Before the
Federal Communications Commission
Washington, D.C. 20554

FEB 25 2005
FCC-MAILROOM

In the Matter of	)	
	)	
AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services	)	WC Docket No. 03-133
	)	
	)	
Regulation of Prepaid Calling Card Services	)	WC Docket No. 05-68

ORDER AND NOTICE OF PROPOSED RULEMAKING

Adopted: February 16, 2005 **Released: February 23, 2005**

Comment Date: 30 days after publication in the Federal Register
Reply Comment Date: 60 days after publication in the Federal Register

By the Commission: Chairman Powell and Commissioner Adelstein issuing separate statements; Commissioner Copps concurring and issuing a separate statement.

I. INTRODUCTION

1. On May 15, 2003, AT&T filed a petition requesting a declaratory ruling that intrastate access charges do not apply to calls made using its so-called "enhanced" prepaid calling cards when the calling card platform is located outside the state in which either the calling or the called party is located.[1] For the reasons set forth below, we deny the petition. We limit our decision in this Order to the calling card service described in AT&T's original petition.

2. On November 22, 2004, AT&T requested a similar ruling with regard to two new variants to its "enhanced" calling card offering.[2] These changes to AT&T's calling card services may be significant for purposes of regulatory classification and jurisdiction. Rather than try to address each possible type of calling card offering through a declaratory ruling, we are instead initiating a rulemaking to consider the classification and jurisdiction of new forms of prepaid calling cards.

II. BACKGROUND

3. Prepaid calling cards provide consumers with the ability to place long-distance calls without presubscribing to an interexchange carrier (IXC) or using a credit card. A calling card customer typically

[1] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Petition of AT&T (filed May 15, 2003) (AT&T Petition).

[2] *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004) (*AT&T Nov. 22 Letter*).

dials a number to reach the service provider's centralized switching platform and the platform requests the unique personal identification number associated with the card for purposes of verification and billing. When prompted by the platform, the customer dials the destination number and the platform routes the call to the intended recipient.

4. To date, calling card services have been regulated by the Commission as telecommunications services because they provide transmission of information, without a change in form or content, for a fee directly to the public.[3] Consistent with this classification, the Commission requires carriers to report revenues from prepaid calling cards on the forms submitted to the Universal Service Administrative Company (USAC) for purposes of universal service contributions.[4]

5. Calling cards have been considered "jurisdictionally mixed" telecommunications services because they enable the caller to make interstate and intrastate calls.[5] For purposes of determining the jurisdiction of calling card calls, the Commission has applied an "end-to-end" analysis, classifying long-distance calls as jurisdictionally interstate or intrastate based on the endpoints, not the actual path, of each complete communication.[6] Under the Commission's end-to-end analysis, intrastate access charges apply when customers use prepaid calling cards to make interexchange calls that originate and terminate within the same state, even if the centralized switching platform is located in a different state.

6. AT&T offers what it calls an "enhanced" prepaid calling card service. During call set-up, the customer hears an advertisement from the retailer that sold the card.[7] Only after the advertisement is

[3] *See* 47 U.S.C. § 153 (43), (46); *see also The Time Machine*, Memorandum Opinion and Order, 11 FCC Rcd 1186, 1192-93, para. 40 (CCB 1995) (provision of information regarding the time remaining on the card is "incidental to the provision of basic communications services, and therefore is not an enhanced service").

[4] *See* Telecommunications Reporting Worksheet, FCC Form 499-A, Line 411. The instructions for this form specifically state that "[a]ll prepaid card revenues are classified as end-user revenues." Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A at 22.

[5] *See Time Machine*, 11 FCC Rcd at 1190, para. 29 (debit card service is jurisdictionally mixed because both interstate and intrastate calls can be completed); *see also Southwestern Bell Tel. Co.*, CC Docket No. 88-180, Order Designating Issues for Investigation, 3 FCC Rcd 2339, 2341, para. 28 (CCB 1988) (credit card services are jurisdictionally mixed).

[6] *Teleconnect Co. v. Bell Tel. Co. of Pennsylvania*, File No. E-88-83, *et al.*, Memorandum Opinion and Order, 10 FCC Rcd 1626, 1629-30, paras. 12-14 (1995) ("both court and Commission decisions have considered the end-to-end nature of the communications more significant than the facilities used to complete such communications"); *Time Machine*, 11 FCC Rcd at 1190, para. 29 ("a debit card call that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state"); *see also Southwestern Bell*, 3 FCC Rcd at 2341, para. 28 ("[s]witching at the credit card switch is an intermediate step in a single end-to-end communication"). As the Commission recently noted, the end-to-end analysis might not be applicable depending on the nature of the service. *See Petition for Declaratory Ruling that pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3320-21, para. 21 (2004) (*Pulver Order*) (end-to-end analysis is "unhelpful" where service simply consists of an Internet server, the portable nature of the service makes it difficult to determine customers' locations, and the service provider does not provide any transmission capability).

[7] AT&T Petition at 5.

complete can the customer dial the destination phone number.[8] Other than the communication of the advertising message to the caller, there is no material difference between AT&T's "enhanced" prepaid calling cards at issue in this Order and other prepaid calling cards.

7. On May 15, 2003, AT&T filed a petition asking the Commission for a declaratory ruling that any call using AT&T's "enhanced" prepaid calling card platform is jurisdictionally interstate, and therefore exempt from intrastate access charges, when the platform is located outside the state in which the calling or called parties are located.[9] Specifically, AT&T argues in its petition that when an "enhanced" prepaid calling card customer places a call to someone in the same state, the call should be considered jurisdictionally interstate because it consists of two calls (one between the caller and the platform and one between the platform and the called party), at least one of which is interstate.[10] Alternatively, AT&T argues, even if the call is deemed to be a single call, it is jurisdictionally interstate.[11]

8. Both of AT&T's arguments are based on the assumption that the "enhanced" prepaid card services platform engages in its own communication with the cardholder, separate from the communication between the calling party and the called party.[12] This communication occurs even if the called party does not answer, or if the calling party hangs up before reaching the called party.[13] AT&T argues that this first stage of the call creates an endpoint for purposes of the Commission's jurisdictional analysis.

9. AT&T also argues that its "enhanced" prepaid calling card service should be classified as an "information service" within the meaning of the Act and the Commission's rules, and that any underlying telecommunications are jurisdictionally interstate.[14] As with its jurisdictional arguments, AT&T's

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[8] *Id.* at 6. The customer can also choose to replenish the minutes on the card, and then place a call or merely hang up. *Id.*

[9] *Id.* at 1. On June 5, 2003, the Wireline Competition Bureau released a Public Notice seeking comment on AT&T's petition. *See Pleading Cycle Established for AT&T Petition for Declaratory Ruling on Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, Public Notice, 18 FCC Rcd 11393 (WCB 2003). A list of commenting parties is attached as Appendix A.

[10] AT&T Petition at 8-9. AT&T concedes that intrastate access charges apply in the relatively rare situation when the centralized switching platform is in same state as both the calling and called parties. *Id.* at 14.

[11] *Id.* at 14-16.

[12] *Id.* at 9.

[13] *Id.* at 8.

