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

In the Matter of	)	
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AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services	)	WC Docket No. ____

AT&T CORP.
PETITION FOR DECLARATORY RULING

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Pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, AT&T Corp. ("AT&T") requests a declaratory ruling that enhanced prepaid calling card services as described herein are interstate communications subject to interstate, rather than intrastate, access charges when the enhanced services platform that provides stored, non-call-related information to end users is not located in the state in which the calling or called parties are located. Such enhanced service calls are interstate calls under a straightforward application of the Commission's standard jurisdictional analysis, and a declaratory ruling is necessary to preclude imposition of inflated intrastate access charges on these interstate services. In addition to violating longstanding jurisdictional principles, imposing such charges would raise the cost of these services to consumers in almost all cases, and thereby threaten the very availability of the low-priced prepaid card services upon which many low-income consumers rely.

INTRODUCTION AND SUMMARY

This Petition seeks a declaratory ruling to clarify the jurisdictional status of enhanced prepaid calling card services. Such services indisputably consist of two separate

"communications" within the meaning of the Communications Act – one from the calling party to the enhanced service platform, and a second communication involving the calling party, the enhanced service platform and a third party. The first such "communication" is an interstate communication under the Commission's standard end-to-end jurisdictional analysis when, as is often the case, the caller and the enhanced service platform are located in different states. The second communication likewise may be interstate, depending upon the location of the called party.

As detailed below, proper jurisdictional classifications are exceedingly important to preserve the efficient low-cost availability of these innovative services, many of which are purchased by low-income consumers, students, small and medium-sized business customers, and the general public. It is increasingly clear, however, that some incumbent local exchange carriers ("LECs") view these services as providing additional opportunity to assess bloated intrastate access charges on providers, and that some states find that doing so could provide a way to delay the difficult job of implementing comprehensive universal service reform and related reforms. Efforts to mischaracterize interstate traffic as intrastate traffic, accompanied by demands that service providers pay the much higher – in some cases *twenty* or more times higher – intrastate access charges that would destroy service providers' ability to offer these low-cost services, are therefore inevitable.

The Commission should issue a declaratory ruling to make clear that such services are usually jurisdictionally interstate, and thus subject to interstate access charges (rather than intrastate access charges). This is so principally because, under any reasoned application of the Commission's existing precedents, such services consist of two separate "calls" – one from the subscriber to the enhanced service platform, and one from the platform to the third party. Each

of these separate calls is an interstate call, unless the subscriber or the third party is in the same state as the platform (in which case that "leg" of the call would be subject to intrastate charges). Alternatively, even if the transaction is deemed to be a single "call," that call is an interstate call, because it indisputably consists of multiple communications, at least one of which is plainly an interstate communication. And AT&T's prepaid card calls are enhanced services that use underlying basic telecommunications services that are jurisdictionally interstate (regardless of the jurisdictional classification of the overall enhanced service).

Imposition of intrastate access charges on AT&T's enhanced prepaid calling card services would not only be unlawful, but it would also threaten the continued viability of these innovative services. In order to reduce the costs of distributing these cards, AT&T and other carriers sell these cards through various national retailers that provide interstate enhanced communications with the cardholder (in the form of advertisements or other information) every time the cardholder uses the card. These enhanced communications are interstate services under the Act and the Commission's well-established jurisdictional precedents. Intrastate access charges, which are often much higher than interstate access charges, would threaten the viability of low-cost prepaid calling cards that are used disproportionately by low-income Americans, and increasingly by middle-income consumers and businesses as well.

Of course, AT&T recognizes the interest of policymakers in preserving universal service and the subsidies needed to maintain it. In this case, some might wish for the Commission to depart from longstanding policies in order to permit assessment of excessive intrastate access charges on enhanced interstate services for no reason other than that those services displace some intrastate calling. Inflated access charges, however, do not afford a sustainable method for preserving universal service and only introduce distortions into the telecommunications

marketplace. They certainly do not warrant the abandonment of longstanding jurisprudence in an effort to place yet another "patch" on a badly listing system. Instead, regulators need to get on with urgently needed comprehensive reform of the universal service and intercarrier compensation systems.

