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

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

In several recent *ex partes*, Verizon and other parties have urged the Commission to make clear that any Order addressing the obligations of prepaid calling card providers has only prospective effect.¹ As those filings explain, the *AT&T Prepaid Calling Card Order*² recognized that the Commission's prior decisions did not resolve the regulatory issues presented by the interactive features in new calling cards and stated that those features "may be significant for purposes of regulatory classification and jurisdiction."³ As a result, the *Order* itself created significant uncertainty in the industry, and providers of new forms of calling cards that believed their offerings were information services were motivated to continue treating those offerings in the same way pending resolution of the *Notice of Proposed Rulemaking*. Put another way, in the face of such uncertainty, providers of these new types of calling cards had a "reasonable basis" for concluding that those offerings would be subject to different regulatory treatment than the offerings at issue in the *AT&T Prepaid Calling Card Order*.⁴ Accordingly, limiting the forthcoming Order to prospective effect would avoid inequity, foreclose unnecessary litigation, and provide certainty to all industry players.

On May 18, Qwest submitted an *ex parte* which appears to argue that regardless of what result the Commission reaches here, it will not affect claims Qwest has made in independent litigation. Notably, Qwest does not object to the new ruling being limited to prospective application; it merely argues that a prospective rule does not automatically foreclose its ability to sue for

¹ See *Ex Parte* Letter from Kathleen Grillo to Marlene H. Dortch (filed April 26, 2006); *Ex Parte* Letter from Edward Shaking to Marlene H. Dortch (filed April 20, 2006)(attached); see also *Ex Parte* Letter from Jack Zinman (AT&T) to Marlene H. Dortch (filed April 27, 2006).

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), *pet. for review pending*, *AT&T Corp. v. FCC*, No. 05-1096 (D.C. Cir., argued Feb. 13, 2006).

³ *Id.* ¶ 2.

⁴ *Id.* ¶ 32.

damages “based on the law as it actually existed when the services were offered.” *Qwest May 18 Ex Parte*, Attachment at 1. Nor does Qwest really dispute that current law is unclear; in fact, the *Ex Parte* implicitly assumes (correctly) that the law is uncertain but argues that Qwest is entitled to collect access charges in any event.⁵ While the thrust of Qwest’s argument does not appear directed at the Commission decision here, Qwest raises several related arguments in support of these claims that misstate the rules concerning retroactive rulemaking and the Commission’s obligations here.

I. Qwest’s primary argument is that the Commission’s authority to “adopt a rule that is prospective only is limited to situations where a new rule is actually adopted [and] does not apply to interpretations of pre-existing law, whether that pre-existing law was unclear or not.” Qwest is mistaken for two reasons. First, the Commission will adopt a new rule in the pending proceeding, and with exceptions not relevant here, rules can be applied only prospectively. Second, the Commission has ample authority – and, indeed, has a duty where due process and equity concerns are implicated – to avoid penalizing entities for violations of “pre-existing law” where, as here, that law is unclear.

- a. Contrary to Qwest’s implication, the forthcoming Order will “actually adopt[]” a “new rule.” The Order will result from a Notice of Proposed Rulemaking, and the APA defines a “rulemaking” as the “agency process for formulating, amending, or repealing a rule.” 5 U.S.C. § 551(5). Moreover, the APA states that a “rule” is a “statement of general or particular applicability and *future effect*,” making it clear that a rule is of prospective application only. *Id.* § 551(4) (emphasis added). Indeed, it is black-letter law that an agency may not apply a rule retroactively to sanction conduct occurring prior to the effectiveness of the rule unless expressly authorized by Congress to do so. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms.”). As Justice Scalia noted in his concurring opinion in *Bowen*, under the APA’s definition of “rule,” “there is really no alternative except the obvious meaning, that *a rule is a statement that has legal consequences only for the future.*” *Bowen*, 488 U.S. at 217 (Scalia, J., concurring) (emphasis added).⁶ Accordingly, if the Commission requires

⁵ Although Qwest does state that the law “is (and has been) clear that carriers that carry information services on their own facilities are not thereby excused from the normal rules governing purchase of services from ILECs’ access tariffs,” *id.*, Attachment at 3, it cites no precedent in support of this contention. And in any event, Qwest’s reference to the “normal rules” simply means that carriers have to pay access charges if they purchase access services; it does not suggest that information service providers (even if they are also interexchange carriers for other services) are compelled to order access services.

