

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

BELLSOUTH REPLY COMMENTS

BellSouth Corporation, on behalf of itself and its wholly owned affiliates (“BellSouth”), by its attorneys, files its reply to comments filed in response to the *Notice of Proposed Rulemaking* issued with the Commission’s *Order* denying AT&T’s Petition for Declaratory Ruling regarding its prepaid calling card services.¹

I. INTRODUCTION

In filing its Petition, AT&T alleged that its prepaid calling card services were actually interstate information services and not telecommunications services because the card user was subjected to an advertisement before completing the call. AT&T further alleged that when a customer placed a call using the prepaid calling card, the call actually consisted of two separate and distinct calls, one from the caller to the prepaid card platform and one from the platform to the called party. AT&T contended that because the card platform usually resided in a state different from both the calling and called parties then each call was interstate in nature and only subject to interstate access rates. The Commission properly rejected AT&T’s Petition, finding

¹ *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services; Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133 & 05-68, *Order (“Prepaid Calling Card Order”)* and *Notice of Proposed Rulemaking (“Notice”)*, WC Docket 03-133, FCC 05-41 (rel. Feb. 23, 2005).

that such calls were telecommunications services, the jurisdiction of which is determined by the originating and terminating points of the call.

During the Petition proceeding, AT&T placed in the record two variations of its prepaid calling card services that it claimed differed from the original card service that was the subject of the Petition. Although these variations provide the same service as the original prepaid card that was the subject of the Commission's *Order*, with slight differences in the platform configuration and transport, the Commission issued the *Notice* seeking comments on whether these slight differences affected their regulatory treatment. As the *Notice* describes, "[i]n the first variant, the customer is given the option to listen to additional information or perform additional functions before listening to the advertising message. In the second variant, AT&T would provide transport associated with enhanced calling card calls over its Internet backbone network using IP technology."² In addition to AT&T's proposals, other carriers have suggested variations that are similar to those proposed by AT&T.³ In the *Notice*, the Commission concluded that instead of "continuing to address the appropriate regulatory regime for variations of prepaid calling cards in a piecemeal manner, . . . the public interest would best be served by considering this issue in a more comprehensive manner, enabling us to gather information about all types of current and planned calling card services."⁴

AT&T filed comments supporting the position that the variants proposed in the *Notice* are information services. Moreover, AT&T claims that no matter what regulatory classification the services may be – telecommunications or information services – the Commission should

² *Notice*, ¶ 38.

³ MCI, for example, has suggested a card that resembles AT&T's first variant but may allow functions not currently proposed by AT&T, such as the ability to check sports scores or review horoscopes.

⁴ *Notice*, ¶ 38.

exercise exclusive federal jurisdiction over these variants of prepaid calling cards. Both of these assertions are patently wrong and should be denied.

II. DISCUSSION

A. The Same Framework Set Forth in the *Prepaid Calling Card Order* Applies to the Variations of Prepaid Card Services Described in the *Notice*

Contrary to AT&T, BellSouth believes that the issue of the appropriate regulatory classification of prepaid calling cards, including the two variations described in the *Notice*, should be resolved based on the same framework applied in the *Prepaid Calling Card Order*. Under this framework, each of the variations described by AT&T would be telecommunications services subject to universal service fund (“USF”) fees and appropriate access charges determined by the originating and terminating points of the call.

In the *Prepaid Calling Card Order*, the Commission found that where a calling card platform provides some intermediate step in the call process, that step is properly classified as an adjunct-to-basic service. These 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.”⁵ Following this framework, the Commission concluded 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.”⁶

⁵ *Prepaid Calling Card Order*, ¶ 16. AT&T argues that this variant differs from the original card because customers may interact with the information on the platform before placing a call. This does not change the analysis. At bottom, customers ultimately buy the card to make telephone calls and may have information incidentally available to them during this process. This is easily contrasted with the *Talking Yellow Pages Order* where customers called specifically for the purpose of obtaining the information provided. See *Northwestern Bell Telephone Company Petition for Declaratory Ruling, Memorandum Opinion and Order*, 2 FCC Rcd 5986 (1987) (“*Talking Yellow Pages Order*”).

⁶ *Prepaid Calling Card Order*, ¶ 21.

This framework for analyzing prepaid calling card services does not depend upon the type or quantity of information that a carrier adds to its calling card platform, as proposed by AT&T under its first variant. Indeed, allowing carriers to change the regulatory classification of the calls from a telecommunications service to an information service by adding incidental information to the calling card platform would allow carriers to transform unilaterally the regulatory classification of their services from a Title II telecommunications service to a Title I information service, without making any change of substance. Thus, the Commission’s finding in the *Prepaid Calling Card Order* that “[t]he ruling AT&T seeks here would enable AT&T to exempt the entire service at issue from Title II regulation merely by including an advertising message”⁷ remains just as true with the first variant described in the *Notice*, as the only difference between the two cards is the few new bells-and-whistles that AT&T has added to the platform.⁸

For example, notwithstanding claims of AT&T and other commenters,⁹ none of the alleged information in the first variant of AT&T’s prepaid card is integrated with the ability of the end user to make a telephone call. The fact that information may be provided in the call set-up phase from the calling card platform – whether in the form of an advertisement or other, arguably more useful, information such as sports scores or weather forecasts – does not achieve such integration of telecommunications service capability with the information service.¹⁰ If a

⁷ *Id.*, ¶ 18.