BACKGROUND

Prepaid calling cards fill an important niche in the telecommunications market and offer a number of important public benefits. For example, they permit customers that cannot afford or do not have access to a wireless telephone easily and inexpensively to make long distance calls from locations other than the customer's residence or place of business. Thus, for example, prepaid calling cards allow customers to avoid the often much higher charges assessed by hotels and hospitals. Prepaid cards also make "budgeting" easier and permit parents to control long distance usage by children (particularly children that are away from home).[1]

Significantly, prepaid calling cards provide a way for low-income Americans, many of whom do not have their own local (or long distance) telephone service (or who share telephone service), to make calls at reasonable rates. Indeed, the "first adopters" for prepaid calling cards were largely recent immigrants to the United States from South America, where such cards are common, and this group remains among the heaviest users of prepaid cards.[2] Overall, "[e]thnic, young adults, and low-income customers are the demographic groups" that are the most frequent purchasers of prepaid calling cards.[3] Users of AT&T's enhanced prepaid cards are

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[1] The CPR Group, *Prepaid Phone Usage From the Customer's Perspective*, at 24-25 (2002) ("*CPR Report*").

[2] *Id.* at 4, 15. *See also* Atlantic-ACM, *Prepaid Market Sizing and Forecasts: 2002 to 2006*, at 66 (March 2002).

[3] *CPR Report* at 14; *see also id.* at 15 ("[t]hose with the highest level of recent purchases [of prepaid cards] were the lowest income group, with three quarters (74%) of card customers earning less than $20,000 a year purchasing a card within the previous month").

disproportionately minorities, college students, travelers, people in the military, and people without bank accounts (who tend to be low-income Americans).

Efficient distribution of calling cards is essential in order to reach the types of customers that are the most frequent users of such cards. Given the demographics of calling card users, one of the most effective distribution mechanisms for carriers has been to sell cards through retail chains, such as national wholesale club stores or discount retailers, as well as through other outlets such as military exchanges.[4] In connection with these enhanced prepaid cards, AT&T provides its distributors with valuable advertising as part of its calling card service – not only on the card itself, but by including an advertisement (or other information) every time the cardholder uses the card. In this way, a retailer's "out of pocket" distribution costs are minimized and AT&T and competing service providers are able to sell cards with extremely low rates; indeed, some of AT&T's prepaid cards offer rates as low as 3¢ per minute.

The provision of these enhanced prepaid calling card services differs from traditional calls in important ways. AT&T has found that the most efficient means of providing these enhanced services is to establish centralized switching platforms from which AT&T can deliver the enhanced messages from retailers. The location of these platforms is a function of network engineering considerations (*i.e.*, where AT&T has existing 4E switches with the capacity available to accommodate such platforms). Accordingly, AT&T's enhanced prepaid calling card service is provided as follows. The cardholder dials an 8YY number, which establishes a connection between the cardholder and the enhanced processing platform that is connected to AT&T's network. Computer software associates the number dialed with the particular retailer that sold the card being used. The cardholder is then prompted to choose a language and to enter

[4] *Id.* at 14.

their prepaid card PIN number. The platform then communicates to the cardholder an advertisement or other information unrelated to call processing.[5] For example, in the case of an AT&T card sold by the "ABC Club" store, the caller might hear a message such as "Remember to shop at the ABC Club." In most cases, the content of this communication between the platform and the cardholder is chosen by the retailer and not AT&T. Because the centralized platform and the cardholder are usually in different states, the communication between the retailer and the cardholder is usually an interstate communication. At this point, the cardholder may choose to launch a second call, among other options, such as replenishing the minutes on the card. If the customer chooses to make a call, the platform prompts the user for the destination phone number.

After the advertising message is completed, the platform confirms the accuracy of the information provided and dials the destination phone number and bridges the two separate calls. The platform remains actively involved during this second call. It rates the call, debits the card, and provides messages to the calling party indicating exhaustion of the prepaid card. Cardholders can, and often do, make multiple voice calls in a single session, and on at least some multi-call sessions, the cardholder will hear the retailer announcement before every new call.

