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May 26, 2006

EX PARTE VIA ELECTRONIC SUBMISSION

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW - Lobby Level
Washington, DC 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

Dear Ms. Dortch:

In this proceeding, AT&T Inc. (“AT&T”) has repeatedly urged the Commission to rule clearly and unambiguously that access charge and universal service obligations apply only on a prospective basis to the interactive menu-driven prepaid calling card services that are the subject of the Commission’s pending *NPRM*.¹ Specifically, to provide regulatory certainty to all members of the communications industry, the Commission should definitively answer the following two questions: (1) do any newly adopted access charge and universal service rules apply retroactively to interactive menu-driven prepaid calling card services; and (2) did the Commission’s existing access charge and universal service rules apply to interactive menu-driven prepaid calling card services prior to the effective date of the Commission’s forthcoming order? As discussed below, the answer to both questions – as a matter of law and sound public policy – must be a resounding “no.”

Despite the ample legal and policy justifications for finding that access charge and universal service obligations apply only prospectively to menu-driven prepaid calling card

¹ In the proceeding that led to the *Prepaid Calling Card Order and NPRM*, AT&T identified two new types of prepaid calling card services: (1) interactive menu-driven prepaid calling card services that offer a caller a variety of information retrieval capabilities, which AT&T had deployed in the marketplace; and (2) prepaid calling card services that rely on IP-in-the-middle technology, which AT&T was considering deploying. See Letter from Judy Sello, AT&T, to Marlene Dortch, FCC, WC Docket No. 03-133 (Nov. 22, 2004); *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Order and Notice of Proposed Rulemaking, FCC 05-41 ¶ 38 (released Feb. 23, 2005) (*Prepaid Calling Card Order and NPRM*). AT&T subsequently chose not to deploy the latter type of prepaid calling card services. Accordingly, AT&T limits its advocacy in this proceeding to interactive menu-driven prepaid calling card services, and all references in this filing to prepaid calling card services concern the interactive menu-driven variety unless otherwise indicated.

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services, Qwest has recently filed two *ex parte* letters arguing that the Commission has no choice but to apply any ruling adopted with respect to the classification and jurisdiction of interactive menu-driven prepaid card services on a retroactive basis, which Qwest argues would entitle it to damages in a pending lawsuit against AT&T.² Qwest's argument rests on three fundamentally incorrect propositions, and it should be rejected.

First, contrary to Qwest's contentions, rules adopted in a formal APA notice and comment rulemaking cannot, *as a matter of law*, be applied retroactively. *Chadmoore Communications, Inc. v. FCC*, 113 F.3d 235, 240 (D.C. Cir. 1997). Thus, any newly adopted rules in this proceeding simply cannot subject menu-driven prepaid calling card services to retroactive liability for access charges and universal service contributions. It is equally well-settled that agencies should deny retroactive application of new declaratory rulings whenever retroactivity would produce a result that is "contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery*, 332 U.S. 194, 203 (1947). The lower court cases on which Qwest relies not only endorse this controlling Supreme Court standard, but make clear that, even when an agency is applying existing law to new situations, retroactivity must be denied where, as here, it would result in a "manifest injustice." *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001). As explained below, the retroactive application of additional access charges and universal service fees on the many providers of highly interactive, menu-driven prepaid card services that reasonably treated these services as enhanced, interstate services would unquestionably work a manifest injustice and further no legitimate statutory purpose. And, as the Commission has already recognized by addressing the classification and jurisdiction of these services through a formal notice and comment rulemaking proceeding, Qwest's claims that an appropriate prospective-only outcome would impair its "settled" rights are entirely misguided.

Second, by following these precedents and applying its new order only prospectively, the Commission will in no way contravene the filed rate doctrine. Qwest is confusing the issue: in applying these retroactivity precedents, the Commission would merely be determining whether its own rules applied in past periods to these types of services. If the Commission finds that its access charge rules did not apply to these services in past periods, that would defeat Qwest's claim that its tariffs for intrastate access applied to these services. But such a ruling would be an *application* of the filed rate doctrine consistent with the rules then applicable, not an abrogation of it.

