

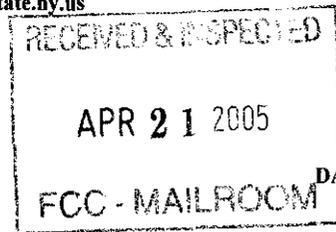
STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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April 15, 2005

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Comments of the New York State Department of Public Service in the Matter of Regulation of Prepaid Calling Card Services; WC Docket No. 05-68

Dear Secretary Dortch:

Enclosed please find the comments of the New York State Department of Public Service in response to the March 16, 2005 Federal Register notice concerning the above-referenced proceeding.

Should you have any questions concerning this filing, please call me at (518) 474-7687.

Very truly yours,

John C. Graham
Assistant Counsel

enc.

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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

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In the Matter of)
)
Regulation of Prepaid Calling Card Services) WC Docket No. 05-68

**COMMENTS OF THE
NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE**

On February 23, 2005, the Commission issued a Notice of Proposed Rulemaking (“NPRM”) in the above-entitled proceeding, which was noticed in the Federal Register on March 16, 2005. In the NPRM, the Commission indicated that it is considering the issue of regulatory treatment for prepaid calling card services in a comprehensive manner, and invited comments on various issues concerning regulation of these services. The New York State Department of Public Service (“NYDPS”) submits these comments in response to the aforementioned NPRM.

The Commission inquired, among other things, whether there are any circumstances under which the Commission should assert exclusive federal jurisdiction over prepaid calling card services, even if calls made via such services originate and terminate within the same state, in the event that the Commission classifies such services as telecommunications services.¹ The Commission also asked whether its recent Vonage Order² has any relevance to determining jurisdiction over intrastate prepaid calling card calls in this circumstance.

¹ NPRM at ¶ 42.

² 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”).

If the Commission determines that prepaid calling card services are telecommunications services, as it should, the utilization of Internet protocol (“IP”) technology in the provision of such services would not affect the traditional jurisdictional legal analysis under Section 2(b) of the Communications Act of 1934³ (“the Act”). Under that analysis, the only circumstances under which the Commission may assert exclusive jurisdiction over such services would be where it is impossible to separate the intrastate and interstate components of regulation (the “impossibility” exception),⁴ or where the Telecommunications Act of 1996⁵ (“1996 Act”) expressly grants the Commission jurisdiction over the intrastate aspects of prepaid calling services.⁶ Further, the Commission would bear the burden of demonstrating, with specificity, that any federal preemption is narrowly tailored to impact only such state law or regulation as would actually negate the Commission’s legitimate exercise of interstate regulation of calling card services.⁷

³ 47 U.S.C. § 151 *et seq.*

⁴ Louisiana Public Service Comm’n v. FCC, 476 U.S. 355, 375 n.4.

⁵ Pub. L. 104-104, 110 Stat. 56 (1996).

⁶ Section 601(c)(1) of the 1996 Act plainly states that “this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.” See Cellco Partnership v. FCC, 357 F.3d 88, 100 (D.C. Cir. 2004); see also Bell-Atlantic Md. v. MCI Worldcom, Inc., 240 F.3d 279, 307 (4th Cir. 2001) (*vacated sub nom.* on other grounds, Verizon Md. Inc. v. Pub. Serv. Comm’n of Md., 535 U.S. 635 (2002)) (the 1996 Act may not be construed to bypass preexisting federal law or alter preexisting assignments of state and Commission authority unless expressly provided).

⁷ See People of the State of California v. F.C.C., 905 F.3d 1217, 1243 (9th Cir. 1990) (“California I”); National Ass’n of Reg. Utility Com’rs v. F.C.C., 880 F.2d 422, 429-430 (D.C. Cir. 1989).

Moreover, the Vonage Order is inapposite to the jurisdictional analysis of prepaid calling card services. Existing prepaid calling services are plainly outside the scope of the Vonage Order. That order expressly applied to services exhibiting certain basic characteristics including, *inter alia*, a requirement for a broadband connection from the user's location, and a need for Internet protocol-enabled customer premises equipment.⁸ Existing prepaid calling card services require neither, and can be accessed from any standard telephone. They are not tied to any particular end-user devices or transport technology. Rather, they are simply cards which entitle the user to make telephone calls for a specified amount of calling time.⁹

Finally, we disagree with the Commission's presumption that prepaid calling card services would be automatically subject to exclusive federal jurisdiction to the extent they are found to be information services.¹⁰ The Commission regulates information services pursuant to its ancillary authority under Title I of the Act; specifically, §2(a).¹¹ Nothing in the Act suggests that Title I may be used either to circumscribe the state-federal jurisdictional boundary created by §2(b) of the Act,¹² nor to upset the dual regulatory

⁸ Vonage Order at ¶ 32.

⁹ Moreover, even if existing or future prepaid calling card services were to utilize IP technology in a manner similar to Vonage's Digital Voice service, which we believe would be unlikely, there would be no basis to conclude that it is impossible to separate the interstate and intrastate components of such services.

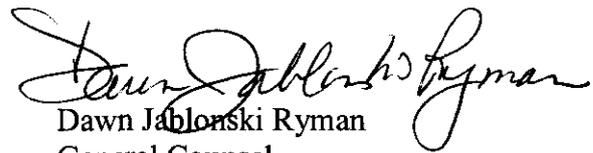
¹⁰ See NPRM at ¶ 42.

¹¹ Section 2 (a) (codified at 47 U.S.C. § 152 (a)) has been read to confer upon the Commission authority "reasonably ancillary" to its specific statutory responsibilities. See California I, 905 F.2d at 1240-41 n.35 (citing U. S. v. Southwestern Cable Co., 392 U.S. 157, 178 (1968)).

¹² Section 2 (b) (codified at 47 U.S.C. § 152 (b)) expressly states that "...nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to ... charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any

system established under the Act.¹³ As the Supreme Court clarified in AT&T v. Iowa Utilities Board,¹⁴ the Commission's ancillary jurisdiction cannot be utilized to override Section 2(b)'s reservation of explicit state authority over intrastate communications.¹⁵ Therefore, the Commission may not assert exclusive jurisdictional authority over a communications service solely on the basis of that service having been classified as an information service.

Respectfully submitted,



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Dated: April 15, 2005

carrier..." This provision clearly assigns jurisdiction over intrastate communications to the States.

¹³ California I at 1240-41 n.35.

¹⁴ 525 U.S. 366 (1999).

¹⁵ Id. at 381 n.8.