

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

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

**AT&T EMERGENCY PETITION FOR IMMEDIATE INTERIM RELIEF**

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**AT&T EMERGENCY PETITION FOR IMMEDIATE INTERIM RELIEF**

AT&T Corp. (“AT&T”) respectfully submits this Emergency Petition for Immediate Interim Relief pending a final decision by the Commission in this rulemaking proceeding.<sup>1</sup>

As detailed below, AT&T respectfully urges the Commission to adopt interim rules to advance universal service and establish regulatory neutrality for all prepaid calling services by May 17, 2005.

**INTRODUCTION AND SUMMARY**

In its *NPRM*, the Commission concluded that “piecemeal” determinations of the “appropriate regulatory regime for variations of prepaid calling cards” would not be in the public interest, and that “the public interest would be best served by considering the issue in a more comprehensive manner.” *NPRM*, ¶ 38. In the accompanying *Order*, the Commission also stated that existing prepaid service providers generally pay USF and intrastate access charges (*Order*, ¶ 37 & n.79), and that its *Order* had “leveled” the “playing field,” giving the Commission time to address remaining issues in the *NPRM*. *Id.*, Statement of Chairman Michael K. Powell.

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<sup>1</sup> *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services, Order & Notice of Proposed Rulemaking*, WC Docket Nos. 03-133, 05-68 (Feb. 23, 2005) (“*Order*” and/or “*NPRM*”).

AT&T files this emergency petition to adopt interim rules because there decidedly is not a level playing field for prepaid calling services today. The Commission's *Order* inadvertently skewed the regulatory regime and has created uncertainty and asymmetries. These are putting at risk the very universal service contributions that the *Order* intended to protect. They are further threatening to cripple competition and produce profound disruptions in this important segment of telecommunications. There is thus NOW a pressing and overwhelming need for clear and comprehensive interim rules that will address universal service concerns and produce a genuinely level playing field applicable to all providers of prepaid calling services – pending the adoption of final rules in this docket (or broader regulatory reforms in other proceedings).

There are two ways in which the Commission can readily create the needed regulatory neutrality and certainty now. The best method would be the adoption of interim rules prescribing that, regardless of the regulatory classification of their services, all prepaid service providers shall pay USF support and interstate access charges on all their services. Alternatively, the Commission's interim rules could require that, again regardless of regulatory classification, all prepaid calling service providers shall pay intrastate access charges where services provide calling between persons located in the same state, and federal USF and interstate access charges on other calls. Such interim rules should contain stringent reporting and certification mechanisms to foster transparency, prevent evasion, and facilitate enforcement.

Whatever the interim rules, they should apply (i) to any form of prepaid calling services that allow users to pay in advance for a specified amount of calling, whether by card, virtual card, or PIN-based, serial number-based, or some other account identification mechanism, and (ii) without regard to the technology used to provide service, to additional features, functions, or capabilities available in conjunction with or in addition to calling services, or to whether the

provider uses the telecommunications or telecommunications services of an unaffiliated entity in provisioning such services. In remedying the market distortions and regulatory uncertainty that now exist, the Commission should be as clear and comprehensive as possible in order to ensure that all providers comply with the same rules and that no amount of service manipulation or artifice could allow any service provider to sidestep those rules.

The need for interim rules exists because the regulatory playing field on which prepaid card services are now provided is decidedly not level. There has been a “piecemeal” determination that one manner of providing these services (the initial AT&T platform) is a telecommunications service subject to USF support and, when the calling and called parties are in the same state, intrastate access charges – and massive retroactive USF liabilities have been imposed on AT&T. But there has been no determination of the regulatory classification of myriad other platforms that providers of prepaid cards now employ (or can develop). And because there has been no effort to develop comprehensive rules, there have been no correlative efforts to adopt reporting or other enforcement methods that would ensure compliance with these rules by all providers – large and small alike. The absence of these devices has subjected large, visible, and prominent carriers to risks of liabilities and sanctions that are not real threats for anyone else, and that will cause traffic to shift away from carriers that make USF contributions to those that do not.