Third, Qwest's suggestion that the governing retroactivity standard requires the Commission to assess each individual carrier's reliance interests on a subjective case-by-case basis is also flatly incorrect. Qwest cites no valid authority for such a proposition, and there is

² See Letter from Melissa Newman, Qwest, to Marlene H. Dortch, FCC (filed May 23, 2006) ("Qwest 5/23/06 *Ex Parte*"); Letter from Melissa Newman, Qwest, to Marlene H. Dortch, FCC (filed May 18, 2006) ("Qwest 5/18/06 *Ex Parte*").

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none. The Commission is plainly empowered to act, as it is doing here, on an industry-wide basis through a formal rulemaking proceeding and to conclude that a prospective-only outcome is appropriate on the basis of findings of objective reasonableness under the circumstances. Here, a finding that it was in the past reasonable for providers of interactive menu-driven prepaid card services to treat those services as enhanced interstate services is straightforward given the Commission's prior statements – both in the NPRM in this proceeding and in many prior orders – regarding the regulatory classification and jurisdiction of interactive-menu driven services and the circumstances under which services are “severable” for purposes of assessing regulatory classification and jurisdiction. In all events, Qwest's suggestion that prospective-only treatment is foreclosed by “evidence” showing that AT&T perceived a “regulatory risk” that its treatment of its prepaid card services might ultimately be rejected is patently absurd. Of course, *every* responsible service provider recognizes the *risk* that even its most reasonable positions on complex and unsettled regulatory issues may not prevail, but that in no way forecloses the Commission from concluding that it would be unreasonable under the circumstances here to retroactively apply an order settling such uncertainty.

A. The Standards Governing Retroactivity Require The Commission's Ruling To Apply Prospectively Only.

Qwest's suggestion that the Commission has no choice but to apply any new ruling in this proceeding retroactively is simply incorrect. The Commission has ample authority to apply its new prepaid card policy prospectively only, and indeed, well-settled precedent *requires* that result in the circumstances of this case.

At the outset, it should be underscored that this proceeding is a formal APA rulemaking. Consistent with the APA and the Regulatory Flexibility Act, the Commission issued a notice of proposed rulemaking, complete with an Initial Regulatory Flexibility Analysis, and published a summary of the notice in the Federal Register. *Prepaid Calling Card Order and NPRM* ¶¶ 38-62, 66-67; 70 Fed. Reg. 12828 (March 16, 2005). Thus, as a matter of law, the Commission may not retroactively apply any rules adopted in this rulemaking proceeding to AT&T's interactive menu-driven enhanced prepaid calling card services. The Supreme Court has made clear that the APA *prohibits* retroactive application of rules unless the agency's governing statute expressly provides that its rules may be given retroactive effect. *See, e.g., Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); *see also id.* at 217 (Scalia, J., concurring); *Chadmoore Communications*, 113 F.3d at 240 (“[T]he APA requires that legislative rules [i.e., rules adopted pursuant to the notice and comment procedures of the APA, 5 U.S.C. § 553] be given future effect only”) (alteration in original); *Retail Wholesale and Dept. Store Union v. NLRB*, 466 F.2d 380, 388 (D.C. Cir. 1972) (“the Administrative Procedure Act, 5 U.S.C. § 551 et seq., has authorized agencies to conduct formal rule making proceedings Rules so adopted are prospective in application only”). Even Qwest does not dispute this fundamental tenet of administrative law. To remove any doubt, however, the Commission should clearly and

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unambiguously state that any newly adopted rules requiring the payment of access charges or universal service contributions for interactive menu driven enhanced prepaid calling card services do not apply retroactively.

Even if the Commission does not promulgate new formal rules addressing the access charge and universal service status of interactive menu-driven prepaid card services, and instead announces a new ruling regarding the applicability of its existing rules, the Commission can and should apply the new ruling on a prospective-only basis. Contrary to Qwest's suggestion, there is no bright-line rule requiring the Commission to apply a clarification or novel application of existing law retroactively. To the contrary, as the Commission held in the *AT&T IP Telephony Order*, the mere fact that the Commission is interpreting and applying existing law to a new and novel situation "does not end the retroactivity inquiry." *AT&T IP Telephony Order*, 19 FCC Rcd. 7457, ¶ 22 (2004). Rather, as the Commission emphasized, the Supreme Court has established that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *SEC v. Chenery*, 332 U.S. 194, 203 (1947). Although the courts, and especially the D.C. Circuit, have offered a variety of formulations over the years to implement the basic *Chenery* test, the Commission and the courts have recognized that those multi-factor tests all "boil down . . . to a question of concerns grounded in notions of equity and fairness."³

