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

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

OPPOSITION OF GCI TO MOTION FOR STAY PENDING APPEAL, SUBJECT TO POSTING OF SECURITY

GENERAL COMMUNICATION, INC.

Tina Pidgeon
Lisa R. Youngers
General Communications, Inc.
1130 17th Street, N.W., Suite 410
Washington, D.C. 20036
(202) 457-8812
(202) 457-8816 FAX
tpidgeon@gci.com

Dated: April 4, 2005

TABLE OF CONTENTS

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

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

OPPOSITION OF GCI TO MOTION FOR STAY PENDING APPEAL, SUBJECT TO POSTING OF SECURITY

General Communication, Inc. ("GCI") opposes AT&T's stay request.[1] AT&T seeks to continue to withhold required USF contributions for interstate calling card revenues, contrary to the Federal Communications Commission's ("Commission" or "FCC") *Order*[2] and at the peril of the fund. AT&T also seeks a collateral—and more financially significant—benefit by having the Commission stay the *Order* as a means to indefinitely delay prosecutions of individual carrier actions to collect the intrastate access charges for calling card calls it has unlawfully withheld since at least the third quarter of 2002. The Commission must deny the request, which fails the requirements for stay.

INTRODUCTION AND SUMMARY

The Commission should deny AT&T's request to further delay its compliance with the law. As an initial matter, the stay request is procedurally defective. AT&T does not seek to preserve the *status quo*, whereby carriers are obligated to pay USF contributions on all interstate calling card revenues—a requirement that AT&T itself once followed. Rather, grant of the stay

[1] Motion for Stay Pending Appeal, Subject to Posting of Security, WC Docket No. 03-133 (filed Mar. 28, 2005) ("AT&T Motion for Stay").

[2] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, *Order and Notice of Proposed Rulemaking*, FCC 05-41 (rel. Feb. 23, 2005) ("*Order*").

would *disturb* the *status quo* that was preserved when the Commission rejected AT&T's request to change the treatment of its calling card service.

As set forth below, AT&T fails to demonstrate "irreparable harm"—the threshold factor for grant of a stay—or any of the remaining factors considered by the Commission in determining whether to grant a stay. There can be no irreparable harm in requiring AT&T to pay what it already owes. To the contrary, the fact that it is not even clear that the security offered by AT&T would be sufficient to cover the full amount of moneys owed to all parties as a result of its mischaracterization of calling card traffic, providing no apparent security for interest due on USF contributions owed or on any unpaid intrastate access obligations (the lion's share of its liability), it fails to protect the public, GCI, and any LEC that fell victim to AT&T's scheme from the harms of a stay. The equities require that any concern regarding AT&T's highly speculative (and improbable) future bid upon appeal for a refund of USF contributions made pursuant to the *Order* be balanced against the interests of maintaining the integrity of the fund and the truly irreparable harm that continues to be perpetrated against other carriers by AT&T's refusal to abide by the Commission's ruling (and that of the Regulatory Commission of Alaska ("RCA")), which is fully consistent with the law, not to mention AT&T's own prior practices.

Further, AT&T's recycled arguments and *post hoc* rationalizations for continuing to withhold payments due for universal service and for intrastate access are not likely to succeed on the merits. The crux of AT&T's stay request is that it was never required to pay access charges or make USF contributions for its calling card services, because these have always been "enhanced" under Commission precedent and AT&T's own self-designation, and thus, the *Order* departs from what the Commission and AT&T (but basically no other participant in the proceeding) had agreed upon all along. This revisionist history cannot be squared with prior decisions, underscored by AT&T's own actions, which reflect not a consistent course of action based on reasoned interpretations of law, but the protestations of a chastised child with its hand caught in the cookie jar. A return to reality is required.

AT&T's actions and legal arguments suffer from an absence of consistency. AT&T claims that it first "classified" at least some of its calling cards—those called "Enhanced Pre-Paid Calling" ("EPPC") service—as enhanced in a 1994 CAM filing. Plainly, this designation holds no force of law and could not change an erroneous designation, as AT&T's own actions for the intervening years demonstrate. For example, in a 1994-1995 complaint proceeding in Alaska, AT&T argued quite the opposite before the RCA predecessor agency, initiating enforcement actions against other calling card providers that were *not* treating their services like telecommunications services (*e.g.*, allegedly not paying intrastate access charges).[3] Then, when it came time for AT&T Alascom to defend before the RCA its exclusion from intrastate demand of calling card minutes for calls that originated and terminated in Alaska, AT&T Alascom *never cited the Commission's prior "approval" of the classification, nor that this was a longstanding company position*. Instead, AT&T filed the Petition for Declaratory Ruling that initiated the instant proceeding. And then again, it was not until very late in the proceeding that AT&T was struck with the recollection that it had actually designated the service as enhanced almost 10-years previously, wrongly inflating routine treatments of CAM filings to the status of Commission action. This simply does not wash.

