

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
AT&T Corp. Petition for Declaratory) WC Docket No. 03-133
Ruling Regarding Enhanced Prepaid Calling)
Card Services)
)
)
)

MOTION FOR STAY PENDING APPEAL, SUBJECT TO POSTING OF SECURITY

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INTRODUCTION AND SUMMARY

In its Order and Notice of Proposed Rulemaking issued February 23, 2005 (“Order”), the Commission declared that enhanced prepaid calling card (“EPPC”) services that AT&T has offered since 1994 are “telecommunications services,” not “information services.” On this basis, the Commission held that AT&T’s revenues from these EPPC services are subject to universal service charges when the calling and called parties are not in the same state. The Commission also concluded that these services are subject to intrastate access charges when the calling and called parties are in the same state because it deemed the interstate communications that are part of those calls not to be “relevant” communications. The Commission further ordered AT&T to file with the Universal Service Administrative Company (“USAC”) within 30 days revised Forms 499-A, categorizing EPPC revenues as subject to universal service charges, for the entire period that AT&T provided service under EPPCs, and ordered USAC to issue revised invoices for universal service charges to AT&T within 60 days of the effective date of the Order. AT&T has estimated that the total claims for retroactive liabilities for USF and intrastate access charges will be as much as \$553 million – with more than \$150 million of this amount attributable to the

universal service charges that are within the Commission's jurisdiction to assess. AT&T has filed a petition for review of the Order. *AT&T Corp. v. FCC*, No. 05-____ (D.C. Cir.).

Pursuant to Sections 1.41 and 1.43 of the Commission's Rules, AT&T respectfully requests that the Commission grant a stay pending appeal of this Order insofar as it imposes or allows retrospective liabilities on AT&T – on the condition that AT&T secure by May 15, 2005, a letter of credit that would cover the amount of the federal liabilities that are hereafter assessed by USAC, plus interest that would accrue beginning on May 15, 2005. As detailed below, this arrangement will fully protect all federal interests pending appeal, and the Commission has held in similar circumstances that stays are appropriate in such cases even when the traditional four-factor test for a stay is not met. Here, however, this stay is also necessary to prevent irreparable harm during the pendency of a very substantial appeal – while fully protecting the Commission, USAC, and others if AT&T's appeal were unsuccessful.

First, AT&T will suffer irreparable harm if a stay is not entered. Without a stay, AT&T can irretrievably lose money it pays to the USAC, for the Commission's rules do not provide for a full refund of those monies to AT&T in the event AT&T's appeal is successful. To the contrary, AT&T would be entitled to recover only a portion of its payments to the USAC, and the Commission's rules also do not provide for the payment of interest on refunds. Payment of monies that cannot be recouped is irreparable harm. Moreover, absent a stay, incumbent carrier litigation will go forward against AT&T across the country in state regulatory and court proceedings – litigation that would be rendered wholly unnecessary if the Commission were to be reversed, wasting enormous judicial and litigant time and resources.

By contrast, neither the USAC nor the incumbent carriers seeking retroactive intrastate access fees will be harmed by entry of a stay. They are sure to obtain full compensation if the

Commission is affirmed. There can be no reasonable question about AT&T's capacity to pay, and AT&T is additionally proposing a stay conditioned on a requirement that AT&T secure a letter of credit for the federal USF charges that are assessed and for the interest that would accrue on these amounts during the appeal – fully protecting federal interests pending appeal.

Further, as detailed below, AT&T has substantial grounds for appeal and will likely prevail on appeal. Most starkly, in declaring that the EPPC services in question are not information services, the Commission did not follow its own regulations and holdings. In particular, the Commission has repeatedly held that the category of “information services” includes all services that are “enhanced services” within the meaning of 47 C.F.R. § 64.702, which provides that a service is enhanced if it is “offered over common carrier transmission facilities” and provides “additional” information to subscribers or “involves subscriber interaction with stored information.” Because the EPPC services are offered over common carrier facilities and provide one of several hundred messages selected by the retail provider of the card before users can place a call, AT&T contended that the EPPC services at issue are enhanced within the meaning of this regulation. In the Order, the Commission simply ignored the terms of § 64.702, gave an unprecedented construction to statutory terms (“offering” a “capability” to obtain information), and treated as dispositive that the EPPC service *includes* the same transmission capabilities as do ordinary basic telecommunications services. In so holding, the Commission departed, without explanation, from over three decades of Commission precedents and retroactively rewrote its regulations to adopt tests that the Commission expressly rejected in the past. Thus, in addition to AT&T's substantial claims that the Commission could not prospectively declare these EPPC services to be “telecommunication services,” the imposition of retroactive liabilities for USF and intrastate access charges violated the duty of

reasoned decisionmaking, the principle that agencies are bound by their own regulations unless and until changed, and the requirement that agencies balance equities before subverting reliance interests.

Finally, the Order is also premised on a clearly erroneous view of the prepaid card industry and the costs and features that have allowed the extraordinarily low rates that end users receive in this intensively competitive segment of telecommunications. In particular, the Commission stated “that numerous carriers have asserted that they comply with the requirements to contribute to universal service mechanisms and pay intrastate access charges” while “continuing to offer calling card rates that are competitive with the rates offered by AT&T.” Order ¶ 37. On this basis, the Commission concluded that its Order would not subvert the interests of the low income users and would accommodate the congressional concerns that nothing be done that would directly or indirectly increase prepaid calling card rates for military troops and their families. *Id.*, ¶ 37 n.79. Indeed, on this basis, Chairman Powell concluded that the Commission’s decision “level[ed] the playing field” among prepaid card providers. *Id.*, Statement of Chairman Michael K. Powell.

These premises of the Order are false, and the Commission should have known better. The leading providers of basic prepaid card services are not paying USF or intrastate access charges. For example, IDT – the nation’s largest provider of prepaid cards – has recently acknowledged that it does not contribute to USF on all its prepaid card traffic.¹ In addition, the attached declaration of Adam Panagia demonstrates that IDT, MCI, Sprint, Verizon, and others are routing prepaid card calls through foreign countries and delivering traffic for termination as if it were international traffic or are otherwise delivering traffic without the originating CPN that

¹ See Thomson StreetEvents, “Final Transcript: IDT-Q2 2005 IDT Corporation Earnings

would permit its identification as intrastate traffic. Thus, under any view, the Commission's Order will defeat one of its stated objectives. If the Order's rulings are strictly enforced without discrimination against other carriers, the Order will sharply increase rates on all prepaid card users, including the members of the military and their families who were of such concern to Congress. By contrast, if the Order imposes massive retrospective liabilities uniquely on AT&T, the Commission manifestly will not have "level[ed] the playing field," but will have anticompetitively handicapped a carrier for forthrightly bringing an industry-wide issue to the Commission for resolution.

