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July 13, 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:

I write on behalf of AT&T Corp. ("AT&T"). AT&T has previously demonstrated that enhanced prepaid card services that make available stored information not of the end-user's choosing are information services. Moreover, calls made by users of such services are jurisdictionally interstate when they involve an interstate communication of the stored information between the information service platform and the card holder. Both propositions are well supported by longstanding Commission precedent, and the Commission should, accordingly, grant AT&T's Petition. The Commission could not, consistent with APA notice and comment requirements, lawfully change course in this proceeding and choose to treat enhanced prepaid card services as intrastate telecommunications services, but even if it could, the Commission could not lawfully apply that determination retroactively.

Regulatory Classification. Courts have held repeatedly that "when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective-only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quoting *Public Serv. Comm. Of Colo. v. FERC*, 91 F.3d 1478, 1488 (D.C. Cir. 1996)) ("in a case in which there is a 'substitution of new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial"); see also *Epilepsy Found. of N.E. Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001); *Williams Natural Gas Co. v. FERC*, 9 F.3d 1544, 1554 (D.C. Cir. 1993); *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). If the Commission were to

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decide in this proceeding that prepaid card and other services that both provide voice communications capabilities and make available computer-stored information are not information services, that determination would plainly constitute the replacement of “new law” for “old law that was reasonably clear,” because the Commission has always and consistently held that services that make available stored information – including advertising – are information services. Under settled law, retroactive application of a ruling that such services will now be treated as telecommunications services would thus be inappropriate and reversible error.

The plain statutory language compels the conclusion that a service that provides access to stored messages is an information service. 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 calling cards necessarily involve the retrieval and transmission of information *not of the user’s choosing*, but of the service provider’s and card distributor’s choosing. Such communications thus involve the “generating,” “acquiring,” “retrieving,” “utilizing,” and the “making available” of “information via telecommunications.”

As the Commission has recognized, Congress’s definition of “information service” both codified and expanded upon the Commission’s previous “enhanced service” classification, and thus codified the bright line that the Commission has always drawn between basic and enhanced services.¹ The Commission has made clear since *Computer II* that “an enhanced service is *any* offering over the telecommunications network which is more than a basic transmission service.” *Computer II*, 77 F.C.C.2d 384, ¶ 97 (1980) (emphasis added). A basic service, by contrast, “is one that is limited to the common carrier offering of transmission capacity for the movement of information.” *Id.* ¶ 93. The Commission has restated this bright line often. For example, in its 1998 *Stevens Report*, the Commission explained that a service is a telecommunications service only “if the user can receive *nothing* more than *pure* transmission.” 13 FCC Rcd. 11501, ¶ 59.

At the time the 1996 Act definition of “information service” was passed, it was well-settled that stored advertisements and other messages were enhanced services. As early as 1987, the Commission expressly held a service that offers the capability of dialing a telephone number to hear stored advertisements to a caller is an enhanced service (and thus an information service). See *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum

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) (“*Stevens Report*”) (same).

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Opinion and Order, 2 FCC Rcd. 5986 (1987) (“*Talking Yellow Pages Order*”). In that proceeding, the Commission specifically 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). The Commission has never indicated that access to stored messages would not be an information service, and indeed, the statute codifies the Commission’s prior holdings that such messages are information services.

The Commission has also said repeatedly that the mere fact that voice communications may be included with enhancements does not take a service out of the category of information services. For example, the Commission has 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).² Moreover, in *Computer II* itself, the Commission explained that “we are not foreclosing enhanced processing applications being performed in conjunction with ‘voice’ service” (¶ 98), and “we recognize that some enhanced services may do some of the same things that regulated communications services did in the past” (¶ 132).³

The Commission’s precedents have likewise made clear to all that a service is an enhanced or information service as long as the information service capability is merely made available to consumers (*see* 47 U.S.C. § 153(20) (information service is the “offering” of certain capabilities); the actual information component of a service may be minor or even nonexistent on

² 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.

³ *See also Stevens Report* ¶ 27 (“The Commission stressed that the category of enhanced services covered a wide range of different services, each with communications and data processing components. Some might seem to be predominantly communications services; others might seem to be predominantly data processing services. The Commission declined, however, to carve out any subset of enhanced services as regulated communications services. It found that no regulatory scheme could ‘rationally distinguish and classify enhanced services as either communications or data processing,’ and any dividing line the Commission drew would at best ‘result in an unpredictable or inconsistent scheme of regulation’ as technology moved forward”).