In arguing to the contrary, Qwest relies heavily on *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001), but it misstates the holding of that case in multiple respects. First, the court in *Verizon* clearly had no intention – and no authority – to supplant the Supreme Court's *Chenery* test, under which the retroactivity analysis centers on the particular equitable concerns relevant to the case at hand.⁴ Nor did the *Verizon* court hold that equitable considerations apply only where an agency has adopted a "change in the law." To be sure, the court noted that if an agency replaces "old law that was reasonably clear" with "new law," that is the easiest case, and a decision not to apply the new rule retroactively is "uncontroversial." *Verizon*, 269 F.3d at 1109. But the court also made clear that even when the agency is applying existing rules to new situations, retroactivity still must be "denied" if, as here, it would work a "manifest injustice." *Id.* Similarly, the *Verizon* court did *not* hold that retroactivity is required unless individual parties prove their "actual detrimental and reasonable reliance on previous authority." Qwest 5/23/06 Ex Parte at 10. Again, the court made clear that *Chenery* establishes the standard, which turns on a balancing of statutory purposes and equitable concerns; detrimental reliance can be

³ *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) ("no need to plow laboriously through the . . . factors"); *see also AT&T IP Telephony Order* ¶ 22 (citing *Cassell*). *See also Retail-Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972) ("courts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by sufficiently significant statutory interests").

⁴ *See Verizon*, 269 F.3d at 1109 (explicitly noting that *Chenery* establishes the essential standard).

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“[o]ne relevant factor,” *AT&T IP Telephony Order* ¶ 22, and was the focus of the court’s discussion in *Verizon* only because that was the petitioners’ main argument in that case.⁵

Moreover, this case is not remotely analogous to the circumstances in *Verizon*. See *Qwest 5/23/06 Ex Parte* at 10-11. In *Verizon*, the Court found retroactivity to be an appropriate means to implement a judicial decision finding an agency order unlawful. See *Verizon*, 269 F.3d at 1110-11; *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965). The situation is quite different here. As explained below, a broad array of past Commission statements reasonably led the industry to believe that interactive menu-driven services could be treated as interstate enhanced services, and the NPRM in this proceeding affirmatively encouraged these assumptions. The Commission has not repudiated any of these past precedents, nor have they been overturned. Rather, the Commission would simply be announcing a new ruling to govern all future access obligations for menu-driven prepaid cards, in the interests of certainty and competitive neutrality. Nothing in the retroactivity case law even supports, much less requires, retroactivity in such circumstances.⁶

To the contrary, application of the *Chenery* standard, properly understood, strongly supports a finding of non-retroactivity in this case, for several reasons. First, the Commission’s previous, consistent rules, orders and statements strongly suggested that interactive menu-driven prepaid cards services should be treated as enhanced, and that calls made using such cards were jurisdictionally interstate. To begin with, the Commission’s precedents certainly suggested that interactive menu-driven services, for which subscribers are provided the capability affirmatively to choose among various information options, are information services.⁷ Indeed, the statute

⁵ The same was true in *Garvey v. NTSB*, 190 F.3d 584-85 (D.C. Cir. 1999). See *Qwest 5/23/06 Ex Parte* at 10 n.30. The full quote from that case is “*In cases like this one*, the issue boils down to the question whether the regulated party reasonably and detrimentally relied on a previously established rule.”

⁶ Qwest’s claim that the Commission’s new order must be given retroactive effect merely because there are pending lawsuits is also mistaken. *Verizon* itself involved a Commission decision rendered in a complaint proceeding, yet the D.C. Circuit in that case applied the equitable balancing test, not the categorical rule Qwest advocates. Moreover, the cases Qwest cites for that categorical rule predate *Verizon*, and involve situations in which the Commission refused to rule on the complaint. See *AT&T v. FCC*, 978 F.2d 727 (D.C. Cir. 1992) (dismissing complaint on ground that Commission would resolve issue through rulemaking); *MCI v. FCC*, 10 F.3d 842 (D.C. Cir. 1993) (dismissing complaint that sought damages for past conduct based on the “*non sequitur*” that prior rulemaking blessed the same conduct prospectively). Qwest is simply confusing the issue: the Commission here is determining the *antecedent* question of how its rules apply in the past periods. There is no claim that any decision-maker will cite the Commission’s order as a ground to refuse to rule on Qwest’s claims at all.

