission. *Order*, para. 6 (JA ___); *Combined Co., Inc. v. AT&T*, No. 96-5185 (3d Cir. May 31, 1996) ("*Third Circuit Op.*") (JA ___, ___). The Third Circuit referred the following question to the FCC: "'Whether section 2.1.8 [of AT&T's Tariff F.C.C. No. 2] permits an aggregator to transfer traffic under a [tariffed] plan without transferring the plan itself in the same transaction.'" *Order*, para. 1 (citing *Third Circuit Op.* at 3, quoting *First District Court Op.* at 15) (JA ___).

D. Subsequent Developments Before The FCC

On July 15, 1996, the Inga Companies and CCI implemented the primary jurisdiction referral by filing a joint petition with the Commission seeking a declaratory ruling on four issues. *Order*, para. 7 (JA ___). AT&T filed opposition comments on August 26, 1996, and petitioners filed reply comments on September 23, 1996. *Id*.

On February 13, 2003, the Wireline Competition Bureau ("WCB") issued a Public Notice inviting comment on two discrete questions that were not squarely addressed by the parties on the existing agency record. First, the WCB asked the parties to "comment on the nature of the relationship, if any, between AT&T and the end-user customers of AT&T's customers, under AT&T's Tariff F.C.C. No. 2 generally, and specifically under the tariff provisions governing the

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[5] The district court noted in this regard that the record contained evidence that AT&T's past practice, "based on [AT&T's] own construction of its Tariff language," had been to grant requests such as CCI's and PSE's, and that AT&T had not "satisfactorily refute[d]" such evidence. *Second District Court Op.* at 15 & n.6 (JA __).

RVPP and CSTP II Plans at issue in this matter." *Id*. at para. 7 (JA ___); *see Further Comment Requested on the Joint Petition for Declaratory Ruling on the Assignment of Accounts (Traffic) Without the Associated CSTP II Plans Under AT&T Tariff F.C.C. No. 2*, Public Notice, 18 FCC Rcd 1887 (2003) ("*Public Notice*") (JA ___). Second, the WCB asked the parties to "comment on the remedy that AT&T's Tariff F.C.C. No. 2 specifies that AT&T may exercise if AT&T has reason to believe that its customer is violating section 2.2.4.A.2 of that tariff by '[u]sing or attempting to use WATS with the intent to avoid the payment, either in whole or in part, of any of the Company's tariffed charges by ... [u]sing fraudulent means or devices, tricks, [or] schemes.'" *Public Notice*, 18 FCC Rcd at 1887-88 (JA __). A number of parties filed comments in response to this Public Notice. *Order*, para. 7 n.42. (JA ___).

E. The *Order* Under Review

The first issue raised in the Inga companies' and CCI's request for declaratory relief was "whether section 2.1.8 permits an aggregator to transfer traffic under a plan without transferring the plan itself in the same transaction." *Order*, para. 8 (quoting *First District Court Op*. at 15). (JA ___). The FCC determined that the transfer provisions of AT&T's Tariff F.C.C. No. 2, section 2.1.8 "did not address or govern CCI's and PSE's request" to move 800 traffic from CCI to PSE, and that AT&T's "respective tariffs with CCI and PSE permitted the movement of [such] traffic." *Order*, para. 8 (JA ___). The Commission explained first that, although section 2.1.8 states that a customer may not transfer "WATS, including any associated telephone number(s)," to a new customer unless the new customer "agrees to assume all obligations of the former Customer at the time of transfer or assignment," AT&T had acknowledged in its comments that the subject of that limitation – "WATS" – referred to the plans themselves, and not to "the movement of end-user traffic." *Order*, para. 9 (JA ____).

At the same time that it determined that section 2.1.8 did not prohibit the movement of traffic between CCI and PSE, the Commission also found that the tariffs under which CCI and PSE took 800 service from AT&T allowed those resellers, respectively, to reduce and to increase the amount of 800 traffic they purchased under those tariffs. *Order*, para. 9 & n.52 (JA _____) (citing AT&T Tariff F.C.C. No. 2 (applicable to the CSTP/II RVPP plan taken by CCI) and AT&T Contract Tariff 516 (applicable to the plan taken by PSE)). The Commission determined that that was, in effect, what CCI and PSE were seeking to do with their requests to move traffic, and "that AT&T's respective tariffs with CCI and PSE permitted it." *Order*, para. 9 (JA ____). 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 customer's liability. *Id*. at para. 9 (JA ___). The Commission stressed, however, that even with the transfer of traffic, "CCI still would have to meet its tariffed commitments." *Id*.

As part of their first request for declaratory relief, the petitioning resellers sought a determination that no provision of Tariff No. 2 – not just section 2.1.8 – prevented CCI from transferring its traffic without also transferring the plans associated with that traffic. AT&T asserted before the Commission (and the District Court) that the petitioners' requests were intended to enable CCI to avoid payment, and therefore "violated the 'fraudulent use' provisions of Section 2.2.4" of Tariff No. 2 and justified AT&T's refusal to accept the transfer from CCI to PSE. *Order*, para. 10 (JA ___).[6] Without deciding the issue, the Commission concluded that

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[6] "AT&T claimed that the transfer from CCI to PSE 'had both the purpose and the effect of avoiding the payment, in whole or in part, of tariffed shortfall ... charges' because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II." *Order*, para. 10 (JA ___).

