

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

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

REPLY COMMENTS OF AT&T CORP.

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Pursuant to the Commission’s Notice of Proposed Rulemaking (“NPRM”), FCC 05-41 (Feb. 23, 2005), AT&T Corp. (“AT&T”) submits these reply comments on the regulation of prepaid calling card services.

INTRODUCTION AND SUMMARY

The comments confirm that the current prepaid card marketplace is not competitively neutral. Many different providers are offering many different kinds of new and innovative prepaid card services today, and as the comments make clear, there is widespread disagreement over the appropriate classification and jurisdiction of these significantly varying services. Given the Commission’s piecemeal approach thus far, and in the absence of any definitive ruling from the Commission, different providers are making their own judgments about what the rules permit and do not permit, and are making universal service contributions (or not) and paying intrastate access charges (or not) as they see fit. Competitive neutrality is eroding away quickly, and Commission action is needed urgently.

Indeed, the Commission cannot afford to wait until the end of this rulemaking proceeding to address these problems. As AT&T demonstrated in its Emergency Petition for Immediate

Interim Relief, filed May 3, 2005 (“Emergency Petition”), it should immediately adopt interim rules to clarify the ground rules for the industry and to restore competitive neutrality while it considers final rules. As AT&T showed, the Commission should (1) require all prepaid card providers to contribute to the Universal Service Fund (“USF”), regardless of whether the services are telecommunications services or information services; (2) either assert federal jurisdiction over all prepaid card services, or clarify that all prepaid card services must pay interstate or intrastate access based on the location of the cardholder and the called party; and (3) establish reporting requirements to ensure a much needed transparency in the prepaid card industry. The Commission should issue such interim rules immediately, and as AT&T has explained, it has ample authority to do so without further notice and comment. *See* Emergency Petition at 6.

With respect to final rules, the Commission should classify interactive prepaid card services as information services. In such services, the end-user affirmatively interacts with the computer platform by actively choosing the information she wants and otherwise manipulating stored information, and the Commission has consistently found such services to be information services. Opponents mainly attempt to revive the long-repealed “primary purpose” test, or to claim that such information capabilities are not really being “offered.” As explained below, these claims are meritless, and the Commission should strongly reaffirm the bright-line rule for determining when a service is an information service. As AT&T noted previously, many parties are resisting classifying such services as information services mainly because of a concern that prepaid card services will avoid universal service contribution requirements. The Commission should deal with such concerns directly, however, by adopting final rules requiring all prepaid card services to contribute to universal service, *regardless* of whether they are telecommunications services or information services.

The commenters also cast no doubt on the Commission’s conclusion that, if a prepaid card service is an information service (as are interactive prepaid card services), then it is properly subjected to exclusive interstate jurisdiction. *NPRM* ¶ 42 (when “existing or potential prepaid card services are classified as information services, they presumably would be subject solely to federal jurisdiction”). The commenters cannot dispute that the interactive services at issue here contain multiple communications, many of which are interstate, and no commenter can identify any business-driven reason for forcing providers to separate out the constituent communications for jurisdictional purposes. *Id.* ¶ 42 & n.87.

In short, the Commission should quickly restore regulatory certainty and competitive neutrality to the prepaid card industry by strongly reaffirming: (1) that interactive prepaid card services are information services; (2) that such services are jurisdictionally interstate regardless of regulatory classification; and (3) that all prepaid card services, whether they are telecommunications services or information services, should contribute to universal service (with an exception for cards sold to the military).

I. THE COMMENTS CONFIRM THAT INTERACTIVE PREPAID CARD SERVICES ARE INFORMATION SERVICES.

The comments confirm that interactive prepaid card services, like AT&T’s current prepaid card service, are information services. Such interactive services are fundamentally different from the services the Commission addressed in the *EPPC Order*, and therefore the Commission should reject the claims of those who would mindlessly extend the scope of that order to interactive services.

