Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

PREPAID CARD PROVIDER COMMENTS

Dated: April 18, 2011

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PREPAID CARD PROVIDER COMMENTS

Cinco Telecom Corp. ("Cinco"), iBasis Retail, Inc. ("iBasis"), IDT Telecom, Inc. ("IDT"), and STi PrePaid, LLC ("STi PrePaid"), (together, "Prepaid Card Providers") hereby respond to the *Notice of Proposed Rulemaking* ("*NPRM*") soliciting comment on draft rules developed by the Commission to modernize the Commission's intercarrier compensation ("ICC") system.[1]

I. Introduction

In paragraph 684 and note 1101 of its Notice of Proposed Rulemaking ("NPRM"), the FCC invites "comment on any other outstanding technical or policy issues related to intercarrier

[1] *Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) (the "NPRM").

compensation reform that the Commission should address," with specific emphasis on the application of access charges to prepaid calling card calls accessed by dialing a local number.[2] Intercarrier compensation is an important issue for the industry and the Prepaid Card Providers appreciate the Commission's active consideration of this issue. In these Comments, we urge the FCC to take swift action to deny the Arizona Dialtone petition for reconsideration and confirm that prepaid calling card providers purchasing local numbers from local exchange carriers ("LECs") are not subject to a third party LEC's originating access charges under current Commission rules. We also urge the Commission to issue this finding as soon as possible, because pending lawsuits and threatened litigation is subjecting the prepaid card industry to uncertainty. Moreover, without a Commission decision applying to all providers, there is an absence of a level playing field across the prepaid card industry.

II. Facts

A. The Prepaid Calling Card Industry

1. Industry Overview

Prepaid calling cards are critically important to low income, elderly and immigrant populations that often do not have the resources or means to pay for traditional, post-paid telephone service.[3] Prepaid calling cards are typically sold in retail distribution outlets, such as convenience stores or gas stations, as well as on-line for those with Internet access. Often the cards are targeted to specific foreign destinations, offering immigrant communities an affordable way to stay in touch with their families and friends abroad.

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[2] NPRM ¶ 684.

[3] *See, e.g., Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶ 8 (2006) (subsequent history omitted) ("2006 Order") (noting that prepaid calling services play a "vital role in providing telecommunications services to low-income consumers and members of the armed services").

While an important niche service for low income and immigrant populations, calling card traffic is a relatively small percentage of overall voice traffic. Based on the FCC's most recent USF Joint Monitoring Board report, prepaid calling card revenue exceeded $3.4 billion in 2008, and comprises approximately 7.2% of total U.S. toll service revenue of $47.4 billion.[4]

The prepaid calling card industry is characterized by extremely low barriers to entry. A number of companies offer turnkey solutions to establish and operate a calling card business in a matter of days.[5] Starting a prepaid calling card business requires no network investment and minimal up-front capital; virtually all of the critical functions can be hosted by other providers. It may be possible to start a calling card operation with as little as $20,000, which is sufficient to purchase minutes, print cards and set up a computer system. The unfortunate result of these extremely low entry barriers, however, is that regulatory compliance is not uniform across the industry. Small companies that can quickly disappear and re-appear in the market may not know about compliance requirements or choose to ignore them. This can put companies that strive to comply with regulatory requirements, such as those filing these comments, at a competitive disadvantage.

2. How Prepaid Calling Cards Work

The Commission previously explained the fundamental mechanics of prepaid calling:

> A calling card customer typically dials a number to reach the service provider's centralized switching platform and the platform requests the unique personal

[4] USF Joint Monitoring Board report (released December, 2010) at p. 23, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303886A3.pdf.

[5] For example, a company called IPsmarx Technology Inc. advertises that it can provide a quote for the cost of setting up a business within 24 hours and can enable service launch within 10 days. See http://www.ipsmarx.com/cms/lp/5/?gclid=CIjJy5nShagCFUSo4AodgSg2cQ (last visited on April 5, 2011) ("IPsmarx gives you all software and hardware, plus installation, maintenance and carrier services – that's a true all-in-one solution. And it can be ready for you to launch in as little as 10 business days!").

> identification number [PIN] associated with the card for purposes of verification and billing. When prompted by the platform, the customer dials the destination number and the platform routes the call to the intended recipient.[6]

This general description masks important differences in the way calling card customers initiate these calls. Historically, the calling card provider would obtain 8YY numbers from carriers that would be used to reach the calling card provider's platform.[7] The calling card would list one or more of these 8YY numbers for the consumer to dial in order to reach the calling card provider. Calls originate on the last mile networks of local exchange carriers, typically the incumbent carrier, who charged originating 8YY access to the long distance carrier.

Two important developments have fundamentally changed the nature of prepaid calling. First, the opening of local markets to competition by competitive local exchange carriers ("CLECs") allowed calling card providers, and their IXC vendors, to escape the monopoly grip of incumbent LECs. Second, the development of Voice over Internet Protocol (VoIP) utilizing the public Internet enabled calling card providers to offer service more efficiently. Newly-established CLECs capitalized on these developments by offering a new service to calling card providers. CLECs began providing a service to calling card providers that enabled those providers to offer local numbers on their cards, rather than (or in addition to) 8YY numbers.

By dialing the local number, the customers initiate the call over a local line – most often owned by the incumbent LEC – or over wireless phones. The LEC or wireless provider then delivers the call to the CLEC associated with the local number. The exchange of these calls between ILECs and CLECs is typically governed by the terms of their interconnection

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[6] *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 4826, ¶ 3 (Feb. 16, 2005) ("2005 Order").

[7] *The Time Machine*, 11 FCC Rcd 1186, ¶ 2 (noting that customers "may use the cards by calling a nationwide 800-access number from any telephone, including payphones.").

agreements. The CLEC then delivers the call directly to the prepaid calling card provider platform, or may hand it off to another carrier that delivers the call to the platform.

B. The Commission's 2005 and 2006 Calling Card Orders

1. The 2005 Order

In May 2003, AT&T filed a petition with the Commission seeking a declaratory ruling that intrastate access charges did not apply to calls made using its "enhanced" prepaid calling cards (which routed intrastate calls through an out-of-state platform).[8] AT&T further asserted that its enhanced prepaid calling cards provided information services and not telecommunication services because the customer listened to an advertised message from the retailer of the calling card before placing the desired call. In February 2005, the Commission responded to AT&T's Petition by issuing an Order and Notice of Proposed Rulemaking. In the 2005 Order, the Commission denied AT&T's 2003 Petition, finding that the services described in it were telecommunications services subject to intrastate access charges.[9] Additionally, it required AT&T to revise its reporting of prepaid calling card revenue so as to calculate its USF obligation accurately, consistent with the Commission's determination that the calls were telecommunications services.[10]

In the 2005 Order, the Commission did not address an *ex parte* letter that was filed by AT&T seeking a declaratory ruling on two additional types of "enhanced" prepaid calling card offerings (both accessed via 8YY dialing): menu-driven cards (a card that offers the caller a menu of options to access non-call-related information), and cards utilizing Internet Protocol (IP)

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8 *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, WC Docket No. 03-133 (Filed May 15, 2003) ("AT&T 2003 Petition").