For almost three years after the Commission implemented the USF contribution requirement of the Telecommunications Act of 1996, AT&T apparently treated the revenues

---

[3] Alaska Exchange Carrier Association ("AECA"), Comments, CC Docket No. 03-133 (filed June 26, 2003) at 6 citing *In the Matter of the Formal Complaint , as Amended, filed by Alascom, Inc., against Talk N' Toss, Inc.,* Regulatory Commission of Alaska Docket U-94-71, Order No. 1, (Feb. 7, 1995).

from this traffic as interstate telecommunications.[4] In Alaska, at least, AT&T Alascom appeared to be treating its 907-to-907 calling card calls as intrastate through that same period of time, evidently changing its practices (at least to noticeable effect) in 2000 or 2001. Neither AT&T Alascom, nor its parent AT&T, has identified any precipitating event requiring or calling for this change, and at least in Alaska, it has appeared that AT&T Alascom excluded *all* calling card minutes from the intrastate access rate pool, without any distinction between those AT&T says were declared "enhanced" in 1994 and those that were not. The change in treatment thus apparently had nothing to do with the forming of a considered judgment about any specific type of calling card that had special "enhanced" powers.

Finally, AT&T's irreconcilable treatment of the traffic, given not even a cursory nod in its advocacy, leads to the unavoidable conclusion that sound legal theory isn't driving this issue, but the increasing pressure to find new revenue "sources" as the traditional long distance business is in a state of dwindling transition. As described by AT&T, it "took the position that the dialing of the platform and the listening to the information supplied by the retailer was a separate interstate communication—such that the EPPC service was jurisdictionally interstate and subject to interstate access charges."[5] If this were really AT&T's position, however, then it would have also been paying USF contributions on these revenues. The service is either a telecommunications service, for which both (some form of) access and USF contributions are due, or are not. By the same token, in the case of intrastate calling cards (like the 907-to-907

---

[4] AT&T claims here that it "did not pay USF support on its revenues from this service after the 1996 Act was passed." AT&T Motion for Stay at 9. This ambiguous statement does not seem consistent with its reporting to the SEC, which claims "savings" from USF contributions since 1999. While it is clear why AT&T would like for the Commission to have the impression that AT&T has acted in some sort of reliance on AT&T's otherwise apparently meaningless 1994 CAM declaration, it is at least equally clear that the penalties that would arise from a false 10-Q or 10-K filing would provide AT&T with a powerful incentive for accuracy before that agency.

[5] AT&T Motion for Stay at 9.

minutes at issue in the RCA proceeding), no USF contributions would be due because intrastate revenues are excluded from the contribution base.

At bottom, this case is nothing more than AT&T being caught in its own web of deception. Having concocted a scheme to avoid the Alaska intrastate access charges (being high does not make them inapplicable), AT&T invited the Commission to declare the service "interstate," apparently not figuring USF contributions would be made an issue. Once they were, AT&T needed yet another scheme to escape USF obligations that it had failed to satisfy. The Commission rightly rejected these theories, which find no basis in precedent, as the Commission has already cogently explained. The stay request should be denied.

ARGUMENT IN SUPPORT OF OPPOSITION

A stay is an extraordinary remedy that the Commission grants only in limited circumstances.[6] In determining whether to grant a stay, the Commission generally considers four factors annunciated by the D.C. Circuit in the *Virginia Petroleum Jobbers* case.[7] The *Virginia Petroleum Jobbers* factors are: (1) a likelihood of success on the merits by the party requesting the stay; (2) irreparable harm in the absence of a stay; (3) no substantial harm to other interested parties if the stay is granted; and (4) public interest in favor of a stay.[8] The most important of

---

[6] *See Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, *Order*, 1995 FCC LEXIS 7423 at *6 (WTB Nov. 20, 1995); *Cincinnati Bell Telephone Co., Requests for Stay of Orders Finding Violations of the Commission's Rate of Return Prescriptions*, *Memorandum Opinion and Order*, 8 FCC Rcd 6709 (CCB 1993).

[7] *Virginia Petroleum Jobbers Assoc. v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) ("*Virginia Petroleum Jobbers*").

[8] *See Cincinnati Bell Telephone Co.*, 8 FCC Rcd at 6709 (citing *Virginia Petroleum Jobbers*, 259 F.2d at 925).

these factors is "irreparable harm" without which other factors need not be considered.[9] As discussed below, AT&T fails to make any showing of irreparable harm, and accordingly, its stay request must be denied on this basis alone. Additionally, AT&T fails to make a sufficient showing with respect to the other three factors.