The consequence of the current “regime” is that there is massive regulatory uncertainty over whether and under what conditions prepaid card services will be classified in ways that subject the services to greatly increased costs (due to USF and intrastate access charge responsibilities). Perhaps worse, because of the absence of reporting and enforcement mechanisms, large and visible carriers like AT&T believe (based on recent experience) that if

they are mistaken in identifying the regulatory classification of services that the Commission has thus far been unable to classify, they will be subject to retroactive liabilities and sanctions, whereas smaller and less visible competitors will not be as a practical matter, particularly where those competitors have engaged in practices that make their services difficult to identify and jurisdictionalize. As Commissioner Adelstein has stated with disapproval, there is today a “marketplace dynamic where success is significantly affected by tolerance for regulatory risk.” *Order*, Statement of Commissioner Adelstein. Because regulatory risk is a function of size and visibility when rules are unclear, genuine asymmetry exists today for providers of prepaid calling services.

Further, these regulatory uncertainties and asymmetries exist in a market where very slight cost differences have immense competitive significance. As the Commission is well aware, prepaid card services are used by low income members of society who require low cost service, and prepaid cards are generally sold at wholesale to large retailers for whom small differences in unit costs of cards have tremendous significance. Providers of prepaid cards thus have powerful incentives to employ any device that will reduce their exposure to charges, to find ways to evade charges that they owe, to exploit regulatory asymmetries and to make any questionable activities in which they engage less visible and less susceptible to effective sanction.

These phenomena are reflected in the behavior of other prepaid service providers. Contrary to the premise of the *Order* (§ 37 & n.79), it is not the case that other providers of prepaid calling services are now generally paying USF support and paying intrastate access charges when they provide calling between customers located in a single state. Some have employed genuinely Byzantine routing and other practices that can enable charges to be avoided.

For example, as explained in the declaration of Adam Panagia (Exh. A. hereto), this appears to be the case for the nation's leading provider of these cards – IDT. Until recently, its services contained no messaging, net protocol conversion, or other apparent enhancements. Panagia Decl. ¶¶ 7, 11. Nevertheless, IDT has publicly acknowledged that it has not been contributing to USF on all its prepaid card traffic. *See id.* ¶¶ 22-26. It also is routing ordinary intrastate calls through foreign countries such as Japan and Chile and delivering that traffic for termination as if it were international traffic, without the originating CPN that would allow the calls to be identified as intrastate by the terminating carriers. *Id.* ¶¶ 8-10. Nor are these concerns limited to IDT. MCI, Sprint, Verizon, and other prepaid card providers also appear to be engaging in these same foreign routing practices on intrastate and interstate calls or otherwise are delivering basic service calls without some or all of the originating CPN used to identify the jurisdiction of the call. *See id.* ¶¶ 14-21. MCI has also publicly stated that it is not paying USF support on prepaid card services offered through its “Golden Retriever” platform. *See* February 2, 2005 *ex parte* Letter from Larry Fenster, MCI to Marlene Dortch, FCC.

The regulatory uncertainties and asymmetries that exist are doing more than leading to practices that serve no rational economic purpose and that appear to have been undertaken to exploit the absence of clear and comprehensive rules. The lack of regulatory clarity and comprehensive rules is also threatening genuine marketplace disruptions and undermining the very universal service contributions the Commission's *Order* sought to secure. For example, while AT&T has been among the largest providers of prepaid cards, the commercial reality is that it may not be able even to remain in the market if the rules that determine critical costs of service remain unclear and if AT&T continues to be threatened with liabilities that may not be imposed – as a practical matter – on providers of indistinguishable services. Given the

uncertainty created by the Commission's rules, there will be a shift across the industry of prepaid calling card traffic away from carriers that contribute to universal service to those carriers that do not, a result precisely contrary to what the Commission's *Order* sought to achieve.

Thus, while AT&T understands that full public comment and consideration will be required before the Commission adopts final rules, AT&T respectfully urges that the Commission now adopt clear and enforceable interim rules that will eliminate uncertainty and prevent marketplace dislocations during the interim period before final rules can be adopted.

In particular, AT&T urges the Commission to adopt interim rules that will ensure equal regulatory treatment of all prepaid card services, that will eliminate the social costs created by the existing uncertainty, and that will prevent the irreparable harms that would result if carriers were to continue to be permitted to use regulatory uncertainty and asymmetry to gain artificial competitive advantages. Promulgation of interim rules without formal notice and public comment is both necessary and proper when there is "good cause" for concluding that "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). As the Commission recently has stated, "[a]voidance of market disruption pending broader reforms is, of course, a standard and accepted justification for a temporary rule" adopted without formal notice and comment.<sup>2</sup> Interim rules are thus manifestly proper here, pending the adoption of final rules in this docket or broader regulatory reforms.

