

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 )

OPPOSITION OF VERIZON<sup>1</sup>

The Commission should reject AT&T's latest attempt to continue to violate federal law by depriving both the federal Universal Service Fund and local exchange carriers of payments to which they are legally entitled.<sup>2</sup> As the Commission properly found, AT&T has unlawfully been evading its legal obligation to pay universal service fund fees and access charges for years. There is no basis for allowing AT&T to continue to obstruct the law and shelve indefinitely its obligation to pay, at AT&T's own estimate, some \$550 million in improperly withheld universal service payments and access charges. AT&T has utterly failed to meet any of the requirements for a stay, and its motion should be denied.

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<sup>1</sup> The Verizon telephone companies and long distance companies (collectively "Verizon") are the affiliated local exchange and interexchange carriers of Verizon Communications, Inc., which are listed in Attachment A hereto.

<sup>2</sup> Motion for Stay Pending Appeal, Subject to Posting of Security, *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133 (filed March 28, 2005) ("*AT&T Motion*").

AT&T FAILS TO MEET ANY OF THE REQUIREMENTS FOR GRANTING A STAY.

As AT&T recognizes, a party seeking stay of an FCC order must demonstrate that: (1) it has a substantial likelihood of succeeding on the merits; (2) it would suffer irreparable harm absent relief; (3) a grant of the stay would not substantially harm others; and (4) the requested relief would be in the public interest.<sup>3</sup> AT&T's Motion plainly does not satisfy this well-established standard.

A. AT&T Has Not and Cannot Demonstrate that It Has a Substantial Likelihood of Prevailing on the Merits of Its Appeal.

AT&T does not even attempt to advance new legal arguments regarding the proper regulation and jurisdictional treatment of its so-called "enhanced" calling cards. Rather, AT&T alleges that it has a substantial likelihood of prevailing on the merits of its appeal by rehashing the same, fully discredited legal theory that the inclusion of an unsolicited advertisement somehow transforms long distance calling cards from a telecommunications service into an information service. *AT&T Motion*, 11-21. The FCC properly rejected this flawed argument and found that AT&T's "enhanced" calling card service "is a telecommunications service as defined by the Act."<sup>4</sup>

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<sup>3</sup> *KSBN Radio, Inc. Request to Toll the Period to Construct Unbuilt Station DKZTY(AM) Winchester, Nevada Facility ID No. 56749*, 19 FCC Rcd 20162, ¶ 15 (2004) (setting forth the four-prong standard) (citing *Virginia Petroleum Jobbers Ass'n v. FCC*, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified by *Washington Metropolitan Transit Authority v. Holiday Tours*, 559 F.2d 841, 843-45 (D.C. Cir. 1977)).

<sup>4</sup> *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133 and 05-68, FCC 05-41, ¶ 14 (rel. Feb. 23, 2005) ("*AT&T Calling Card Order*").

Specifically, the Commission concluded 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.” *AT&T Calling Card Order*, ¶ 21. In other words:

AT&T offers its “enhanced” calling card service to customers solely as a telecommunications service. 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.

*Id.*, ¶ 20 (internal citation omitted); *see also id.*, ¶ 28 (concluding that AT&T “is not offering customers an information service that *uses* telecommunications; the service it offers *is* a telecommunications service”) (emphasis in original).

AT&T erroneously alleges that the *AT&T Calling Card Order* departs from the Commission’s precedent. *AT&T Motion*, 11-21. Indeed, the Commission already addressed, in painstaking detail, why each of the cases cited by AT&T were inapposite. *AT&T Calling Card Order*, ¶¶ 17-21.

AT&T’s regurgitation of its jurisdictional argument—that its calling cards are interstate services because the advertising message creates a call endpoint at the switching platform—fares no better. *AT&T Motion*, 16-18. The Commission properly applied its well-established end-to-end analysis to determine the jurisdiction of calls made using AT&T’s calling card service. *AT&T Calling Card Order*, ¶¶ 22-29.