"[e]ven assuming" that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff, AT&T "did not avail itself of the associated remedy that was specified in its tariff." *Order*, para. 12 (JA ____) (citing AT&T Tariff F.C.C. No. 2, § 2.8.2). In particular, although tariff section 2.8.2 permitted AT&T to "temporarily suspend service to CCI" for fraudulent use, AT&T had "simply refused, in perpetuity, to move the traffic to PSE." *Id.* The Commission held that those provisions did not authorize AT&T to refuse to move the traffic from CCI to PSE. *Order*, para. 11 (JA ___). The Commission concluded that CCI's obligations remained under the CSTP II 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." *Id.* The Commission reasoned that "[e]ven assuming that AT&T did have reason to believe that the proposed movement of traffic from CCI to PSE violated section 2.2.4 of its tariff, AT&T did not avail itself of the associated remedy" – suspension of service – in the tariff. *Order*, para. 12 (JA ___).

Having determined that AT&T's tariff permitted the movement of traffic from CCI to PSE and that it did not authorize AT&T to refuse the requested movement of traffic as a remedy for allegedly fraudulent use, the Commission concluded that AT&T's refusal to move traffic from CCI to PSE violated the requirement of 47 U.S.C. § 203(c) that carriers provide service only as "specified" in their tariffs. *Order*, paras. 19, 21 (JA).

STANDARD OF REVIEW

Under the Administrative Procedure Act, this Court must uphold agency action unless it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This is a "'deferential standard' that 'presume[s] the validity of agency action.'" *Global NAPS, Inc. v. FCC*, 247 F.3d 252, 257 (D.C. Cir. 2001) (quoting *Southwestern*

Bell Tel. Co. v. FCC, 168 F.3d 1344, 1352 (D.C. Cir. 1999)). *See also Cellco Partnership v. FCC*, 357 F.3d 88, 93-94 (D.C. Cir. 2004). Where, as here, the case involves both tariff interpretations and the FCC's interpretation of its own rules, the Commission's determinations are entitled to special deference. An agency's interpretation of its own rules must be given "controlling weight" unless "plainly erroneous or inconsistent with the regulation." *Communications Vending Corp. of Arizona v. FCC*, 2004 WL 911769 at *4 (D.C. Cir. April 30, 2004). "A similar standard applies to the FCC's interpretation of tariffs." *Global NAPS, Inc.*, 247 F.3d at 258 (citing *American Message Centers v. FCC*, 50 F.3d 35, 39 (D.C. Cir. 1995)). "Reversing an FCC tariff interpretation should only occur where it 'is not supported by substantial evidence, or the [Commission] has made a clear error in judgment.'" *Id.* (citations omitted).

The "filed rate doctrine" requires strict adherence by all parties to the plain terms of tariffs, even through the doctrine often yields harsh results for customers.[7] On the other hand, where "the usual canons and techniques of interpretation leave real uncertainty" regarding a tariff's application, the Commission properly construes the tariff "strictly against the carrier" and resolves "any doubt … in favor of the customer." *Associated Press v. FCC*, 452 F.2d 1290, 1299 (D.C. Cir. 1971).[8] Indeed, the Commission's codified rules require that tariffs be "clear and explicit," 47 C.F.R. § 61.2, and the Commission may decline to enforce a tariff against customers when it does not comply with that requirement. *Global NAPS, Inc.*, 247 F.3d at 258.

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[7] *See*, *e.g.*, *AT&T v. Central Office Telephone,*524 U.S. at 222-23; *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 487, 490 (7th Cir. 1998); *Fax Telecommunicaciones v. AT&T*, 138 F.3d at 491.

[8] *See Associated Press Request for Declaratory Ruling*, 72 FCC 2d 760, 764-65 (para. 11) (1979); *CommodityNews Services, Inc. v. Western Union*, 29 FCC 1208, 1213 (para. 3), *aff'd*, 29 FCC 1205 (1960).

FCC actions interpreting tariffs – and interpreting its own tariffing rules – may be reversed only where they are clearly erroneous. *Global NAPS, Inc.*, 247 F.3d at 258; *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

SUMMARY OF ARGUMENT

In the *Order* under review, the Commission interpreted AT&T's relevant tariffs as not barring CCI and PSe from moving traffic between their respective plans, and concluded that AT&T violated those tariffs in refusing to move such traffic as requested. The Commission's ruling is a reasonable exercise of its expertise in matters of tariff construction. Many of AT&T's principal arguments were not presented to the Commission below and thus are barred by 47 U.S.C. § 405(a). On the merits, AT&T has not demonstrated, as it must, that the Commission's ruling results from a "clear error in judgment." *Global NAPS, Inc.*, 247 F.3d at 258.