At least one state commission, however, has recently begun to seek information about the nature of these services, apparently as a prelude to permitting imposition of intrastate access charges on these services, on the assumption that such calls are intrastate calls.[6] This

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[5] In some instances, the advertising message will be heard after the caller dials the destination number.

[6] *See, e.g., Investigation into Unauthorized Telecommunication Intrastate Debit Card Marketing by AT&T apart from AT&T Alascom*, U-97-120, Order Reopening Docket, Vacating Waiver and Registration Requirement, and Requiring Filing (Regulatory Comm'n of Alaska, March 18, 2003).

commission has suggested that use of such cards actually consists of a single end-to-end call for jurisdictional purposes, and that based on this "one call" theory, intrastate access charges should apply when the cardholder and called party are in the same state, regardless of the existence of interstate communications with the AT&T enhanced services platform. This contention ignores the indisputable fact that the "call" is an enhanced service which includes an interstate enhanced communication from the enhanced service platform to the cardholder.

Permitting the imposition of intrastate access charges on such services would seriously threaten the ability of service providers to offer prepaid calling cards at existing low rates. As the Commission is well aware, intrastate access charges are generally well in excess of both interstate access charges and any conceivable measure of cost. At the same time, the calling cardholder and the ultimate called party are often in the same state, particularly in large and populous states like California, Texas, and New York. Thus, whereas today interstate access charges apply to most enhanced prepaid card calls, if such services are deemed intrastate, many such calls would instead be subject to much higher intrastate access charges.

It is, of course, basic economics that any increased access charges must be passed along to prepaid card users. A substantial increase in access costs in just a few major states would inevitably require substantial rate increases for enhanced prepaid card users. As noted above, however, low-income Americans and others with limited access to telephone service constitute a disproportionate percentage of the users of prepaid calling cards, and therefore increasing the cost of providing such cards would inevitably have a detrimental impact on the overall availability of these types of wire communications to "all Americans." 47 U.S.C. § 151. Moreover, such a "fix" would do nothing to correct the underlying cause of so much of the

contention and distortion in the industry today – an economically irrational intercarrier compensation regime propped up by an unsustainable universal service support mechanism.

ARGUMENT

Enhanced prepaid calling card services are jurisdictionally interstate in most cases, and therefore attempts to impose intrastate access charges on such services are foreclosed by the Communications Act and Commission precedent. For jurisdictional purposes, AT&T's enhanced prepaid calling card services involve two separate calls, to which interstate access charges ordinarily apply. The first is the call initiated by the calling card user to the AT&T platform, in which the caller hears the message typically selected by the card retailer. This communication takes place regardless of whether the cardholder communicates with any third party (*i.e.*, if the called party does not answer or the calling party hangs up without attempting any further communications). Under Commission and court precedents, this active communication of information unrelated to call routing between the platform and calling party plainly creates a call "endpoint" and, to the extent the platform and calling party are located in different states, a jurisdictionally interstate call between the calling party and the platform. The second call is the active platform's connection of the third party. This second call is likewise interstate if the platform and called party are located in different states. As demonstrated below, AT&T's enhanced prepaid card service (and other services that involve platform-initiated communications unrelated to call routing) are therefore like the three-way calling scenarios that the Commission has held do constitute two separate calls and unlike the "dumb" platform interactions that the Commission has held do not create call endpoints at the platform (because the platform-initiated communications are entirely related to routing). And because both the cardholder and called parties are usually in a different state than the active platform, interstate access charges generally are properly applied to both calls.

But even if such services were deemed to be only one call, notwithstanding the advertising message communicated by the platform, that "one call" would still be jurisdictionally interstate because each such "call" consists of multiple "communications," at least some of which are interstate. In addition, AT&T's prepaid card calls are enhanced (or "information") services that use underlying basic telecommunications services that are jurisdictionally interstate (regardless of the jurisdictional classification of the overall information service).

