

**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)	
Services)	
)	
Regulation of Prepaid Calling Card Services)	WC Docket No. 05-68

**COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY
CONSUMER ADVOCATES**

I. INTRODUCTION AND SUMMARY

The National Association of State Utility Consumer Advocates (“NASUCA”)¹ files these comments in response to the Notice of Proposed Rulemaking (“NPRM”) included with the Order of the Federal Communications Commission (“Commission”) released February 23, 2005 in these proceedings.² In the Order, the Commission addressed the petition filed May 15, 2003 by

¹ NASUCA is a voluntary association of 43 advocate offices in 41 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

² FCC 05-41. The Order consists of ¶¶ 13-37 of FCC 05-41; the NPRM is ¶¶ 38-43. For convenience’s sake, ¶¶ 1-37 will be referred to here as part of the Order. The NPRM was published in the Federal Register on March 16, 2005.

AT&T Corp. (“AT&T”) for 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.³ In the Order, the Commission denied the AT&T petition, but limited the decision to the specific calling card service described in AT&T’s original petition.

However, on November 22, 2004, AT&T requested a similar ruling with regard to two variants to its “enhanced” calling card offering.⁴ The Commission initiated this rulemaking to consider generically the classification and jurisdiction of forms of prepaid calling cards different from the specific AT&T service addressed in its petition.

NASUCA submits that the Commission should find that there are no differences between the two new AT&T variants and the original calling card service significant enough to disturb the Commission’s finding that the service is a telecommunications service,⁵ and that the service is liable for payment of access charges -- both interstate and intrastate⁶ -- and universal service contributions.⁷ This is vitally important because, as the Commission notes, other providers may use these or similar variants, and may -- like AT&T -- be evading access charges and universal

³ 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”).

⁴ 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”).

⁵ Order, ¶ 14.

⁶ Id., ¶ 29.

⁷ Id., ¶ 31.

service contributions.⁸

II. THE NOTICE OF PROPOSED RULEMAKING

As described above, 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, the customer is given the option to listen to additional information or perform additional functions before listening to the advertising message.⁹ In the second variant, AT&T would provide transport associated with enhanced calling card calls over its Internet backbone network using IP technology.¹⁰ 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 could use IP transport for a portion of the call).¹¹

The Commission opened the NPRM to consider “the appropriate regulatory regime for variations of prepaid calling cards ... in a more comprehensive manner, enabling us to gather information about all types of current and planned calling card services.”¹² As the Commission noted,

⁸ See *AT&T Nov. 22 Letter*. In a “Motion for Stay Pending Appeal, Subject to Posting of Security” filed by AT&T on March 28, 2005, AT&T provided additional information that some providers of “basic” prepaid calling card service -- that do not include any “enhanced” capability -- are not paying universal service assessments or intrastate access charges. The Commission must open an enforcement proceeding to ensure that all prepaid calling card providers comply with the relevant portions of its Order. In an April 5, 2005 *ex parte* letter, Sprint asserted that AT&T’s allegations -- as applied to Sprint -- were false.

⁹ *AT&T Nov. 22 Letter* at 2-3.

¹⁰ *Id.* at 3-4.

¹¹ *Id.*

¹² NPRM, ¶ 38. NASUCA shares Commissioner Adelstein’s concern that by opening the NPRM, the Commission leaves these important questions for another day. NASUCA urges the Commission to act expeditiously to resolve these generic questions and ensure that prepaid calling card services pay the intrastate access charges and the universal service assessments that they should.

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 customer with respect to the advertising message; and (2) the advertising message is incidental to the underlying telecommunications service.¹³

The Commission first asked questions on how to apply this analysis to the first variant on AT&T's "enhanced" calling card service -- which adds information or functions to the service considered by the Commission in the Order.¹⁴ With regard to the second variant -- which merely adds IP technology to deliver calls placed using prepaid calling cards -- the Commission asked whether this is a relevant factor in determining the classification of such cards under the Act.