A number of commenters recognize that interactive prepaid card services like AT&T’s satisfy the statutory definition of an information service, even under the Commission’s interpretation of those terms in the *EPPC Order*. See *MCI* at 5-6; *IDT* at 4-6; *eKIT* at 3-4. Most

fundamentally, interactive services like AT&T's unquestionably "offer" an information "capability" with respect to the stored messages within the meaning of the statute. *EPPC Order* ¶ 15. As AT&T noted, in its new service, the platform *asks* the caller if she would like more information about various topics, and that request is an "offer" within the meaning of § 153(20). Moreover, the service offers an information "capability" – the end-user affirmatively interacts with the service by actively choosing the information she wants and otherwise manipulating the stored information. And many recently introduced prepaid cards, such as AT&T's latest interactive cards, offer a wealth of different services and options, including access to weather, sports, movie listings, restaurant reviews, and other information (which the end-user must affirmatively select and often for which there is a fee).

As the commenters recognize, these services cannot be distinguished from the advertising services that the Commission found to be enhanced services in the *Talking Yellow Pages Order*, even as the Commission interpreted that order in *EPPC Order*. *EPPC Order* ¶ 17; see IDT at 4-5; eKIT at 4. In the *EPPC Order*, the Commission explained that the advertising service in the *Talking Yellow Pages Order* was an information service because that service "played advertisements in response to subscribers' individual selections for various categories of information." *EPPC Order* ¶ 17. The interactive prepaid card services at issue here unquestionably provide stored information "in response to subscribers' individual selections for various categories of information." Indeed, AT&T's newest cards go well beyond that, by allowing customers to manipulate and interact iteratively with a wide variety of stored information. No commenter has refuted these dispositive points.

These conclusions are even clearer when the service is viewed from the perspective of AT&T's actual arm's-length customer, the retailer. AT&T's interactive calling card service

allows retailers to load prerecorded messages and other iterative information of their own choosing into computers and to have these messages made available to the end users that purchase their retail cards. There is a wide variety of messages and information that retail providers are making available through the use of AT&T's enhanced platform. Thus, AT&T plainly "offers" these retailers the "capabilities" of generating, storing, processing, retrieving, and making available information that the retailer selects. 47 U.S.C. § 153(20). The retailers set the rates for the retail services and create the messages and information that will be integrated into their retail calling card offerings, and AT&T provides both the underlying transmission and the computer and data storage capabilities necessary to integrate those messages into the service. That is a classic information service. Far from "not being offered" to customers, the "capabilities" that allow retailers to send stored messages to their customers are a principal selling point and benefit of the service that AT&T offers to the retailers who purchase and resell these AT&T services.

Several parties nonetheless attempt to argue that even interactive prepaid card services are telecommunications services, but these arguments are meritless. These commenters' principal argument is almost always that the service is still "primarily" or "essentially" or "fundamentally" a telecommunications service, even though there may be also information components, and therefore the service must be classified a telecommunications service. In other words, these parties want the Commission to apply the long-discredited "primary purpose" test, which the Commission repealed in 1980. *Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 92-101 (1980).¹ The primary purpose test proved to be thoroughly unworkable in practice, and the

¹ Numerous commenters argue the point in precisely those terms. *See, e.g.*, USTA at 3 ("consumers buy prepaid calling cards in order to make telephone calls," and the information components are not "the essential service for which the prepaid calling card was purchased");

Commission therefore replaced it with a simple, bright-line test: “an enhanced service is *any* offering over the telecommunications network which is more than a basic transmission service.” *See Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 97, 107, 130 (1980). Although these commenters obviously believe that the Commission abandoned that bright-line rule in the *EPPC Order* in favor of a subjective, case-by-case “primary purpose” test, the Commission should firmly rebuff these efforts to erode the existing bright-line rule. Interactive prepaid card services provide far more than basic transmission, and thus are information services under settled law.²

Moreover, the new breed of interactive prepaid calling cards are not segregable into information and telecommunications services, as Sprint contends (at 9-10). As eKIT explains (at 2), the old prepaid calling card industry is quickly evolving into a “stored value card” industry, in which card providers offer “a wide universe of computer-based functionality.” Voice calls are increasingly just one aspect of an multifaceted offering that integrates iterative information queries, Internet access, banking transactions, and much else. The Commission adopted a hands-off approach to the regulation of information services to encourage precisely this sort of innovation. Sprint’s attempt to shoe-horn these information services, increasingly offered by companies not traditionally common carriers, into the straight-jacket of traditional common carrier regulation will inevitably retard the growth of these innovative services. *See also* IDT at 5-8, 12-14 (information features are “an integral element of the calling card product and are

