SIDLEY AUSTIN BROWN & WOOD LLP

BEIJING
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DALLAS
GENEVA
HONG KONG
LONDON

1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com

FOUNDED 1866

LOS ANGELES
NEW YORK
SAN FRANCISCO
SHANGHAI
SINGAPORE
TOKYO
WASHINGTON, D.C.

WRITER'S DIRECT NUMBER
(202) 736-8088

WRITER'S E-MAIL ADDRESS
dlawson@sidley.com

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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") to address three related topics in the above-captioned proceeding. First, if the Commission were, contrary to law, to decide that prepaid card services should be deemed telecommunications services notwithstanding enhancements that make those services information services under existing precedents, the Commission should apply that new rule only prospectively. Moreover, the presence of an interstate communication from the calling card platform to the cardholder, even if deemed insufficient to support an information service classification, provides the Commission with clear authority to exercise interstate jurisdiction over prepaid card calls, authority it should exercise to lessen the rate shock on low-income, military and other prepaid card users and to ensure a level competitive playing field that does not inappropriately favor resellers over vertically-integrated prepaid card providers. By exercising its interstate jurisdiction, the Commission would ensure that all prepaid card providers contribute equally to universal service (assuming that is its goal), while at the same time shielding consumers from the even larger rate hikes that would be required if intrastate access charges were to apply.

Second, it is obvious from the very low prices offered by all prepaid card providers (as low as a *penny* a minute) that AT&T's prepaid card competitors are not paying intrastate access charges (of as much as 10 cents or more per minute) or making universal service contributions in connection with these interstate information services. Accordingly, it would be patently unlawful for the Commission to issue *any* order in this proceeding that singled out AT&T (or

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vertically-integrated providers) for disparate regulatory treatment. Finally, Verizon's most recent *ex parte* claim that prior Commission decisions compel a telecommunications service classification grossly mischaracterizes the cited decisions.

1. AT&T has previously demonstrated that enhanced prepaid cards are information services under the statute and the Commission's rules and prior decisions. Thus, as AT&T has shown, if the Commission were to decide, as a policy matter, that all prepaid card services should be treated as telecommunications services, notwithstanding enhancements that would make those services information services under existing precedents, that decision obviously could not lawfully be applied *retroactively*.[1] Indeed, given the plain language of the statutory and Commission definitions and the weight of prior Commission precedent, even a ruling that telecommunications service classification would apply only to newly issued cards would be difficult to defend. However, regardless of how the Commission classifies prepaid card services, it is critically important that the Commission retain jurisdiction over these services.

Regardless of regulatory classification, the Commission unquestionably has authority to regulate prepaid card calls that include a non-call related interstate communication from the calling card platform to the cardholder. The Communications Act gives the Commission jurisdiction over "interstate communications by wire."[2] "Interstate communication," in turn, is defined as communication or transmission between one state and another.[3] When using AT&T's enhanced prepaid calling card services, the calling party calls the enhanced service platform and the platform communicates a stored advertisement to the calling party. This transmission is indisputably a "communication by wire," and it is 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. This is true whether or not the presence of that interstate "communication" is deemed adequate to support an information service classification.

And regardless of regulatory classification, that separate interstate communication is an integral part of the call and the service, 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. Indeed, no party suggests that a single call must be subject to both state and FCC regulation, and nothing in the Commission's prior decisions suggests that "end-to-

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[1] *See generally Ex Parte* Letter from David Lawson to Marlene Dortch, FCC (July 13, 2004).

[2] 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).

[3] 47 U.S.C. § 153(22).

end" jurisdictional analysis requires the Commission to cede jurisdiction over calls that plainly include a non-call-related interstate communication. In this regard, the Commission's prior decisions each addressed a service platform that performed only intermediate switching functions, which the Commission has long held are irrelevant to jurisdictional analysis. Here, in contrast, the platform initiates a *separate* interstate communication of additional information that all parties concede is not call-related.

It is important to recognize that a prospective telecommunications service classification would subject these services to universal service contribution *only* with respect to prepaid card traffic subject to the Commission's *interstate* jurisdiction. A determination that prepaid card calls that unquestionably include an interstate communication from the platform to the card holder are nonetheless "intrastate" calls, in contrast, would mean that only a fraction of prepaid card traffic would be included in the universal service contribution base (but that the prices of prepaid cards would nonetheless have to rise dramatically to cover massive cost increases associated with providers' payment of intrastate access charges).