The Commission also noted that 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 federal jurisdiction.¹⁵ If any such services were classified as telecommunications services, the Commission sought comment on the circumstances, if any, under which it should assert exclusive federal jurisdiction, even if the calls originate and terminate in the same state.¹⁶

¹³ NPRM, ¶ 39.

¹⁴ Id.

¹⁵ Id., ¶ 42.

¹⁶ Id., citing *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").

Finally, the Commission asked for comment on whether there are steps the Commission could take to ensure that prepaid calling cards continue to be available to soldiers and their families at reasonable rates.¹⁷ NASUCA's only comment on this issue is to note that, as the Commission recognizes, calling cards that are priced competitively with AT&T's cards -- but which apparently pay intrastate access charges and universal service assessments -- are available from a number of other providers.¹⁸ This should provide adequate assurance to the Commission and to the affected military personnel.¹⁹ This reasoning also applies to the issue of availability of prepaid calling cards at low rates for the use of low-income families. Indeed, for both points the Statement of former Chairman Powell summed up the key issue here:

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.

NASUCA will respond to most of the Commission's questions. But first, a detailed summary of the Order is needed in order to put the questions in the NPRM into context.

¹⁷ NPRM, ¶ 43.

¹⁸ Order, ¶ 37, n.79.

¹⁹ NASUCA reserves the right to comment further on these issues in reply.

III. BACKGROUND

To begin, as noted by the Order,

[p]repaid 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 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.²⁰

Calling card services have generally 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.²¹ As such, the revenues from prepaid calling cards are classified as end-user revenues and are subject to universal service contributions.²²

Further, calling cards enable the caller to make interstate and intrastate calls and thus have been considered "jurisdictionally mixed" telecommunications services.²³ As the Commission noted, "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

²⁰ Order, ¶ 3.

²¹ See 47 U.S.C. § 153 (43), (46); see also *The Time Machine*, Memorandum Opinion and Order, 11 FCC Rcd 1186, 1192-93, ¶ 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").

²² Order, ¶ 4.

²³ 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).

complete communication.”²⁴ 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.²⁵

In the Order, the Commission addressed what AT&T called an “enhanced” prepaid calling card service. As the Commission describes it, in using this service,

[d]uring call set-up, the customer hears an advertisement from the retailer that sold the card. Only after the advertisement is complete can the customer dial the destination phone number. 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.²⁶

The customer can also choose to replenish the minutes on the card, and then place a call or merely hang up.²⁷

On May 15, 2003, almost ten years after beginning the service, 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. AT&T also argued 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.²⁸

²⁴ Order, ¶ 5 (citations omitted).

²⁵ *Id.*

²⁶ Order, ¶ 6.

²⁷ *Id.*, n.8.

²⁸ AT&T Reply at 18-19 (citing 47 U.S.C. § 153(20)).

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

Specifically, AT&T argued 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.²⁹ Alternatively, AT&T argued, even if the call is deemed to be a single call, it is jurisdictionally interstate.³⁰

As noted above, the Commission had earlier 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. In the Order, the Commission used this same analysis to determine the jurisdiction of calls made using AT&T’s “enhanced” calling card service as described in its original petition. The Commission stated:

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. ... [I]t 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.”³¹

The Commission also disagreed with AT&T’s application of the Commission’s rulings

²⁹ AT&T Petition at 8-9. AT&T conceded that intrastate access charges apply in the relatively rare situation when the centralized switching platform is in the same state as both the calling and called parties. *Id.* at 14. However, there do not appear to be any instances where AT&T actually paid intrastate access charges.

³⁰ *Id.* at 14-16.

³¹ Order, ¶ 23.

on ISP-bound traffic to its “enhanced” calling card services. The Commission found that

AT&T's service is not analogous to ISP-bound traffic. 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.³²

The Commission also rejected 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.”³³ The Commission stated,

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.³⁴

B. Classification of AT&T's service

AT&T argued that its service is an information service rather than a telecommunications service, based on the assertion that each time an “enhanced” prepaid calling card is used, the

³² *Id.*, citing *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, 9177 (2001) (“*ISP Remand Order*”) ¶ 57, *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.

