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August 23, 2006

BY HAND

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

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Federal Communications Commission
Office of Secretary

**Re: In the Matter of Regulation of Prepaid Calling Card Services,
WC Docket 05-68, iBasis Petition for Stay Pending Judicial Review**

Dear Ms. Dortch:

Please find enclosed an original and four (4) copies of a Petition for Stay Pending Judicial Review submitted on behalf of iBasis, Inc. for filing in *Regulation of Prepaid Calling Card Services*, WC docket 05-68. Copies of this Petition will be served to all parties as indicated on the Certificate of Service attached to the Petition.

Please do not hesitate to contact me with any questions.

Sincerely,



Kemal Hawa
Michael Pryor

Counsel for iBasis, Inc.

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Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of)
) WC Docket No. 05-68
Regulation of Prepaid Calling Card Services)

PETITION FOR STAY PENDING JUDICIAL REVIEW

Kemal Hawa, Esq.
Michael Pryor, Esq.
Mintz Levin Cohn Ferris,
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C. 20004
(202) 434-7300 (phone)
(202) 434-7400 (fax)

Counsel for iBasis, Inc.

and

Jonathan D. Draluck, Esq.
iBasis, Inc.
20 Second Avenue
Burlington, MA 01803

August 23, 2006

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In the Matter of)
) WC Docket No. 05-68
Regulation of Prepaid Calling Card Services)

PETITION FOR STAY PENDING JUDICIAL REVIEW

iBasis, Inc. (“iBasis”), by its counsel, and pursuant to 47 C.F.R. §§ 1.41 and 1.43, hereby requests that the Commission stay that portion of the *Calling Card Order* that imposes retroactive liability on service providers that offer prepaid calling cards utilizing IP-transport functionalities (“IP-Calling Card Providers”), pending judicial review.^{1/}

I. Introduction and Summary

On February 23, 2005, the Commission initiated a rulemaking to decide the proper regulatory classification of prepaid calling cards using IP transport and other types of “enhanced” calling cards. The Commission specifically informed the industry that it would *not* decide the classification question as part of an adjudication that had been brought by AT&T. Rather than continue with piecemeal adjudications, the Commission found that it would be in the public interest to decide this issue in a comprehensive rulemaking. Because the classification decision would arise in the context of a rulemaking, instead of an adjudication, iBasis reasonably

^{1/} In the Matter of Regulation of Prepaid Calling Card Services, Declaratory Ruling and Report and Order, WC Docket No. 05-68, FCC 06-79 (rel. June 30, 2006) (“*Calling Card Order*”). iBasis will file a petition to review the *Calling Card Order*. The order takes effect October 31, 2006, 90 days after publication in the Federal Register, which occurred on August 2, 2006. 71 FR 43667. The *Calling Card Order* otherwise provides no specific timetable for when retroactive payments may be due, or when the period of retroactivity should begin. iBasis’s motion seeks only to stay the *Order*’s imposition of retroactive liability pending the appeal.

believed that the decision would only have prospective effect since rulemakings can, by law, only apply prospectively.

On June 30, 2006, the Commission released the *Calling Card Order* finding that IP transported calling card services were telecommunications services. Despite its specific disclaimer, the Commission announced that its decision arose out of the adjudication originally brought by AT&T, and can thus be applied retroactively. The Commission further imposed this new classification decision retroactively on any entity providing IP calling cards, not just the party that started the adjudication, AT&T.

The Commission's abrupt and unexplained change from deciding the classification of IP-transported calling cards pursuant to a rulemaking, as it said it would, to an adjudication, which it specifically said it would not do, is grossly unfair, extraordinarily prejudicial and constitutes an abuse of discretion. iBasis thus seeks a stay of this aspect of the *Calling Card Order*.

iBasis is, and since its inception in 1996 has always been, an Internet-based service provider. It is primarily in the business of placing other carriers' voice traffic on the public Internet for termination in foreign countries. Starting in 2003, iBasis began providing prepaid calling cards distributed through small local retail outlets. iBasis also routed its calling card traffic using the same Internet technology it used for its wholesale business service. Like other VoIP providers, iBasis has kept a careful eye on regulatory developments. For years the Commission refused to find that Voice over Internet Protocol ("VoIP") services were telecommunications services, despite repeated requests to do so. At the same time, the Commission maintained a hands-off approach to the regulation of the Internet. The Commission's 2004 ruling that AT&T's *IP-in-the-Middle* service was subject to access charges

marked the first time that Commission had made a ruling on VoIP service of any kind.²¹ That order was specifically limited to the type of service provided by AT&T. All other VoIP services were excluded, and the Commission expressly noted it might reach a different result in pending rulemakings addressing IP-enabled services generally.