1. The Commission reasonably held that the transfer provision of AT&T's Tariff F.C.C. No. 2 did not prohibit the requested move of "traffic only" between CCI and PSE. The Commission explained that the requirement in tariff section 2.1.8 that the new customer (PSE) assume the obligations of the former customer (CCI) applied to the wholesale transfer of plans, and did not address – and therefore did not prohibit – the movement of traffic from one reseller to another. Furthermore, the FCC explained that the tariffs under which CCI and PSE took service permitted those resellers, respectively, to reduce and to increase the amount of 800 traffic that they purchased under their 800 service plans. The Commission concluded that the requested movement of traffic between CCI and PSE could reasonably be viewed as a permissible "separate requests" for a reduction in traffic by CCI and an increase in traffic by PSE.

2. The Commission also reasonably concluded that, even if the requested movement of traffic between CCI and PSE would violate the "fraudulent use" provisions of AT&T's tariff (a

question the agency found it unnecessary to decide), AT&T's refusal to move traffic from CCI to PSE was not authorized under the tariff's "temporary suspen[sion of] service" remedy upon which AT&T relied below. That ruling was more than justified, particularly given the requirement of 47 C.F.R. § 61.2 that tariff provisions be "clear and explicit" and this Court's holding that the FCC may decline to enforce tariff provisions against customers for failure to comply with that provision, *Global NAPS, Inc.*, 247 F.3d at 258.

3. AT&T's newly-minted theory that the Commission's *Order* gives CCI and PSE an unlawful preference in violation of 47 U.S.C. § 203(c) was not presented to the Commission below, and thus is barred by 47 U.S.C. § 405(a). The argument fails on the merits in any event, because it depends upon AT&T's unsupported challenge to the Commission's conclusion that the CCI-to-PSE transaction could be viewed as permissible "separate requests" to reduce and add traffic.

ARGUMENT

Before the Commission, AT&T argued that section 2.1.8 of its tariff prohibited the transfer of "WATS" plans without the transferee's assumption of the transferring customer's existing liabilities. Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling, filed August 26, 1996, at 10 ("AT&T Opposition") (JA) ("in this case the relevant WATS services [to which section 2.1.8's transfer provisions apply] are the CSTP II Plans"). AT&T also argued that CCI's request to move "traffic only" to PSE without an assumption of liability by PSE violated the fraudulent use provisions of tariff section 2.2.4, and that tariff section 2.8.2 (which permits AT&T "to temporarily suspend service" for violations of the fraudulent use provisions) therefore authorized it to refuse CCI's request to move traffic to PSE.

AT&T Further Comments, filed April 2, 2003, at 11 (J.A.). The Commission's *Order* reasonably answered the pertinent arguments that AT&T presented.

As we detail in the Argument sections below, moreover, AT&T's brief to this Court raises entirely new arguments aimed at justifying its refusal to move CCI's 800 traffic, including AT&T's –

- Claim that the clause "including the associated telephone numbers" in tariff section 2.1.8 supports its view that that provision applied to the requested movement of traffic. Br. 19.

- Claim that the Commission's reading of tariff section 2.1.8 renders that provision meaningless. Br. 14, 19-20.

- Challenges to the Commission's "separate requests" analysis. Br. 4-5, 20-22.

- Claim that its refusal to move traffic from CCI's plan to PSE's plan was a permissible exercise of the tariff section 2.8.2 remedy of "deny[ing] requests for additional service." Br. 25.

- Claim that the FCC's *Order* creates an unlawful preference in violation of 47 U.S.C. § 203(c). Br. 29-30.

The Court should not consider such newly-minted arguments because "[i]t is black-letter law that 47 U.S.C. § 405 bars [the Court] 'from considering any issue of law or fact upon which the Commission has been afforded no opportunity to pass.'" *American Family Ass'n v. FCC*, 2004 WL 1047846, *9, ___ F.3d ___ (D.C. Cir. May 11, 2004) (citations omitted). *See also AT&T Corp. v. FCC*, 317 F.3d 227, 235-36 (D.C. Cir. 2003); *Illinois Bell Telephone Co. v. FCC*, 988 F.2d 1254, 1264 n.12 (D.C. Cir. 1993).

This Court has explained that the "purpose of section 405 is to require complainants to give the FCC a 'fair opportunity' to pass on a legal or factual argument before coming to this

court." *Washington Ass'n for Television & Children v. FCC*, 712 F.2d 677, 681 (D.C.Cir.1983) (internal quotation marks and citations omitted). Moreover, the exceptions to section 405(a) are limited. As this Court summarized in *Petroleum Communications, Inc. v. FCC*: "[W]e have permitted exceptions [to the section 405 exhaustion requirement] where issues by their very nature could not have been raised before the agency; where it would have been 'futile' for petitioners to lodge their complaints before the agency; and where the Commission has in fact considered the issue, whether on its own motion, or at the behest of third parties." 22 F.3d 1164, 1169 (D.C.Cir. 1994) (citations omitted). None of the exceptions apply to the new arguments raised by AT&T in its brief. Accordingly, AT&T "should have filed a petition for reconsideration to afford the Commission an opportunity to pass on [its] arguments before they turned to this court for review." *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 79 (D.C. Cir. 2003) (citing 47 U.S.C. § 405(a)(2)).