[14] AT&T Reply at 18-19 (citing 47 U.S.C. § 153(20)). Notwithstanding its argument that "enhanced" calling cards are information services, AT&T states that it does not intend to avoid paying interstate access charges under the ESP exemption, because providers of prepaid cards use "Feature Group D access for which there is no ESP exemption equivalent." *Id.* at 20. AT&T notes that the ESP exemption merely "permits the purchase of access from tariffs offering local business services." *Id.* AT&T has, however, apparently stopped reporting revenues for these services for purposes of calculating universal service contributions. *See* AT&T Corp. Form 10-Q at 16 (filed with the Securities and Exchange Commission on November 4, 2004) (*AT&T November 10-Q Report*) (identifying $160 million in "USF contribution savings since the beginning of 1999" as a result of characterizing "enhanced" calling (continued....)

classification argument is based on the assertion that each time an "enhanced" prepaid calling card is used, the centralized switching platform engages in its own communications with the cardholder by sending the advertising message.[15] AT&T argues that this service falls within the Commission's definition of an information service because it provides "additional, different or restructured information" unrelated to routing or billing and it "involve[s] subscriber interaction with stored information."[16]

10. Finally, AT&T notes that prepaid calling cards generally provide an important form of "universal service" to many low-income and minority households.[17] AT&T argues that the application of intrastate access charges to its "enhanced" prepaid calling cards might cause it to raise the price of the cards, which would make the availability of this telecommunications service prohibitively expensive to the significant numbers of underprivileged groups that rely on it.[18] Similarly, AT&T argues that military personnel often use prepaid calling cards and that they would be adversely affected by a decision denying the petition.[19]

11. On November 22, 2004, AT&T filed an *ex parte* letter amending its petition to request an additional ruling on two new "variants" of its "enhanced" prepaid calling card service. In the first variant, rather than immediately sending the advertising message, the platform provides the caller with a series of options other than making a call (e.g., "press 1 to learn more about specials at ABC stores; press 2 to add minutes to your card").[20] AT&T recently added this type of capability to cards it offers through a partnership with Wal-Mart Stores, Inc., including an option for customers to donate minutes to troops serving overseas.[21] When the chosen option is completed, or if no option is chosen, the caller is directed to dial the destination number and at that point the platform transmits the advertising message in the same manner as the original version of the service.

12. In the second variant of the service, the service provided to the customer is the same as the service described in the original petition, but some of the transport is provided over AT&T's Internet backbone using Internet Protocol technology.[22] AT&T states that these calls are not dialed on a 1+ basis

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card services as information services); *see also* Letter from Robin Tuttle, USTA, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004).

[15] AT&T Petition at 18.

[16] AT&T Reply at 9 (citing 47 C.F.R. § 64.702(a)) & 12 n.6 (qualifies as information service via *either* changed information *or* interaction).

[17] AT&T Reply at 4 ("half of households with incomes below $20,000 and 70% of African-American households have used prepaid cards, and consumers 55 and older represent the fastest-growing segment of prepaid card users").

[18] *Id.* (noting that intrastate access charges may be as high as 14 cents per minute on both ends of the call).

[19] *See* AT&T Petition at 5; AT&T Reply at 4; Letter from Mark Evans, Vice President-Prepaid Services, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 20, 2004) (*AT&T Evans Letter*).

[20] *See AT&T Nov. 22 Letter* at 2-3.

[21] *See* Letter from Amy Alvarez, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 30, 2004).

[22] *AT&T Nov. 22 Letter* at 3-4.

and therefore are not covered by the Commission's prior determination that "IP-in-the-middle" calls are telecommunications services, not information services.[23]

III. ORDER

13. In this portion of the item we address the classification and jurisdiction of the "enhanced" prepaid calling service identified in AT&T's petition as filed. In the Notice of Proposed Rulemaking (NPRM) portion of the item we consider issues related to the variants of the service identified in AT&T's November 22 amendment to the petition and other possible types of calling card offerings.

A. Classification of AT&T's Service

14. We find that the "enhanced" calling card service described in AT&T's original petition is a telecommunications service as defined by the Act. AT&T offers "telecommunications" because it provides "transmission, between or among points specified by the user of information of the user's choosing, without change in the form or content of the information as sent and received."[24] And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public."[25]

15. We are not persuaded by AT&T's claim that inserting advertisements in a calling card service transforms that service into an information service under the Act and our rules.[26] As an initial matter, we find that AT&T's service does not meet the statutory definition of an information service because AT&T is not "offering" any "capability" with respect to the advertising message. As noted by Sprint, the packaging materials for AT&T's "enhanced" prepaid calling cards do not even mention their possible use as a device for listening to advertisements.[27] Because the advertising message is provided automatically, without the advance knowledge or consent of the customer, there is no "offer" to the customer of anything other than telephone service, nor is the customer provided with the "capability" to do anything other than make a telephone call.

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[23] *Id.* (citing *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Order, 19 FCC Rcd 7457 (2004) (*AT&T IP Telephony Order*)).

[24] 47 U.S.C. § 153(43).

[25] 47 U.S.C. § 153(46).

[26] Section 3(20) of the Act defines an information service as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). The Commission's rules further provide that an enhanced service: (1) acts on subscriber-provided information; (2) provides the subscriber additional, different or restructured information; or (3) involves subscriber interaction with stored information. 47 C.F.R. § 64.702(a). The Commission has found that the terms telecommunications service and information service used in the 1996 Act are similar to the terms basic service and enhanced service that were used by the Commission prior to 1996. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955-58 paras. 102-07 (1996) (*Non-Accounting Safeguards Order*).

[27] Sprint Comments at 8.

16. Furthermore, we find that in this case the provision of the advertising message is an adjunct-to-basic service, and therefore not an "enhanced service" under the Commission's rules. Adjunct-to-basic services are services that are "incidental" to an underlying telecommunications service and do not "alter[] their fundamental character" even if they may meet the literal definition of an information service or enhanced service.[28] The Commission has found that Congress preserved the Commission's pre-1996 Act treatment of "adjunct-to-basic" services as telecommunications services, rather than information services.[29] We find that the advertising message provided to the calling party in this case is incidental to the underlying service offered to the cardholder and does not in any way alter the fundamental character of that telecommunications service.[30] From the customer's perspective, the advertising message is merely a necessary precondition to placing a telephone call and therefore the service should be classified as a telecommunications service.[31]

17. The cases AT&T cites in support of its argument that the "enhanced" calling card service is an information service all are distinguishable. For example, we reject AT&T's argument that we are compelled to follow the Commission's decision in the *Talking Yellow Pages* case that stored advertisements played from a centralized switching platform create an information service.[32] In *Talking Yellow Pages*, the information service at issue played advertisements in response to subscribers' individual selections for various categories of information (*e.g.*, restaurants, stores, services). The Commission found this service to be an information service because it involves "subscriber interaction

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[28] *See, e.g., Policies and Rules Concerning Local Exchange Carrier Validation and Billing Information for Joint Use Calling Cards*, CC Docket No. 91-115, Report and Order and Request for Supplemental Comment, 7 FCC Rcd 3528, 3531, para. 19 (1992) (validation and screening services are "incidental" to the provision of local exchange access service and therefore subject to Title II regulation) (*Joint Use Calling Card Order*); *North American Telecommunications Association Petition for Declaratory Ruling Under § 64.702 of the Commission's Rules Regarding the Integration of Centrex, Enhanced Services, and Customer Premises Equipment*, ENF 84-2, Memorandum Opinion and Order, 101 FCC 2d 349, 359-361, paras. 24-28 (1985) (*NATA Order*) (services that "facilitate the provision of basic services without altering their fundamental character" are not considered enhanced services), *recon.*, 3 FCC Rcd 4385, 4386, paras. 8-9 (1988) (*NATA Reconsideration Order*); *Beehive Telephone v. The Bell Operating Companies*, File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10566, para. 21 (1995) ("services that are incidental or adjunct to the common carrier transmission service are to be regulated in the same way as the common carrier service"), *aff'd on remand*, Memorandum Opinion and Order, 12 FCC Rcd 17930 (1997); *AT&T 900 Dial-It Services and Third Party Billing and Collection Services*, File No. ENF-88-05, Memorandum Opinion and Order, 4 FCC Rcd 3429, 3431, para. 20 (CCB 1989) (service is an enhanced service if the information provided is "not incidental" to the basic telecommunications service, but rather is "the essential service provided").

[29] *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 107 ("services the Commission has classified as 'adjunct-to-basic' should be classified as telecommunications services, rather than information services").

[30] *See Time Machine*, 11 FCC Rcd 1192-93, para. 40 (information regarding time remaining on card is not an enhanced service).