⁷ See, e.g., *Amendment of Section 64.702 of the Commission’s Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 97 (1980) (“*Computer II*”) (“An enhanced service is any offering over the telecommunications network which is more than a basic transmission service”); *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd. 5986, ¶¶ 17-20 (1987) (“*Talking Yellow Pages Order*”) (service in which a customer “makes a phone call and hears a recorded advertisement . . . falls squarely within the definition of ‘enhanced service’ in Section 64.702(a) of our rules”); *AT&T Prepaid Card Order* ¶ 17 (advertising service in the *Talking Yellow Pages Order* was an information service

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expressly defines an information service as the “offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.” 47 U.S.C. § 153(20). Based upon these precedents, it was clearly reasonable to treat interactive menu-drive prepaid card services as enhanced, because end-users must affirmatively interact with the menu by actively choosing the desired information and otherwise manipulating stored information.

Equally important, the Commission has consistently described its “severability” test for determining when a service containing both basic and enhanced elements should be deemed a single integrated service in broad terms that could plainly lead providers to believe that interactive menu-driven card services constitute a single, integrated, enhanced service. For example, in the *Report to Congress* (¶ 79), the Commission held that under its objective customer viewpoint-focused severability analysis “it would be incorrect to conclude that Internet access providers offer subscribers separate services – electronic mail, Web browsing, and others – that should be deemed to have a separate legal status, so that, for example, we might deem electronic mail to be a ‘telecommunications service’ and Web hosting to be an ‘information service.’” *See also id.* ¶ 79 n.163 (affirming this conclusion even though other providers offered e-mail in the market as a separate, stand-alone product). The Commission reached similar conclusions, using similarly broad language, with respect to cable modem services and wireline broadband services, each of which bundles basic transmission capabilities with enhanced features. *See Cable Modem Declaratory Order* ¶ 38; *Wireline Broadband Order* ¶ 15.⁸ There cannot be any serious doubt that these broadly worded holdings led directly to a widespread assumption in the industry that menu-driven prepaid cards would likely be deemed a single, integrated service.

The Commission largely confirmed these widespread understandings in the *Prepaid Calling Card Order* and the accompanying *NPRM*. The Commission held in the *Prepaid Calling Card Order* that AT&T’s original prepaid card service, which provided only passive messages and not interactive menu-drive functionality, was a telecommunications service. The Commission was unable to conclude, however, that interactive menu-driven enhanced prepaid calling card services were covered by the Act or its rules and prior decisions – despite having had the opportunity to closely review and analyze these services and AT&T’s supporting arguments for more than four months before issuing its decision.⁹ Indeed, the Commission

because that service “played advertisements in response to subscribers’ individual selections for various categories of information”).

⁸ The Supreme Court has affirmed the general approach adopted in these Commission orders, and has held that the proper inquiry under the statute is whether the components are “sufficiently integrated with the finished service to make it reasonable to describe the two as a single, integrated offering.” *See NCTA v. Brand X Internet Services*, 125 S.Ct. 2688, 2704 (2005).

⁹ *Prepaid Calling Card Order and NPRM* ¶ 38 (citing Letter from Judy Sello, AT&T, to Marlene Dortch, FCC, WC Docket No. 03-133 (Nov. 22, 2004)).

expressly recognized that “these changes to AT&T’s calling card services” to make them menu-driven and more interactive “may be significant for purposes of regulatory classification and jurisdiction,” and it therefore initiated a rulemaking to consider the “classification and jurisdiction” of these “new forms of prepaid calling cards.” *Id.* ¶ 2; *see also id.* ¶ 38 (“the public interest would be better served by considering this issue in a more comprehensive manner,” *i.e.*, in a prospective rulemaking rather than in “piecemeal” declaratory rulings). The Commission reinforced the industry’s assumptions about jurisdiction in particular, stating that “[t]o the extent the variant services described by AT&T or other existing or potential prepaid calling card services are classified as information services, they presumably would be subject to federal jurisdiction,” and even seeking comment on whether the Commission could assert *exclusive* jurisdiction over prepaid card services that were classified as telecommunications services and that originated and terminated within the same state. *Id.* ¶ 42.¹⁰ Although several parties questioned the wisdom of the Commission’s decision, including Commissioners Copps and Adelstein,¹¹ the Commission decided to press forward with the rulemaking to create new rules to govern the enhanced prepaid card services offered by AT&T and other existing prepaid calling card services “that are not currently addressed by our rules or this item.”¹²