All the reasons that support issuance of the requested stay are set forth more fully below. AT&T also wishes to inform the Commission that it will be required to seek a stay in the court of appeals if the Commission has not granted AT&T's request by April 11, 2005.

BACKGROUND

1. Prepaid calling cards allow end users to make long distance telephone calls without presubscribing to an interexchange carrier ("IXC") or using a credit card. The end user dials a number to reach a computer platform that requests the card's personal identification number for billing and verification. The end user then dials the destination number and the platform routes the call to the recipient. Prepaid cards are generally provided at wholesale by interexchange carriers to retail outlets, which provide the cards to end users.

In 1994, AT&T introduced an enhanced prepaid calling card service that gave retail providers of the cards the capability to provide messages to their end user customers every time the cards are used to access the platform and before calls are placed. In particular, under the version of the service addressed in the Order, an end user customer who dials into the platform

Conference Call," March 10, 2005, at 14.

cannot dial the destination number until after he or she listens to a message or other information provided by the retail issuer of the card.

Because retail issuers have selected a variety of messages, AT&T EPPC platforms now store and communicate to end users more than 100 different messages that are of varying duration and content. These range from advertisements for merchants (“your local post office”), to messages from public figures requesting donations to charities, to information about such programs as “Upromise,” an Internet-based college savings plan, “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, to “Paypal,” a secure method of purchasing goods and services over the Internet.²

2. When AT&T introduced this EPPC service in 1994, the Commission’s regulations distinguished between “basic” transmission services that are directly regulated under Title II of the Communications Act and “enhanced” services that are not themselves regulated under Title II (but that were subject to requirements that dominant carriers make the underlying transmission components of their services available by tariff). Basic services rely on transmission facilities (and associated switching and functions) to deliver information of the subscriber’s choosing without change. By contrast, “enhanced services” are defined as services that are “offered over common carrier transmission facilities” and that “employ computer processing applications” that (1) act on the format, content, or similar aspects of the transmitted information, (2) “provide the

² AT&T also has developed a version of the platform under which calling parties receive a series of options other than making a call when they dial into the platform (for example, press “1” to learn about specials at [a particular retailer], press “2” to add minutes to your card, press “3” to donate minutes to troops serving overseas). When the selected option is completed or if no option is selected, the caller is instructed to dial the destination number. At that point, the platform transmits the advertisement. The Commission did not address the classification of this EPPC service in the Order, but issued an NPRM to address that issue. Order ¶ 39.

subscriber additional, different or restructured information,” or (3) “involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a).

When the Commission adopted those regulations, it expressly rejected an approach that made the classification of the service turn on the “primary purpose” of the service: that is, whether it was “essentially” a communications service or “essentially” a data processing service. *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 92-101 (1980). Rather, it stated that “an enhanced service is *any* offering over the telecommunications network which is more than a basic transmission service.” *Id.* ¶ 97 (emphasis in original). In so ruling, the Commission acknowledged that “some enhanced services may do some of the same things that regulated communications services did in the past” (*id.* ¶ 132) and “are not dramatically dissimilar from basic services” (*id.* ¶ 130). But the Commission determined that it was irrelevant that some enhanced services would be close substitutes for basic services, for it wanted to have a “bright line” test that was easily administered and that would assure that there was no Title II regulation of any computer-based services offered over telecommunications transmission facilities. *Id.* It concluded that the rules that assured “non-discriminatory access to [underlying] common carrier telecommunications facilities” would assure that enhanced services would be competitively priced and that basic services would remain available at reasonable prices. *Id.*

3. When AT&T introduced its EPPC service in 1994, it was required (as a then “dominant carrier”) to propose a classification of the service to the Commission. AT&T proposed that the service be treated as enhanced because it both provides subscribers with additional information and involves subscriber interaction with stored information.³ Following

³ See AT&T 11/1/04 *Ex Parte* (attaching AT&T CAM amendment filing) (in the “nonregulated services” section of the filing, describing the service as a “customized Pre Paid Card that contains promotional advertisements for specific customers. These customers provide the cards

a public notice and comment period in which no one challenged AT&T's proposed classification, the Common Carrier Bureau accepted it and AT&T was permitted to proceed with the EPPC offering on a nonregulated enhanced basis.

4. In the Telecommunications Act of 1996, Congress did two things that are relevant to this case. First, it largely codified the Commission's existing regulations by limiting Title II regulation to "telecommunications services" (basic services) and barring such regulation of "information services." In a series of decisions, the Commission has held that "all of the services" that are enhanced services under its rules are "information services" and "that the term 'information services' [also] includes services that are not classified as 'enhanced services' under the Commission's current rules." *Non-Accounting Safeguards*, 11 FCC Rcd. 21905, ¶¶ 102-103 (1996); *accord*, *Universal Service Report*, 13 FCC Rcd. 11501, ¶ 45 (1998).

Second, Congress adopted a new method of funding universal service through explicit support payments to a federally administered fund. The Commission determined that it would require such support payments only from revenues on "telecommunications services" and that revenues from "information services" would be exempt from making such payments. *Universal Service*, 12 FCC Rcd. 8776, ¶¶ 788-90 (1997). At the time, the Federal-State Joint Board on Universal Service had noted that the definition of information services included many close substitutes for telecommunications services and recommended that "the Commission re-evaluate which services qualify as information services" for purposes of the exemption from USF support. *Universal Service*, 12 FCC Rcd. 87, ¶ 790 (1996). The Commission responded by issuing a Notice of Inquiry to address that issue, but the Commission has taken no action to limit the scope

to their end-user customers who will hear the advertisements initially when they dial into the PPPC platform and on every subsequent call while dialing within the PPPC platform. This activity is an enhanced service that utilizes network plant.").

of the exemption from universal service support. Rather, it has since reiterated that its rules “result in different regulatory treatment for firms that arguably provide similar functionalities based on whether the firms offer ‘telecommunications’ or ‘information services.’” *Universal Service Report*, 13 FCC Rcd. 11501, ¶ 39 (1998).

5. Because its EPPC service had been classified as enhanced under the Commission’s existing rules – and was thus an “information” service – AT&T did not pay USF support on its revenues from this service after the 1996 Act was passed. This conduct by AT&T was not challenged.

Instead, what gave rise to the declaratory ruling proceeding was a dispute with the Alaska commission over whether AT&T EPPC service was subject to intrastate access charges in conditions where an end user located in Alaska was served through a platform located in another state and placed a call to an Alaska telephone number. AT&T took the position that the dialing of the platform and the listening to the information supplied by the retailer was a separate interstate communication – such that the EPPC service was jurisdictionally interstate and subject to interstate access charges. When it appeared that the Alaska commission would disagree, AT&T filed a petition with the Commission that sought a declaratory ruling on *this* jurisdictional issue (leading the Alaska commission to stay its subsequent intrastate access charge assessments on the condition that AT&T provide a corporate guarantee to cover any amounts due from Alascom). However, in their responses to AT&T’s petition for a declaratory ruling from the Commission, incumbent LECs challenged AT&T’s failure to make USF support payments on its EPPC revenues as well.