I. A STAY THREATENS OTHER INTERESTED PARTIES, NOT AT&T, WITH IRREPARABLE HARM

As the Commission has previously determined, "the cornerstone of our [stay] test turns on whether the party requesting a stay will suffer irreparable harm. . . . [I]f a party fails to demonstrate that it will suffer irreparable harm, a stay will not be granted."[10] In order to obtain a stay, a party must make a "concrete showing" of "irreparable harm."[11] "[T]he injury must be both certain and great; it must be actual and not theoretical."[12] "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."[13] Further, mere economic loss, including monetary damages, does not constitute irreparable injury unless the movant can show that the viability of the business is placed in jeopardy.[14] AT&T's claim of irreparable harm is based entirely on its claim that it does

---

[9] *See Application of SCANA Communications Inc. Proposed Antenna Tower Georgetown, SC*, *Order*, 15 FCC Rcd 9203, 9205 (WTB 2000) ("A concrete showing of 'irreparable' harm is therefore necessary for the grant of a stay"); *Telmex/Sprint Communications, LLC Application for Authority Under Section 214*, *Order*, 13 FCC Rcd 15678 (IB 1998); *Application of Wireless Co., LP for a License to Provide Broadband PCS Service*, *Order*, 10 FCC Rcd 13233, 13237 (WTB 1995) ("The Commission has previously determined that the cornerstone of our test turns on whether the party requesting a stay will suffer irreparable harm. . . . if a party fails to demonstrate that it will suffer irreparable harm, a stay will not be granted"); *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 1995 FCC LEXIS 7423 at *6 ("The most important of the factors is irreparable harm, without which other factors need not be considered"); *Cincinnati Bell Telephone Co.*, 8 FCC Rcd at 6709-10 (same).

[10] *Application of Wireless Co., LP for a License to Provide Broadband PCS Service*, 10 FCC Rcd at 13237.

[11] *Application of SCANA Communications Inc. Proposed Antenna Tower Georgetown, SC*, 15 FCC Rcd at 9205.

[12] *Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them*, 1995 FCC LEXIS 7423 at *6 (citing *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *Cincinnati Bell Telephone Co.*, 8 FCC Rcd at 6709).

[13] *Virginia Petroleum Jobbers*, 259 F.2d at 925.

[14] *See Cincinnati Bell Telephone Co.*, 8 FCC Rcd at 6710.

not owe monies for USF on calling cards, and its desire to be shielded from carrier claims of intrastate access charges due. Neither claim constitutes irreparable harm.

Other parties, however, are threatened with significant irreparable harm as AT&T continues to withhold payment for services. This is precisely why the RCA has required since April 2004 that AT&T Alascom (and all IXCs) pay Alaska Exchange Carrier Association ("AECA")[15] intrastate access rates calculated based on demand that includes estimated demand for 907-907 calling card calls as applied to all intrastate access minutes, including 907-907 calling card calls. AT&T's self-help approach, which would be perpetuated by grant of a stay contrary to the legal *status quo*, leaves rural carriers holding the bag when lower rates calculated based on intrastate calling card demand are collected on a reduced pool of minutes. Unlike AT&T's clear ability to collect refunds from USAC, there is great difficulty—if any chance at all— for the LECs to be able to recoup lost, or in the case of IXCs, misbilled revenues for the past several years that AT&T has misreported in-state calling card calls. Given that almost 75 percent of the "savings" AT&T attributes to its calling card accounting practices are attributable to unpaid intrastate access, the equities weigh heavily *against* grant of a stay.

A. AT&T Fails to Demonstrate Irreparable Harm

First and foremost, being obliged to pay monies owed is not irreparable harm; it is compliance with existing law, such that a stay would disturb the *status quo*. The *Order* did not create a new obligation to pay, but it responded to AT&T's request for a declaration as to the law following the RCA's investigation into AT&T's own change in practice, which is believed to have occurred sometime in 2001 or 2002.[16] The *status quo* is that the payments are due, but

[15] AECA is the intrastate access tariff pooling organization of the Alaska rural LECs.

[16] Since AT&T controls the information and data necessary to determine when it started mischaracterizing the traffic and the total impact, GCI, AECA, and ATA member companies have only been able to estimate monies owed based on what AT&T tells us. This is not an ideal arrangement for protecting one's interest.

AT&T now wants to hang on to those revenues, contrary to the law as it has existed and was left unchanged by the *Order*. Because AT&T seeks to change that *status quo* through a stay, its request is procedurally defective and must be denied.[17] That AT&T elected, without explanation, sometime around 1999 to change treatment of its calling card revenues for USF contributions and 2002 for access charges was a risk that it bears, and in seeking a stay, AT&T now seeks continued, self-appointed exemption from contribution obligations. Indeed, in the unlikely event that AT&T prevails on appeal, it will be left in the same position or better position as all other carriers who contributed to the fund based on the inclusion of interstate calling card revenues—perhaps owed a refund, but still having no claim of irreparable harm.

In recognition of the fact that the obligation for monetary payments does not constitute irreparable harm in support of a stay, AT&T spins an argument that it will be impossible for monies paid to USF to be returned in their entirety, claiming that differences in the calculation of monies owed subsequent to a carrier's underreporting and of refunds paid in the event of overpayment will result in unrecoupable losses for AT&T.[18] As an initial matter, this argument tries to prove too much. Under AT&T's theory, every decision requiring a USF contribution, including the setting of contribution factors and contribution collection actions, should be stayed without requiring payment because of the risk that a future refund might be due, but the refund calculation will not return every penny. By the same token, no payment obligations would be enforceable under the theory that the fund might be insolvent some day, with no ability to return refunds that might be owed for past period. Of course, no agency or court would issue a stay on

[17] *See, e.g.*, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, *Order*, DA 05-675 (rel. Mar. 14, 2005) at para. 3; *Implementation of the Local Competition Provisions of the Act of 1996,* Order Denying Requests for Stay, 11 FCC Rcd 11,754 at para.29 ("It is doubtful in these circumstances, that the ordinary standards for evaluating stay motions should apply because, where the objective of the motion is not to maintain the status quo, the courts have applied a more demanding standard.").