After having been unable to find that AT&T’s menu-driven enhanced prepaid calling card services are covered by the Commission’s existing rules and decisions, and after having launched a formal rulemaking proceeding to adopt new rules for these services, it would be manifestly unjust for the Commission to now effectively say “never mind,” and decide that its existing access charge rules applied to these services all along. If the Commission truly believed that its existing rules apply to enhanced prepaid calling card services, it would have said so in February 2005, and it would not have initiated a formal APA rulemaking proceeding to create new rules. Indeed, the only reasonable inference that can be drawn from the Commission’s conduct here is that its existing rules do not apply to enhanced prepaid calling card services.

¹⁰ As the Commission indicated, if such card services were integrated enhanced services, the Commission’s holdings in the *Pulver* and *Vonage* orders would have led to a finding that such services were wholly interstate and thus subject either to interstate access charges or reciprocal compensation. *See id.* ¶ 42 & nn.87-88 (citing *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, ¶ 20 (2004), and *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning the Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd. 22404 (2004)).

¹¹ 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) (“[T]he Commission all but ensures that calling card confusion from the past is perpetuated in the future.”); 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) (expressing concern that the Commission decided to “leave for another day” important regulatory questions about prepaid calling card services).

¹² *Prepaid Calling Card Order and NPRM* ¶ 50.

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For all of these reasons, it would be inequitable to apply any determination that these interactive menu-driven services should be subject to additional access charges and universal service payments retroactively. Commission statements in other contexts at the very least strongly suggested that interactive menu-driven services would be treated as interstate enhanced services, and the Commission actively encouraged those assumptions in the NPRM. The Commission of course may conclude in its upcoming order in this rulemaking proceeding that the peculiar circumstances of the prepaid card industry, and the specific characteristics of these “new forms of prepaid cards” in particular (*Prepaid Calling Card Order* ¶ 2), require that these broader statements from other contexts be held inapplicable here (even as the Commission reaffirms them in contexts outside the prepaid card industry). That does not negate the fact, however, that prior Commission pronouncements could reasonably be read to allow treating these services as interstate enhanced services, and that the providers of these cards would have no way of recouping their losses if the Commission were now to impose massive retroactive liabilities. The Commission indicated in the NPRM that it was unable readily to determine the proper classification and jurisdiction of menu-driven cards and sought comment for a new rule; Qwest’s position that the issue was clear all along and that the Commission not only can but must apply its order retroactively is precisely the sort of “gotcha” decision-making that the courts have consistently condemned.¹³

Retroactivity would also produce results that are contrary to the “statutory design,” and indeed, would serve *no* beneficial statutory purpose. *Chenery*, 332 U.S. at 203. For one thing, retroactivity would undermine the statute’s and the Commission’s paramount goals of promoting certainty and competitive neutrality, because it would only lead to a multiplicity of lawsuits across the country with the potential for inconsistent judicial rulings (as the Qwest *ex partes* vividly illustrate). It would also be extremely burdensome for all concerned, including the Commission, because many such lawsuits result in referrals to the Commission under the doctrine of primary jurisdiction.¹⁴

Indeed, under the circumstances, a prospective-only ruling is the only outcome that can be reconciled with the relevant precedents. In its upcoming order, the Commission will presumably hold at a minimum that the interactive menu-driven services offered as part of the menu-driven cards are in fact enhanced services, and that a cardholder’s communications with an out-of-state computer platform for such interactive menu services constitute interstate communications over which the Commission could assert jurisdiction. Even if the Commission

¹³ See *Time Warner Entertainment Co. v. FCC*, 144 F.3d 75, 81-82 (D.C. Cir. 1998) (“we do not look sympathetically to the Commission playing ‘gotcha’ either. The Commission has 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.”).

¹⁴ See *Southwestern Bell Telephone, L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), Memorandum and Order, pp. 8, 11 (E.D. Mo. Feb. 7, 2006) (noting that four separate IP-in-the-middle cases have been referred to the Commission under the doctrine of primary jurisdiction).