⁶ The D.C. Circuit considers Justice Scalia’s concurrence in *Bowen* to be “substantively authoritative.” *Celtronix Telemetry, Inc. v. FCC*, 272 F.3d 585, 588 (D.C. Cir. 2001) (citing *Bergerco Canada v. Treasury Dep’t*, 129 F.3d 189, 192-93 (D.C. Cir. 1997)). In its own opinion in *Bowen*, 821 F.2d 750 (D.C. Cir. 1987), *aff’d on other grounds by* 488 U.S. 204 (1988), the D.C. Circuit called the APA’s definition of rules a “clear statutory command [that] retroactive application is foreclosed by the express terms of the APA.” *Id.* at 758.

providers of these new prepaid calling card services to pay access charges going forward, that decision cannot have retroactive effect.

- b. Nor can Qwest seek to impose liability on prepaid calling card providers by arguing that it had the right to do so under “pre-existing law.” Two related lines of cases foreclose such a claim.

The first line prohibits an entity from being penalized for violating a rule or policy where it was not “ascertainably certain” that the conduct at issue was proscribed by that rule or policy. For example, the D.C. Circuit has long recognized that “[t]raditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without providing adequate notice of the substance of the rule.” *Satellite Broad. Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987). When the agency’s interpretation of its own regulations is not “ascertainably certain,” *General Electric Co. v. United States Env. Prot. Agency*, 53 F.3d 1324, 1330 (D.C. Cir. 1995), the new interpretation cannot form the basis for retroactive penalties. The relevant inquiry is “whether by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with ascertainable certainty, the standards with which the agency expects parties to conform” *Trinity Broad. of Fla. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2001) (internal quotation marks omitted).

Although Qwest argues that the instant case concerns private litigation rather than an administrative penalty, the same principle must apply. The tariff under which Qwest claims that payments are due has legal force solely because of, and must be interpreted in light of, the Commission’s organic statute, rules, and policies. As the Commission itself effectively conceded in the *AT&T Calling Card Order*, it is far from clear whether the agency’s current policies require providers of new types of prepaid calling cards to pay access charges. Subjecting them to such liability would implicate the same due process and equity concerns as if the Commission itself were imposing a penalty.

The second line of cases applies where an agency effectively creates a new rule by applying an existing rule or policy to new facts. In such circumstances, “retroactivity will be denied when to apply the new rule to past conduct or to prior events would work a manifest injustice.” *Verizon Tel. Cos. v. FCC*, 260 F.3d 1098, 1109 (D.C. Cir. 2001) (internal quotations and citations omitted). The D.C. Circuit, taking its lead from the Supreme Court’s concern about the potential “ill effects” of retroactive application of policies announced in an agency’s adjudicatory proceeding, see *SEC v. Chenery Corp.*, 323 U.S. 194, 203 (1947), generally has applied a balancing test for determining whether retroactive application of a new policy is appropriate. See, e.g., *Retail, Wholesale and Dep’t Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972); *Heartland Regional Medical Center v. Leavitt*, 415 F.3d 24, 31 (D.C. Cir. 2005). At bottom, “the test’s factors ‘boil down . . . to a question of concerns grounded in notions of equity and fairness.’” *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998). Here, where the Commission itself has given notice that the features of new forms of prepaid calling cards “may be significant for purposes of regulatory classification,” it would be manifestly inequitable and unfair to subject providers to liability for conduct occurring prior to announcement of a new policy resolving that uncertainty.

II. Contrary to Qwest's claims, neither *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992), *MCI v. FCC*, 10 F.3d 842 (D.C. Cir. 1993), nor the overearnings cases cited by Qwest prevent the Commission from applying its new calling card policy only prospectively and foreclosing damage claims for past conduct. See *Qwest May 18 Ex Parte*, Attachment at 4-9. All of these cases concern limits on the Commission's authority in the context of *adjudications*. Because the current proceeding is a rulemaking, these cases would be irrelevant even if they stood for the propositions for which Qwest cites them, which they do not. In any event, as discussed below, all of these cases are readily distinguishable from the circumstances here.