6. In the Order, the Commission held that this EPPC service is a “telecommunications service,” not an “information service.” The Commission concluded that the AT&T service does

not satisfy the statutory definition of “information service” because the service provides unsolicited information to end users automatically and thus “offer[s]” end users only the capability to make a telephone call. Order ¶ 15. The Commission also held that the service’s provision of advertisements or other information is an “adjunct to basic service” and therefore not an enhanced service under the Commission’s rules. On these bases, the Commission held (1) AT&T is retroactively required to pay USF support on the interstate revenues associated with the service and (2) that the EPPC services are subject to intrastate access charges when the calling and called party are in the same state.

7. AT&T is moving its enhanced prepaid calling card traffic to a new platform that was not addressed in the Order. AT&T here seeks a stay of the Order only insofar as it imposes or supports retroactive liabilities for past periods.

ARGUMENT

In ruling on applications for a stay pending appeal, the Commission ordinarily assesses the likelihood of success on appeal, the extent to which the movant will suffer irreparable harm in the absence of a stay, and whether the stay will harm private parties, governmental entities like USAC or the public interest. See *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Where “there is a particularly overwhelming showing in at least one of the factors, [the Commission] may find that a stay is warranted notwithstanding the absence of another one of the factors.” *Biennial Regulatory Review*, 14 FCC Rcd. 9305, ¶ 4 (1999). See also *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (“stay pending appeal” proper “where the likelihood of success is not high but the balance of hardships favors the applicant” or “whether the probability of success is ‘high’ and ‘some injury’ has been shown”).

In this regard, the Commission has held that where, as here, a movant has agreed to post security which covers the entire amount of the federal liabilities that could result from an order

and that accrues interest during the pendency of the appeal, no significant public or private harm can result from the stay and the stay may be granted without regard to whether the traditional four factor test is satisfied.⁴

As explained below, AT&T has established that each of the traditional factors is satisfied, so a stay of the Order's retroactive liabilities should be entered under any standard.

I. AT&T HAS A SUBSTANTIAL LIKELIHOOD OF PREVAILING ON THE MERITS.

1. AT&T has a substantial likelihood of succeeding on its claim that the Commission committed reversible error in holding that the EPPC services are not "information services," which was both the basis for the conclusion that USF charges apply and an essential premise of the jurisdictional determination. Among other things, this holding is contrary to the Commission's regulations and is an unexplained departure from its other past precedents.

The Commission has twice held in the most unequivocal terms that any service that meets the definition of "enhanced services" under 47 C.F.R. § 64.702(a) is an "information service" under the Act; indeed, the Commission has made clear that the statutory category of "information service" is *broader* than the "enhanced service" definition. *Non-Accounting Safeguards*, 11 FCC Rcd. 21905 ¶ 102 (1996); *Universal Service Report*, 13 FCC Rcd. 11501 ¶ 33 (1998). AT&T's central argument in this proceeding was that EPPC services fit squarely within the Commission's "enhanced service" rule (and therefore the Act's definition of "information service"), because the EPPC services are "offered over common carrier

⁴ *Virgin Island Tel. Corp. Tariff FCC No. 1*, 7 FCC Rcd. 4235, ¶ 13 (1992) ("It appears that Vitelco has not met the requirements for a stay, particularly regarding irreparable injury, under the *Virginia Petroleum Jobbers* line of cases which we have applied in other contexts. Nevertheless, we are exercising our equitable discretion (*see, e.g.*, 5 U.S.C. § 705) to stay the refund and reporting requirements, conditioned on Vitelco filing with the Commission within 14 days of the release of this Order proof that the amounts owed as a result of the decision have been deposited in an interest bearing escrow account").

transmission facilities” and *both* “provide the subscriber additional, different or restructured information,” and “involve subscriber interaction with stored information.” 47 C.F.R. § 64.702(a).

The Order simply ignored this central, dispositive claim. Instead, the Order tried to avoid the issue by affirmatively misrepresenting its earlier holdings. The Commission asserted in a footnote that the “enhanced service” definition is merely “similar” to the statutory definition of information services (*see* Order ¶ 15 n.26), contrary to the explicit holdings that anything that falls with the “enhanced service” rule also falls within the statutory definition of “information service.” *Non-Accounting Safeguards Order* ¶¶ 102-07. The Order should be reversed for this reason alone. “An agency’s failure to come to grips with conflicting precedent constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking.” *Ramaprakash v. FAA*, 346 F.3d 1121, 1125 (D.C. Cir. 2003) (citation omitted).

Then the Order gave a new and unprecedented construction to the statutory definition of “information services,” concluding that AT&T’s service does not qualify under the statutory language because the “capability” of accessing retailers’ messages has not been formally “offered” to the end users. This holding ignores the Commission’s own regulations and is otherwise an unexplained departure from the Commission’s precedents. The Commission’s principal theme is that end users purchase EPPC cards primarily to place basic telephone calls, and that the stored messages are “incidental” and “not . . . an integral or essential part of the service” offered to the consumer. Order ¶¶ 15-20. Here, the Commission has resurrected the “primary purpose” test that had made the classification of a service turn on whether it was “essentially” a communications service or “essentially” a data processing service. *First Computer Inquiry*, 28 F.C.C.2d 267, ¶ 27 (1971).

However, because that test had proved unworkable in practice, the Commission repealed it in 1980 and adopted the simple, bright-line test that continued to apply until its EPPC order. *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 97, 107, 130 (1980). In this regard, the Commission expressly recognized that “some enhanced services” under this bright-line rule would include basic calling capabilities and would not be “dramatically dissimilar from basic services.” *Id.* ¶ 130. But the Commission concluded the bright-line rule was necessary because “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,” with the “danger that such proceedings could lead to unpredictable or inconsistent regulatory definitions.” *Id.* The Order is thus an unexplained departure from these precedents as well.

Nor can the Order be defended on the basis of the Commission’s alternative suggestion that EPPC services are not enhanced services or information services because they are “adjunct to basic.” The “adjunct-to-basic” exception is inapposite, for it applies only to services that are *not* enhanced services within the FCC’s regulation. It encompasses only computerized functions within the telecommunications network itself that are necessary for or integrally related to the completion or billing of a basic call, such as computer-provided functions that relate to call setup, call routing, call cessation, called or calling party identification or billing and accounting and that therefore “facilitate[] the establishment of a transmission path over which a telephone call may be completed.” *Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd. 20391, ¶ 39 (1998).⁵ Congress, moreover, has excluded from the definition of

⁵ *NATA/Centrex Order*, 3 FCC Rcd. 4385, ¶¶ 11-12, 32 (1988); *see also Computer II*, 77 F.C.C.2d 384, ¶¶ 97-98 (1980); *Communications Protocols under Section 64.702*, 95 F.C.C.2d 584, ¶ 28 (1983).

information services only those computer 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).