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adopts a policy in the order that, for the sake of competitive neutrality, all menu-driven card providers must now pay access solely on the basis of the locations of the calling and called parties, irrespective of the interactive menu-driven nature of the services, that provides no basis for retroactive liability. With respect to past periods, it cannot be said that card providers' treatment of such card sessions as interstate or enhanced was clearly incorrect or in any way contrary to the "statutory design," and thus there is no basis for retroactive application to "correct" these providers' past treatment of these services. *See, e.g., U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1006 (D.C. Cir. 2002) (because an agency has "ample latitude to adapt [its] rules and policies to the demands of changing circumstances," both an initial policy and a subsequently adopted policy can be reasonable) (quoting *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Sales Co.*, 463 U.S. 29, 42 (1983)).

In all events, the *most* that could be said of the Commission's prior orders, as they relate to interactive menu-driven prepaid card services, is that there was no clearly ascertainable rule as to what conduct was permitted or proscribed. In such circumstances, the courts have made clear that the Due Process clause and the APA preclude an agency from imposing civil penalties, including damages, for violations of regulations that do not inform regulated entities with "ascertainable certainty" what conduct has been proscribed. *See, e.g., Trinity Broadcasting of Fla., Inc. v. FCC*, 211 F.3d 618, 628-32 (D.C. Cir. 2000); *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-34 (D.C. Cir. 1995). As the D.C. Circuit has repeatedly held, in the "absence of notice," an "agency may not deprive a party of property by imposing civil or criminal liability."¹⁵ Accordingly, the Commission cannot lawfully apply its new policy retroactively in a way that would directly expose prepaid card providers to universal service and access charges liabilities, where providers had no adequate opportunity to ascertain from the Commission's precedents that their conduct was in fact proscribed by Commission rules.

To remove all doubt about the prospective-only application of its new policy, the Commission should also grant retroactive waivers of its rules to the extent they could otherwise be read to require retroactive payment of access charges or universal service fees.¹⁶ The Commission has granted similar retroactive waivers on a number of occasions in the past.¹⁷ For

¹⁵ *General Elec.*, 53 F.3d at 1328-29. *See also Gates & Fox Co. v. OSHRC*, 790 F.2d 154, 156 (D.C. Cir. 1986) (Scalia, J.); *Satellite Broad. Co., Inc. v. FCC*, 824 F.2d 1, 2-4 (D.C. Cir. 1987); *PMD Produce Brokerage Corp. v. U.S. Dep't of Agriculture*, 234 F.3d 48, 51-54 (D.C. Cir. 2000); *United States v. Chrysler Corp.*, 158 F.3d 1350, 1354-57 (D.C. Cir. 1998); *Rollins Envtl. Servs. Inc. v. EPA*, 937 F.2d 649, 652 (D.C. Cir. 1991); *see also In re Application of Mercury PCS II, LLC*, 13 FCC Rcd. 23755, ¶ 10 (1998).

¹⁶ *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) ("That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, established the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases").

¹⁷ *See, e.g., OPEB Order*, 20 FCC Rcd. 7672 (2005); *Universal Service*, 15 FCC Rcd. 8544 (granting retroactive waiver to utility from conditions on receipt of Lifeline support, stating that "[w]aiver is therefore appropriate if

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the reasons discussed above, such a waiver here would be manifestly in the public interest. Indeed, rote application of agency rules to produce massive retroactive liabilities in circumstances such as these would be manifestly unjust.¹⁸

B. The Factual Material Gathered In The Related Litigation Should Not Affect The Commission's Consideration Of A Prospective-Only Rule

Qwest asserts that confidential documents that it has gathered in discovery under a protective order in federal court litigation are “highly relevant” to the Commission’s decision whether to adopt a prospective-only rule for menu-driven prepaid calling card services. Qwest is wrong. As Qwest’s own characterization of these documents confirms, they would provide the Commission with no information useful in deciding whether to make its new rules prospective-only.