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a given call. For example, in the *Stevens Report*, the Commission held that Internet access service was an information service, even though the subscriber “may not exploit [the information service features] of the service.” *Id.* ¶¶ 78-79. Similarly, in the *Cable Modem Declaratory Order*, the Commission recognized that certain capabilities that are merely offered 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).⁴ The mere fact that these capabilities are available to the subscriber as part of the service makes cable modem service an information service.

These holdings are consistent with the Commission’s repeated statements 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.” *Stevens Report* ¶ 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”); *see also id.* ¶ 60 (“[w]e recognize that the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service. . . . [t]he issue is whether, functionally, the consumer is receiving two separate and distinct services”).

Both the statute and the Commission’s precedents also make clear that recorded advertisements cannot be considered “adjunct-to-basic.” Prior to 1996, the Commission treated certain computerized functions as basic instead of enhanced, if those functions directly facilitated the completion of a basic call. These so-called “adjunct-to-basic” functions were inseverable from the basic call itself, and included computerized switching functions and other call monitoring and billing functions. Congress codified these pre-1996 holdings in the statutory definitions of information service and telecommunications. “Information service” is defined to exclude capabilities used for the “management, control, or operation of a telecommunications system or the management of a telecommunications service,” 47 U.S.C. § 153(20), and the definitions of “telecommunications” (and “telecommunications service”) are 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); *Stevens*

⁴ *See also id.* ¶ 35 (statutory definition of information service “rests on the function that is made available”).

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Report ¶ 59 (“if the user can receive *nothing* more than pure transmission, the service is a telecommunications service”) (emphasis added).

None of the Commission’s prior precedents can be read to support the notion that the advertisement or other message on enhanced prepaid card calls could be considered “adjunct-to-basic” in this sense. As noted, the Commission has expressly held that recorded advertisements are enhanced, *not* “adjunct-to-basic.” *Talking Yellow Pages Order* ¶ 20. The advertisement provides information separate from a basic call (and not of the end user’s choosing). And it is indisputable that the provision of recorded advertisements plays no role in the completion of a basic call, and has no conceivable connection to the “management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20).⁵ Indeed, a certain percentage of enhanced prepaid card users hear the ad but do not place or complete any other call at all.

The Commission’s precedents also expressly disclaim any “primary purpose” test. Indeed, that had been the test under *Computer I*, and the Commission, in adopting the current regime in *Computer II*, expressly rejected such a rule as having been proven unworkable. As the Commission explained:

At the margin, some enhanced services are not dramatically dissimilar from basic services or dramatically different from communications as defined in *Computer Inquiry I*. But any attempt to draw the line at this margin potentially could subject both the enhanced services providers and us to the prospect of literally hundreds of adjudications over the status of individual service offerings. We have noted the danger that such proceedings could lead to unpredictable or inconsistent regulatory definitions. . . . Such proceedings also could consume a very significant proportion of the resources of this agency. The requirement to devote significant resources to try to make individual service distinctions would necessarily reduce the resources available for regulating basic services and

⁵ See also *Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd. 20391, ¶ 39 (1998) (adjunct-to-basic services “fall within the literal definition of an ‘enhanced service’ set forth in the Commission’s rules, but are basic in purpose *and facilitate the completion of calls* through utilization of basic telephone service facilities. They include, *inter alia*, speed dialing, call forwarding, computer-provided directory assistance, call monitoring, caller identification, call tracing, call blocking, call return, repeat dialing, and call tracking, as well as certain Centrex features. The Commission found that such ‘adjunct to basic’ services *facilitated the establishment of a transmission path over which a telephone call may be completed*, without altering the fundamental character of the telephone service”); *North American Telecommunications Association*, 3 FCC Rcd. 4385, ¶ 32 (1988) (adjunct-to-basic services “are all the result of communications between subscribers and the network for call setup, call routing, call cessation, calling or called party identification, billing or accounting”).

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ensuring non-discriminatory access to common carrier telecommunications facilities. *Computer II*, ¶ 130.

Accordingly, the Commission adopted its current bright-line test – *i.e.*, *anything* more than a pure telecommunications service is an information service – to end the unpredictability of the previous system. *See Computer II* ¶ 107 (“[i]t is apparent that, over the long run, any attempt to distinguish [among] enhanced services will not result in regulatory certainty”); *see also Stevens Report* ¶ 57 (“if we interpreted the statute as breaking down the distinction between information services and telecommunications services, so that some information services were classed as telecommunications services, it would be difficult to devise a sustainable rationale under which all, or essentially all, information services did not fall into the telecommunications service category”). The Commission expressly urged the industry to rely on this bright-line distinction and cannot now penalize the industry for doing so. *See Computer II* ¶ 101 (Commission has “draw[n] a clear and, we believe, sustainable line between basic and enhanced services upon which business entities can rely in making investment and marketing decisions”).