³³ Order, ¶ 27, citing 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)).

³⁴ Order, ¶ 28.

centralized switching platform engages in its own communications with the cardholder by sending the advertising message.³⁵ AT&T argued that this service falls within the 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.”³⁶

In the Order, the Commission rejected all of those AT&T arguments. The Commission stated:

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.” And its offering constitutes a “telecommunications service” because it offers “telecommunications for a fee directly to the public.”³⁷

The Commission was “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.”³⁸ The Commission found 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. ... [T]he packaging materials for AT&T’s “enhanced” prepaid calling cards do not even mention their possible use as a device for listening to advertisements. Because the advertising message is provided automatically, without the advance knowledge or consent of the

³⁵ AT&T Petition at 18.

³⁶ 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).

³⁷ Order at ¶ 14, citing 47 U.S.C. § 153(43) and 47 U.S.C. § 153(46).

³⁸ Order at ¶ 15.

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.³⁹

Further, the Commission found 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. 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. 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. 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.⁴⁰

The Commission also found that all four of the cases AT&T cited in support of its argument that the “enhanced” calling card service is an information service were distinguishable.⁴¹ The Commission rejected AT&T’s citation to the *Talking Yellow Pages* case,⁴²

³⁹ Id.

⁴⁰ Id. at ¶ 16 (internal citations omitted).

⁴¹ Id. at ¶¶ 17-20.

⁴² *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988, para. 20 (1987) (“*Talking Yellow Pages*”).

the *AT&T CEI Order*,⁴³ the *NATA Reconsideration Order*,⁴⁴ and the *Cable Modem Ruling*.⁴⁵

The Commission concluded:

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.⁴⁶

C. "Universal service" issues

In what appeared to many to be an attempt to avoid payment of access charges regardless of the classification or jurisdiction of its calling card service,⁴⁷ AT&T asserted that prepaid calling cards generally provide an important form of "universal service" to many low-income and minority households.⁴⁸ AT&T argued 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.⁴⁹ Similarly, AT&T argued that military personnel often use prepaid calling cards and that they would be adversely affected by a

⁴³ *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*").

⁴⁴ *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, Order on Reconsideration, 3 FCC Rcd 4385, 4391, ¶ 42 (1988) ("*NATA Reconsideration Order*").

⁴⁵ *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).

⁴⁶ Order, ¶ 21.

⁴⁷ See, e.g., NASUCA Ex Parte (February 22, 2005).

⁴⁸ AT&T Reply at 4.

⁴⁹ *Id.*

decision denying the petition.⁵⁰ A number of commenters accepted these arguments.⁵¹

The Commission found, however, that none of AT&T's arguments required changing its conclusions about the classification or, more importantly, the jurisdiction of AT&T's prepaid calling cards.⁵² The Commission concluded:

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.⁵³

IV. COMMENTS ON NOTICE OF PROPOSED RULEMAKING

Calling card services that are in fact information services under the Act may receive different treatment from the AT&T service addressed in the Order. Neither of the two AT&T

⁵⁰ 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).

⁵¹ 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 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; 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); 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).

⁵² Order, ¶ 36.

⁵³ Id., ¶ 37.

variants qualifies as an information service, however; a similar service which might be offered by another provider should also not qualify.

A. Under the Commission’s analysis, calling cards where additional information or functions are an adjunct to the basic service -- such as AT&T’s “first variant” -- provide telecommunications services.

In the first variant to AT&T’s enhanced prepaid calling card, 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”).⁵⁴ AT&T 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.⁵⁵ 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.⁵⁶

The Commission first asked questions on how to apply its analysis from the Order to the first variant on AT&T’s “enhanced” calling card service -- which adds information or functions to the service considered by the Commission in the Order. The additions are insufficient to make this an information service.