[18] AT&T Motion for Stay at 23-24.

this ground, and none should be issued here. If AT&T believes it has a credible challenge to the rules governing the administration of the fund, it should take that issue up with the Commission or the courts, but those effective rules cannot be claimed as the source for "irreparable harm," so as to shield AT&T from its payment obligation under the law, as interpreted by the Commission.

Moreover, AT&T's claim of "irreparable harm" is so speculative as to be meaningless. AT&T has yet to make the required filings to determine what is owed. It provides no indication as to whether, in fact, there are any material differences between the two highest quarterly contribution factors and the two lowest for a given year. "The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the future."[19] AT&T has done nothing but offer bare allegations, pinned largely on a decision the Commission has *not* made on a BellSouth petition. There is no proof that the harm claimed will be sustained. Moreover, a cursory review of contribution factors shows that the facts simply do not bear out AT&T's dire predictions of "irretrievable, irreparable harm."[20] This defect in AT&T's claim underscores why monetary harm is not considered irreparable harm—it *can* be calculated and rectified, and AT&T's failure to do so here does not provide a basis to override this fundamental requirement for a stay.

Moreover, it is not even clear that AT&T is *only* withholding USF contributions for the calling card revenues in dispute. In Alaska, for example, AT&T Alascom also failed to report

---

[19] *Price Cap Performance Review for Local Exchange Carriers*, 10 FCC Rcd 11,991, 11,998 (1995).

[20] In its stay request, AT&T's reliance on *American Hospital Supply* to support the concept that "unrecoupable losses constitute irreparable harm" is entirely misplaced in this instance. AT&T Motion for Stay at 22. The Court in *American Hospital Supply* affirmed a preliminary injunction granted by a lower court because the supplier's (defendant's) insolvency in the case was apparent such that the court questioned the ability of the defendant to pay any damages that the plaintiff may be awarded at trial. *American Hospital Supply Corp. v. Hospital Products Ltd*., 780 F. 2d 589, 596 (7th Cir. 1986). The potential losses were "unrecoupable" relevant to that firm's insolvency. Indeed, the defendant's solvency was a material fact in the contractual dispute between the parties with the distributor having loaned millions of dollars to the supplier to keep it from going broke. *Id.* at 598. Other than mere speculation, AT&T has failed to demonstrate the same level of unrecoupable loss.

non-prepaid calling card minutes for assessment of intrastate access calls. This was the case regardless of whether or not a particular card forced a caller to listen to an ad before using the card.[21] How could it be irreparable harm for AT&T to pay what is owed even for these minutes?

AT&T further argues that stay of the *Order* is appropriate because it will stave off lawsuits and regulatory proceedings seeking to collect intrastate access charges that should have been paid on calling card calls originating and terminating in the same state. But "time and energy" spent in the absence of a stay is not irreparable harm. On AT&T's theory, rarely would there be an action by this Commission, any agency, or any court, for that matter, that would not be stayed by the losing party. Lawsuits or regulatory proceedings to enforce the law must not be deferred on this basis.

Finally, AT&T seems to suggest that compliance will not be fair, claiming that "if the Order imposes massive retrospective liabilities uniquely on AT&T, the Commission manifestly will not have 'level[ed] the playing field,' but will have anticompetitively handicapped a carrier for forthrightly bringing an industry-wide issue to the Commission for resolution."[22] It would certainly be a first if the Commission accepted allegations of similar illegal conduct against other carriers excused the party seeking to be excused from compliance. But in any event, AT&T's fears are unfounded, as the Commission has ordered all providers to comply.[23]

B. AT&T's Proposed "Security" Fails to Protect the Public or Private Entities

AT&T seems to suggest that posting a letter of credit is dispositive of its stay request, claiming that "[its] commitment to secure a letter of credit for the amounts assessed by USAC

---

[21] *In the Matter of the Consideration of the Revenue Requirement of the Alaska Exchange Carriers Association, Inc., To be Included in Intrastate Interexchange Access Charges*, Regulatory Commission of Alaska Docket U-03-49, Prefiled Testimony of Emily Thatcher at 2, and 4-5 (filed Feb. 13, 2004) ("Thatcher Testimony") (attached hereto as Exhibit 1).

[22] AT&T Motion for Stay at 5.

[23] *Order* at para. 31.

pursuant to the Order (and interest accruing during the pendency of the appeal) establishes that the stay cannot result in any significant federal harms."[24] This claim essentially boils the four-prong test for assessing stay requests into one—if you can put up the money, you can continue breaking the law—a proposition that runs counter to Commission and court precedent generally disfavoring stays. Moreover, it is significant here that the effect of a stay would not be limited to AT&T's USF contribution obligations, but is plainly designed to preserve the "*status quo*" of AT&T intrastate access nonpayment.