If the Commission were (unlawfully, in AT&T's view) to change its regulatory classification of enhanced prepaid calling cards, the public interest would be best served were the Commission then also to exercise its authority to regulate prepaid card calls. Ceding Commission jurisdiction over calls that include interstate communications would dramatically distort competition and harm consumers by tilting the competitive playing field arbitrarily to favor prepaid card resellers, as these resellers would likely continue to treat the separately purchased interstate 800 inbound service to the calling card platform and the interstate outbound service to terminate calls to called parties as creating separate interstate "calls."

To preserve a level competitive playing field while the Commission completes long overdue comprehensive intercarrier compensation reform that should do away with above cost access charges, the Commission should rule that all prepaid card calls that include an interstate communication from the platform to the calling party are interstate calls. This would subject almost *all* prepaid card traffic provided under services that the Commission classifies as telecommunications services to federal universal service contributions going forward – which is presumably the only reason the Commission would depart from existing rules and precedents and deny enhanced prepaid card services information service status – while avoiding the even more significant rate shock that would attend any determination that such traffic is subject to intrastate access charges. Imposing intrastate access charges on these services would have a dramatic and devastating impact on the cost structure underlying these services – and hence on the central goal of universal service policy of maintaining affordable rates.

Of course, as AT&T has shown, the best way to advance the goals of universal service would be to maintain the current status of enhanced prepaid cards as information services. These cards are sold overwhelmingly in discount stores and through military exchanges, and thus provide uniquely affordable long-distance services to lower income households, members of minority groups, students, members of the military, senior citizens, recent immigrants, and

speakers of a language other than English. The Commission has a strong interest in maintaining the availability of these low-cost cards under both its traditional universal service authority under 47 U.S.C. § 151[4] – 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). The Commission should recognize that interest here, and leave these cards as unregulated information services.

To do otherwise would not increase the size of the universal service fund or augment the access revenues of the rate-of-return ILECs. It would merely shift more of the costs of the fund and the ILECs' revenue requirements to those least able to afford them – those people using enhanced prepaid cards – and away from less price sensitive, more affluent consumers who use cellular phones and 1+ dialing from home in lieu of prepaid cards. While the calling practices of many at the Commission will be unaffected by an increase in the price of enhanced prepaid cards, that will not be the case for millions of Americans. To the contrary, they will be adversely and materially affected by the increases occasioned by imposition of intrastate access and universal service charges. If the Commission now insists on imposing a basic services classification on enhanced prepaid cards, it should at least recognize the public interest implications of its decision. It should regulate those services under its own jurisdiction because a non-call-related interstate communication occurs from the calling card platform to the cardholder. Interstate jurisdiction would, moreover, shield from the most exorbitant intrastate access charges those consumers least able to afford them.

This solution need only be temporary, of course, because the Commission is considering fundamental intercarrier compensation reform that should phase out the existence of access charges altogether. Indeed, this is only one more example of how the entire access charge system has become a pernicious, competition-killing, universal service-retarding anachronism. The Commission has authority – and can best effectuate its core policies – by asserting interstate jurisdiction over these prepaid card calls.

2. In all events, *any* ruling the Commission issues in this proceeding *must* apply to the entire industry. Most prepaid cards are priced competitively with (or even lower than) AT&T's cards – a fact that would be economically impossible if these other providers were making federal universal service contributions and paying exorbitant intrastate access charges on such calls.

Accordingly, the Commission must recognize that any declaratory ruling in this proceeding must apply equally to the entire industry. Crafting a declaratory ruling to favor particular prepaid card providers with particular configurations would be arbitrary in ways that

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

would be quite obvious to any reviewing court. Excusing only a subset of enhanced prepaid card providers from either federal universal service contributions or intrastate access charge liability would confer a significant and unwarranted competitive advantage on those providers, even though their services compete directly with other prepaid card services. Courts have repeatedly held that the Commission may not discriminate among similarly situated providers merely to "aid the minnows against the trout, such as AT&T and MCI." *United States* v. *Western Electric*, 969 F.2d 1231, 1243 (D.C. Cir. 1992). *See also Competitive Telecommunications Ass'n* v. *FCC*, 87 F.3d 522, 531-32 (D.C. Cir. 1996); *Western Union Tel. Co.* v. *FCC*, 665 F.2d 1112, 1122 (D.C. Cir. 1981); *Hawaiian Tel. Co.* v. *FCC*, 498 F.2d 771, 776 (D.C. Cir. 1974); Memorandum Opinion and Order, *Bell Atlantic Mobile Sys., Inc. and NYNEX Mobile Communications Co.*, 12 FCC Rcd. 22280, ¶ 16 (1997) (the "[Commission's] statutory duty is to protect efficient competition, not competitors").