That some AT&T personnel may have thought there was some risk that AT&T’s advocacy positions at the Commission would not be accepted is neither surprising nor relevant. The Commission does not need to review “over a thousand documents” from AT&T’s internal files that “go[] back at least six years” to determine that carriers may have recognized regulatory risk – whatever their treatment of prepaid card services – given the complexity of the classification and jurisdiction issues. More generally, the subjective beliefs of any specific prepaid card provider are simply irrelevant. If Qwest’s filings accurately described the law, then the Commission could never determine that a policy should not apply retroactively unless it first combed through the files of all affected entities and made sure that not a single employee subjectively believed that there was some regulatory risk. This is absurd, and it is not the law. Particularly in light of evolving technologies, the application of past Commission rules and precedents to any new circumstances will inevitably lead to some degree of regulatory risk. Rather than focus on affected entities’ subjective beliefs, the Commission should properly examine the equities, including if necessary whether it was objectively reasonable to rely on a particular position.

special circumstances warrant a deviation from the general rule, and such deviation would better serve the public interest than strict adherence to the general rule”); *Rath Microtech Complaint Regarding Electronic Micro Systems, Inc.*, 16 FCC Rcd. 16710 (2001) (retroactive waivers for phones sold in violation of FCC rules); *Federal-State Joint Board on Universal Service; Petition of the Public Service Commission of the District of Columbia for Waiver*, 15 FCC Rcd. 21996 (2000) (retroactive waivers for receipt of universal service subsidies prior to eligible telecommunications carrier status); *Federal-State Joint Board on Universal Service*, 15 FCC Rcd. 8544 (1999) (retroactive waivers of rule requiring state commission approval for receipt of universal service subsidies for Lifeline services); *Sanborn Telephone Cooperative, et al.*, 1999 WL 700555, ¶ 25 (retroactive waiver of study area designation for purposes of calculating DEM weighting).

¹⁸ See, e.g., *C.F. Communications Corp. v. FCC*, 128 F.3d 735, 740 (D.C. Cir. 1997) (“The Commission simply – and, we think, unreasonably – ignored context and stated that we must apply our rules as they are now codified...The Commission put on blinders after it found that CFC did not meet its definition of ‘public telephone,’ not acknowledging that the definition had been adopted in a different context”) (internal citation omitted).

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In fact, if the Commission were to adopt the approach advocated by Qwest, rulemakings would drag on interminably while the Commission devoted its scarce resources to review of internal documents. In rulemaking proceedings like this one, the Commission typically does not review large amounts of internal documents from individual carriers generated in the ordinary course of business, and there is no reason to change that view now. In this regard, if the Commission were to change its view and decide to review AT&T's internal documents, AT&T would certainly urge the Commission to review similar material from Qwest's files. Qwest also operated a prepaid calling card program that it sold off several years ago, and if Qwest's arguments are correct, its internal documents would also be "highly relevant."¹⁹

The documents that Qwest discusses are a red herring designed to distract and delay the Commission from the important industry-wide policy considerations at issue in this proceeding. A number of the Commissioners have expressly acknowledged that the uncertainty regarding the classification of menu-driven prepaid calling cards is harmful to the industry. Rather than delay the proceedings to review detailed documents from individual carriers' files, the Commission should proceed promptly to end this uncertainty and adopt a fair regulatory regime that does not penalize entities for the Commission's previously unclear rules.

C. The Commission's Adoption Of A Prospective-Only Rule Would Not Implicate The Filed Tariff Doctrine.

Qwest also claims that the Commission's adoption of a prospective-only rule would violate the filed tariff doctrine. *See* Qwest May 23 *Ex Parte* at 2, 6-8; Qwest May 18 *Ex Parte* at 3. But the filed tariff doctrine merely provides that, for a validly-filed tariff, carriers generally must charge and customers generally must pay the specified rates for the services described in the tariff. It is obvious that nothing in this proceeding would purport to waive any of the charges in Qwest's tariffs or would otherwise run afoul of the filed tariff doctrine. The Commission would merely be exercising its rulemaking authority to address a general issue that affects the entire industry – specifically, the appropriate "classification and jurisdiction of new forms of prepaid calling cards." *NPRM* ¶ 2. Qwest nonetheless argues that the Commission's exercise of rulemaking authority on a prospective-only basis somehow amounts to "recognizing an equitable defense" to the filed tariff doctrine that would "relieve AT&T of liability for access charges due to Qwest and other carriers under interstate and intrastate tariffs." Qwest May 24 *Ex Parte* at 2. This is nonsense.