From GCI and the Alaska Telephone Association's ("ATA") perspective, the amount of payments owed is not insignificant. As described in the attached declaration, previously filed with the RCA in its proceeding, the effect of AT&T Alascom underreporting intrastate minutes by excluding 907-to-907 calling card calls has a dual effect. First, the access minute demand will be set too low for the following year, and the rate per minute that IXCs pay will be too high.[25] If the minutes are later corrected, Alascom will pay the LECs the higher intrastate rate for the under-reported minutes, and GCI will not receive a refund, even if the LECs overrecover. For intrastate bulk bill (Alaska's version of carrier common line recovery), GCI pays the amount that AT&T Alascom "avoids", because it is a "keep-whole" pool—whatever revenue requirement the LECs report have to paid by someone, and the payment obligation is divvied up by relative market share assessed by the IXCs' respective reported intrastate minutes.[26] Indeed, in AT&T Alascom's latest corporate guarantee renewal, filed pursuant to the RCA's Order requiring AT&T Alascom to pay intrastate access relevant to its debit calling card services, AT&T Alascom estimated its obligation for unpaid intrastate access charges relevant to

[24] AT&T Motion for Stay at 25.

[25] Thatcher Testimony at 2-3 and 8.

[26] *Id*. at 9.

debit calling cards in Alaska alone had increased to $13,264,754 plus interest, for the period from July 1, 2002 through March 31, 2004.[27]

AT&T Alascom's letter of guarantee for Alaska access charges covers only 18 months prior to the RCA's order requiring that it pay back the money. There is no protection for amounts owed for periods more than 18 months prior to the RCA's order, and the potential inability to recoup any lost funds beyond this amount—a situation that undoubtedly occurs in other states, as well—is irreparable harm that will be perpetuated by grant of a stay. For this reason, though the RCA order requiring AT&T to rectify past calling card mischaracterizations has not been implemented, AT&T Alascom is required to make payments based on an intrastate classification prospectively, and access rates have been set accordingly.

Moreover, offers to guarantee or place funds in escrow are not dispositive of the stay request, and the Commission does not automatically grant stays simply because they are accompanied by promises to pay.[28] For example, the Commission refused to grant a stay with escrow where, *inter alia*, the petitioner's financial ability creates uncertainty about its ability to make restitution and it had not offered to post a bond or put monies due in escrow.[29] Though AT&T claims that "there can be no reasonable question about AT&T's capacity to pay any retroactive intrastate access fees that it may be found to owe," it is the lion's share of the monies AT&T has withheld thus far, but totally ignored in AT&T's pledge to post a letter of credit for

---

[27] *In the Matter of the Investigation into Unauthorized Telecommunication Intrastate Debit Card Marketing by AT&T Corp. apart from AT&T Alascom,* Docket No.U-97-120, Notice of Filing of AT&T's Corporate Guarantee Renewal and Attachment (Letter from Tomas W. Horton, Senior Executive Vice President and Chief Financial Officer, to the Regulatory Commission of Alaska) (October 5, 2004).

[28] *See e.g.*, *Price Cap Regulation of Local Exchange Carriers*, *Order*, 10 FCC Rcd 11979, 11985 (1995); *Investigation of Equal Access Date Elements Filed Pursuant to Waivers of Part 69*, *Memorandum Opinion and Order*, 1988 FCC LEXIS 658 (CCB Jan. 13, 1988).

[29] *Century TCI-California, L.P. Appeal of Order Setting Basic Service Rates of Los Angeles CA*, 18 FCC Rcd 15,849, 15,850 (MB Pol. Div. 2003).

"federal liabilities." And even if we can take AT&T's lawyers' word for the company's financial health and ability to pay such amounts owed, any security would have to be assured of covering all amounts due.[30] AT&T makes no representation as to the amount or prejudgment on interest due on the required USF contributions, the payment of which is required,[31] the amount of fees associated with the delinquent payments have yet to be determined. It's dubious whether AT&T's offer to secure a letter of credit at some date in the future for an amount under the *Order* that has not yet been determined is sufficient to warrant grant of stay without demonstration that the four-prong test is satisfied.

II. AT&T FAILS TO SHOW A LIKELIHOOD OF SUCCESS ON THE MERITS

In demonstrating a likelihood of success on the merits, a petitioner must "make a strong showing that it is likely to prevail on the merits of the appeal."[32] However, even a strong showing of likelihood of success on the merits will not warrant a stay unless the party can also demonstrate irreparable harm.[33] In this case, as discussed above, AT&T cannot show irreparable harm when grant of stay disturbs the *status quo* and it fails to make any showing with respect to irreparable harm, accordingly, so that even a strong showing of success on the merits would not justify a stay in this instance. That being said, AT&T's "analysis" merely rehashes arguments

---

30 *TCI Cablevision of Dallas, Inc. Request for Stay of Local Rate Order of the City of Dallas, TX*, 15 FCC Rcd 9535, 9538 (Cab. Serv. Bur. 2000) (conditioning grant of stay on condition of creating an escrow account for the total amount due and accumulating amounts owed, or posting of a bond for the same).