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<sup>2</sup> *Unbundled Access to Network Elements; Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd. 16783, ¶ 20 (2004) (quoting *Comptel v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002) (citing cases)). The "good cause" standard also is satisfied when interim rules are necessary to "avoid 'regulatory confusion' and industry disruption." *Id.* ¶ 28; accord *The Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd. 19,975, ¶ 56 n. 160 (2003) ("We note that it is well-established in the courts that avoidance of market disruption pending broader reforms is a standard and accepted justification for a temporary rule"); see also *Amendment of Parts 80 and 87 of the Commission's Rules To Permit Operation of Certain Domestic Ship and Aircraft Radio*

Ultimately, the Commission will need to determine, in a comprehensive manner, whether, and under what circumstances, enhanced prepaid card services will be subject to (1) universal service contributions, (2) state regulatory jurisdiction, including intrastate access charges, and (3) interstate access charges. Until then, however, it is critically important that the Commission set forth interim standards that will provide regulatory clarity and ensure that prepaid card providers operate on an equal regulatory footing. As shown below, AT&T proposes that the Commission act immediately to level the regulatory playing field with respect to the federal universal service fund contributions and federal and state access charges.

*First*, as to USF contributions, AT&T proposes that the Commission exercise its authority under Section 254(d) and direct that universal service funding obligations apply to all prepaid card services, whether or not the Commission ultimately concludes that they should be categorized as telecommunications services or information services. In doing so, the Commission can, however, exempt from the contribution requirement revenues associated with cards sold to military personnel and their families, by creating an exemption for prepaid card services sold by, to, or on behalf of military exchanges or the Department of Defense.

*Second*, the Commission should issue interim rules that ensure that all prepaid calling service providers are subject to the same access charges. The Commission can reach that result through two distinct paths. It can rule that no prepaid service provider is subject to intrastate access charges by concluding that the prepaid card services described in the NPRM, on an interim basis, will be treated as interstate services that are exempt from state regulation. As AT&T previously has shown, there is ample reason for concluding that these prepaid card

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*Stations Without Individual Licenses*, 11 FCC Rcd. 6353, ¶ 13 (1996) (finding that “interim rule is necessary to avoid confusion and regulatory uncertainty”).

services are jurisdictionally interstate based upon well-established Commission precedent. An additional advantage of this regime is that it affords no room for gamesmanship based on regulatory uncertainty, and thus is inherently the easiest to enforce. Alternatively, if the Commission is not prepared to preempt the states' regulatory authority, it can instead, on an interim basis, ensure regulatory neutrality by ruling that prepaid card providers will be subject to interstate or intrastate access charges (based on the location of calling and called parties). In all events, these Commission's interim rules should adopt reporting and certification requirements to promote transparency and facilitate enforcement.

## ARGUMENT

### **I. ON AN INTERIM BASIS, ENHANCED PREPAID CARD PROVIDERS SHOULD BE REQUIRED TO CONTRIBUTE TO THE USF.**

During the pendency of this rulemaking proceeding, AT&T proposes that the Commission should require all prepaid calling card services to contribute to the federal universal service fund, irrespective of whether those services are classified as information services or as telecommunications services.

There are compelling reasons to believe that not all prepaid card providers are contributing to the USF today. As noted previously, the leading prepaid card provider, IDT, has recently stated that it does not make USF contributions on all of its prepaid card traffic, even though its services, according to AT&T test calls, appear to contain no features that would permit classification of its services as enhanced. *See* Panagia Dec. ¶¶ 22-26. When pressed to explain on what basis it was avoiding such payments, IDT replied only that such matters were "proprietary." *Id.* ¶ 24. Similarly, MCI has publicly stated that it will not pay USF support on revenues from prepaid services offered through its "Golden Retriever" platform. IDT, in turn,

has moved some of its prepaid services to a platform similar to MCI's Golden Retriever. As with intrastate access charges, different carriers are taking a wide variety of different approaches, and detecting and policing the validity of each provider's theory on whether or not its services are information services is extraordinarily difficult.