[31] *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 107; *Joint Use Calling Card Order*, 7 FCC Rcd at 3531, para. 21 (service may be incidental to transmission even if it is not strictly necessary to complete a call). For similar reasons, we reject AT&T's argument that the "enhanced" calling card service is an electronic publishing service under section 274 of the Act. 47 U.S.C. § 274.

[32] AT&T Petition at 9; AT&T Reply at 11-12 (citing *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988, para. 20 (1987) (*Talking Yellow Pages*)).

with stored information."[33] In contrast, there is no meaningful subscriber interaction with the information provided by AT&T's service; customers must let the recorded advertising message play – whether or not they listen to it – because that is the only way they can actually place a call.[34] This automatic imposition of an advertising message does not rise to the level of a subscriber interaction, and therefore it does not meet the definition of an enhanced service.

18. AT&T's reliance on the *AT&T CEI Order* also is misplaced.[35] In that order, the Commission approved an amendment to AT&T's comparably efficient interconnection (CEI) plan to provide outbound calling capabilities with AT&T's interactive voice and data services.[36] AT&T asserts that this order demonstrates that any service that includes both telecommunications and information service components is regulated as an information service. AT&T's assertion is wrong. In that case, AT&T started with a stand-alone enhanced service and added the capability to make calls. As noted in a subsequent order, the Commission approved the CEI plan precisely because the underlying telecommunications service used in the amended offering was made available to other carriers under tariff and regulated as a telecommunications service.[37] In contrast, there is no stand-alone information service in this case. The ruling AT&T seeks here would enable AT&T to exempt the entire service at issue from Title II regulation merely by including an advertising message.

19. The *NATA Reconsideration Order* cited by AT&T also does not support its position.[38] In that case, the Commission classified as an information service a Bell Operating Company offering that provided additional billing information to customers if they dialed extra digits before making a call (*e.g.*, so calls could be tracked by client).[39] As with the *AT&T CEI Order*, nothing in the *NATA Order* removes the underlying telecommunications service from Title II regulation. The information service at issue in the *NATA Order* was offered separately from the telecommunications service and there is no suggestion in that order that every call made by subscribers using the information service somehow would be deemed jurisdictionally interstate or outside of Title II regulation altogether.

20. We also disagree with AT&T's argument that our *Cable Modem Ruling* stands for the proposition that a service that makes information available cannot be classified as a telecommunications

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[33] *Talking Yellow Pages*, 2 FCC Rcd at 5988, para. 20 (citing 47 C.F.R. § 64.702(a)).

[34] For that reason, we reject MCI's argument that the customer "interacts" with the information because it affirmatively consents to listen to it. MCI Reply at 4.

[35] *See* Letter from David Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 03-133 (filed May 11, 2004) at 4 (*AT&T May 11 Ex Parte Letter*) (citing *American Telephone and Telegraph Company Comparably Efficient Interconnection Plan for Enhanced Services Complex*, Memorandum Opinion and Order, 6 FCC Rcd 4839 (CCB 1991) (*AT&T CEI Order*)).

[36] *AT&T CEI Order*, 6 FCC Rcd at 4840, para. 6.

[37] *Independent Data Communications Manufacturers Ass'n Petition for Declaratory Ruling that AT&T's InterSpan Frame Relay Service Is a Basic Service*, Memorandum Opinion and Order, 10 FCC Rcd 13717, 13723, para. 43 (CCB 1995).

[38] *AT&T May 11 Ex Parte Letter* at 7 (citing *NATA Reconsideration Order*, 3 FCC Rcd at 4391, para. 42).

[39] *NATA Reconsideration Order*, 3 FCC Rcd at 4391, paras. 42-46.

service, even if the information capability is not used.[40] In that case, the Commission stated that not all cable modem subscribers use e-mail or web-hosting that is provided with the service, but that nearly every subscriber uses the domain name system that is provided.[41] Given the availability and use of these functions, the Commission found that cable modem service is offered to customers as a single, integrated information service, and that the underlying telecommunications cannot be separated from the data processing capabilities.[42] In marked contrast, AT&T offers its "enhanced" calling card service to consumers solely as a telecommunications service.[43] The advertising information it provides is not in any sense an integral or essential part of the service AT&T offers to consumers. Rather, it is completely incidental to that service and therefore not sufficient to warrant reclassification of the service as an information service. As commenters note, subscribers buy AT&T's calling cards to make telephone calls, not to listen to advertisements.

21. In sum, we find that the mere insertion of the advertising message in calls made with AT&T's prepaid calling cards does not alter the fundamental character of the calling card service. Accordingly, consistent with the foregoing precedent, we find that AT&T's service is properly classified as a telecommunications service.

B. Jurisdiction of Calls Made with AT&T's Service

22. As noted above, the Commission previously has found that prepaid calling cards are jurisdictionally mixed, and that calls made with such cards that originate and terminate in the same state are jurisdictionally intrastate under the Commission's traditional end-to-end analysis.[44] We use this same analysis to determine the jurisdiction of calls made using AT&T's "enhanced" calling card service as described in its original petition.

23. We reject AT&T's argument that the communication of the advertising message creates a call endpoint at the switching platform, thereby dividing a calling card communication into two calls. As Verizon and GCI argue, it cannot be the case that communication of the advertising message creates an endpoint because *all* calling card platforms engage in some form of communication with the calling party, and the Commission never has found this communication to be relevant for jurisdictional purposes. Under an end-to-end analysis, communication of the incidental advertising message embedded in the AT&T card here is no more relevant than the typical phrase, "Thank you for using AT&T."[45]

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[40] *AT&T May 11 Ex Parte Letter* at 5 (citing *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4822-23, para. 38 (2002) (*Cable Modem Ruling*), *vacated in part and remanded, Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003), *cert. granted*, 125 S. Ct. 655 (2004), *and cert. granted sub nom. National Cable & Telecomms. Ass'n v. Brand X Internet Services*, 125 S. Ct. 654 (2004)).

[41] *Cable Modem Ruling*, 17 FCC Rcd at 4822-23, para. 38 n.153.

[42] *Id.* at 4823, para. 39.

[43] As noted above, the packaging materials for AT&T's "enhanced" prepaid calling cards do not mention their use as devices for listening to advertisements and AT&T does not bill its customers for the time they spend listening to the advertisements. Sprint Comments at 8.

[44] *See Time Machine*, 11 FCC Rcd at 1190, para. 30.

[45] Verizon Comments at 5; GCI Comments at 7.

24. We also disagree with AT&T's comparison of its service to three-way calling services. With three-way calling, the caller makes one call over a single circuit that terminates with one end user, then makes a second call over a second circuit to a second end user, and then the two calls are joined together.[46] AT&T states that the Commission has recognized that three-way calling involves two separate calls and it urges us to make a similar finding with respect to "enhanced" calling card services.[47] We agree with SBC and GCI that this comparison is inapt because AT&T's "enhanced" prepaid calling card calls terminate with just one end user at a time.[48] Moreover, as noted by Verizon, subscribers that use three-way calling services choose to converse with two different people at the same time, and each call is characterized as jurisdictionally interstate or intrastate depending on the endpoints of the call, without regard to the physical location of the three-way calling platform.[49] Consequently, these decisions do not support AT&T's argument that the switching platform should be considered an endpoint for jurisdictional purposes.

25. AT&T's application of the Commission's rulings on ISP-bound traffic to its "enhanced" calling card services also is flawed. In 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.[50] AT&T argues that a similar approach is appropriate in this case because at least one "communication" within each calling card "call" usually will be interstate (because cardholders and the centralized switching platforms are usually in different states), and therefore the whole call should be considered jurisdictionally interstate.[51]

26. We agree with BellSouth that AT&T's service is not analogous to ISP-bound traffic.[52] Although a call to an ISP may include multiple communications, the only relevant communication in the case presented by AT&T is from the calling card caller to the called party. Moreover, even if there are multiple communications, the Commission has found that neither the path of the communication nor the location of any intermediate switching point is relevant to the jurisdictional analysis.[53]

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[46] SBC Comments at 5.