In the wake of that AT&T access charge order, iBasis began making voluntary contributions to the federal Universal Service Fund (“USF”) on revenue from its wholesale business. It did so out of an abundance of caution even though it reasonably believed its service was an information service and distinguishable from AT&T’s *IP-in-the-Middle* service. Whereas AT&T sought simply to overlay some IP transport over its traditional long distance service, iBasis solely relies on the Internet. It has never retrofitted its services to make them look like information services. Moreover, unlike AT&T’s *IP-in-the-Middle* service, iBasis’s services perform a net protocol conversion -- from IP to TDM formats -- for a significant amount of the wholesale traffic it receives. Additionally, nearly ten percent of its wholesale traffic originates and/or terminates over local broadband connections, thus it is not PSTN-to-PSTN traffic.

Although iBasis started making USF contributions on revenue from its wholesale business, iBasis reached a different decision concerning its calling card revenue because of the calling card rulemaking initiated by the Commission. iBasis relied on the statements in the Commission’s calling card notice of proposed rulemaking (“NPRM”) leaving open the regulatory classification of IP-transported calling cards until the classification was determined as part of that rulemaking procedure.

²¹ *AT&T IP Telephony Order*, 19 FCC Rcd. 7457 (rel. April 21, 2004) (“*AT&T IP-in-the-Middle Access Charge Order*”).

The Commission cannot ignore the fact that it was engaged in a rulemaking. The Commission's discretion to proceed by rulemaking or adjudication, while broad, is not unfettered. Courts look beyond an agency's characterization of its proceeding and determine what it did in fact, particularly when the characterization results in prejudice, as it does here. What the Commission did in fact was conduct a rulemaking. The Commission proffers no reasoned explanation for ignoring its ongoing rulemaking; in fact, it acts as if it never started a rulemaking. If the Commission had changed its mind during the course of the rulemaking and determined to address the classification question as part of AT&T's initial declaratory ruling petition after all, it should have given notice, rather than springing an unfair surprise. In short, the Commission's proceeding properly constituted a rulemaking rendering its broad retroactivity finding unlawful.

Were the Court, however, to agree with the Commission's adjudication label, retroactive liability on iBasis is still unlawful. The "adjudication" addressed an issue of first impression, which the D.C. Circuit rarely finds suitable for retroactivity. But even if the classification decision is a new application of existing law, as the Commission claims, retroactivity on iBasis would be unreasonable because it is manifestly unjust. The Commission claims that its *AT&T IP-in-the-Middle Access Charge Order* put calling card providers using IP on notice of a possible telecommunications services designation. But that order expressly did not address other types of IP-enabled services. The Commission clearly did not believe that the *AT&T IP-in-the-Middle Access Charge Order* obviously applied to IP-enabled calling card services. Instead, it found that IP-enabled calling cards and other types of enhanced cards may incorporate features that may be significant for regulatory classification purposes and found it necessary to initiate a

rulemaking. The Commission's NPRM undermined any notice that the *AT&T IP-in-the-Middle Access Charge Order* allegedly provided. And, as noted, by initiating a rulemaking to address the question, the Commission informed the industry that any decision would only be applied prospectively.

The Commission also failed to consider the burden of imposing the full panoply of Title II regulation retroactively on entities like iBasis. At the same time, it found such burdens would be unfair if applied retroactively to the largest carriers, like AT&T and Verizon, which provided only so-called menu driven calling cards that the Commission exempted from retroactive liability.

The balance of harms also clearly favors a stay in this circumstance. iBasis will be irreparably harmed absent a stay. It will be required to make a substantial -- in terms of impact on iBasis -- retroactive payment to the USF. iBasis estimates that it would have to make a retroactive payment of some \$2.5 million, effectively wiping out iBasis's entire profit for the past year. iBasis will be unable to recover fully those amounts should it ultimately prevail on its appeal. At the same time, there is no harm to the USF, which was fully funded for prior periods. Nor will past contributors to the USF be harmed by some delay, while the appeal runs its course, in having their individual future contributions reduced by the amount of iBasis's retroactive payment if required to be made. That payment, when distributed among the thousands of contributors, will be miniscule for each contributor and not even measurable if passed on to their customers.

Nor is the public interest harmed by a stay. Any concern that the Commission may have of shoring up the USF and bringing certainty to the prepaid calling card market is fully addressed

by the *Calling Card Order*'s interim ruling imposing, *prospectively*, USF contribution requirements on all prepaid calling card providers. By contrast, imposing retroactive liability only on one small segment of prepaid calling card industry creates a decidedly uneven playing field.