I. THE COMMISSION REASONABLY CONCLUDED THAT THE TRANSFER PROVISIONS OF AT&T'S TARIFF DID NOT PROHIBIT CCI FROM MOVING TRAFFIC FROM ITS PLANS TO PSE'S PLAN AND THAT AT&T'S TARIFFS PERMITTED SUCH MOVEMENT OF TRAFFIC.

The FCC reasonably determined that the transfer provisions of AT&T's pertinent tariff – section 2.1.8 of Tariff F.C.C. No. 2 – "did not address or govern CCI's and PSE's request" to move 800 traffic from CCI to PSE, and that AT&T's "respective tariffs with CCI and PSE permitted the movement of [such] traffic." *Order*, para. 8 (JA). Section 2.1.8 states that a customer may not transfer "WATS, including any associated telephone number(s)," to a new customer unless the new customer confirms "in writing that it agrees to assume all obligations of the former Customer at the time of transfer or assignment." The Commission explained that

AT&T had acknowledged in its comments that the subject of that limitation – "WATS" – referred to the *plans themselves*. *Order*, para. 9 (JA); *see* Comments of AT&T Corp. in Opposition to Joint Petition for Declaratory Ruling, filed August 26, 1996, at 10 ("AT&T Opposition") (JA) ("in this case the relevant WATS services [to which section 2.1.8's transfer provisions apply] are the CSTP II Plans"). The Commission concluded – consistent with AT&T's acknowledgement – that the assumption-of-obligations limitation applied to "the wholesale transfer of 'WATS'" and "did not preclude or otherwise govern . . . the movement of end-user traffic from one aggregator to another, as CCI and PSE sought to effect in this case." *Order,* para. 9 (JA).

At the same time that it determined that section 2.1.8 *did not prohibit* the movement of traffic between CCI and PSE under the circumstances presented here, the Commission found that the tariffs under which CCI and PSE took 800 service from AT&T *permitted* those resellers, respectively, to reduce and to increase the amount of 800 traffic they purchased under those tariffs. *Order*, para. 9 & n.52 (JA) (citing AT&T Tariff F.C.C. No. 2 (applicable to the CSTP/II RVPP plans taken by CCI) and AT&T Contract Tariff 516 (applicable to the plan taken by PSE)). The Commission determined that that was, in effect, what CCI and PSE were seeking to do with their requests to move traffic, and "that AT&T's respective tariffs with CCI and PSE permitted it." *Order*, para. 9 (JA).

AT&T's assorted challenges to the Commission's analysis are barred by section 405(a) and, on their own terms, lack merit. They do not establish, as they must to succeed, that the Commission's analysis results from a "clear error in judgment." *Global NAPS, Inc.*, 247 F.3d at 258.

AT&T argues, first, that because section 2.1.8 governs the transfer of "WATS, *including the associated telephone numbers*," and because CCI and PSE expressly asked AT&T to move "the BTNs" (*i.e.*, billed telephone numbers) associated with the pertinent traffic, section 2.1.8, by its terms, applied to the request. Br. 19. AT&T never presented to the Commission the textual claim that the clause "including the associated telephone numbers" controlled the disposition of this issue. Indeed, the Commission expressly relied upon AT&T's *inconsistent* contention below that section 2.1.8 applied only to the transfer of the "CSTP II Plans" themselves. *Order*, para. 9 (JA); AT&T Opposition at 10 (JA). In these circumstances, AT&T's claim is not properly before the Court. *See* 47 U.S.C. § 405(a) (providing that the filing of a petition for reconsideration is a condition precedent to judicial review where the party seeking review "relies on questions of fact or law upon which the Commission . . . has been afforded no opportunity to pass").

In any event, the tariff language upon which AT&T now relies – "WATS, including any associated telephone numbers" – is most reasonably interpreted merely to confirm that the "associated telephone numbers" are *components* of WATS, and that when a customer seeks to transfer a WATS plan in its entirety pursuant to section 2.1.8, the telephone numbers associated with that WATS plan are also transferable. The language of section 2.1.8 does not compel the conclusion that its limitations apply to the movement of telephone numbers (with or without associated traffic) independent of the plan itself.[9]

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[9] Indeed, the "associated telephone numbers" language could not operate as a limitation on the transferability of an 800 telephone number (or 800 traffic, for that matter), because 800 service providers are required by law to allow customers to take their 800 numbers with them when changing service providers. *See Competition in the Interexchange Marketplace*, 10 FCC Rcd 4421, 4421 (para. 3) & n.9 (1995).