[47] AT&T Petition at 11 (citing *AT&T Corp. v. Bell Atlantic-Pennsylvania*, File Nos. E-95-006, *et al.*, Memorandum Opinion and Order, 14 FCC Rcd 556, 587, paras. 69-70 (1988) (*Three-Way Calling Order*)).

[48] SBC Comments at 5-6; GCI Comments at 6.

[49] Verizon Comments at 5-6 (citing *Three-Way Calling Order*, 14 FCC Rcd at 587, paras. 69-70).

[50] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9178, para. 58 (2001) (*ISP Remand Order*), *remanded on other grounds*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. denied*, 123 S. Ct. 1927 (2003). The *WorldCom* decision remanding the *ISP Remand Order* did not take issue with the Commission's jurisdictional finding. *See also GTE Telephone Operating Cos., GTOC Tariff No. 1, Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22466, 22478-80, paras. 22-26 (1998).

[51] AT&T Petition at 16.

[52] BellSouth Comments at 5-6.

[53] *ISP Remand Order*, 16 FCC Rcd at 9177, para. 57.

27. We reject AT&T's argument that its service is jurisdictionally interstate because "the underlying telecommunications services . . . retain their basic jurisdictional character even if they are used as 'building blocks' in a larger information service that falls within a different jurisdiction."[54] According to AT&T, if it were to purchase the underlying telecommunications services from non-affiliated carriers (*e.g.*, a wholesale 800 link from WorldCom and Sprint), those services would retain their interstate classification "even if AT&T uses that building block as part of a larger information service that might ultimately be deemed intrastate."[55] AT&T argues that we should reach the same result even if it purchases underlying basic services from itself (*e.g.*, an affiliated carrier).[56] Along the same lines, AT&T argues that any requirement that it pay intrastate access charges on calls that are jurisdictionally intrastate would discriminate against facilities-based providers in favor of resellers that provide service using interstate services purchased from other carriers.[57]

28. The flaw in AT&T's argument is that it is not offering customers an information service that *uses* telecommunications; the service it offers *is* a telecommunications service. Consequently, we determine the jurisdiction of calls made with that service based on an end-to-end analysis, without regard to the routing of the call or the geographic characteristics of the underlying telecommunications. This same analysis applies to facilities-based carriers and to resellers. In either case, the service provided to the calling card customer is a telecommunications service that is subject to intrastate access charges when calls originate and terminate in different local calling areas within the same state.[58]

29. Finally, we reject AT&T's argument that a ruling denying its petition and subjecting its "enhanced" calling card service to intrastate access charges is presumptively inconsistent with the First Amendment because it penalizes AT&T relative to other information service providers based on the content of the information it provides.[59] As an initial matter, we conclude above that AT&T is providing a telecommunications service, not an information service. Therefore, the relevant comparison is with other calling card service providers, not with information service providers. As noted throughout this order, our treatment of AT&T's "enhanced" calling card service is identical to our treatment of similar telecommunications services. We have applied the same legal analysis for purposes of determining the

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[54] AT&T Petition at 18-19 (citing *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase I, Memorandum Opinion and Order, 4 FCC Rcd 1, 141, para. 274 (1988)).

[55] AT&T Petition at 19.

[56] *Id.* at 19-20.

[57] *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (October 12, 2004) at 5 (non-facilities-based resellers obtain interstate 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).

[58] Claims for unpaid intrastate access charges should be filed in the appropriate court or state commission. The Commission has held that it does not act as a collection agent for carriers with respect to unpaid tariff charges. *See, e.g., U.S. TelePacific Corporation*, File No. EB-04-MD-005, Memorandum Opinion and Order, FCC 04-284 at para. 8 (released Dec. 14, 2004).

[59] *See* AT&T Petition at 14 n.19 ("Intrastate access charges generally are higher than interstate access charges, and therefore classifying these calls as intrastate or interstate on the basis of the content of the communication is 'presumptively inconsistent' with the First Amendment."); *see also AT&T May 11 Ex Parte Letter* at 6.

jurisdiction of calls and, with respect to jurisdictionally interstate traffic, the same Title II regulatory requirements apply.[60] Consequently, our decision here raises no First Amendment concerns.

C. Universal Service Contributions

30. As noted above, by unilaterally deciding to treat "enhanced" prepaid calling cards as information services, AT&T claims that it has "saved" $160 million in universal service contributions since the beginning of 1999.[61] Given these representations by AT&T in its SEC statements, it is apparent that the universal service contribution forms that it has submitted to USAC do not accurately reflect the treatment of "enhanced" prepaid calling cards as telecommunications services.

31. We direct AT&T to file with USAC revised Forms 499-A that properly report prepaid calling card revenue consistent with the findings in this Order so that USAC may calculate and assess the appropriate additional universal service contributions for the entire period that AT&T provided such calling card services.[62] AT&T must make such revised filings within 30 days of the effective date of this Order. We direct AT&T to pay any past due universal service amounts, including any applicable late fees, as invoiced by USAC and by the due date listed on USAC's invoice. Further, we expect all other companies providing calling card services similar to those described herein to file new or revised Forms 499-A within 30 days of the effective date of this Order as needed to properly report revenues from these services consistent with this Order. We direct USAC to issue revised invoices for all new or revised Forms 499-A described herein, those filed by AT&T and by similarly situated companies, within 60 days of the effective date of this Order and requiring payment as specified on the invoices. To the extent that AT&T or other similarly situated companies do not file new or revised Forms 499-A and begin paying revised universal service contribution amounts in accordance with the deadlines provided above, we direct the Enforcement Bureau to take or recommend appropriate enforcement action under section 503(b) of the Act.

32. AT&T argues that it should not be subject to retroactive liability because its treatment of "enhanced" prepaid calling cards as information services was consistent with the Commission's precedent.[63] In addition, AT&T claims that it informed the Commission – through the filing of a 1994 revision to its cost allocation manual (CAM) – that it planned to treat this type of calling card service as an enhanced service and this treatment was "deemed accepted" on February 28, 1995.[64] We reject AT&T's arguments and find that retroactive liability for universal service contributions is warranted in this case. The Commission's prior decisions had always treated prepaid calling cards as telecommunications services,[65] and the universal service contribution forms submitted to USAC plainly

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[60] *See, e.g.*, 47 C.F.R. § 54.706.

[61] *See AT&T November 10-Q Report* at 16.

[62] AT&T must limit the revisions on its Forms 499-A to information concerning prepaid calling card revenue (currently line 411 on Form 499-A).

[63] *See* Letter from Amy Alvarez, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 2, 2004).

[64] *Id.*

[65] *See Time Machine*, 11 FCC Rcd at 1192-93, para. 40.

require revenues from prepaid calling cards to be reported.[66] In this context, we find that AT&T had no reasonable basis to expect to avoid these obligations merely by adding an unsolicited advertising message to its prepaid calling card service.[67]

33. Similarly, 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. As an initial matter, we agree with BellSouth that a CAM filing does not establish the proper legal classification of a service for any purpose other than the allocation of costs between regulated and non-regulated services.[68] Furthermore, because the Commission substantially deregulated AT&T in October 1995,[69] its treatment of "enhanced" prepaid calling cards for cost allocation purposes was in effect for only a few months and was irrelevant by the time the Commission started requiring explicit contributions to the Universal Service Fund pursuant to the Telecommunications Act of 1996. Moreover, nothing in the Commission's decisions regarding the contribution mechanisms ever suggested that some types of prepaid cards should be exempt from the contribution requirement. We therefore find that AT&T's 1994 CAM revision does not provide a basis for shielding it from the obligation to contribute for past periods.