The Commission should cut through this problem by requiring all prepaid card providers to contribute to universal service. The governing statute permits the FCC to require USF contributions on all interstate prepaid calling card services, regardless of regulatory classification. The Act mandates that interstate "telecommunications carriers" must contribute to the federal USF, but it also provides that the Commission may extend the contribution base to "providers of interstate telecommunications . . . if the public interest so requires." 47 U.S.C. §254(d). Because all information services are provided "via telecommunications," 47 U.S.C. § 153(20), and all information service providers are thus "providers of telecommunications," although not providers of "telecommunications *services*," the Commission has discretionary authority to extend contribution requirements to all prepaid calling card services, including those that might qualify for enhanced service status.

Extending universal service contribution obligations to all prepaid calling card services on an interim basis would be appropriate because the "public interest so requires." Such a rule would satisfy concerns that such services contribute to universal service and promote competitive neutrality in the prepaid card market.

The Commission can, however, exempt from this interim rule revenues associated with cards sold to military personnel and their families, by creating an exemption for prepaid card services sold by, to, or on behalf of military exchanges or the Department of Defense. *NPRM* ¶ 43. The Commission need only require prepaid card service providers to pay into the USF to

the extent the "public interest so requires," and Congress's expressed wish that prepaid card rates be maintained as low as possible for the military would give the Commission ample authority to exclude such cards from USF obligations.

**II. ON AN INTERIM BASIS, THE COMMISSION SHOULD ENSURE THAT ENHANCED PREPAID CARD PROVIDERS ARE SUBJECT TO THE SAME ACCESS CHARGES.**

The Commission also should, on an interim basis, level the playing field in the area of access charges. As proposed by AT&T in its comments in response to the NPRM, the Commission can (and should) render intrastate access charges irrelevant by ruling that the prepaid calling card services described in the *NPRM* will be treated as jurisdictionally interstate, and thus exempt from intrastate access charges. Alternatively, the Commission can ensure regulatory neutrality by modifying the ESP exemption so that prepaid calling card services will be subject to both interstate and intrastate access charges based upon the location of the parties without regard to whether the services ultimately qualify as information services. In all events, the Commission should promote transparency by adopting interim rules requiring prepaid card providers to report to the Commission on a monthly basis their total number of long-distance minutes, and the number of interstate long-distance minutes for which they paid interstate access charges, and to certify their compliance with the Commission's interim rules.

**A. The Commission Should Rule That Enhanced Prepaid Card Services Are Subject To Exclusive Interstate Jurisdiction And Thus Exempt From Intrastate Access Charges.**

The Commission can ensure regulatory neutrality, on an interim basis, by ruling that enhanced prepaid card services are interstate services exempt from intrastate access charges.

1. The Commission itself recognizes in the *NPRM* that when "existing or potential prepaid card services are classified as information services, they presumably would be subject

solely to federal jurisdiction.” *id.* ¶ 42, and thus would not be subject to intrastate access charge regulations. That conclusion should be adopted on an interim basis for several reasons.

The Communications Act gives the Commission jurisdiction over “interstate communications by wire.”<sup>3</sup> “Interstate communication” is defined as communication or transmission between one state or the District of Columbia and another. 47 U.S.C. § 153(22). As set forth in AT&T’s comments, AT&T’s current prepaid card service unquestionably “offers” an information “capability” by allowing the caller to interact with the platform and hear stored messages of her choosing. Such caller interactions and transmissions of messages are indisputably “communication[s] by wire.” And when the caller and the platform are located in different states – as they almost always are – these interactions and transmissions are also indisputably “*interstate* communication[s].” 47 U.S.C. § 153(22). As the Commission has explained, “unless an information service can be characterized as ‘purely intrastate,’ or it is practically and economically possible to separate interstate and intrastate components of a jurisdictionally mixed information service without negating federal objectives for the interstate component, exclusive Commission jurisdiction has prevailed.”<sup>4</sup> Enhanced prepaid card services (“EPPC”) are certainly not “purely intrastate.”

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<sup>3</sup> 47 U.S.C. § 152(a) (“The provisions of this chapter shall apply to all interstate and foreign communications by wire”). The Act defines “communications by wire” as “the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.” 47 U.S.C. § 153(52).