AT&T further asserts that CCI's and PSE's use of "Transfer of Service Agreement" forms to request the pertinent movement of traffic "conclusively established" that section 2.1.8 applied to their request. Br. 18. AT&T is forced to acknowledge, however, that CCI and PSE *modified* those forms to request movement of "traffic only" (Br. 18-19) – thereby negating any inference that use of the forms indicates that section 2.1.8 applied to the pertinent requests. Implausibly, AT&T cites the parties' handwritten modification of the forms as evidence of *non-compliance* with section 2.1.8, rather than as indicating the inapplicability of that provision. Br. 18. But there is no reason to believe that CCI and PSE would have taken affirmative steps to modify the forms in ways that only served to establish that they were not entitled to the requested relief. The obvious inference is that the parties proposed to transfer "traffic only" (as their chosen language asserted), and that they had to modify AT&T's standard form precisely because they were not requesting a typical plan transfer subject to section 2.1.8.

AT&T also contends that the Commission's construction of section 2.1.8 (as not prohibiting the proposed movement of 800 traffic between CCI and PSE) renders that provision meaningless, because it allegedly would be "unnecessary when liabilities were assumed," but would "not prohibit transfers when liabilities were not assumed." Br. 14; *see also id.* 19-20. This argument also is not properly before the Court, because AT&T did not present it to the agency. 47 U.S.C. § 405(a). But on the merits, this claim fails as well. As an initial matter, section 2.1.8 retains meaning under the Commission's reading because the provision still applies to transfers of plans, such as those involved in the original Inga-to-CCI transactions. 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 yield 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 "step[s] into the shoes of [the transferor]" and *replaces* the transferor as the party liable for any *future* purchases of service. *Order*, para. 9 (JA).[10] By contrast, when only traffic is moved, the party reducing its traffic (in this case, CCI) "would continue to subscribe to its existing CSTP II plans," and the totality of the reciprocal obligations between that party and AT&T under those CSTP II plans would remain in effect, both with respect to service that already had been purchased at the time the traffic was moved *and* with respect to any future service taken under the plans. *Order*, para. 9 (JA). 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.

AT&T also contends that the requested movement of traffic from CCI to PSE cannot plausibly be equated with, or justified as, separate requests by CCI to decrease traffic under its tariff and by PSE to increase traffic under its tariff, because the transactions, so construed, would have been subject to numerous impediments that would have rendered them impracticable. Br. 4-5, 20-22. AT&T presented none of its objections to the Commission's "separate requests" analysis below – either in comments prior to the *Order* or in a petition for reconsideration. Accordingly, these claims are not properly before the Court. 47 U.S.C. § 405(a); *see Illinois Bell Telephone Co. v. FCC*, 988 F.2d at 1264 n.12.

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[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 (JA) (quoting section 2.1.8).

AT&T's challenges to the Commission's "separate requests" analysis lack merit in any event. AT&T contends, first, that when a customer requests additional 800 service under a plan that already is in force for that customer (as opposed to the transfer of plans), AT&T must "engage in a complex process of engineering and installing the service," which includes "order[ing] any necessary facilities from the local exchange carrier that serves the locations, arrang[ing] for the assignment of an available 800 number, [and] program[ming] interexchange network facilities to translate calls that are placed to that number to the appropriate POTS ["plain old telephone service"] number." Br. 4. These functions are so complex, according to AT&T, that its tariff "contains no fixed time table for the installation of 800 service to any locations" and instead provides AT&T with "discretion" to "establish a 'due date' for filling the order." *Id.* (citing Tariff F.C.C. No. 2, §§ 2.1.3, 2.1.4, and 2.5.10). Because service allegedly could not have been "reprovisioned" to PSE without "a substantial risk of service interruptions" under these provisions, AT&T asserts that the "transfer or assignment" mechanism of section 2.1.8 controlled the CCI and PSE requests and justified AT&T's refusal to move the traffic as requested. *Id.*; *see also* Br. 21-22.

Although AT&T never gave the FCC an opportunity to address this contention, and the record concerning AT&T's claim therefore is undeveloped, the argument quite clearly is exaggerated. Whatever "engineering and installing" may be required when 800 service is newly installed at a location, the movement of traffic that CCI and PSE requested required no such engineering and installation, because 800 service was already in place at the relevant end-user locations. All that was required to satisfy the resellers' requests likely was a billing account change (from CCI to PSE) – which should not, in the ordinary course, present an unreasonable risk of service disruption. Although AT&T contends that proper use of the section 2.1.8 transfer

provision in its tariff was the only way to avoid such disruptions, moreover, that tariff provision itself provided no more assurance of timely action than did the general tariff provisions AT&T cited regarding engineering and installing of new service. Indeed, as AT&T tacitly acknowledges, the "guarantee" against service interruptions with respect to section 2.1.8 transfers was contained *not* in the tariff, but in AT&T's "Transfer of Service" form, which is not cross-referenced in section 2.1.8. Br. 21 & n.15. In any event, the adequacy of provisioning under the general tariff provisions governing the addition of new service (rather than section 2.1.8) was never tested, because AT&T declined to move the requested traffic under *any* provision.