9 *See generally* 2005 Order.

10 2005 Order ¶¶ 28, 31.

technology to transport a portion of the calling card call.[11] Instead, the Commission opted to initiate "a rulemaking to consider the classification and jurisdiction of new forms of prepaid calling cards."[12]

2. The 2006 Order

In 2006, the Commission issued a Declaratory Ruling and Report and Order as a result of the 2005 NPRM process. The Commission made certain determinations and set forth various requirements that are clearly intended to apply to all prepaid calling card providers. For example, the Commission stated that *all* prepaid calling card providers are telecommunications services providers,[13] and that prepaid calling card calls are to be analyzed end-to-end for regulatory purposes.[14] The way a call is analyzed is important because, as the Commission clarified, calling card calls must pay charges based on their jurisdictional nature.[15] The Commission recognized the difficulty in characterizing the jurisdictional nature of a calling card call. To resolve this potential difficulty, the 2006 Order required *all* prepaid calling card providers to: 1) pass the calling party number (CPN) of the customer, not the calling card platform, in the SS7 stream;[16] 2) report percentage of interstate use (PIU) factors to carriers from which they purchase transport services;[17] and 3) file a quarterly PIU and USF certification with

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[11] *See* Letter from Judy Sello, Senior Attorney, AT&T to Marlene H. Dortch, Secretary, Federal Communications Commission (Nov. 22, 2004).

[12] 2005 Order ¶ 2.

[13] 2006 Order ¶ 10.

[14] *Id.* ¶ 27; 2005 Order ¶ 5.

[15] 2006 Order ¶ 27.

[16] *Id.* ¶ 33; 47 C.F.R. § 64.1601. Carriers that serve calling card providers, for their part, must not pass the calling card platform number in the charge number parameter of the SS7 stream. *Id.* ¶ 34.

[17] *Id.* ¶ 35; 47 C.F.R. §§ 64.5000-5001.

the Commission.[18]

In the specific context of the application of access charges, however, the Commission only addressed "providers of prepaid calling cards that are menu-driven or use IP transport to offer telecommunications services."[19] These providers, the Commission stated, are obligated to pay interstate or intrastate access charges based on the location of the called and calling parties."[20] Notably, in the 2006 Order the Commission also stated that it had "previously […] found that these same access charge obligations apply to basic prepaid calling cards and prepaid calling cards with unsolicited advertising."[21] As defined by Commission precedent, all of these types of cards are accessed via 8YY numbers.[22]

Although the use and treatment of locally dialed prepaid calling card calls was raised by a number of companies that filed comments in response to the 2005 NPRM, including Level 3 and

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[18] *Id*. ¶¶ 38-39.

[19] *Id.* ¶ 26. The Commission categorized "menu-driven" prepaid calling card service as one where "[u]pon dialing the 8YY number, the cardholder is presented with the option to make a telephone call or to access several types of information, such as additional information about the card distributor, sports, weather, or restaurant or entertainment information." *Id.* ¶ 11. It categorized IP transport cards as utilizing "Internet Protocol (IP) technology, accessed by 8YY dialing, to transport a portion of the calling card call." *Id*. ¶ 3.

[20] *Id.* ¶ 27.

[21] *Id.* Basic prepaid calling cards are those that offer the customer "no capability to do anything other than make a telephone call" and have therefore "always" been treated as telecommunications services by the Commission. *Id.* ¶ 43. Prepaid calling cards with "unsolicited advertising" are those where "the customer hears an advertisement from the retailer that sold the card" during the call set up, and "only after the advertisement is complete can the customer dial the destination phone number." 2005 Order ¶ 6.

[22] *See supra* note 19; *The Time Machine Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services,* Memorandum Opinion and Order, 11 FCC Rcd 1186 ¶ 2 (CCB 1995); AT&T 2003 Petition at 5.

Verizon, this issue was not addressed by the Commission.[23] Rather, the Commission's 2006 Order, as well as the 2005 Order and NPRM, notably opted to focus on prepaid calling cards using 8YY numbers and did not include any discussion of prepaid calling card calls dialed using local numbers and CLEC DIDs.

C. Arizona Dialtone Petition for Reconsideration

Arizona Dialtone, a CLEC, filed a petition for reconsideration of the 2006 Order (hereafter, "Arizona Dialtone Petition").[24] Given that the 2006 Order spoke only of 8YY numbers used to reach the calling card platform, Arizona Dialtone sought guidance from the Commission for the specific case where a local DID number is used instead. The Commission has yet to act on the Arizona Dialtone Petition.

Arizona Dialtone's chief complaint was that it did not have the information necessary to bill access charges for long-distance prepaid calling card calls that use local access (specifically DID) origination. It stated that it was impossible or impractical to identify which DID numbers are being used to connect to calling card platforms, and which calls to those numbers are long distance and thus subject to access charges for origination. Therefore, Arizona Dialtone asserted, it was unable to collect access charges on "hundreds of thousands of prepaid access minutes" per month.[25]

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[23] *See, e.g.*, Letter from John T. Nakahata, Counsel to Level 3 Communications, LLC to Marlene H. Dortch, Secretary, Federal Communications Commission (May 5, 2006); Letter from Kathleen Grillo, Vice President, Verizon to Marlene H. Dortch, Secretary, Federal Communications Commission (May 22, 2006).

[24] *Arizona Dialtone Inc. Petition for Reconsideration* (Aug. 31, 2006), available at http://fjallfoss.Commission.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6518442461.

[25] *Id* at 5.

Arizona Dialtone offered a number of proposals to rectify the shortcomings of the 2006 Order. Chiefly, it asked the Commission to require carriers that offer DIDs used to originate prepaid calling card calls to provide the identity of the company using a specific DID number upon request.[26] This would presumably allow a LEC or CLEC to identify those DID numbers being used for calling card purposes and then treat a call to that number as an access charge-generating call. Arizona Dialtone proposed that the Commission impose the same obligation on any intermediate DID resellers (between LECs and a prepaid calling card provider's ultimate carrier) so that the identity information would be passed from one party to the next until it reached the originating LEC.

A number of parties filed comments in response to the Arizona Dialtone Petition. Although the commenters had different positions on the issue, almost all noted in their filings the Commission's failure to address the intercarrier compensation issues associated with the use of DID numbers in the 2006 Order. For example, Verizon, Level 3, and Embarq generally agreed with Arizona Dialtone's call for clarification of the Order and proposed their own mechanisms to fix the Order's shortcomings.[27] AT&T did not note any shortcomings regarding the mechanism to determine and collect access charges, but did advocate for the use of Feature Group A services by prepaid calling card providers, rather than the current DID arrangements.[28] Arizona Dialtone disagreed with this approach, correctly noting that numerous prepaid calling card providers and intermediate carriers could not afford to establish the direct LEC access (i.e., separate dedicated

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[26] *Id* at 12-13.

