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August 17, 2006

***VIA ELECTRONIC FILING***

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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

Dear Secretary Dortch:

On August 16, 2006, on behalf of iBasis, Inc. ("iBasis"), Jonathan Draluck, Vice President of Business Affairs and General Counsel; Michael Pryor, of Mintz Levin, and the undersigned met separately with the following Commission personnel: James Ball, George Li, Francis Gutierrez, Narda Jones, and Richard Engelman of the International Bureau; Jacob Lewis, Eric Miller, Mathew Berry, Laurel Bergold and John Ingle of the Office of General Counsel; Michelle Carey, Senior Legal Advisor to Commissioner Martin; Scott Deutchman, Competition and Universal Service Legal Advisor to Commissioner Copps; Scott Bergmann, Legal Advisor for Wireline Issues to Commissioner Adelstein; Dana Brown Shaffer, Acting Legal Advisor for Wireline Issues to Commissioner McDowell.

At each meeting we explained that iBasis intends to seek a stay from the retroactive application of the Commission's Prepaid Calling Card Order released June 30, 2006 in the above-referenced docket based on the points raised in the attached presentation.

Pursuant to sections 1.1206(b)(1) and (2) of the Commission's rules, a copy of this letter is being filed electronically with the Office of the Secretary. Copies are also being served electronically on the Commission participants in the meeting. Please address any questions concerning this submission to the undersigned.

Respectfully submitted,

_/s/_Kemal Hawa___
Kemal Hawa
*Counsel to iBasis, Inc.*

Attachments

cc: James Ball
George Li
Francis Gutierrez
Narda Jones
Richard Engelman
Jacob Lewis
Eric Miller
Mathew Berry
Laurel Bergold
John Ingle
Michelle Carey
Scott Deutchman
Scott Bergmann
Dana Brown Shaffer

Welcome to Our World

# iBasis, Inc. Ex Parte Presentation on June 30, 2006 *Calling Card Order*

**WC Docket No. 05-68 (Prepaid Calling Card Services)**

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# Purpose of Meeting



- **iBasis intends to seek a stay of the June 30, 2006 *Calling Card Order's* imposition of retroactive USF contribution and access charge liability on calling card providers utilizing IP transport**
- **We believe the decision is legally unsound**
- **It will cause substantial and irreparable harm to iBasis**
- **Public interest will not be harmed if the FCC issues a temporary stay pending judicial review**

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# About iBasis



- Founded in 1996 on the cutting edge of developing and facilitating new Internet-based voice services
- One of the largest carriers of international voice traffic
- Global VoIP network truly harnesses the power of the Internet
  - We utilize the public Internet for all transmission
  - All IP – we do not operate a single circuit switch
- Championed dramatic decrease in international calling prices for U.S. consumers
  - Brought significant competitive pressure on foreign markets
  - Major enabling vendor to VoBB suppliers like Skype and Yahoo!
- Never attempted to game the system or avoid compliance with regulations
  - Have not retrofitted our network with IP-based technologies
  - Have not interposed transparent enhancements like advertising or weather

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# Our Approach to Universal Service



- **iBasis provides two types of services**
  - **Wholesale: This is the lion's share of our business; we provide international voice termination to over 400 carrier customers**
  - **Retail: IP-enabled prepaid calling card services**
- **Beginning in 2005, iBasis voluntarily made USF contributions based on <u>wholesale</u> revenues although we have always maintained that we offer Information services**
  - **In an abundance of caution**
  - **In the wake of the *AT&T IP-in-the-Middle Order* issued in 2004**
- **iBasis did not pay USF on its <u>retail</u> services**
  - **Issue of whether USF (and access charges) apply to IP calling cards was an open question of law subject to a pending rulemaking**

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# *Calling Card Order*: Background



- **May 15, 2003 Petition**
  - **AT&T filed a petition for declaratory ruling that its prepaid calling cards that inserted advertising before call connection were Enhanced**
- **November 22, 2004 Letter**
  - **AT&T added two variants to its petition**
    - **"Menu-Driven" calling card services (with sports/weather offerings)**
    - **Cards using "IP-Transport"**
- **February 16, 2005**
  - **FCC issued *Enhanced Prepaid Calling Card Order and Notice of Proposed Rulemaking ("EPCC Order & NPRM")***
  - ***EPCC Order* ruled that cards with advertising were Telecommunications Services**
  - **FCC did not rule on AT&T's two variants**
  - **Disclaimed further case-by-case adjudication through declaratory rulings and instead initiated a rulemaking to address those two variants and all other prepaid cards**