AT&T also contends that the "separate requests" analysis in the *Order* fails because, under that approach, CCI and PSE would have been required to get prior express permission from each end user that was moved from the CCI plan to the PSE plan, or be guilty of the unreasonable practice – known as "slamming" – of switching a customer's carrier without authorization. Br. 22 (citing *AT&T Corp. v. Winback & Conserve Program, Inc.*, 16 FCC Rcd 16074 (paras. 12, 19, 29) (2001)). By contrast, AT&T contends that a transfer of plans under section 2.1.8 would have been considered a "bulk transfer" exempt from that requirement. *Id.* (citing 47 C.F.R. § 64.1120(e)). Contrary to AT&T's assertion, however, the proposed movement of traffic presented no question of slamming, because the 800 service end users would not change carriers under the transaction. Rather, both before and after the transaction, the 800 service end users' contractual privity would remain with CCI. *See* Joint Petition for Declaratory Ruling, Attachment G (Letter, dated January 16, 1995, from Frank G. Scardino (PSE) to Larry G. Shipp (CCI), acknowledging that the 800 service end users would continue to be "CCI's

Endusers" after the transaction) ("PSE/CCI Letter Agreement") (JA).[11] Thus, the bulk transfer provision that AT&T cites (47 C.F.R. § 64.1120(e)) would be irrelevant, even if it had existed during the 1994-1995 time period relevant to this dispute. (In fact, that provision had not yet been adopted at the time.)[12]

Finally, AT&T vaguely suggests that the Commission's "separate requests" analysis is unreasonable because, if the end user location and associated 800 number were disconnected from CCI's account with AT&T and then separately added to PSE's account with AT&T, the end user might lose the use of its existing 800 number. Br. 5, 21. AT&T acknowledges that PSE "could and undoubtedly would have submitted a separate request for AT&T to install a new account on its plan by using the same 800 number to serve that end user location." Br. 21. Nevertheless, AT&T also contends that, under 47 C.F.R. § 52.103(d), when an 800 number is "disconnected," it "[n]ormally" is "unavailable for reassignment for up to 4 months." Br. 21 n.16. AT&T fails to develop this argument in any detail,[13] but its claim clearly is unavailing as stated since, like the bulk transfers provision cited above, section 52.103(d) was not in existence

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[11] CCI would now provide service to its end users by reselling AT&T 800 service that it purchased indirectly from PSE, rather than directly from AT&T. But that also is not a change in provider that required prior customer authorization. *Cf. WATS International Corp. v. Group Long Distance (USA) Inc.*, 11 FCC Rcd 3720, 3728 (paras. 14-16) (Com.Car.Bur. 1995) (reseller's decision to switch facilities-based providers of underlying service does not require prior *authorization* from the reseller's customers). Moreover, since AT&T would remain the underlying facilities-based provider of the resold service before and after the movement of traffic from CCI to PSE, the transaction caused no material change in the nature of the underlying service to CCI's end users that would require prior *notification* of those end users. *Compare id.* at 3728-29 (paras. 17-18).

[12] Section 64.1120 was not adopted until 2000, and section 64.1120(e) was not added until 2001. *See* 65 Fed.Reg. 47691 (August 3, 2000); 66 Fed. Reg. 12892 (March 1, 2001); 66 Fed. Reg. 28124 (May 22, 2001).

[13] *See National Rural Telecom Ass'n v. FCC*, 988 F.2d 174, 185 (D.C. Cir. 1993) (the petitioner "must argue the point in its brief with enough detail to show why its claims merited an answer").

during the relevant time period and thus has no bearing on this case. *See* 62 Fed.Reg. 20127 (April 25, 1997) (adopting 47 C.F.R. §§ 52.101 through 52.109). In any event, as with all of its challenges to the FCC's "separate requests" analysis, this claim is not properly before the Court because AT&T did not first present it to the Commission in a petition for reconsideration. 47 U.S.C. § 405(a).

II. THE COMMISSION REASONABLY CONCLUDED THAT AT&T DID NOT PROPERLY INVOKE THE FRAUDULENT USE PROVISIONS OF ITS TARIFF.

Having found that the transfer provisions of AT&T's Tariff F.C.C. No. 2 did not prohibit the movement of traffic that CCI and PSE had requested, the Commission turned to the question whether any other provision of the tariff prohibited the transaction. *Order*, para. 10 (JA) (quoting Petition at 7-8 (JA)). AT&T pointed to only one such additional provision: It claimed that the requested transaction violated the prohibition against "fraudulent use" in tariff section 2.2.4, because it purportedly "'had both the purpose and effect of avoiding payment, in whole or in part, of tariffed shortfall . . . charges' because CCI's entire revenue stream would transfer to PSE, but PSE would have no corresponding obligation to pay any shortfall charges under the CSTP II [plans]." *Order*, para. 10 (JA) (quoting AT&T Opposition at 5 (JA)); *see also Order*, para. 13 (JA) (noting that "AT&T does not rely upon any other provisions of its tariff to justify its conduct"). The Commission reasonably concluded that this claim did not establish a basis under AT&T's tariff for AT&T's refusal to move 800 traffic from CCI to PSE as requested, and AT&T fails, once again, to demonstrate that the Commission's conclusion was clearly wrong. *Global NAPS, Inc.*, 247 F.3d at 258.