II. Procedural History

A. AT&T's Initial EPCC Petition and the EPCC Order

On May 15, 2003 AT&T filed a Petition for Declaratory Ruling requesting a ruling that an AT&T prepaid calling card product that played an advertisement when callers utilized the calling card was an interstate "enhanced" or "information service" (this service is referred to herein as "AT&T's Ad Service").^{3/} On November 22, 2004, AT&T submitted a letter amending its petition to include two new prepaid calling card variants: one card offers callers a menu of options to access non-call related information ("Menu-Driven Cards"), and a second that uses IP technology, accessed by 8YY dialing, to transport a portion of the call (referred to herein as "IP-Calling Cards," which is the type of service that is provided by IP-Calling Card Providers).^{4/}

On February 23, 2005, the Commission released an Order and Notice of Proposed Rulemaking in response to AT&T's petition.^{5/} In the *EPCC Order and NPRM*, the Commission classified AT&T's Ad Service as a telecommunications service, not an information service. As such, AT&T's Ad Service was therefore subject to Title II regulation under the Communications Act of 1934 (the "Act") including payment of access charges and universal service contributions.

^{3/} Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, WC Docket No. 03-133, (filed May 15, 2003) ("*AT&T EPCC Petition*").

^{4/} See Letter from Judy Sello, Senior Attorney, AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004) ("*AT&T Nov. 22, 2004 Letter*").

^{5/} See generally, *EPCC Order and NPRM*.

Noting that by “unilaterally deciding to treat ‘enhanced’ prepaid calling cards as information services, AT&T claims that it has ‘saved’ \$160 million in universal service contributions,” the Commission assessed retroactive liability for AT&T’s unpaid universal service contributions.^{6/}

B. *The EPCC Notice of Proposed Rulemaking*

In the *EPCC Order and NPRM*, the Commission declined to rule on the two prepaid calling variants contained in the *AT&T Nov. 22, 2004 Letter*, (*i.e.* Menu-Driven Cards and IP-Calling Cards). Noting that “[t]hese changes to AT&T’s calling card services may be significant for purposes of regulatory classification and jurisdiction,” the Commission expressly stated that it would not address the classification “through a declaratory ruling” but that instead it was “initiating a rulemaking” to consider the proper classification of the two variants identified by AT&T and other new forms of calling cards.^{7/} The Commission found “that the public interest would best be served by considering [the classification of the two AT&T variants] in a more comprehensive manner, enabling us to gather information about all types of current and planned calling card services.”^{8/}

The Commission thus issued a notice of proposed rulemaking and sought comment on the appropriate regulatory classification for the Menu-Driven Cards and IP-Calling Cards described by AT&T, as well as any other variants of prepaid calling card services. The NPRM proposed no rules nor proffered any tentative conclusions as to the appropriate classification. Instead it identified the issues and asked a series open ended questions.

^{6/} *Id.* ¶¶ 30-32.

^{7/} *Id.* ¶ 2.

^{8/} *Id.* ¶ 38.

With respect to IP-Calling Cards, the Commission noted that it had previously determined that AT&T's IP transported 1+ dialed long distance calls that otherwise originated and terminated as regular telephone calls ("*IP-in-the-Middle*") constituted a telecommunications service, not an information service.^{9/} The *EPCC Order and NPRM* asked whether prepaid calling cards that use IP transport, and meet the same criteria the Commission applied in the *AT&T IP-in-the-Middle Access Charge Order* to find that *IP-in-the-Middle* services are telecommunications service, are also telecommunications services.^{10/} The NPRM also sought comment on whether it mattered that calls originated as +1 calls or as 8YY calls, as used with prepaid calling cards, and the extent to which other providers using IP transport treated them as information services and how those services might be different from the *IP-in-the-Middle* service classified as a telecommunications service in the *AT&T IP-in-the-Middle Access Charge Order*.^{11/} The *EPCC Order and NPRM* noted that, to the extent such services are classified as information services, they would be subject to federal jurisdiction and asked, "if any such service is classified as a telecommunications service" should the Commission nonetheless assert federal jurisdiction even for intrastate calls.^{12/}

Concurrent with issuing the NPRM, the Commission opened a new docket, WC docket 05-68, and required all pleadings intending to respond only to those issues raised in the *EPCC*

^{9/} *Id.* ¶ 40 (citing the *AT&T IP-in-the-Middle Access Charge Order*).

^{10/} *Id.* The Commission found that AT&T's service: (1) used ordinary CPE with no enhanced functionality; (2) originated and terminated on the PSTN, and (3) provided no evidence of a net protocol conversion or offering of enhanced functionality to end users. *AT&T IP-in-the-Middle Access Charge Order* ¶ 1.

^{11/} *Id.*

^{12/} *Id.* ¶ 42.