[27] *See* Verizon's Comments in Partial Support of Arizona Dialtone's Petition for Reconsideration, WC Docket No. 05-68 (filed Oct. 12, 2006); Comments of Level 3 Communications LLC in Response to Arizona Dialtone's Petition for Reconsideration, WC Docket No. 05-68 (filed Oct. 23, 2006); Embarq's Reply Comments in Partial Support of Petition, WC Docket No. 05-68 (filed Oct. 12, 2006).

[28] *Reply Comments of AT&T, Inc.*, WC Docket No. 05-68 (filed Oct. 23, 2006).

trunk connections at every central office) needed for Feature Group A, and that, in any case, numerous smaller CLECs could not offer Feature Group A access – thus rendering this solution ineffective for the entire industry, even though it might work for AT&T.[29]

Plainly, AT&T is incorrect when it asserts that the 2006 Order found that "'all' prepaid calling card providers must pay the applicable access charges for prepaid long distance calls."[30] First, AT&T's failure to quote a complete sentence of the 2006 Order highlights its selective and out-of-context reliance on the Commission's ruling. Nowhere does the Commission state that all providers in all situations must pay access charges. Instead, in paragraph 27 of the 2006 Order – the one AT&T relies upon for its assertion – states that, "providers of prepaid calling cards *that are menu-driven or use IP transport* to offer telecommunications services are obligated to pay interstate or intrastate access charges based on the location of the called and calling parties."[31] "Menu-driven" cards and "IP transport" cards referred solely to the 8YY-originated cards that were the subject of (then-IXC) AT&T's petition. The Commission's reference to these cards does not address prepaid calling cards in which the card provider obtains access through a CLEC DID and the caller calls a local number – where both a different dialing method and different carrier arrangements are involved. Moreover, the Commission elsewhere made clear that its ruling only addressed "providers of the two types of prepaid calling cards described [in the Order]."[32] AT&T cannot, by selectively quoting the word "all" in the 2006 Order, broaden the scope of that order.

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[29] *Reply Comments of Arizona Dialtone*, WC Docket No. 05-68 (filed Oct. 23, 2006).

[30] AT&T Comments at 36 & n.77.

[31] 2006 Order ¶ 27 (emphasis added).

[32] 2006 Order ¶ 21. Tellingly, the Commission only concluded that such providers, as telecommunications carriers, are subject to "applicable" requirements of the Communications Act and the Commission's rules. *Id.* This begs the question of precisely what requirements are

D. AT&T's Litigation Against Prepaid Card Providers

Some time after the Commission's release of the 2006 Order and while the Arizona Dialtone Petition remained pending, AT&T began a letter-writing campaign accusing prepaid card providers of avoiding the payment of AT&T's tariffed switched access charges and threatening litigation if AT&T's claims were not satisfied. In these letters, AT&T claimed that prepaid card providers, by using "local telephone numbers" for the origination of prepaid card calls, were violating "access tariffs" and engaging in an "improper attempt to evade federal law."[33] AT&T declared that unless providers were to "immediately cease and desist from all activities the effect of which is to avoid the payment of access charges" and "route and deliver" prepaid card traffic "over appropriate feature group trunks" AT&T would "exercise" its "legal right to stop the practice" of using local telephone numbers to originate prepaid card calls.[34]

In July 2009, AT&T filed suit against IDT in the United States District Court for the Northern District of Texas, based on the mistaken assumption that AT&T provided switched access services to IDT related to the origination of local calls placed to CLEC DIDs and that AT&T was therefore entitled to collect "switched access charges" from IDT under AT&T's federal and state tariffs.[35] AT&T's lawsuit is a transparent attempt to use litigation to undermine ongoing regulatory proceedings pending before the Commission, including the still-pending

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"applicable" in the context of locally dialed calls to a CLEC that offers alternative local arrangements to prepaid card providers.

[33] Letter from Demtrios G. Metropoulos, Esq. Mayer Brown, Counsel for AT&T Local Exchange Carriers, to Thomas Nagle, IDT Telecom, Inc. at p. 1 (July 21, 2008) (on file with IDT).

[34] *Id*. at p. 2.

[35] *See Southwestern Bell Telephone Company et al v. IDT Telecom, Inc. et al,* 3:09-CV-01268-P, Complaint (filed July 2, 2009).

Arizona Dialtone Petition as well as the Commission's proceeding to enact comprehensive intercarrier compensation reform.

In light of the Arizona Dialtone Petition, IDT asked the Court to stay the litigation and refer the case to the Commission under the doctrine of "primary jurisdiction." After briefing by the parties, the District Court denied IDT's motion. The Court ignored the pending reconsideration petition and instead found that "the FCC, through regulations and released orders, provides the necessary tools for adjudication without administrative referral."[36] The Court also decided that "the FCC desired judicial remedies to sustain the system until industry reform is in place."[37] While the Court "recognize[d] [IDT]'s concerns that this matter should be addressed at an industry-wide level to avoid inconsistent rulings" it found that referral to the Commission "would only protract litigation and increase financial burdens."[38] After the Court's ruling on IDT's primary jurisdiction referral, AT&T filed two virtually identical claims against prepaid calling card providers Touch Tel and Next-G.[39] All three cases are currently in the midst of discovery.

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[36] *See Southwestern Bell Telephone Company et al v. IDT Telecom, Inc. et al,* 3:09-CV-01268-P, Order at p. 8 (June 3, 2010).

[37] *Id*.

[38] *Id*.

[39] *See Southwestern Bell Telephone Company et al v. Touch-Tel USA, LLC*, 3:10-cv-01642-M, Complaint (filed August 21, 2010); *Southwestern Bell Telephone Company et al v. Next-G Communication, Inc.*, 3:10-cv-01498-O, Complaint (filed July 20, 2010).

III. Prepaid Card Calls Where the CLEC Provides the DID Service Are Subject to Section 251(b)(5) and Do Not Fall Within the Exception of Section 251(g).[40]

A. Sections 251(b)(5) and 251(g) of the Act Establish Distinct Traffic Categories for Purposes of Intercarrier Compensation

The applicability of access charges to telecommunications traffic is governed by Sections 251(b)(5) and 251(g) of the Act. As explained below, an analysis of the precedent relating to these sections makes it clear that local calls to CLEC DIDs are not subject to the imposition of access charges. Both the Commission and U.S. Court of Appeals for the District of Columbia ("the Court") have reconciled Sections 251(b)(5) and 251(g) in a straightforward manner: compensation for all traffic exchanged by telecommunications carriers with local exchange carriers ("LECs") is governed by section 251(b)(5) unless the traffic is carved out by section 251(g). Section 251(b)(5) of the Act requires that LECs enter into reciprocal compensation arrangements to compensate each other for the transport and termination of telecommunication services. According to the Commission, "the transport and termination of all telecommunications exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5),"[41] unless that traffic is excluded (or "carved-out") by section 251(g).[42]

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[40] This section solely addresses the situation where local access numbers have been obtained from CLECs by the prepaid calling card providers. Prepaid calling card providers also have obtained local access numbers directly from ILECs in order for their customers to access the prepaid calling card platform. Nothing in this section shall be construed to suggest or imply that access charges apply in such a situation.