Nor is there any indication in prior precedents that regulatory classification could turn on after-the-fact Commission speculation about whether the stored information is “wanted” or “unwanted.” In this regard, it is undisputed that the stored information made available to AT&T’s enhanced prepaid card customers is wanted both by the card distributors that approve the messages and the card purchasers themselves – AT&T has learned, for example, that literally thousands of its card holders have called the toll free number for Upromise.com (a college savings plan) after receiving that number in the stored advertisement transmitted from the calling card platform. There can, accordingly, be no serious concern that a ruling that a service that makes available stored information that is clearly valued both by consumers and third party distributors would compel a ruling that any 1+ traffic that included, for example, “Thank you for using Verizon” would be information service traffic.

Anyone reading this long list of precedents and Commission statements would have to conclude that providing access to stored advertisements and other stored messages is an information service. The Commission has never before suggested that there is any exception to that rule. Therefore, if the Commission issued a ruling to the contrary in this proceeding, such a declaration would constitute “new law” replacing “old law that is reasonably clear.” *Verizon*, 269 F.3d at 1109. Indeed, in light of the Commission’s consistent statements over the past two decades, any ruling now that advertisements may not be information services will likely come as a shock to other enhanced service providers that provide advertisements and will doubtless cause many such providers to reassess whether their services are still classified as enhanced. Accordingly, “the new rule may justifiably be given prospective-only effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’” *Id.* That is plainly the proper – indeed, required – course of action here. AT&T and all other enhanced service providers reasonably relied on the Commission’s prior consistent statements and actions – passing on to low income and other consumers cost savings associated with information service

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classification – and it would clearly upset “the settled expectations of those who [like AT&T] had relied on” that preexisting, settled precedent to rule otherwise.

Even if a declaration that advertisements are not enhancements could be considered simply a new application of existing law, retroactive application of such a “clarification” would still be manifestly unjust and improper. In cases involving new applications of existing law, an agency must balance the “ill effect” of retroactivity against “the mischief of producing a result which is contrary to statutory design,” if any, that would result from a prospective only ruling. *SEC v. Chenery*, 332 U.S. 194 (1947). Here that balancing requires a prospective only ruling.

First, there is no “*statutory* interest in applying a new rule despite the reliance of a party on the old standard.” *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1081 (D.C. Cir. 1987) (en banc) (emphasis added). To the contrary, the availability of these enhanced prepaid cards as information services has affirmatively furthered the statute’s universal service goals. By partnering with discount stores and other advertisers, enhanced prepaid card providers have been able to offer uniquely affordable long-distance services aimed at segments of our society that have been traditionally excluded from access to the telecommunications network, including lower income households, members of minority groups, students, members of the military, senior citizens, recent immigrants, and speakers of a language other than English.⁶

There is unquestionably a powerful statutory interest in the availability of such low-cost cards. Indeed, the Commission has a strong statutory interest in maintaining the availability of such options for lower income end-users under both its traditional universal service authority under 47 U.S.C. § 151⁷ – which requires the FCC to make the telecommunications network “available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex” – and under its 1996 Act universal service authority, which must be based in part on the principle that services should be available at rates that are “affordable.” 47 U.S.C. § 254(b)(1), (i). Even if the Commission chose now to eliminate these unique benefits by reclassifying these services as “telecommunications services,” there is no statutory interest in applying that determination retroactively.⁸

⁶ See D. Wolfe, CPR Group, “Card Usage Climbs,” (2002); IDC, “Is There Room for Growth: U.S. Prepaid Calling Card Forecast and Analysis, 2002-2006 (Dec. 2002).

⁷ *NARUC v. FCC*, 737 F.2d 1095, 1108 n.6 (D.C. Cir. 1984).

⁸ The statutory interest in ensuring adequate contributions to the universal service fund is plainly not implicated here. The fund has suffered no shortfalls in past years. There has been no diminution in the availability of telephone services (telephone penetration is at record levels); universal service was at all times fully funded (disproportionately by interexchange carriers like AT&T); and the interstate enhanced prepaid card traffic at issue was at all times a very small percentage of overall traffic. Accordingly, there is no basis for imposing retroactive liabilities in order to advance any statutory interest in universal service.