Order and NPRM to reference this new docket and not the docket number assigned to AT&T's original petition for a declaratory ruling (WC Docket 03-133).^{13/} In addressing the need for the *NPRM*, the Commission stated that it initiated the rulemaking because the two new types of prepaid calling cards identified by AT&T “are not currently addressed by our rules.”^{14/} The *EPCC NPRM* was subsequently published in the Federal Register.^{15/}

C. The Calling Card Order

On June 30, 2006, the Commission issued the *Calling Card Order*^{16/} classifying as telecommunication services Menu-Driven Cards and IP-Calling Cards.^{17/} It found that prepaid calling cards that use 8YY dialing rather than 1+ dialing “appear” to be identical to the services addressed in the *AT&T IP-in-the-Middle Access Charge Order*. The Commission concluded that “the use of IP transport in the provision of a prepaid calling card service does not alone convert that service from a telecommunications service to an information service.”^{18/}

Despite having specifically stated that it would not address the classification of those calling cards by declaratory ruling/adjudication, but rather in the context of the rulemaking it

^{13/} *Id.* ¶ 44.

^{14/} *Id.* ¶ 50 (“In this *NPRM*, the Commission seeks comment on two types of ‘enhanced’ prepaid calling card services offered or planned by AT&T as well as other existing or potential prepaid calling card services incorporating features that are not currently addressed by our rules or this item.”)(emphasis added).

^{15/} Publication in the Federal Register occurred March 15, 2005. *See* 70 FR 12828-12832.

^{16/} Notably the *Calling Card Order* is issued under the same WC Docket as the *EPCC Order's NPRM* (WC Docket 05-68). The AT&T declaratory ruling docket, 03-133, is not referenced.

^{17/} In addition, the Commission granted, in large part, an emergency petition filed by AT&T in this docket seeking interim rules imposing, on a prospective basis, universal obligations on all prepaid calling card providers.

^{18/} *Calling Card Order* ¶ 20.

initiated, and without providing any notice that such a change of procedure was being contemplated, the Commission declared that its determination was a “declaratory ruling” and an adjudication. The importance of this abrupt change was that it enabled the Commission to impose retroactive liability. As stated by the Commission:

“[O]ur decision to classify prepaid calling cards that use IP transport and menu-driven prepaid calling cards as telecommunications services is a declaratory ruling, a form of adjudication. Generally, adjudicatory decisions are applied retroactively when they involve ‘new applications of existing law, clarifications, and additions.’”^{19/}

The Commission concluded that its classification determination fell within this category and thus may be made retroactive unless it would result in manifest injustice.

Applying this standard, the Commission determined that it would be manifestly unjust to apply its new classification retroactively to Menu-Driven Cards, but that it would be appropriate to apply the new classification retroactively to IP-Calling Cards. Moreover, the Commission imposed retroactive liability on an industry-wide basis, not just on the party, AT&T, that had initially requested the declaratory ruling. In fact, AT&T had, during the course of the rulemaking, informed the Commission that it never did utilize the IP-Calling Cards that it had asked the Commission to classify, and that it would limit its advocacy to Menu-Driven cards.^{20/} The Commission found it appropriate to impose retroactive liability on IP-Calling Cards because the *AT&T IP-in-the-Middle Access Charge Order* provided “ample notice” that “merely converting a calling card to IP format and back” does not create an information service.^{21/}

^{19/} *Id.* ¶ 41 (citation omitted).

^{20/} See Letter from David Lawson, Counsel to AT&T, to Marlene H. Dortch, Secretary, Federal Communications Commission (May 26, 2006) (“*AT&T May 26, 2006 Letter*”) at n.1.

^{21/} *Calling Card Order* ¶ 43.

The Commission rejected arguments that issuing an NPRM converted its proceeding into a rulemaking. Notwithstanding its express statements that it would not address the classification as part of AT&T's declaratory ruling request, the Commission claimed that its classification decision here was simply a continuation of the adjudication initiated by AT&T's petition for declaratory ruling as amended by its letter request to include Menu-Driven Cards and IP-Calling Cards.^{22/} The Commission also claimed its determination to seek comment by issuing an NPRM had no more significance than if it had sought comment via public notice. According to the Commission, the NPRM thus did not alter the adjudicatory nature of the decisions it reached, nor convert these classification decisions into rulemaking decisions.^{23/}

III. Background on iBasis

A. Background on iBasis Internet-based Services

iBasis is a wholesale VoIP provider and a provider of retail traditional and "virtual" prepaid calling cards that connect to iBasis's IP-enabled platform. The company was launched in 1996 to utilize the ubiquity of the public Internet and harness the efficiency of packet routing and the universal IP protocol to provide affordable, wholesale, international calling services. Its wholesale operations have grown substantially and now serve more than 400 carriers and provide call termination to over 100 countries. iBasis's retail services consist of prepaid calling cards and a "virtual" calling card service sold over the Internet.

iBasis owns no transmission facilities. Its "network" consists of numerous gateways or computers that accept voice traffic, some originating on the PSTN and sent to iBasis in TDM

^{22/} *Id.* ¶ 44.