[41] *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6483 ¶ 15.

[42] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6483 ¶ 16 (2008) ("*2008 Order and ICC/USF FNPRM*") *aff'd Core v. FCC,* 592 F.3d 139 (D.C.

But section 251(g) is itself a limited carve out. First, section 251(g) only applies to services LECs provide to IXCs and information service providers, not to other LECs. Second, section 251(g) only preserves arrangements that pre-date the 1996 Act. The Commission has held that section 251(g) "temporarily grandfathered the pre-1996 Act rules governing 'exchange access, information access and exchange services for such access' provided to interexchange carriers and information service providers until 'explicitly superseded by regulations prescribed by the commission.'"[43] This holding is consistent with the D.C. Circuit's analysis in *WorldCom*, 288 F.3d at 432, that on "its face, § 251(g) appears to provide simply for the 'continued enforcement' of certain pre-Act regulatory 'interconnection restrictions and obligations.'" In sum, where there "had been no pre-Act obligation relating to intercarrier compensation," the traffic does not qualify for the section 251(g) carve out.[44] Further, section 251(g) does not confer on the Commission any authority to adopt new intercarrier compensation rules inconsistent with section 251(b)(5).[45]

B. Prepaid Card Calls Accessed Via CLEC DIDs Fall Within the Ambit of Section 251(b)(5)

Other than traffic that falls within the scope of the 251(g) carve out, all telecommunications traffic is subject to 251(b)(5), including prepaid card traffic accessed via CLEC DIDs. As discussed above, the Commission has already addressed and rejected

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Cir. 2010) *cert denied*, 131 S. Ct. 597, 626 (2010); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order,* 16 FCC Rcd 9151, 9165-66 (¶¶ 30-39) (2001), *remanded, WorldCom v. FCC,* 288 F.3d 429, 431-34 (D.C. Cir. 2002), *cert. denied,* 538 U.S. 1012 (2003).

[43] *2008 Order and ICC/USF FNPRM*¸ 24 FCC Rcd at 6480 ¶ 9.

[44] *Id*. citing *WorldCom*, 288 F.3d at 432-34.

[45] *WorldCom*, 288 F.3d at 433 ("nothing in § 251(g) seems to invite the Commission's reading under which (it seems) it could override virtually any provision in the 1996 Act so long as the rule it adopted were in some way, however remote, linked to LECs' pre-Act obligations.").

arguments for a narrower construction of section 251(b)(5). For example, the Commission found that the scope of section 251(b)(5) is "not limited…to particular services."[46] Similarly, the Commission rejected the argument that section 251(b)(5) does not apply to traffic being terminated by an interexchange carrier, instead holding that section 251(b)(5) applies to traffic exchanged between a LEC and *any* other carrier.[47] The Commission codified this construction of the statute in 47 C.F.R. § 51.703(a), which states that each "LEC shall establish reciprocal compensation arrangements for transport and termination of telecommunications traffic with any requesting telecommunications carrier." The use of the term "requesting telecommunications carrier" instead of LEC or another subset of telecommunications carrier demonstrates that § 251(b)(5) covers traffic that LECs exchange with IXCs.[48]

Further, section 251(b)(5) extends to intrastate traffic as well and is not limited to interstate traffic or limited by section 2(b). Congress charged the Commission with implementing the Act. Section 201(b) of the Act authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this

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[46] *High-Cost Universal Service Support*, WC Docket No. 05-337, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link Up*, WC Docket No. 03-109, *Universal Service Contribution Methodology*, WC Docket No. 06-122, *Numbering Resource Optimization*, CC Docket No. 99-200, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, *IP-Enabled Services*, WC Docket No. 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6479 ¶ 8 (2008) ("*2008 Order and ICC/USF FNPRM*") *aff'd Core v. FCC*, 592 F.3d 139 (D.C. Cir. 2010) *cert denied*, 131 S. Ct. 597, 626 (2010).

[47] *See Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9193–94, ¶ 89 n.177 (2001) ("*ISP Remand Order*"); *remanded by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002) ("Section 251(b)(5) applies to telecommunications traffic between a LEC and a telecommunications carrier . . . .").

[48] *See e.g. USTA v. FCC*, 359 F.3d 554, 592 (D.C. Cir. 2004) (rejecting FCC rule attempting to limit the term telecommunications service to local telecommunications service).

Act." According to the Supreme Court, this "grant in § 201(b) means what it says: The Commission has rulemaking authority to carry out the 'provisions of this Act.'"[49] Thus, the Commission's authority under §§ 251(b)(5) and 252(d)(2) is not limited to local traffic and encompasses intrastate as well as interstate traffic not subject to the carve out in section 251(g).[50]

C. Prepaid Card Traffic Accessed via CLEC DIDs Is Beyond the Scope of Section 251(g)

Although it should be clear, as shown above, that prepaid card traffic accessed via CLEC DIDs is subject to section 251(b)(5), AT&T contends that prepaid card traffic falls within the 251(g) carve out because there were pre-1996 arrangements covering Feature Group arrangements for long distance calls.[51] But AT&T's claims fail for two independent reasons: first, because the text of the statute precludes such a construction, and second, as matter of fact, there were no requirements prior to 1996 governing arrangements between CLECs and ILECs for the exchange of prepaid card calls accessed through a CLEC DID.

1. The Plain Language of Section 251(g) Indicates That ILEC to CLEC Exchanges of Prepaid Card Traffic Do Not Fall Within the Ambit of the Section 251(g) Carve-Out.

Section 251(g) does not apply when calls are handed off between LECs.[52] Therefore, section 251(g) cannot apply to the DID service used by prepaid calling card companies because, with this service an ILEC hands traffic off to a CLEC. Nor is it relevant that the call may eventually reach an IXC. In *WorldCom*, the D.C. Circuit found that "§ 251(g) speaks only of

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[49] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[50] *See id*. at 378 n.6 ("[T]he question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.")

[51] AT&T Comments at p. 38.

