

Federal Communications Commission

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
AT&T Corp. Petition for Declaratory)	WC Docket No. 05-68
Ruling Regarding Enhanced Prepaid)	
Calling Card Services)	
)	
Regulation of Prepaid Calling Card)	
Services)	

REPLY COMMENTS OF MCI INC.

Many commenters from different perspectives have echoed the principal points made in MCI's opening comments. Specifically, commenters agree with MCI that the regulatory uncertainty the Commission addresses in this NPRM is a symptom of larger unresolved regulatory issues. Most of all, the Commission needs to complete reform of the current irrational intercarrier compensation system, which is the root cause of the concerns that have generated this proceeding. Until that reform is completed, the Commission should treat the definitional issues raised here consistently with the way it is treating them in the other more generic pending proceedings addressing the definitions of "information services" and "telecommunications services." It should not attempt to resolve these larger questions in the narrow context of two variants of ATT's prepaid card offerings. Instead, the Commission here should act consistent with its most recent pronouncements on this subject and conclude that when a prepaid card service has an information service component, the entire service should be treated in all respects as an information service.

Commenters agree with MCI that this proceeding is closely related to other more generic pending proceedings at the FCC. For example, USTA voices a concern that MCI has raised repeatedly in proceedings such as the *IP-Enabled Services NPRM*, in which the Commission is addressing the distinction between information services and telecommunications services. The concern is that the Commission's rule that "hybrid services are information services, and are not telecommunications services," *Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501 (1998) ("*Report to Congress*") at ¶ 39, when applied to facilities-based carriers ultimately will lead to a regime in which *every* telecommunications-based service is an information service, and thus that there will "then be no more Title II regulation." *USTA Comments* at 5. MCI shares this concern. Since most forms of telecommunications can be offered in a service combined with information service features, the Commission's current understanding of these definitional provisions should be revisited. *See also Independent Telephone and Telecommunications Alliance et al. Comments* at 9 (addressing prepaid card issues in isolation would "prejudge some of the critical issues raised . . . in the proceeding on IP-enabled services"). But the Commission should address these underlying definitional issue uniformly and globally, rather than attempting to forge a special rule to yield a specific result for AT&T's prepaid card services.

Most fundamentally, while some commenters urge the Commission to address specific service offerings that they assert are structured to take advantage of regulatory loopholes, others join MCI in stressing that unless and until the Commission reforms the current wholly irrational system of intercarrier compensation, the Commission will simply be wasting resources that would be better spent on addressing the underlying cause of the problem. MCI in particular strongly agrees with SBC that it is poor policy for regulation to treat different types of carriers

and different services disparately, even though there may be no significant differences in the costs among the carriers or the services. *SBC Comments* at 2 (quoting *Intercarrier NPRM* ¶ 5). *See also Sprint Comments* at 4-6; *ITTA Comments* at 9. And when some in the marketplace reduce costs by taking advantage of an irrational regulatory structure, other competitors are placed in an impossible situation. As AT&T stresses in its comments, one problem with the status quo therefore is that it undermines the level playing field that is necessary for a healthy competitive marketplace. *AT&T Comments* at 2-3. We agree that the cure here is to treat the underlying disease, and not its many symptoms. The Commission should promptly reform the intercarrier compensation regime.

The difficulties inherent in case-by-case rulemaking aimed at the symptoms and not the disease are fully evident in these comments. In the Order that accompanied this NPRM, the Commission addressed narrowly one kind of enhanced prepaid card service -- AT&T's advertisement card. By the time the Commission had concluded that this card was a telecommunications service and not an information service, AT&T already had already proposed two new variants of enhanced cards -- a card with interactive advertising, and a VoIP card. The Commission thus issued this NPRM to address these two new enhanced prepaid cards.

In these comments, many commenters urge that AT&T's new interactive advertising card is little different than its old card. In their view, offering a choice of advertisements is no different than offering one advertisement. *See, e.g., NASUCA Comments* at 14; *General Communications Comments* at 4, 6; *Verizon Comments* at 2-4. Other commenters argue to the contrary that AT&T's new card is an information service because it involves customer interaction. *EKit Comments* at 304; *IDT Comments* at 4-5.