There was ample reason for the Commission to doubt AT&T's claim that CCI necessarily would be left without the ability to pay shortfall charges under the proposed transaction,[14] but the Commission found it unnecessary to decide that question. *Order*, para. 11 (JA); *compare* AT&T Br. 23-24. Instead, the Commission ruled that, "[e]ven assuming" that AT&T reasonably suspected a violation of the "fraudulent use" provisions of its tariff, AT&T "did not avail itself of the associated remedy that was specified in its tariff." *Order*, para. 12 (JA) (citing AT&T Tariff F.C.C. No. 2, § 2.8.2). In particular, the Commission found that although tariff section 2.8.2 permitted AT&T to "temporarily suspend service to CCI" for fraudulent use, AT&T had "simply refused, in perpetuity, to move the traffic to PSE." *Id*.

In essence, the Commission ruled that AT&T had invoked a remedy other than the ones authorized under its tariff. But the terms of the tariff define and constrain AT&T's conduct and specify the remedies available to the company in connection with its provision of tariffed services. *See AT&T v. Central Office Telephone Co.*, 524 U.S. at 222-24. As this Court recently noted, "[f]iled tariffs are pointless if the carrier can depart from them at will." *Orloff*, 352 F.3d at 421. Condoning AT&T's departure in this case from the remedial terms of its tariff would "undermine[] the regulatory scheme" and give AT&T the power to control the economic fates of its customers – here, the resellers. *Ibid.* The Commission's holding on this issue thus is both consistent with the law and reasonable.

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[14] Under the proposed transaction: (1) CCI still would receive in revenues a portion of the difference between what PSE paid to AT&T under Contract Tariff 516 for the moved traffic and the charges that the corresponding 800 service end-user customers had to pay for their service; (2) PSE contracted to assist CCI in moving the traffic back to CCI's plan in the event such movement was needed to meet CCI's commitments to AT&T; and (3) CCI retained the opportunity to "amass new traffic" on its existing plans, which were not terminated. *See Order*, para. 9 n.51, para. 11 (JA); PSE/CCI Letter Agreement (JA).

AT&T nonetheless argues that the Commission's analysis impermissibly ignores language in section 2.8.2 that permits AT&T to "*deny requests for additional service*" as a remedy for violations of the fraudulent use prohibition, and the carrier complains that the FCC's *Order* "used ellipses to delete the italicized words." Br. 25. The Commission did not consider that tariff language, however, because no party relied upon it below.[15] Indeed, although the Commission expressly asked the parties to "comment on the remedy that AT&T's Tariff F.C.C. No. 2 specifies" for violations of the tariff's fraudulent use provisions, and directed the parties "to provide citations to specific sections of the tariff,"[16] AT&T relied below only on the tariffed remedy of taking "immediate action to suspend service" and claimed that "'[s]uspension of service' . . . subsumes the action taken by AT&T" of declining to move traffic from CCI to PSE. AT&T Further Comments at 11 (JA). Because no party raised with the FCC the issue of whether the tariffed remedy of "deny[ing] . . . additional service" was applicable, that question is not properly before the Court. 47 U.S.C. § 405(a).[17]

Nor is there merit to the tariff construction argument that AT&T did present to the Commission. AT&T claimed that the remedy of declining to move the traffic from CCI to PSE should be deemed to be a "lesser remedy" that was "subsume[d]" within the tariffed remedy of

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[15] In any event, declining to move traffic *away from* CCI can hardly be characterized as the denial of "additional service" to *CCI*; and it is not self-evident why *PSE* should be subject to the sanction of denial of additional service under *its* tariff (Contract Tariff 516) for CCI's alleged attempt to avoid payment of minimum charges under CCI's separate CSTP II plan.

[16] *Public Notice*, 18 FCC Rcd at 1887-88 (JA).

[17] For the same reason, the Court also should not consider AT&T's passing contention that, when it notified CCI and PSE that it would not move the traffic as requested, it was merely providing "prior notice before suspending service" consistent with section 2.8.2. Br. 26 n.23. Although AT&T alleges that the Commission "completely disregard[ed]" the prior notice requirement, no party below ever argued that that provision was pertinent. AT&T Br. 26 n.23.

