

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

In the Matter of)	
)	
AT&T Corp. Petition for Declaratory Ruling)	WC Docket No. 03-133
Regarding Enhanced Prepaid Calling)	
Card Service)	
)	
Regulation of Prepaid Calling Card Services)	WC Docket No. 05-68

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. (“GCI”), by its undersigned counsel, hereby submits these reply comments in response to the Notice of Proposed Rulemaking (“NPRM”) issued by the Federal Communications Commission (“FCC” or “Commission”) in the above captioned-proceeding.

I. INTRODUCTION

The FCC should determine in this proceeding that the inclusion of information incidental to the essential service being provided – the ability to make a calling card call – does not transform the prepaid calling card service into an enhanced or information service and clarify that any calling card service is presumptively classified as a telecommunications service.¹ While almost all parties to this proceeding agree that intercarrier compensation reform is needed,² proposals to characterize prepaid calling card services as “enhanced” or information services because of commercial messaging placed at the front-end of the call, threaten the intercarrier

¹ See GCI Comments, WC Docket Nos. 03-133 and 05-68 (filed Apr. 15, 2005) at 8-10.

² See e.g. MCI Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 2; Sprint Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 4; SBC Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 1.

compensation regime even before rational reform is implemented. Such mischaracterizations ultimately undermine universal service at the expense of consumers and provide harm to other carriers that play by the rules. GCI and other commenters have well addressed why the recent *Calling Card Order* analysis aptly applies to any variations of the service cooked up to engender the apparently much desired “enhanced” or “information” services classifications.³ As such, the FCC’s prior decision in this docket, which reaffirmed Commission precedent, provides the appropriate framework for analyzing the treatment of prepaid calling card services as telecommunications services.⁴

These replies, therefore, rebut AT&T’s latest ploy to escape intrastate access charges on in-state prepaid calling card calls. Simply stated, there is nothing to support proposals to give the FCC exclusive jurisdiction over all prepaid calling card services or to preempt state jurisdiction in order to preclude the assessment and collection of intrastate access charges on calls that originate and terminate in the same state. The two-call theory has clearly been rejected in this docket and there is no basis to resurrect it. Moreover, AT&T’s own internal investigations demonstrate that the endpoints of such calls are identifiable, and have only been rendered ambiguous due to provider actions to strip ANI from calls to escape jurisdictional classifications.

³ GCI Comments at 8; *see also* Verizon Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 2-4; Sprint Comments at 2; National Association of State Utility Consumer Advocates Comments, WC Docket Nos. 03-133 and 05-68 (filed Apr. 15, 2005) at 14-17.

⁴ *See* USTA Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 2; Verizon Comments at 2.

II. NO BASIS EXISTS FOR THE FCC TO ASSERT EXCLUSIVE JURISDICTION OVER PREPAID CARDS

A. Jurisdiction Still Determined by End Points of the Call

In its comments, AT&T states that the FCC should assert interstate jurisdiction as broadly as possible over prepaid card services.⁵ To support this proposal, AT&T trots-out, again, in several places in its comments the two-call theory, which has been repeatedly rejected by the FCC. As it attempts its second bite at the apple, AT&T now claims that the prepaid card services are not “purely intrastate” because it is not possible to separate the traffic in a prepaid calling card call,⁶ there is a communication between the end-user and the calling card platform,⁷ and that the Commission’s traditional end-to-end jurisdictional analysis is not appropriate where multiple communications within a single communications session do not have a single point of termination.⁸ This line of argument has no merit and is nothing more than a rehashing or re-litigation of the same two-call argument, which has been rejected.

The law is clear: the end-points of a call determine the jurisdiction of the call.⁹ In the case of a call made using a debit card, there is no difficulty in separating out the traffic. The end points are the point of the origination of the call and the point of the termination of the call. As such, the FCC in the *Calling Card Order* affirmed that calls that originate and terminate in the same state are subject to intrastate jurisdiction.¹⁰ Intermediate points, such as calling card

⁵ AT&T Comments at 10.

⁶ AT&T Comments at 12.

⁷ *Id.*

⁸ *Id.* at 14.

⁹ *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation, Regulation of Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket Nos. 03-133 and 05-68 (rel. Feb. 23, 2005) (“*Calling Card Order*”) at ¶ 22.