^{23/} *Calling Card Order* ¶ 44.

format, some originating over broadband connections. For example, iBasis is a major wholesale provider for retail VoIP companies such as Skype and Yahoo!, which provide voice services to their customers with broadband connections. iBasis has over forty (40) such VoIP customers, and estimates that nearly ten percent (10%) of overall traffic routed through its gateways originates and/or terminates over local broadband connections. In other words, it is not PSTN to PSTN traffic.^{24/}

Once traffic reaches an iBasis gateway, iBasis converts it from TDM to IP packets, if necessary, (the majority of traffic is already in IP format) and routes the packets over the public Internet to the appropriate iBasis terminating gateway. iBasis performs a net protocol conversion for a significant percentage of traffic that it receives. That is, iBasis receives traffic in IP format and converts that traffic to TDM format before handing it off for termination.^{25/} And, as it explained in its reply comments to the Commission's notice of proposed rulemaking, iBasis has never utilized circuit switching.^{26/} In other words, it has, from its inception, provided what the Commission characterizes as IP-enabled services.^{27/}

In order to capitalize on excess capacity, iBasis began providing prepaid calling cards in 2003. These cards are made available to the public through a number of small local retail outlets such as independent markets, convenience stores and gas stations. They enable calling card

^{24/} Declaration of Jonathan D. Draluck, Vice-President of Business Affairs and General Counsel of iBasis, Inc., ("Draluck Decl.") ¶ 4 (attached hereto as Exhibit A).

^{25/} Draluck Decl. ¶ 5.

^{26/} See iBasis Reply Comments in Docket 05-68 p. 3 (May 16, 2005).

^{27/} *IP-Enabled Services*, 19 FCC Rcd. 4863 ¶ 1 n. 1 (2004) ("*IP-Enabled Services NPRM*") (defining "IP-enabled services" as "services and applications relying on the Internet Protocol family" including VoIP).

users to access iBasis's Internet-based network for domestic and international calls at highly affordable rates by dialing an 8YY number, (which iBasis obtains from telecommunications carriers). Additionally, in September 2004, iBasis began offering a web-based "virtual" calling card service called Pingo™ that allows local access from 35 countries to users purchasing calling time over the iBasis network using a credit card or PayPal account, provides convenient features like auto-recharge when the balance reaches five dollars, and PIN-less dialing when calling from the phones the subscriber uses most often.^{28/} There can be no question that Pingo is an information service as it offers a capability "for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."^{29/}

B. *iBasis and the FCC's AT&T IP-in-the-Middle Access Charge Order*

The Commission largely predicated its finding of retroactive liability on prepaid calling cards that use IP transport on its previous "*IP-in-the-Middle Access Charge Order*." According to the Commission, even though that order dealt solely with access charges, it put prepaid calling card providers that route traffic over the Internet on notice that their services might be classified as telecommunications services and retroactively subject universal service payments. It is thus important to understand the differences between iBasis services and the service that was at issue in the AT&T proceeding.

That service consisted of AT&T taking its own ordinary 1+ dialed long distance calls, converting them from TDM to IP in its network, transmitting the calls for some unspecified distance over its own IP facilities, then converting the calls back to TDM in its network for

^{28/} Draluck Decl. ¶8.

^{29/} 47 U.S.C. § 153(20).

termination on the PSTN.^{30/} AT&T claimed that that this phone-to-phone, *IP-in-the-Middle*, service was an information service exempt from access charges. The Commission found that, under its current rules, this *specific* service was a telecommunications service to which access charges could be assessed.^{31/} The Commission specifically noted that other VoIP services were beyond the scope of that proceeding.^{32/}

iBasis's services are distinct from AT&T's in several critical respects. Whereas AT&T sought simply to overlay some IP transport over its traditional long distance service, iBasis solely relies on the Internet. It has never retrofitted its services to make them look like an information service.^{33/} In fact, following the *Calling Card Order*, certain operations personnel at iBasis asked iBasis's general counsel whether iBasis should add menu-driven options to its retail business services, which could be done with relative ease and little cost, to help insulate iBasis from liability. The general counsel specifically rejected that proposal since he did not want to engage in after the fact alterations in an attempt to insulate iBasis's services, particularly since he already believed that those services were unregulated information services under the current state of the law.^{34/} Furthermore, he believed that the addition of menu-driven options could not serve as a reasonable basis for drawing regulatory classification differentiations. As it turns out, under

^{30/} *AT&T IP-in-the-Middle Access Charge Order* ¶ 1.

^{31/} The Commission noted that pending rulemakings, including the IP-enabled services rulemaking, were assessing whether access charges should apply VoIP or other IP-enabled services, and that it may reach a different conclusion in those rulemakings. *Id.* ¶ 2

^{32/} *Id.* ¶ 13 n. 58.

^{33/} Draluck Decl. ¶ 10.