"temporarily suspend[ing] service," because reading the tariff provision otherwise would yield "commercially absurd" results and would violate the alleged "separate principle" that remedies for fraud should be construed flexibly to effectuate their remedial purposes. Br. 26-28. Contrary to AT&T's argument, denial of a request to move traffic would not necessarily be a "lesser remedy" than suspension of service from the perspective of AT&T's reseller customers. Br. 28. AT&T's refusal to move the traffic, in effect, compelled CCI to continue purchasing service "at the higher CSTP II rate, rather than the CT 516 rate." *See Order*, n.66 (JA). One can well imagine circumstances – for instance, if a customer is operating at a loss – in which "suspension" (ceasing service entirely) would present that customer with a better option than having to continue to operate (and to incur new losses) under an existing plan. Given the possibility of such circumstances, AT&T is simply wrong in contending that the Commission has read the remedy provision in a "commercially absurd" manner.

Even if there otherwise were substance to AT&T's claim that its chosen remedy of declining to move traffic might reasonably be "subsume[d]" within the tariff's "temporarily suspend service" language, AT&T's claim would fail because the Commission's codified tariff rules expressly required that, "[i]n order to remove all doubts as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations." 47 C.F.R. § 61.2; *Order*, n.65 (JA). This Court has held that the Commission lawfully may decline to enforce a tariff provision against a customer when the carrier fails to comply with section 61.2, *Global NAPS, Inc.*, 247 F.3d at 258, and the Commission here reasonably relied upon that provision in concluding that "if AT&T intended the term 'temporarily suspend service' to mean 'permanently suspend the right to move traffic to another Customer' it should have said so," *Order*, n.65 (JA). The Court "give[s] 'controlling weight' to

the Commission's interpretation of its own regulations 'unless it is plainly erroneous or inconsistent with the regulation.'" *Communications Vending Corp. of Arizona v. FCC*, 2004 WL 911769 at *4 (quoting *Capital Network System, Inc. v. FCC*, 28 F.3d at 206). AT&T's attempt to invoke contract interpretation principles from other contexts does not establish that the Commission's reading of AT&T's tariff was unreasonable in light of the "clear and explicit" statement requirements of 47 C.F.R. § 61.2.

III. THE FCC REASONABLY CONCLUDED THAT AT&T VIOLATED SECTION 203 OF THE COMMUNICATIONS ACT WHEN IT REFUSED TO MOVE THE TRAFFIC FROM CCI TO PSE AS REQUESTED.

The FCC concluded that neither the transfer provisions of Tariff F.C.C. No. 2, nor the tariff's fraudulent use provisions and associated remedies, prohibited the requested movement of traffic between CCI and PSE. To the contrary, the Commission determined "that AT&T's respective tariffs with CCI and PSE permitted it." *Order*, para. 9 (JA); *see also id*, paras. 9-13 (JA). Accordingly, the Commission concluded that AT&T's action in denying the requested movement of traffic violated the requirement of 47 U.S.C. § 203(c) that carriers provide service only as "specified" in their tariffs. *Order*, paras. 19, 21 (JA).

AT&T now contends that the *Order* itself provides CCI and PSE with an unlawful preference in violation of section 203(c) because, even if the Commission were correct that neither the transfer provision (section 2.1.8) nor the fraudulent use provision (section 2.2.4) specifically prohibited the requested movement of traffic, no tariff provision affirmatively *required* AT&T to move the traffic as requested. Br. 29-30. In this regard, AT&T asserts that the Commission's conclusion that CCI's and PSE's requests should have been treated as permissible separate orders to reduce and to add 800 traffic conferred upon CCI and PSE

"valuable provisioning benefits" that were not specified in the tariffs and unlawfully favor CCI and PSE over other AT&T customers, because it compelled AT&T to process the separate orders as if they were a single transfer of service request under section 2.1.8. Br. 30. Once again, AT&T did not first present the argument to the Commission and it therefore is barred. *See* 47 U.S.C. § 405(a).

In any event, AT&T is mistaken on the merits. AT&T's "unlawful preference" claim depends on its argument that the pertinent tariffs did not permit CCI and PSE to implement the requested movement of traffic as separate requests to reduce and to add 800 traffic. As discussed above (at pages 20-24), that claim is unsupported and, in any event, it also is not properly before the Court because AT&T never presented its current challenge to the "separate requests" approach to the agency. 47 U.S.C. § 405(a). Accordingly, AT&T cannot establish the predicate to its unlawful preference claim. Under the Commission's interpretation of the tariffs, moreover, no preference would be conferred because the same movement of traffic that was allowed to CCI and PSE here would be available to other similarly situated customers.

Finally, even if AT&T could establish that the Commission's "separate request" analysis was erroneous and that AT&T's tariff therefore did not authorize CCI and PSE to move traffic as requested, no party presented to the Commission AT&T's current claim that the Commission's ruling creates an unlawful preference in violation of section 203(c) of the Communications Act. Accordingly, section 405(a) of the Act bars consideration of that claim here.

CONCLUSION

For the foregoing reasons, the Court should dismiss AT&T's petition for review, or, if the Court determines that certain arguments are not barred by section 405(a), deny it.

Respectfully submitted,

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May 17, 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AT&T CORPORATION, PETITIONER, V. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, RESPONDENTS.	)	NO. 03-1431

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 9186 words.

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