Sprint at 9-10 (not an information service because not “the reason why people purchase these cards”); ITTA *et al.* at 2, 4 (“prepaid card services are purchased by consumers for one predominant purpose: to make telephone calls”); WilTel at 4-5 (the ability to use the information capabilities “is not why the user buys the card”); Verizon at 3 (making long distance calls is the “*raison d’etre* for purchasing the card”).

² Sprint claims that courts have found the “perspective of the customer” to be relevant to the questions presented here, but the cases Sprint cites all deal with whether services are “like” under § 202(a) of the Act, not whether a service is an information service, which turns on what functions are “offered.” *See Ad Hoc Telecommunications Users Group v. FCC*, 680 F.2d 790, 795 (D.C. Cir. 1982).

presented to the customer as such”); MCI at 7, 9-10 (service is information service when offering “integrated information and telecommunications functionality”).

The commenters’ other principal argument focuses on the supposed fact that AT&T’s marketing materials do not mention the information components, which allegedly proves that there is no “offer” within the meaning of the statute. *See, e.g.*, Sprint at 8; ITTA *et al.* at 4; Verizon at 3. Even if this were legally relevant, the commenters are simply wrong on the facts. AT&T’s current marketing materials often *do* mention and offer the information capabilities; the commenters that state otherwise were relying on older cards that have been superseded. Even if that were not true, the platform itself indisputably offers the end-user the opportunity to interact with stored information every time the end-user uses the card.³

GCI’s contention (at 8-9) that these interactive services should be classified as adjunct-to-basic is equally meritless. *See also* ITTA *et al.* at 3-4. The adjunct-to-basic exception is a narrow one with a clearly defined boundary. It is limited to computer-provided functions that are *call-related* – *i.e.*, call setup, call routing, call cessation, called or calling party identification or billing and accounting.⁴ Contrary to GCI’s apparent belief, non-call-related computer functions such as the interactive stored messages here cannot qualify as “adjunct-to-basic.” Indeed, in seeking to expand the “adjunct-to-basic” category beyond call-related functions to include any enhancement that might be said not to alter the fundamental character of a basic service, GCI and

³ WilTel’s suggestion (at 6) that a function is not “offered” unless a provider separately charges for it is simply wrong. The statute does not contain such a requirement. Moreover, WilTel is wrong on the facts: the retailers to whom AT&T sells its interactive service do pay for the entirety of the service – the basic transmission coupled with the computer and data functions that allow the retailer to integrate stored messages into its retail offerings. And retail end-users also pay separately for some of the information functions as well.

⁴ *Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd. 20391, ¶ 39 (1998); *NATA/Centrex Order*, 3 FCC Rcd. 4385, ¶¶ 11-12, 32 (1988); *see also Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 97-98 (1980); *Communications Protocols under Section 64.702*, 95 F.C.C.2d 584, ¶ 28 (1983).

ITTA *et al.* are effectively turning the narrow adjunct-to-basic exception into the “primary purpose” test that was repealed in 1980. *See Second Computer Inquiry*, 77 F.C.C.2d 384, ¶¶ 97, 107, 130 (1980).

This is further confirmed by the statute. As shown above, the interactive prepaid card services at issue here “offer” users information “capabilities” within the meaning of the statute. Once the Commission has found that a service offers an information capability, however, the service *must* be classified as an information service unless the Commission finds that “such capabilities” are used for “the management, control, or operation of a telecommunications system or the management of a telecommunications service.” 47 U.S.C. § 153(20). No commenter here contends (or could contend) that the information capabilities inherent in these interactive prepaid card services meet the prerequisites of this statutory exception. That should be the end of the matter.