[52] *WorldCom*, 288 F.3d at 433-34. ("Section 251(g) speaks only of service provided "to interexchange carriers and information service providers"; LEC's services to other LECS, even if en route to an IPS, are not "to" either an IXC or to an ISP").

services provided 'to interexchange carriers and information service providers'; LECs' services to other LECs, even if en route to an ISP, are not 'to' either an IXC or to an ISP."[53] This textual analysis applies equally to the DID service provided by LECs to prepaid calling card providers. With the prepaid calling services at issue, an originating LEC hands traffic off to another LEC which, through its provision of DID service, connects callers to the prepaid card provider's POP or calling card platform. Like ISP-bound calls, the LECs' DID service does not involve service provided by the LEC serving the caller to an interexchange carrier or ISP. The origination services provided by the LEC here are provided to another LEC – for example a CLEC that in turn has contractual privity with the prepaid card provider. As the D.C Circuit found in *Worldcom*, it does not matter that the service the originating LEC provides to another LEC is "en route to an" IXC.[54] Even if the prepaid card call were en route to an IXC, it would not fall within the limited carve out set forth in the statute, as the statute does not cover services that are provided to a LEC which then routes traffic to another provider, whether that is a prepaid card provider, IXC or ISP.[55]

This statutory interpretation does not hinge upon whether there existed a pre-1996 Act obligation with respect to Feature Group A services, as AT&T claims. Any such arrangements, to the extent they are at all relevant, would have been between the ILEC and an IXC or the end user.[56] When the Commission restructured the local transport component of switched access charges, the IXCs disputed the implementing tariffs. With respect to the Feature Group A services to which AT&T's comments refer, the pre-1996-Act AT&T argued that Feature Group

[53] *WorldCom*, 288 F.3d at 433-34.

[54] *Id*. at 434.

[55] *See id*.

[56] *Local Exchange Carrier Switched Local Transport Restructure Tariffs*, 9 FCC Rcd 400, 423 ¶ 61 (CCB 1996).

A services are "billed to the end user as the billing customer of record" and that "an end user may order FGA service directly from a LEC."[57] Thus the existence of Feature Group A, to the extent it is similar to the arrangements prepaid card providers employ with CLECs, does not bring prepaid card calls accessed through CLEC DIDs within the ambit of section 251(g) since the LEC's services were not necessarily provided to an interexchange carrier as required by the statutory text. Rather, the Feature Group A services were provided to end users, which in this context is the purchaser of the prepaid card, and were not used at all for prepaid calling cards.

2. There Was No Pre-1996 Act Obligation With Respect to Prepaid Card Calls Accessed Through CLEC DIDs, and the Existence of ILEC FGA Tariffs Does Not Create such an Obligation for Prepaid Card Calls

Despite AT&T's claims to the contrary,[58] there was no pre-1996 Act obligation applicable to prepaid card calls accessed through a CLEC DID in the same territory as the ILEC. By way of background, AT&T argues that a prepaid card provider's use of local exchange lines is similar to the historic use of local telephone service by competitive long-distance carriers (such as MCI and Sprint) to originate traffic prior to the introduction of equal access. In the late 1970's and early 1980's, customers wishing to use these carriers to place long-distance calls had to dial a local telephone number to access the carrier's switch, then enter an account number and the distant telephone number to be called. The local telephone lines used by the long-distance carriers for this purpose were classified as "facilities for interstate access," and were subject to special charges (higher than ordinary local service charges) under the Commission's rules.

In 1984, as the Commission restructured the long distance and exchange access markets consistent with the divestiture of AT&T's monopoly, these arrangements were replaced with "interstate access tariffs" under which the local telephone lines then commonly used by non-

[57] *Id.*

[58] AT&T comments at p. 38.

dominant long-distance carriers were classified as "Feature Group A" or "FGA," a form of switched access service. Under current law, however, prepaid card providers may choose to access the local network by purchasing service from CLECs that is *not* access service. Since the advent of competitive local exchange service pursuant to the 1996 Act, the Commission has specifically exempted CLECs from complying with the full panoply of access charge rules to which ILECs are subject, and amended its Part 69 access charge rules so that they explicitly apply only to ILECs.[59] Therefore, a CLEC, as a non-dominant carrier, is permitted (as long as it complies with the Commission's benchmark regime in 47 C.F.R. § 61.26(b)) to establish whatever rate structure and rate levels it chooses for jurisdictionally interstate use of its facilities.[60]

Because CLECs are not subject to the Commission's Part 69 access charge rules, a CLEC may (for example) provide jurisdictionally interstate service to customers such as prepaid card providers under the same rates, terms, and conditions as it provides otherwise intrastate local exchange service, if it so desires. For example, a CLEC may choose to provide a prepaid card provider with local exchange service for the origination of prepaid card calls under its local exchange tariffs rather than access tariffs. Or, if the CLEC opts not to file tariffs and operate solely under contract (where permitted under state laws governing local services) it may offer services under contract in lieu of tariff. Since the CLEC is not subject to the Commission's rules

[59] *Access Charge Reform*, 12 FCC Rcd 15982, 16153 ¶ 396 (1997) (amending definition of "telephone company" under rules to be synonymous with incumbent LEC, in recognizing that CLECs lack market power in access market and that as a result the FCC "should not apply Part 69 to" CLECs), *amending* 47 CFR § 69.2(hh) (definition of "telephone company" and "local exchange carrier").

[60] While 47 C.F.R. § 61.26 limits the rates that CLECs may charge when they provide access service, it does not require CLECs to impose access charges for any particular service. In contrast, rule 69.5(b) requires ILECs to impose access charges on "all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

that require ILECs to distinguish between "local exchange service" and "access" services, this arrangement is lawful and there is no reason why the prepaid card provider cannot obtain local service under the CLEC's contracts or tariffs (subject, of course, to the ability of the CLEC, as with any common carrier, to change its tariffs in the future). There is nothing to prevent a CLEC from offering originating services for interstate traffic as local offerings, rather than as access offerings. When CLECs offer such services as local services, they are *not* access services and, as such, cannot be preserved by section 251(g).

AT&T claims that ILECs providing Feature Group A services "have the ability to coordinate the routing and billing for [Feature Group A] calls through a jointly provided access arrangement."[61] As explained above, where the CLEC is *not* offering the prepaid card provider an access service, there is no jointly provided access preserved by section 251(g). Moreover, even if jointly provided access services existed, AT&T has not cited, and we are not aware of, any cases or Commission rules that applied this obligation where the calls were prepaid card calls. Nor has AT&T cited, and we are not aware of, any cases or commission rules that stand for the proposition that prior to the 1996 Act, LECs operating in the same market (this excludes extended local calling plans) were required to enter into intercarrier compensation arrangements. Similarly, AT&T has not "point[ed] to any pre-Act, federally created obligation for LECs to interconnect to each other for" the origination of prepaid card calls.[62] In the absence of such a pre-existing requirement, there was obviously no compensation arrangement to be preserved under § 251(g) and thus reciprocal compensation, not access charges, applies to prepaid card calls accessed through a CLEC DID.

Moreover, the Commission rejected similar section 251(g) arguments in another situation

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[61] AT&T Comments at p. 39.

