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Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

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

Dear Ms. Dortch:

AT&T Corp.'s prior submissions in this docket show that the Commission has clear authority under existing law to regulate enhanced prepaid card ("EPPC") services as interstate services and that there are numerous compelling reasons for the Commission to do so.¹ As detailed below, the Commission's recent *Vonage Order* provides further confirmation that EPPC services are properly subject to the Commission's interstate jurisdiction and that it is neither necessary nor appropriate to allow incumbent LECs to impose exorbitant intrastate access charges that would deny low-income, military and other consumers the important benefits of these uniquely affordable services.²

In the *Vonage Order*, the Commission considered "mixed-use" or "jurisdictionally mixed" services that, like AT&T's EPPC service, can involve both

¹ See, e.g., October 12, 2004 *ex parte* Letter from Judy Sello to Marlene H. Dortch ("October 12 *ex parte*").

² *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267 (rel. Nov. 12, 2004) ("*Vonage Order*").

interstate and intrastate communications (often in a single communications session). The Commission recognized that irrespective of information service, telecommunications service or other definitional classifications, such a service should not be burdened by state economic regulation where the characteristics of the service “preclude any practical identification of, and separation into, interstate and intrastate communications” and permitting state regulation “would thwart federal law and policy.” *Id.* ¶ 14. In such circumstances, the Commission exercises its authority “to preempt inconsistent state regulations that thwart federal objectives, treating jurisdictionally mixed services as interstate with respect to the preempted regulations.” *Id.* ¶ 17. Indeed, the Commission noted that “the fact that a particular service enables communication within a state does not necessarily subject it to state economic regulation” at all, citing numerous precedents “where for regulatory purposes, treatment as an interstate service prevailed despite this ‘intrastate’ capability.” *Id.* ¶ 22.³

A straightforward application of the *Vonage Order* confirms that AT&T’s EPPC service is, for regulatory purposes, appropriately subject only to interstate economic regulation. Like the services at issue in the *Vonage Order*, AT&T’s EPPC service enables the end user to place telephone calls from wherever the end user is geographically located to any other point in the world. Also like the services at issue in the *Vonage Order*, it is impossible at the time the service is sold to the end user for the seller of the service to know the beginnings or endpoints of communications that will be made using the service. And, even more so than the services at issue in the *Vonage Order*, virtually all communications sessions made using the EPPC service involve *some* interstate communication through, at a minimum, the calling party’s receipt of, and interaction with, non-call-routing related information stored at the platform.⁴

³ See also *GCI v. ACS*, 16 FCC Rcd. 2834, ¶ 24 (2001) (“[i]t is well settled that when communications, such as ISP traffic, are jurisdictionally mixed, containing both interstate and intrastate components, the Commission has authority to regulate such communication”); *Intercarrier Compensation for ISP-Bound Traffic*, Notice of Proposed Rulemaking, 14 FCC Rcd. 3689, ¶ 18 (1999); *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶¶ 57-58 (2001) (“*ISP-Bound Traffic Order*”); *GTE Tel. Operating Cos.*, 13 FCC Rcd. 22466, ¶¶ 22-26 (1998) (DSL services should be tariffed at the state level only where the service is *entirely* intrastate).

⁴ As AT&T has previously explained, 17-20% of EPPC calls involve *only* an interstate communication with the platform; more than 65% of all EPPC calls are *entirely* interstate (or international), on a calling-to-called party basis, even disregarding the interstate communication from the platform to the calling party; and many other EPPC calls involve multiple interstate communications with the platform interspersed with multiple calling/called party communications that may be between parties in the same or different states. October 12 *ex parte* at 3.

Moreover, AT&T's EPPC service shares with the services at issue in the *Vonage Order*, the single criterion that the Commission ruled "[i]n particular" warrants treating the service as interstate for economic regulatory purposes: the service "includes a suite of integrated capabilities and features . . . that allows customers to manage personal communications dynamically, including enabling them to originate and receive voice communications and access other features and capabilities." *Id.* ¶ 32. Like AT&T's EPPC service, the services at issue in the *Vonage Order* "enable subscribers to utilize multiple features that access different" locations and stored information "during the same communication session . . . none of which the provider has a means to separately track or record." *Id.* ¶ 25. And, as in the case of Vonage's service, AT&T's EPPC service does not separately identify and measure the intrastate communications and interstate communications (*e.g.*, from the platform to the calling party) that may occur in a single communications session, and there is accordingly no practical way to sever EPPC into discrete interstate and intrastate communications that would allow imposition of intrastate access charges only to intrastate calling functionalities without also interfering with the interstate aspects of EPPC. *See Vonage Order* ¶ 32.⁵