¹⁰ *Calling Card Order* at ¶ 22 (holding that cards that originate and terminate in the same state are jurisdictionally intrastate under the Commission’s traditional end-to-end analysis). *See also The Time Machine*, Memorandum Opinion and Order, 11 FCC Rcd at 1186, 1190, ¶ 30 (holding that a debit card call

platforms, do not change this determination.¹¹ There is no “communication” with the calling card platform as AT&T suggests. Nor are there “multiple communications” in a calling card call as AT&T attempts to advocate.¹² Customers use a calling card to make a call and communicate with the party at the point of termination of the call (the called party’s location) and not to reach a menu of retailer-recorded advertising at the switch. AT&T has offered no persuasive reasons to justify a departure from the clear legal precedent.

To the contrary, the traffic identification issues on which the FCC relied for preemption in the *Vonage Order*¹³ are not present here, by AT&T’s own admission.¹⁴ It is plainly possible (and common practice) to track such calls, as can be done with relative ease, so long as the ANI is not stripped. AT&T’s own test calls demonstrate that other calling card providers are avoiding intrastate access charges by routing the traffic through foreign countries and *removing* the calling party number (“CPN”) identification.¹⁵ Rather than throw up its hands in response to this fraudulent practice, as AT&T suggests, the Commission should put all providers on notice that the original ANI must be passed with the call, which capability is plainly available and has been the longstanding practice until it became profitable to exclude the information.

that originates and terminates in the same state is intrastate even if it is processed through a switch in another state).

¹¹ *Calling Card Order* at ¶¶ 22-23.

¹² AT&T Comments at 14.

¹³ *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*”).

¹⁴ AT&T Comments at 12.

¹⁵ AT&T Comments at 10, 15. GCI notes that AT&T may be inviting the arbitrage of other carriers that it describes in the Declaration of Adam Panagia. AT&T Comments at 10. What is unclear is why AT&T does not take steps to exclude domestic arbitrage calls from its low international rates through its contracts with international carrier customers.

AT&T also suggests that the FCC should pursue exclusive jurisdiction over prepaid calling card calls in order to keep the cards “affordable” to “traditionally excluded groups”.¹⁶ To date, throughout the course of this proceeding, AT&T has yet to provide a nexus between the rates it sets for its prepaid calling card services and its on-going, publicly-touted avoidance of making required USF and access charges payments.¹⁷ In rejection of such arguments – again – the FCC should recognize these unsupported attempts to leverage social policy concerns as scare tactics designed to further the objective of avoiding certain regulatory costs, such as making appropriate USF and access charge payments.

On the other hand, the record does demonstrate that continued gaming creates competitive unfairness for those providers that *do* follow the rules and poses a serious threat to universal service. By mischaracterizing its in-state prepaid calling card traffic as interstate, AT&T has shifted the portions of common line intrastate access charges (*i.e.*, non-traffic sensitive) that it rightfully owed through the Alaska Exchange Carrier Association (“AECA”) pool (but avoided) onto GCI and other IXCs.¹⁸ The charges were not simply withheld from the local exchange carrier; they were billed to and paid for by AT&T’s long distance competitors. To date, this harm has not been fully remedied and should not be allowed to continue.

Whereas GCI is the primary party at risk with respect to the intrastate common line charges, it is the entire Alaska rural carrier community that is at risk with respect to traffic sensitive, per minute charges. The rates for these access charge elements have been set based on the inclusion of estimated pre-paid calling card demand. If pre-paid providers game the system—whether by jurisdictional mischaracterization, traffic misclassification, or fraudulent

¹⁶ AT&T Comments at 15.

¹⁷ Calling Card Order at ¶ 30; GCI Opposition to AT&T Request for Emergency Relief, CC Docket Nos. 03-133 and 05-68 (filed May 10, 2005) at 4.

¹⁸ GCI Comments at 17.

stripping of ANI from internationally-routed calls—rural carriers collect the lower per minute charges on fewer minutes. The shortfall could be significant given the high percentage of prepaid traffic relative to all Alaska intrastate toll minutes. This harm—both to interstate IXCs and the LECs—strongly advise against the broad preemption sought by AT&T and others.¹⁹

B. Activities of Other Providers Does Not Excuse Compliance With the Law

AT&T would have the Commission use a lowest common denominator approach to rulemaking, by excepting all prepaid calls from currently applicable rules because some providers have self-assigned this treatment (either by asserting an information services designation, an interstate jurisdiction, or some combination of the two). Finger pointing to other alleged wrong-doers does not form the basis for preemption of state jurisdiction to impose intrastate access charges. Nor can such claimed industry practice excuse pre-paid card providers from complying with the law and the payment of appropriate access charges. Should a party fail to comply with the law, the FCC has the appropriate enforcement and investigative authority to address any alleged wrong-doing of other carriers.