Qwest's argument assumes that Qwest has already established that AT&T in fact has incurred "liability for access charges due to Qwest and other carriers under interstate and intrastate tariffs" for the menu-driven prepaid calling card services at issue. That is simply not

¹⁹ For instance, if the Commission were to engage in a highly fact-specific document review, AT&T would urge it to review internal Qwest documents that might shed light on Qwest's assertions that a carrier engages in "sleight-of-hand" if it does not determine jurisdiction for prepaid calls "based on the traditional 'end points' analysis." Qwest May 23 *Ex Parte* at 4-5.

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true. To the contrary, it is a central dispute at issue in the ongoing litigation proceedings discussed by Qwest. Qwest's claim is that it undercharged AT&T and that the terms of its tariff entitle Qwest to collect additional amounts because the menu-driven prepaid calling card calls at issue were not assigned to the correct jurisdiction. AT&T contends that the calls were already properly categorized under the terms of Qwest's tariff (or, at worst, that Qwest's tariff was ambiguous and should be construed against the drafter), such that AT&T has already paid the proper rates specified in Qwest's tariff. This dispute cannot be settled, as Qwest contends, merely by invoking the filed tariff doctrine, for one of the very issues is to construe the terms of the tariff and applicable federal law. Since the meaning of the tariff has yet to be established, the filed tariff doctrine is not applicable.

In these circumstances, if the Commission were to adopt a regulatory classification for the services at issue that is prospective-only, it would not "erase a lawful debt based on a filed tariff." Qwest May 18 *Ex Parte* at 3. For past periods, there simply is no lawful debt that has been established, so the Commission could not possibly erase it by announcing a prospective-only rule.²⁰ To be sure, the Commission's announcement of a prospective-only rule regarding the proper classification of menu-driven prepaid calling card services will undoubtedly affect how courts resolve actions instituted by carriers to collect alleged undercharges under their filed tariffs for past periods. But this is not at all the same thing as "eras[ing] lawful debts" or "recognizing affirmative defenses" to the filed tariff doctrine. There is, accordingly, no conflict with the filed tariff doctrine if the Commission announces a prospective-only rule.²¹

Qwest's remaining claims are equally unconvincing. Its assertion that the Commission must follow its decision in *AT&T Phone-to-Phone IP Telephony Services Order* and permit individual courts to consider the factual circumstances that might affect past liabilities (Qwest May 23 *Ex Parte* at 2) is wrong. The Commission is here conducting a general rulemaking proceeding, where its resolution of the issues turns on general issues of policy and expertise that are uniquely suited for decision by the Commission. Simply because the Commission in the *AT&T Phone-to-Phone IP Telephony Services Order* chose not to address questions about past liabilities does not mean the Commission cannot make such a ruling here. Indeed, the Commission's failure to address such questions in the *AT&T Phone-to-Phone IP Telephony*

²⁰ For future periods, of course, the Commission's rule would create a binding rule, such that, going forward, carriers and customers would be required to conform their tariff interpretations to this rule.

²¹ Qwest's arguments that any prospective-only rule is somehow inappropriate because Qwest's lawsuit against AT&T involves intrastate access charges (Qwest May 23 *Ex Parte* at 3) is a red herring. The Commission in this proceeding is not purporting to regulate intrastate access charges. Rather, it is addressing the appropriate "classification and jurisdiction of new forms of prepaid calling cards," *NPRM* ¶ 2, which is plainly a federal question that the Commission has authority to address and authoritatively resolve.

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Services Order has resulted in numerous primary jurisdiction referrals that have injected new uncertainty into what should have been a settled area of law.²²

Accordingly, to avoid months of unnecessary litigation and further industry tumult, the Commission should clearly and unambiguously state that its existing access charge and universal service rules did not apply to interactive menu-driven prepaid calling card services prior to the effective date of the Commission's forthcoming order. The Commission should make it equally clear that, on a going forward basis, all prepaid calling card services are subject to access charges.

Sincerely,

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cc: Daniel Gonzalez
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²² See *Southwestern Bell Telephone, L.P. v. Global Crossing Ltd.*, No. 4:04-CV-1573 (CEJ), Memorandum and Order, pp. 8, 11 (E.D. Mo. Feb. 7, 2006) (noting that four separate IP-in-the-middle cases have been referred to the Commission under the doctrine of primary jurisdiction).