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# *Calling Card Order:* Pertinent Highlights 6

- **Ruling classified cards of both variants -- Menu-Driven and IP Transport – as Telecommunications Services**
- **FCC characterized classification as a declaratory ruling, a form of adjudication, growing out of AT&T's Nov. 22, 2004 Letter**
  - **By characterizing its decision as an adjudication, rather than a rulemaking, FCC paved the way for retroactive liability**
  - **Rulemakings are prospective whereas adjudications can be retroactive**
- **Imposed retroactive liability on cards utilizing IP Transport, but not Menu Driven Cards**
  - ***Order* claims *AT&T IP-in-the-Middle Order* put carriers on notice that calling cards using IP-Transport would also be classified as telecommunications services**

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# *Calling Card Order* Resulted From a Rulemaking



- **The classification decision grew out of a rulemaking, not AT&T's petition for declaratory ruling**
  - **The *Calling Card Order* was issued in the rulemaking docket, 05-68; the AT&T declaratory ruling docket, 03-133, was not referenced**
- **The FCC stated it would not address the issue through further declaratory rulings, opting instead to initiate a rulemaking**
  - **"Rather than try to address each possible type of calling card offering through a declaratory ruling, we are instead *initiating a rulemaking* to consider the classification and jurisdiction of new forms of prepaid calling cards." *EPCC NPRM* para. 2 (emphasis added)**
- **Having initiated a rulemaking, the FCC cannot change course and claim that it has engaged in an adjudication after the fact**
- **Because the classification decision is properly the result of a notice and comment rulemaking, it cannot be retroactive**

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# Even if This Were an Adjudication, Retroactivity Would Still Be Unlawful



- **In adjudications, retroactivity is only permissible in the case of new applications or clarifications of existing law**
- **Here there were no existing rules classifying these services, and the FCC has repeatedly stated that the classification is an open question of law:**
  - ***IP-Enabled Services NPRM* (states that the regulatory classification of all IP-enabled services is unresolved)**
  - ***Intercarrier Compensation NPRM* (states that access charges do not apply to IP-enabled services)**
  - ***Universal Service Order* (determined for the first time in June 2006 that class of IP-enabled service providers must pay into the USF)**

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# Retroactivity Produces Manifest Injustice



- **Even in the case of new applications or clarifications of existing law, retroactivity is still impermissible if its imposition would work a manifest injustice**
- **By disclaiming further adjudication in favor of rulemaking, the *EPCC NPRM* put providers on notice that any FCC decision would apply prospectively only**
- **The IP-in-The-Middle Order could not have provided notice of a telecommunications services classification because the *EPCC NPRM* specifically left that question open:**
  - **"Are prepaid calling card services that use 'IP-in-the-middle' and meet the same criteria [as the AT&T Order] also telecommunications services?" *EPCC NPRM* para. 40**
- **The *EPCC NPRM* stated that classification of IP transported calling cards was "not currently addressed by [FCC] rules" ¶ 50**

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# Giving Prospective Only Effect to Menu-Driven Cards but Not IP Transported Calls Is Arbitrary and Capricious



- **Basis for rejecting retroactive application to menu driven cards applies equally to IP transport cards**
  - **Law was unclear as to both**
  - **Burden of retroactive liability applies to both**
  - ***EPCC NPRM* sought comment as to proper classification for both**
- **AT&T IP-in-the-Middle Order provided no greater notice for IP transport than *EPCC Order* provided for Menu-driven cards**
  - **FCC found the telecommunications service classification for menu driven cards was not a close question because those services were "just like" the cards in the *EPCC Order***

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# No Harm to the USF will Result from Staying the Retroactivity Component



- **The retroactivity portion of the *Calling Card Order* should be stayed for the brief period necessary for providers of IP-Transport Services to obtain judicial review of the decision**
- **Should the *Calling Card Order* be sustained, payment can be made later on previous years without impact on the USF**
- **The USF *status quo* will not change during the temporary stay, since funding for previous years has already been determined and disbursed**

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# Absent a Stay, iBasis Will Suffer Irreparable Harm



- The *Calling Card Order* appears to require retroactive USF payments potentially to the date of the *IP-in-the-Middle Order* (April 21, 2004)
- This could result in a significant retroactive liability sufficient to erase iBasis profits for the comparable period
- The *Calling Card Order* exposes iBasis to potential litigation from shareholders, and from other carriers for access charges
- Finally, the FCC has a policy of not providing refunds on USF payments, so if iBasis later prevails it will only be entitled to a credit

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