In particular, the Commission must ensure that it treats facilities-based and non-facilities-based providers equally. Many prepaid card providers are non-facilities-based resellers. They obtain 800 services from unaffiliated IXCs to provide the connection between their cardholders and the platform, and separately obtain long distance services to route communications from the platform to called parties. Moreover, when, as is almost always the case, the platform is in a different state than the calling and called parties, these prepaid card providers obtain *interstate* 800 services from unaffiliated carriers, and that they resell *interstate* long distance service purchased from an IXC.

There can be no lawful distinction between resellers and vertically integrated providers for these purposes. To the contrary, it would be manifestly unreasonable and discriminatory for the Commission to treat the underlying telecommunications service as interstate when purchased from an unaffiliated carrier, but intrastate when self-provided. Indeed, if AT&T were to buy the underlying wholesale 800 service for the link between the cardholder and the platform from an *unaffiliated* carrier, that underlying service would unquestionably be a jurisdictionally interstate service when the cardholder and platform are in different states; the same would be true if AT&T bought the terminating link (from the platform to the called party) from an unaffiliated carrier. Courts have repeatedly held that agencies must justify disparate treatment of similarly situated parties, and there is no conceivable justification for treating IXCs carrying identical traffic differently merely because in one case the prepaid card provider is vertically integrated.[5] Indeed,

[5] *See, e.g., Adams Telcom, Inc.* v. *FCC*, 38 F.3d 576, 581 (D.C. Cir. 1994) ("We have . . . reminded the FCC of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment" (internal quotation marks omitted)); *Melody Music, Inc.* v. *FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (to justify disparate treatment of parties, FCC "must explain its reasons and do more than enumerate factual differences, if any, between [them]; it must explain the relevance of those differences to the purposes of the Federal Communications Act"); *FEC* v. *Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) ("[A]n agency's unjustifiably disparate treatment of two similarly situated parties works a violation of the

such an outcome would be blatantly discriminatory, in violation of Sections 201 and 202 of the Act.[6]

Such a rule would discriminate against facilities-based carriers and would place such carriers at a severe disadvantage with respect to carriers that relied on capacity from other carriers.[7] Such a rule would ultimately accomplish little, because providers could continue to offer such services while avoiding vertically integrated provision of the service. Rather, such a rule would merely create perverse incentives for all providers to lease capacity from other carriers (or to lease from one another) rather than self-provide telecommunications over their own facilities.[8]

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arbitrary-and-capricious standard.").

[6] Under Section 202(a) "like" services must be treated similarly. The "test of whether services are 'like' is functional similarity or equivalence." Tentative Decision, *Investigation of Special Access Tariffs of Local Exchange Carriers*, 8 FCC Rcd. 1059, ¶ 19 (1994) ("*SNFA Remand Findings*"). "This test looks to the nature of the service" to determine "whether the services 'are different in any material functional respect.'" *Id.* And the test considers whether services are functionally equivalent "from the perspective of consumers." *Id.* ¶ 20; *see also Ad Hoc Telecommunications Users Committee* v. *FCC,* 680 F.2d 790, 796 (D.C. Cir. 1982). In this regard, the D.C. Circuit and the Commission have emphasized that "the functional equivalency test should be allowed to yield a determination that . . . services are 'like,' whether or not they are 'identical.'" *SNFA Remand Findings* ¶ 20; *Ad Hoc* v. *FCC*, 680 F.2d at 797. The Commission has explained that discriminatory rates are unjust or unreasonable if they are not "justified by considerations such as differences in cost" or do not serve the "goals of the Act." *SNFA Remand Findings* ¶ 135. Disparate treatment of the underlying telecommunications in a prepaid card call based on whether the provider is vertically integrated would violate section 202(a) of the Communications Act because it would establish an unjust and unreasonable rate difference for like (in fact, identical) services.

[7] If a carrier were to sell 800 service to affiliated and unaffiliated service providers on different terms, such practices could constitute unlawful discrimination. *See, e.g.,* Report and Order, *Policy And Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd. 7418, ¶ 39 (2001) ("In order to ensure that competitive enhanced service providers continue to have non-discriminatory access to the underlying transmission capacity, we do not eliminate the existing requirement that facilities-based carriers offer such capacity to these providers on the same terms and conditions under which they provide such service to their own enhanced service operations.").

[8] Even an across the board rule that intrastate access charges apply both to calls by customers of facilities-based prepaid card providers and to calls by customers of non-facilities-based prepaid card providers would raise serious enforcement and discrimination risks given that non-facilities-based providers may purchase interstate 800 services to the platform and interstate outbound

3. Verizon's latest *ex parte* letter, putting aside the overheated rhetoric, largely rehashes claims that have already been refuted. *See Ex Parte* Letter from Ann Rakestraw, Verizon, to Marlene Dortch, FCC (July 15, 2004) ("Verizon Letter"). A brief response, however, is in order.