I. ENHANCED PREPAID CALLING CARD SERVICES IN MOST CASES CONSIST OF TWO JURISDICTIONALLY INTERSTATE CALLS.

AT&T's enhanced prepaid calling card services are jurisdictionally interstate in most cases and therefore should usually be subject to interstate, not intrastate, access charges. Under the Communications Act and well-settled Commission principles, the typical use of these card services involves two separate interstate calls – an interstate call to an enhanced services platform, which communicates information selected by the card retailer to the cardholder, and a second interstate call to add the called party. These conclusions are compelled by the Commission's traditional end-to-end jurisdictional analysis, and attempts to regulate such services as intrastate calls – notwithstanding the fact that the component "communications" are "interstate communications" – would constitute an unwarranted and unlawful re-drawing of jurisdictional lines.

As noted, the AT&T cardholder dials an 8YY number and establishes a connection with an enhanced prepaid services platform. The enhanced services platform then engages in its own communications with the cardholder. This communication is an enhanced or "information service" under the Act and well-settled precedent.[7] It is equally clear that this communication

[7] 47 U.S.C. § 153(20); *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 20 (1987) (holding that Teleconnect's Talking Yellow Pages service is an enhanced service because when the subscriber "makes a phone call and hears a recorded

between the platform and the cardholder, which occurs even if the cardholder does not complete any communications with any third party, constitutes a separate call (and "communication" within the meaning of 47 U.S.C. § 152(a)), and that the platform constitutes an "endpoint" of the call. Moreover, whenever the cardholder and the enhanced services platform are in different states – as is most often the case – this "communication" is an "interstate communication." If the cardholder so instructs, the enhanced services platform initiates a second call, conferencing in a third party. When the platform and the called party are in different states (which is often true), interstate access charges would properly apply to this "leg" of the service as well.[8]

The Commission over the years has confirmed repeatedly that, for jurisdictional purposes, a call must be analyzed on an "end-to-end" basis. The Commission has thus held consistently that, where the endpoints of a call are in different states, the fact that a carrier may perform intermediate switching functions does not establish any call endpoints that "break" the call into two calls and thus divest the Commission of jurisdiction over an assertedly intrastate portion of the end-to-end communication.[9] The Commission has *never* held, however, that an end-to-end communication is a single call where (as here) there *is* a separate "communication" emanating from an intermediate platform that under any reasoned analysis does create a call

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advertisement" there is "subscriber interaction with stored information"), *vacated on other grounds*, 7 FCC Rcd. 5644 (1992).

[8] Because AT&T's platform is connected to AT&T's long distance network, AT&T incurs only originating switched access charges on the first call, and only terminating switched access charges on the second call.

[9] *See, e.g., NARUC* v. *FCC*, 746 F.2d 1492, 1499 (D.C. Cir. 1984); *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation*, 7 FCC Rcd. 1619 (1992) ("*BellSouth MemoryCall Order*"); *Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, 11 FCC Rcd. 1186 (1995); *Long Distance USA, Inc. et al.* v. *Bell Tel. Co. of Pa.*, 10 FCC Rcd. 1634 (1995); *Southwestern Bell Tel. Co., Transmittal Nos. 1537 and 1560*, 3 FCC Rcd. 2339, ¶¶ 25-28 (1988).

endpoint. To ignore the fact that there are two separate "communications" would be flatly at odds with the Commission's traditional end-to-end analysis and would seriously undermine the Commission's authority to regulate interstate communications.

Indeed, the Commission has already held in one context – three-way calls – that separate and independent communications at an intermediate point in the call establish that there are call endpoints at the intermediate point and thus two separate calls, each of which can be subject to interstate or intrastate access depending on the location of the parties. As the Commission has explained, "[t]hree-way calling enables the subscriber to participate in two wholly separate calls at any given time and subsequently to join or link them for conferencing purposes."[10] Each call represents "independent, beneficial uses" and must be considered "two distinct calls."[11] The Commission has therefore held that each call generates separate access charges; for example, the Commission has made clear that long distance carriers would pay two CCL charges on the conferencing end of a three-way call (the intermediate point equivalent to the platform here), even though the LEC is carrying the two calls simultaneously over a single common line.[12] And where one call is interstate and the other is intrastate, the LEC would properly assess interstate access charges for the one call and intrastate access for the other.[13]

Prepaid card calls are closely analogous and, in a similar manner, almost always involve two interstate calls. The first leg of the call – from the cardholder to the enhanced service platform – would be an interstate call unless the cardholder is in the same state as the platform. In the second leg of the call, just as in the three-way calling example, the call is held at the

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[10] *AT&T Corp., et al.* v. *Bell Atlantic-Pennsylvania*, 14 FCC Rcd. 556, ¶ 69 (1998).

