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May 11, 2004

By Electronic Filing

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th St., SW
Washington, D.C. 20554

Re: AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133.

Dear Ms. Dortch:

This *ex parte* letter, submitted on behalf of AT&T Corp. ("AT&T"), responds to claims by incumbent local exchange carriers ("ILECs") and AT&T's largest interexchange competitor in Alaska that enhanced prepaid calling card services that unquestionably make available information via telecommunications should be denied information service classification because the "only" information provided to customers is advertising. As detailed below and in AT&T's reply comments in this proceeding, these claims are foreclosed by the plain statutory text and decades of consistent Commission precedent establishing a bright line demarcation between information and telecommunications services based upon the *existence*, rather than the quantity or perceived "quality," of information supplied by the service provider. Moreover, the regulatory uncertainty that the ILECs urge the Commission to perpetuate would necessarily stifle innovation and investment. In a world in which regulatory classification turns on after-the-fact subjective judgments of the "value" of enhancements, no provider could ever predict how its new services would be regulated.

AT&T's enhanced prepaid calling cards, which are purchased predominantly by the lowest-income consumers, seniors, and military personnel, permit cardholders to place calls at very low rates. Unlike traditional prepaid card services, the enhanced prepaid card service is *not* a bare transmission service that transmits only information of the cardholder's choosing. Rather, every time that the consumer uses the card, AT&T transmits information of the card distributor's choosing – ranging from simple advertisements to information regarding college savings plans –

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to the cardholder. As one example, when a customer places a call using an AT&T enhanced prepaid card purchased from a retailer that supports “Upromise.com” – a service that applies a portion of the cost of products and services purchased from affiliates to college savings plans – the customer is informed that “[t]o learn how your everyday purchases can add up to college savings, visit www.upromise.com.” The customer retrieves this stored information as follows: the customer first dials an 8YY telephone number and is connected to AT&T’s enhanced prepaid card platform; the platform determines the correct recorded message associated with the card; retrieves that stored message and delivers it to the cardholder. Once the cardholder has listened to the message, he or she can dial a telephone number and is connected to that number by the platform. In many cases, of course, the called party does not answer, and the only communication that takes place is the communication of the stored information chosen by the card distributor to the cardholder.

AT&T’s service fits squarely within the Communications Act “information service” definition. The Act defines an “information service” as a service that includes “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing.” 47 U.S.C. § 153(20). Enhanced prepaid card services indisputably fall within the terms of that definition. When a customer places a call using an enhanced prepaid calling card, the customer is connected to a computer platform, which retrieves and transmits information, not of the user’s choosing, but of the service provider’s and card distributor’s choosing, to that cardholder. These enhanced prepaid cards, therefore, invariably involve the “generating,” “acquiring,” “retrieving,” “utilizing,” and the “making available” of “information via telecommunications.” And the statutory definition of “information service” also “includes electronic publishing” (47 U.S.C. § 153(20)), which in turn expressly includes the “dissemination [or] provision” of “advertising” to a “person.” 47 U.S.C. § 274(h)(1).

Congress’s definition of “information service” both codified and expanded upon the Commission’s previous “enhanced service” classification, and enhanced prepaid card services also easily fit within the Commission’s pre-existing definition of “enhanced services” (and thus are “information services”).¹ The Commission’s rules define “enhanced services” as service offered over common carrier transmission facilities that (1) “provide the subscriber additional, different, or restructured information” or (2) “involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a). The enhanced prepaid card service’s provision of stored

¹ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, First Report And Order And Further Notice Of Proposed Rulemaking, 11 FCC Rcd. 21905, ¶ 102 (1997) (“*Non-Accounting Safeguards Order*”) (“We conclude that all of the services that the Commission has previously considered to be ‘enhanced services’ are ‘information services,’” although the category of “information services” is broader); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, ¶ 33 (1998) (“*Report to Congress*”) (same).

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messages over common carrier transmission facilities plainly satisfies both criteria. It provides the subscriber with additional information (the advertisement or message) and, because the advertisement is stored on a computer platform, the service involves subscriber interaction with stored information.

This is not a matter that is open to serious dispute. The Commission has *already held* that providing stored advertisements to a caller is an enhanced service (and thus an information service). See *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986 (1987) (“*Talking Yellow Pages Order*”). In that proceeding, the Commission addressed whether a service called “Talking Yellow Pages” – a “service [that] enables customers . . . to dial a local number and hear recorded advertisements” – constitutes an enhanced service. *Id.* ¶ 2. The Commission held that a service in which a customer “makes a phone call and hears a recorded advertisement . . . involves ‘subscriber interaction with stored information,’ and [thus] falls *squarely* within the definition of ‘enhanced service’ in Section 64.702(a) of [our] rules.” See *id.* ¶ 20 (emphasis added).² Accordingly, it has been clear for more than a decade that the dissemination of advertisements to customers over telephone facilities constitutes an enhanced service.