^{34/} Draluck Decl. ¶ 15.

the *Calling Card Order*, this simple addition would have spared iBasis from retroactive liability.^{35/}

iBasis's services are unlike AT&T's *IP-in-the-Middle* service in other important ways. As noted above, iBasis's services perform a net protocol conversion -- from IP to TDM formats - - for a significant amount of the traffic it receives. Additionally, nearly 10% of its overall traffic originates and/or terminates over local broadband connections. This traffic is not PSTN to PSTN traffic, as was AT&T's *IP-in-the-Middle* service.^{36/}

Moreover, unlike AT&T, iBasis is not a facilities-based carrier. In determining whether services are enhanced or basic, the regulatory precursors to the statutory categories of "information services" and "telecommunications services,"^{37/} the Commission drew sharp distinctions between facilities-based carriers, like AT&T, and entities like iBasis that obtain transmission from other carriers. For example, the Commission applied what it called the "contamination theory" to non-facilities based providers but not to facilities based carriers.^{38/}

^{35/} Draluck Decl. ¶ 15.

^{36/} Draluck Decl. ¶ 4.

^{37/} Under the Computer Inquiry regime, the Commission established two types of services, enhanced services that were deregulated, and basic services that were subject to Title II regulation. The Commission has found that its definition of enhanced services is substantially identical to the "information services" category established by the 1996 Act, and that "all of the services that the Commission has previously considered to be 'enhanced services' are 'information services.'" *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 21905 ¶ 102 (1996) ("*Non-Accounting Safeguards Order*").

^{38/} *In re Independent Data Communications Manufacturers Association, Inc.*, DA 95-2190, 10 FCC Rcd. 13,717 ¶¶ 17-18 (October 18, 1995) ("*Frame Relay Order*").

Under the contamination theory, an enhanced services component of an offering “contaminated” the basic services component, rendering the entire service an enhanced service.^{39/}

Finally, iBasis has passed on to its customers the cost savings derived from the efficiencies of using the Internet and the universal IP protocol. This point brings up yet another distinction with AT&T’s *IP-in-the-Middle* service. The end user customers of AT&T’s *IP-in-the-Middle* service obtained no benefit, in terms of enhanced functionality or better pricing, than those served solely over AT&T’s circuit switched network.^{40/} By contrast, iBasis’s customers, other carriers, receive substantial price reductions over standard forms of international calling, which have been passed along to consumers. As a result, iBasis has been a major factor in the reduction of international calling rates.

C. *iBasis’s Cautious Approach to USF Obligations and the Effect of the Commission’s Calling Card Rulemaking*

iBasis has always considered itself an information service provider. Nevertheless, and notwithstanding the various distinctions between its services and those found to be telecommunications services in the *IP-in-the-Middle Access Charge Order*, iBasis began making USF contributions on its wholesale business service revenues as of January 1, 2005 on a voluntary basis. iBasis did so in the wake of the *IP-in-the-Middle Access Charge Order*, which signaled, but did not decide, that revenues from at least some of iBasis’s wholesale business services were subject to USF contribution requirements.^{41/} Such contributions were, however, made by iBasis with full reservation of its rights as an information service provider.

^{39/} *Id.*

^{40/} *IP-in-the-Middle Access Charge Order* ¶ 17.

^{41/} Draluck Decl. ¶ 12.

With respect to iBasis's prepaid calling card services, iBasis concedes that its prepaid calling card users typically utilize the PSTN to reach the iBasis IP-enabled platform by calling an 800 number, and that the calling party typically is on the PSTN. iBasis thus carefully assessed whether, as a result of the *IP-in-the-Middle Access Charge Order*, it should also make USF contributions on its interstate calling card revenues. At the time of this assessment, however, the Commission, in February of 2005, released its order on AT&T's petition for declaratory ruling on the classification of AT&T's prepaid calling card services that included advertisements. iBasis was also well aware that AT&T had requested that the Commission, as part of its petition for declaratory ruling, also address the classification of calling cards that use IP transport as well as what it called menu driven calling cards.

Rather than address those questions, however, the Commission initiated a rulemaking specifically asking whether the *IP-in-the-Middle Access Charge Order* should be applied to all prepaid calling cards.^{42/} The Commission also specifically stated that it would not answer the classification question as part of AT&T's declaratory ruling request.^{43/} iBasis reasonably relied on the Commission's statement that the question had not yet been decided, and that the determination of the proper classification of its calling cards would occur in a rulemaking,

^{42/} *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd. 4826 ¶ 40 (2005) ("*EPCC Order and NPRM*") ("Are prepaid calling card services that use "IP-in-the-Middle" and meet the same criteria also telecommunications services?"), affirmed *American Telephone and Telegraph Co. v. F.C.C.*, 454 F.3d 329 (D.C. Cir. Jul 14, 2006) (No. 05-1096).