The stored advertising messages at issue here have no conceivable relationship to the completion or billing of a call, and the Commission does not identify any such relationship in the Order. The Commission has, until now, uniformly rejected attempts to classify as “telecommunications services” any subset of services that include *non-call-related* enhancements, such as the stored messages here. See, e.g., *Computer II* ¶¶ 120-132; *NATA/Centrex Order*, 3 FCC Rcd. 4385, ¶ 42 (1988); *US WEST Comm. Inc. Petition for Computer III Waiver*, 11 FCC Rcd. 7997, ¶ 12 (1996). The Order is thus an unexplained departure from these precedents as well.⁶

The Commission’s attempts to distinguish the cases on which AT&T relied also fail. For example, the Commission acknowledges that, in both the *AT&T CEI Order* and the *NATA/Centrex Order*, the Commission held that a service that combined non-call related computer applications with outbound calling capabilities was an enhanced service. Order ¶¶ 18-19. It argues that these orders are inapplicable because there AT&T made “the underlying telecommunications service . . . available to other carriers under tariff and regulated as a telecommunications service.” Order ¶ 18. But the Commission had made these observations because AT&T was then a dominant carrier that, under the *Computer II* rules, was required to

⁶ Contrary to the Commission’s suggestion (Order ¶ 23), AT&T’s use of the phrase “Thank you for using AT&T” on 0+ calls has always been considered adjunct-to-basic because this message serves an important call setup and billing function – *i.e.*, it confirms to the user that she is using and will be billed by the carrier she was expecting and *not* by the “fly-by-night” 0+ carriers who have charged wildly excessive rates. The varying advertising messages that are communicated to EPPC users have no relationship whatsoever to any call setup or billing function. See also AT&T 2/9/05 Ex Parte (at Commission staff’s insistence, AT&T filed waiver request for

make the telecommunications underlying an enhanced service available as a tariffed, telecommunications service. AT&T does not do so today *under tariff* because AT&T today is nondominant and its services have been detariffed. But AT&T continues to provide transmission services that provide connections between end users and between platforms and end users, and other enhanced services providers can purchase underlying transmission from AT&T to use in their own enhanced prepaid calling card services.

Similarly, contrary to the Order's statements (§ 17), the *Talking Yellow Pages Order*, 2 FCC Rcd. 5986, § 17 (1987), squarely held that services that include stored and non-call related advertisements are enhanced because they provide access to "additional" and "different" information within the meaning of Rule 64.702(a)(2). Under the terms of this rule and this holding, it is irrelevant whether end users actively chose to hear specific messages or whether they were made features of the service by the retail providers of a calling card. The service is enhanced in either event.

The Commission is not free to ignore its rules simply because it may not like the result. The Commission adopted the bright-line test in *Computer II* with the full knowledge that many services that are indistinguishable from or compete directly with basic services would be classified as enhanced. *See Computer II* §§ 107, 130. It erred on the side of over inclusion in 1980 to ensure that computer applications would not be regulated under Title II, to encourage the development of the information services industry generally, and to eliminate the debilitating uncertainty that had prevailed under the *Computer I* "primary purpose" test. In the intervening years, notwithstanding the interchangeability of various basic and enhanced services, the Commission has continued to exempt enhanced services from rules adopted for basic services,

enhanced treatment of time at destination ("TAD") feature).

and it has never (at least until the instant order) revisited the enhanced service definition itself. While the Commission may not like how the starkly different treatment of basic and enhanced services plays out in particular cases, the Commission can change those results only through a rulemaking with prospective effect – it cannot use a declaratory ruling to accomplish an effective repeal of the rule retroactively.

2. The erroneous information services holding led not only to the determination that AT&T owes USF charges for past periods, but also to the Commission’s conclusion that intrastate access charges apply to some of these EPPC services. As the Commission stated in the *NPRM* that accompanies the Order, when “existing or potential prepaid card services are classified as information services, they presumably *would* be subject solely to federal jurisdiction,” *id.* ¶ 42 (emphasis added) – and thus *not* subject to state access charge regulations. Thus, if the court of appeals vacates the Commission’s information services determination, it will also vacate the jurisdictional holding.

Further, the Commission also recognizes that it can, *regardless of service classification*, assert “exclusive federal jurisdiction” over prepaid card services “even if the calls originate and terminate in the same state.” *Id.* ¶ 42. The Commission states its willingness to consider a range of factors – including those that led it in the *Vonage Order* to assert exclusive federal jurisdiction, without regard to service classification, over VoIP services that include purely intrastate calls – in deciding whether to assert exclusive jurisdiction over any prepaid card services *other* than the AT&T service that is the subject of the Order. But AT&T made precisely such a showing with respect to its service – *i.e.*, that the *Vonage Order* factors and other core

Communications Act considerations demand exclusive federal jurisdiction – and the Order arbitrarily fails even to address that argument.⁷

The Order instead purports mechanically to apply the Commission’s “traditional end-to-end” jurisdictional precedents that, by their own terms, have no application here. As the Order recognizes, those precedents hold only that “neither the path of the communication nor the location of any intermediate *switching* point is relevant to the jurisdictional analysis.” Order ¶ 26 (emphasis added). That is because mere “[s]witching” and other *call-related* functions and communications that take place at a communications switch are “intermediate step[s] in a single end-to-end communication” from the calling party to the called party.⁸ That principle has no relevance in this proceeding. The Order does not – and could not – contend that the interstate communication of college savings plan information and other advertising messages sought and approved by the third party resellers of AT&T’s service have *anything* to do with call setup, routing, completion or billing or perform *any* “intermediate” step in the communication between the cardholder and called parties. Rather, as noted above, they are separate non-call-related interstate communications of information that are subject to exclusive federal jurisdiction, *see* 47 U.S.C. § 152(a), and that the Commission cannot simply “deem” not relevant.

The Order is also flatly inconsistent with the Commission’s consistent recognition that traditional “end-to-end” jurisdictional analysis simply does not work where, as here, a service involves multiple communications – both interstate and intrastate – on a single call or

⁷ *See, e.g.,* AT&T 12/7/04 *Ex Parte* at 2-3 (applying *Vonage* test and demonstrating that subjecting AT&T’s service to intrastate access charges is inconsistent with 47 U.S.C. §§ 151, 254(b)(1), (f), (i), (k)).