The *Talking Yellow Pages Order* also makes clear that a service that communicates stored advertisements involves a computer enhancement that cannot be considered merely “incidental” to establishing a basic transmission path. The Commission has consistently held that “basic” or “telecommunications” services are services that provide a “pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer-supplied information.”³ Congress codified that limitation by defining “telecommunications” (and “telecommunications service”) as limited to transmission of “information of the *user’s* choosing, without change in the form or content of the information as sent or received.” 47 U.S.C. § 153(43); see also 47 U.S.C. § 153(46); *Report to Congress* ¶ 59

² The Commission has previously explained that if “an automated information retrieval computer need not be accessed remotely over communications circuits . . . [to] still have value and utility,” that provision of information via telecommunications would necessarily be an enhanced service. *Amendment of Sections 64.702 of the Commission’s Rules and Regulations (Third Computer Inquiry) and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission’s Rules and Regulations*, Notice of Proposed Rulemaking, CC Docket No. 85-229, 1985 FCC LEXIS 2770, n.64 (1985). The prepaid card messages at issue here, including information about participation in Upromise.com, for example, obviously would still have substantial value and utility to consumers if delivered through other means – and therefore the delivery of that information via telecommunications is necessarily the provision of an information service.

³ *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶¶ 93, 96 (1980) (“*Computer II*”).

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(“if the user can receive *nothing* more than pure transmission, the service is a telecommunications service”) (emphasis added). As the Commission squarely held in the *Talking Yellow Pages Order*, however, receiving stored messages from third parties goes beyond mere transmission of the communications initiated by the subscriber. Nor are the advertising messages that the enhanced prepaid cardholder hears used (or even capable of being used) for the “management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).

The Commission has elsewhere held that a platform of services that *combines* stored messages with the ability to make calls is an enhanced service. *AT&T CEI Order*, Memorandum Opinion and Order, 6 FCC Rcd. 4839 (1991) (approving as interstate enhanced service AT&T’s Enhanced Services Complex, which combined enhanced services (including stored messages) with the ability to make calls). Similarly, in 1995, the Commission held that “reverse directory assistance” services are enhanced services. *US West Communications, Inc. Petition for Computer III Waiver*, Order, 11 FCC Rcd. 1195 (1995). Reverse directory assistance provides subscribers with the name and address of a person based on that person’s telephone number. The Commission found that reverse directory assistance “on its face meets two of the three characteristics that define an enhanced service because it provides additional information (name and address associated with a telephone number) and involves subscriber interaction with stored information.” *Id.* ¶ 29. The same is true of AT&T’s enhanced prepaid calling card service. And, “[s]atisfying any one of the characteristics would suffice to classify the service as enhanced.” *Id.*⁴

In short, AT&T’s enhanced prepaid card service fits squarely within the plain terms of the statutory definition of “information service.” Indeed, Verizon has conceded that the message communicated by the platform constitutes “additional, different, or restructured information,” Verizon Comments at 7, and Qwest has conceded that the “commercial message” that an enhanced prepaid card platform adds to the information provided by the subscriber “fit[s] within the literal definition of an information/enhanced service.” Qwest Comments at 5. That should be the end of the matter, because the plain language of the Act must govern.⁵ AT&T’s

⁴ See also *US West Communications, Inc. Petition for Computer III Waiver*; *BellSouth Petition for Computer III Waiver*; *Southwestern Bell Telephone Company Petition for Computer III Waiver*, Memorandum Opinion and Order and Order on Reconsideration, 11 FCC Rcd. 7997 (1996); *Petition of SBC Communications, Inc. for Forbearance from Structural Separation Requirements of Section 272 of the Communications Act of 1934, as amended, and Request for Relief to Provide International Directory Assistance Services, et al.*, Memorandum Opinion and Order, 19 FCC Rcd. 5211 (2004) (international reverse directory assistance is information service).

⁵ See e.g., *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) (“as long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute”).

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opponents nonetheless insist that the Commission can simply ignore the statute, and read new exceptions into the statutory definition. For example, some parties have variously suggested that the Commission should create an exception here based on the duration, content, purpose or nature of the enhanced message. As discussed below, no such exception could be reconciled with the statutory text or the Commission's consistent decisions construing that text. Any such exception would also shatter the longstanding bright line between basic and enhanced services, on which providers have structured their businesses, and which is necessary to encourage carriers to develop and deploy innovative advanced services.