<sup>4</sup> *Petition for Declaratory Ruling That Pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd. 3307 ¶ 20 (2004) (“*Pulver Order*”) (quoted in *NPRM* ¶ 42 n.87); see also *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Public Utilities Comm’n*, WC Docket No. 03-211, Memorandum Opinion and Order, FCC 04-267, ¶ 17 (rel. Nov. 12, 2004) (“*Vonage Order*”).

First, the communications between the end-user and the platform are almost always interstate; a significant percentage of such calls involve *only* interstate communications between the end-user and the platform; and the substantial majority of communications between the end-user and the called party are also interstate. Second, there is no feasible, service-driven reason separately to identify the interstate and intrastate portions of such sessions. Like the services at issue in the *Vonage Order*, it is impossible at the time the service is sold to the end-user for the seller of the service to know the beginnings or endpoints of communications that will be made using the service.<sup>5</sup>

For these reasons, application of “geographic ‘end-to-end’ analysis to distinguish interstate from intrastate communications” would be inappropriate in these circumstances, where the multiple communications within a single communications session do not necessarily have a single “point of ‘termination’ in the traditional sense.” *Vonage Order* ¶ 24 & n.89 (quoting *GTE Telephone Operating Cos., GTE Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order, 13 FCC Rcd. 22466, 22478-79, ¶ 22 (1998) (“*GTE ADSL Order*”). As the Commission held in the *Vonage Order*, where (as here) it is “difficult to apply an end-to-end approach,” the Commission can and should treat the entire service as interstate so long as more than a *de minimis* amount of the communications at issue are interstate. *Vonage Order* ¶ 26 n.98.

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<sup>5</sup> Nor would there be any sound basis for imposing a requirement that a service provider implement mechanisms to allow tracking and measurement so that LECs could separately assess interstate access charges on the *interstate* communications that take place on an enhanced prepaid card call and intrastate access charges on other communications on the same call. *Vonage Order*, ¶ 29 (where there is no “service-driven reason to incorporate such capability . . . [w]e have declined to require such separation in those circumstances, treating the services at issue as jurisdictionally interstate for the particular regulatory purposes at issue and preempting state regulation where necessary”).

The Commission's assertion of interstate jurisdiction pending the adoption of final rules would be entirely appropriate because the Commission may preempt state regulation when it determines that services are interstate in nature. *See, e.g., NARUC v. FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984) (ruling that Section 2(b) of Act did not prevent FCC from exercising jurisdiction over facilities used to provide interstate services). Where, as here, interim action is necessary to promote federal policies, the Commission is fully authorized to adopt preemptive interim rules. Moreover, by doing so here, the Commission would advance important federal objectives beyond simply protecting the Commission's authority over non-incident interstate communications. Federal jurisdiction would further the goal of maximizing access to interstate services. Prepaid calling cards are sold almost exclusively through discount stores and similar outlets, as well as military exchanges, and thus are aimed at and provide uniquely affordable services to segments of our society that have been traditionally excluded from access to the telecommunications network. In addition, Congress has expressly established a federal policy of minimizing prepaid card rates for members of the military. *See Order* ¶ 37 & n.79 (citing H.R. Conf. Rep. No. 108-792, 839 (2004)).

The Commission's exercise of exclusive jurisdiction is important for another reason as well: as detailed in the Panagia Declaration, *supra*, many leading providers of basic prepaid card services do not appear to be paying intrastate access charges, even on what appear to be prepaid card services that fall squarely within the Commission's historical definition of basic services (*i.e.*, no messaging, net protocol conversion, or other apparent enhancements). Panagia Dec. ¶¶ 7-21. As AT&T's test calls have established, however, ordinary intrastate calls made with these "basic service" cards are being routed through foreign countries such as Japan and Chile and are being delivered to AT&T's network for termination as if they were international traffic,

without originating CPN that would allow the calls to be identified as intrastate by the terminating carrier. *Id.* Verizon and other prepaid card providers have also engaged in these same foreign routing practices on intrastate and interstate calls or otherwise have delivered basic service calls without originating CPN. *See id.* ¶¶ 14-21. These practices are extremely difficult to detect, and place carriers that do not engage in such practices at a competitive disadvantage.