⁸ *Southwestern Bell Tel. Co.*, 3 FCC Rcd. 2339, ¶ 28 (1988); *see also NATA/Centrex Order* ¶¶ 11-12, 32 (basic service includes “call setup, call routing, call cessation, calling or called party identification, billing, and accounting”).

communications session. The Commission cautioned in the *Vonage Order* against formalistic application of “geographic ‘end-to-end’ analysis to distinguish interstate from intrastate communication” where the multiple communications on a single communications session do not necessarily have a single “point of ‘termination’ in the traditional sense.” *Vonage Order* ¶ 24 & n.89. And the Order itself recognizes that “[i]n decisions regarding ISP-bound traffic, the Commission has found that calls to ISPs may consist of multiple communications, and because these communications often are interstate or international in nature, the whole call is considered jurisdictionally interstate.” Order ¶ 25. The same is true of AT&T’s enhanced prepaid card service, which, it was undisputed, almost *always* includes interstate communications among the multiple communications on a single call.⁹ The Order simply wishes the problem away, again asserting, without explanation, that “the only *relevant* communication in the case presented by AT&T is from the calling card caller to the called party.” Order ¶ 26 (emphasis added). Existing precedent required the Commission to treat AT&T’s service as jurisdictionally interstate or to provide a reasoned explanation for its failure to do so. Because the Commission did neither, there is a substantial likelihood that its decision will be reversed on appeal.

3. Finally, even if the Commission’s information service and jurisdictional determinations were sustainable, there is also a substantial likelihood that the Order will be reversed for failing to provide a reasoned justification for the decision to apply its rulings retroactively. In disregarding the plain text of the enhanced services rule, decades of consistent precedent enforcing the *Computer II* bright-line distinction between basic and enhanced services, and its own prior acceptance of AT&T’s classification of the service, the Order clearly makes

⁹ See AT&T 10/12/04 *Ex Parte* (virtually all EPPC calls involve interstate communication with the platform, 17-20% involve only such communications, and more than 65% of AT&T’s EPPC calls are entirely interstate on a calling-to-called party basis).

“new law” and replaces “old law that was reasonably clear.” *Verizon Telephone Co. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001) (quotations omitted) (“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”). The Commission has consistently recognized that this is the proper test for whether a ruling should apply retroactively, and has weighed a variety of equitable factors in other similar contexts to preclude retroactive application of new rulings. Indeed, the Commission applied that test in another order issued within a week of the Order here. See *T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, FCC 05-42 (Feb. 24, 2005); see also *AT&T IP Phone-to-Phone Declaratory Ruling*, 19 FCC Rcd. 7457, ¶¶ 21-23 (2004). The Commission simply ignored the prevailing test in the Order, and therefore committed reversible error by failing to make a reasoned decision to give its decision retroactive effect.

The case for prospective-only effect was particularly compelling here. AT&T and other service providers reasonably relied on the FCC’s prior consistent statements and actions, and passed on to low income and other consumers the cost savings associated with information service treatment of enhanced prepaid card services. Even if the declaration that the EPPC services are not “information services” could somehow be considered simply an application of existing law, the FCC’s decision retroactively to apply this so-called clarification was manifestly unjust and improper. In cases involving new applications of existing law, the agency must balance the “ill effect” of retroactivity against “the mischief of producing a result which is contrary to a statutory design.” *SEC v. Chenery*, 332 U.S. 194, 203 (1947). The substantial reliance interests here weigh heavily against retroactive application of the FCC’s purported clarification of the law, and there would be no way for the providers of EPPCs to recover from

customers the USF contributions and intrastate access charges that providers had no idea they were accruing.

In addition, there is no “statutory interest in applying [the] 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). To the contrary, the EPPC service affirmatively furthered the statute’s universal service goals and offered uniquely affordable long-distance services aimed at underserved constituencies. Nor is the statutory interest in ensuring adequate contributions to the universal service fund implicated; the fund has suffered no shortfalls, and today telephone penetration is at record levels.

The Commission argues that AT&T could not reasonably have relied on the FCC’s consistent bright-line enhanced service classification of *all* services that provide more than basic transmission, because “prior decisions had always treated prepaid calling cards as telecommunications services.” Order ¶ 32. The only prior decision cited in support of that proposition involved an 800-access *basic service* debit card that included *no* non-call-related enhancements. *See Time Machine*, 11 FCC Rcd. at 1192-93 ¶ 40. Moreover, that same order recognized that AT&T’s “Teleticket” service, which did include non-call-related enhancements, *was* enhanced (and thus subject to *Computer Inquiry* unbundling and nondiscrimination requirements). *See id.* ¶ 39. And, as detailed above, prior decisions concerning computer-stored advertisements – including the Bureau’s 1995 decision to allow AT&T to classify its enhanced prepaid card service as an enhanced service – unquestionably did provide AT&T and other parties a reasonable basis to expect that the Commission would continue to adhere to its bright-line basic/enhanced framework.

The Order's observation that "the fact that the Common Carrier Bureau allowed AT&T's 1994 CAM revision to take effect does not constitute a Commission decision or finding regarding the classification of the service that shields AT&T from liability for past contributions" misses the point. Order ¶¶ 32-33. AT&T has never claimed that the FCC is legally bound by its acceptance of AT&T's filing, but that AT&T reasonably relied on that filing and its acceptance – in conjunction with Commission precedent – in treating its enhanced prepaid card service as an interstate information service. The fact that AT&T's cost allocation manual was no longer in effect when the Commission started requiring explicit universal service contributions in 1998 in no way undermines the reasonableness of AT&T's reliance; the FCC went out of its way to make clear that it would continue to adhere to the bright-line rule established in *Computer II*, even if that meant that some "voice" services would not contribute to the universal service fund. See, e.g., *Universal Service Report* ¶¶ 57, 59, 87-92.¹⁰

II. THE BALANCE OF THE EQUITIES FAVOR A STAY.

The equities overwhelmingly favor the stay that AT&T has proposed. AT&T agrees that, as a condition of this stay, it will secure a letter of credit that will cover the entire amount of the liabilities for federal USF charges that will result from the Order and the interest that will accrue on this amount during the pendency of the appeal. In particular, this letter of credit will cover the federal USF charges that USAC assesses pursuant to the Order and the interest that would accrue on this amount during the pendency of the appeal at the IRS large corporate overpayment rate, which the Commission has repeatedly found to be the most appropriate measure of the time

¹⁰ The Order's reliance upon the fact that "universal service contribution forms submitted to USAC plainly require revenues from prepaid calling cards to be reported," Order ¶ 32, is puzzling, given that the contribution forms and governing universal service contribution rules also plainly exempt all enhanced services revenues. See *Universal Service, Report and Order*, 12 FCC Rcd. 8776, ¶¶ 788-90 (1996). The universal service contribution form thus can only be

value of money in similar circumstances,¹¹ and which is currently 3.5%. This commitment will fully protect all federal interests pending appeal, for it assures that the USF will be made whole in the event that AT&T's appeal were unsuccessful. *GCI v. Alaska Commun. Sys. Holdings, Inc.*, 16 FCC Rcd. 8169, ¶¶ 3-4 (2001); *TCI Cablevision of Dallas, Inc.*, 15 FCC Rcd. 9535, ¶ 7 (2000) (Cable Service Bureau); *Virgin Island Tel. Corp. Tariff FCC No. 1*, 7 FCC Rcd. 4235, ¶ 13 (1992). Indeed, as noted above, the Commission has held that when, as here, a movant has agreed to arrangements that set aside and protect the Commission's ability to obtain the monies owed (including interest), a stay is appropriate even where the movant cannot show irreparable harm or otherwise satisfy the traditional four-part balancing test. *See supra*, p. 11 n.4. In any case, here each of the equitable factors supports a stay.