There certainly is no statutory basis for holding that the duration of the information service call is relevant to whether the service is an "information service." Many services that are indisputably information services involve calls of short duration – reverse directory assistance services, for example, may include only a short recitation of a name and address, but as noted there is no question that such services are "information services." In fact, if the Commission were to hold for the first time that duration were relevant to whether a service is an information service, that would call into question the regulatory status of a whole host of existing and potential services. *See, e.g., also NATA/Centrex Order*, Memorandum Opinion and Order, 3 FCC Rcd. 4385, ¶ 42 (1988) (finding BOC service was enhanced even though only step taken by customer different from basic call was dialing "extra numbers, generally two digits, [to] represent the code the subscriber wants to have associated with the call" for the subscriber's billing functions).

Similarly, the information component of an information service can be quite brief in duration relative to the transmission of customer-supplied information. For example, in the *Cable Modem Declaratory Order*, the Commission recognized that certain capabilities that are merely made available to cable modem subscribers make that service an information service, even if the subscriber uses such capabilities only briefly (or even not at all) in a given session. *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798, ¶ 38 & n.153 (2002) ("*Cable Modem Declaratory Order*"), *aff'd in relevant part, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003).⁶ Moreover, the Commission has repeatedly held that regulatory classifications apply to *entire services*, not individual components of services, much less individual components of particular calls. "[A]n offering that constitutes a single service from the end user's standpoint" – as an enhanced prepaid card service does – is not a basic telecommunications service "simply by virtue of the fact that it involves telecommunications components." *Report to Congress* ¶ 58 (citing *Computer II*, 77 F.C.C.2d at 420-28). If, as here, the service includes enhancements unrelated to call routing or billing, the entire service is "enhanced." *See, e.g., id.* ¶ 57 ("hybrid services are information services, and are not telecommunications services").

⁶ *See also id.* ¶ 35 (statutory definition of information service "rests on the function that is made available").

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Nor could the Commission create an exception on the ground that the enhanced service here is “just an ad.” First, as noted above, the Commission has already held that services that provide third party advertisements via telecommunications are “enhanced services” (and thus “information services”). *Talking Yellow Pages Order* ¶ 20. Moreover, the Act expressly defines “information service” to include “electronic publishing,” which in turn includes the “dissemination” of “advertising” to a “person.” 47 U.S.C. § 274(h)(1). More fundamentally, the Commission has never based the regulatory status of a service on the nature of the *content* of the information that is being provided. Indeed, such blatantly content-based distinctions would raise serious First Amendment concerns. Penalizing prepaid card providers relative to other providers solely because of the content of the prepaid card messages would be considered “presumptively inconsistent with the First Amendment” by the courts. *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991); *see also Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (quoting *Reagan v. Time Inc.*, 468 U.S. 641, 648-49 (1984)) (“regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment”).

Such a ruling would also invite endless litigation, because there would be no principled basis on which to distinguish disfavored messages (*e.g.*, advertising) from favored messages. AT&T’s platforms store and communicate to subscribers scores of different messages of many varieties. Some are advertisements for retailers, “your local post office,” and military exchanges; many cards provide information about “Upromise,” an Internet-based college savings plan; some provide information about “Operation Uplink,” a program that keeps military personnel and hospitalized veterans in touch with their families and loved ones by providing them with a free phone card, or “Paypal,” a secure method of purchasing goods and services over the Internet; some provide messages from public figures requesting donations to, for example, the Alzheimer’s Association. The Act does not permit the Commission to make subjective value judgments as to which if any of these messages is “worthy” to be considered an “information service.”⁷

Similarly, the Commission cannot create an exception linked to the supposed *purpose* of the enhanced message. In that regard, some opponents have suggested that the enhanced message is “unwanted” or is not the “principal” purpose of call. There is no statutory basis for any such distinction; the statutory definition of information service “rests on the function that is made available,” not on the purpose of the function of information provided or the provider’s or

⁷ Contrary to the Bells’ claims, a finding that the additional *non-call-related* information communicated by enhanced prepaid card platforms makes those services information services will *not* transform 1+ interexchange calls that include call completion messages (*e.g.*, “thank you for using Verizon”), that play music snippets during call completion, or, as Verizon absurdly suggests, that contain “static noise” into information services. It has been settled for decades that communications related to call setup, call routing, call cessation, calling or called party identification, or billing and accounting do not trigger an information service classification.

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consumer's motivation or state of mind. *Cable Modem Declaratory Order* ¶ 35. Any distinction based on the purpose of the message would require the Commission to make subjective value judgments and engage in impermissible content-based regulation. Moreover, it is clear that the enhanced messages are not "unwanted" in any relevant sense, because prepaid card purchasers seek out and buy these enhanced cards from retailers, and the cardholders continue to purchase the cards even though they know that they will hear an advertising message every time they use the card.