[62] *See WorldCom*, 288 F.3d at 433.

in which an ILEC asserted that CLEC local services required the payment of ILEC access charges. In the *Virginia Arbitration* proceeding, the Commission was faced with a question about "how to determine whether a call passing between [ILEC and CLEC] networks is subject to reciprocal compensation (traditionally referred to as 'local') or access charges (traditionally referred to as 'toll')."[63] In that instance, the issue involved another innovative local service product offered by CLECs – virtual foreign exchange service. Verizon, the ILEC, argued that CLECs were "thwarting" Verizon's access regime by treating toll traffic as local traffic.[64] AT&T – then a CLEC and IXC – disputed this characterization and, most relevant here, disputed Verizon's claim that section 251(g) required that access charges be applied. Specifically, AT&T argued in the arbitration that "section 251(g) merely grandfathered pre-existing rules governing exchange access and information access, and there were no such rules relating to the category of traffic at issue here."[65]

The Commission rejected Verizon's position that section 251(g) applied. It accepted the CLEC petitioners' proposed language, which applied reciprocal compensation arrangements under section 251(b)(5) to the traffic at issue.[66] Under the "current system," the Commission concluded, "carriers rate calls [exchanged between them] by comparing the originating and terminating NPA-NXX codes."

Verizon had argued that in order to effectuate its access charge regime, new arrangements

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[63] *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 17 FCC Rcd 27039, 27126 (Wireline Comp. Bur. 2002) ("Virginia Arbitration Order").

[64] Virginia Arbitration Order, 17 FCC Rcd at 27181.

[65] Virginia Arbitration Order, 17 FCC Rcd at 27177.

[66] *See* Virginia Arbitration Order, 17 FCC Rcd at 27181.

would be necessary between the ILEC and CLECs serving their customers. Verizon conceded that the traffic could not be distinguished from other local traffic – which is rated based on the NPA-NXX of the dialed number. To solve this, Verizon proposed that CLECs conduct a traffic study or develop a factor to identify the percentage of traffic subject to its access charges.[67] The Commission rejected these claims too, finding that Verizon's proposals "offered no viable alternative" to section 251(b)(5).[68] Rating calls by their geographical end points – Verizon's proposed solution in the Virginia Arbitration – "raises billing and technical issues that have no concrete, workable solutions at this time."[69]

Verizon's arguments in the Virginia Arbitration case mirror the arguments AT&T (as the ILEC) now makes in the case of locally dialed calls delivered to CLECs. AT&T was correct back in 2002 – and incorrect in 2011. Section 251(g) does not apply to situations in which there were no pre-existing rules "relating to the category of traffic at issue here." Instead, as between an ILEC and a CLEC, the determination of whether reciprocal compensation or access applies is determined by the NPA-NXX of the dialed numbers. Under this standard, section 251(b)(5) clearly governs the locally dialed calls AT&T exchanges with a CLEC.

Even assuming, *arguendo*, that calls to CLEC DIDs are "functionally equivalent" to FGA service that pre-dates the 1996 Act,[70] the Commission cannot issue the categorical ruling AT&T requests, namely that "'all' prepaid calling card providers [are required] to pay 'access charges' for interexchange calls placed by their customers, regardless of the 'calling pattern' used to

[67] Virginia Arbitration Order, 17 FCC Rcd at 27181.

[68] Virginia Arbitration Order, 17 FCC Rcd at 27181-82.

[69] Virginia Arbitration Order, 17 FCC Rcd at 27182.

[70] AT&T Comments at pp. 38-39.

initiate such calls."[71] As AT&T successfully argued in challenging application of an access tariff to AT&T in its capacity as an IXC, a LEC must provide switched access services as defined in its tariff and any ambiguity in the tariff is construed against the drafter.[72] As the *YMAX* case shows, the Commission must examine both the tariff terms and the routing of a call before concluding that tariffed switched access charges apply to a particular calling pattern. In other words, even if FGA is "functionally equivalent" to calls to CLEC DIDs, AT&T would bear the burden of showing the tariff applies in any collection action. At a minimum, the Commission should not rule that LECs' FGA tariffs apply to calls to CLEC DIDs for the origination of prepaid card calls, because the *YMAX Order* shows that any such ruling requires a detailed analysis of the terms of the tariffs as applied to the routing arrangements to which the tariff purportedly applies. As explained herein, rather than try to fit a square peg (calls to CLEC DIDs) in a round hole (pre-1996 Act FGA arrangements), the Commission should adopt new rules that apply prospectively to the entire industry so that LECs can adjust their tariffs and contracts accordingly.

IV. Locally Dialed Prepaid Calling Card Calls Should Not Be Subject to Access Charge Requirements

In the NPRM, the Commission sets forth its overarching goal of eliminating the waste and inefficiencies that are present in the current universal service fund, as well as the intercarrier compensation system.[73] With respect to intercarrier compensation, there are two specific types of regulatory measures in use today: reciprocal compensation arrangements and the access charge regime. As indicated in the NPRM, the rates that apply to specific types of traffic are

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[71] *Id.* at 35.

[72] *AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, FCC 11-59, ¶ 11, n.87, ¶ 33 (rel. April 8, 2011) ("YMax Order").

[73] NPRM ¶ 7.

predicated on several factors, including the origination and termination of the call, the carrier involved and the type of traffic being communicated (i.e., wireline voice, wireless voice, and ISP data).[74] As the Commission notes, this can result in a cumbersome patchwork of rates and regulations.[75] Such a conglomeration of rate schemes further advances inefficiency and most importantly, as noted by the Commission, is delaying the evolution to IP networks.[76] Given the goals of reducing inefficiencies and eliminating waste, it makes no sense to apply access charges to locally dialed prepaid calling card calls.

The Commission's 2006 Order does not address what form of intercarrier compensation, if any, is appropriate for such locally dialed calls.[77] Rather, the 2006 Order focuses on whether menu-driven prepaid calling cards and prepaid calling cards utilizing Internet protocol (IP) technology to deliver calls should be classified as telecommunications or information services, and solely refers to these specific forms of prepaid calling card offerings as subject to the Commission's rules and requirements relating to contributions to the federal universal service fund and the access charge regime.[78]

While the 2006 Order nominally applies to all prepaid calling cards, it only addresses the applicability of access charges for 8YY-dialed calls.[79] While interested parties raised the issue of DID numbers in the prepaid calling card proceedings prior to the issuance of the Order,[80] the Commission does not include any language addressing the issue of locally dialed prepaid calling

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[74] NPRM ¶ 502.

[75] *Id.*

[76] *Id.*

[77] 2006 Order ¶ 2.

[78] *Id.* at ¶¶ 9, 10, 20-21.

[79] 2006 Order ¶ 28.

[80] *See* supra note 23.

card calls.[81] It is noteworthy that there is no analysis whatsoever in the Order as to whether 251(b) or 251(g) should apply to locally dialed calls. It is for this reason that the Arizona Dialtone Petition sought clarity on the application of access charges for such prepaid calling cards,[82] and many other parties agreed with the general view that the 2006 Order left this issue unresolved; however, the Commission has so far failed to settle it.