In short, these claims that there is no “offer” of information, or that end-users or retailers do not buy the service to take advantage of the information capabilities, do not pass even the most basic check. AT&T and others clearly offer, and retailers purchase, the capability to integrate messages and other information into the retailer’s prepaid card offering through the generating, storing, processing, retrieving, and making available of information that the retailer selects. 47 U.S.C. § 153(20). In addition, in the context of these interactive cards, the end-user *affirmatively chooses* to interact with the stored information at the platform. In the face of such affirmative selections by the end-user, to suggest that such components are not even “offered” or are not wanted borders on frivolous.

II. THE COMMISSION SHOULD ASSERT INTERSTATE JURISDICTION AS BROADLY AS POSSIBLE OVER PREPAID CARD SERVICES.

The comments confirm not only that interactive prepaid card services are information services, that they are also jurisdictionally interstate. Indeed, the Commission already concluded in the *EPPC Order* that, if interactive prepaid calling card services are information services (as they are), then they “presumably would be subject solely to federal jurisdiction,” and the comments confirm that conclusion. *NPRM* ¶ 42. As AT&T showed in its recent Emergency Petition, however, there is an immediate need for clarity in this area, and the Commission quickly issue interim rules establishing either that interstate access charges will or will not apply while this rulemaking is pending.

In the recent *Pulver Order*,⁵ the Commission held that “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.” Here, AT&T’s current interactive EPPC services cannot be characterized as “purely intrastate,” and no commenter contends otherwise.

Moreover, contrary to various commenters’ arguments, the interstate and intrastate components of such services cannot be readily separated. *See* Verizon at 3-4; Sprint at 11. 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, although virtually *all* communications sessions made using

⁵ *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).

AT&T's current service involve some interstate communication.⁶ AT&T's current interactive service does not separately identify and measure the intrastate communications and interstate communications (*e.g.*, from the platform to the calling party) that may occur in a single communications session, and there is no existing capability or practical way to sever EPPC into discrete interstate and intrastate communications that would allow imposition of intrastate access charges only to intrastate calling functionalities without also interfering with the interstate aspects of EPPC. *See Vonage Order* ¶ 32. As the Commission held in the *Vonage Order*, a service like the interactive prepaid card services here is deemed to be practically inseverable as long as there is a showing that, as here, there is no "service-driven" reason separately to track interstate and intrastate communications in a single communications session. *Id.* ¶ 29. As IDT shows, "forcing an artificial separation" of EPPC service into interstate and intrastate components would compel providers wishing to offer enhanced services to offer two separate products, thereby impeding the development of competitive calling card products and stifling innovation. IDT at 13-14. As VeriSign concludes (at 9), a "*Vonage Order* preemption analysis seems especially dispositive."

Exclusive federal jurisdiction over interactive prepaid card services like AT&T's is particularly important to level the playing field in the prepaid calling card market and advance the federal policy of competitive neutrality. As AT&T has established, many leading providers of prepaid card services do not appear to be paying intrastate access charges despite the fact that such services appear to fall squarely within the Commission's historical definition of basic

⁶ *See, e.g.*, IDT at 12-13 ("[u]nlike the examples previously cited by the Commission as providing two separate and distinct services, . . . calling card services that provide users the ability to access stored information or place a telephone call provide a single enhanced product that gives a single user access to information or telecommunications, or any combination of both, during a single session").

services. *See AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133, AT&T Motion for Stay, Subject to Posting of Security, Declaration of Adam Panagia ¶¶ 7-21 (Mar. 28, 2005) (“Panagia Dec.”). In fact, AT&T’s test calls illustrate that many providers appear to be routing ordinary intrastate calls made with prepaid cards through foreign countries, which are then delivered back to the United States without calling party number information and terminated as if they were international calls subject only to interstate access charges. *Id.* ¶¶ 14-21. In addition, IDT argues that a non-facilities-based calling card provider would be performing a net protocol conversion if it receives a call in TDM format and converts it to IP for delivery to another carrier, even if the second carrier converts the call back into TDM before terminating the call. IDT at 10-11. Yet, the Commission has squarely held that such intermediate conversions among different carriers do *not* constitute a net protocol conversion. *See AT&T IP Telephony Order*, 19 FCC Rcd. 7475, ¶ 12 (2004).