Verizon relies heavily on the Commission's *Time Machine* order as establishing that enhanced prepaid cards are basic telecommunications services. *See* Verizon Letter at 4-5 (citing Memorandum Opinion and Order, *The Time Machine*, 11 FCC Rcd. 1186 (1995). Verizon completely misreads the order, which does not even address that question. In *Time Machine*, the petitioner argued that 800-access debit card calls that included *no* non-call-related enhancements were interstate. The petitioner cited AT&T's Teleticket service in support, but AT&T took no position on the petition. *Time Machine* ¶ 24 n.55. And, contrary to Verizon's contention, the Commission never addressed the separate question whether the ability of the end user to make calls as part of AT&T's enhanced "Teleticket" service affected the classification of the Teleticket service. Rather, in the passage on which Verizon relies, the Commission assumed the Teleticket service *was* enhanced and simply stated that the affiliated enhanced service providers must under the *Computer Inquiry* rules acquire the input – the underlying 800-access service – as an interstate telecommunications service. *Time Machine* ¶ 39 ("[t]he long distance calling capability using the Teleticket debit card, however, is a basic debit card interstate calling capability that must be taken by AT&T's enhanced service provider pursuant to tariff").[9]

Verizon is equally confused about the relevance (or lack thereof) of the Commission's *Computer II* and *Bundling* orders. *See* Verizon Letter at 4-5. As Verizon notes, the Commission has permitted a carrier to offer "bundles" of otherwise individually marketed "stand-alone" telecommunications and information services, so long as the carrier continues to comply with the *Computer II* obligation to make the "underlying transmission capacity of the enhanced service available on nondiscriminatory terms" and includes in its universal service contribution base revenues attributable to any "stand alone" telecommunications services that are included in a bundle of service that also includes "stand alone" information services. *See* Report and Order, *Policy and Rules Concerning the Interstate Interexchange Marketplace*, 16 FCC Rcd. 7418, ¶¶ 47-54 (2001) (describing application of rules to a bundle of basic telephone service and a separately available voice mail service). As Verizon itself concedes (Verizon Letter at 6), the test is "whether, functionally, the consumer is receiving two separate and distinct services." *Report to Congress* ¶ 60. Consumers universally regard enhanced prepaid cards as a single

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services from the platform from two separate IXCs, and even a single IXC providing both links could not jurisdictionalize calls on a calling-to-called party basis if it did not control the platform.

[9] The Commission's jurisdictional resolution of Time Machine's service is equally irrelevant to the jurisdictional question here. Time Machine's platform performed only intermediate switching functions, which the Commission has long held are irrelevant to jurisdictional analysis, whereas in this case the platform initiates a separate interstate communication of additional information that Verizon concedes is not call-related.

service, not two separately available services that are bundled together. Verizon's references to the *Computer II* and *Bundling* orders are therefore inapposite.

Verizon also repeats the claim that if AT&T's petition is granted, then all long distance calls could be converted to interstate by the addition of a message like "Thank you for using Verizon." Verizon is simply wrong, however, in claiming that the only relevant "communication" in an enhanced prepaid card call is the one between the cardholder and the called party. *See* Verizon Letter at 7. Here, the platform also indisputably communicates with the cardholder, through an advertisement sought and approved by the third party (who is *not* AT&T). Verizon may wish to denigrate this advertisement, but it cannot possibly deny the fact that there is a separate – usually interstate – "communication" occurring. While indications like "Thank you for using Verizon" serve a call setup function, by confirming to the end-user that she has connected with the carrier she expected to use, the affirmative advertisements and other messages in prepaid card calls have no conceivable relationship to switching functions or carrier identification and unquestionably constitute a "communication" within the meaning of the Act.[10]

Respectfully submitted,

/s/ David L. Lawson

David L. Lawson

cc: Matthew Brill
Scott Bergmann
Dan Gonzalez
Christopher Libertelli
Jessica Rosenworcel
William Maher

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[10] Verizon also wrongly claims that by purchasing interstate access services in connection with its enhanced prepaid card service, AT&T has "conceded" that its service is a telecommunications service that "at a minimum" is subject to interstate access services. That is absurd. An information service classification merely gives the service provider the *option* of purchasing end user services, rather than access services, to originate and terminate traffic. For operational reasons, information service providers may, and, as AT&T did here, frequently do, nonetheless *choose* to buy some access services. But the service provider's choice to do so in no way overrides the regulatory classification or constitutes a "concession" that the traffic in question is telecommunications service traffic.

Tamara Preiss
Steve Morris
Jeff Dygert
Paula Silberthau
Christopher Killion