**B. AT&T Fails to Show Irreparable Injury.**

AT&T’s claim with respect to the second prong of the standard for issuance of a stay is similarly unavailing. Although it laments that “the Order requires AT&T to pay substantial sums into the federal USF fund,” *AT&T Motion*, 22, AT&T has not demonstrated the irreparable injury

requisite for the issuance of a stay pending appeal. Indeed, the Commission's Order merely puts AT&T in the same position as other carriers who have been following the law.<sup>5</sup> The loss of an unwarranted competitive advantage is not a cognizable irreparable harm, nor is the requirement to pay sums that can later be recovered if AT&T were to prevail on appeal.<sup>6</sup>

C. The Universal Service Fund, Verizon, and other Local Exchange Carriers Will Suffer Substantial Harm If a Stay is Granted.

The universal service fund is facing mounting strains and enormous shortfalls of approximately \$550 million in the beginning of 2005.<sup>7</sup> In March 2005, the Universal Service Administrative Company ("USAC") released a report projecting that it will need to collect approximately \$1.8 billion to fund second quarter 2005 universal service programs.<sup>8</sup> As a result, the universal service contribution factor, which was 8.9% in the fourth quarter of 2004, was raised to 10.7% for the first quarter of 2005, and the FCC just proposed a further increase to 11.1% for the second quarter of 2005.<sup>9</sup> AT&T's unlawful actions are exacerbating this problem.

Given the strains on the fund, every day that AT&T continues to evade its requirement of paying over \$150 million that it owes to the fund constitutes irreparable harm to, and puts further unnecessary strain on, the fund. It also harms other carriers, whose contributions are increased to

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<sup>5</sup> AT&T's suggestion that Verizon fails to pay universal service contributions and access charges in connection with its prepaid calling cards is simply untrue.

<sup>6</sup> See, e.g., *Wisconsin Gas Co. v. FERC*, 758 F.2d 669 (D.C. Cir. 1985) ("The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.") (citations and internal quotations omitted).

<sup>7</sup> See USAC, "Federal Universal Service Support Mechanisms Fund Size Projections for the First Quarter 2005," at 29-32 (Nov. 2, 2004), available at [www.universalservice.org/overview/filings/](http://www.universalservice.org/overview/filings/).

<sup>8</sup> FCC Public Notice, *Proposed First Quarter 2005 Universal Service Contribution Factor*, 19 FCC Rcd 24045 (2004).

<sup>9</sup> FCC Public Notice, *Proposed Second Quarter 2005 Universal Service Contribution Factor*, CC Dkt No. 96-45, DA 05-648 (rel: March 10, 2004).

compensate for AT&T's unlawful withholding. The posting of security, which will delay payment for additional months or even years, does nothing to mitigate this immediate harm.<sup>10</sup>

Furthermore, granting a stay would reward AT&T with the continuation of an unlawful competitive advantage, which constitutes a substantial injury to Verizon and other calling card providers. Tellingly, AT&T, in its recently filed 2004 Annual Report, openly touts the competitive advantage it unlawfully received, noting that “[s]ince we did not pay USF and paid lower interstate access rates, these savings have permitted us *to sell prepaid cards at prices below what otherwise would have been possible.*” AT&T, SEC Form 10-K, at 22 (filed March 10, 2005) (emphasis added). It is clear that AT&T's competitive advantage, based on its evasion of its legal obligations to contribute to the universal service fund and pay appropriate access charges, has caused—and unless eliminated will continue to cause—substantial harm to other calling card providers.

Finally, AT&T completely ignores the direct impact of its actions on Verizon and other local exchange carriers. AT&T, by its own calculation, owes these carriers over \$400 million for the past years in which AT&T illegally decided not pay access charges for calls placed with its calling cards. Carriers have waited long enough for these funds and should not be further harmed by additional delay.

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<sup>10</sup> Posting security cannot justify a stay because it would not mitigate the substantial harm to the Universal Service Fund, discussed above. However, if the Commission were to grant the stay, which it should not, the Commission should *at a minimum* require security to be posted not only for sums owned to the fund but also for the hundreds of millions of dollars that AT&T has unlawfully withheld, and continues to withhold, in access charge payments to the local exchange carriers. *See, e.g., Virgin Islands Tel. Corp. Tariff FCC No. 1*, 7 FCC Rcd 4235, ¶ 13 (1992) (ordering posting of security to protect AT&T and its shareholders and ratepayers from financial losses).