The Commission has recognized the need to adopt a sustainable long-term compensation framework to gradually reduce all per-minute charges.[83] Largely driving this initiative is the simple fact that per-minute charges are inconsistent with peering and transport arrangements for IP networks, where traffic is not measured in minutes.[84] The Commission intends to adopt an approach to intercarrier compensation that will support and sustain broadband growth and development, but as noted below there is no mechanism to apply access charges to locally dialed prepaid calling card calls and this is not the time to impose cumbersome rules that the Commission is looking to reform. Moreover, imposing rules on a new category of services goes against the objectives of the NPRM. It is appropriate for the Commission to dismiss the Arizona Dialtone petition and explicitly state that the current access regulations do not address prepaid calling card calls made using local numbers, and further that there has not been any rule or regulation promulgated that specifies that "all" prepaid calling card providers should be subject to access charges. This will clarify that locally dialed prepaid calling card calls are not required to pay access charges.

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81 *Id.*

82 *Arizona Dialtone Inc. Petition for Reconsideration* (Aug. 31, 2006).

83 NPRM ¶ 40.

84 *Id.*

A. Additional Regulatory Obligations Will Work Against the Objectives of the NPRM and Lead to Higher Prices for Consumers.

One of the fundamental purposes of intercarrier compensation reform is to simplify and streamline the regulatory framework. As stated in the NPRM, the Commission seeks through this proceeding to reduce complexity and associated costs to foster the migration to next-generation IP networks.[85] Creating new obligations for locally dialed prepaid calling card calls would mean adding even more complexity and bureaucracy to the intercarrier compensation system – clearly at odds with the Commission's objectives in this proceeding.

The NPRM recognizes "the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption."[86] Imposing new requirements on locally dialed prepaid calling card calls would be very disruptive. The typical consumers of prepaid calling cards are low-income consumers looking for the lowest long-distance rates. They often have no credit history and few options for currency other than cash. For these consumers, prepaid calling cards may be the only feasible solution for long-distance telecommunications – a link to relatives in their home country, a way to follow up on a job opportunity, a lifeline in times of trouble. Any increase in price is felt sharply.

The Commission itself has said that prepaid services have played "a vital role in providing telecommunications services to low-income consumers and members of the armed services."[87] A requirement to pay access charges, along with the billing system upgrades necessary to calculate and account for those charges, would result in a large increase in overhead. Ultimately, these low-income consumers, with limited access to communications,

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85 *See generally* NPRM ¶¶ 496, 505-506.

86 NPRM ¶ 12.

87 2006 Order ¶ 8.

would suffer by paying higher prices for their preferred (and perhaps only) alternative for long-distance communication.

B. There Is No Sound Way to Apply Access Charges to This Type of Prepaid Calling Card Calls Consistent With the Current Regulatory Framework

As noted, the current regulatory framework for access charges is based on minutes of use. Because calls are originated through a CLEC DID, providers of prepaid calling cards are not able to identify the carrier that served the end user for any given call. Like Verizon in the Virginia Arbitration, AT&T has offered "no viable alternative" to section 251(b)(5) compensation.[88] Rating calls by their geographical end points – Verizon's proposed solution in the Virginia Arbitration and AT&T's proposed solution here – "raises billing and technical issues that have no concrete, workable solutions at this time."[89]

To attempt to allocate responsibility for payment of access charges among the multiple players involved, including the LECs, CLECs, ILECs, and Prepaid Card Provider, would create an administrative nightmare for all parties involved and further violate the spirit and intention of what the Commission is attempting to address in this NPRM. If rules and regulations are to be developed, these would have to outline some mechanism whereby the CLEC could determine which LEC originated each call in order to allocate minutes of use on local trunks for all LECs in the exchange for customers utilizing the DID numbers allocated by CLECs to prepaid calling cards.

Indeed, the CLECs have raised this very issue. The Arizona Dialtone Petition noted that several issues had not been fully resolved in the 2006 Order, including whether prepaid card providers should provide lists of local numbers, imposing reporting obligations on LECs that

[88] Virginia Arbitration Order, 17 FCC Rcd at 27181-82.

[89] Virginia Arbitration Order, 17 FCC Rcd at 27182.

provide DIDs to prepaid calling card providers, and clarifying specifically which provider is responsible for access.[90] While there has been no action on this petition to date, in light of the goal in this NPRM to improve the intercarrier compensation regime through "simplification,"[91] it makes no sense for the Commission to attempt to spell out elaborate rules for locally dialed prepaid card calls.

The lack of clarity in the current scheme has led to further disputes and litigation based on the exchange of fees on a per-minute basis, which the Commission acknowledges as outdated and has designated for elimination.[92] Moreover, Feature Group arrangements will not work because they rely in part on determining minutes of use as part of their scheme. To require prepaid providers to utilize Feature Group services runs counter to the spirit and intention of what the Commission is seeking to accomplish through this NPRM, and further calls into question the ability of the intercarrier compensation regime to move away from a per-minute rate design and achieve a more economically-efficient model.

V. Timing and Applicability

In the *NPRM*, the Commission articulates a long-term vision to "gradually reduce all per-minute charges" and replace them with peering and transport arrangements for IP networks.[93] The Commission expresses a desire to be more responsive to "fundamental shifts in technology and competition in the last two decades" and establish a more certain "glide path" to the transition to an all-IP future. In the context of prepaid cards, we suggest that the Commission can best achieve these goals by keeping access rates for prepaid card calls to CLEC DIDs as they

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[90] *Id.*

[91] *See* NPRM ¶ 15.

[92] NPRM ¶ 494.

[93] NPRM ¶ 40.

are – governed by CLEC local service arrangements, not access charges – and incorporating prepaid card arrangements into its long-term reform of intercarrier compensation. Moreover, the Commission should act now to ensure that its long-term objectives are not undermined by piecemeal litigation.

A. The FCC Cannot Alter Prepaid Card Compensation Rules Retroactively

As explained in the preceding sections, traffic for prepaid calling card calls accessed through a CLEC DID falls outside the scope of the access charge regime preserved by section 251(g) because there was no pre-Act obligation related to such traffic. A Commission finding that prepaid calling card calls accessed through a CLEC DID are outside the scope of 251(g) and instead are subject to reciprocal compensation under section 251(b)(5) precludes efforts by ILECs to recover originating access charges for this traffic for any time period. This result flows naturally from a Commission finding that dialed prepaid card calls accessed through a CLEC DID are not encompassed by section 251(g). The Commission noted in the *ISP Bound Mandamus Order* that traffic "encompassed by section 251(g) is excluded from section 251(b)(5) except to the extent that the Commission acts to bring that traffic within its scope."[94] The Commission further found, however, that this language did not apply to ISP-bound traffic because such traffic "did not fall within the section 251(g) carve out from section 251(b)(5) as there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[95] There was thus no lawful basis to ever have applied access charges to ISP-bound traffic. Similarly, a finding that prepaid card calls accessed through a CLEC DID fall outside the

[94] *ISP-Bound Traffic Mandamus Order*, 24 FCC Rcd at ¶16.