31 *GCI v. ACS*, *Order*, 16 FCC Rcd 8169, 8170 (2001).

32 If the party seeking the stay makes a particularly strong showing as to the other three factors, then it need only demonstrate the existence of "serious legal questions" to satisfy the requirements. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board on Universal Service*, *Order*, 15 FCC Rcd 13191, 13193 n.9 (2000); *Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977). In this case, as discussed above, AT&T fails to make any showing as to the threshold factor—irreparable harm—or a strong showing as to any of the other factors, accordingly this lower standard does not apply. Even under this lower standard, however, AT&T's showing as to this factor is insufficient because AT&T fails to identify any serious legal questions but rather rehashes questions considered and rejected by the Commission in its Order.

33 *Application of SCANA Communications Inc. Proposed Antenna Tower Georgetown, SC*, 15 FCC Rcd at 9205.

considered and rejected by the Commission in its *Order* and fails to make a strong showing of likelihood of success on the merits.

AT&T's first attack on the *Order* is that the Commission did not follow its own regulations and holdings. The crux of AT&T's argument is that any service that falls within the definition of "enhanced service" is an "information service", and because the AT&T advertising calling card is (according to AT&T) an enhanced service, then it is an information service under Commission precedent.[34] This tautological reasoning then leads AT&T to discount the prior rulings that clearly led to the Commission's ruling that the AT&T calling card services addressed in the order are telecommunications services, an outcome that was entirely consistent with AT&T's own historic treatment of the service.

AT&T's criticism of the Commission's discussion of "information services" and "enhanced services" highlights the weakness of its argument. For example, AT&T makes much of the Commission's comparison (in n.26 of the *Order*) of "telecommunications services" and information services" to "basic services" and "enhanced services", respectively, taking issue with the description of the terms as "similar" rather describing "enhanced" as a subset of "information."[35] The AT&T distinction, however, is one without a difference, as the decision did not, as AT&T implies, turn on any distinction between the two terms.

Rather, the Commission concluded that the plain language of "enhanced services" could not support AT&T's requested finding, consistent with Commission precedent, as the AT&T-imposed advertising made no "offering" of any "capability" to the user.[36] AT&T's own description of the spam card confirms the Commission's finding, stating the services "are offered

[34] *See* AT&T Motion for Stay at 11.

[35] AT&T Motion for Stay at 12.

[36] *Order* at para. 15.

over common carrier facilities and provide one of several hundred messages *selected by the retail provider of the card before the user can place a call*."[37] Similarly, AT&T states, "Because retail issuers have selected a variety of messages, AT&T EPPC platforms now store and communicate to end users more than 100 different messages that are of varying duration and content."[38] This advertising spam does not meet the "enhanced services" definition because there is no interaction, storage, transformation, utilization, or processing of subscriber information.[39]

This is a critical distinction from the *Talking Yellow Pages* case. Unlike *Talking Yellow Pages* or other interactive offerings, the subscriber to the AT&T prepaid calling card service does not solicit information, there is no information transmitted by the subscriber to solicit the ad, and thus, there is no change in the content of subscriber information. It is merely the delivery of an ad, the content of which is selected by AT&T's retailer, who is in no way, shape, or form a party to the communication underway between the calling card subscriber and the called party. Thus, AT&T's claim that "providing stored advertisements to a caller is an enhanced service" ignores a critical feature of the *Talking Yellow Pages* Order—that the caller dials the Talking Yellow Pages number for the purpose of accessing the stored information it receives, the very service provided.[40] The finding here does not require the Commission to engage in a primary purpose analysis, as claimed by AT&T (at 15-16), because the service AT&T offers—

---

[37] AT&T Motion for Stay at 3 (emphasis added). AT&T has conceded from the outset of this case, that the ad is not of the user's choosing, but of the service provider's and card distributor's choosing, to the cardholder. *AT&T Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services,* WC Docket No. 03-133, (filed May 15, 2003) ("AT&T Petition") at 6.

[38] AT&T Motion for Stay at 6.

[39] *See* 47 C.F.R. § 64.702(a).