Further undercutting AT&T's argument that the elimination of intrastate access charges is necessary to put all prepaid card providers on a level playing field²⁰ is the fact that the *Calling Card Order* is fair in that it treats all similarly-situated card providers the same. For example, the FCC specifically instructed that all prepaid calling card providers offering similar services to those of AT&T must file updated revenue information with USAC in order to properly report revenues consistent with the FCC's *Calling Card Order*.²¹ As such, there is simply no basis for a preemption of state jurisdiction over intrastate access charges.

¹⁹ AT&T Comments at 10; VeriSign, Inc. Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 9.

²⁰ AT&T Comments at 11.

²¹ *Calling Card Order* at ¶ 31.

C. No Justification for Preemption of State Jurisdiction

GCI opposes AT&T's suggestion that the FCC assume exclusive jurisdiction of all prepaid calling card calls whether such calls are characterized as information services or telecommunications services in preemption of state jurisdiction.²² There is nothing in the record upon which to base such a legal determination.²³ At a minimum, the Commission would bear the burden of demonstrating that any federal preemption is narrowly tailored to impact only such state law or regulation as would actually negate the Commission's legitimate exercise of interstate regulation of calling card services.²⁴ No such showing has (or can be) made.

III. USF PAYMENTS ARE APPROPRIATELY DUE ON CALLING CARD CALLS

In its comments, AT&T proposes that all prepaid calling card providers should be required to contribute to the USF whether they are an information service or telecommunications service.²⁵ To be clear, this is consistent with current legal requirements that all telecommunications providers must contribute to the federal USF²⁶ because the provision of prepaid calling card services is the provision of a telecommunications service. If a prepaid card provider, or any other service provider, believes that it is offering something that it has self-determined is an information service and is exempt from the requirements to pay into USF, that is a risk that carrier may (wrongly) assume. Finally, GCI notes that the real and sustainable solution to this matter is not piecemeal inclusion or exclusion by special rule, but rather

²² AT&T Comments at 16. Even were the Commission to determine (which it should not) that some flavor of prepaid calling card services may be rendered enhanced or information services, such a finding in and of itself would not justify automatic preemption. See *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990).

²³ Sprint Comments, WC Docket No. 05-68 (filed Apr. 15, 2005) at 15.

²⁴ *National Association of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 429-430 (D.C. Cir. 1989). See also Comments of the New York State Department of Public Service, WC Docket No. 03-133 (filed Apr. 15, 2005) at 2.

²⁵ AT&T Comments at 18.

²⁶ 47 U.S.C. § 254(d).

fundamental contribution reform to broaden the base of USF contributions and proposals that will curb incentives to avoid contribution by gaming traffic or jurisdictional classifications.

GCI does not agree with AT&T's proposal that the FCC exclude from USF obligations the revenues associated with certain military calling cards by creating an exemption for prepaid calling card services sold by, to, or on behalf of military exchanges or the Department of Defense to members of the military and their families.²⁷ While GCI recognizes the importance of free or reduced calling card minutes provided to the military, a fact highlighted in the FCC's *Calling Card Order*,²⁸ it is not clear that the tracking and separation of such revenues normally attributable to military prepaid calling cards is possible from a technical standpoint.²⁹ No party has provided a proposal for how this would occur. Nor can it be ensured that the purchase of such cards would be limited to the use of members of the military or their families. Given that there is no evidence even showing a detrimental impact of USF assessments on interstate calling card revenues (a requirement with which some calling card providers have complied all along), there is no basis to adopt by interim rule a potentially unworkable solution to solve a problem that has not even been shown to exist.

IV. CONCLUSION

Consistent with numerous comments received in the above-captioned proceeding, GCI urges the FCC to affirm that AT&T's two variants of calling card services are not enhanced and are, in fact, telecommunications services. As argued by several parties, the FCC should find that the inclusion of information incidental to the essential service being provided – the ability to make a calling card call – does not transform prepaid calling card services into enhanced or

²⁷ AT&T Comments at 19.

²⁸ *Calling Card Order* at ¶¶ 35-36 and Appendix B (listing information regarding several calling card donation programs for the military).

²⁹ It should be noted that identifying the caller and/or called party is wholly a different undertaking from identifying the calling and called numbers.

information services and clarify that any calling card service is presumptively classified as a telecommunications service. For carriers that chose not to follow the law, they do so at their own risk. GCI concurs that interstate prepaid calling card providers should pay appropriate USF and access charge payments, as currently required. There is no basis, however, to change the application of USF and access charges or to preempt the jurisdiction of states over intrastate calling card calls.

Respectfully submitted,

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