[95] *ISP-Bound Traffic Mandamus Order*, 24 FCC Rcd at ¶16 (quoting *WorldCom*, 288 F3d at 433) (emphasis in original).

scope of 251(g) precludes any effort by ILECs to impose access charges, either before or after the effective date of the order in this proceeding.

Even if the Commission should, however, determine in this rulemaking that access charges should apply to prepaid card calls accessed through a CLEC DID, such a ruling can be prospective only. Rules stemming from a rulemaking pursuant to section 553 of the APA, such as this proceeding, can only have prospective effect.[96]

Imposing retroactive liability would not only violate well-settled law, but would be wholly unfair and contrary to sound public policy. The prepaid calling card industry, and its CLEC vendors, have uniformly treated traffic of prepaid card calls accessed through a CLEC DID as outside the scope of the Commission's traditional access charge regime. The industry has organized its business and priced its products on that understanding, offering lower prices to consumers for calls placed by dialing a CLEC DID. It is certainly not the understanding of the companies submitting this pleading, which represent a substantial portion of the prepaid calling card industry, that access charges apply to prepaid card calls accessed through a CLEC DID.

The Commission has refused to impose retroactive liability in similar circumstances. In the *InterCall Order*, the Commission refused to retroactively impose direct USF contribution obligations on stand-alone providers of audio bridging services because it was "unclear to Intercall, as well as to the industry," that such obligations applied and that the consistent industry

[96] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *In re Applications of McElroy Electronics Corp.*, 10 FCC Rcd 6762, at ¶ 16 (1995). In contrast to prospective-only effect of rulemakings, adjudications are presumptively retroactive unless backward revision would be manifestly unjust. *See, e.g.*, *Qwest v. FCC*, 509 F.3d 531 (D.C. Cir. 2007) (finding that the 2006 Prepaid Calling Card Order was an adjudication and overturning the FCC's decision not to apply rules to menu-driven cards retroactively).

practice among such providers was not to remit USF payments to USAC.[97] In light of consistent and uniform industry practice, as well as the lack of clarity in the pre-existing rules, the Commission refused to impose retroactive liability. Instead, it required all providers of audio bridging services to remit payments to USAC on a going-forward basis, and, by so doing, the Commission "promote[d] the public interest by establishing a level playing field and encouraging open competition among providers of audio bridging services."[98] The same result should obtain here.

Establishing a uniform, prospective rule will also help level the playing field and encourage fair competition among prepaid calling card providers. Imposing retroactive liability, on the other hand, would only serve to financially undermine those prepaid calling card providers that operate on the premise that they must comply with regulatory requirements. Many small "fly-by-night" companies could simply shed past obligations by closing shop, withdrawing any assets from the company, and reopening under a different corporate identity – a practice made readily achievable given the extraordinarily ease with which companies can exit and enter this business.

B. As the Agency with Primary Jurisdiction, the FCC Should Ensure the Uniform Applicability of Section 251(b)(5) Pending its Long-Term Reforms

The Commission is in the best position to resolve the uncertainty that AT&T's litigation has created for the industry. AT&T has undermined that authority by taking matters into its own hands, rather than waiting for the Commission to resolve the Arizona Dialtone Petition. AT&T's litigation invites the courts (or, more specifically, a single court in AT&T's home state of Texas) to usurp the Commission's authority over intercarrier compensation under section 251(b)(5).

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[97] *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, 10738, ¶ 23 (2008) (*"InterCall Order")*.

[98] *InterCall Order*, 23 FCC Rcd at 10739, ¶ 25.

To date, AT&T has sued three prepaid card providers under its theory that access charges apply. AT&T has urged the court in those cases to ignore the Arizona Dialtone Petition and to impose a costly and inefficient system based on outdated and inapplicable views of intercarrier compensation arrangements. The result that AT&T seeks would undermine the Commission's reform goals by allowing a single court to establish piecemeal the arrangements applicable to certain providers in the industry.

That Texas court cannot, however, establish a uniform nationwide rule for intercarrier compensation in this instance. Only the FCC can do that. Regardless of whether AT&T is successful in obtaining a ruling in the three cases it has brought, there are hundreds of other entities in the industry that provide prepaid cards – and entry barriers are low. Without action by the Commission, other providers may be sued by AT&T in other courts (or may seek declaratory rulings to stop AT&T's demand letters). This could lead to a classic case of inconsistent rulings and inconsistent rates applicable to similarly situated service providers. Some prepaid providers could be subjected to high, above-cost LEC access charges for originating calls, while others are able to originate calls under negotiated agreements with CLECs furnishing them with access to the PSTN, while others yet operate "under the radar" and would not have a definitive ruling applicable to their services.

This result would be very disruptive to the industry. As discussed, there are very low barriers to entry in the market, and prepaid card providers typically price cards at extremely thin margins above underlying costs. A situation in which providers are subject to varying rates depending upon whether they litigated the issue, and where, would give competitive advantages to certain providers based solely on luck. Further, even if the courts ultimately could sort out the inconsistent rulings and reach a uniform result, it would take years to resolve through the courts of appeals. In the meantime, the industry would be subjected to uncertainty and the additional costs of litigation, which ultimately would suppress the availability of prepaid cards to low income and immigrant populations.

VI. Conclusion

Access charges do not apply to locally dialed prepaid calling card calls. The Commission has never said as much, and any such pronouncement would be in contravention of well-established interpretations of statutory law. Even if this were not the case, it would not be reasonable to apply access charges to locally dialed prepaid calling card calls at a time when the Commission is headed in the opposite direction, expending great efforts to simplify and streamline the ICC regime. Applying access charges to locally dialed prepaid calling card calls, if at all feasible, would be cumbersome and impractical, and would cause widespread upheaval in this highly-competitive industry.

The Commission's proceeding on intercarrier compensation reform presents the most opportune time for the Commission to address the issue of locally dialed prepaid calling card calls. As a matter involving questions of the applicability of access charges versus reciprocal compensation, it fits squarely within the confines of the ICC NPRM. Should this issue be allowed to lay fallow for another five years, the Commission will once again jeopardize its goal of establishing a uniform regime that applies fairly, predictably, and universally.

The Commission should deny the Arizona Dialtone petition for reconsideration and confirm that locally dialed prepaid calling card calls are not subject to originating access charges under current Commission rules. Because of pending lawsuits and threatened litigation that is subjecting certain prepaid card providers to uncertainty, and the need to maintain a level playing field across the prepaid card industry, the Commission should issue this finding as soon as possible.

Respectfully submitted,

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