2. The Commission could (and should) also assert, on an interim basis, interstate jurisdiction over prepaid card services even if they are telecommunications services. That is because such services indisputably involve an interstate “communication” from the service platform to the cardholder, even if that communication is not deemed part of an information service. The Commission’s contrary conclusion in the *Order* was grounded in the view that the communication from the platform in AT&T’s previous service was not a significant component of the service (and thus jurisdictionally irrelevant). Even if such services are not information services, the communications from the more enhanced platforms described in the NPRM are *not* insignificant to the service, but are an integral part of the service activated by the end-user’s affirmative choosing. The presence of these interstate communications unquestionably gives the Commission authority to exercise jurisdiction over the entire call under the principles discussed above. *See, e.g., Vonage Order* ¶ 24 & n.89 (interstate jurisdiction appropriate where service contains multiple communications and do not necessarily have a single “point of ‘termination’ in the traditional sense”).

More fundamentally, the Commission’s traditional “end-to-end” jurisdictional analysis does not necessarily apply to the type of services at issue in this proceeding. The Commission has never held that this particular version of the “end-to-end” analysis is compelled by the statute in all cases. Unlike most intermediate switching points, virtually all prepaid card platforms –

whether enhanced or not – typically *do* engage in some form of communication with the cardholder. *See Order* ¶ 23. Accordingly, the Commission could now recognize the prepaid card platform as a call endpoint in this rulemaking proceeding, consistent with its prior precedents.

As noted, many leading prepaid card providers already avoid intrastate access charges today by routing calls through foreign countries without CPN and by engaging in other, similar practices, even with respect to prepaid cards that are unquestionably “basic” in character. Given that these practices are extremely difficult to detect, the Commission could restore competitive neutrality by acknowledging that the typical communications from prepaid card platforms are significant and will henceforth be deemed relevant to the jurisdictional analysis. In asserting its authority over these fundamentally interstate services, the Commission could promote the federal policy of competitive neutrality in the prepaid card market by subjecting all such services to the same rules.

**B. Alternatively, The Commission Should Rule That Enhanced Prepaid Card Services Are Subject To Both Interstate And Intrastate Access Charges Based Upon The Location Of The Parties.**

As noted, there is a critical need for a level playing field during the pendency of this rulemaking proceeding, a goal the Commission strived unsuccessfully to achieve with its *Order*. Therefore, if the Commission is not willing to declare all prepaid card services to be jurisdictionally interstate on an interim basis, it should at least ensure parity among prepaid card providers by adopting interim rules requiring that prepaid card providers must pay intrastate access charges when the service is used for communications between parties located in the same state (and interstate access charges on other calls).

Preliminarily, the Commission has clear authority to require payment of intrastate access charges on services even though they may later be determined to be jurisdictionally interstate

when the Commission issues its final decision in this proceeding. The Commission is authorized to defer to state regulation in setting charges for interstate uses of local facilities and to preempt state regulation of these services only where it is affirmatively found to be inconsistent with overriding federal policies. *Diamond International Corp. v. FCC*, 627 F.2d 489, 492-94 (D.C. Cir. 1980); *New York Telephone Co. v. FCC*, 631 F.2d 1059, 1065 (2d Cir. 1980). Here, it plainly fosters the federal policy of competitive neutrality for the Commission to adopt interim rules requiring all prepaid card services to pay intrastate access charges where they provide communications between a calling and called party in a single state, pending the Commission's determinations of whether and when particular prepaid calling services are properly classified as information services and the underlying local access arrangements thus determined to be jurisdictionally interstate.

Similarly, although the Commission's rules generally exempt information services from access charges, the Commission is free to adopt interim rules that revoke that exemption in these narrow circumstances. Revoking the ESP exemption for prepaid card services would be amply justified on an interim basis to restore competitive neutrality in this discrete marketplace. As the Commission has explained many times, the purpose of the ESP exemption is to protect what the Commission has considered to be a fledgling industry – the information services industry. The Commission properly has retained the ESP exemption, and shielded information services generally from access charges, to encourage the development of innovative services.<sup>6</sup> The prepaid card industry, however, is a discrete and relatively mature industry that is raising

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<sup>6</sup> E.g., *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, 3 FCC Rcd. 2631, ¶¶ 1, 13, 17 (1988); *Access Charge Reform, et al.*, CC Docket Nos. 96-262, *et al.*, First Report and Order, 12 FCC Rcd 15982, ¶¶ 344-45 (1997) (“[m]aintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry”), *aff'd*, *Southwestern Bell Tel. Cos. v. FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998).

