

EX PARTE

April 26, 2006

Ms. Marlene H. Dortch
 Secretary
 Federal Communications Commission
 445 12th Street, S.W.
 Washington, D.C. 20554

Bingham McCutchen LLP
 Suite 300
 3000 K Street NW
 Washington, DC
 20007-5116

Re: Regulation of Prepaid Calling Card Services, WC Docket No. 05-68

Dear Ms. Dortch:

Recently, Sprint Nextel (“Sprint”) has filed several documents with the Commission in which it argues that Commission should make its decision regarding the regulatory treatment of prepaid calling cards retroactive. For the reasons detailed below, IDT Telecom, Inc. (“IDT”) urges the Commission to reject this argument. Given the historical manner in which the subject matter of this docket, particularly menu-driven prepaid calling cards, have been regulated, Commission precedent and basic principles of administrative law dictate that the application of any decision in this docket be prospective only.

As noted by IDT in its previously-filed comments in this proceeding, menu-driven prepaid calling cards offer access to numerous services including traditional telephony and enhanced services such as stock quotes, movie times and related information services. Based on longstanding Commission regulations and precedent, these products are appropriately categorized as hybrid information services.¹ Additionally, these products are factually and conceptually distinct from the prepaid calling card services addressed in response to AT&T’s Petition for a Declaratory Ruling

¹ 47 C.F.R. § 64.702(a); see, *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986, at ¶ 20 (1987) (finding that “talking yellow pages” offer interaction with stored information and are therefore enhanced); see, also, *Amendment of Section 64.702 of the Commission’s Rules and Regulations*, Memorandum Opinion and Order, 84 F.C.C.2d 50, 54-55 (1980) (finding interactive voice response services that allow subscribers to obtain access to voice information (including news, weather, and sports)).

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regarding cards that contain “push” advertising,² as the Commission itself acknowledged in initiating this rulemaking.³

Furthermore, we respectfully remind the Commission that, other than in rare and unique circumstances - which are not present in this docket- new policy that departs from prior Commission precedent cannot be applied retroactively. The D.C. Circuit established a five-factor inquiry to determine when retroactivity is permissible.⁴ All five factors clearly point against retroactive application in this docket. Most notably, in the Notice of Proposed Rulemaking (“NPRM”) that began this proceeding, the Commission explicitly stated that it no longer wanted to address the classification of prepaid calling cards on a “piecemeal basis,” but rather wanted to create a more unified system to address the regulatory treatment of prepaid calling card services, both current and future, in a consistent manner and sought comment on how to create uniform regulation of all prepaid calling cards.⁵ To the extent that a new regulatory framework departs from underlying Commission precedent, there is simply no justification under applicable law to make this new policy retroactively effective.

IDT stands by its prior comments that menu-driven prepaid calling cards should continue to be treated as hybrid information services. To the extent that the Commission varies from this precedent, however, the application of such a distinct change in policy clearly must be prospective in nature. Other commenters that argue for retroactive

² *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 4826 (2005) (“AT&T Order”).

³ Specifically, the Commission described the menu-driven cards as a “variant” of an enhanced service, acknowledged that “changes to AT&T’s calling card services may be significant for purposes of regulatory classification and jurisdiction,” and sought comment on how to “distinguish between telecommunications and information services for other existing or potential prepaid calling card services that incorporate features not specifically addressed in this item.” *Id.*, at ¶¶ 2, 39, 41.

⁴ These factors are (1) whether the case is one of first impression, (2) whether the new rule is an abrupt departure from well-established practice or merely an attempt to fill a void in an unsettled area of law, (3) whether and to what extent the party against whom the new rule is applied relied on the former rule, (4) whether and to what extent the retroactive order imposes a burden on a party, and (5) whether and to what extent there is a statutory interest in applying a new rule despite reliance of a party on an old standard. *Retail Wholesale & Department Store Union v. NLRB*, 466 F.2d 280 (D.C. Cir. 1972).

⁵ *AT&T Order*, at ¶ 38.

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application are simply incorrect, both as a matter of the Commission's expressly stated intent in the NPRM and as a matter of law.

Very truly yours,



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cc: Chairman Martin
Commissioner Copps
Commissioner Adelstein
Commissioner Tate
Thomas Navin
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