D. Other Considerations

34. AT&T argues that a decision denying its petition would compromise the availability of inexpensive calling card calls to consumers, particularly low-income consumers and consumers in rural communities and inner-city neighborhoods.[70] Several commenters echo these concerns.[71] AT&T also

[66] In 1999, when AT&T decided not to contribute to the Universal Service Fund based on its prepaid calling card revenues, the Commission released both its Telecommunications Reporting Worksheet, FCC Form 499-A, and Instructions to the Telecommunications Reporting Worksheet, Form 499-A. Both documents made clear that carriers were expected to report prepaid calling card revenues and contribute to the Universal Service Fund based on those revenues. *See, e.g.*, Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A at 18 (dated July 1999) (stating that Line 223 should "include revenues from pre-paid calling cards provided either to customers or to retail establishments. Gross billed revenues should represent the amounts actually paid by customers and not the amounts paid by distributors or retailers, and should not be reduced or adjusted for discounts provided to distributors or retail establishments. All pre-paid card revenues are classified as end-user revenues.").

[67] AT&T argues that if it is subject to a retroactive contribution obligation, the Commission must impose a similar obligation on other providers of prepaid calling cards. *See* Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 13, 2004) at 6-8. We agree with AT&T that services similar to the service it offers are also subject to the contribution obligation. If AT&T or any other entity has reason to believe that another carrier is evading its universal service obligations, it should contact the Universal Service Administration Company.

[68] *See* Letter from Stephen Earnest, Regulatory Counsel, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Dec. 8, 2004) at 3.

[69] *See In the Matter of Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271 (1995).

[70] *See* AT&T Petition at 4-7; *AT&T Evans Letter* at 1-2.

[71] *See, e.g.*, Letter from Erik Winborn, Vice President National Government Relations, Wal-Mart Stores, Inc., to Michael K. Powell, Chairman, Federal Communications Commission (July 21, 2004) at 2; Letter from Richard P. Siliakus, GMM/VP-Merchandising, Family Dollar Stores, Inc., to Marlene H. Dortch, Secretary, Federal (continued....)

states that military personnel make extensive use of "enhanced" prepaid calling cards and that they may be adversely affected if AT&T is forced to raise the rates associated with these cards.[72] The Department of Defense acknowledges that AT&T provides prepaid calling cards to military personnel around the world, including personnel serving in Operation Iraqi Freedom, and asks that we consider the impact of our decision on military families.[73] A number of commenters representing members of the armed services raise similar concerns.[74]

35. We appreciate that prepaid calling cards can provide a low-cost calling option for all types of consumers, including members of the military and their families. Prepaid calling cards are a lifeline for troops serving overseas, and we applaud the generous donations made by many carriers, including AT&T, as well as many other organizations. Appendix B to this Order highlights some of these contributions and provides information about ongoing programs through which the public can donate calling cards to members of the armed services.

36. Nothing in this decision is intended to jeopardize the benefits provided by prepaid calling cards. As an initial matter, given AT&T's representation that the majority of calls made with these calling cards do not originate and terminate in the same state,[75] we are not convinced that subjecting intrastate calls to intrastate access charges, as existing law requires, will have a material impact on AT&T's rates. In particular, it is not apparent why an increase in the cost of intrastate calls should have any material effect on the cost of calls made to or from members of the armed services that are serving overseas.[76] AT&T is correct that cards sold to members of the armed forces can be used for purely intrastate calls, and can be priced accordingly,[77] but AT&T provides no information on calling patterns of service men and women to support its position that payment of intrastate access charges on intrastate calls would result in a material increase in the cost of providing service under its contract with the

(Continued from previous page)
Communications Commission (July 15, 2003) at 1; Letter from Scott L. Ross, Executive Director, Florida Student Association, Inc., to Michael K. Powell, Chairman, Federal Communications Commission (Nov. 8, 2004) at 1.

[72] *AT&T Evans Letter* at 1-2. AT&T states that its contract to supply prepaid calling cards to the military contains a change of law provision that allows for price adjustments in response to regulatory changes. *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 8, 2004).

[73] *See* Letter from Charles Abell, Principal Deputy, Office of the Undersecretary of Defense for Personnel and Readiness, to Michael K. Powell, Chairman, Federal Communications Commission (July 23, 2004) (*DOD Letter*).

[74] *See, e.g.*, Letter from Elaine B. Rogers, President, USO of Metropolitan Washington, to Michael K. Powell, Chairman, Federal Communications Commission (July 15, 2004); Letter from Joe A. Ortiz, National Civil Rights Director, American GI Forum, to Michael K. Powell, Chairman, Federal Communications Commission (Dec. 12, 2004); Letter from Robert E. Wallace, Executive Director, Veterans of Foreign Wars, to Michael K. Powell, Chairman, Federal Communications Commission (Dec. 9, 2004).

[75] *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Oct. 12, 2004) at 3 (17-20 percent of calls involve only an interstate communication between the platform and the calling party and more than 65 percent of calls are entirely interstate or international).

[76] *See* Letter from Glenn Reynolds, Vice President-Federal Regulatory, BellSouth, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 5, 2004) at 5.

[77] *See* Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 8, 2004) at 3.

military. Although this Commission has no direct involvement in AT&T's contractual dealings with the military, we urge AT&T to heed the concerns expressed by the Department of Defense and the numerous organizations representing the interests of the armed forces and consider all possible alternatives before raising rates to members of the armed forces.[78]

37. As to the suggestion that requiring universal service contributions will result in increased rates for prepaid calling cards, the same argument can be made for all telecommunications services. The regime established by Congress under section 254 of the Act relies on contributions from all telecommunications carriers, including carriers that offer prepaid calling cards like those offered by AT&T. We note that numerous carriers have asserted that they comply with the requirements to contribute to universal service mechanisms and pay intrastate access charges on these calls today while continuing to offer calling card rates that are competitive with the rates offered by AT&T.[79]

IV. NOTICE OF PROPOSED RULEMAKING

A. Discussion

38. As explained above, AT&T's November 2004 amendment to its petition identified two variants to the "enhanced" prepaid calling card service described in its original petition. In the first variant, the customer is given the option to listen to additional information or perform additional functions before listening to the advertising message.[80] In the second variant, AT&T would provide transport associated with enhanced calling card calls over its Internet backbone network using IP technology.[81] These two variations could be offered separately from one another or in combination (e.g., a card that gives callers the option to access additional information and uses IP transport for a portion of the call.)[82] Rather than continuing to address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner, we conclude that the public interest would best be served by considering this issue in a more comprehensive manner, enabling us to gather information about all types of current and planned calling card services.

39. In the Order portion of this item, we find that the prepaid calling card service described in AT&T's original petition is a telecommunications service. We find that this service does not meet the statutory definition of an information service because: (1) AT&T does not offer any capability to the

[78] *DOD Letter* at 1; *see also, e.g.*, note 74, *supra.*

[79] *See* Letter from Richard Juhnke, Vice President-Regulatory Affairs, Sprint, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 2, 2004) at 2 ("AT&T's unlawful practices have not translated into marked savings for its customers. . . . Sprint currently distributes cards through major retailers at rates that are at the lower part of the range cited by AT&T"); *see also* Letter from Ann Rakestraw, Assistant General Counsel, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 15, 2004). For these reasons, and because the action we take in this Order is consistent with the requirements of the Act, we believe this Order is consistent with Congress' non-binding direction "not to take any action that would directly or indirectly have the effect of raising the rates charged to military personnel or their families for telephone calls placed using prepaid phone cards." H.R. Conf. Rep. No. 108-792, at 839 (2004).

[80] *AT&T Nov. 22 Letter* at 2-3.

[81] *Id.* at 3-4.

[82] *Id.*

customer with respect to the advertising message; and (2) the advertising message is incidental to the underlying telecommunications service. We seek comment on how to apply this analysis to the first variant on AT&T's "enhanced" calling card service described above. Does offering the caller a menu of options to access information satisfy the definition of an information service, or must the information made available be more integral to the underlying telecommunications service? How should we distinguish between incidental information and information that is essential to the service? Is there any evidence that any of these cards are being marketed as providing a service other than making telephone calls? Is there any evidence that customers purchase these cards for any reason other than making telephone calls? Is the customer's purpose in buying the card relevant to this inquiry? How relevant is the frequency with which customers use any such additional features? We seek comment on the manner in which these cards are marketed, the types of features they offer, and the frequency with which customers use those features.