Irreparable Harm. First, AT&T is threatened with irreparable harm in the absence of stay. First, irreparable injury exists because the Order requires AT&T to pay substantial sums into the federal USF fund and in the absence of a stay, there is a substantial risk that AT&T would not recover these monies in full following a successful appeal. It is elementary that a risk of such unrecoupable losses constitutes irreparable harm. *See Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (stay appropriate where "unlikely that [movant] should he succeed, would be able to recover the funds paid out"); *American Hosp. Supply Corp. v. Hospital Products Ltd.*, 780 F.2d 589, 594, 596 (7th Cir. 1986); *see also Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam). Here, the risk is acute.

read to require contributions on revenues associated with prepaid *telecommunications* services.

¹¹ *See, e.g., 1993 Annual Access Filings*, CC Docket No. 93-193, 2005 WL 646634, DA 05-719, ¶¶ 15-18 (Wireline Comp. Bur. March 17, 2005) (citing other cases).

Preliminarily, there have been unrecouped losses in similar conditions in the past. Following the court of appeals' holding that the Commission had initially improperly assessed USF charges on intrastate revenues, *see TOPUC v. FCC*, 183 F.3d 393, 446-48 (5th Cir. 1999), BellSouth sought a refund of the amounts that it had paid in the federal USF fund by reason of the erroneous inclusion of intrastate revenues in the assessment base. *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, BellSouth Petition for Reconsideration (filed December 6, 1999). But parties opposed this request on the ground that the inclusion of intrastate revenues in the assessment base had led to a lower assessment percentage and that it was impossible to "unscramble the egg" after the fact. For whatever reason, the Commission never ruled on BellSouth's motion, and these facts establish that AT&T faces a risk of unrecouped losses, particularly if the Commission were to lower the assessment factor in response to the increase in the revenue assessment base that results from the Order.

Further, while the Commission's rules now make some provision for limited refund, the terms of those rules will allow AT&T to recover only a fraction of the amount that it will have paid in the federal USF fund in response to the Order. Pursuant to the Order, AT&T must file with the USAC within 30 days revised worksheets. *See Order* ¶ 31; *499-A Modification Order*, CC Docket 96-45, DA 04-3669, 2004 WL 2848147, ¶¶ 1, 10-12 (Dec. 9, 2004)); 47 C.F.R. § 54.709(a). Based on these revised worksheets, the USAC must then bill AT&T within 60 days for the difference between contributions it has made to date and what AT&T would owe had it paid universal service on revenues derived from EPPC services plus late fees, if any. Order ¶ 31.

Because the Commission regards AT&T's non-payment of universal service charges on EPPC revenues as an understatement of actual telecommunications revenues, when issuing the bill based on the revised worksheets, the USAC will determine the amount of underpayment for

each year by multiplying AT&T's EPPC revenue by the average of the *two highest* FCC-approved quarterly universal service fund contribution factors for that year. See *Interim USF Contribution Order*, 17 FCC Rcd. 24,952, ¶ 36 (2002); *Quarterly Reporting Order*, 16 FCC Rcd. 5748, ¶ 12 (2001). In contrast, if the court of appeals subsequently holds that AT&T properly treated EPPC services as information services – and this outcome must be assumed in evaluating AT&T's irreparable harm claim – the Commission's stated procedures indicate that USAC would calculate refunds of overpayments based on the average of *the two lowest universal service fund contribution factors for the reporting period*. See *Interim USF Contribution Order*, 17 FCC Rcd. 24,952, ¶ 36 (2002); *Quarterly Reporting Order*, 16 FCC Rcd. 5748, ¶ 12 (2001).

Thus, under the Commission's stated procedures, the USAC would *not* refund to AT&T the full value of the principal of its retroactive universal service charge payment. Nor would USAC pay interest on the amounts that it would have overcharged AT&T. In light of the amounts at stake in this case, the irretrievable, irreparable harm to AT&T in the form of lost interest and principal supports a stay. *American Hosp. Supply Co.*, 780 F.2d at 594, 596.

Further, the Order's jurisdictional holding has already led at least one incumbent LEC to bring an action seeking to recover intrastate access charges and even some of the federal USF charges that the incumbent paid in the past. *Qwest Corp. v. AT&T Corp.*, No. 05-WM-375 (D. Colo.) (filed Feb. 28, 2005). In theory, each of the several hundred incumbent LECs in the nation could bring such claims, and the Order could lead to scores of lawsuits or regulatory proceedings that will address the complex issues raised by these claims – litigation which will be unnecessary and wasteful in the event that the order is vacated on appeal. Because the practical effect of a stay pending appeal will be that stays will be entered in such private suits, a stay will prevent irreparable harm for a second and independent reason. *Entergy, Arkansas, Inc. v.*

Nebraska, 210 F.3d 887, 899 (8th Cir. 2000); *Calderon v. United States*, 121 F.3d 714, *1 (9th Cir. 1997) (unpublished); *N.L.R.B. v. Superior Forwarding, Inc.*, 762 F.2d 695, 699 (8th Cir. 1985).

Lack Of Harm To Private Entities Or USAC. AT&T's commitment to secure a letter of credit for the amounts assessed by USAC pursuant to the Order (and interest accruing during the pendency of the appeal) establishes that the stay cannot result in any significant federal harms, for the USF is assured that it will be made whole if AT&T's appeal were unsuccessful. AT&T's letter of credit commitment applies to the USF charges that are assessed under the Order, for these are the only retroactive liabilities that the Commission has jurisdiction to assess. However, it is also the case that, even in the absence of such an arrangement, that there can be no reasonable question about AT&T's capacity to pay any retroactive intrastate access fees that it may be found to owe in the unlikely event the Commission's decision is affirmed on appeal.