[11] *Id.* This is true whether the conferencing party originated or received the first call. *See id.* ¶ 66 n.166.

[12] *Id.* ¶¶ 69-70.

enhanced service platform switch,[14] while AT&T establishes a second connection between the platform and the called party. This is also an interstate call, unless the third party is in the same state as the platform. Accordingly, the Commission's traditional end-to-end analysis would mandate the application of interstate access charges for any leg of the service in which the cardholder or called party is in a different state from the platform.

Indeed, many teleconferencing services operate in a similar manner and, if anything, are even more analogous. For example, in many teleconferencing services, multiple parties will dial into a platform, which will establish a bridge that permits a large conference call. Even if all parties are in state A, and the platform is in state B, the carrier will treat the teleconferencing session as a set of interstate calls. Given that the platform in the enhanced prepaid card context engages in its own communications with the calling party, it should be even more clear that such calls constitute multiple interstate calls.

The fact that the enhanced prepaid services platform engages in its own separate communication during the course of the call distinguishes this type of prepaid card service from other types of arrangements that the Commission has deemed to be a single call. For example, in previous cases in which the Commission has found calls using 800 number calling cards to be a single call, the "communications" were limited to that of the caller and the called party, and the carrier's 800 switch, to the extent that it interacted with the calling party at all, did so only in performing routing functions necessary to complete the end-to-end call.[15] The intermediate

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[13] *Id.* ¶ 70.

[14] *See id.* ¶ 66 ("[w]hile the subscriber is calling the second party, the first call is held by central office equipment at the LEC end office serving the three-way subscriber").

[15] *See, e.g., The Time Machine, Inc., Request for a Declaratory Ruling Concerning Preemption of State Regulation of Interstate 800-Access Debit Card Telecommunications Services*, 11 FCC Rcd. 1186, ¶¶ 2-3 (1995) (when customer used card, switch "receives the call, validates the customer's calling card number and security code, determines the amount of time left on the

switch in those cases did not engage in any separate and distinct third party communications, as is the case here because of the advertising message. Similarly, in the *BellSouth MemoryCall* case, the intermediate switch did not engage in any independent communications, but merely routed the call to the voice mail service at issue.[16] Here, the advertising message communication, typically selected by the retailer, from the platform to the calling party establishes call endpoints at the platform and two separate calls for purposes of jurisdictional determinations.

The Commission's ISP-related jurisdictional rulings are not to the contrary. Indeed, those orders expressly recognize that an Internet session consists of many separate "communications," some of which are local and some of which are interstate. For example, as the Commission has explained, an end-user's attempt to access a single webpage frequently results in the transmission of information from multiple computers from numerous locations, both local and out-of-state.[17] The Commission has never attempted separately to identify and regulate each of the constituent "calls," or "communications," in that context. Rather, the Commission has simply deemed the entire session jurisdictionally interstate.[18]

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card, and completes the call to the number requested by the customer"); *Long Distance USA, Inc. et al.* v. *Bell Tel. Co. of Pa.*, 10 FCC Rcd. 1634, ¶¶ 5, 15 (1995) (intermediate switches and facilities performed only routing functions); *Southwestern Bell Tel. Co., Transmittals No. 1537 and 1560*, 3 FCC Rcd. 2339, ¶¶ 25-28 (1988) (intermediate switch performed only routing functions).

[16] *BellSouth MemoryCall Order* ¶ 9 (intermediate switch merely forwards the call, and there is "a continuous, two-way transmission path from the caller location to the voice mail service").

[17] *See Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151, ¶ 58 (2001) ("*ISP-Bound Traffic Order*") ("[a] single web address frequently results in the return of information from multiple computers in various locations globally").