40. We also seek comment on the extent to which the use of IP technology to deliver calls placed using prepaid calling cards is a relevant factor in determining its classification under the Act. In the *AT&T IP Telephony Order*, we concluded that an AT&T voice service utilizing 1+ dialing from a regular telephone that is converted into IP format for transport over AT&T's network and converted back into analog format for delivery through local exchange carrier lines is a telecommunications service.[83] We stated that this conclusion applies to all services that (1) use ordinary customer premises equipment with no enhanced functionality, (2) originate and terminate on the public switched telephone network, and (3) undergo no net protocol conversion and provide no enhanced functionality to end users due to the provider's use of IP technology.[84] Are prepaid calling card services that use "IP-in-the-middle" and meet these same criteria also telecommunications services? Does it matter, as AT&T argues, whether 1+ dialing or 8YY dialing is used to originate the call?[85] AT&T has asserted that other prepaid calling card providers are using IP to transport prepaid calling card services and are treating such calls as information services.[86] If other providers are offering such services, are they treating them as information services? If so, how are those services similar or dissimilar to the "IP-in-the-middle" service we classified as a telecommunications service in the *AT&T IP Telephony Order*?

41. In addition to services similar to the variants described above, we seek comment on how we might distinguish between telecommunications and information services for other existing or potential prepaid calling card services that incorporate features not specifically addressed in this item. Are there other existing prepaid calling cards that offer capabilities in addition to the ability to place a phone call? What capabilities do these other cards offer, and how are they different from the prepaid calling cards offered or proposed by AT&T? In what other ways is IP technology being used to provide prepaid calling services? What other features are relevant to the classification of any existing or potential prepaid calling cards?

42. To the extent the variant services described by AT&T or other existing or potential prepaid calling card services are classified as information services, they presumably would be subject solely to

[83] *AT&T IP Telephony Order*, 19 FCC Rcd at 7457, para. 1.

[84] *Id.* at 7457-58, para. 1.

[85] *AT&T Nov. 22 Letter* at 4.

[86] *Id.* (citing Net2Phone and IDT as examples).

federal jurisdiction.[87] If any such services are classified as telecommunications services, we seek comment on the circumstances, if any, under which we should assert exclusive federal jurisdiction, even if the calls originate and terminate in the same state. What factors would be relevant in deciding whether the Commission should assert exclusive jurisdiction? Does the Commission's recent *Vonage Order* have any relevance in this circumstance?[88]

43. The record developed in response to AT&T's petition makes clear that prepaid calling cards are a vital communications tool for members of the armed services and their families.[89] As demonstrated in Appendix B, numerous programs exist through which the public can support the troops by donating calling cards, and the Commission fully supports these efforts. We seek comment on whether there are steps this Commission can take to ensure that prepaid calling cards continue to be available to soldiers and their families at reasonable rates. Specifically, are there any circumstances in which soldiers and their families would be negatively impacted if prepaid calling cards were subject to universal service and access charges?[90] If there would be any such negative impact, are there steps the Commission can take, consistent with the requirements of the Act, to ameliorate it? In this respect, would it be within our authority to exempt calling cards sold at military exchanges or other military retails outlets from universal service or access charges, or within our authority to forbear from applying such charges? Even if it is within our authority, is it technically feasible for vendors to differentiate such cards?

B. Procedural Matters

1. Comment Filing Procedures

44. Pursuant to sections 1.415 and 1.419 of the Commission's rules,[91] interested parties may file comments on or before 30 days and reply comments on or before 60 days after publication of this NPRM in the Federal Register. **All pleadings responsive to this NPRM must reference WC Docket 05-68. Pleadings intended to respond only to the issues raised in this NPRM should not reference WC Docket No. 03-133.** Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[92] Comments filed through the ECFS can be sent as an electronic file

[87] The Commission has previously stated that, "unless an information service can be characterized as 'purely intrastate,' or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed." *Pulver Order*, 19 FCC Rcd at 3320, para. 20 (footnote omitted).

[88] *See 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*).

[89] *See, e.g.*, Letter from G.R. Rowan, President, Armed Forces Marketing Council, to Michael K. Powell, Chairman, Federal Communications Commission (Dec. 21, 2004) at 1.

[90] The offering of comparably priced services by Sprint while paying such charges, and the other means of support set forth in Appendix B, would tend to indicate that there are alternatives in the market that would limit any such impact, but we seek comment on whether this is actually the case.

[91] 47 C.F.R. §§ 1.415, 1.419.

[92] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

via the Internet to http://www.fcc.gov/cgb/ecfs/. Only one copy of an electronic submission must be filed in a single docket. In completing each transmittal screen, commenters should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number, in this case, WC Docket No. 05-68. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form." A sample form and directions will be sent in reply. Parties are strongly encouraged to file comments electronically using the Commission's ECFS.

45. Parties who choose to file by paper must file an original and four copies of each filing. Paper filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners, and any envelopes must be disposed of before entering the building. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743. U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, SW, Washington, D.C. 20554.

46. All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. Parties should also send one copy of their filings to the Chief, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, 445 12th Street, SW, Washington, D.C. 20554. In addition, parties should send one copy to the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, D.C. 20554, (202) 488-5300, or via e-mail to fcc@bcpiweb.com.

47. Documents in WC Docket No. 05-68 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, telephone (202) 488-5300, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting the Consumer & Governmental Affairs Bureau, at (202) 418-0531, TTY (202) 418-7365, or at fcc504@fcc.gov.

2. Ex Parte Requirements

48. This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[93] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented generally is required.[94] Other rules pertaining to oral and written *ex parte*

[93] *See* 47 C.F.R. §§ 1.1200, 1.1206.

[94] *See* 47 C.F.R. § 1.1206(b).

presentations in permit-but-disclose proceedings are set forth in section 1.1206(b) of the Commission's rules.[95]

3. Initial Regulatory Flexibility Analysis

49. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),[96] the Commission has prepared this Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the NPRM provided in paragraph 44 of the item. The Commission will send a copy of the NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[97] In addition, the NPRM and IRFA (or summaries thereof) will be published in the Federal Register.[98]

a. Need for, and Objectives of, the NPRM

50. In the past, the Commission has treated prepaid calling cards as jurisdictionally mixed telecommunications services subject to state and federal regulation. As companies introduce "enhanced" prepaid calling cards, questions arise as to whether these new services should be subject to the same regulatory treatment. In this NPRM, the Commission seeks comment on two types of "enhanced" prepaid calling card services offered or planned by AT&T as well as other existing or potential prepaid calling card services incorporating features that are not currently addressed by our rules or this item. Specifically, the Commission seeks comment on the classification of such services as telecommunications services or information services and whether, or under what circumstances, the Commission should exercise exclusive federal jurisdiction over such services. The Commission also seeks comment on whether there are steps it can take to ensure that prepaid calling cards continue to be available to soldiers and their families at reasonable rates.

b. Legal Basis

51. This rulemaking action is supported by sections 4(i), 4(j), 201, 202, 203, and 254 of the Communications Act of 1934, as amended.[99]

c. Description and Estimate of the Number of Small Entities to Which the Notice will Apply

52. The RFA directs agencies to provide a description of, and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[100] The RFA generally

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[95] 47 C.F.R. § 1.1206(b).

[96] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. §§ 601-12, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

[97] *See* 5 U.S.C. § 603(a).

[98] *See id.*

[99] 47 U.S.C. §§ 154(i), (j), 201, 202, 203, 254.

f. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

61. None.

4. Paperwork Reduction Act

62. This document does not contain proposed information collection(s) subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104-13. In addition, therefore, it does not contain any new or modified "information collection burden for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198.[124]

V. ORDERING CLAUSES

63. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), 201, 202, 203, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, 203, 254, the AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services IS DENIED as set forth herein.