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In contrast, the “ill effects” of retroactivity would be particularly substantial in this context. AT&T and many other providers of enhanced prepaid cards priced their cards to pass on to consumers the benefits of the information service classification that, under the Commission’s prior precedents, clearly applied to these services. There would be no way now for these providers of much-needed low-cost services to recover from consumers costs that the providers had no idea they were accruing. Indeed, given the existing inventories of cards that have already been sold, but have not yet been used, it would be arbitrary and capricious not to allow a transition period before the effective date of any ruling that enhanced prepaid cards will henceforth be regulated as telecommunications services.

Jurisdiction. The Commission should also make clear that the past jurisdictional treatment of enhanced prepaid card traffic will be grandfathered and will not be subject to further litigation.

There is no question that the Commission has jurisdiction and *could* assert regulatory authority over these services for past (and, for that matter, future) periods. The Communications Act gives the Commission jurisdiction over “interstate communications by wire.”⁹ “Interstate communication,” in turn, is defined as communication or transmission between one state or the District of Columbia and another.¹⁰ When using AT&T’s enhanced prepaid calling card services, the calling party calls the enhanced service platform and the platform transmits a stored message to the calling party. This transmission is indisputably a “communication by wire.” Moreover, it is also indisputably an “*interstate* communication,” 47 U.S.C. § 153(22), when, as in almost all cases, the transmission begins in one state and ends in another.

Because the vast majority of enhanced prepaid card calls contain an “interstate communication,” the Act unambiguously gives the FCC authority to exercise jurisdiction over the service – and certainly over all calls that do include such interstate communications. The interstate communication is integral to the call, and therefore the presence of that interstate communication gives the Commission statutory authority to exercise jurisdiction over the entire call on an end-to-end basis. *See, e.g., GCI v. ACS*, 16 FCC Rcd. 2834, ¶ 24 (2001). Even if the Commission were to decline in this proceeding to exercise any regulatory authority over these services going forward – and thus permit the state commissions to impose intrastate access charges prospectively – there is no question that the services can and should, for prior periods, be treated as jurisdictionally interstate and subject to the Commission’s exclusive authority.

⁹ 47 U.S.C. § 152(a) (“The provisions of this chapter shall apply to all interstate and foreign communications by wire”). The Act defines “communications by wire” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” 47 U.S.C. § 153(52).

¹⁰ 47 U.S.C. § 153(22).

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The Commission must recognize that treating these services as intrastate telecommunications services (instead of interstate information services), with the resulting imposition of intrastate access charges and universal service contributions, will destroy the economic viability of maintaining prepaid cards as a low-cost option available to previously excluded populations. Rather than abruptly eliminating the viability of these offerings, and potentially subjecting such cardholders to rate shock, the Commission should, accordingly, assert its authority to adopt a reasonable transition to the Commission's chosen regime. Such a transition would include grandfathering all past jurisdictional treatment of enhanced prepaid card traffic and a phased transition of at least one year to full application of exorbitant intrastate access charges. The Commission has adopted similar transitions to avoid precipitous rate changes for other charges that have universal service implications. *See, e.g., Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd. 12962, ¶¶ 79-80 (2000) (“*CALLS Order*”) (adopting transition for increases in the SLC); *see also MTS and WATS Market Structure*, Memorandum Opinion and Order, 60 Rad. Reg. 2d (P&F) 1345, ¶ 25 (1986) (no retroactive reimbursement for intrastate costs recovered in interstate rates).

In no event, however, should the Commission permit intrastate access charges to be imposed retroactively. AT&T has paid full interstate access charges (not the lower reciprocal compensation rates) for all of this traffic at all times – and has passed on to consumers the cost savings associated with not paying much higher intrastate access charges. Interstate access charges are more than compensatory and, indeed, generate windfalls for the ILECs. As all industry participants, including the Bells, have long recognized, there is no longer any logic or sound policy behind the inconsistent rules and regimes that determine which entities and services pay which rates. There can therefore be no claim that there is any legitimate statutory interest in ensuring that enhanced prepaid card traffic is subject to the very highest termination rates (intrastate access charges). Any interest in retroactive payments for past period access charges is purely a Bell interest, and not a statutory or public interest that should be considered in the retroactivity analysis.

Respectfully submitted,

/s/ David L. Lawson

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