[18] *See GTE Tel. Operating Cos.*, 13 FCC Rcd. 22466, ¶¶ 22-26 (1998) ("*GTE ADSL Tariff Order*") ("[a]n Internet communication does not necessarily have a point of 'termination' in the traditional sense," and "it may not be possible to ascertain the destination of any particular transmission"); *ISP-Bound Traffic Order* ¶¶ 57-58. With the proliferation of broadband

The Commission should therefore issue a declaratory ruling clarifying that interstate access charges apply, unless either the cardholder or the called party are in the same state as the enhanced prepaid services platform. Such a ruling would not preclude intrastate access charges in all instances. To be sure, such a ruling should result in the continued application of interstate access charges in many situations today. It is also the case, however, that such a ruling would make clear that intrastate access charges properly apply in some instances where LECs may charge interstate access charges today (*i.e.*, where calls originate or are completed in the same state as the enhanced services platform but where the calling and called parties are located in different states). Continued application of interstate access charges would allow carriers to continue to offer prepaid calling cards at their current low rates.[19]

II. EVEN IF COMMUNICATIONS MADE WITH AT&T'S ENHANCED PREPAID CARD CALLS COULD RATIONALLY BE DEEMED "ONE CALL," THAT ONE CALL WOULD BE JURISDICTIONALLY INTERSTATE.

In all events, even if enhanced prepaid card services are deemed to be a single "call," such calls are still properly classified as jurisdictionally interstate. Virtually every AT&T

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networks and enhanced services – including the Internet – the prevalence of services that combine enhanced communications and voice call routing will only increase. Attempts to assert intrastate jurisdiction over such services by focusing in isolation on one aspect of the service – the routing of the voice call – threatens to undermine the ability of the Commission to fulfill its statutory responsibility to regulate interstate communications.

[19] Given that the Commission has classified other long-distance calls containing independent third-party communications as interstate calls, any conclusion that these enhanced communications did not create call "endpoints" would constitute a content-based distinction that would raise issues under the First Amendment. *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 230 (1987) ("[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment") (internal quotations omitted). Intrastate access charges generally are far higher than interstate access charges, and therefore classifying these calls as intrastate or interstate on the basis of the content of the communication is "presumptively inconsistent with the First Amendment." *Simon & Schuster, Inc.* v. *Members of the New York State Crime Victims Board*, 502 U.S. 105, 115 (1991); *see also Minneapolis Star & Tribune Co.* v. *Minnesota Com'r of Revenue*, 460 U.S. 575 (1983); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

enhanced prepaid card call contains at least one "communication" that is indisputably interstate, and therefore prepaid card calls are jurisdictionally interstate even if the overall transaction is considered one "call."

The Communications Act gives the Commission jurisdiction over interstate "communications by wire."[20] The Act defines "communications by wire" as "the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[21] "Interstate communication," in turn, is defined as communication or transmission between one state or the District of Columbia and another.[22] The Commission's ISP-related jurisdictional rulings make clear, however, that a single "call," as that term is colloquially used, can consist of more than one "communication" within the meaning of 47 U.S.C. § 152(a).[23]

AT&T's enhanced prepaid card calls indisputably consist of multiple "communications" within the meaning of the Act, and at least one of those communications is almost always jurisdictionally interstate under a standard end-to-end analysis. Every prepaid card call begins with a "communication" from AT&T's enhanced prepaid service platform – a message from the retailer to the cardholder – and because the cardholder is usually in a different state than AT&T's platform, that "communication" is usually an "interstate communication." Such calls generally

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[20] 47 U.S.C. § 152(a) ("[t]he provisions of this chapter shall apply to all interstate and foreign communications by wire . . ."); *see also BellSouth MemoryCall Order* ¶ 10.

[21] 47 U.S.C. § 153(52).

[22] 47 U.S.C. § 153(22); *see also BellSouth MemoryCall Order* ¶ 10.

[23] *See, e.g., GTE ADSL Tariff Order* ¶ 22.

will also consist of a second "communication" between the caller and the called party, which may be interstate or intrastate. A prepaid card call thus almost always consists of at least one interstate "communication," except in the relatively rare instance in which the cardholder, the AT&T platform, and the called party are all in the same state.