64. IT IS FURTHER ORDERED that, within 30 days of the effective date of this Order, AT&T SHALL FILE with the Universal Service Administrative Corporation (USAC) revised Forms 499-A for the entire period that AT&T provided the "enhanced" calling card service described in its original petition, consistent with the findings in this Order.

65. IT IS FURTHER ORDERED that, within 60 days of the effective date of this Order, USAC SHALL ISSUE revised invoices consistent with the findings in this Order for all new or revised Forms 499-A filed pursuant to this Order.

66. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 4(i), 4(j), 201, 202, 203, and 254 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 202, 203, 254, NOTICE IS HEREBY GIVEN of the proposed rulemaking described above and COMMENT IS SOUGHT on those issues.

67. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[124] *See* 44 U.S.C. § 3506(c)(4).

they were engaged in the provision of prepaid calling cards.[121] Of these 32 companies, an estimated 31 have 1,500 or fewer employees and one has more than 1,500 employees.[122] Consequently, the Commission estimates that the great majority of prepaid calling card providers are small entities that may be affected by the rules and policies proposed herein.

d. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

58. In this NPRM, we are seeking comment on, among other things, the appropriate classification of certain prepaid calling card services and the scope of federal jurisdiction over such services. If we determine that particular prepaid calling card services are telecommunications services, providers of any such services that have not complied with applicable regulatory requirements in the past would be subject to additional reporting or recordkeeping burdens related to those requirements. If the Commission determines that it should exercise exclusive federal jurisdiction over prepaid calling card services, any current reporting and recordkeeping burdens related to state regulation likely would be reduced.

e. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

59. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[123]

60. In this NPRM, the Commission seeks comment on the classification of prepaid calling card services, the scope of federal jurisdiction over such services, and whether the Commission should take steps to ensure that prepaid calling cards remain affordable to members of the military and their families. The Commission's resolution of these issues will affect not only small providers of prepaid cards, but also small LECs that exchange traffic with these providers and small IXCs that compete with these providers. Options that reduce burdens for one type of small entity may increase the burden on another type of small entity. We therefore seek comment on the types of burdens small entities could face if the Commission alters its treatment of prepaid calling card providers as proposed in the NPRM. Entities, especially small businesses, are encouraged to quantify, if possible, the costs and benefits of potential reporting, recordkeeping, and other compliance requirements. We will consider any proposals made to minimize significant economic impact on small entities.

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[121] *Trends in Telephone Service*, Table 5.3.

[122] *Id.*

[123] 5 U.S.C. §§ 603(c)(1)–(c)(4).

we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

55. *Wired Telecommunications Carriers*. The SBA has developed a small business size standard for Wired Telecommunications Carriers, which consists of all such companies having 1,500 or fewer employees.[110] According to Census Bureau data for 1997, there were 2,225 firms in this category, total, that operated for the entire year.[111] Of this total, 2,201 firms had employment of 999 or fewer employees, and an additional 24 firms had employment of 1,000 employees or more.[112] Thus, under this size standard, the majority of firms can be considered small.

56. *Local Exchange Carriers*. Neither the Commission nor the SBA has developed a size standard for small businesses specifically applicable to local exchange services. The closest applicable size standard under SBA rules is for Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.[113] According to Commission data, 1,310 carriers reported that they were incumbent local exchange service providers.[114] Of these 1,310 carriers, an estimated 1,025 have 1,500 or fewer employees and 285 have more than 1,500 employees.[115] In addition, according to Commission data, 563 companies reported that they were engaged in the provision of either competitive access provider services or competitive local exchange carrier services.[116] Of these 563 companies, an estimated 472 have 1,500 or fewer employees and 91 have more than 1,500 employees.[117] In addition, 37 carriers reported that they were "Other Local Exchange Carriers."[118] Of the 37 "Other Local Exchange Carriers," an estimated 36 have 1,500 or fewer employees and one has more than 1,500 employees.[119] Consequently, the Commission estimates that most providers of local exchange service, competitive local exchange service, competitive access providers, and "Other Local Exchange Carriers" are small entities that may be affected by the rules and policies proposed herein.

57. *Telecommunications Resellers*. The SBA has developed a size standard for a small business within the category of Telecommunications Resellers. Under that SBA size standard, such a business is small if it has 1,500 or fewer employees.[120] According to Commission data, 32 companies reported that

[110] 13 C.F.R. § 121.201, NAICS code 517110.

[111] U.S. Census Bureau, 1997 Economic Census, Subject Series: Information, "Establishment and Firm Size (Including Legal Form of Organization)," Table 5, NAICS code 513310.

[112] *Id.* The census data do not provide a more precise estimate of the number of firms that have employment of 1,500 or fewer employees; the largest category provided is "Firms with 1,000 employees or more."

[113] 13 C.F.R. § 121.201, NAICS code 517110.

[114] *Trends in Telephone Service*, Table 5.3.

[115] *Id.*

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] 13 C.F.R. § 121.201, NAICS code 517310.

defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[101] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[102] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[103]

53. The most reliable source of information regarding the total numbers of certain common carrier and related providers nationwide, as well as the number of commercial wireless entities, appears to be the data that the Commission publishes in its *Trends in Telephone Service* report.[104] The SBA has developed small business size standards for wireline and wireless small businesses within the three commercial census categories of Wired Telecommunications Carriers,[105] Paging,[106] and Cellular and Other Wireless Telecommunications.[107] Under these categories, a business is small if it has 1,500 or fewer employees. Below, using the above size standards and others, we discuss the total estimated numbers of small businesses that might be affected by our actions.

54. We have included small incumbent LECs in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation."[108] The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent LECs are not dominant in their field of operation because any such dominance is not "national" in scope.[109] We have therefore included small incumbent LECs in this RFA analysis, although

(Continued from previous page)
[100] 5 U.S.C. § 603(b)(3).

[101] 5 U.S.C. § 601(6).

[102] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 5 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[103] 15 U.S.C. § 632.

[104] *Trends in Telephone Service*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division (May 2004) (*Trends in Telephone Service*).

[105] 13 C.F.R. § 121.201, North American Industry Classification System (NAICS) code 513310 (NAICS code 513310 was changed to 517110 in October 2002).

[106] 13 C.F.R. § 121.201, NAICS code 517211.

[107] 13 C.F.R. § 121.201, NAICS code 517212.

[108] 15 U.S.C. § 632.

[109] Letter from Jere W. Glover, Chief Counsel for Advocacy, SBA, to William E. Kennard, Chairman, FCC (May 27, 1999). The Small Business Act contains a definition of "small business concern," which the RFA incorporates into its own definition of "small business." *See* 15 U.S.C. § 632(a); 5 U.S.C. § 601(3). SBA regulations interpret "small business concern" to include the concept of dominance on a national basis. 13 C.F.R. § 121.102(b).

Appendix A

Comments (filed June 26, 2003)

Alaska Exchange Carriers Association, Inc.
BellSouth Corp.
General Communications, Inc. (GCI)
Qwest Services Corp.
Regulatory Commission of Alaska
SBC Communications, Inc.
Sprint Corp.
Verizon

Reply Comments (filed July 24, 2003)

AT&T Corp.
New York State Dep't of Public Service
WorldCom, Inc. d/b/a MCI

Appendix B

Prepaid calling cards are a vital means of communications for members of the armed services, particularly those serving overseas. This appendix provides information on several ongoing programs through which the public may donate calling cards to military personnel. We also highlight a number of recent donations by the telecommunications industry of prepaid calling cards and long-distance minutes. This summary is not intended to be an exhaustive list of calling card donation programs or service provider contributions.

Calling Card Donation Programs

Cell Phones for Soldiers

Cell Phones for Soldiers is a non-profit organization that provides prepaid calling cards to American soldiers serving in the Middle East. Cell Phones for Soldiers, which was started by teenager Brittany Bergquist and her younger brother Robbie, raises money by collecting old cell phones and selling them to companies for refurbishment, and through cash donations. To learn more about this program or to make a donation, visit the organization's website, http://www.cellphonesforsoldiers.com.