The Commission asked whether offering the caller a menu of options to access information satisfies the definition of an information service.⁵⁷ The calling card addressed in the Order presented consumers with an advertisement. AT&T’s first variant provides customers

⁵⁴ See *AT&T Nov. 22 Letter* at 2-3.

⁵⁵ See Letter from Amy Alvarez, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 30, 2004).

⁵⁶ *Id.*

⁵⁷ NPRM, ¶ 39.

with a choice of advertisements. The menu does not materially change the purpose of the card.

Neither does the ability to replenish minutes on the card. That was one of the functions available for the calling card that was the basis of the Order and was found **not** to be an information service.⁵⁸ Likewise, the ability to donate minutes to troops overseas does not bring the card within the ambit of 47 U.S.C. 153(20). There are no material enhancements to the cards' capabilities of "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information..." as required by 47 U.S.C. 153(20).

The Commission also asked whether the information made available must be integral to the underlying telecommunications service.⁵⁹ That is precisely the point: When a consumer buys one of AT&T's first variant calling cards, the consumer is not buying the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..."⁶⁰ The Commission's "adjunct-to-basic" and "incidental" analyses are appropriate for the AT&T first variant and similar services.⁶¹

The Commission asked how it should distinguish between incidental information and information that is essential to the service.⁶² One place to start is with AT&T's calling cards -- either the original or the first variant. The advertisements and other functions offered are clearly not essential to the calling card service.

⁵⁸ Order, ¶ 6, n.8.

⁵⁹ NPRM, ¶ 39.

⁶⁰ 47 U.S.C. 153(20).

⁶¹ Order, ¶ 16.

⁶² NPRM, ¶ 39.

As the Commission recognized, the marketing of the service is crucial -- because the functions marketed are those for which consumers are enticed to spend their money. No one goes to Wal-Mart to buy a card that allows them to hear an advertisement; there may be some consumers who go to purchase a means to donate calling time to members of the armed forces serving overseas, but that is not how the card is marketed.

The Commission asks whether there is any evidence that any of these cards are being marketed as providing a service other than making telephone calls.⁶³ NASUCA is unaware of any such evidence. Nor is NASUCA aware of any evidence that that customers purchase these cards for any reason other than making telephone calls.⁶⁴

The Commission also asked if the customer's purpose in buying the card is relevant to this inquiry.⁶⁵ The customer's purpose must be relevant: Otherwise, a secondary, seldom-used or even unknown (to the consumer) function of a service would dictate the regulatory classification of the service. That would lead carriers to add these functions to all of their services, in order to evade the responsibilities and duties that are required for telecommunications services.

As Commissioner Copps stated in his Concurring Statement, “[C]alling card services that include incidental announcements or advertisements are basic telecommunications services....” Commissioner Copps warned that merely by issuing the Notice of Proposed Rulemaking, the Commission was somehow prejudging the issue. NASUCA trusts not. We do, however, fully agree with Commissioner Copps in his doubt that there is “a bright line” between information

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

services and telecommunications service “between calling cards subject to universal service and those that are not [depending on] whether they feature an automated voice that coos on the line ‘press 1 for more information.’” The line falls much closer toward including more calls through more calling cards, as required to support universal service.

B. Under the Commission’s analysis, calling cards that use IP technology for transport -- such as AT&T’s “second variant” -- provide telecommunications services.

In the second variant of the AT&T service, the only difference from the service described in the original petition is that some of the transport is provided over AT&T’s Internet backbone using Internet Protocol technology.⁶⁶ There should be no question that these services are telecommunications services.

In the *AT&T IP Telephony Order*, the Commission stated that its determination that the AT&T service addressed there was not an information service applied 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.⁶⁷ In the NPRM here, the Commission noted that “[i]n 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.”⁶⁸

⁶⁶ *AT&T Nov. 22 Letter* at 3-4.

