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October 11, 2011

VIA ELECTRONIC FILING

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

Re: Notice of Ex Parte Communication, CC Docket No. 96-45; CC Docket No. 01-92; WC Docket No. 05-337; WC Docket No. 07-135; WC Docket No. 03-109; WC Docket No. 10-90; GN Docket No. 09-51

Dear Ms. Dortch:

On October 6, 2011, James Courter, Vice Chairman, and Carl Billek of IDT Telecom, Jay Lefkowitz (by phone) and Devora Allon of Kirkland & Ellis LLP, and the undersigned of Bingham McCutchen, met with Zachary (“Zac”) Katz, Chief Counsel and Senior Legal Advisor to Chairman Julius Genachowski.

Mr. Courter explained that IDT and the rest of the prepaid calling card industry need the Commission to provide certainty regarding the intercarrier compensation regime that applies to locally-dialed prepaid calling card calls. The prepaid calling card industry represents approximately 7% of total toll revenue and locally-dialed calls have grown over the past five years to be a substantial part of the prepaid calling card business. Industry practice has been to rate these calls as local and prepaid calling card providers have passed these savings on to the primarily low income consumers that use such cards. AT&T’s litigation against IDT and two other prepaid card providers threatens to upset this settled industry practice with the potential to impose substantial retroactive liability on only certain industry participants. The FCC, not the courts, should determine intercarrier compensation policy and the upcoming USF/ICC Reform Order is the best means for the FCC to assert its jurisdiction to do so.

IDT reiterated its arguments that the 2006 Order did not impose access charge obligations on locally-dialed prepaid card calls. Rather, the 2006 Order decided whether *certain* prepaid card services qualified as telecommunications or information services, classifying menu-driven and IP transport prepaid calling cards as telecommunications services subject to “applicable” regulations, including “existing access charge rules.”¹ The FCC defined “menu-driven” prepaid calling card service as a service 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” Likewise, the FCC defined IP transport cards as

¹ *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290, ¶¶ 1, 10, 21, 31. (2006) (“2006 Order”).

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utilizing “Internet Protocol (IP) technology, accessed by 8YY dialing, to transport a portion of the calling card call.” 2006 Order, ¶¶ 3, 10-11, 20 (emphasis added). The FCC concluded 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.*” 2006 Order, at ¶ 27 (emphasis added).

In contrast, where the dialed telephone number is local, the FCC has recognized that standard “industry practice among local exchange carriers” is that “calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties” and not by the actual geographic location of the called and calling parties.² Indeed, the 2006 Order reiterated that practice noting that: “for now carriers continue to rely on telephone numbers as a proxy for geographic location.” 2006 Order, n.89.

The 2006 Order adopted implementation rules designed for 8YY dialed calls because standard industry practice does not work in that case, *i.e.*, there is no called “telephone number” for rating.³ 8YY calls require a database dip to look up routing information and PIU to determine jurisdiction.

The FCC has determined that there is no workable solution for rating locally-dialed calls as subject to access and has not adopted any such solution, either in the 2006 Order or generally. *Starpower*, ¶ 17 (Verizon “lacks the technical capability to identify [locally dialed] calls as non-local based on physical end points of the call.”); Virginia Arbitration Order, ¶¶ 288-89, 301 (Verizon proposed no workable method to rate locally-dialed calls based on their physical end points). The Arizona Dialtone petition⁴ confirms the implementation solution in the 2006 Order does not work for locally-dialed calls; the PIU reporting obligation does not identify locally-dialed calls that should be taken OUT of standard call rating practice (local) and subject to access charges. AT&T’s practice confirms the same; AT&T has never issued IDT access bills for locally-dialed card calls.

² See, e.g., *Starpower Communications, LLC v. Verizon South, Inc.*, Memorandum Opinion and Order, 18 FCC Rcd 23,625, 23632-33, ¶¶ 9-10, 17, n.60 (Nov. 7, 2003) (“*Starpower*”) (“at all relevant times, industry practice among [LECs] similarly appears to have been that calls are designated as either local or toll by comparing the NPA-NXX codes of the calling and called parties.”); 2006 Order, ¶ 28, n.89; *Petition of WorldCom*, Memorandum Opinion and Order, 17 FCC Rcd 27039, ¶¶ 286-289, 294, 301 (Wireline Comp. Bur. 2002) (“Virginia Arbitration Order”).

³ 2006 Order, ¶ 28 (“the originating carrier will not be able to determine the appropriate jurisdiction of the call based on a comparison of the calling and called numbers because it only will know the 8YY number associated with the platform, not the telephone number of the called party.”).

⁴ See, e.g., *Arizona Dialtone, Inc., Petition for Reconsideration*, WC Docket No. 05-68, at 1 (filed Aug. 31, 2006) (requesting the Commission to “clarify the party responsible to pay access charges when local access is used to place a prepaid calling card call,” and to establish reporting requirements for LECs who provide DIDs for prepaid card calls).

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If the FCC wants to change the intercarrier compensation applicable to locally-dialed prepaid calling card calls, it would need to adopt a workable solution for segregating locally-dialed prepaid card calls from all other locally-dialed calls and/or require all LECs (not just ILECs) to offer access products to prepaid card providers.⁵

Finally, the IDT participants argued that the 2006 Order does not expand the scope of access tariffs, which must unambiguously describe the services and functions provided. A LEC is bound by the terms and service descriptions of its access tariff whether or not the tariff is “narrower than that used for purposes of the Act and Commission rules.”⁶ The FCC requires all tariffs to “contain ‘clear and explicit explanatory statements regarding the rates and regulations.’” *Sprint v. Northern Valley*, ¶¶ 8-10; 47 C.F.R. § 61.2(a). Tariffs must unambiguously describe the kinds of services and functions that the LEC provides with respect to the traffic at issue and “any ambiguity in a tariff is construed against the party who filed the tariff.”⁷

If you have any questions, please do not hesitate to contact me.

Sincerely yours,

/s/ electronically signed

Tamar E. Finn

cc (by e-mail):

Zachary Katz

⁵ 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).

⁶ *Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Company*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14811, at ¶ 24 (Nov. 25, 2009) (“We will not expand the term ‘switched access’ as used in the tariff before us to encompass more than the tariff itself delineates”); *see, Sprint v. Northern Valley*, Memorandum Opinion and Order, FCC No. 11-111, ¶¶ 4, 10 (July 18, 2011) (“*Sprint v. Northern Valley*”).

⁷ *AT&T Corp. v. YMAX Communications Corp.*, Mem. Opinion and Order, 26 FCC Rcd 5742, 5755, at ¶¶ 12-14, n.50, 33-34, n.104 (April 8, 2011) (“a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff”).