^{43/} *Id.* ¶¶ 2, 38

meaning that, if the service were found to be a telecommunications service, it would apply only on a going-forward basis.^{44/}

ARGUMENT

IV. iBasis Has a Substantial Likelihood of Prevailing on the Merits

The Commission ordinarily assesses requests for a stay pending appeal utilizing the factors set forth in *Virginia Petroleum*^{45/} -- the likelihood of success on appeal, the extent the applicant will suffer irreparable harm, and whether the stay will harm other parties or the public interest. Where “there is a particularly overwhelming showing in at least one of the factors, [the Commission] may find that a stay is warranted notwithstanding the absence of another one of the factors.”^{46/} Even where the moving party has not established a likelihood that it will prevail on the merits, a court may decide to stay enforcement of its ruling if it finds that plaintiff has presented a “serious legal question []” and that the other three factors weigh heavily in plaintiff’s favor.^{47/} Here, the probability of success is high and the balance of harms tips sharply in favor of a stay.

^{44/} Draluck Decl. ¶ 13.

^{45/} *Virginia Petroleum Jobbers Ass’n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958) (“*Virginia Petroleum*”).

^{46/} *Biennial Regulatory Review*, 14 FCC Rcd 9305, ¶ 4 (1999); see also, *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (“stay pending appeal” proper “where the likelihood of success is not high but the balance of hardships favors the applicant” or “whether the probability of success is ‘high’ and ‘some injury’ has been shown”).

^{47/} *Washington Metro. Area Transit Comm’n v. Holiday Tours*, 559 F.2d 841, 844 (D.C. Cir. 1977).

A. *The Calling Card Order Was the Result of a Rulemaking Proceeding, and thus Can only Have Prospective Effect*

The Commission's abrupt, un-announced and unexplained change from deciding the classification of IP-Calling Cards pursuant to a rulemaking, as it said it would, to an adjudication, which it expressly said it would not do, is grossly unfair and extraordinarily prejudicial. The sole apparent purpose of the Commission's gambit of changing its rulemaking to an adjudication is to enable the imposition of retroactive liability, as it is axiomatic that rulemakings cannot be applied retroactively.^{48/} Not only is there unfair surprise in having a prospective-only rulemaking suddenly turn into a retroactive adjudication, but the Commission retroactively applies the new classification announced in the purported adjudication not just to the parties to the adjudication, but on an industry-wide basis.^{49/}

While agencies generally have discretion to proceed via rulemaking or adjudication, such discretion is not unlimited, and it was abused here.^{50/} Where the agency's characterization of administrative vehicle results in substantial prejudice to the parties, it has abused its discretion.^{51/}

^{48/} *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("*Bowen*").

^{49/} *Cf. NLRB v. Bell Aerospace Co.* 416 U.S. 267, 292 (1974) (agency may in an adjudication "promulgate a new standard that would govern *future* conduct" of non-parties) (emphasis added); *National Labor Relations Board v. Wyman-Gordon*, 394 U.S. 759, 765 (1969) (plurality opinion) (noting that agency failed to apply the rule to the parties in the adjudicatory proceeding, "the only entities that could properly be subject to the order in that case").

^{50/} *See Bell Aerospace Company*, 416 at 294 (noting that there may be situations where agency's choice of adjudication "would amount to an abuse of discretion").

^{51/} *See F. Lewis-Mota v. Sec. of Labor*, 469 F.2d 478, 482 (DC Cir. 1972) (rejecting agency's characterization of its proceeding as announcing a general statement of agency procedure where result of agency's action was to alter "existing rights and obligations").

There is no question that the Commission initiated and conducted a rulemaking to address the classification of IP-Calling Cards. The Commission said as much in the *EPCC Order and NPRM* -- “we are . . . initiating a rulemaking.”^{52/} The proceeding had all of the hallmarks of a rulemaking and was treated as such by the Commission. The Commission issued a notice of proposed rulemaking, which pursuant to the APA and the Commission’s rules, initiates a rulemaking.^{53/} Moreover, the NPRM contained the requisite information to initiate a rulemaking. It identified the issues to be resolved, provided a reason for the rulemaking, (that the classification of IP-Calling Cards and other new forms of calling cards were not addressed by the Commission’s existing rules),^{54/} and included a regulatory flexibility analysis.^{55/} As required by the rulemaking provisions of the APA, the Commission published the NPRM in the federal register and sought and received comments from the general public.^{56/} The Commission

^{52/} *EPCC Order and NPRM* ¶ 2.

^{53/} 47 C.F.R. § 1.412; *see also*, 47 C.F.R. § 0.411(b)(2) (“Summaries of the full Notices of Proposed Rule Making and other rule making decisions adopted by the Commission constitute rule making documents for purposes of Federal Register publication”); 5 U.S.C. § 553.

^{54/} 5 U.S.C. § 553(a)(2). *See EPCC Order and NPRM* ¶ 50 (“In this NPRM, the Commission seeks comment on two types of ‘enhanced’ prepaid calling card services offered or planned by AT&T as well as other existing or potential prepaid calling card services incorporating features that are not currently addressed by our rules or this item”).