Prepaid card calls, if improperly deemed to be "one call," would be closely analogous to a "call" to an ISP that consists of multiple "communications." As the Commission has explained, "[m]ost Internet-bound traffic traveling between a LEC's subscriber and an ISP is indisputably interstate in nature when viewed on an end-to-end basis."[24] That is because an ISP session consists of many separate "communications" as the user interacts with multiple computers, which may be located either locally or across the country or the world.[25] As the Commission has noted, "a single web address frequently results in the return of information from multiple computers globally," and that these different transmissions of information "will be sent to the user over different network paths."[26] In short, a single "call" to an ISP consists of many separate communications, some intrastate and some interstate, but the entire "call" is deemed interstate due to the existence of interstate communications.

The same result should apply here. Virtually all prepaid card calls consist of at least one interstate communication. Accordingly, if such "calls" are deemed to be "one call," the call is necessarily within the Commission's jurisdiction, and is correctly deemed to be a jurisdictionally interstate call. The Commission has never held that a *single* call could be subject to both interstate and intrastate access charges. Otherwise, the Commission's determination that ISP-bound traffic is exclusively jurisdictionally interstate would be unlawful. ISP sessions

[24] *ISP-Bound Traffic Order* ¶ 58.

[25] *Id.* ("[u]sers on the Internet are interacting with a global network of connected computers").

[26] *Id.*

consist of numerous "communications," some of which are indisputably intrastate (indeed, the Commission has recognized that ISPs cache many websites and other information locally[27]). Even though ISP sessions unquestionably consist of intrastate communications, the Commission has never deemed that fact to require an apportionment of access charges between the interstate and intrastate jurisdictions (either through direct measurement or by other means, such as an estimated percent usage factor). Rather, the presence of interstate communications within the call was sufficient to classify the entire call as jurisdictionally interstate.[28]

It is important to recognize that deeming prepaid card calls to be a single "call" would result in a substantially broader application of interstate access charges than recognizing there are two separate calls, one to the platform and one from the platform. As noted above, if the enhanced prepaid card calls are considered to be two calls, intrastate access charges would apply, in part, if *either* the called party or the calling party are in the same state as the AT&T platform. If these enhanced prepaid card calls are considered to be one call, however, intrastate access charges would apply only when *all three* parties – the cardholder, the AT&T platform, and the called party – are all in the same state. As explained above, enhanced prepaid card calls are more properly considered to be two calls, which would result in a more limited displacement of intrastate access charges.

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[27] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689, ¶ 18 (1999).

[28] *See also GTE ADSL Tariff Order* ¶ 27 (DSL services should be tariffed at the state level only where the service is entirely intrastate). For similar reasons, it seems clear that the Commission would have been forced to deem three-way calls jurisdictionally interstate as long as one of the calls was an interstate call, if the Commission had not established that such calls consist of *two* different calls (and, thus, that both interstate and intrastate access charges could apply based on the location of the parties to each call).

III. AT&T PREPAID CARD CALLS ARE ENHANCED SERVICES THAT USE JURISDICTIONALLY INTERSTATE TELECOMMUNICATIONS SERVICES AS BUILDING BLOCKS.

In addition, AT&T prepaid card calls are enhanced (or "information") services that make use of underlying telecommunications that are jurisdictionally interstate, regardless of the jurisdictional classification of the overall enhanced service. As noted above, AT&T's enhanced prepaid card services are "information services" within the meaning of the Act and the Commission's rules. That is because each time the cardholder uses the card, the AT&T enhanced platform engages in its own communications with the cardholder by sending stored third-party messages and other information.[29] Under the plain terms of the Act and well-established Commission precedent, AT&T's enhanced prepaid card services are information services, rather than simple "telecommunications services."

It is equally well-established that the underlying telecommunications services, whether they are jurisdictionally interstate or intrastate, retain their basic jurisdictional character even if they are used as "building blocks" in a larger information service that falls within a different jurisdiction. As the FCC has explained:

> Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier *nor alters the carrier's tariffing obligations, whether federal or state*, with respect to that service.[30]

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[29] 47 U.S.C. § 153(20); *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, 2 FCC Rcd. 5986, ¶ 20 (1987) (holding that Teleconnect's Talking Yellow Pages service is an enhanced service because when the subscriber "makes a phone call and hears a recorded advertisement" there is "subscriber interaction with stored information"), *vacated on other grounds*, 7 FCC Rcd. 5644 (1992).