As Qwest notes, the *AT&T* case concerned the Commission's denial of a claim for damages by AT&T against MCI for having provided service at off-tariff rates. In reality, the *AT&T* decision stands only for the unremarkable proposition that the Commission cannot evade its responsibility to resolve a claim made in an FCC complaint by deferring the issue to a rulemaking of prospective application. See *AT&T*, 978 F.2d at 732 ("When presented with AT&T's complaint, the Commission had an obligation to answer the questions it raised and to decide whether MCI had violated the statute."). Nothing in the case limits the Commission's ability to foreclose liability for past conduct when announcing a prospective rule or policy, as long as it provides a rational explanation for its action.⁷ Moreover, even if the *AT&T* case could be read as broadly as Qwest suggests, it is factually distinguishable because the court made plain its belief that past law was clear.⁸ Here, in contrast, there is no dispute that "past law" as applied to new forms of prepaid calling cards is anything but clear.

The *MCI* case is equally irrelevant. In that decision, the D.C. Circuit vacated and remanded to the Commission an agency order finding that MCI was not entitled to damages from AT&T with respect to past bundling of outbound and inbound services. The court based its action, however, on the fact that the Commission's explanation for dismissing the damages claim – that its decisions grandfathering existing bundled service customers resolved the issue of AT&T's liability for the provision of bundled services before the effective date of the those decisions – was undermined by the agency's own logic. In particular, the court found that the FCC essentially had conceded that past bundling by AT&T "was unlawful and that [MCI] was entitled to damages." *MCI*, 10 F.3d at 846. Because there was no real uncertainty about the law in the *MCI* case, that decision does not constrain the Commission's ability here to clarify regulatory issues surrounding prepaid calling cards going forward while excusing retroactive liability based on uncertainty regarding providers' preexisting legal obligations.

Finally, the over earnings cases have no bearing on the issue here. While Qwest quotes from a Commission decision declining to consider "equitable or public policy considerations" in determining whether an ILEC was liable for damages as a result of over earning in a particular

⁷ *AT&T*, 978 F.2d at 737 ("If the Commission continues to believe that retroactivity is an obstacle to recovery of damages, it must explain what it understands to be the applicable law and why that law constitutes a change that implicates retroactivity concerns.").

⁸ In particular, the D.C. Circuit already had invalidated the Commission's mandatory detariffing order, employing reasoning that made it plain that an earlier permissive detariffing order would be invalid as well if, as the Commission acknowledged, it represented an interpretation of the statute rather than an exercise of the Commission's enforcement discretion. See *AT&T*, 978 F.2d at 733-36.

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access category, that decision concerns an entirely different issue: whether, when liability is clear, it can be excused by equitable considerations. *Qwest May 18 Ex Parte* at 7-8, citing *MCI Telecommunications Corp. v. Pacific Bell Tel. Co.*, 8 FCC Rcd 1517 (1993). In those cases, there was no doubt that the Commission had set an earnings ceiling and that rates of return in excess of that ceiling were considered unlawful. Nor was there any doubt that the ILECs' earnings exceeded the relevant ceiling. The only issue was the relevance of the ILECs' lack of intent to over earn and the allegation that refunds would result in a windfall to access customers; the Commission elected not to take these considerations into account because liability was clear. Once again, the instant case presents a far different situation: the law itself is unclear, and thus equitable considerations are at the heart of the retroactivity analysis (and bear directly on the ultimate question of liability for past conduct).

III. Qwest's remaining argument is that the filed tariff doctrine bars the Commission from precluding Qwest from collecting access charges for past traffic from the types of prepaid calling cards that Commission currently is considering. This claim is baseless. As Qwest itself notes, the filed tariff doctrine merely requires a customer to pay the tariffed rate for the service it used, even if the customer is "confused about the rate." *Qwest May 18 Ex Parte* at 3, citing *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214 (1998). Put another way, "[o]nce the FCC approves the tariff, the rates filed for the carrier's services are the only lawful charges." *FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 61 (2d Cir. 2006). That answers nothing about the question of whether the services in question were subject to access charges prior to a Commission decision here.

* * *

The Commission has clear authority to resolve the pending prepaid calling card issues through an order of prospective application only. It should issue such an order as promptly as possible, so that all parties understand the applicable rules and can operate without the distraction of legal disputes about their regulatory obligations.

Sincerely,



cc: Michelle Carey
Jessica Rosenworcel
Scott Bergmann
Dana Shaffer
Tom Navin