The Commission’s piecemeal approach up until now has led many carriers pursuing many different approaches, most of which are difficult to detect or police. This state of affairs places AT&T at a severe competitive disadvantage, contrary to the claims of Verizon and others. The best way for the Commission to eliminate the confusion and to restore regulatory parity in the industry is to assert federal jurisdiction over all prepaid card calls. *See AT&T* at 10-17.

But the Commission should not wait until the conclusion of this rulemaking to restore predictability and order. As AT&T demonstrated in its Emergency Petition, there is an urgent need for interim uniform rules on access charges. And with respect to interim rules, any consistent and enforceable rule is better than no rule at all. As AT&T showed in its Petition, the Commission should either assert federal jurisdiction in the interim, or it should clarify that in the

interim intrastate access charges apply to all prepaid card calls where the cardholder and the called party are in the same state. The Commission should issue such interim rules immediately, and as AT&T demonstrated, no new notice and comment is necessary. *See* Emergency Petition at 6-7.

Finally, as many commenters note,⁷ these controversies concerning prepaid calling cards are merely one symptom of a much broader problem – the need for fundamental intercarrier compensation reform. AT&T, as part of the Intercarrier Compensation Forum (ICF), has proposed a detailed and comprehensive plan for reforming the intercarrier compensation regime that would largely moot these and many other important disputes in the industry. The Commission should adopt the ICF proposal as soon as possible, and eliminate the practice of placing identical uses of the network in different regulatory “boxes.”

III. ALL PREPAID CARD PROVIDERS SHOULD CONTRIBUTE TO THE USF, WHETHER THEIR SERVICES ARE TELECOMMUNICATIONS OR INFORMATION SERVICES.

Many commenters assert that AT&T is attempting to circumvent the Commission’s USF contribution requirements through this proceeding. Quite the contrary, AT&T is the only commenter arguing that the Commission should require *all* EPPC providers to contribute to the USF, regardless of regulatory classification. As AT&T showed (at 18-19), the Commission has ample authority to extend USF contribution requirements to all prepaid card services, whether they are telecommunications services or information services. And such a rule is necessary to restore much needed regulatory parity to the prepaid calling card services market, given that it appears that not all prepaid card providers are contributing to the USF. *See id.* at 18. The

⁷ *See, e.g.,* MCI at 2-3; SBC at 1-5; Sprint at 4-5; ITTA *et al.* at 8-9.

Commission should establish an exception, however, for cards offered specifically to the military, to the extent explained in AT&T Comments (at 19).⁸

This is also an issue that cannot wait until the end of this proceeding. As AT&T has shown, not all prepaid card providers appear to be contributing fully to the USF today. *See* Panagia Dec. ¶¶ 7-21. A federal court recently held that the removal of “white noise” from IP-enabled transmissions constitutes an information service, thus exempting such services from universal service (and access) contribution requirements.⁹ These disparities are leading to significant competitive imbalances in the prepaid card industry. The Commission should therefore grant AT&T’s Emergency Petition and adopt interim rules immediately to require all prepaid card providers to contribute to the USF on an equitable basis. As AT&T showed in its Emergency Petition, the Commission has ample authority to adopt clear and enforceable interim rules without formal notice and public comment under the “good cause” standard under 5 U.S.C. § 553(b)(3)(B) and articulated in Commission precedent. *See 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)).

⁸ Sprint’s claim (at 15-16) that a military exemption is unnecessary is not credible. Universal service contributions indisputably constitute a substantial cost, and an exemption from such requirements will lower the cost of providing these services to our military. Sprint’s contrary contention is based almost entirely on the erroneous perception that other carriers are maintaining “very low rates” while still contributing to the USF and paying intrastate access charges, when in fact many carriers are not making such payments, and not capable of providing the extensive and costly services to the military.

⁹ *In re Transcom Enhanced Services*, Case No. 05-31929-HDH-11 (Bankr., N.D. Texas, April 28, 2005).

CONCLUSION

For the reasons stated, AT&T respectfully requests that the Commission amend and clarify its rules as described above.

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