questions about regulatory classification that are apparently difficult for the Commission to resolve. In these special circumstances, the need for competitive neutrality while the Commission's comprehensive rulemaking proceeding is pending substantially outweighs any need to encourage prepaid card providers to establish new information services in conjunction with these cards. The current regulatory uncertainty has led prepaid card providers to adopt wildly varying interpretations of the Commission's rules, and to engage in a plethora of undetectable practices, that are destroying competitive neutrality in this marketplace. To be sure, AT&T believes that many of these services are in fact information services, and that the Commission should adopt clear, final rules in this proceeding that appropriately reflect that classification. In the *interim*, however, the uncertainty surrounding the ESP exemption is exacting such a huge toll on the industry that it would be better for the Commission to suspend the exemption altogether, to ensure that all prepaid card providers operate under the same rules.

With the ESP exemption suspended, all prepaid card providers would be subject to the access charge regime. Again, to avoid wildly varying interpretations and practices before the Commission has had an opportunity to make comprehensive rules, the Commission should expressly clarify that, on an interim basis, *all* prepaid card providers are required to pay either interstate or intrastate access charges based on the location of the calling and called parties. Thus, the Commission should make clear that its interim rules apply – and that all prepaid services providers pay intrastate access charges when the calling and called party are located in the same state – notwithstanding whatever additional features are provided as part of the service, whatever technology is used in provisioning the service, and whatever capabilities are obtained from unaffiliated carriers. In establishing these interim rules, the Commission should make clear that prepaid service providers are not permitted to avoid these interim rules either by (1)

removing calling party number information to make it impossible to determine whether a call is interstate or intrastate where such information is the basis for jurisdictionalizing traffic for intercarrier compensation purposes; (2) routing calls through foreign countries or other circuitous means; (3) routing calls through the use of IP-enabled technologies or facilities or any other similar, innovative arrangement; or (4) reporting PIU factors based on anything other than the location of the calling and called party.

While the proposal discussed above in Section II.A would be the preferable approach, this alternative approach is still far preferable to the current situation (with no interim rules at all), in which prepaid card providers are taking vastly different approaches and in which no one can be sure what the Commission will ultimately approve and what it will not.

**C. In All Events, The Commission Should Impose Reporting And Certification Requirements To Promote Transparency And Facilitate Enforcement.**

There is, in all events, a pressing need for transparency that should be addressed immediately by the Commission through the adoption of (1) reporting requirements that will require prepaid calling card providers to disclose the total number of long distance minutes provided each month, and the total number of interstate long-distance minutes provided each month; and (2) certification requirements that confirm that providers are complying with the Commission's interim rules.

The need for transparency is manifest given that prepaid card providers are going to great lengths to avoid access charges by routing these calls internationally, over IP facilities, or by stripping CPN in a manner that makes it more difficult to determine the jurisdictional nature of the end-points of a prepaid calling card call. The Commission has, in other contexts, adopted reporting requirements as a means of ensuring that, in the event of a dispute, there will be a clearer trail so that the accuracy of the providers regulatory treatment of its services can more

readily be verified. See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 18 FCC Rcd. 19,975, ¶ 51-52 (2003) (adopting reporting requirements and explaining that interested parties would be able to determine whether carriers' "data . . . is out of proportion to the data provided" by other market participants). Likewise, the Commission has imposed certification requirements to help confirm compliance with its rules. See *id.* at 20018 (requiring certification from CFO); *Interstate Interexchange Marketplace*, 11 FCC Rcd. 20730, ¶ 83 (1996) (requiring annual certifications signed, under oath, by an officer of the company). The need for such reporting and certification mechanisms is amply justified to ensure that the Commission's universal service objectives are achieved and that prepaid card providers operate on a level regulatory playing field that prevents them from gaining unfair competitive advantages based upon their ability to cloak their conduct from full and fair scrutiny. These additional requirements will help assure that the nondiscriminatory enforcement of the Commission's interim rules against *all* providers of prepaid calling services.

## CONCLUSION

For the reasons stated, AT&T respectfully requests that the Commission grant AT&T's emergency petition for interim relief and adopt interim rules necessary to advance the Commission's universal service objectives and ensure competitive neutrality during the period before the Commission adopts final rules.

Respectfully submitted,

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