[40] *In the Matter of Northwestern Bell Telephone Company Petition for Declaratory Ruling,* 2 FCC Rcd 5986, (Oct. 5, 1987) ("*Talking Yellow Pages*").

completing calls for which the service is pre-paid—is a telecommunications service.[41] Unlike the "electronic Yellow Pages" or other interactive offerings, the subscriber to AT&T's service does not solicit information, there is no information transmitted by the subscriber, and, thus, there is no change in the content of subscriber information. The Commission correctly concluded that the mere involuntary imposition of a tag line—no different from "Thank you for using AT&T"—does not meet the statutory definition of an information service.[42] Nor does AT&T make any claim that its calling card service performs the type of end-to-end protocol processing service addressed in the *Non-Accounting Safeguards Order*.[43]

The second attack is on the Commission's continued application of an end-to-end analysis to affirm that calling card calls that originate and terminate in the same state are intrastate.[44] AT&T's challenge here is based largely on statements in the NPRM acknowledging that there are instances where the Commission could assert federal preemptive jurisdiction. However, the Commission has taken no steps to do so for calling card services. To the contrary, the Commission determined in *Time Machine* that "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

---

[41] Nevertheless, the "primary purpose" of a service was instructively considered in both the *US West CEI* proceeding and in the *NATA Centrex Order*. *See US West Communications, Inc. Petition for Computer III Waiver*, *Memorandum and Order on Reconsideration*, 11 FCC Rcd 7997, 8004 (Com. Car. Bur. 1996) (citing *NATA Centrex Order*, 101 FCC 349, 360 (1985)).

[42] Now AT&T claims that this message is adjunct-to-basic because of the critical service provider confirmation provided in the hearing of the message. AT&T Motion for Stay at 14. If this argument is true (though other carriers using similar promotional messages disagreed), then how is the message that reminds the caller where she purchased the card—and thus, of the rate that enticed the sale—any different? *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, *First Report and Order and Further Notice of Proposed Rulemaking*, 13 FCC Rcd -------, 21958 (1996) ("*Non-Accounting Safeguards Order*") (discussing the *NATA Centrex Order*).

[43] *Id.* at 21957.

[44] AT&T Motion for Stay at 16-18.

another state."[45] The Commission also expressly rejected an AT&T argument that its "Teleticket" service—a prepaid card service deemed an "enhanced service" by AT&T that allowed purchasers to access news programs, as well as make outbound phone calls—was purely interstate in nature.[46] AT&T's criticism of the outcome here alternatively requires the assumption that the services are information services or that the Commission should have breathed new life into the "two call" theory. Neither holds water.

AT&T has previously argued that because its so-called "enhanced services platform" is "not located in the state in which the calling or called parties are located," an interstate classification was required "under a straightforward application of the Commission's standard jurisdictional analysis." However, the jurisdictional analysis required to produce AT&T's desired result of an interstate jurisdictional classification, bears no resemblance to the end-to-end analysis that is the "standard jurisdictional analysis."

AT&T continues to trot out various iterations of the legally unsustainable "two-call" theory, stating that its "enhanced prepaid calling card services "consist of two separate 'communications'".[47] According to AT&T, the first call is placed from the calling party to the "enhanced services platform" (or switch), and is interstate when "the caller and the enhanced services platform are located in different states."[48] AT&T sees a second call, then, between the switch and the called party, which AT&T characterizes as another interstate call, so long as the called party is not in the same state as the AT&T switch.[49] This is a retread version of the two-

---

[45] *Time Machine*, 11 FCC Rcd 1186, 1190 (Com. Car. Bur. 1995) (citing *Southwestern Bell Telephone Co. Transmittal Nos. 1537 and 1560*, *Revisions to Tariff No. 68*, 3 FCC Rcd 2339, 2341 (1988) ("Switching at the credit card switch is an intermediate step in a single end-to-end communication.").

[46] *Id.*

[47] AT&T Petition at 1-2.

[48] *Id.* at 2.

[49] *Id.*

call theory, most recently rejected in connection with CLEC arguments that Internet calls "terminate" at the ISP premises.[50] Just as the CLEC's ISP customer was not the endpoint in a dial-up call to access the Internet, AT&T's switch is not the endpoint for the cardholder's call to the called party.

The final attack, no more compelling than the first two, is that the Commission should have limited its ruling to prospective application. As described herein—and exhaustively on the record of this proceeding—the AT&T calling card service is undeniably a telecommunications service. So the only additional basis is that AT&T (and unnamed other carriers) "relied on" other unidentified prior Commission statements and actions.[51] Here, AT&T's own actions, consistently treating the calling card service as a telecommunications service for many intervening years (as described above) expose that it had no reasoned expectation that the service would be treated any differently than it ever had in any decision addressing calling card services.[52] The fallacy in AT&T's claim is its starting presumption that its forced advertisements provide something more than a basic service calling card.[53]

III. THE PUBLIC INTEREST IS SERVED BY ENFORCEMENT

AT&T claims that a stay serves the public interest by saving carriers the trouble of suing and state commissions the trouble of initiating proceedings to recover intrastate access charges, and because the Commission did not really understand that AT&T was not the only one violating the law. To be clear, providing AT&T a temporary shield from exposure to litigation for its

[50] *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9175-79 (2001), *vacated and remanded on other grounds by WorldCom v. FCC*, 288 F. 3d 429 (DC Cir. 2002).

[51] AT&T Motion for Stay at 19. In this regard, AT&T "passed on" ill-gotten "savings" at its own risk.

[52] The AT&T CAM reliance arguments have been soundly rejected. *See Order* at para. 33.

[53] *See id.* at 20.

failure to pay intrastate access charges and allowing it to continue its calling card scheme benefits a single party, and that's AT&T.