⁶⁷ *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 (“*AT&T IP Telephony Order*”), at 7457-58, ¶ 1.

⁶⁸ NPRM, ¶ 40, citing *AT&T IP Telephony Order*, ¶ 1.

Clearly, AT&T's second variant of a calling card service -- that incidentally is converted into IP format -- also falls into the "telecommunications service" category.

Prepaid calling cards are not designed or marketed for use over the Internet. AT&T's decision to transport some of its calling card traffic -- indeed, even if it were all of the traffic -- over the Internet, cannot obscure the fact that the calling cards are marketed as providing telecommunications services, as discussed in the previous section. The vast majority of the calls are placed from one telephone to another telephone, with Internet transport having no impact on the content of the call.⁶⁹

The Commission notes that 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.⁷⁰ Such services, unless they are dissimilar in significant respects to AT&T's second variant, should also be bound by the Commission's finding in the *AT&T IP Telephony Order* that "IP-in-the-middle" service is a telecommunications service.

C. Both AT&T variants can be segregated into interstate and intrastate calls and should be under both jurisdictions.

In the Order, the Commission found that AT&T's calling card service is a telecommunications service. Thus the Commission's assertion of exclusive federal jurisdiction over information services is irrelevant to the AT&T service described in the Order.

The Commission asked for comment, however, with regard to services like AT&T's two variants, "on the circumstances, if any, under which we should assert exclusive federal

⁶⁹ The Commission asks if it matters for these purposes whether 1+ dialing or 8YY dialing is used to originate the call. NPRM, ¶ 40. The means by which the call is completed using the telephone does not add an "information service" quality to the card.

⁷⁰ Id., citing *AT&T Nov. 22 Letter* at 4 (giving Net2Phone and IDT as examples).

jurisdiction, even if the calls originate and terminate in the same state.”⁷¹ Clearly, the burden should be on those seeking exclusive federal jurisdiction.

The Commission asks whether the recent *Vonage Order* has any relevance in this circumstance.⁷² It should not have any relevance. The fact that AT&T’s second variant and similar services use the Internet as an incidental part of their transport does not bring them into the ambit of Vonage-like services, which depend entirely on the Internet. The Vonage Order does not provide any basis for the Commission to assert exclusive federal jurisdiction over “enhanced” calling card services like those offered by AT&T. Neither does the Pulver Order, which involved a service that was exclusively Internet-based.⁷³

Even if the Commission were correct (which it is not) that an end-to-end analysis doesn’t work for Vonage’s service or for Free World Dialup -- which it is not -- there is no reason to abandon the analysis for calling card services, “enhanced” or not.⁷⁴ There is also no reason for the Commission to assert exclusive federal jurisdiction.

⁷¹ NPRM, ¶ 42.

⁷² Id., citing *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*”). As the Commission knows, NASUCA and other parties have appealed the *Vonage Order* on this jurisdictional issue.

⁷³ *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 (2004) (“*Pulver Order*”).

⁷⁴ In the *Pulver Order*, the Commission found that an 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. *Pulver Order* at 3320-21, ¶ 21.

V. CONCLUSION

The Commission should find that both AT&T calling card variants -- and all similar services offered by others -- are telecommunications services that can be separated between interstate and intrastate calls, and are subject to universal service obligations and the payment of access charges. The Commission should also instruct the industry that if it believes that any calling card service is not a telecommunications service, specific application needs to be made to the Commission *before* the service is introduced.

Respectfully submitted,

Janine Migden-Ostrander
Consumers' Counsel
David C. Bergmann
Assistant Consumers' Counsel
Chair, NASUCA Telecommunications Committee
The Office of the Ohio Consumers' Counsel
10 West Broad Street, Suite 1800
Columbus, OH 43215-3485
Telephone: 614-466-8574
Facsimile: 614-466-8475

NASUCA
8380 Colesville Road, Suite 101
Silver Spring, MD 20910
Phone (301) 589-6313
Fax (301) 589-6380