^{55/} 5 U.S.C. § 601 *et. seq.* (“*Regulatory Flexibility Act*”). *The Regulatory Flexibility Act* requires, among other things, that whenever an agency publishes general notice of proposed rulemaking for any proposed rule pursuant to the APA’s rulemaking requirements, the agency must prepare and make available for public comment an initial regulatory flexibility analysis describing the impact of the proposed rule on small entities. The initial regulatory flexibility analysis or a summary must be published in the Federal Register at the time of the publication of general notice of proposed rulemaking for the rule. Publication of the Commission’s regulatory flexibility analysis with respect to the *EPCC NPRM* was published in the Federal Register on March 16, 2005.

^{56/} 5 U.S.C. § 553(a)(2). *See also*, 70 FR 12828 (March 15, 2005) (Federal Register setting comment and reply comment dates); *EPCC Order and NPRM* ¶¶ 38-40, 49, 50.

instituted a new rulemaking docket, 05-68, separate from the docket that had been assigned to AT&T's request for a declaratory ruling, docket number 03-133.^{57/} The Commission then released the *Calling Card Order* solely under the rulemaking docket number, 05-68.

Nor can there be any doubt that the Commission specifically eschewed further resort to piecemeal adjudication to address the classification of IP-Calling Cards.^{58/} The NPRM expressly noted that AT&T's November 22, 2004 Letter had sought to add the two new calling card variants, IP-Calling Cards and Menu-Driven Cards, to its then-pending petition for declaratory ruling for its Ad-based calling cards. It chose not to adjudicate those variants at that time, although it clearly could have done so if it wanted. Instead, noting that "these changes [referring to the two variants] to AT&T's card services may be significant for purposes of classification," the Commission concluded that continued resort to piecemeal adjudication via declaratory ruling was not in the public interest, and it thus announced it would decide the classification question in the rulemaking it was then initiating.^{59/}

Notwithstanding these incontrovertible facts, the Commission jarringly announced in the *Calling Card Order* that its classification decision was a "declaratory ruling, which is a form of adjudication."^{60/} Moreover, the Commission claimed it was an adjudication involving "new

^{57/} *EPCC Order and NPRM* ¶ 44.

^{58/} The *EPCC Order and NPRM* specifically identifies those two variants, Menu-Driven and IP-Calling cards in announcing its rulemaking, *EPCC Order and NPRM* ¶ 2, 38, and the majority of the NPRM raises questions about the appropriate classification of those two variants. *Id.* ¶¶ 38-40.

^{59/} *Id.* ¶¶ 2, 38, 50. In effect, the Commission treated AT&T's November 22, 2004 letter as a petition for a rulemaking.

^{60/} *Calling Card Order* ¶ 41. The jarring nature of this reversal is illustrated by juxtaposing the statement in the *EPCC Order and NPRM* that "rather than try to address each possible type of calling card offering through a declaratory ruling, we are instead initiating a rulemaking," with

applications of existing law, clarifications, and additions” in which retroactivity is generally applied in the absence of manifest injustice.^{61/}

The Commission’s procedural sleight of hand will not be countenanced. The law is clear that courts do not defer to an administrative agency’s procedural labels – rather, the characterization of a proceeding is governed by what the agency did in fact.^{62/} And the proper procedural characterization is critical when the propriety of retroactive liability is at issue.^{63/} As made clear from the recitation of the facts set forth above, what the Commission did in fact was to commence and conduct a rulemaking. As such, the Commission’s imposition of retroactive liability is unlawful. In the absence of an express statutory authorization, which is not the case here, agencies may not engage in retroactive rulemaking.^{64/} The D.C. Circuit has repeatedly held that rulemakings can only have prospective effect.^{65/} Having initiated a rulemaking to address the classification of IP-Calling Cards, and other variations of prepaid calling cards, and

the *Calling Card Orders* claim that “our decision to classify cards that use IP transport as a telecommunications service is a declaratory ruling.”

^{61/} *Calling Card Order* ¶ 41.

^{62/} *F. Lewis-Mota v. Sec. of Labor*, 469 F.2d at 481-482 (“the label that the particular agency puts upon its given exercise of administrative power is not, for our purposes conclusive; rather it was what the agency does in fact”).

^{63/} *General American Transportation Corp. v. ICC*, 883 F.2d 1029, 1030 n. 2 (D.C. Cir. 1989) (Silberman, J., concurring in denial of rehearing) (“the characterization of the proceeding below is important for it bears directly on the propriety of retroactivity of the new governing principle. ‘[R]etroactivity is not only permissible but standard’ in the adjudicatory setting . . .but it is disfavored in rulemaking.”) (citations omitted).

^{64/} *Bowen*, 488 U.S. at 208.

^{65/} *See, Health Insurance Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 425 (D.C. Cir. 1994) (“*Shalala*”); *General American*, 883 F.2d at 1030.