The *Vonage Order* also confirms that any requirement that a service provider implement mechanisms to allow tracking and measurement so that LECs could separately assess interstate access charges on the *interstate* communications that take place on an enhanced prepaid card call and intrastate access charges on other communications on the same call would be unprecedented and inappropriate. Rather, as the Commission explained, the requisite severability "difficulty" is established by showing that, as here, there is no "service-driven" reason separately to track interstate and intrastate communications in a single communications session. *Id.* ¶ 29 (where there is no "service-driven reason to incorporate such capability . . . [w]e have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purposes at issue and preempting state regulation where necessary").⁶

⁵ Although the Commission also noted two other characteristics of the Vonage service, broadband and IP, those characteristics are relevant not to the practicality of separately identifying and tracking interstate and intrastate communications – as the *Vonage Order* notes, the cable broadband IP services at issue, for example, have fixed origination points – but to the federal policies that would be undermined by state economic regulation. And, as AT&T has previously demonstrated, different, but equally important, federal policies favoring, *inter alia*, affordable services for underserved consumers, would be undermined by the imposition of intrastate access charges on EPPC services. *See* October 12 *ex parte* at 4-5.

⁶ *See also* *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, 3320-21, ¶ 21 (2004) ("*Pulver*") ("Attempting to require Pulver to locate

Imposition of intrastate access charges on EPPC calls would, moreover, plainly transgress important overarching federal policy objectives. Most fundamentally, abdicating interstate authority would frustrate the important federal policy of maximizing access to interstate services. By partnering with discount stores and other advertisers, enhanced prepaid card providers are 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. And, given customer preferences and the inherent mobility of prepaid calling cards, it is obviously infeasible to offer an interstate only service.

For these reasons, as in *Vonage*, it is vitally important that the Commission assert jurisdiction over these interstate services, and preempt imposition of intrastate access charges, to keep these uniquely affordable cards as an *option* available to traditionally excluded groups. For recent immigrants, military personnel and the poorest of the poor, prepaid cards are often a substitute for wired or wireless phone service and are their *only* way to make telephone calls. EPPC cards are an ideal vehicle for these groups to obtain access to the telecommunications network. The Commission has a strong 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. § 151 – 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 are available at rates that are “affordable.” 47 U.S.C. § 254(b)(1), (i). Because enhanced prepaid cards are disproportionately purchased by low-income, minority, and other protected groups, it would be *inequitable* to force those end-users to bear the burden of intrastate access charges, which concededly contain implicit subsidies that violate the Act. *See* 47 U.S.C. § 254(f), (k).

Finally, the *Vonage Order* also addressed other baseless arguments that incumbent LECs have raised in this proceeding in support of dual jurisdiction. The Commission declined to accept the suggestion that a service should be subject to dual federal-state regulation merely “*because it is functionally similar* to traditional local exchange and long distance voice service,” *id.* ¶ 22 (emphasis in original). And the Commission cautioned against formalistic application of “geographic ‘end-to-end’ analysis to distinguish interstate from intrastate communications” where, as here, the multiple communications on a single communications session do not necessarily have a single “point of ‘termination’ in the traditional sense.” *Id.* ¶ 24 & n. 89 (*quoting GTE ADSL Order*, 13 FCC Rcd at 22478-79, ¶ 22). The Commission concluded that where,

(footnote continued from previous page)

its members for the purpose of adhering to a regulatory analysis that served another network would be forcing changes on this service for the sake of regulation itself, rather than for any particular policy purpose.”).

as here, it is “difficult to apply an end-to-end approach,” the Commission may treat the entire service as interstate so long as more than a *de minimis* amount of the communications at issue are interstate – particularly where, as here, percentage proxies or other approaches “would not avoid frustration of the Commission’s policy objectives.” *Id.* n.98.

In short, it is now more clear than ever that the Commission can and should clarify that EPPC services are, for economic regulatory purposes, interstate services that are not subject to intrastate access charges. If the Commission were to abdicate that authority, and permit the ILECs to assess intrastate access charges, it would accomplish nothing other than removing a uniquely affordable long-distance option for low-income and military end-users, while further inflating ILECs’ already excessive profit margins and creating unlawful discrimination in favor of resale providers.⁷

One electronic copy of this Notice is being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission’s rules.

Respectfully submitted,

/s/

Judy Sello

cc: Christopher Libertelli
Matthew Brill
Daniel Gonzalez
Jessica Rosenworcel
Scott Bergmann
Jeffrey Carlisle
Michelle Carey
Tamara Preiss
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⁷ See October 12 *ex parte* at 5-6.