D. The Public Interest Demands that the Commission Deny the Stay Request.

The grant of a stay in this proceeding has similarly substantial adverse public interest effects. First, by unlawfully circumventing the Commission’s rules and improperly refusing to make universal service contributions and pay access charges, AT&T’s actions not only interfere with the settled expectations of carriers and regulators about how universal service and other programs function, they also offend the public interest by contravening Congress’s express instructions about how the programs must operate.<sup>11</sup> Universal service has been a basic element of American telecommunications policy since 1934 and was designed to ensure that all Americans—regardless of geography and income—have access to affordable telephone service.<sup>12</sup> Any delay in contributing to the fund directly harms the public interest by hindering its underlying purposes and goals.<sup>13</sup>

Because the public interest always favors effectuation of Congress’s will, AT&T does violence to that interest by unlawfully evading its legal obligation to pay universal service fund fees and access charges.<sup>14</sup> AT&T’s violation of federal law per se harms the public interest.<sup>15</sup>

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<sup>11</sup> See 47 U.S.C. § 254(d) (providing that carriers “shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service”).

<sup>12</sup> See *id.* § 254(b)(3) (mandating that “[c]onsumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services . . . that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas”).

<sup>13</sup> See, e.g., *Cuomo v. United States Nuclear Regulatory Comm’n*, 772 F.2d 972, 978 (D.C. Cir. 1985) (explaining that, under the public-interest prong, the views of “Congress, the elected representatives of the entire nation,” are “another sense by which the public interest should be gauged”).

<sup>14</sup> See *Shays v. FEC*, 340 F. Supp. 2d 39, 53 (D.C. Cir. 2004) (denying FEC’s motion for a stay and explaining that “[t]he public is owed a [regulatory] system whose contours reflect the democratic will as outlined in the expressed intent and explicit legislation enacted by their elected representatives—the Congress”); *United States v. Oakland Cannabis Buyers’ Coop.*, 532

For the foregoing reasons, Verizon respectfully requests that this Commission deny AT&T's motion for a stay.

Respectfully submitted,

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U.S. 483, 497 (2001) (“[A] court sitting in equity cannot ignore the judgment of Congress, deliberately expressed in legislation.”) (citations and internal quotations omitted).

<sup>15</sup> See *Ill. Hosp. Ass’n v. Ill. Dep’t of Pub. Aid*, 576 F. Supp. 360, 371 (N.D. Ill. 1983) (noting impossibility of arguing that compliance with a federal statute, “a congressional mandate, the classic expression of the ‘public interest’ in a democracy—could disserve the public interest”).

## ATTACHMENT A

### THE VERIZON TELEPHONE COMPANIES AND LONG DISTANCE COMPANIES

The Verizon telephone companies are the local exchange carriers affiliated with Verizon Communications Inc. These are:

- Contel of the South, Inc. d/b/a Verizon Mid-States
- GTE Southwest Incorporated d/b/a Verizon Southwest
- The Micronesian Telecommunications Corporation
- Verizon California Inc.
- Verizon Delaware Inc.
- Verizon Florida Inc.
- Verizon Hawaii Inc.
- Verizon Maryland Inc.
- Verizon New England Inc.
- Verizon New Jersey Inc.
- Verizon New York Inc.
- Verizon North Inc.
- Verizon Northwest Inc.
- Verizon Pennsylvania Inc.
- Verizon South Inc.
- Verizon Virginia Inc.
- Verizon Washington, DC Inc.
- Verizon West Coast Inc.
- Verizon West Virginia Inc.

The Verizon long distance companies are the interexchange carriers affiliated with Verizon Communications Inc. These companies are:

- Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance
- NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions
- Verizon Select Services Inc.

CERTIFICATE OF SERVICE

I, Christy Wright Hammond, hereby certify that on this 4<sup>th</sup> day of April, 2005, a true and exact copy of the foregoing was sent via U.S. Mail to the following:

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\* Filed electronically via ECFS