The public doesn't benefit. Congress and the FCC have determined that universal service is provided through support to affordable and comparable services over high costs networks, not through the "benevolent" distribution of so-called low cost calling cards by AT&T or any other company. Schemes to avoid USF contributions continue to place the fund in jeopardy. The current contribution factor exceeds 11 percent, and as the factor increases, so do incentives to avoid making contributions at all. Yes, this issue must be addressed and the system needs to be reformed, but not by individual self-help.

Nor is it acceptable for payment burdens to be shifted to other carriers. GCI and the Alaska Telephone Association have been waiting two years now for enforcement of the RCA's order. Why should we, and carriers—particularly rural carriers—throughout the country be deterred from taking steps to enforce the law that is and has been in place?

Finally, AT&T has (wrongly) tried to justify its violations by claiming that compliance would "force" it to raise costs to the troops and military families, and now it compounds the offense by claiming that continued violations are acceptable because other card providers appear to be doing the same. First, the record in this proceeding plainly demonstrates that carriers do comply with the USF contribution requirements and offer competitive services.[54] Second, it is not clear why AT&T would be "compelled" to raise rates when it touts a "special holiday calling rate" of 19 cents per minute for troops to make international calls to the United States.[55] AT&T touts an even more "special" rate for calls from Navy ships, for 50 cents per minute, a sheer

[54] *See Order* at n.79.

[55] "AT&T Continues Long History of Military Support," AT&T Press Release (dated Nov. 29, 2004) (attached hereto as Exhibit 2).

bargain compared to the original price of $1.00 per minute.[56] Not only do these rates appear to be well above the super competitive rate against which AT&T complains it will not be able to compete if required to compel with the law, but as international calls, one component of the fees that AT&T has been shirking—intrastate access—would not even apply. It seems that the Commission had a perfectly clear understanding that any action by AT&T to increase the costs of calling for the troops and their families would neither be directly or indirectly compelled by its ruling.[57]

Contrary to AT&T's claim, the "me, too" factor here favors enforcement of existing law against *all* providers, not continued delay. The public interest is served by swift and sure enforcement of the law, and any failure to do so plainly just emboldens and prolongs the bad acts of some, while competitively disadvantaging those that comply. Similarly, were the Commission to grant AT&T's stay request—or worse, retreat from the retroactive payment obligation—it would be telling providers that it is acceptable to evade the law; that during that time, an individual entity's interpretation of law and policy trump that of the agency's, and that there is only upside in doing so, because the ill-gotten gains will never be disgorged. It is impossible to see the public interest in adopting policies whereby the Commission cedes authority over matters during the time that a provider is actually breaking the law.

---

[56] *Id.*

[57] *Order* at para. 36.

IV. CONCLUSION

For these reasons, the Commission should deny the AT&T stay request. In addition, the Commission should ensure that all interested parties have access to the revised USF contribution data that AT&T will file on April 15, to ensure accurate reporting and payment. In the event the Commission grants the stay, then irreparable harm to LECs and IXCS that bear the higher cost of intrastate access may only be avoided by directing AT&T to establish an escrow account for the full reported amount, including all interest on USF backpayments and for intrastate access recovery.

Respectfully submitted,

GENERAL COMMUNICATION, INC.

/s/ Tina Pidgeon

Tina Pidgeon
Lisa R. Youngers
General Communications, Inc.
1130 17th Street, N.W., Suite 410
Washington, D.C. 20036
(202) 457-8812
(202) 457-8816 FAX
tpidgeon@gci.com

Dated: April 4, 2005

CERTIFICATE OF SERVICE

I, Colleen A. Mulholland, do hereby certify that a copy of the foregoing General Communication, Inc. Opposition of GCI to Motion for Stay Pending Appeal, Subject to Posting of Security was mailed this 4th day of April, 2005, to the following parties:

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Room CY-B402
Washington, DC 20554

Best Copy
Portals II
445 12th Street, SW
Washington, DC 20554

John M .Goodman
Verizon
1515 North Courthouse Road
Arlington, VA 22201

Sharon J. Devine
Robert B. McKenna
Qwest Services Corporation
607 14th Street, NW
Washington, DC 20005

Dave Harbour
Regulatory Commission of Alaska
701 West 8th Avenue, Suite 300
Anchorage, AK 99501-3469

Michael B. Fingerhut
Richard Junke
Sprint Corporation
401 9th Street NW, Suite 400
Washington, DC 20004

Stephen L. Earnest
Richard M. Sbaratta
BellSouth Corporation
675 West Peachtree Street, NE
Suite 4300
Atlanta, GA 30375

Jeffery A. Bruggeman
Davida M. Grant
Gary L. Phillips
SBC Communications Inc.
1401 Eye Street NW, Suite 1100
Washington, DC 20005

Robin O. Brena
Brena, Bell & Clarkson, PC
310 K Street, Suite 601
Anchorage, AK 99501

Dawn J. Ryan
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 122223-1350

Larry Fenster
MCI
1133 19th Street, NW
Washington, DC 20036

/s/

Colleen A. Mulholland