Public Interest. Finally, a stay serves the public interest. Absent a stay, as noted, it is quite likely that numerous incumbent telephone carriers will sue AT&T to collect intrastate access charges from AT&T for its EPPC services, and state commissions may institute proceedings with respect to any state universal service obligations that arguably may be owed in light of the Order's jurisdictional determinations. Clearly, if the FCC's jurisdictional findings are found to be erroneous, these lawsuits will become moot. Thus, if AT&T were to ultimately prevail, it would be a waste of both the judiciary's and the litigants' time and resources to file and litigate these cases.

Finally, there is an additional factor that supports the conditional stay that AT&T seeks. The Commission had no basis for concluding that the Order would not eliminate conditions that have enabled prepaid calling cards to be offered at very low rates to members of the military,

their families, and low income end users. In particular, the Commission stated that it believed that “numerous carriers” were contributing to universal service and paying intrastate access charges while also offering prepaid card users low calling rates. Order ¶ 37. On this basis, the Commission concluded that its order adequately accommodated congressional concerns that it do nothing that would increase prepaid calling card rates for military troops and their families, either directly or indirectly. *Id.*, ¶ 37 n.79.

But there was no basis for this conclusion. Leading providers of basic prepaid card services are not paying USF or intrastate access charges on what appear to be prepaid card services that fall squarely within the Commission’s historical definition of basic services. For example, as detailed in the attached declaration of Adam Panagia, that appears to be starkly the case for the nation’s leading provider of these cards – IDT. Its services contain no messaging, net protocol conversion, or other apparent enhancements. Panagia Aff. ¶¶ 7, 11. IDT has publicly acknowledged that it does not contribute to USF on all its prepaid card traffic. *See id.* ¶¶ 22-26. It also is routing ordinary intrastate calls through foreign countries such as Japan and Chile and delivering that traffic for termination as if it were international traffic, without originating CPN that allows the calls to be identified as intrastate calls by the terminating carriers. *Id.* ¶¶ 8-10. MCI, Sprint, Verizon, and other prepaid card providers have also engaged in these same foreign routing practices on intrastate and interstate calls or otherwise have delivered basic service calls without originating CPN. *See id.* ¶¶ 14-21.

CONCLUSION

For the reasons stated, AT&T respectfully requests that the Commission's Order be stayed pending appeal, subject to the condition that AT&T secure a letter of credit (including interest) for the amount of unpaid USF charges that are assessed on its EPPC service revenues by May 15, 2005.

Respectfully submitted,

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March 28, 2005

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)
)
AT&T Corp. Petition for Declaratory) WC Docket No. 03-133
Ruling Regarding Enhanced Prepaid Calling)
Card Services)
)
)
)

DECLARATION OF ADAM PANAGIA

1. My name is Adam Panagia. I am District Manager, Network Fraud Investigations, for AT&T Business Services. My responsibilities include conducting investigations to uncover fraudulent or other abusive uses of AT&T's services.

2. The purpose of this affidavit is to describe certain investigations AT&T has recently conducted into the manner in which AT&T's leading prepaid card competitors are routing and identifying their prepaid card calls. With one exception, these competitors' cards provide phone-to-phone calling with no access to stored messages or advertisements, no interaction with non-call-related information, and no net protocol conversion. AT&T's investigations of these services demonstrate that these carriers are routing calls through Japan, Chile, Switzerland, the UK, or through other states. The calls are being handed off to intermediary carriers without originating calling party number information, making them appear as if they were international services. AT&T has documented these practices or similar practices on the part of many of the major

prepaid card providers, including most prominently the market leader IDT and also including Verizon, MCI, Sprint, and others.

3. I also note that IDT has recently stated that it does not contribute to the Universal Service Fund on at least some of its prepaid card traffic. IDT has not explained the basis on which it believes such traffic is exempt from universal service payments, on the grounds that such information is "proprietary." But as explained below, the IDT prepaid card services that I tested contain no apparent enhancements.

I. AT&T's Prepaid Card Competitors

4. Many of AT&T's major prepaid card competitors offer very low per-minute rates. Carriers such as IDT have offered cards with rates as low as 1 cent per minute. IDT has used such attractive offerings to become the leading prepaid card provider in the nation.
5. These low rates would seem to be below a carrier's cost if intrastate access charges were paid on calls between calling and called parties in the same state or if universal service contributions were made on interstate traffic.
6. For these reasons, we recently began to test prepaid card calls. We purchased our competitors' prepaid cards and made a series of test calls using each card. Call detail information is generated in the originating switch for all telecommunications calls – e.g., calling party number identification (CPN), the called party number, the time is call is made, the duration of the call, and so forth. Each carrier in the call flow can extract this information into its own systems, and carriers use this information both for call routing and billing purposes. Thus, if our competitors were delivering traffic to

AT&T's network, at least some of the call detail information (*e.g.*, the called party number, the time and duration of the call) from such calls should show up in either of AT&T's two databases that track domestic and international calling on AT&T's network.

A. IDT

7. We began with IDT's "Super Quick" prepaid card. This card provides phone-to-phone telephony services. The card provided no access to stored messages or advertisements, or any other enhancement that could be considered interaction with non-call-related information. On January 10, 2005, we used this card to make 15 intrastate calls from locations in Alaska to other locations in Alaska. All of the calls we made were voice calls made from traditional wireline telephones to other traditional wireline telephones – *i.e.*, there could be no net protocol conversion involved in the service.
8. Ten of the fifteen wireline calls showed up in AT&T's databases as having been terminated via AT&T. The calling party number identifying the call as having originated in Alaska was missing on all ten calls when received for termination; the calls were matched using the called party number and the time and duration of the call. In addition, eight of the ten calls were handed off to AT&T by Kokusai Denshin Denwa ("KDD"), a Japanese telecommunications carrier. The two other calls were handed off to AT&T from AT&T Chile, which is a carrier in Chile.
9. While it is impossible for us to tell exactly what is happening at each stage of the call flow, some aspects of IDT's arrangements are clear. We know that the Alaska caller initiates a call by first dialing an 800 number to connect to IDT's prepaid calling card

platform. The Alaska caller would then dial the local Alaska number of the called party. The call is then routed, either directly or more likely through other intermediary carriers or facilities, to KDD in Japan. We do not know what happens to the calling party number, but believe that KDD sees no originating calling party number, and sees that the call is actually destined for Alaska (not Japan), and therefore routes the call to AT&T for termination in Alaska (pursuant to its carrier access agreement with AT&T). AT&T hands the call off to the local exchange carrier in Alaska and pays the terminating access charges.