Help Our Troops Call Home

This program is sponsored by the Armed Services Exchanges, which sell prepaid calling cards to any individual or organization that wishes to purchase cards for service members deployed in support of Operation Enduring Freedom or Operation Iraqi Freedom. To learn more about this program or to make a donation, visit any of the Armed Service Exchange websites: the Army and Air Force Exchange Service, http://www.aafes.com; the Navy Exchange Service, http://navy-nex.com; or the Marine Corps Exchange, http://www.usmc-mccs.org.

Operation USO Care Package

United Service Organizations, Inc. (USO) sponsors a program that delivers care packages to members of the U.S. military deployed around the world. A donation of $25 sponsors a care package that includes a pre-paid worldwide phone card. To learn more about this program or to make a donation, visit the care package website, http://www.usocares.org.

Operation Uplink

Operation Uplink provides free prepaid phone cards to active-duty military personnel and hospitalized veterans, and has distributed more than 4,000,000 prepaid phone cards since it was launched by the Veterans of Foreign Wars in 1996. To learn more about this program or to make a donation, visit the Operation Uplink website, http://www.operationuplink.org.

USO Operation Phone Home

The USO accepts donations for calling cards through its Operation Phone Home program. Since it launched Operation Phone Home in March 2003, the USO has distributed more than 80,000 free cards. To learn more about this program or to make a donation, visit the program's website, http://www.uso.org/pubs/8_20_2733.cfm.

Donations by Telecom Providers

AT&T

In a news release dated November 29, 2004, AT&T noted that since the onset of hostilities in the Middle East, it has donated more than $6 million in prepaid phone cards to our troops. The press release is available on AT&T's military headquarters website, http://www.usa.att.com/military/events/support_troops.jsp.

BellSouth

BellSouth states on its Pioneer Volunteers website that employees that donate to the USO qualify for a corporate match through the BellSouth Matching Gift program. See http://www.bellsouthpioneers.org/TroopDonations.htm.

MCI

In a press release dated November 16, 2004, MCI stated that it would provide to U.S. Armed Forces personnel stationed in Iraq free phone calls on November 21-27 and December 21 through January 1. MCI also stated that it had provided pre-paid calling cards to military support groups for distribution during the 2004 holiday season. The press release is available on MCI's website, http://global.mci.com/about/news/news2.xml?newsid=12450&mode=long&lang=en&width=530&root=/about/&langlinks=off.

Qwest

In a press release dated February 4, 2004, Qwest announced that it had recently donated 500, 30-minute long-distance calling cards to members of the military recuperating at Walter Reed Army Medical Center in Washington, DC. The press release is available on Qwest's website, http://www.qwest.com/about/media/pressroom/1,1281,1436_archive,00.html.

SBC

On April 17, 2003, SBC launched a public service campaign to promote the Operation Uplink program, which provides free international calling cards for military personnel stationed overseas. In the press release announcing the public service campaign, SBC stated that it had contributed $250,000 to Operation Uplink. The press release is available on SBC's website, http://www.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=20454.

Sprint

In a press release dated February 6, 2002, Sprint announced that it had donated prepaid long-distance calling cards to the 5,000 military personnel that served to protect the Olympic Winter Games in Salt Lake City. The press release is available on Sprint's website, http://www2.sprint.com/mr/news_dtl.do?id=1128.

Verizon

On June 21, 2004, Verizon announced the donation of 5,000 prepaid calling cards to the USO for distribution to American soldiers wounded in battle and being treated at U.S. Army hospitals. In the same announcement, Verizon stated that in the previous year it had donated over 450,000 calling cards to support all branches of the military and their families. The press release containing these announcements is available on Verizon's website, http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=85633&PROACTIVE_ID=cecdc9cdcdc9c9cec7c5cecfcfcfc5cecec9c7cfcbc6cacbccc5cf.

Vonage

In a press release dated December 28, 2004, Vonage announced that its donation of free phone service to the United States military stationed in Iraq and Afghanistan has allowed our soldiers to spend over two million minutes on the phone with loved ones back in the U.S. Vonage stated that it plans to continue this program throughout 2005. The press release is available on Vonage's website, http://www.vonage.com/corporate/press_index.php?PR=2004_12_28_0.

STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133; Regulation of Prepaid Calling Card Services, WC Docket No. 05-68.

Companies cannot engage in misdirection or word games to avoid their universal service obligations. And they certainly cannot unilaterally decide when and where they pay their universal service charges. These payments are the law of land – and they apply to all calling cards that offer telecommunications services. Today we reject any ambiguity created by these companies' efforts to duck their universal service responsibilities.

The original calling card service described in the petition is a telecommunications service and therefore the provider must pay universal service fees. Recent filings with the Securities and Exchange Commission indicate that one company alone has withheld approximately $160 million from the Fund. That amount would subsidize telephone service for over 6 million low income consumers for an entire quarter. Or provide enough resources for the first four years of the rural telemedicine program. One carrier's failure to comply with its universal service obligations means that other carriers and their customers pay more for service, and the burden is shifted from one group to another – unfairly.

AT&T has engaged in a campaign to suggest that consumer rates would rise 20 percent or more if carriers are required to pay their fair share. They have gone so far as to take the extraordinary step of conscripting consumers into a lobbying effort directed at this Commission and members of Congress. Shamelessly, they trumpet the impact of this decision on our soldiers serving in Iraq. What is remarkable about this allegation is that other carriers are offering comparable rates to people serving in the military – some have even offered to donate free service - without taking funds from our rural universal service program or programs designed to help low-income individuals. The FCC must be and is concerned about the impact of our rulings on servicemen and their families. However some companies' advocacy on this issue is better seen as an attempt to distract the public from companies' underlying effort to evade their regulatory responsibilities to the Universal Service Fund. Today we level the playing field so that all calling card carriers pay their fair share.

STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket Nos. 03-133, 05-68 (FCC 05-41).

This Order clarifies that the Commission's existing rules for telecommunications services apply to calling card services even when consumers are played a recorded advertising message. This result is the most logical reading of our rules and best preserves our universal service policies. Accordingly, I support the Order.

I have concern, however about the scope of the issues we address here. In particular, I am concerned that the Commission defers ruling and instead seeks comment through a Notice of Proposed Rulemaking on two alternative forms of calling card services, which the petitioner in this case now uses to provide service. Indeed, commenters have raised the possibility that a significant portion of the multi-billion dollar calling card industry may use these alternative forms of service.

By not addressing these two alternative forms of calling card services here, we leave for another day questions about whether these calling card services must also contribute to the universal service fund and how these services are classified for purposes of our intercarrier compensation rules. This ambiguity may be read by providers to signal a regulatory edge for one form of technology over another, despite the fact that the services appear functionally the same from the perspective of the consumer. Alternatively, when the Commission finally does address these other forms of service, a portion of the calling card industry may face the same sort of liability contemplated in this Order. Either way, I am concerned that we perpetuate a marketplace dynamic where success is significantly affected by tolerance for regulatory risk. As policymakers, and as stewards of universal service, we should move to address these issues quickly and comprehensively.

STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING

Re: *AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking (WC Docket No. 03-133)

By law, this Commission has a duty to preserve and advance universal service. In some ways we live up to that charge today. But in others our analysis falls short. We clarify in this item that AT&T calling card services that include incidental announcements or advertisements are basic telecommunications services, subject to universal service obligations. This sets straight a messy situation and I support the result.

Still, I am concerned with the backward-looking nature of our decision. By starting a Notice of Proposed Rulemaking, the Commission suggests that going forward the boundary between calling cards subject to universal service and those that are not is whether they feature an automated voice that coos on the line "press 1 for more information." There may be a bright line out there between services subject to regulatory authority and those that are not. But I doubt this is it. And by initiating a proceeding based on this distinction, the Commission all but ensures that calling card confusion from the past is perpetuated in the future. Because I believe we have deeper analytical duties when it comes to universal service, I choose to concur.