



Jack Zinman
General Attorney

AT&T Services, Inc.
1401 I Street NW, Suite 400
Washington, D.C. 20005
Phone 202 326-8911
Fax 202 408-8745

April 27, 2006

VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW – Lobby Level
Washington, D.C. 20554

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

Dear Ms. Dortch:

In the above-referenced rulemaking proceeding, AT&T, Inc. (AT&T) has urged the Commission to rule that all prepaid calling card services should be subject to access charge and universal service obligations on a going forward basis.¹ We have explained that such a ruling is needed to ensure that all enhanced prepaid calling card providers compete on a level regulatory playing field. In addition to ruling on the regulatory obligations applicable prospectively to these services, we also strongly encourage the Commission to expressly rule that such obligations do *not* apply on a retroactive basis to the types of enhanced prepaid calling cards that are the subject of the Commission's notice of proposed rulemaking in this docket. As explained below, the failure to issue such a clear and unambiguous ruling would be patently unfair and would prolong the regulatory uncertainty that has plagued the calling card industry for far too long.

In February 2005, the Commission ruled that, under its "prior decisions," AT&T's then existing enhanced prepaid calling card service, which included a brief advertising message, is a telecommunications service.² The Commission declined, however, to rule on two variants of the service: (1) enhanced prepaid calling cards that offer the caller a variety of information retrieval capabilities, and (2) enhanced prepaid calling cards that transport calls over an Internet backbone using IP technology.³ At the time, several parties raised serious concerns as to whether the Commission's failure to classify these new calling card services would create more regulatory uncertainty.⁴ Indeed, Commissioner Copps presciently observed that, by initiating the

¹ See AT&T Emergency Petition for Immediate Interim Relief, WC Docket No. 05-68 (filed May 3, 2005); SBC Reply Comments, WC Docket No. 05-68 (filed May 16, 2005).

² *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41, ¶ 32 (released Feb. 23, 2005) (*Prepaid Calling Card NPRM*).

³ *Prepaid Calling Card NPRM* ¶ 38.

⁴ See, e.g., Verizon Comments, WilTel Comments.

rulemaking without resolving the classification question, “the Commission all but ensures that calling card confusion from the past is perpetuated in the future.”⁵ Commissioner Adelstein likewise expressed concerns about the “ambiguity” over whether the new calling card services would, or would not, be subject to access charge and universal service obligations.⁶ Despite these concerns, the Commission concluded that “the public interest would best be served” by initiating a brand new rulemaking proceeding to examine these new services “in a more comprehensive manner.”⁷

In light of the Commission’s inability to resolve the regulatory obligations of the two new prepaid calling card variants under its prior decisions, and the Commission’s determination to initiate a new rulemaking proceeding to address such obligations, it would now be patently unfair for the Commission to apply any newly imposed regulatory obligations on a retroactive basis for the period of time before the Commission issues a final decision in that proceeding. Indeed, the imposition of retroactive liability in these circumstances would be akin to the type of “gotcha” decisionmaking that has earned the Commission judicial rebukes in the past.⁸ Moreover, ducking this question and sending parties off to courts around the country to resolve disputes over retroactive liability would create the potential for multiple inconsistent judicial rulings,⁹ which would only exacerbate the regulatory uncertainty that Commissioners Copps and Adelstein warned about in their separate statements on the *Prepaid Calling Card NPRM*. Worse still, as the Commission has learned in a similar context, some courts may be inclined to send such issues right back to the Commission through primary jurisdiction referrals.¹⁰ Thus, to avoid protracted case-by-case determinations that will further prolong uncertainty for the industry and sap Commission resources, we strongly urge the Commission to clearly and unambiguously rule that its forthcoming decision applies prospectively, but not retroactively, to the enhanced prepaid calling card services at issue in the pending rulemaking.

⁵ Statement of Commissioner Michael J. Copps, Concurring, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41 (released Feb. 23, 2005).

⁶ Statement of Commissioner Jonathan S. Adelstein, *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41 (released Feb. 23, 2005).

⁷ *Prepaid Calling Card NPRM* ¶ 38.

⁸ See *Time Warner v. FCC*, 144 F.3d 75, 81-82 (DC Cir. 1998) (“We do not look sympathetically to the Commission playing ‘gotcha’ either. The Commission had an opportunity to pass on the question [presented by the petitioners], but chose to duck – its failure to address the point was not an accidental mistake.”).

⁹ See, e.g., *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, FCC 04-97 ¶ 23 n.93 (2004) (“we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts as appropriate.”).

¹⁰ See *Southwestern Bell Telephone, L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), Memorandum and Order at 8, 11 (E.D. Mo. Feb. 7, 2006) (observing that four separate cases related to IP-in-the-middle traffic have been referred to the FCC under the doctrine of primary jurisdiction).

If you have any questions or need additional information, please do not hesitate to contact me. Pursuant to section 1.1206 of the Commission's rules, this letter is being filed electronically with the Commission.

Sincerely,

/s/

Jack Zinman

CC: Ian Dillner
Dana Shaffer
Jessica Rosenworcel
Scott Bergmann
Tom Navin
Sam Feder