In short, any of these proposed distinctions would quickly prove unworkable and would call the regulatory status of numerous existing and potential services into question. Moreover, creating such exceptions would undermine the bright line that currently exists between information and telecommunications services. It has been settled for over two decades that adding non-call-related stored data to the signal sent by the caller makes a service an information service.⁸ The Commission has consistently held that "*any* offering over the telecommunications network which is more than a basic transmission service," *Computer II* ¶ 97 (emphasis added), is an enhanced service and hence an information service. Using computers to provide stored information to the end-user, as enhanced prepaid card services do, constitutes a "change in the . . . content of the information as sent or received" by the end-user and a "making available" of "information via telecommunications" for purposes of 47 U.S.C. § 153(20). As the Commission has stressed, this bright line between telecommunications and information services exists to avoid the constant "adjudication over the status of individual service offerings." *Computer II* ¶ 30. The chaos that would necessarily follow any blurring of the bright line rules would chill investment, innovation and the rapid development of Internet-based and other consumer services, because no provider could know in advance whether particular new enhancements might in the future be deemed too insubstantial, too commercial, too racy, or simply of too little "value" to consumers to qualify as information services.

Finally, the Bells' asserted policy justifications for disregarding the statutory text and the Commission's prior decisions are makeweights. The centerpiece of the Bells' policy justification is that doing so is necessary to avoid draining the universal service fund. But the declaration AT&T seeks in this proceeding will not drain the universal service fund. To the contrary, most consumers will continue to prefer the traditional 1+ telecommunications services

⁸ See, e.g., *Computer II* ¶¶ 120-32 (although enhanced services have a "communications component" and "may do some of the same things that regulated communications services did in the past," Commission would hew to the line between enhanced and basic services); *NATA/Centrex Order* ¶ 42 (finding BOC service was enhanced even though only step taken by customer different from basic call was dialing "extra numbers, generally two digits, [to] represent the code the subscriber wants to have associated with the call" for the subscriber's billing functions); *U S WEST Comm. Inc. Petition for Computer III Waiver* ¶ 12 (there is a "presumption" that services involving the "provision of access to a database" for any purpose "other than to obtain the information necessary to place a call" is an enhanced service).

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that are undeniably covered by the existing contribution mechanism, and, in any event, the Commission, for many other reasons, has no real choice but to substitute expeditiously a more rational (*e.g.*, numbers- and capacity-based) contribution mechanism. Moreover, the majority of enhanced prepaid card customers are low-income customers that could not otherwise afford to make many of the calls that are made using enhanced prepaid card services, and the Commission therefore could not hope to generate more universal service contributions by making it impossible for AT&T and others to continue to provide these low-cost services. Indeed, the *only* material consequence of recognizing that enhanced prepaid card services are interstate information services is an entirely salutary one: low-cost prepaid card services will remain available to those who need them.

Enhanced prepaid card services facilitate access to telecommunications services by those least able to acquire or afford service, and the Commission should apply existing law to *encourage* the continued provision of those services. Prepaid card services are particularly appealing to those who have traditionally been excluded from equitable access to telecommunications services: lower income households, members of minority groups, students, members of the military, senior citizens, recent immigrants, and speakers of a language other than English. AT&T Reply at 4. Fully *half* of households with incomes below \$20,000 and 70% of African-American households use prepaid cards, and consumers 55 and older represent the fastest growing segment of prepaid card users. *Id.* These services are successful for these and other consumer groups because they are so affordable. And allowing the incumbents to treat these services as intrastate telecommunications services would utterly destroy the ability of providers to continue to make access available at rates as low as three cents a minute.

The central policy issue here is thus whether the Commission will, while abstractly invoking “universal service” to preserve and enhance local monopolists’ profits, very publicly increase prices for the service that most effectively and dramatically has increased the universality of access for millions of consumers. Consumers obviously would know and understand exactly why their prepaid card services are no longer affordable. What would be much less understandable to consumers (and the court of appeals) is *why* the Commission cast aside existing rules and precedents to reach that result.

Of course, the best way to deal with this dispute and many others that currently plague the industry is directly to address the underlying problem – *i.e.*, fundamentally flawed intercarrier compensation and universal service regulation. All parties agree with AT&T that the current system of enhancing monopoly profits with subsidies to attempt to pursue policy outcomes has long outlasted its usefulness. *See* SBC at 7 (“SBC agrees with AT&T in one respect – reform of outdated intercarrier compensation and universal service mechanisms is urgently needed”). But until that reform is completed, the Commission simply must take steps to minimize the enormous harm those flawed regulations cause to competition and the public interest.

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Respectfully submitted,

/s/ David L. Lawson

David L. Lawson