10. In this scenario, AT&T would, consistent with industry standards and practices, pay interstate access on such calls (believing the call to be international).
11. *Other IDT Test Calls.* We have since conducted several other tests using IDT prepaid cards. On February 10, 2005, we made ten basic wireline calls from Texas to Alaska using an IDT "Super Quick" prepaid card. Again, the calls involved no net protocol conversion or advertisements. All ten calls were terminated via AT&T's network; all ten were handed off to AT&T by AT&T Chile, with no calling party number information available to AT&T (or AT&T Chile) on any of the calls. On February 27, 2005, we made 19 calls from New Jersey to Alaska using an IDT "Super Quick" card. Again the calls were terminated via AT&T; the calling party number information was missing and in its place was the area code and phone number associated with a New York City carrier hotel. On March 4, 2005, we made ten more calls from New Jersey to Iowa using an IDT prepaid card. Once again, the calls were terminated via AT&T; the calling party number information was missing on all ten, and five of the ten were handed off to AT&T from Cable & Wireless in the United Kingdom.

12. We conducted four tests using IDT "Super Quick" cards on March 6, 2005. First, we made 30 intrastate calls within New Jersey. All 30 were terminated at AT&T's local network switches. The original calling party number information was missing on all 30 calls; in its place was either (1) nothing, (2) an invalid calling party number, or (3) a New Jersey area code followed by seven zeroes. Consistent with industry standards and practices, AT&T's billing systems classify a call as "unknown" when it receives only the area code without any other numbers. Second, we made 15 intrastate calls from Austin, Texas to Houston, Texas. Three calls were not completed, but the other twelve all terminated on AT&T's local network switch in Houston. The calling party number information was missing on all twelve calls, and replaced with either nothing at all or a New Jersey number associated with Focal Communications, a competitive LEC. The remaining two cards were used to make 30 intrastate calls from Austin to Dallas. The calls again terminated on AT&T's network, with calling party number information missing on two calls and the others carrying a local 972 Dallas number that is associated with Xspedius, another competitive LEC. The calls made with one of these cards also had a "Secondary Originating Number," which were various out-of-state numbers associated with Focal Communications.
13. Finally, on March 8, 2005, we made ten more intrastate calls from Austin to Houston with another IDT card. Six of the calls terminated on AT&T's local switch in Houston, and the calling party number information was missing.

B. Other Carriers

14. In the last several weeks we have also tested other carriers' prepaid cards. We have confirmed that several carriers, including Verizon, Sprint, MCI, and others are engaged in similar practices.
15. *Verizon.* AT&T has performed two tests using Verizon's 7-Eleven branded prepaid card. On March 5, 2005, we made ten calls from New Jersey to Puerto Rico. Six of the ten calls were terminated via AT&T's network (handed off from Verizon). The calling party number information was missing on each call and replaced with numbers from the 212 or 718 area codes; both numbers are associated with a carrier hotel at 470 Vanderbilt Avenue in Brooklyn, New York.
16. On March 15, 2005, we made ten more test calls, this time from New Jersey to Alaska.¹ Eight of the calls were completed, and all eight were terminated via the AT&T network. The calling party number information was missing on all of the calls. Five of the calls were handed off to AT&T from KDD in Japan; the other three were handed off to AT&T from Swiss PTT Telecom in Switzerland. Thus, Verizon also appears to be routing calls to Japan and other countries for delivery onto AT&T's network.
17. *Sprint.* On February 27, 2005, we made ten intrastate voice wireline calls from Austin to Dallas using a Sprint prepaid calling card. The calls were all terminated at AT&T's local switch in Dallas, and the calling party number was missing except for a Texas area code. Consistent with industry standards and practice, however, AT&T's billing systems classify a call as "unknown" when it receives only the area code without any

other numbers and pays access based on factors designed to reflect the expected mix of intrastate and interstate access.

18. *MCI*. On February 27, 2005, we also made five intrastate calls from Austin to Dallas using an MCI prepaid card. Once again, the calls terminated at AT&T's local switch in Dallas, and the calling party number information was missing.
19. *STI*. On February 28, 2005, we made five test calls from New Jersey to Alaska using a prepaid card from another carrier, STI. Only two of the calls were completed, but both terminated via AT&T's network with the calling party number information was missing. The calls were handed off to AT&T from KDD in Japan.
20. *PT1*. On March 1, 2005, we made ten test calls from New Jersey to Alaska using a prepaid card from PT1. The calls were completed via AT&T's network, handed off from Swiss PTT Telecom in Switzerland. The calling party number information was missing.
21. *Global Crossing*. Finally, we tested two Global Crossing post-paid cards on February 27, 2005. In one test, we made ten intrastate calls from Austin to Dallas. All were terminated via AT&T's local Dallas switch, and calling party information was missing on eight of the ten.² In the other test, we made ten calls from New Jersey to Alaska. The calls were completed via AT&T's network. While the calling party

¹ This card, unlike the others, did have a promotional message at the beginning of each call: "Please purchase your next phone card at 7-Eleven."

² The calls were made from New Jersey using a remote call feature from an Austin number, and on the remaining two calls the New Jersey originating number was passed (but not the Austin number).

number information was passed, the calls were again handed off to AT&T from KDD in Japan.

II. IDT Does Not Contribute To The Universal Service Fund On All Of Its Prepaid Calling Card Traffic.

22. As noted above, the IDT cards we tested provide nothing more than voice phone-to-phone calling; there is no feature of the calling card services that provides access to information or any net protocol conversion.
23. In its recent earnings conference call on March 10, 2005, IDT stated that “the FCC’s denial of AT&T’s calling card proceeding is limited to the prepaid calling card services described in AT&T’s original petition to the FCC. IDT does not rely and has not relied on such services for any aspect of its regulatory compliance. And the FCC’s rejection of AT&T’s position has no impact whatsoever on the way IDT has in the past or currently conducts its calling card operations. We are very confident that our calling card business complies with every aspect of the rules and regulations, including the USF regime.” Transcript at 3.
24. IDT was asked to elaborate, however, on what was different about IDT’s services that ensured that IDT was complying with the FCC’s rules. IDT’s CEO answered that “You know basically a lot of what we do is proprietary, so we cannot really get into the details of it. But we have high confidence that where we do pay Universal Service payments, we’re paying them correctly. *Where we don’t pay, we don’t have to pay based on the way we do business.*” Transcript at 14 (emphasis added) (“so it’s difficult for me because of the proprietary nature of our products to get into it”).

25. IDT's CFO further explained: "I think the way to phrase the question as you put it is not so much a matter of what IDT is doing that AT&T is not doing. It is really what AT&T was doing that AT&T only was doing [*i.e.*, the advertisements], and that was really the entire scope of that particular ruling." *Id.* at 15.

26. Participants in the call continued to press for an explanation, and IDT's CEO stated again that "[w]e are not going to file a petition because we believe that we are total compliant [*sic*] with all rules and regulations. We can't go beyond that because obviously we will just be highlighting to competitors the way we do business." *Id.* at 16.

* * * * *

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge information and belief. Executed on this 28th day of March, 2005.

/s/ Adam Panagia
Adam Panagia

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2005, I caused true and correct copies of the forgoing Petition for Stay of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 28, 2005
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

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