[30] *Filing and Review of Open Network Architecture Plans*, CC Docket No. 88-2, Phase I, 4 FCC Rcd. 1, ¶ 274 (1988) (emphasis added and footnotes omitted) ("*ONA Order*").

Accordingly, when an information service provider purchases interstate telecommunications services out of federally regulated tariffs as a "building block" for its own information services, those underlying telecommunications services remain interstate services within the jurisdiction of the Commission even if the *overall* information service, of which it is merely a building block, is jurisdictionally intrastate.[31]

Under these precedents, the underlying telecommunications services used to provide AT&T's enhanced prepaid card services are jurisdictionally interstate when the cardholder and the platform are in different states. AT&T, when it provides enhanced prepaid card services, is an information service provider. As such, AT&T buys underlying basic services from common carriers, such as WorldCom, Sprint or (usually) its own affiliate. When AT&T buys the underlying wholesale 800 service for the link between the cardholder and the platform from an *unaffiliated* carrier, that underlying service is unquestionably a jurisdictionally interstate service when the cardholder and platform are in different states. As the Commission has held, the jurisdictional nature of that underlying telecommunications service does not change even if AT&T uses that building block as part of larger information service that might ultimately be deemed intrastate.[32] The jurisdictional nature of the unaffiliated carrier's offering does not fluctuate back and forth depending on how the enhanced service provider uses the service.

The same result must obtain, however, when AT&T self-provides the underlying 800 service. It would be unreasonable and anomalous to treat the underlying telecommunications

[31] Indeed, under the Commission's longstanding rules and policies, information service providers are routinely deemed to be "end users" and the jurisdictional nature of the overall enhanced service is often different from the jurisdictional classification of the underlying building block services. *See, e.g., ISP-Bound Traffic Order* ¶ 11 (ISPs obtain access for interstate Internet traffic from locally-tariffed intrastate business services).

service as interstate when purchased from an unaffiliated carrier but intrastate when self-provided. Indeed, if AT&T or another carrier were to sell 800 service to affiliated and unaffiliated information service providers on different terms, such practices could constitute unlawful discrimination.[33] When a carrier sells 800 service from state A to state B to an unaffiliated information service provider, that carrier invariably deems the traffic interstate; nothing in the Act or in the Commission's rules obligates the carrier to track the enhanced service provider's subsequent use of that service for purposes of determining the jurisdiction of the basic service. The fact that the information service provider is affiliated with the underlying carrier should not lead to a different result.

All of this simply reinforces that each link of the overall enhanced prepaid service is a distinct service and that the platform constitutes a call endpoint. The platform uses a basic 800 service for the purpose of communicating with the cardholder, and this communication takes place regardless of whether cardholder attempts or completes a further call. When the platform and the cardholder are in different states, the platform makes use of an underlying interstate telecommunications service, just as an unaffiliated information service platform would. And if the cardholder wished to initiate a further communication, the platform would establish a second connection, which might be interstate or intrastate depending on whether the called party was in the same state as the platform. But the essential jurisdictional nature of the original link would

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[32] *See ONA Order* ¶ 274 n.617 ("Thus, an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision of a service that is not subject to Title II").

[33] *See, e.g., Policy And Rules Concerning the Interstate, Interexchange Marketplace*, 16 FCC Rcd. 7418, ¶ 39 (2001) ("In order to ensure that competitive enhanced service providers continue to have non-discriminatory access to the underlying transmission capacity, we do not eliminate the existing requirement that facilities-based carriers offer such capacity to these providers on the same terms and conditions under which they provide such service to their own enhanced service operations.").

be unaffected by the information service provider's subsequent use of the underlying building block telecommunications service.

CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory order establishing that prepaid calling cards with the characteristics described above constitute two calls which are usually jurisdictionally interstate, or in the alternative, that such calls are jurisdictionally interstate unless all three parties are within the same state.

Respectfully submitted,

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