⁸ As Commissioner Copps indicated, the Commission should not allow service classification matters, as well as national telecommunications policies, to turn on whether the service features “an automated voice that coos on the line ‘press 1 for more information.’” *Prepaid Calling Card Order*, Statement of Commissioner Michael J. Copps, Concurring.

⁹ AT&T Comments at 8-10; IDT Telecom, Inc. Comments at 6-9.

¹⁰ The offering of information, whether an advertisement or other forms of information, on a prepaid calling card, does not convert the prepaid calling card service to an information service. Thus, no matter how the card is marketed to consumers, the fundamental character of

prepaid card service were analyzed based on the type of incidental information provided as part of the process of placing a call, form would take precedence over the characteristics that the statute and the Commission have identified as differentiating information services and telecommunications services. As Commissioner Adelstein warned, the mere discussion of such an outcome in the *Notice* creates an “ambiguity [that] may be read by providers to signal a regulatory edge for one form of technology over another, despite the fact that these services appear functionally the same from the perspective of the consumer.”¹¹ Indeed, AT&T has already indicated that it has moved all of its prepaid calling card services to the first variant described above and is therefore presumably withholding the payment of USF and intrastate access fees under the theory that this variant is an information service and the services are under exclusive federal jurisdiction.¹²

Applying the framework set forth in the *Prepaid Calling Card Order* will ensure a workable and competitively neutral approach in evaluating any prepaid calling card service. Moreover, the *Prepaid Calling Card Order* framework ensures that carriers will not game the system by inserting extraneous information onto the platform solely in an attempt to convert their prepaid calling card services to information services, thereby avoiding their USF and access charge obligations while making no change in the substance of the services offered to consumers. Thus, if the customer uses a prepaid calling card service and the call terminates to the public switched telephone network (“PSTN”), the call is a telecommunications service

the calling card service remains the same – the provision of the capability to place a call – and therefore is a telecommunications service.

¹¹ *Prepaid Calling Card Order*, Statement of Commissioner Jonathan S. Adelstein.

¹² See AT&T’s Motion for Stay Pending Appeal, Subject To Posting Of Security, WC Docket No. 03-133 (filed Mar. 28, 2005).

regardless of the fact that the caller may have access to various and sundry information on the prepaid card platform during an intermediate phase of making the call.

As for AT&T's second variant, the fact that a portion of the transmission of a call made using a prepaid calling card may be by Internet protocol ("IP") technology does not affect the service classification of the call. The Commission correctly found in the *AT&T IP Telephony Order*,¹³ the use of IP technology in the middle of a call that originates and terminates on the PSTN does not convert a telephone call to an information service. That finding does not change simply because the payment for the call occurs through a prepaid calling card. Accordingly, pursuant to the test the Commission established in the *AT&T IP Telephony Order* and reiterated in the *Notice*, a call made using a prepaid calling card platform is a telecommunications service if the customer (1) uses ordinary customer premises equipment ("CPE") with no enhanced functionality, (2) to originate and terminate a call on the PSTN, and (3) the call undergoes no net protocol conversion and provides the end user no enhanced functionality during the duration of the call.¹⁴

B. The Jurisdictional Framework Set Forth in the *Prepaid Calling Card Order* Applies to the Two Prepaid Calling Card Variants Described in the *Notice*

If the Commission concludes that the two variants of prepaid card services are telecommunications services, the *Notice* seeks comment on whether there are any circumstances under which the Commission should assert exclusive federal jurisdiction over such services even if the calls originate and terminate in the same state.¹⁵ Regardless of AT&T's arguments to the

¹³ *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 (2004) ("*AT&T IP Telephony Order*").

¹⁴ *Id.* at 7457-58, ¶ 1; *Notice*, ¶ 40.

¹⁵ In its Comments AT&T makes two jurisdictional claims. First, AT&T asserts that, if the two prepaid calling card variants are found to be information services, then the Commission

contrary, the simple and clear answer to this query is no. The federal or state jurisdiction of any call made using a prepaid calling card is fixed and easily determined. The origination and termination points are captured and known by the automatic number identification (“ANI”). Through the ANI, carriers know the geographic location of both ends of the call and therefore know whether it is interstate or intrastate in nature. The *Prepaid Calling Card Order* confirmed long standing precedent that the jurisdiction of a telecommunications service is “based on an end-to-end analysis, without regard to the routing of the call or the geographic characteristics of the underlying telecommunications.”¹⁶ Just as with the regulatory classification framework established in that *Order*, the jurisdictional conclusion reached by the Commission does not change simply because additional information is added to the calling card platform or a portion of the transmission is completed through IP-in-the-middle. Thus, not only is there no reason to extend exclusive federal jurisdiction over all telecommunications services provided through the variants of prepaid calling cards described in the *Notice*, the Commission must refrain from doing so based on current law and its long-standing precedent in determining the jurisdiction of a call.