In the meantime, by the time Comments were filed, AT&T predictably had offered yet another enhanced card, one that undoubtedly offers information service functionality, such as the ability to access weather, sports, movie listings and the like. *AT&T Comments* at 5. As AT&T observes, this new card appears in some respects to be similar to MCI's Golden Retriever service, and is plainly distinguishable from the advertisement-only card that was addressed in other comments. *Id.* at n.1. There can be no dispute that a card like MCI's Golden Retriever, or the card discussed in AT&T's Comments, meets the definition of an "information service": It offers the user "a capability for . . . acquiring . . . retrieving, utilizing or making available information via telecommunications." 47 U.S.C. § 153(20). *See also* 47 C.F.R. § 64.702(a) ("provides the subscriber additional, different or restructured information").¹

At this point, consequently, there is little utility in debating whether or not the superseded variant of the AT&T card identified in the NPRM does or does not really offer enhanced functionality. That offering no longer exists. Unfortunately, most of the comments were devoted to just such an inquiry. The Commission's piecemeal approach seems doomed to forever be one step behind a quickly evolving marketplace.

Here MCI will reply instead only to the few comments that address issues likely to apply to most enhanced calling cards. Thus, some commenters urge that even when a card service such as MCI's Golden Retriever plainly offers information service functionality, the Commission should attempt to draw distinctions between services that are *principally* information services (and should not be subject to regulation), and those that are not (and so should be treated as telecommunications services). But none of these commenters grapple with the obvious problem

¹ In other respects, MCI's Golden Retriever service appears to be different than AT&T's newest service. For example, MCI promotes the enhanced features of its card, while AT&T apparently does not.

with such a regulatory approach. As AT&T correctly observes, “metaphysical distinctions to determine when information capabilities are merely ‘incidental’ instead of ‘essential’” create both “confusion and uncertainty.” *Comments* at 2-3.

The Commission has already experimented with this “essential functions” test in defining information services, and it has declared the experiment a failure, leading to “unpredictable or inconsistent regulatory definitions” and the “prospect of literally hundreds of adjudications over the status of individual service offerings.” *Computer II*, ¶ 130 (explaining the abandonment of the *Computer I* regime). It would be a step backwards to reintroduce that test here.

Moreover, as a legal matter, such a “we know it when we see it” standard almost inevitably masks arbitrary conduct -- with the agency labeling one kind of service “essentially telecommunications,” and another “essentially information service” based on policy preferences that have little or nothing to do with the “essential nature of the service.” *See MCI Comments* at 10.

There is a great risk of such arbitrary rulemaking here. For example, USTA urges that AT&T’s interactive advertisement card is “really” a telecommunication services because “none of [the interactive choices] is the essential service for which the prepaid calling card was purchased.” *Comments* at 3. But of course if that is the standard the same thing could be said about broadband Internet access service, which the Commission insists is an information service even though by some measure “the essential service for which the [Internet access service] was purchased” plainly is telecommunications, and not the web page creation and other enhanced features upon which the Commission has relied in concluding that the service is an information service. *See National Cable & Telecommunications Association v. Brand X Internet Services*,

U.S. Nos. 04-277 and 04-281 (“*Brand X*”).² It would be arbitrary for the Commission to draw distinctions in the case of AT&T’s prepaid cards that it did not draw in addressing Internet access service.

Other commenters argue that the Commission should separately regulate the information service and the telecommunications components of mixed services. *E.g.*, *Sprint Comments* at 10. MCI has proposed a similar approach in the Commission’s generic rulemaking proceedings on *IP-Enabled Services*, and in judicial review proceedings challenging the Commission’s cable unbundling rules. But as those proceedings make clear, adopting that view here would constitute a stark departure from the Commission’s current practice in this area, and would have profound effects on many matters at the heart of the Commission’s current regulatory initiatives. *See, e.g.*, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, WC Docket No. 02-33 (“*Broadband Framework Proceeding*”); *IP-Enabled Services, Notice of Proposed Rulemaking*, WC Docket No. 04-36 (“*IP-Enabled Services NPRM*”); *Brand X*. The Commission’s current position is that when facilities-based providers offer a service that includes both information and transmission components, the service is viewed as an integrated information service, unless the Commission imposes its *Computer Inquiry* requirements and requires the provider separately to offer the transmission component for sale to the public on a nondiscriminatory basis. *See MCI Comments* at 5-9. In MCI’s view, the Commission should reconsider this conclusion in the generic rulemaking proceedings in which it is being addressed.

² Other commenters seize upon proposed distinctions relating to marketing or to whether the consumer has to pay for the additional services (both of which, as it happens, would lead to the conclusion that MCI’s enhanced card is an “information service”), without acknowledging the obvious administrative difficulties in drawing regulatory conclusions based on such factors. *See MCI Comments* at 10-11.

It should not adopt a special rule for “mixed services” that would apply only in the narrow context of two variants of AT&T’s prepaid calling cards.

CONCLUSION

For the foregoing reasons, and the reasons set out in MCI’s initial comments, the Commission should conclude that providers who offer enhanced prepaid calling cards such as MCI’s “Golden Retriever” card are offering information services to the public.

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