AT&T continues to promote the idea that the connection to the calling card platform, which is usually in a different state than the caller and the called party, constitutes “an integral part of the service activated by the end-user’s affirmative choosing.”¹⁷ Thus, citing the *Vonage*

should assert exclusive federal jurisdiction over these services. Because, as demonstrated above, the cards clearly are not information services, there is no need for BellSouth to respond to this claim. Second, AT&T asserts that, even if the Commission finds the cards to be telecommunications services, it should still exercise federal jurisdiction over them. For the reasons set forth below, BellSouth strongly disagrees with this assertion.

¹⁶ *Prepaid Calling Card Order*, ¶ 28.

¹⁷ AT&T Comments at 16.

Order,¹⁸ AT&T continues to advance the discredited theory that calls made using its prepaid card consist of multiple calls, and thus that “the presence of these interstate communications” provides the Commission the authority to exercise jurisdiction over the entire call.¹⁹ The *Vonage Order*, however, is inapposite.

Vonage addressed voice-over-Internet calls that begin on the Internet in an Internet protocol and end on the PSTN. The Commission did not make any conclusions regarding the regulatory classification, *i.e.*, information or telecommunications, but did assert exclusive federal jurisdiction and preempt state regulation for these IP-to-PSTN services in part because the location of the IP end of the call could not reliably be determined. That was so because an end user could place the call from a computer located anywhere in the world, and multiple communications could take place to various points on the Internet. Because of these findings and the unique nature of IP-PSTN traffic, the Commission took affirmative steps to preempt state jurisdiction in that context.

Unlike in *Vonage*, however, the regulatory classification of the services that are the subject of the *Notice* is known – they are telecommunications services – and, in contrast to IP-PSTN traffic, the end points of the prepaid calling-card services are readily determinable. As the Commission explained, in the IP context, “the whole call is considered jurisdictionally interstate” because it is impossible to determine the precise end points of the communication.²⁰

¹⁸ *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*, 19 FCC Rcd 22404 (2004) (“*Vonage Order*”).

¹⁹ AT&T Comments at 16.

²⁰ *See Prepaid Calling Card Order*, ¶25; *Vonage Order*, 19 FCC Rcd at 22423, ¶31 (“There is, quite simply, no practical way to sever [IP-to-PSTN traffic] into interstate and intrastate communications . . .”).

As demonstrated above, the geographic end points for prepaid calling card services are readily known and the mere fact that the transmission of a call made with a prepaid calling card may pass through an out-of-state platform does not convert that call to an interstate service.²¹

C. A Commission Determination That USF Contributions Apply to a Limited Set of Information Services Is Not Appropriate for This Proceeding

Finally, AT&T proposes that the Commission impose USF charges on all prepaid calling card services regardless of whether they are telecommunications or information services. This request is not ripe for the Commission's consideration and is not properly within the scope of the *Notice*. All of the prepaid calling cards services in question in this proceeding, the card that was the subject of AT&T's original request and the two variants described in the *Notice*, clearly provide telecommunications services and require AT&T to make USF contributions for those services. Moreover, any carrier that offers a similar prepaid calling card would, like AT&T, be providing telecommunications services and is required to contribute to the USF for those services. Because none of these services constitutes an information service, there is no need to consider whether it is appropriate to apply USF contributions to information services provided pursuant to a prepaid card. In the same way that this *Notice* is attempting to address prepaid calling cards in a comprehensive manner, application of USF charges to information services should not be taken up on a piecemeal basis but should be reviewed in a broader context in the universal service docket.

²¹ See *Southwestern Bell Telephone Company Transmittal Nos. 1537 and 1560, Revisions to Tariff F.C.C. No 68*, CC Docket No. 88-180, *Order Designating Issues for Investigation*, 3 FCC Rcd 2339, 2341, ¶28 (CCB 1988) ("Switching at the credit card switch is an intermediate step in a single end-to-end communication."); *The Time Machine, Inc. Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services, Memorandum Opinion and Order*, 11 FCC Rcd 1186, 1190, ¶30 (CCB 1995) ("[C]all that originates and ends in the same state is an intrastate call, even if it is processed through an 800 switch located in another state.").

Conclusion

BellSouth implores the Commission to move quickly to end this rulemaking and remove any ambiguity about the proper regulatory classification of prepaid calling card services. The two variations of cards described in the *Notice*, no matter what information may be included in the call set-up phase of the call or what protocol is used in transporting the call, are telecommunications services and are subject to USF and appropriate access charges. As Commissioner Adelstein correctly noted, the mere hint of ambiguity over this matter will no doubt cause numerous carriers improperly to position these calling cards as information services and, thus, stop paying their legally mandated fees. The Commission must therefore head off the inevitable and issue an order that leaves no doubt about the regulations controlling these services.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 16th day of May 2005 served the parties of record to this action with a copy of the foregoing **BELLSOUTH REPLY COMMENTS** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties listed on the attached:


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